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CASES ADJUDGED

IN

THE SUPREME COURT

AT

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FROM JANUARY 18, 1943 (CONCLUDED) TO AND INCLUDING APRIL 19, 1943

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

HARLAN FISKE STONE, Chief 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.
ROBERT H. JACKSON, Associate Justice.
WILEY RUTLEDGE, Associate Justice.[1]

RETIRED

CHARLES EVANS HUGHES, Chief Justice.
JAMES CLARK McREYNOLDS, Associate Justice.

FRANCIS BIDDLE, Attorney General.
CHARLES FAHY, Solicitor General.
CHARLES ELMORE CROPLEY, Clerk.
THOMAS ENNALLS WAGGAMAN, Marshal.

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[1] Honorable Wiley Rutledge, of Iowa, an Associate Justice of the United States Court of Appeals for the District of Columbia, was nominated by President Roosevelt on January 11, 1943, to be an Associate Justice of this Court; the nomination was confirmed by the Senate on February 8th; he was commissioned on February 11th, and took the oath and his seat on February 15, 1943.

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, ROBERT H. JACKSON, Associate Justice.

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

For the Fourth Circuit, HARLAN F. STONE, Chief Justice.

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

For the Sixth Circuit, STANLEY REED, Associate Justice.

For the Seventh Circuit, FRANK MURPHY, Associate Justice.

For the Eighth Circuit, WILEY RUTLEDGE, Associate Justice.

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

For the Tenth Circuit, WILEY RUTLEDGE, Associate Justice.

For the District of Columbia, HARLAN F. STONE, Chief Justice.

March 1, 1943.

(For the next previous allotment, see 314 U. S. p. IV.)

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CASES ADJUDGED
IN THE
SUPREME COURT OF THE UNITED STATES
AT
OCTOBER TERM, 1942.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS *v.* BROTHERHOOD OF RAILROAD TRAINMEN ET AL.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

No. 218. Argued December 15, 16, 1942.—Decided January 18, 1943.

1. In the absence of federal legislation which conflicts or occupies the field, as here, it is within the authority of a State, in the interest of the health and safety of employees, to require a terminal railroad, though engaged largely in interstate commerce, to provide cabooses on trains within the State on designated runs. P. 7.

   Neither the Boiler Inspection Act, the Safety Appliance Act, nor the Interstate Commerce Act precludes the state regulation here involved; and, since the Interstate Commerce Commission has made no rule or regulation in respect of the matter, it is unnecessary to consider the extent of the Commission's power under those Acts. Nor is the regulation precluded by the Railway Labor Act.
2. The state regulation here involved is not rendered invalid by the fact that some of the runs are across state lines and, because of lack of facilities, the cabooses must be provided for some distance into a neighboring State; nor by the fact that the requirement may to some extent retard, or increase the cost of, interstate transportation. P. 8.

379 Ill. 403, 41 N. E. 2d 481, affirmed.

APPEAL from a judgment which, reversing a lower state court, sustained an order of the Illinois Commerce Commission.

Mr. Bruce A. Campbell, with whom *Messrs. Rudolph J. Kramer, Arnot L. Sheppard, Louis A. McKeown, Carleton S. Hadley,* and *Walter N. Davis* were on the brief, for appellant.

Messrs. William C. Wines, Assistant Attorney General of Illinois, and *Alvin E. Stein,* with whom *Mr. George F. Barrett,* Attorney General, was on the brief, for appellees.

MR. JUSTICE JACKSON delivered the opinion of the Court.

Appellant is a corporation engaged in performing terminal services and furnishing terminal facilities in and about East St. Louis, Illinois, to a number of railroad companies which share its ownership and control. It operates several yards for the sorting and classification and interchange of cars, with some service to industries within the switching district.

The Brotherhood of Railroad Trainmen, one of the appellees, representing trainmen and switchmen employed by appellant, complained to the Illinois Commerce Commission of appellant's failure to provide caboose cars for its employees. In answer the appellant denied that the Commission had power to enter any order that would relate to movements in interstate commerce, which it said included substantially all of its operations; and it contended further that it had already provided all reasonably necessary facilities. The issues were sharply contested before the Commission, and the evidence, while it may not have required, certainly permitted these conclusions:

Appellant's switching crews make and break up trains of cars and deliver and transfer them. One man of each crew is required to ride the rear car of the train when it is in motion. Depending upon the distances by which fixed

structures along the track clear this car, he rides its top or side, and in some places both top and side clearances are so small that he must ride on the drawbar projecting from the end of the car. Sudden jerks and stops are common and they have on occasion thrown off switchmen. The duties of the rear switchman include lining switches into position after the train has passed and watching street and highway crossings to protect the public when the train is backing up. In cases of emergency he must stop the train by turning an air valve located next to the drawbar, which he cannot readily or safely do if he is riding on the top or side of the car.

During some seasons of the year he is exposed to rain, sleet, snow and ice, which also cover the parts of the car to which he must cling to stay on it, thus adding to his difficulties.

Appellant's trains, when not equipped with cabooses, have no storage space for safety devices, flagging equipment, or for extra clothing, lunches and drinking water of the men; and they provide no space in which the men can perform their clerical duties.

The Commission found that by providing cabooses the appellant could eliminate the necessity for the rear switchmen to ride the tops, sides, or draw-bars of the rear cars; afford safe and ready access to the air valve; and provide space for storage and for clerical work. It found that it was essential to the health, safety, and comfort of the rear switchmen that the appellant provide cabooses on all of designated runs in so far as they were within the confines of the State, and made its order accordingly. The order was sustained by the Supreme Court of Illinois as "obviously promulgated to protect the lives and health of citizens of this State engaged in appellee's business within the State," and as not imposing an un-

lawful burden upon interstate commerce.[1] The case is here on appeal.[2]

All but an insignificant number of the cars in the trains on the specified runs move in interstate commerce, so that the order pertained to a matter clearly within the power of Congress to regulate interstate commerce.

Appellant claims that there had been Congressional occupation of the field by virtue of the Boiler Inspection Act,[3] the Safety Appliance Act,[4] and the Interstate Commerce Act.[5] It is not contended, nor do we understand, that these statutes, by themselves and unimplemented by any action of the Interstate Commerce Commission, lay down any requirement that cabooses shall or shall not be used on any of the runs in question. Nor is it contended that the Interstate Commerce Commission itself has sought to make any such requirement. At least in the absence of such action these Acts do not themselves preclude the state order, *Atlantic Coast Line* v. *Georgia,* 234 U. S. 280; cf. *Welch Co.* v. *New Hampshire,* 306 U. S. 79, and it is unnecessary to consider on this occasion and without the participation of the Interstate Commerce Commission what may be the extent of its power under these Acts. If it should in the exercise of granted power determine whether appellant must provide cabooses, the State would be powerless to gainsay it. This and no

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[1] 379 Ill. 403, 41 N. E. 2d 481.

[2] § 237 (a) of the Judicial Code, 28 U. S. C. § 344 (a).

[3] 45 U. S. C. §§ 22–34.

[4] 45 U. S. C. § 1 *et seq.*

[5] 49 U. S. C. § 1 *et seq.* Particular reliance is put upon paragraphs (10), (11), (13), (14), (15), (16), (17), and (21) of § 1, relating to the Commission's powers in respect to car service; and upon paragraph 2 of § 20 (a), relating to its powers over the issuance of securities and the assumption of liabilities thereon. We have not been informed whether such issuance or assumption is needed to obtain the cabooses which the Illinois Commission has ordered to be used.

more is the effect of *Pennsylvania R. Co.* v. *Public Service Commission,* 250 U. S. 566.

The Railway Labor Act,[6] also relied upon by appellant, remains for consideration and presents questions of a different order, not heretofore examined in any opinion of this Court.[7] The purpose of this Act is declared to be to provide "for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions"; and "for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." [8] It places upon carriers and employees the duty of exerting every reasonable effort to settle these disputes by agreement, and prohibits the carrier from altering agreed rates of pay, rules, or working conditions except in the manner provided by the agreement or by the Act itself.[9] Machinery is set up for the adjustment, mediation, and arbitration of disputes which the parties do not succeed in settling among themselves.[10] The First Division of the National Railroad Adjustment Board has jurisdiction over disputes involving train and yard-service employees of carriers, which may be referred to it by agreement of both parties or by either party.[11] Its awards are made "final and binding" upon both parties to the dispute [12] and the carrier may be required by the courts to comply, the Board's findings being, in a proceeding for such purpose, prima facie evidence of the facts therein stated.[13]

[6] 45 U. S. C. § 151 *et seq.*

[7] Cf. *Missouri Pacific R. Co.* v. *Norwood,* 283 U. S. 249, 258.

[8] 45 U. S. C. § 151a.

[9] 45 U. S. C. § 152, paragraphs 1 and 7.

[10] 45 U. S. C. § 153 *et seq.*

[11] 45 U. S. C. § 153 (h) (i); see also § 155.

[12] 45 U. S. C. § 153 (m).

[13] 45 U. S. C. § 153 (p).

The order before us is the outgrowth of a dispute between the carrier and its employees. The contract between the appellant and the Brotherhood contains provision for cabooses for certain trains and services, but does not provide for those ordered by the Illinois Commission. We assume, without deciding, that the demand for additional caboose service and its refusal constitute a dispute about working conditions, and that the National Railroad Adjustment Board would have jurisdiction of it on petition of the employees or their representative and might have made an award such as the order in question or some modification of it. The question is whether the Railway Labor Act, so interpreted, occupied the field to the exclusion of the state action under review. We conclude that it does not, and for the following reasons:

The Railway Labor Act, like the National Labor Relations Act,[14] does not undertake governmental regulation of wages, hours, or working conditions. Instead it seeks to provide a means by which agreement may be reached with respect to them. The national interest expressed by those Acts is not primarily in the working conditions as such. So far as the Act itself is concerned these conditions may be as bad as the employees will tolerate or be made as good as they can bargain for. The Act does not fix and does not authorize anyone to fix generally applicable standards for working conditions. The federal interest that is fostered is to see that disagreement about conditions does not reach the point of interfering with interstate commerce. The Mediation Board and Adjustment Board act to compose differences that threaten continuity of work, not to remove conditions that threaten the health or safety of workers. Cf. *Pennsylvania R. Co.* v. *Labor Board,* 261 U. S. 72, 84.

State laws have long regulated a great variety of conditions in transportation and industry, such as sanitary

[14] 29 U. S. C. § 151 *et seq.*

facilities and conditions, safety devices and protections, purity of water supply, fire protection, and innumerable others. Any of these matters might, we suppose, be the subject of a demand by workmen for better protection and upon refusal might be the subject of a labor dispute which would have such effect on interstate commerce that federal agencies might be invoked to deal with some phase of it. But we would hardly be expected to hold that the price of the federal effort to protect the peace and continuity of commerce has been to strike down state sanitary codes, health regulations, factory inspections, and safety provisions for industry and transportation. We suppose employees might consider that state or municipal requirements of fire escapes, fire doors, and fire protection were inadequate and make them the subject of a dispute, at least some phases of which would be of federal concern. But it cannot be that the minimum requirements laid down by state authority are all set aside. We hold that the enactment by Congress of the Railway Labor Act was not a preëmption of the field of regulating working conditions themselves and did not preclude the State of Illinois from making the order in question.

We must decide the question of state power in this case in the absence of any Act of Congress that conflicts with the order or may be said to occupy its field.

The order of the State Commission requires that cabooses be used on appellant's trains making runs of two different sorts. Runs of the first sort are made by trains which, although they begin and end and make their entire movements within the State, are made up almost entirely of cars moving in interstate commerce. Runs of the second sort are made by trains which move between points in East St. Louis, Illinois, and St. Louis, Missouri, and cross one or the other of two bridges spanning the Mississippi River and the state line. On its face the order requires only that cabooses be used within Illinois, and

does not require that they be used in Missouri. Appellant contends, and we assume, however, that there do not exist, and that it is not reasonably practicable to install, facilities for taking on and dropping off cabooses at the points where the trains cross the state line; and that the practical consequence of the order is that if cabooses are to be used in Illinois on runs of the second sort they must also be used at least as far as the nearest switching point in Missouri.

As to both classes of runs, the effect of the order is in some measure to retard and increase the cost of movements in interstate commerce. This is not to say, however, that the order is necessarily invalid. In the absence of controlling federal legislation this Court has sustained a wide variety of state regulations of railroad trains moving in interstate commerce having such effect.[15] The governing principles were recently stated in *Parker* v. *Brown,* 317 U. S. 341, 361–363.

We are of opinion that under these principles the order is valid as to runs of both sorts. It finds its origin in the local climatic conditions and in the hazards created by particular local physical structures, and it has rather obvious relation to the health and safety of local workmen. The record in the case does not afford a sure basis for calculating the costs to commerce resulting from the order against the costs to the safety and health of the workmen which it was intended to minimize, and there is evidence in the case that nearby railroads have seen fit in the absence of legal compulsion to provide cabooses in circumstances substantially similar to those upon which appellant relies to establish absence of state power.

If lack of facilities at the state line requires as a practical matter that in order to provide cabooses in Illinois appellant must also provide them for some distance in Missouri, that fact does not preclude Illinois from regulating the

[15] See cases cited in *California* v. *Thompson,* 313 U. S. 109, 113–114.

operation to the limits of its territory. *Missouri Pacific Ry. Co.* v. *Kansas,* 216 U. S. 262; cf. *South Covington & C. S. Ry. Co.* v. *Covington,* 235 U. S. 537.[16]

The judgment of the court below is

Affirmed.

NATIONAL LABOR RELATIONS BOARD *v.* INDIANA & MICHIGAN ELECTRIC CO. ET AL.

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

No. 73. Argued November 13, 16, 1942.—Decided January 18, 1943.

1. An application to the Circuit Court of Appeals, under § 10 (e) of the National Labor Relations Act, for leave to adduce additional evidence before the Board, is addressed to the sound judicial discretion of the court. P. 16.
2. Although misconduct of the party making charges of unfair labor practices does not deprive the National Labor Relations Board of jurisdiction to issue a complaint and conduct a proceeding, such misconduct may properly be considered by the Board in determining whether it should institute or continue a proceeding upon the charges. P. 18.

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[16] This case involved a street-car line running between Covington, Kentucky, and Cincinnati, Ohio, over a bridge connecting the two cities. The City of Covington required that: (1) passengers must not ride on car platforms unless the platforms were equipped with suitable rails and barriers; (2) the cars must be kept clean, ventilated and fumigated; (3) the temperature of the air in the cars must never fall below a stated minimum; (4) in practical effect, that additional cars must be run in Cincinnati as well as in Covington in excess of the Cincinnati franchise rights and in such manner as to make probable the creation of serious impediments to other traffic in Cincinnati and conflict with Cincinnati regulations. The first two requirements were sustained. The third was struck down because the opening and closing of the car doors made compliance impossible; the fourth, because of the likelihood that serious burdens would be imposed upon interstate commerce by virtue of the impossibility of compliance with probable conflicting regulations. These factors have not been shown to exist in the present case.

3. An employer which had been found guilty by the National Labor Relations Board of unfair labor practices and ordered to disestablish a union found by the Board to be company dominated, petitioned the Circuit Court of Appeals under § 10 (e) of the National Labor Relations Act for an order that the Board hear and consider new evidence of a course of depredations, including dynamitings, committed upon the employer's property during the pendency of the case before the Board. It appeared that an officer and a member of the union which filed the charges upon which the Board instituted its proceedings had been convicted of participation in the depredations, and that they and others affiliated with this union and in close relation to them had testified on behalf of the Board; and it was alleged that the depredations were part of a conspiracy of this union to influence the case. The action of the Circuit Court of Appeals in granting the petition on the ground that the new evidence was material to the credibility of Board witnesses and on the issue of company domination, *held*, upon a review of the whole record, not to constitute an abuse of its discretion. P. 29.

124 F. 2d 50, affirmed.

CERTIORARI, 316 U. S. 657, to review a decree remanding a cause to the National Labor Relations Board with directions to hear additional evidence. See 20 N. L. R. B. 989.

Mr. Ernest A. Gross, with whom *Solicitor General Fahy* and *Messrs. Richard S. Salant, Robert B. Watts,* and *Morris P. Glushien* were on the brief, for petitioner.

Messrs. Murray Seasongood and *Eli F. Seebirt* for Indiana and Michigan Electric Co., respondent.

MR. JUSTICE JACKSON delivered the opinion of the Court.

The court below granted respondent Indiana and Michigan Electric Company's petition to remand the case to the Labor Board to hear additional evidence as to a course of depredations, including dynamitings, committed, it is alleged, by Local B–9 of the International Broth-

erhood of Electrical Workers, on the Company's properties during the pendency of the case. It directed that the Board make findings on such evidence, include it in the transcript, and make such modifications, if any, in its order, as the evidence might require. The court expressly refrained from passing on questions as to the bias and partisanship of the Trial Examiner and the sufficiency of the findings and of the evidence, raised by the Board's petition for enforcement and the answer thereto. The importance of the questions raised to enforcement of the Act prompted us to grant certiorari.[1]

For present purposes we take to be true the facts stated in the petition or offer of proof on the basis of which the court below directed a remand. These facts were stated on oath, and have not been denied. Petitioner says that we must hold that even if true they are immaterial. On this assumption of truth the case is as follows:

On November 12, 1938, Samuel Guy, the Business Manager of Local B–9 of the International Brotherhood of Electrical Workers, filed in amended form with the Board charges that the Company had been guilty of several unfair labor practices. On the same day the Board through its Regional Director issued a complaint against the Company, setting November 28, 1938, as a hearing date, and events of violence ensued in the following sequence as related to the Company's steps in defense of the case:

The Company filed its answer on November 23, 1938. On the following day, four days before the hearing, cables at one of the Company's South Bend substations were dynamited. The hearings proceeded, and the Trial Examiner's intermediate report recommended generally against the Company.

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[1] 316 U. S. 657. The decisions below are reported at 20 N. L. R. B. 989 and 124 F. 2d 50.

On September 1, 1939, the Company filed its exceptions to the intermediate report. On September 5, three of its transmission line poles were sawed off, and on September 8, a transmission line tower was dynamited. On October 17, 1939, the oral hearing on the exceptions was set before the Board at Washington for November 9, 1939. Two days later another transmission line tower was dynamited. On October 28, two transmission poles at different locations were dynamited. Another transmission tower was so destroyed on October 30, ten days before the oral hearing, and two more at different parts of the system on November 23, 1939. All carried high voltage lines, and some were located along public highways or railroad tracks.

On February 19, 1940, the Company filed with the Board a petition to reopen the case and receive further evidence. This petition alleged the commission of the depredations upon its property as set forth above and further that: John R. Marks, Assistant Business Manager of Local B–9, and Earl Freeman, one of its members, both of whom had been witnesses against the Company, and three others, were arrested after February 1, 1940, and charged with the commission of some or all of the depredations, and with having conspired to commit them all. Except Marks, each had made confessions stating that Marks paid them sums of money aggregating $2,325 for committing such acts. One of them stated that Marks had caused the first dynamiting to intimidate the Company in connection with the hearing and three stated that he had caused the later ones to intimidate it in connection with the oral argument. The Company proposed by the evidence of dynamiting to discredit Marks and Freeman, on whose testimony the Trial Examiner appeared to rely. It also sought to discredit Guy, who also had been a witness, on the claim that he knew, or must have known, of the use of the $2,325 of the Union's money for the purpose of destroying respondent's property. But it claimed

more. It asserted evidence of a conspiracy to destroy property to influence the pending case, which it contended was not a good-faith labor controversy, but an unlawful effort of Local B–9 to coerce the Company to require its employees to join the union.

On February 28, 1940, the Board denied the Company's petition. It held that "the matters recited therein have no relation to the issues in this proceeding." The Board went on to make findings on the issues, expressly reciting that it did so "upon the entire record in the case." While the Board did not designate all of the testimony for printing, it has certified it all to us, it has stricken no testimony of any witness in question from the record and has made no finding that any specific parts of it were not relied upon.[2]

The report of the Trial Examiner, Dudley, had held the Company's attitude to be hostile and obstructive toward the effort to unionize its men, relying substantially on events as to which Guy, Marks, and Freeman had testified. The Board findings made but little reference to the activities of Guy and no reference at all to Marks, but reached the same conclusion as to the attitude of the

[2] Section 10 of the Act provides: "(c) The testimony taken . . . shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board may upon notice take further testimony or hear argument. . . . (d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it. (e) The Board . . . shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to . . . enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree . . ." 49 Stat. 454, 29 U. S. C. § 160.

Company. The examiner had recommended ordering immediate and full reinstatement of Freeman and that he be made whole for all lost wages. The Board did not follow that recommendation. The examiner had recommended an order that the Company withdraw all recognition from respondent Michiana Association as representative of employees upon the ground of company promotion and domination, and the Board so found and so ordered. The examiner had also recommended that the Company be ordered to cease and desist coercing employees in their right, among other things, to "join or assist the International Brotherhood of Electrical Workers, Local B–9." The Board order dropped the name of the union, but ordered respondent generally to cease and desist from interfering with its employees in the exercise of their right "to join or assist labor organizations."

On December 13, 1940, the Board petitioned for enforcement of its order and on July 29, 1941, the Company petitioned the Circuit Court of Appeals for a remand to the Board pursuant to § 10 (e) of the National Labor Relations Act. This petition referred to the earlier petition to the Board and set forth under oath in addition that: Marks, Freeman and another member of the Brotherhood had been convicted of one of the dynamitings described in the petition and sentenced to terms of from two to fourteen years in the state penitentiary; and two others had pleaded guilty of other of the depredations. Marks had said he obtained all of the money to purchase dynamite and pay the dynamiters from the treasury of International Brotherhood of Electrical Workers, Local B–9. The petition also recited that during the hearings the Trial Examiner asked a conference with the company attorney and urged settlement of the case. He was told of the dynamiting of November 24, 1938, and given references to articles about the practices and methods of the officers of this union, and to the record in *Boyle* v. *United States,* 259 F.

803, in which the Circuit Court of Appeals for the Seventh Circuit had affirmed a conviction of Michael J. Boyle, its International Vice-President, and severely condemned his methods in labor matters. The examiner replied, "Well, your Company will be required some time to recognize B–9 and you might as well do it now." On three separate later occasions different attorneys or officers of the Board were informed of the depredations, but continued to urge the Company to cease resistance in the case. The truth of these statements has not been denied. Finally, the Company asserted in its petition to the Court that on reopening it would be able to prove that the Board's witnesses (not limited to Guy and Marks and Freeman) were of such character that they are not entitled to credit and belief, and that the case had no relation to the purposes of the National Labor Relations Act.

The court below stated as one ground of the Company's case for remand that the tendered evidence was material for the purpose of "impeaching the credibility of witnesses before the Board on whose testimony the Board relied for its finding of ultimate facts." After referring to the testimony of Guy and Marks, it said that "at the time of the trial, the evidence adduced on the trial of the criminal cases in the Indiana State Court involving these witnesses, was not available to respondent or to the Board. The new evidence is of such character that its consideration by the Board would probably produce a different result." In support of its remand it went on to say that the question whether the supervisory employees whose activities had been found by the Board to constitute coercion on the part of the Company "were acting on their own behalf and that of their co-employees, or at the behest of the respondent, is the crux of the case. . . . The new evidence may throw some light on the issue of employer domination."

Section 10 (e) of the National Labor Relations Act authorizes the Circuit Court of Appeals to order additional evidence to be taken when it is shown "to the satisfaction of the court that such additional evidence is material," and that there were reasonable grounds for the failure to adduce the evidence at the hearing.[3] In *Southport Petroleum Co.* v. *Labor Board,* 315 U. S. 100, 104, we sustained the Board's contention and held that an application for leave to adduce additional evidence thereunder "was addressed to the sound judicial discretion of the court." The Board does not suggest that a different construction should be put upon the Act when the court below decides against, rather than for, it. The question it has submitted for our decision is whether the court below "acted arbitrarily" and "abused its discretion." Thus, in order to decide this case in favor of the Board we would have to hold not merely that the evidence of dynamiting would be a matter of indifference in our own view of the case, but that the court designated by statute to exercise discretion in the matter and which desired to know the facts about it before passing on the sufficiency of the evidence and the impartiality of the examiner and which thought the finder of the facts should hear and consider such evidence, must not only have been in error but must also have abused its judicial discretion.

The Board argues that the decision below must be reversed on the grounds that the court erred in holding that misconduct of the complainant before the Board would go to the Board's jurisdiction; that, as it contends, the court held that a remand might result in the impeach-

[3] 49 Stat. 454–455, 29 U. S. C. § 160 (e):

". . . If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. . . ."

ment of the credibility of Guy, Marks and Freeman, whose testimony was either cumulative (being corroborated by other witnesses) or entirely immaterial and not relied upon by the Board; and that there is other substantial evidence in the record to support the Board's decision. The specifications of error in the petition for certiorari did not, however, take this narrow compass, but extended to the propriety of the ruling of the court below upon the whole case.[4] We have not confined ourselves to the scope of the Board's view of the case, and have examined all the evidence in the certified transcript, and not merely the evidence set forth in the printed record.[5]

We cannot agree with the view of the Circuit Court of Appeals that the evidence might disqualify Local B–9 from making the charge of violation against the Company or deprive the charge of force and effect, and thereby defeat the Board's jurisdiction to hear the case.

The Act requires a charge before the Board may issue a complaint, but omits any requirement that the charge be filed by a labor organization or an employee.[6] In the legislative hearings Senator Wagner, sponsor of the Bill, strongly objected to a limitation on the classes of persons who could lodge complaints with the Board. He said it was often not prudent for the workman himself to make a complaint against his employer, and that strangers to

[4] "1. The court below erred in remanding the case to the Board for the taking of additional evidence as to the unlawful conduct of the union which filed the charge against respondent.

"2. The court below erred in remanding the case to the Board in order that the testimony of certain witnesses might be impeached.

"3. The court below erred in failing to enforce the order of the Board."

[5] *Stromberg* v. *California*, 283 U. S. 359, 368; *McCandless* v. *Furlaud*, 293 U. S. 67, 71.

[6] § 10 (b), 49 Stat. 453, 29 U. S. C. § 160 (b) provides that "Whenever it is charged that any person has engaged or is engaging in any such unfair labor practice, the Board . . . shall have power to issue . . . a complaint. . . ."

the labor contract were therefore permitted to make the charge.[7] The charge is not proof. It merely sets in motion the machinery of an inquiry. When a Board complaint issues, the question is only the truth of its accusations. The charge does not even serve the purpose of a pleading. Dubious character, evil or unlawful motives, or bad faith of the informer cannot deprive the Board of its jurisdiction to conduct the inquiry.

While we hold that misconduct of the union would not deprive the Board of jurisdiction, this does not mean that the Board may not properly consider such misconduct as material to its own decision to entertain and proceed upon the charge. The Board has wide discretion in the issue of complaints. Indeed it did not act on a charge earlier made by the C. I. O. against the same employer. It is not required by the statute to move on every charge; it is merely enabled to do so.[8] It may decline to be imposed

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[7] Hearings before the Committee on Education and Labor, United States Senate, 74th Cong., 1st Sess., on S. 1958, Washington, Government Printing Office, Part 3 (1935), pp. 439–442.

[8] Compare the following statistics on the disposition of charges filed with the Board:

	Percentage of total cases on docket for fiscal years ending:			
Cases closed before issuance of complaint:	1937†	1938‡	1939*	1941**
By settlement	32.1	34.5	27.9	30.3
By dismissal	13.5	13.4	7.6	9.7
By withdrawal	7.4	17.7	17.8	20.6
By other means	.2	1.2	.5	.2
Cases disposed of after issuance of complaint	3.0	2.5	5.5	6.6
Cases pending	43.6	30.7	40.7	32.7

†Report of the National Labor Relations Board (1937) 20.
‡Report of the National Labor Relations Board (1938) 31.
*Report of the National Labor Relations Board (1939) 34.
**Report of the National Labor Relations Board (1941) 26.
Statistics for 1940 are set up on a slightly different basis, but indicate a trend like that of the years set forth above. Report of the National Labor Relations Board (1940) 20.

upon or to submit its process to abuse. The Board might properly withhold or dismiss its own complaint if it should appear that the charge is so related to a course of violence and destruction, carried on for the purpose of coercing an employer to help herd its employees into the complaining union, as to constitute an abuse of the Board's process.

The Company claims support for this inference as to the purpose of the organizers in the testimony of Guy, Business Manager of Local B–9. It appears that he and Marks, his assistant, called on Thomas F. English, operating head of the Company, in the Spring of 1937. Guy testified that the purpose was "along the lines" of getting the assistance of English in causing the employees to come into Local B–9 instead of into a C. I. O. union or an independent union. Guy said, "we decided" to "take over the organization" of the men, that "we had jurisdiction in this particular community or part of the State, and if they were going to be organized that they rightfully belonged in our organization." Their proposition to the Company that it cause the men to join Local B–9 was a proposal to violate the National Labor Relations Act, whose purpose is to protect the workmen from employer pressure and leave them free to choose for themselves whether, and with whom, they will associate. The Company refused, and English later warned that the organizers must cease representing to the men that the Company favored Local B–9.

Later another meeting was called by a Field Examiner for the National Labor Relations Board, attended by the Field Examiner, Guy, Marks and Company representatives. On questioning, Guy recalled that Boyle, Vice-President of the Brotherhood, had also been there. The company attorney made an offer of proof at the hearing that this meeting was held on May 5, 1938, at the instance of the Field Examiner, who stated that a series of inci-

dents recited constituted a violation by the Company of the Labor Relations Act and "asked Mr. Boyle what recommendation he would make." The Trial Examiner rejected the proof.[9]

Apart from the materiality of the additional evidence on the question of the Board's discretion as to whether it would institute or continue a case on the recommendation and charges of this informer under the circumstances now appearing, its materiality on other branches of the case is sufficiently established to support the Court's exercise of discretion in ordering taking of new testimony. We think this course of violence and lawlessness concurrent with the Board proceedings, apparently instigated by those who stand to gain from the Board's decisions, participated in by parties and witnesses, may not be said to lack possible materiality on other issues of the case. The question goes to the fairness of giving absolute finality to the Board's findings of fact where there has been a refusal to hear and incorporate in the record such evidence as may be produced of such a conspiracy.

The testimony ordered to be heard goes to the credibility of Marks and Freeman, and perhaps to that of Guy, three witnesses whom the Board's staff thought useful to call, and on whom the examiner plainly relied. The Board expressly accepted and relied upon the version of events as to which Guy testified.[10] Local B–9 was a party

[9] This was on November 28, 1938, the first day of the hearing. On December 9, 1938, the last day of the hearing, Charles B. Calvert, English's assistant, testified without objection that Boyle's response was "I guess that is about it."

[10] The Board found that: Earl Livelsberger, one of the Company's general line foremen, and Glenn Carlton, his assistant, were among those invited to attend a meeting of Local B–9 in April, 1937. During the course of the meeting, Guy, learning from several Company employees that they were sitting in a car outside the meeting hall, left it and invited them to come to the meeting. Carlton declined, stating

to the proceeding and appeared throughout the hearings by Guy, who managed its interests. He, the Business Manager, was the first witness; and Marks, his assistant, the second. Aside from English, operating head of the Company, and employees who were members of what the

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that he could get the information anyway. Carlton and Livelsberger were in a position to observe, and did observe, who attended the meeting. "The fact that Guy's attention was called to the presence of Livelsberger and Carlton indicates that the respondent's employees were aware of the supervisory surveillance of their meeting place. . . . Although Livelsberger and Carlton were invited to the meeting and therefore their attendance at the meeting itself would not have discouraged membership in the Brotherhood, it is clear, and we find that their stationing themselves outside the meeting place was for the purpose of scrutinizing those who entered and thereby discouraging employees from attending such meetings." It also found that since Livelsberger and Carlton were supervisory employees whose activities were attributable to the Company, their conduct constituted a violation by the Company of the rights guaranteed the employees in § 7 of the Act.

Carlton and Livelsberger, called as witnesses for the Company, admitted being across the street from the hall at the time of the meeting. Livelsberger testified that he had belonged to the Brotherhood for three years after 1919, but got "disgusted" and dropped out; and that he did not go into the meeting because "I didn't see anyone there that I cared much about association in membership with." Carlton testified to the same effect as to his reason for staying out. There were about fourteen men at this meeting, including Claude F. Buckley, Dewey Edwards, Guy, Albert Otis and Lester Shields.

Frank Claeys testified that he saw Carlton outside, and "wanted to get out of there," but that he had nevertheless attended the meeting. Guy testified that Buckley, and probably others, had told him of Carlton's presence outside the hall, and that when he went out and invited Carlton to attend and learn firsthand what was going on, he was told by Carlton that he would get the information anyway. Ralph L. Hoblitzel was the only one to corroborate this statement, and Carlton denied having made it.

As to Buckley, Claeys, Edwards, Hoblitzel, Otis and Shields, all Board witnesses and affiliated with Local B–9, see the following discussion.

Board found to be a company-dominated union,[11] the Board called twenty witnesses. Of these, fourteen besides Guy, Marks and Freeman, were affiliated with Local B–9.[12] Of these fourteen, eight had come to work shortly before or during Local B–9's organizing campaign which, as Guy and Marks testified and the Board found, began in the Fall of 1935.[13] One of these, Buckley, admitted knowing Boyle, and Marks testified that he knew Buckley before he came to work for the Company. Marks also testified that he began organizational efforts by getting in touch with Buckley and Shields, who, like Buckley, came to work in 1935. Buckley called the first meeting for Local B–9 among the Company's employees. Edwards, an officer of Local B–9, was another of the new employees who figured in the case. He testified that he had known Marks for approximately four years and had seen him "quite a number of times" and in "a number of places." Otis, another 1935 arrival, went from Chicago, where he was employed at the time of the hearing, to South Bend to see a sick friend whom he had not seen or corresponded with for a year. On the way he happened to see Edwards out in a field hunting, and talked to him there. This was around Thanksgiving time of 1938. The South Bend substation was dynamited November 24, 1938. The company attorney on cross-examination asked "What did you talk about?" Otis answered: "That

[11] Witnesses presented by the Board and affiliated with respondent Michiana were: Geraldine Carlson, Ray M. Collins, Taylor Edgell, George S. Holmes, and Nelson D. Lambert.

[12] Claude F. Buckley, Frank Claeys, Ernest Durfey, Dewey Edwards, Forrest Elkins, E. J. Ernst, Charles A. Havlin, Ralph L. Hoblitzel, Walter Hulwick, Russell H. Kidder, Eugene S. Lee, Albert Otis, Earl Seeley, and Lester Shields. Three others of the Board's witnesses were affiliated with the C. I. O.

[13] Otis, April, 1935; Edwards, May, 1935; Buckley and Hulwick, July, 1935; Shields, August, 1935; Durfey, October, 1935; Seeley, October, 1936; Elkins, May, 1937. Kidder came to work in September, 1934.

is none of your business either." The Board attorney then objected to the question, which was never answered beyond a denial that they talked about the Company. Otis was twenty-seven years old at the time of the hearing and had worked for at least ten public utility concerns and one manufacturing plant in a short period. Asked on cross-examination the reason for his peculiarly acute memory in respect to the period of his employment by another electric company, he answered that it was because "an incident happened that isn't any affair of the court." Freeman, one of those convicted of the dynamiting, was a witness, testified at length as to alleged unfair practices of the Company, as did others affiliated with Local B–9, including those mentioned above.

It is idle in this context to say that because the Board now denies it relied on the evidence of the two who were convicted, because it was willing to omit their testimony from the record, and because it rejected the examiner's recommended relief to Freeman, the door should be closed to any inquiry about the knowledge or responsibility of members of this group for these acts of violence. The items recited and many others revealed by the transcript of testimony, as well as the printed record, give support for the lower court's belief that the evidence, if taken, might change the results. The convicted witnesses and many of the others on whom the Board must have relied were not only co-members of Local B–9, but they were coöperating in promoting its fight against the Company. It is unrealistic to say that this union was granted nothing by the Board's order or that no relief has been given to this particular union. The C. I. O. had practically withdrawn [14] and the Board's order disestablishes respondent

[14] A C. I. O. charter had issued to a group of Company employees in April, 1937. This group met with little success, and, failing to get the assistance of an organizer from the main body, the men transferred to Local B–9 in October, 1937.

Michiana. This not only leaves the field free to Local B–9 and breaks up the only center of resistance to it, but the Board prohibits any interference with the employees' right "to join or assist labor organizations." That includes this one, and for practical purposes at this time, none other. Local B–9 was the complainant, its effort to organize was at stake, and the relations shown are such that cross-examination to ascertain whether the witnesses had any part in such violence would appear proper. It must be remembered that not only is the credibility of these men involved, but the decision itself turns on an interpretation of their acts and of the acts and attitudes of supervisors toward them and whether the employees were in good faith in testifying to the reasons for preferring an association of their own to Local B–9. We see no reason why witnesses so identified with the organizing effort of the dynamiters should not be questioned on a subject that might reveal bias in their testimony and might also explain acts of alleged discrimination against them.

We especially see no reason for holding that officers or members of Local B–9 should be spared such inquiry when the subject was thought by the Trial Examiner a fit one on which to examine the head of the employees' association. One George S. Holmes was president of respondent Michiana, which the Board holds to be the product of unlawful company activity and orders to be disestablished. He was a distribution engineer who had been employed by the Company for many years. After testifying to his understanding of the reasons for the formation of Michiana as being the fact of outside organizations "creating a disturbance and jeopardizing the present working conditions," the relative amounts of dues [15] and directness of

[15] Marks testified that dues in the Brotherhood were 1½% of average earnings, and initiation fees $10 for journeymen and $7 for helpers. Dues for Michiana were 25¢ per month, with an initiation fee of $1.

approach to the company officials through Michiana,[16] he was questioned by the Trial Examiner. One of the questions put by the Trial Examiner was "Supposing that there was an organization formed to throw bombs at the company's plant every Saturday night, would you become president of such an organization?" Holmes said that he doubted that extremely. The examiner also asked him, in connection with his attitude as to the proper technique of bargaining with the Company, "Would you suggest cutting down electricity and turning off electric lights?" He was told by Holmes that ". . . if you get the entire community adversely prejudiced against you, you would have tough going, regardless of how you acted toward the company." If questioning as to hypothetical bombings was deemed material and relevant to discredit Holmes' claim of independence of Company domination, which is the only purpose apparent, we would think it a little difficult to contend that it is improper to inquire as to the attitudes of those closely associated with those convicted of actual bombings as to their knowledge and attitude in relation to them.

It is at least reasonably conceivable that further inquiry into the depredations will bear not only upon the effect to be given the testimony of any further participants or conspirators thereby disclosed, but also upon that of witnesses whose testimony might without such inquiry be taken to indicate company domination of Michiana. Many supervisory and other employees voiced opposition

[16] According to the testimony of Guy and Marks, grievances as to wages and working conditions were considered by local bodies set up within B–9, and then referred to Marks, who would endeavor to adjust them. If he failed, the matter would be taken up with Guy in Chicago, who, with the executive board and membership of the main body—variously stated by Guy to number from 2,500 to 3,500—would decide the matter. Local bodies apparently had no power to settle their own grievances by approaching the management.

to the intrusion of "outsiders" into their affairs.[17] Present knowledge and further investigation of the depredations seem not altogether unlikely to lend credibility to their testimony that they had acted to protect their own interests and not as participants in Company interference. Testimony of employees that they organized Michiana because they did not wish to accept the leadership of Local B–9, and that Michiana was the product of their own preference rather than of Company pressure or interference, has been wholly disbelieved by the Board. It

[17] Two examples suffice:

The Board made a number of findings with respect to the activity of Jack Betly, a lineman employed by the Company since 1929, who had been particularly active in the organization of Michiana. It quoted from a petition which he had circulated. The petition was entitled "S. A. F. E.", and read in the part quoted by the Board as follows: "We, the older men in the employ of this company, believe that we have men among us that can intelligently arbitrate with the management without resorting to radicalism and dictation of outsiders. Our meeting will be posted in the near future." Some time before Betly got out his petition he had been solicited by Otis, Shields, and Marks to rejoin the Brotherhood, to which he had belonged in 1915. According to his testimony, they had called him out in the evening to their car, and had refused to come into his home, thus causing him some uneasiness. He was invited to attend, and did attend, the first Local B–9 meeting. He testified further that at a later meeting he had difficulties with Otis who "took a slough" at him and bumped his head against a wall, and that shortly after this he went home and got out his petition.

The Board also quoted at some length from the testimony of Harter, a foreman, as to his questioning of employees with respect to Local B–9 matters, and found that such questioning constituted a violation by the Company of the Act. His story was that the men he questioned were members of his line crew who had been acting "tight" and as though they had more on their minds than linemen working on charged inter-city power lines should have; that his questioning divulged similar visits by Shields and Otis upon two of the three men in his crew; and that outside unions were "bothering . . . I know I was wondering if they was going to move their trunks in and put up at my place, or whether I would have to move out and let them in."

might well be rejected when Local B–9 appears only in the light of an ardent but lawful champion of workmen's welfare. The testimony of many employees was critical of Local B–9, but the grounds were not clearly articulated. But their aversion to the B–9 leadership, disbelieved by the Board when no very tangible reason was brought out to explain it, may be entirely credible when it appears that even poorly explained apprehensions were justified and that there was ample reason for avoiding entanglement with the men who officered Local B–9 and who are now convicted—injuring no doubt the cause of those whom they were trying to "take over."

Undoubtedly, an element of fair judicial discretion vested in the court below consists of respect for a wide range of discretion in the Board itself as to when it should or should not inquire into allegations of violence or threats of violence by witnesses or parties before it. It must not be overlooked, however, that the evidence on which the Court reopened this case was substantially different from that on which the Board refused to do so.[18] Charges that violence has been threatened or encouraged are frequent and easy in negotiations that proceed in an air of belligerency. Both sides regard labor relations as tough business, and not only vital interests but passions and sensitivities as to prestige are involved. Neither side is lightly to be held answerable for acts where responsibility cannot be fixed. Few tasks of leadership are more difficult than

[18] Facts appearing in the petition to the Court not contained in the petition to the Board were: the conviction of men who had earlier confessed, and of Marks, who had not confessed; and the efforts by the Trial Examiner during the hearing, and by other attorneys or officials of the Board after the hearing, to get the Company to consent to disestablishment of Michiana despite charges that the Local had caused the dynamitings.

It also appeared from the Board's response to the petition to the Court that at least one of the non-employee dynamiters hired by Marks was also a member of the Brotherhood.

those which confront those who represent labor. If they are gentle, they are often unheeded; and if they are blunt, they are often held up as menacing. The Board is not required to sidetrack proceedings involving an employer's violation of the labor law while it explores irrelevant derelictions of parties or witnesses or acts of unknown or irresponsible persons.

The Act accords a great degree of finality to the Board's findings of fact, and this Court has been insistent that the admonition of the Act be strictly observed. But courts which are required upon a limited review to lend their enforcement powers to the Board's orders are granted some discretion to see that the hearings out of which the conclusive findings emanate do not shut off a party's right to produce evidence or conduct cross-examination material to the issue. The statute demands respect for the judgment of the Board as to what the evidence proves. But the court is given discretion to see that before a party's rights are finally foreclosed his case has been fairly heard. Findings cannot be said to have been fairly reached unless material evidence which might impeach, as well as that which will support, its findings, is heard and weighed.

We will not assume in the circumstances of this case that the Board will in any event refuse to modify its conclusions. Since the court below has not yet passed on the issue of sufficiency of the evidence to sustain the finding that Michiana is a company-dominated union, any assumption that it is such can be only tentative unless we are to deny the Company the right to review granted by the Act. One of the very issues yet to be decided, and on which the court below desires the light of additional evidence, is whether Michiana was, as its officers and members testified, a true employee organization, formed to get away from Local B–9, or whether it was a company tool, as the Board has inferred from testimony, much of it from

Local B–9 sources. We have no warrant to assume that the Board will find that it is company-dominated, no matter what the additional proof may show as to the motives of the men who organized it. We do not prejudge the issue—we hold only that it is not unreasonable or an abuse of judicial power to reserve judgment on it until the full story has been heard and judged by the Board itself.

The Labor Relations Act contemplates submission of disputes as to labor practices of employers to reasoned and impartial determination after full and fair hearing. If by that procedure there is found wrong-doing on both sides, the Board can act to prevent the employer wrong-doing prohibited by the Act, even though it can not reach other wrong-doing. But the process of presenting cases to it must be kept free from forces generating bias or intimidation. Dynamiting or display of force by either party has no place in the procedures which lead to reasoned judgments. The influence of lawless force directed toward parties or witnesses to proceedings during their pendency is so sinister and undermining of the process of adjudication itself that no court should regard it with indifference or shelter it from exposure and inquiry. The remedies of the law are substitutes for violence, not supplements to violence, and it is proper that courts and administrative bodies so employ their discretion as to dispel any belief that use of dynamite will advance legal remedies.

Further delay in this case is to be regretted, particularly in view of the long delay that has already occurred. We set out in the footnote the facts in this regard, which we do not recite as any criticism of the Board, which in turn has suggested no criticism of the Company.[19]

[19] The complaint was served November 15, 1938 and the hearing set for November 28. A continuance was requested by the Company on the ground of illness of its attorney, but was refused. The Board presented its evidence in six days, the Company in three. The hearings

In view of the whole record the order of the court below is not arbitrary or unreasonable or an abuse of discretion. It is

Affirmed.

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MURPHY concur, dissenting.

A desire to punish dynamiters does not justify a failure to protect respondent's employees, innocent of wrongdoing, in their freedom either to bargain collectively through representatives of their own choosing or to be represented by no one at all. Without relying in the slightest degree on the evidence of persons convicted of or charged with dynamiting, the Board found the Association to be company-dominated. Its order gave no benefit to anyone even remotely suspected of complicity in the crimes charged. Instead it carefully eliminated such individuals, and the Union, from the scope of its award and gave no credence to the suspect witnesses. The sole issue for the courts to determine is whether there is, in the tes-

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closed on December 9, 1938, and the Trial Examiner's intermediate report was filed on July 27, 1939—a little more than seven months later. The Company's exceptions were filed September 1, 1939, and the Board set them for hearing on November 9, 1939. The Board had not decided the case when, on February 19, 1940, the Company petitioned it for a rehearing with regard to the evidence of the depredations obtained by the arrest of all, and the confessions of some, of the participants, all occurring since February 1, 1940. Nine days later the Board decided the case. On December 13, 1940, the Board petitioned the court below for enforcement of its order, and the court rendered its decision on December 12, 1941. On February 19, 1942, after the time for filing a petition for rehearing had expired, the Board moved for leave to file it out of time. The court denied the motion, and on March 9, 1942, three days before the time to petition this Court for a writ for certiorari had expired, the Board asked and obtained an extension of time to April 11, 1942, in which to file its petition. The petition was filed on that date, granted on May 25, and argument in this Court was completed November 16, 1942.

timony of witnesses untainted by any suspicion, sufficient evidence to support the Board findings that the employer has (1) set up a company-dominated union contrary to § 8 (2) of the Act, and (2) interfered with, restrained and coerced its employees in exercising their right to belong to the union of their choice contrary to § 8 (1). The Board order, requiring disestablishment of the dominated union and cessation of interference, contemplates only that this Company shall not intimidate or coerce its employees—that it shall leave them free. This freedom is their legal right; and crime by some of them cannot justify the Company in destroying the freedom of all, or even a few of them. Under our government guilt is personal; it cannot, or at least should not, attaint the innocent; it cannot, or should not provide an excuse for one injured by it to invade the liberty of others. In short, the crimes of some of these employees, or of the non-employee members of a union, cannot have relevance to the two issues the Board decided.

I agree with the Court that alleged errors in the administration of the hearing by the trial examiner or by the Board officials are not properly before us. Such questions can be considered when the case is properly reviewed by the court below. Having agreed with the Court that this question is now irrelevant, I cannot join in discussing, as the Court does, the propriety of alleged statements to one Boyle, and reserve all opinion on this phase of the case.

If the evidence respondent asks to offer has any relevance whatever, it must be for one of two reasons: that (a) the Union's purposes in filing the complaint were not salutary and that the character of its activities was such that the Board might upon hearing the proffered evidence decline to exercise any jurisdiction to protect the rights of employees, even the innocent; or (b) that the Board's witnesses were of such character as to be unworthy of belief.

The first of these grounds surely has no real merit. There is of course no reason why a meritorious complaint should be dismissed merely because of the bad character of one who makes the charge. The ill character of a complainant, or of witnesses, provides no excuse for leaving the public interest unprotected. A witness can be impeached in a proper manner; but the opinion here seems to suggest that administrative agencies should hereafter spend a large part of their time in trying complainants instead of those charged with violating the law. Now, four years after this proceeding began, it is broadly hinted that the Board should permit the employer to try the informer and it is clearly implied that if the complaining union is proved evil, the employees should not be free of company-domination no matter how extreme it may be. If the practice here suggested is not soon repudiated, a new method will have been provided in which to paralyze administrative agencies by discursive delay.

As has been noted, the Board has carefully eliminated from its order all provisions which would specifically benefit the Union, and I see no reason for ordering it to take new evidence of the character of a union to which it has granted nothing at all. Despite this there is a premise, vaguely stated but nonetheless permeating the opinion of the Court, that evidence of the bad character of the Union would require the Board to take some other action; that somehow, as a practical matter, the Board, despite its careful effort to avoid such a result, has aided the Union which brought the charges. But if the desire be to punish the Union, I cannot agree that this should be done by compelling innocent employees to remain in a dominated Association. If the Board's order requiring the disestablishment of the Association is found to be supported by evidence, the employees may form a genuine independent union, they may join some other organization, or they

may choose to remain unorganized. A requirement that, for their own good, they must remain in a company-dominated union to avoid any possibility of their aiding the wrongdoers denies them the freedom of choice which the Act preserves. Whatever character the Union may be found to have, the Board's protection to respondent's employees should not be disturbed because of it.

The motion for permission to offer new evidence attacking the credibility of witnesses raises a different question—one going to the quality of evidence on which a conclusion is to be reached. The Board, after full consideration, denied the motion because it found that the proffered evidence even if true had no relation to the issue of Company coercion of its employees. Whether a case shall be reopened after the evidence is closed, is, in courts, ordinarily a matter of discretion. I think the Board's action in this proceeding can not be said to be an unfair exercise of discretion and that in any event it was correct in holding the evidence irrelevant to the limited issues it decided.

It must be remembered that the fundamental issue which the Board decided here is whether the Association is company-dominated. We are told that testimony concerning the misdeeds of the electrical workers are material to this conclusion because the Board relied on witnesses Marks, Freeman, and Guy; because the Board "must have relied" on other union witnesses; because the Board's decision may drive the employees into the offending Union; because an Association official was asked hypothetical questions about bombing; and because company witnesses might have been more credible if the full facts of violence had been known.

To support its view that the Board might have disbelieved certain of its witnesses had the full facts been known, the Court has gone not only to the testimony

which has been printed by the Board and the Company and offered by the Board as the basis of its case, but has searched evidence to which the Board has made no reference in its findings and which it has not offered as of any credibility at all. Evidently the Board is to be required to re-examine that evidence in which it has already, by rejection of it, expressed disbelief. I think no possible good can come from reconsidering evidence once rejected for the purpose of re-rejecting it.

The Board called sixteen Union witnesses. The three most under suspicion for dynamiting were Guy, Marks, and Freeman. Guy's testimony, as submitted by the Board in support of its finding, is that two company supervisors kept a Union meeting under surveillance, a fact conceded by the supervisors. Marks testified that the Company did not interfere with union organization, and Freeman testified that Holmes, president of the Association, was respected by his fellow employees. A more innocuous or colorless collection of evidence can scarcely be imagined. The testimony of six other Union witnesses, as reflected by the printed record, is equally trifling, while that of the other seven, which fills about four per cent of the printed record, was not relied on by the Board in its findings.

The ultimate Board holding before the Circuit Court of Appeals for review is that the Association was company-dominated. This holding rests almost exclusively on the testimony of Company witnesses or witnesses affiliated with the Association. There is not even a hint that these witnesses were intimidated or interfered with in any way, or that they told anything but the truth. If it be assumed that Guy, Freeman, and Marks are wholly unworthy of belief, this basic testimony given by Company witnesses would still be unaffected. The suggestion made by the Court, not raised by the Company either in its petition for rehearing to the Board or in its motion for remand in

the Circuit Court of Appeals, that examination into the dynamiting will reflect on the attitude of the employees toward the Union during the earlier organizational period, therefore misses the heart of the case. If the Company's supervisory representatives did organize and dominate the Association, the Association is company-dominated and the Board's order should be upheld, *I. A. of M.* v. *Labor Board,* 311 U. S. 72, 79, 80; if they did not, the Board's order should not be enforced. The character of organizers of a separate and distinct union contributes nothing to the issue of Company conduct.

The last suggestion as to the materiality of further investigation into the dynamiting is that for some reason the trial examiner asked Holmes questions concerning his view on violence in labor disputes. Holmes expressed a proper respect for law and order, and it is incredible that a new hearing would either cause him to alter his view in this regard or change the Board's respect for his conclusion.

It will not seem odd that so much of the evidence originally introduced by the Board was eventually deemed irrelevant to the final decision when it is realized that the original charge against the respondent was much broader than the final holding. This evidence, directed to the support of these peripheral charges, lost all consequence for this case when the Board declined to believe the charges themselves. For example, the original complaint alleged that one Elkins was wrongfully discharged. Since both the trial examiner and the Board found the charge unsupported, Elkins' testimony in this respect and all that supports it drops completely from the case. The opinion of the Court appears to require re-assessment of such surplus testimony offered in behalf of charges concluded to be unfounded.

Of course no Court should shelter dynamiters from exposure and inquiry. But compelling the Board to digress

from the adjudication of a labor dispute in which such dynamiting has no part into a pursuit of the guilty, punishes the innocent employees of respondent rather than the evildoers themselves. The Labor Board is no fair substitute for a grand jury or a criminal court.

If the Board had denied respondents an opportunity to offer newly discovered evidence which tended to show that witnesses to material facts relied on by the Board had since the hearing been convicted of serious crimes affecting their credibility, I would not object to sending the matter back to the Board. But analysis of the record demonstrates that no such thing occurred. I think we should send the case back to the Circuit Court of Appeals for the normal review procedure.

O'DONNELL *v.* GREAT LAKES DREDGE & DOCK CO.

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

No. 320. Argued January 6, 1943.—Decided February 1, 1943.

1. A deckhand in the service of a vessel plying navigable waters in interstate commerce, who was ordered by the master to go ashore and assist in repairing, at its connection with a land pipe, a conduit through which the vessel was unloading cargo, and who while thus engaged was injured by the negligence of a fellow servant, has a right of recovery under the Jones Act, 46 U. S. C. § 688, which gives a right of action to a seaman injured "in the course of his employment." P. 38.
2. The Jones Act as so applied is constitutional, even though the injury was inflicted while the seaman was on shore. P. 43.
3. The constitutional authority of Congress to provide such a remedy for seamen derives from its authority to regulate commerce, and its power to make laws which shall be necessary and proper to carry into execution powers vested by the Constitution in the government or any department of it, including the judicial power

which extends "to all Cases of admiralty and maritime Jurisdiction." P. 39.

4. There is nothing in the constitutional grant of admiralty jurisdiction to preclude Congress from modifying or supplementing the rules of the maritime law as experience or changing conditions may require, at least with respect to those matters which traditionally have been within the cognizance of admiralty courts either because they are events occurring on navigable waters, or because they are the subject matter of maritime contracts or relate to maritime services. P. 40.
5. The right of recovery in the Jones Act is given to the seaman as such, and, as in the case of maintenance and cure, the admiralty jurisdiction over the suit depends not on the place where the injury is inflicted but on the nature of the service and its relationship to the operation of the vessel plying in navigable waters. P. 42.
6. Since the subject matter—the seaman's right to compensation for injuries received in the course of his employment—is one traditionally cognizable in admiralty, the Jones Act, by enlarging the remedy, did not go beyond modification of substantive rules of the maritime law well within the scope of the admiralty jurisdiction, whether the vessel, plying navigable waters, be engaged in interstate commerce or not. P. 43.
7. The fact that Congress has provided that suits under the Jones Act may be tried by jury, on the law rather than on the admiralty side of the federal courts, does not require a conclusion different from that here reached. P. 43.

127 F. 2d 901, reversed.

CERTIORARI, 317 U. S. 611, to review a judgment denying recovery in an action under the Jones Act.

Mr. Walter F. Dodd for petitioner.

Mr. Ezra L. D'Isa for respondent.

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

The question for decision is whether a seaman injured on shore while in the service of his vessel is entitled to recover for his injuries in a suit brought against his em-

ployer under the Jones Act. § 33, Merchant Marine Act of 1920, 41 Stat. 1007, 46 U. S. C. § 688.

Petitioner was a deckhand on respondent's vessel "Michigan," engaged in transporting sand from Indiana to Illinois over the navigable waters of Lake Michigan. As her cargo was being discharged through a conduit passing from the hatch and connected at its outer end to a land pipe by means of a gasket, petitioner was ordered by the master to go ashore to assist in repair of the gasket connection. While he was so engaged the alleged negligence of a fellow employee caused a heavy counterweight, used to support the gasket, to fall on petitioner and cause the injuries of which he complains. The district court dismissed the cause of action under the Jones Act and granted an award for wages. The Court of Appeals for the Seventh Circuit modified the judgment, 127 F. 2d 901, by allowing an additional award for maintenance and cure, but held that no recovery could be had under the Jones Act for injury to a seaman not occurring on navigable waters. We granted certiorari, 317 U. S. 611, the question being one of importance in the application of the Jones Act.

The Jones Act, so far as presently relevant, provides:

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply . . ."

The Act thus made applicable to seamen injured in the course of their employment the provisions of the Federal Employers Liability Act, 45 U. S. C. §§ 51–60, which gives to railroad employees a right of recovery for injuries resulting from the negligence of their employer, its agents

or employees. *Panama R. Co.* v. *Johnson,* 264 U. S. 375; *The Arizona* v. *Anelich,* 298 U. S. 110. The term "seamen" has been interpreted to embrace those employed on a vessel in rendering the services customarily performed by seamen, including stevedores while temporarily engaged in stowing cargo on the vessel. *International Stevedoring Co.* v. *Haverty,* 272 U. S. 50; *Buzynski* v. *Luckenbach S. S. Co.,* 277 U. S. 226. There is nothing in the legislative history of the Jones Act to indicate that its words "in the course of his employment" do not mean what they say or that they were intended to be restricted to injuries occurring on navigable waters. On the contrary it seems plain that in taking over the principles of recovery already established for railroad employees and extending them in the new admiralty setting (see *The Arizona* v. *Anelich, supra*) to any seaman injured "in the course of his employment," Congress, in the absence of any indication of a different purpose, must be taken to have intended to make them applicable so far as the words and the Constitution permit, and to have given to them the full support of all the constitutional power it possessed. Hence the Act allows the recovery sought unless the Constitution forbids it.

The constitutional authority of Congress to provide such a remedy for seamen derives from its authority to regulate commerce, *Second Employers' Liability Cases,* 223 U. S. 1, and its power to make laws which shall be necessary and proper to carry into execution powers vested by the Constitution in the government or any department of it, Article I, § 8, cl. 18, including the judicial power which, by Article III, § 2, extends "to all Cases of admiralty and maritime Jurisdiction." By § 9 of the Judiciary Act of 1789, 1 Stat. 76, 28 U. S. C. § 371 (Third), Congress conferred on the district courts "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction . . . saving to suitors, in all cases, the right of a common

law remedy where the common law is competent to give it . . ." By the grant of admiralty and maritime jurisdiction in the Judiciary Article, and § 9 of the Judiciary Act, the national government took over the traditional body of rules, precepts and practices known to lawyers and legislators as the maritime law, so far as the courts invested with admiralty jurisdiction should accept and apply them. *Waring* v. *Clarke,* 5 How. 441, 459; *The Lottawanna,* 21 Wall. 558, 576; *In re Garnett,* 141 U. S. 1, 14; *Detroit Trust Co.* v. *The Barlum,* 293 U. S. 21, 43, and cases cited.

It is true that the jurisdiction in admiralty in cases of tort or collision is in general limited to events occurring on navigable waters, *Waring* v. *Clarke, supra;* cf. *The Blackheath,* 195 U. S. 361, and that the maritime law gave to seamen no right to recover compensatory damages for injuries suffered from negligence. *The Osceola,* 189 U. S. 158, 172, 175; *Pacific S. S. Co.* v. *Peterson,* 278 U. S. 130, 134. It allowed such recovery if the injury resulted from unseaworthiness of the vessel or her tackle, *The Osceola, supra,* 173, 175, and permitted recovery of maintenance and cure, ordinarily measured by wages and the cost of reasonable medical care, if the seaman was injured or disabled in the course of his employment. *The Osceola, supra,* 172–75; *The Iroquois,* 194 U. S. 240; *Calmar S. S. Corp.* v. *Taylor,* 303 U. S. 525, 527–28.

But it cannot be supposed that the framers of the Constitution contemplated that the maritime law should forever remain unaltered by legislation, *The Lottawanna, supra,* 577, or that Congress could never change the status under the maritime law of seamen, who are peculiarly the wards of admiralty, or was powerless to enlarge or modify any remedy afforded to them within the scope of the admiralty jurisdiction. There is nothing in that grant of jurisdiction—which sanctioned our adoption of the system of maritime law—to preclude Congress from modifying

or supplementing the rules of that law as experience or changing conditions may require. This is so at least with respect to those matters which traditionally have been within the cognizance of admiralty courts either because they are events occurring on navigable waters, see *Waring* v. *Clarke, supra,* or because they are the subject matter of maritime contracts or relate to maritime services. *Insurance Company* v. *Dunham,* 11 Wall. 1, 25.

From the beginning this Court has sustained legislative changes of the maritime law within those limits. See *Waring* v. *Clarke, supra; The Lottawanna, supra; Butler* v. *Boston & Savannah S. S. Co.,* 130 U. S. 527, 555. Congress has both limited the liability of vessels for their torts even though not engaged in interstate commerce, *In re Garnett, supra; Hartford Accident & Indemnity Co.* v. *Southern Pacific Co.,* 273 U. S. 207, 214, and extended the limitation to claims for damages by vessel to a land structure. Compare *The Plymouth,* 3 Wall. 20, and *Cleveland Terminal & V. R. Co.* v. *Cleveland S. S. Co.,* 208 U. S. 316, with *Richardson* v. *Harmon,* 222 U. S. 96, 101, 106. It has altered and extended the maritime law of liens on vessels plying navigable waters. *Detroit Trust Co.* v. *The Barlum, supra,* and cases cited. And the Jones Act itself has given seamen a right of recovery for injury or death, not previously recognized by the maritime law, which has been uniformly sustained by this Court in cases where the injury occurred on navigable waters. *Panama R. Co.* v. *Johnson, supra,* 385–87; *The Arizona* v. *Anelich, supra; Lindgren* v. *United States,* 281 U. S. 38.

As we have said, the maritime law, as recognized in the federal courts, has not in general allowed recovery for personal injuries occurring on land. But there is an important exception to this generalization in the case of maintenance and cure. From its dawn, the maritime law has recognized the seaman's right to maintenance and cure for injuries suffered in the course of his service to his

vessel, whether occurring on sea or on land. It is so stated in Article VI of the Laws of Oleron, twelfth century, 30 Fed. Cas. 1174, and in Article XVIII of the Laws of Wisbuy, thirteenth century, *id.* p. 1191. And see Article XXXIX of the Laws of the Hanse Towns, *id.* p. 1200; Articles XI and XII of Title Fourth, Marine Ordinances of Louis XIV, *id.* p. 1209. Such is the accepted rule in this Court, see *The Osceola, supra,* 169, 175; *Calmar S. S. Corp.* v. *Taylor, supra,* 527–28, and it is confirmed by Article 2 of the Shipowners' Liability Convention of 1936, 54 Stat. 1695, proclaimed by the President to be effective as to the United States and its citizens as of October 29, 1939. Article 12 of the Convention provides that it shall not affect any national law ensuring "more favourable conditions than those provided by this Convention." 54 Stat. 1700.

Some of the grounds for recovery of maintenance and cure would, in modern terminology, be classified as torts. But the seaman's right was firmly established in the maritime law long before recognition of the distinction between tort and contract. In its origin, maintenance and cure must be taken as an incident to the status of the seaman in the employment of his ship. See *Cortes* v. *Baltimore Insular Line,* 287 U. S. 367, 372. That status has from the beginning been peculiarly within the province of the maritime law, see *Calmar S. S. Corp.* v. *Taylor, supra,* and upon principles consistently followed by this Court it is subject to the power of Congress to modify the conditions and extent of the remedy afforded by the maritime law to seamen injured while engaged in a maritime service.

The right of recovery in the Jones Act is given to the seaman as such, and, as in the case of maintenance and cure, the admiralty jurisdiction over the suit depends not on the place where the injury is inflicted but on the nature of the service and its relationship to the operation of the

vessel plying in navigable waters. See *Waring* v. *Clarke, supra; Insurance Co.* v. *Dunham, supra.*

It follows that the Jones Act, in extending a right of recovery to the seaman injured while in the service of his vessel by negligence, has done no more than supplement the remedy of maintenance and cure for injuries suffered by the seaman, whether on land or sea, by giving to him the indemnity which the maritime law afforded to a seaman injured in consequence of the unseaworthiness of the vessel or its tackle. *Pacific S. S. Co.* v. *Peterson, supra.* Since the subject matter, the seaman's right to compensation for injuries received in the course of his employment, is one traditionally cognizable in admiralty, the Jones Act, by enlarging the remedy, did not go beyond modification of substantive rules of the maritime law well within the scope of the admiralty jurisdiction whether the vessel, plying navigable waters, be engaged in interstate commerce or not. Cf. *Jackson* v. *The Magnolia,* 20 How. 296; *The Belfast,* 7 Wall. 624, 640, *et seq; In re Garnett, supra.*

The fact that Congress has provided that suits under the Jones Act may be tried by jury, on the law rather than on the admiralty side of the federal courts, does not militate against the conclusion we have reached. This is but a part of the general power of Congress to prescribe the forum in which federally-created causes of action are to be tried, *Claflin* v. *Houseman,* 93 U. S. 130, 136–42,—a concomitant of the power many times sustained by this Court to direct that causes of action arising under the Jones Act may be tried in the state courts. E. g., *Engel* v. *Davenport,* 271 U. S. 33, 37–38; *Panama R. Co.* v. *Vasquez,* 271 U. S. 557; cf. *Garrett* v. *Moore-McCormack Co.,* 317 U. S. 239.

We have no occasion to consider or decide here the question whether a longshoreman, temporarily employed in storing cargo on a vessel, if entitled to recover under the

Jones Act for injuries sustained while working on the vessel (compare *International Stevedoring Co.* v. *Haverty, supra,* with *Nogueira* v. *N. Y., N. H. & H. R. Co.,* 281 U. S. 128, 137), could recover for an injury received on shore in the circumstances of this case. Compare *State Industrial Commission* v. *Nordenholt Corp.,* 259 U. S. 263, with *South Chicago Co.* v. *Bassett,* 309 U. S. 251, 256.

Reversed.

TILESTON *v.* ULLMAN, STATE'S ATTORNEY, ET AL.

APPEAL FROM THE SUPREME COURT OF ERRORS OF CONNECTICUT.

No. 420. Argued January 13, 14, 1943.—Decided February 1, 1943.

A physician is without standing to challenge, as a deprivation of life without due process in violation of the Fourteenth Amendment, a state statute prohibiting the use of drugs or instruments to prevent conception, and the giving of assistance or counsel in their use, where the lives alleged to be endangered are those of patients who are not parties to the suit. P. 46.

Appeal dismissed.

APPEAL from a judgment, 129 Conn. 84, 26 A. 2d 582, holding a state statute applicable to appellant and sustaining its constitutionality.

Messrs. Morris L. Ernst and *Edwin Borchard* for appellant.

Messrs. Abraham S. Ullman and *William L. Beers,* with whom *Messrs. Arthur T. Gorman* and *Philip R. Pastore* were on the brief, for appellees.

Briefs of *amici curiae* were filed by *Mr. Charles E. Scribner* on behalf of Dr. Marye Y. Dabney et al., and by *Messrs. Lawrence L. Lewis* and *J. Warren Upson* on behalf of Dr. A. Nowell Creadick et al.,—in support of the appellant.

PER CURIAM.

This case comes here on appeal to review a declaratory judgment of the Supreme Court of Errors of Connecticut that §§ 6246 and 6562 of the General Statutes of Connecticut of 1930—prohibiting the use of drugs or instruments to prevent conception, and the giving of assistance or counsel in their use—are applicable to appellant, a registered physician, and as applied to him are constitutional. 129 Conn. 84, 26 A. 2d 582, 588.

The suit was tried and judgment rendered on the allegations of the complaint which are stipulated to be true. Appellant alleged that the statute, if applicable to him, would prevent his giving professional advice concerning the use of contraceptives to three patients whose condition of health was such that their lives would be endangered by child-bearing, and that appellees, law enforcement officers of the state, intend to prosecute any offense against the statute and "claim or may claim" that the proposed professional advice would constitute such an offense. The complaint set out in detail the danger to the lives of appellant's patients in the event that they should bear children, but contained no allegations asserting any claim under the Fourteenth Amendment of infringement of appellant's liberty or his property rights. The relief prayed was a declaratory judgment as to whether the statutes are applicable to appellant and if so whether they constitute a valid exercise of constitutional power "within the meaning and intent of Amendment XIV of the Constitution of the United States prohibiting a state from depriving any person of life without due process of law." On stipulation of the parties the state superior court ordered these questions of law reserved for the consideration and advice of the Supreme Court of Errors. That court, which assumed without deciding that the case was an appropriate one for a declaratory judgment, ruled that the statutes

"prohibit the action proposed to be done" by appellant and "are constitutional."

We are of the opinion that the proceedings in the state courts present no constitutional question which appellant has standing to assert. The sole constitutional attack upon the statutes under the Fourteenth Amendment is confined to their deprivation of life—obviously not appellant's but his patients'. There is no allegation or proof that appellant's life is in danger. His patients are not parties to this proceeding and there is no basis on which we can say that he has standing to secure an adjudication of his patients' constitutional right to life, which they do not assert in their own behalf. *Cronin* v. *Adams,* 192 U. S. 108, 114; *Standard Stock Food Co.* v. *Wright,* 225 U. S. 540, 550; *Bosley* v. *McLaughlin,* 236 U. S. 385, 395; *Blair* v. *United States,* 250 U. S. 273; *The Winnebago,* 205 U. S. 354, 360; *Davis & Farnum Mfg. Co.* v. *Los Angeles,* 189 U. S. 207, 220. No question is raised in the record with respect to the deprivation of appellant's liberty or property in contravention of the Fourteenth Amendment, nor is there anything in the opinion or judgment of the Supreme Court of Errors which indicates or would support a decision of any question other than those raised in the superior court and reserved by it for decision of the Supreme Court of Errors. That court's practice is to decline to answer questions not reserved. General Statutes § 5652; *Loomis Institute* v. *Healy,* 98 Conn. 102, 129, 119 A. 31; *John J. McCarthy Co.* v. *Alsop,* 122 Conn. 288, 298–99, 189 A. 464.

Since the appeal must be dismissed on the ground that appellant has no standing to litigate the constitutional question which the record presents, it is unnecessary to consider whether the record shows the existence of a genuine case or controversy essential to the exercise of the jurisdiction of this Court. Cf. *Nashville, C. & St. L. Ry. Co.* v. *Wallace,* 288 U. S. 249, 259.

Dismissed.

MANDEVILLE, TRUSTEE, ET AL. *v.* CANTERBURY.

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

No. 422. Argued January 13, 1943.—Decided February 1, 1943.

A federal District Court having jurisdiction, by diversity of citizenship, of a suit wherein the complainant, claiming an interest in a trust estate created under a will, seeks to have the will construed and prays a decree determining the complainant's rights in the trust property and directing the trustees to account and to turn over to the complainant her share in the trust property, is precluded by § 265 of the Judicial Code from enjoining subsequent proceedings in state courts of other States, wherein are sought adjudications of the rights of the parties in land belonging to the trust and located in such other States. P. 49.

130 F. 2d 208, reversed.

CERTIORARI, 317 U. S. 616, to review the affirmance of a federal court injunction staying proceedings in state courts.

Miss Corinne L. Rice for petitioners.

Mr. Herbert R. Tews, with whom *Mr. Lloyd C. Whitman* was on the brief, for respondent.

PER CURIAM.

Respondent, said to be a citizen of California who claims an interest in a trust estate created under a will probated in Illinois, brought this suit in the District Court for Northern Illinois for construction of the will, joining as defendants the trustees and other interested parties, all alleged to be citizens of Illinois. The relief prayed is that the court, after construing the will, render a decree determining respondent's rights in the trust property and directing the trustee to account and to turn over to respondent her share in the trust property. Included in the

trust property are tracts of land located in Minnesota, Wisconsin and Illinois.

After respondent began the present suit, petitioners brought suit in a Minnesota state court against respondent and unknown heirs, devisees and legatees of decedent and unknown beneficiaries under the will, seeking a construction of so much of the will as relates to the Minnesota land, and an adjudication of their rights in the land. Shortly afterwards petitioners also brought suit in a Wisconsin state court against the same defendants, seeking like relief with respect to the Wisconsin land. On motion of respondent the district court granted a temporary injunction restraining the prosecution of the pending suits in Minnesota and Wisconsin. It also enjoined further prosecution of a probate proceeding brought by petitioner Richard Canterbury Mandeville in the County Court of Rock County, Wisconsin, which sought a construction of the will and a determination of the rights of the parties under it, but with the proviso that the injunction should not restrain the probate of the will or a determination of inheritance taxes due to the state. On appeal from the injunction order the Court of Appeals for the Seventh Circuit affirmed, 130 F. 2d 208, and we granted certiorari. 317 U. S. 616.

Section 265 of the Judicial Code, 28 U. S. C. § 379, provides that except as authorized by any law relating to proceedings in bankruptcy "the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State." To this sweeping command there is a long recognized exception that if two suits pending, one in a state and the other in a federal court, are *in rem* or quasi *in rem,* so that the court or its officer must have possession or control of the property which is the subject matter of the suits in order to proceed with the cause and to grant the relief sought, the court first acquiring jurisdiction or assuming control of such property

is entitled to maintain and exercise its jurisdiction to the exclusion of the other.

In such cases this Court has uniformly held that a federal court may protect its jurisdiction thus acquired by restraining the parties from prosecuting a like suit in a state court notwithstanding the prohibition of § 265. This exception to the prohibition has been regarded as one of necessity to prevent unseemly conflicts between the federal and state courts and to prevent the impasse which would arise if the federal court were unable to maintain its possession and control of the property, which are indispensable to the exercise of the jurisdiction it has assumed. But where the judgment sought is strictly *in personam* for the recovery of money or for an injunction compelling or restraining action by the defendant, both a state court and a federal court having concurrent jurisdiction may proceed with the litigation at least until judgment is obtained in one court, which may be set up as res judicata in the other. These principles were recognized and the authorities sustaining them collected in *Penn General Casualty Co.* v. *Pennsylvania,* 294 U. S. 189, and *Toucey* v. *New York Life Ins. Co.,* 314 U. S. 118, 134–36.

The present suit, so far as it relates to the subject matter of the suits pending in Minnesota and Wisconsin, is a suit *in personam* brought against the trustees and other claimants, actual or potential, to the land located in those states. Maintenance of the suit in the district court does not require possession of the property by that court or require it to assume supervisory or administrative control of it even through exercise of its control over the trustees, at least until it has determined that respondent has some interest in the property, nor has the court undertaken to exercise such control. While jurisdiction assumed by a state court over a pending proceeding for an accounting by testamentary trustees, involving problems of administration and restoration of the corpus of the

trust, has been deemed exclusive of the jurisdiction of a federal court over a later suit there for the same relief, *Princess Lida* v. *Thompson,* 305 U. S. 456, 466–67, here the federal court has not attempted to assume such jurisdiction with respect to an asserted but contested interest in land located in another state. So far as the suits in either the federal or the state courts seek an adjudication of the interests of the parties in the land, it cannot be said that the federal court has exclusive jurisdiction. *Commonwealth Trust Co.* v. *Bradford,* 297 U. S. 613. In any case, exercise by the state courts of their jurisdiction to adjudicate the parties' rights to land located in those states involves no interference with or impairment of the jurisdiction of the federal court in Illinois, and affords no ground for the injunction restraining prosecutions of the suits in the state courts. *Commonwealth Trust Co.* v. *Bradford, supra.* The case does not come within any exception to the prohibition of § 265 of the Judicial Code.

The judgment of the Circuit Court of Appeals will be reversed with directions to the district court to vacate the injunction order.

Reversed.

IN RE WILLIAM V. BRADLEY.

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

No. 473. Argued January 8, 1943.—Decided February 1, 1943.

A federal court having erroneously imposed upon the petitioner a sentence of fine *and* imprisonment for contempt (Jud. Code § 268, 28 U. S. C. § 385), and the fine having been paid to the clerk of the court, who gave a receipt therefor, the court is without power thereafter—although the money had not been covered into the Treasury—to modify the sentence to one of imprisonment only, and the petitioner must be discharged. P. 52.

Reversed.

CERTIORARI, 317 U. S. 616, to review a judgment sentencing the petitioner for contempt.

Mr. Thomas D. McBride for petitioner.

Mr. W. Marvin Smith, with whom *Solicitor General Fahy, Assistant Attorney General Berge,* and *Messrs. Oscar A. Provost* and *John Ford Baecher* were on the brief, for the United States.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

A proceeding, instituted by the National Labor Relations Board against Delaware-New Jersey Ferry Company for enforcement of an order of the Board, was pending in the Circuit Court of Appeals. A hearing was set at which witnesses were to be heard. The petitioner was to be a witness for the Board. During the course of the trial the petitioner was summoned and, after hearing, was adjudged guilty of contempt because of his intimidation of a witness for the Ferry Company in the corridor adjoining the court room.

The court sentenced the petitioner to six months' imprisonment, to pay a fine of $500, and to stand committed until he complied with the sentence. The sentence was erroneous. *Ex parte Lange,* 18 Wall. 163, 176. Under § 268 of the Judicial Code, 28 U. S. C. 385, the sentence could only be a fine *or* imprisonment. *Ex parte Robinson,* 19 Wall. 505, 512; *Clark* v. *United States,* 61 F. 2d 695, 709; affirmed 289 U. S. 1.

The marshal was directed forthwith to execute the judgment. On September 28, 1942, the petitioner was taken into custody and committed to prison. On October 1 his attorney paid the fine in cash to the clerk of the court. Later on that day the court, realizing that the sentence was erroneous, delivered to the clerk an order amending it by omitting any fine and retaining only the

six months' imprisonment. The court instructed the clerk, who still held the money, to return it to the petitioner's attorney. The latter refused to receive it, and the clerk has it.

The petitioner, being in jail, petitioned this Court to grant certiorari, alleging as errors the adjudication that he was guilty of contempt and the manner of sentencing him. We granted the writ and admitted him to bail pending decision.

We do not review the finding that the petitioner's conduct was a contempt summarily punishable by the court, for we are of opinion that the errors involved in the sentence require that he shall be freed from further imprisonment.

When, on October 1, the fine was paid to the clerk and receipted for by him, the petitioner had complied with a portion of the sentence which could lawfully have been imposed. As the judgment of the court was thus executed so as to be a full satisfaction of one of the alternative penalties of the law, the power of the court was at an end.[1] It is unimportant that the fine had not been covered into the treasury; it had been paid to the clerk, the officer of the United States authorized to receive it,[2] and petitioner's rights did not depend upon what that officer subsequently did with the money.[3]

It follows that the subsequent amendment of the sentence could not avoid the satisfaction of the judgment, and the attempt to accomplish that end was a nullity. Since one valid alternative provision of the original sentence has been satisfied, the petitioner is entitled to be freed of further restraint.

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[1] *Ex parte Lange, supra,* 176.

[2] *In re Fletcher,* 71 App. D. C. 108, 107 F. 2d 666, 668.

[3] *Ex parte Lange, supra,* p. 176; and compare the dissenting opinion, pp. 180, 190, 199–200; *Yavorsky* v. *United States,* 1 F. 2d 169, 171; *Moss* v. *United States,* 23 App. D. C. 475, 485.

50 STONE, C. J., dissenting.

The judgment is reversed and the cause remanded with directions that the petitioner be discharged from custody.

Reversed.

MR. CHIEF JUSTICE STONE, dissenting:

In *Ex parte Lange,* 18 Wall. 163, the trial court did not remit or offer to remit the fine which the offender had paid. The opinion was careful to point out (p. 175) that the fine paid had been covered into the treasury and that the courts were powerless to direct its return. That decision thus lends no support to that now rendered that the choice rests with the offender rather than with the court whether he shall be punished by fine or by imprisonment, either of which alone the court could have lawfully imposed; and that by payment of the fine, imposed and accepted under mistake of law and immediately remitted, he may irrevocably escape punishment by imprisonment.

So far as *Ex parte Lange* is regarded here as resting on the ground that it would be double jeopardy to compel the offender to serve the prison sentence after remission of the fine on the same day on which it was paid, I think its authority should be reëxamined and rejected. The substance of the punishment imposed on the offender by a fine is in depriving him of the money he has paid. Here he has not been deprived of the money paid to the clerk of the court, for the fine was remitted on the same day on which it was paid, and he was then free to reclaim it. Since he is shown to have suffered no more from the imposition of the fine than if the clerk had refused to receive it when tendered, there is I think no substance in the contention that he will suffer double punishment if compelled to serve out his prison sentence.

The Constitution is concerned with matters of substance not of form. Nothing in its words or history forbids a common sense application of its provisions, or excludes

them from the operation of the principle *de minimis*. I can hardly suppose that we would hold unconstitutional an Act of Congress commanding prompt return of a fine mistakenly imposed under these circumstances, and requiring the prison sentence originally imposed to be served. Yet *Ex parte Lange* as interpreted and applied here rests on constitutional grounds which are equally applicable to an Act of Congress.

I agree with the suggestion of the Government that the court's second order resentencing petitioner could not rightly be entered without affording petitioner or his counsel an opportunity to be present, and that the cause should, on that account, be remanded for further proceedings.

TILLER, EXECUTOR, *v.* ATLANTIC COAST LINE RAILROAD CO.

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

No. 296. Argued January 4, 1943.—Decided February 1, 1943.

1. The 1939 amendment of the Federal Employers' Liability Act, which provides that in an action against a common carrier under the Act to recover damages for injury or death of an employee, "such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier," obliterated from that law every vestige of the doctrine of assumption of risk. P. 58.
2. The rule of decision in cases under the Act as amended is the doctrine of comparative negligence, which permits the jury to weigh the fault of the injured employee and to compare it with the negligence of the employer, and thereupon to do justice to both. P. 65.
3. The question of the negligence of the employer is to be determined by the general rule which defines negligence as the lack of due care under the circumstances; or the failure to do what a reasonable and prudent man would ordinarily have done under the circumstances; or doing what such a person under the circumstances would not have

done. The standard of care must be commensurate to the dangers of the employment. P. 67.

4. Under the Act as amended, no case is to be withheld from a jury on any theory of assumption of risk, and questions of negligence should be submitted to the jury with appropriate instructions. P. 67.

5. Upon the evidence in this case under the Federal Employers' Liability Act, the question of negligence on the part of the railroad and on the part of the employee should have been submitted to the jury. P. 68.

128 F. 2d 420, reversed.

CERTIORARI, 317 U. S. 610, to review the affirmance of a judgment on a directed verdict for the defendant in a suit under the Federal Employers' Liability Act.

Mr. J. Vaughan Gary for petitioner.

Messrs. Collins Denny, Jr. and *Thomas W. Davis* for respondent.

MR. JUSTICE BLACK delivered the opinion of the Court.

The petitioner's husband and intestate, John Lewis Tiller, was a policeman for the respondent railroad. Among his duties was that of inspecting the seals on cars in railroad yards to make sure that no one had tampered with them. He had held this position for some years, was familiar with the yard, and was aware, in the words of the court below, that respondent's employees "are instructed that they must watch out for the movement of the trains as no employee watches out for them and no lights are used at night on the head end of back-up movements except when an employee is placed at the back end with a lantern to protect a road crossing." The Circuit Court of Appeals found that there was evidence sufficient to sustain the following account of the tragedy:

On the night of March 20, 1940, Tiller was standing between two tracks in the respondent's switch yards, tracks which allowed him three feet, seven and one-half inches of standing space when trains were moving on both sides.

The night was dark [1] and the yard was unlighted. Tiller, using a flashlight for the purpose, was inspecting the seals of the train moving slowly on one track when suddenly he was hit and killed by the rear car of a train backing in the opposite direction on the other track. The rear of the train which killed Tiller was unlighted although a brakeman with a lantern was riding on the back step on the side away from Tiller. The bell was ringing on the engine but both trains were moving, and the Circuit Court found that it was "probable that Tiller did not hear cars approaching" from behind him. No special signal of warning was given.

Petitioner brought this suit to recover damages under the Federal Employers' Liability Act, 45 U. S. C. § 51 *et seq.* The complaint alleged negligent operation of the car which struck defendant and failure to provide a reasonably safe place to work. Respondent denied negligence, pleaded contributory negligence on the part of the defendant, and set up as a separate defense that the deceased had assumed all the risks "normally and necessarily incident to his employment." After the plaintiff's evidence had been heard the defendant moved for a directed verdict on the grounds (a) that the evidence disclosed no actionable negligence and (b) that the cause of the death was speculative and conjectural. The motion was granted, judgment was accordingly entered for the defendant and the Circuit Court of Appeals, interpreting the decision of the district court as resting on a conclusion that the evidence showed no negligence, affirmed. 128 F. 2d 420. This result was based on a holding that the deceased had assumed the risk of his position and that therefore there was no duty owing to him by respondent. We granted certiorari because of the important question in-

[1] It was so dark that when the engineer after the accident asked the fireman to pick up an object near the tracks, the fireman replied, "No, I am afraid to go down in the dark by myself; you come with me."

volved in the Circuit Court of Appeals' interpretation of the scope and effect of the 1939 amendment to the Federal Employers' Liability Act, 53 Stat. 1404, 45 U. S. C. 54. The amendment provides that an "employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier."

The Circuit Court distinguished between assumption of risk as a defense by employers against the consequence of their own negligence, and assumption of risk as negating any conclusion that negligence existed at all. The court reasoned that if, for example, the respondent had negligently failed to provide a workman with a sound tool, and he was thereby injured, it could not under the amendment claim that he had assumed the risk of using the defective implement; but that if a workman were injured in the ordinary course of his work, as in such a switching operation as this, the assumption of risk might still be relied upon to prove that the respondent had no duty to protect him from accustomed danger. The court rejected petitioner's argument that since the doctrine of assumption of risk had been abolished "the carrier can no longer interpose it as a shield against the consequences of its neglect and hence is liable for injuries to its employees in its railroad yards or elsewhere, unless it takes precautions for their safety commensurate with the danger that they are likely to encounter." In rejecting this argument the court below put the core of its decision in these words: "The conclusion is inescapable that Congress did not intend to enlarge the obligation of carriers to look out for the safety of their men when exposed to the ordinary risks of the business, and that in circumstances other than those provided for in the amended section of the statute, *the doctrine of the assumption of the risk must be given its accustomed weight.*" [Italics added.]

We find it unnecessary to consider whether there is any merit in such a conceptual distinction between aspects of assumption of risk which seem functionally so identical, and hence we need not pause over the cases cited by the court below, all decided before the 1939 amendment, which treat assumption of risk sometimes as a defense to negligence, sometimes as the equivalent of non-negligence.[2] We hold that every vestige of the doctrine of assumption of risk was obliterated from the law by the 1939 amendment, and that Congress, by abolishing the defense of assumption of risk in that statute, did not mean to leave open the identical defense for the master by changing its name to "non-negligence." As this Court said in facing the hazy margin between negligence and assumption of risk as involved in the Safety Appliance Act of 1893, "Unless great care be taken, the servant's rights will be sacrificed by simply charging him with assumption of the risk under another name;" [3] and no such result can be permitted here.

Perhaps the nature of the present problem can best be seen against the background of one hundred years of master-servant tort doctrine. Assumption of risk is a judicially created rule which was developed in response to the general impulse of common law courts at the begin-

[2] See, e. g., *Toledo, St. L. & W. R. Co.* v. *Allen*, 276 U. S. 165, 171, 172; *Missouri Pacific R. Co.* v. *Aeby*, 275 U. S. 426, 430. It is sometimes said that courts have held the master blameless in actions by employees who have entered and remained in hazardous occupations on the premise that the employee assumed the risk; but the theory has not always appeared under the name "assumption of risk" since the same result is reached by assigning a given case to one of three practically interchangeable categories: (a) the employee assumed the risk; (b) he was guilty of contributory negligence; (c) the master was not negligent. See 35 Am. Jur. 719 and 3 Labatt, Master and Servant, 2d ed. par. 1164–1172, 1205, 1210. The court below thought the Amendment eliminated defense (a) but in effect retained defense (c).

[3] *Schlemmer* v. *Buffalo, R. & P. Ry. Co.*, 205 U. S. 1, 12, 13.

ning of this period to insulate the employer as much as possible from bearing the "human overhead" which is an inevitable part of the cost—to someone—of the doing of industrialized business.[4] The general purpose behind this development in the common law seems to have been to give maximum freedom to expanding industry.[5] The assumption of risk doctrine for example was attributed by this Court to "a rule of public policy, inasmuch as an opposite doctrine would not only subject employers to unreasonable and often ruinous responsibilities, thereby embarrassing all branches of business," but would also encourage carelessness on the part of the employee.[6] In the

[4] The following table drawn from the 51st through the 55th Reports of the Interstate Commerce Commission, indicates that a substantial number of railroad employees are killed and injured each year:

Employees Killed and Injured on Steam Railways

	Killed	*Injured*
1936	593	9,021
1937	557	9,294
1938	386	6,481
1939	400	6,988
1940	475	7,956

[5] See 35 Am. Jur. 717; and for discussion of this view, see Pound, Economic Interpretation of Torts, 53 Harv. L. Rev. 365, 373.

[6] *Tuttle* v. *Detroit, G. H. & M. Ry.*, 122 U. S. 189, 196. Representative Claiborne, advocating a bill to abolish assumption of risk as a defense under the Federal Employers' Liability Act at a Committee Hearing in the 75th Congress expressed a contrary view as to the usefulness of the doctrine as an accident preventive: "The courts went along and commenced to weave into the decisions this assumption of risk doctrine . . . They said for one thing that it is good public policy to hold the employee liable when he knew of certain conditions and did not protect himself against them; that by doing that, you made the man better regard his two legs, or better regard his two hands, or better regard his stomach. Why, no employee of a railroad company is going out there and lose an arm or an eye or a leg and rely on a jury to make him whole." Hearings before Sub-committee Number 4 of the Committee on the Judiciary, House of Representatives, 75th Cong., 1st Sess., on H. R. 5755, H. R. 7336 and H. R. 7621, p. 62.

pursuit of its general objective the common law took many forms and developed many doctrines. One of the first was the fellow servant-assumption of risk rule which originated in *Priestley* v. *Fowler*.[7] In *Priestley* v. *Fowler*, the Court said, "The servant is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself: and in most of the cases in which danger may be incurred, if not in all, he is just as likely to be acquainted with the probability and extent of it as the master."

As English courts lived with the assumption of risk doctrine they discovered that the theory they had created had become morally unacceptable but of such legal force that it could not be repudiated.[8] The English sought to eliminate the fellow servant rule, which placed the burden of an employee's negligence as it affected another employee on the injured person rather than on the business enterprise, by the Employers' Liability Act of 1880[9] and found that the assumption of risk doctrine still left the employee in a hopelessly unprotected position. In the leading case

[7] 3 M. & W. 1, 6 (Ex. 1837); on the question of which was the first case creating this doctrine, cf. *Chicago, M. & St. P. Ry. Co.* v. *Ross*, 112 U. S. 377, 386.

[8] "Morally speaking, those who employ men on dangerous work without doing all in their power to obviate the danger are highly reprehensible, as I certainly think the company were in the present instance. The workman who depends on his employment for the bread of himself and his family is thus tempted to incur risks to which, as a matter of humanity, he ought not to be exposed. But looking at the matter in a legal point of view, if a man, for the sake of the employment, takes it or continues in it with a knowledge of its risks, he must trust himself to keep clear of injury." *Woodley* v. *Metropolitan Dist. Ry. Co.*, L. R. 2 Ex. Div. 384 (1887).

[9] For brief discussion of the English experience, see Packer, Workmen's Compensation, Sen. Doc. 618, 62nd Cong., p. 5; Cohen, Workmen's Compensation in Great Britain, chap. 5. For an account covering the history of English and American Workmen's Compensation laws, see Dodd, Administration of Workmen's Compensation, chaps. 1 & 2.

of *Thomas* v. *Quartermaine,* 18 Q. B. D. 685 (1887), the court held that an employee standing on a three foot runway between two unfenced vats who was attempting to dislodge a piece of wood from one of the vats and who by accident fell into the other and was scalded was barred from recovery. Since he had long known of the possible dangers of the narrow passage he was held to have assumed the risk of his position. In 1897 the English finally abandoned the common law remedy altogether as a protection for injured employees and adopted a workmen's compensation law. 60 & 61 Vict. c. 37.

This Court accepted the assumption of risk doctrine as applied to railroad employees, at least in part, in 1879.[10] That decision placed the employee's assumption of risk upon the theory that an agreement to assume the risk was implied from the terms of the employment contract.

Prior to the passage of the Federal Employers' Liability Act of 1906 the assumption of risk doctrine, except for a considerable vagueness as to its relation with contributory negligence, was fairly well known.[11] It had already been applied generally at the time of the adoption of the Act because of acceptance of the theory that the employee's compensation was based upon the added risk to his position and that he could quit when he pleased. *Tuttle* v. *Detroit, G. H. & M. Ry., supra;* and compare for a restatement of this view after the passage of the Employers' Liability Act, *Seaboard Air Line* v. *Horton,* 233 U. S. 492, 504.[12] Federal and state courts, with some notable excep-

[10] *Hough* v. *Railway Co.,* 100 U. S. 213, 217. See also *Narramore* v. *Cleveland, C., C. & St. L. Ry. Co.,* 96 F. 298.

[11] See Warren, Volenti Non Fit Injuria, etc., 8 Harv. L. Rev. 457 (1895); Bohlen, Voluntary Assumption of Risk, 20 Harv. L. Rev. 14, 91, (1906).

[12] Senator Neely, sponsor of the 1939 amendment, explicitly rejected the economic theory which was the basis of the early opinions: "The contention that you have advanced apparently embraces the theory that the employee . . . voluntarily assumed the risk in spite of

tions, accepted and applied the rule with all of its implications and consequences except when expressly prohibited from doing so by statute.[13]

Congress took a major step toward modification of the common law barrier against employee recovery in accident suits in the Federal Employers' Liability Act of 1906, 34 Stat. 232, repassed with alterations not material in 1908, 35 Stat. 65. This Act, in its principal features, abolished the fellow servant rule, substituted comparative negligence for the strict rule of contributory negligence, and allowed survivors' actions for tort liability. Section 4 of that Act, as interpreted by this Court in *Seaboard Air Line* v. *Horton, supra,* perpetuated the defense of assumption of risk.[14] Unfortunately, from the standpoint of legal clarity, the Act as interpreted required careful distinction between assumption of risk and contributory negligence, since assumption of risk was an absolute bar to recovery

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the fact that the employer said, in effect, 'You take the risk or you get no job.' In these days when millions are unemployed and must find work in order to save themselves and their families from distress, the situation is so desperate that men will sign any sort of waiver or agreement in order to obtain employment." Hearings, Subcommittee of the Senate Judiciary Committee, 76th Cong., 1st Sess., on S. 1708, p. 33.

[13] For collections of early state cases, see 49 L. R. A. 33 and 97 Amer. State Reports 877. Early state and foreign statutes are summarized in the Report of the House Judiciary Committee on the 1906 Act, Rept. No. 2335, p. 2, and decisions on state statutes are collected in the Am. State Rep. note 891. The Seaboard Air Line case, *supra,* held these statutes inapplicable to actions under the federal act.

[14] For a vigorous attack on this decision, see Buford, Assumption of Risk Under the Federal Employers' Liability Act, 28 Harv. L. Rev. 163; and see Peterson, The Joker in the Federal Employers' Liability Act, 80 Cent. L. J. 5. The House Judiciary Committee in reporting a bill aimed at making some minor modification in the assumption of risk rule stated that the 1908 Congress never "dreamed, when it passed this former law, that this defense [assumption of risk] would ever be raised by the use of" § 4 of the Act. Report of the House of Representatives Committee on Judiciary, 76th Cong., 1st Sess., Rept. No. 1222, on H. R. 4988, p. 4.

while contributory negligence merely reduced the amount of recovery. The great uncertainty existing prior to the Act as to what the margin between these doctrines was [15] thus became of real significance. The language of the statute itself seemed to impel the courts to practice "the niceties, if not casuistries, of distinguishing between assumption of risk and contributory negligence, conceptions which never originated in clearly distinguishable categories, but were loosely interchangeable until the statute attached such vital differences to them." *Pacheco* v. *N. Y., N. H. & H. R. Co.*, 15 F. 2d 467. For an attempt to distinguish between the doctrines, see *Schlemmer* v. *Buffalo, R. & P. Ry. Co., supra,* 12, and the same case at 220 U. S. 590, 596.

The assumption of risk clause in the statute became the subject of endless litigation. The Federal Code Annotated and the United States Code Annotated devote over thirty pages each of fine type merely to the citation and brief summary of the reported decisions; and the number of unreported and settled cases in which the defense was involved must run into the thousands.[16] Aside from the difficulty of distinguishing between contributory negligence and assumption of risk many other problems arose. One of these was the application of the "primary duty rule" in which contributory negligence through violation of a company rule became assumption of risk. *Unadilla Valley Ry. Co.* v. *Caldine,* 278 U. S. 139; *Davis* v. *Kennedy,* 266 U. S. 147. Other complications arose from the introduction of "promise to repair," "simple tool," and "peremptory order" concepts into the assumption doc-

[15] See 49 L. R. A. 33, 49 (Relation Between Defenses of Assumption of Risk and Contributory Negligence), and 35 Am. Jur. 719 (Pragmatic Distinctions Shown to be Lacking).

[16] For some analysis of the cases, see Note 32 Col. L. Rev. 1384, 53 Harv. L. Rev. 341, 71 A. L. R. 451, 89 A. L. R. 693. For an estimate of their quantity, see Schoene and Watson, Workmen's Compensation on Interstate Railways, 47 Harv. L. Rev. 389, 394.

trine.[17] In the disposition of cases the question of a plaintiff's assumption of risk has frequently been treated simply as another way of appraising defendant's negligence,[18] as was done by the court below in the instant case.

It was this maze of law which Congress swept into discard with the adoption of the 1939 amendment to the Employers' Liability Act, releasing the employee from the burden of assumption of risk by whatever name it was called. The result is an Act which requires cases tried under the Federal Act to be handled as though no doctrine of assumption of risk had ever existed.

If this were not sufficiently clear from the language of the amendment, any doubt would be dissipated by its legislative history. The 1939 bill[19] was introduced by Senator Neely and was supported at the hearings by the railway labor unions. It was accepted both by the unions and the railroads that the bill would utterly and completely abolish the defense of assumption of risk.[20] The report of the Senate Judiciary Committee struck at the

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[17] "In thousands of cases the doctrine is complicated by 'promise to repair,' 'peremptory order,' and other special incidents. The 'simple tool' doctrine also arose as an exception. The 'promise to repair' aspect of the question is further confused by two superimposed theories; that the employee may rely upon such promise for a reasonable time and, next, that if the danger was so manifest that no reasonable person would act upon such promise, then assumption of risk is reestablished." House Committee Report, *supra*, Note 14, p. 4. For a collection of citations on all of the assumption of risk problems, see 2 Roberts Federal Liability of Carriers, 2nd ed., Chapter 39. For a discussion of the "simple tool" doctrine, see *Jacob* v. *New York City*, 315 U. S. 752, 756.

[18] Harper, The Law of Tort, 292.

[19] S. 1708, 76th Cong., 1st Sess.

[20] Substantially the same proposal as that finally adopted in 1939 was before the 75th Congress in H. R. 7336. The chief labor exponent of that bill said: The "bill in its nature is intended to relieve the servant from the assumption-of-risk doctrine as interpreted and applied by our United States Supreme Court." Hearings, *supra*, Note 6, p. 69. Or,

basic reasons advanced by common law courts for the existence of the doctrine, declared it unsuited to present day activities, and described them as out of harmony with the equitable principles which should govern determinations of employer-employee responsibilities.[21] The bill, as described in the report, was clearly aimed at making the principles of comparative negligence the guiding rules of decision in accident cases: "The adoption of this proposed amendment will, in cases in which no recovery is now allowed, establish the principle of comparative negligence, which permits the jury to weigh the fault of the injured employee and compare it with the negligence of the employer, and, in the light of the comparison, do justice to all concerned." [22]

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as it was put by the principal railroad representative at the 1939 Senate hearings, "Here . . . the proposal is to abolish the defense of assumed risk, to abolish it in toto." Hearings, Note 12, *supra*, p. 37, 38.

[21] "But such simple doctrines do not apply equitably under the infinite complexities of modern industrial practices when one's fellow servants may be numbered by hundreds or even thousands, and unlimited output and maximum speed are watchwords on every hand. The common-law doctrine of assumption of risk, as applied to the worker in a small factory, cannot be fairly applied to the railroad man, whose services are performed over 150 miles of railroad track, or in a large and congested railroad yard.

"The present rule apparently ignores the fact that the master, and not the servant, has control over the conditions which affect the safety of employees. . . . The existing rule not only permits the employer to be careless about the condition of his premises but, in effect, places a premium upon his carelessness. . . .

"Under present economic conditions, employees must, of necessity, continue to work under unsafe conditions or frequently sacrifice the fruits of many years of accumulated seniority, go on relief, or beg their bread."

Report of the Senate Committee on Judiciary, 76th Cong., 1st Sess., Rept. No. 661, p. 4.

[22] One statement by the bill's chief supporter at the Senate Hearings comes very close to covering the instant case: "It gets back to our

The purpose of the Act is made clearer upon analysis of the House bill which was rejected by the conference committee in favor of the Senate bill which is now the law. The House bill [23] was intended to preserve some part of the doctrine of assumption of risk, preserving that defense except "where said employee has not had actual notice of any negligently maintained condition or practice." The bill, unlike the Senate bill as the Representative reporting it explained, left untouched the rule of *Toledo, St. L. & W. R. Co.* v. *Allen,* 276 U. S. 165, "namely, that in the absence of special custom or unusual circumstances, a man who is run over by a switching movement cannot recover." [24] It was the *Allen* opinion on which the court below in the instant case particularly relied. But the House bill, which the chief railroad counsel appearing before the Senate committee conceded would make no change in the existing law,[25] was rejected in conference. The *Allen* case was specifically and caustically discussed at the Senate hearings, and the Senate bill was clearly aimed at ending its rule.[26]

The doctrine of assumption risk can not be "abolished in toto"[27] and still remain in partial existence as the court below suggests. The theory that a servant is completely barred from recovery for injury resulting from his master's negligence, which legislatures have sought to eliminate in

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original argument that the courts have so enlarged upon this doctrine that we are confronted with such a situation as this: A poor fellow working in a yard, intent upon his work, and somebody kicks a car on top of him, and the courts, notwithstanding he has no knowledge of it, if he is struck, hold that he has no right to recover. It may be that he was negligent, but again I say the comparative negligence doctrine should be applied." Hearings, Note 12, *supra,* p. 78.

[23] H. R. 4988, 76th Cong., 1st Sess.

[24] House Report, Note 14, *supra,* p. 6.

[25] Senate Hearings, Note 12, *supra,* p. 61.

[26] Senate Hearings, Note 12, *supra,* 14, 17, 76, 81.

[27] *Supra,* Note 20.

all its various forms of contributory negligence, the fellow servant rule, and assumption of risk, must not, contrary to the will of Congress, be allowed recrudescence under any other label in the common law lexicon. The Act of 1908 and the amendment of 1939 abolish the post-*Priestley* v. *Fowler* defenses and authorize comparison of negligence instead of barring the employee from all recovery because of contributory negligence. They leave for practical purposes only the question of whether the carrier was negligent and whether that negligence was the proximate cause of the injury.

In this situation the employer's liability is to be determined under the general rule which defines negligence as the lack of due care under the circumstances; or the failure to do what a reasonable and prudent man would ordinarily have done under the circumstances of the situation; or doing what such a person under the existing circumstances would not have done.[28] A fair generalization of the rule is given in the Senate Committee report on the 1939 amendment: "In justice, the master ought to be held liable for injuries attributable to conditions under his control when they are not such as a reasonable man ought to maintain in the circumstances."[29] Of course in any case the standard of care must be commensurate to the dangers of the business. *Hough* v. *Railway Co.*, 100 U. S. 213, 218; cf. *Northern Pacific R. Co.* v. *Herbert*, 116 U. S. 642, 652.

No case is to be withheld from a jury on any theory of assumption of risk; and questions of negligence should under proper charge from the court be submitted to the jury for their determination. Many years ago this Court said of the problems of negligence, "We see no reason, so

[28] *Railroad Co.* v. *Jones*, 95 U. S. 439, 442; *Texas & Pacific Ry. Co.* v. *Barrett*, 166 U. S. 617, 619; *Grand Trunk Ry. Co.* v. *Ives*, 144 U. S. 408.

[29] Sen. Report, *supra*, Note 21, p. 4.

long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others." *Jones* v. *East Tennessee, V. & G. R. Co.*, 128 U. S. 443, 445. Or as we have put it on another occasion, "Where the facts are in dispute, and the evidence in relation to them is that from which fair-minded men may draw different inferences," the case should go to the jury.[30]

We think that the question of negligence on the part of the railroad and on the part of the employee should have been submitted to the jury. The decision below is reversed and the case is remanded for further proceedings in conformity with this opinion.

Reversed.

MR. JUSTICE FRANKFURTER, concurring:

The phrase "assumption of risk" is an excellent illustration of the extent to which uncritical use of words bedevils the law. A phrase begins life as a literary expression; its felicity leads to its lazy repetition; and repetition soon establishes it as a legal formula, undiscriminatingly used to express different and sometimes contradictory ideas. Thus, in the setting of one set of circumstances, "assump-

[30] *Washington & Georgetown R. Co.* v. *McDade*, 135 U. S. 554, 572. See also *Kane* v. *Northern Central Ry. Co.*, 128 U. S. 91, 95, 96; *Hough* v. *Railway Co., supra*, 225; *Jacob* v. *New York City*, 315 U. S. 752, 757. It appears to be the clear Congressional intent that, to the maximum extent proper, questions in actions arising under the Act should be left to the jury: "At the beginning this defense [assumption of risk] was deemed to be at most a jury question. But repeated holdings have encroached more and more upon the right of the employee and various new doctrines or amplifications of previous principles have tended constantly to treat this defense as one to be determined by the courts as 'matter of law'—taking it away from the jury; and the courts have decided now it is a question of law." House Report, *supra*, Note 14, p. 1. Cf. *Delaware, L. & W. R. Co.* v. *Koske*, 279 U. S. 7, 11; *Toledo, St. L. & W. R. Co.* v. *Allen*, 276 U. S. 165, 170.

tion of risk" has been used as a shorthand way of saying that although an employer may have violated the duty of care which he owed his employee, he could nevertheless escape liability for damages resulting from his negligence if the employee, by accepting or continuing in the employment with "notice" of such negligence, "assumed the risk." In such situations "assumption of risk" is a defense which enables a negligent employer to defeat recovery against him. In the setting of a totally different set of circumstances, "assumption of risk" has a totally different meaning. Industrial enterprise entails, for all those engaged in it, certain hazards to life and limb which no amount of care on the part of the employer can avoid. In denying recovery to an employee injured as a result of exposure to such a hazard, where the employer has in no sense been negligent or derelict in the duty owed to his employees, courts have often said that the employee "assumed the risk." Here the phrase "assumption of risk" is used simply to convey the idea that the employer was not at fault and therefore not liable.

Plainly enough only mischief could result from using a single phrase to express two such different ideas. Such ambiguity necessarily does harm to the desirability of clarity and coherence in any civilized system of law. But the greater mischief was that in one of its aspects the phrase "assumption of risk" gave judicial expression to a social policy that entailed much human misery. The notion of "assumption of risk" as a defense—that is, where the employer concededly failed in his duty of care and nevertheless escaped liability because the employee had "agreed" to "assume the risk" of the employer's fault—rested, in the context of our industrial society, upon a pure fiction. And in all English-speaking countries legislation was necessary to correct this injustice. In enforcing such legislation the courts should not lose sight of the ambiguous nature of the doctrine with which the

legislation dealt. In giving effect to the legislative policy, care must be taken lest such ambiguity perpetuate the old mischief against which the new legislation was directed.

Our present concern is with the Federal Employers' Liability Act. Prior to 1939, the only inroad made by the Act upon the doctrine of "assumption of risk" as a defense to liability arising from negligence was that in any action brought by an employee, he "shall not be held to have assumed the risks of his employment in any case where the violation by said common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." Section 4 of the Act as amended April 22, 1908, c. 149, 35 Stat. 65. The provision was construed, naturally enough, to mean that "the assumption of risk as a defense is abolished only where the negligence of the carrier is in violation of some statute enacted for the safety of employees. In other cases, therefore, it is retained." *Jacobs* v. *Southern Ry. Co.*, 241 U. S. 229, 235. By only partially withdrawing the defense of "assumption of risk," Congress enabled the railroads to avoid liability in many situations where the employee's injury resulted from the negligence of the carrier in the only way in which an employer can be negligent, namely, through the negligence of its servants. In other words, Congress continued to sanction the fiction of attributing to employees a willingness to bear the consequences of the carrier's negligence, other than that arising from its violation of a statute enacted for the safety of employees.

This was the unfortunate situation which the 1939 amendment, the Act of August 11, 1939, c. 685, 53 Stat. 1404, sought to remedy. To § 4 was added the provision that in any action brought by an employee he "shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents,

or employees of such carrier. . . ." The effect of this provision is to make it clear that, whatever other risks an employee may assume, he does not "assume the risk" of the negligence of the carrier or its other employees. Once the negligence of the carrier is established, it cannot be relieved of liability by pleading that the employee "assumed the risk."

But the 1939 amendment left intact the foundation of the carrier's liability—negligence. Unlike the English enactment which, nearly fifty years ago, recognized that the common law concept of liability for negligence is archaic and unjust as a means of compensation for injuries sustained by employees under modern industrial conditions, the federal legislation has retained negligence as the basis of a carrier's liability. For reasons that are its concern and not ours, Congress chose not to follow the example of most states in establishing systems of workmen's compensation not based upon negligence. Congress has to some extent alleviated the doctrines of the law of negligence as applied to railroad employees. By specific provisions in the Federal Employers' Liability Act, it has swept away "assumption of risk" as a defense once negligence is established. But it has left undisturbed the other meaning of "assumption of risk," namely, that an employee injured as a consequence of being exposed to a risk which the employer in the exercise of due care could not avoid is not entitled to recover, since the employer was not negligent.

The point is illustrated by two opinions of Mr. Justice Holmes. In *Schlemmer* v. *Buffalo, R. & P. Ry. Co.*, 205 U. S. 1, 12–13, he called attention to the danger of relieving from liability for negligence by talking about "assumption of risk"—a danger resulting from the ambiguity of the phrase. "Assumption of risk" by an employee may be a way of expressing the conclusion that he has been guilty of contributory negligence. But an employee can-

not be charged with contributory negligence simply because he "assumed the risk"; the inquiry is, did his conduct depart from that of a reasonably prudent employee in his situation? As Mr. Justice Holmes admonished us in the *Schlemmer* case, "unless great care be taken, the servant's rights will be sacrificed by simply charging him with assumption of the risk under another name." *Ibid.* That case was decided before the Federal Employers' Liability Act was in force. In a later case arising under the Act, *Chesapeake & Ohio Ry. Co.* v. *Nixon,* 271 U. S. 218, Mr. Justice Holmes for a unanimous Court reversed a judgment for the plaintiff on the ground that the employee's death was caused by a failure to keep a lookout which was one of the "usual risks" of his employment. To be sure, this decision was made prior to the 1939 amendment, but in this respect that enactment makes no change in the law. The basis of an action under the Act remains the carrier's negligence. The carrier is not to be relieved from the consequences of its negligence by any claim that the employee "assumed the risk" of its negligence. But neither is the carrier to be charged with those injuries which result from the "usual risks" incident to employment on railroads—risks which cannot be eliminated through the carrier's exercise of reasonable care.

"Assumption of risk" as a defense where there is negligence has been written out of the Act. But "assumption of risk," in the sense that the employer is not liable for those risks which it could not avoid in the observance of its duty of care, has not been written out of the law. Because of its ambiguity the phrase "assumption of risk" is a hazardous legal tool. As a means of instructing a jury, it is bound to create confusion. It should therefore be discarded. But until Congress chooses to abandon the concept of negligence, upon which the Act now rests, in favor of a system of workmen's compensation not dependent upon negligence, the courts cannot discard the

principle expressed, in one of its senses, by the phrase "assumption of risk," namely, that a carrier is not liable unless it was negligent.

Perhaps no field of the law comes closer to the lives of so many families in this country than does the law of negligence, imbedded as it is in the Federal Employers' Liability Act. It is most desirable, therefore, that the law should not be cloudy and confused. I am not at all certain that the Circuit Court of Appeals misconceived the nature and extent of the carrier's liability after the 1939 amendment, rather than merely obscured its understanding by beclouding talk about "assumption of risk." But since I agree that the District Court should have allowed the case to go to the jury on the issue of negligence, I concur in the decision.

ZIFFRIN, INCORPORATED, *v.* UNITED STATES ET AL.

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

No. 245. Argued December 16, 1942.—Decided February 1, 1943.

At the time of the filing of an application to the Interstate Commerce Commission for a permit under the "grandfather clause" of § 209 (a) of the Interstate Commerce Act to continue designated contract carrier operations, and at the time of the hearing by the Commission on the application, § 210 of the Act provided that a certificate as a common carrier and a permit as a contract carrier could not be held by the same carrier except upon a finding by the Commission of consistency with the public interest. Prior to the Commission's decision on the application, § 210 was amended to provide that, without a similar finding, a certificate as a common carrier and a permit as a contract carrier could not be held by carriers which are under common control. *Held:*

1. The Commission was required to make its decision on the application in accordance with the Act as amended. P. 78.

2. The contentions that the applicant was not given proper notice of the hearing, and was denied an opportunity to show compliance with the Act as amended, are unsupported. P. 79.

3. The Commission's order denying the application on the ground that the applicant was under common control with a certificated common carrier, and that the application could not be granted consistently with the public interest and the national transportation policy, is supported by the evidence. P. 80.

Affirmed.

APPEAL from a judgment of a District Court of three judges refusing to set aside an order of the Interstate Commerce Commission.

Mr. Ira Howell Ellis, with whom *Mr. John S. Powell* was on the brief, for appellant.

Mr. Daniel H. Kunkel, with whom *Solicitor General Fahy, Assistant Attorney General Arnold,* and *Messrs. Robert L. Pierce, Edward Dumbauld,* and *Daniel W. Knowlton* were on the brief, for appellees.

MR. JUSTICE REED delivered the opinion of the Court.

This appeal brings here for review a judgment of a statutory three judge court denying a petition for an interlocutory and a final injunction setting aside and annulling an order of the Interstate Commerce Commission.[1] The order attacked denied an application of appellant, an Indiana corporation, filed February 4, 1936, for a permit to continue designated contract carrier operations under the grandfather clause of § 209 (a) of the Interstate Commerce Act.

The denial of the application by the Commission on May 29, 1941, 28 M. C. C. 683, was on the ground that applicant and Ziffrin Truck Lines, Inc., a certificated com-

[1] Urgent Deficiencies Act, 38 Stat. 208, 220, 28 U. S. C. §§ 47, 47 (a); Judicial Code § 238, 43 Stat. 936, 938, 28 U. S. C. § 345; § 205 (h) Interstate Commerce Act, Part II, 49 Stat. 543, 550, 49 U. S. C. § 305 (h).

mon carrier by motor vehicle, were owned, controlled and managed in a common interest and that under § 210 of the Interstate Commerce Act, Part II, it would not be consistent with the public interest and the national transportation policy to grant the application.

Section 210 of the Motor Carrier Act was amended between the filing of the application and the entry of the order denying it. The two forms of § 210 appear in the note below.[2]

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[2] Section 210 (49 Stat. 554), as originally enacted in the Motor Carrier Act, 1935, provided:

"No person, after January 1, 1936, shall at the same time hold under this part a certificate as a common carrier and a permit as a contract carrier authorizing operation for the transportation of property by motor vehicle over the same route or within the same territory, unless for good cause shown the Commission shall find that such certificate and permit may be held consistently with the public interest and with the policy declared in section 202 (a) of this part."

Section 210, as amended (49 U. S. C. 310) by § 21 (a) of the Transportation Act of 1940 provides:

"Unless, for good cause shown, the Commission shall find, or shall have found, that both a certificate and a permit may be so held consistently with the public interest and with the national transportation policy declared in this Act—

"(1) no person, or any person controlling, controlled by, or under common control with such person, shall hold a certificate as a common carrier authorizing operation for the transportation of property by motor vehicle over a route or within a territory, if such person, or any such controlling person, controlled person, or person under common control, holds a permit as a contract carrier authorizing operation for the transportation of property by motor vehicle over the same route or within the same territory; and

"(2) no person, or any person controlling, controlled by, or under common control with such person, shall hold a permit as a contract carrier authorizing operation for the transportation of property by motor vehicle over a route or within a territory, if such person, or any such controlling person, controlled person, or person under common control, holds a certificate as a common carrier authorizing operation for the transportation of property by motor vehicle over the same route or within the same territory."

It is appellant's contention that whatever may have been the effect of the earlier form, with the passage of the amendment after the hearing the applicant should now have an opportunity to show the absence of common control of it and Ziffrin Truck Lines, Incorporated. As § 210 stood when appellant requested its permit and at the hearing, a certificate as a common carrier and a permit as a contract carrier were not to be held by the same person without special finding of consistency with the public interest by the Commission. The amendment provided that without a similar special finding no person should hold a contract carrier permit who was under common control with a person holding a common carrier certificate. Person, of course, included a corporation. 49 U. S. C. 303 (a) (1).

Obviously the fear of possible evasion led to the change in language. Indeed, the Commission had disregarded the corporate fiction and interpreted the earlier form as covering persons under common control.[3] This was called to applicant's attention by an order of June 23, 1938, setting the date for hearing the application.[4] The interpretation was discussed in the examiner's report, in the Com-

[3] In re New York & New Brunswick Auto Exp. Co., Inc., Common Carrier Application, 23 M. C. C. 663, 671. Cf. In re Bigley Brothers, Inc., Contract Carrier Application, 4 M. C. C. 711; Universal Service, Inc.,—Purchase—W. R. Arthur & Co., Inc., 15 M. C. C. 247.

[4] The order read in part as follows:

"Notice is hereby given that although application herein is for a certificate or permit on Form BMC 1, the applicant must establish also the corporate relationship existing between the applicant herein mentioned and the Ziffrin Truck Lines, Inc., (No. MC 2510) and if said applicant and the Ziffrin Truck Lines, Inc., are found to be affiliated within the meaning of Section 5 (6) of Part I, applicant must also establish that a permit may be held by applicant consistently with the public interest and with the policy declared in Section 202 (a) of the Motor Carrier Act, 1935, within the meaning and contemplation of Section 210 of said Motor Carrier Act, 1935."

mission's report, and applied, adversely to appellant, by the findings. 28 M. C. C. 683, 692–99.

When the Transportation Act of 1940 was before the Senate, the draftsmen added a sentence to the earlier form of § 210, reading as follows: "This section shall apply to dual operations by affiliated carriers." When the bill, S. 2009, in the two forms in which it was enacted in the Senate and the House of Representatives, was examined by the Interstate Commerce Commission, the Chairman of its legislative committee transmitted a report on the provisions of the bill to the Chairman of the Senate Interstate Commerce Committee and the Chairman of the House Committee on Interstate and Foreign Commerce.[5] In the report (at page 62) this comment was made as to the present § 210:

"Desirable.—(a) After the new section 22 which we have proposed above, add a new section 23 (with appropriate renumbering of subsequent sections) reading as follows:

'SEC. 23. Section 210 of the Interstate Commerce Act, as amended, is amended by adding at the end thereof the following new sentence: "This section shall apply to dual operations by affiliated carriers." '

This sentence has been introduced at the end of section 45 of the Senate bill, and it has our approval. The Commission has construed section 210 of part II to have such an application, but it is desirable to remove all doubt on the point."

At the conference of the committee for the two Houses of Congress, the form of § 210 was changed to the present reading. The report contains this explanation:[6]

[5] Omnibus Transportation Legislation, House Committee Print, 76th Cong., 2d Sess.

[6] H. Rep. No. 2832, 76th Cong., 3d Sess., p. 78.

"Section 21 (a). Dual Operations Under Certificates and Permits, Motor Carriers.

"The conference substitute in section 21 (a) amends section 210 of the Interstate Commerce Act which prohibits a person from holding at the same time both a certificate as a common carrier of property by motor vehicle and a permit as a contract carrier of property by motor vehicle over the same route or within the same territory, unless for good cause shown the Commission shall find that both forms of operating authority may be held consistent with the public interest and with the policy declared in part II, so that the section will apply not only to a particular motor carrier but also to any person controlling, controlled by, or under common control with, such person."

It is unnecessary, however, to decide whether the Commission correctly applied § 210 as originally enacted to such common control as the Commission found in appellant and Ziffrin Truck Lines, Inc. We are convinced that the Commission was required to act under the law as it existed when its order of May 29, 1941, was entered. The permit was effective for the future and the amendment forbade persons under common control holding both a permit and a certificate. Previously appellant had been operating under an ex parte permit. Protests to the grant had been made on account of the dual operation, the formal hearing was held and the question raised by these protests was heard at length. A change in the law between a nisi prius and an appellate decision requires the appellate court to apply the changed law. *Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U. S. 538, and cases cited. Cf. *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443, 464. *A fortiori*, a change of law pending an administrative hearing must be followed in relation to permits for future acts. Otherwise the administrative body would issue orders contrary to the existing legislation.

We find no basis for appellant's contention that it was given improper notice of the hearing and denied an opportunity to show compliance with the amended section. The steps of notice and hearing detailed above demonstrate the error of the former contention. As to the latter, it is met completely by the report and order of the Commission, made while this suit was pending in the District Court, and denying appellant's motion for reconsideration of the order of May 29, 1941. Ziffrin, Incorporated, Contract Carrier Application, 33 M. C. C. 155. This opinion was called to our attention by the Government in brief and argument. In the circumstances, we will not disregard it. The Commission there said, p. 156:

"At the conclusion of the trial on applicant's suit before the three-judge court, a conference was held between the counsel for all the parties to the suit in the court's chambers. It was there suggested by the court that applicant submit to this Commission some method for divorcing applicant herein from Ziffrin Truck Lines, Inc., which might eliminate the conflict with section 210 of the act on which the denial of the application was grounded. Pursuant to this suggestion, applicant has filed a petition seeking reopening and reconsideration of the proceeding, and, as a basis therefor, proposes a plan for elimination of the common control of applicant and Ziffrin Truck Lines, Inc. The petition is opposed by an association of motor common carriers. It is understood that the filing of this petition and action by us thereon does not terminate the court proceeding. Pending our action on the petition, however, the entry of judgment by the court is being held in abeyance. In view of the pendency of the litigation, we believe that a statement of the reasons for our action with respect to this petition will be helpful."

The Commission then restated the evidence showing common control of the two corporations and concluded that the plan proposed would not change the situation.

See 33 M. C. C. 155; 28 M. C. C. 683, 692 *et seq.* The evidence is ample to support the conclusion of the Commission entered at the earlier hearing. This is sufficient to support the order upon judicial review. *Shields* v. *Utah Idaho Central R. Co.*, 305 U. S. 177, 185; *United States* v. *Maher*, 307 U. S. 148, 155.

Affirmed.

SECURITIES AND EXCHANGE COMMISSION *v.* CHENERY CORPORATION ET AL.

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

No. 254. Argued December 17, 18, 1942.—Decided February 1, 1943.

By an order of the Securities and Exchange Commission under the Public Utility Holding Company Act of 1935, approval was given, over objections, to a plan for the reorganization of a registered holding company, whereby preferred stock which had been acquired by officers and directors of the company while plans for its reorganization were before the Commission, would not be converted into stock of the reorganized company, as would all other preferred stock, but would be surrendered at cost plus interest. The Commission explicitly based its order on its view of principles of equity judicially established. However, the Commission did not find, but on the contrary disavowed, that the specific transactions showed misuse by the officers and directors of their position as reorganization managers, or that as such managers they took advantage of the corporation, other stockholders, or the investing public. *Held:*

1. On review under § 24 (a) of the Act, the validity of the order of the Commission must be judged on the grounds upon which the record discloses that its action was based. P. 87.

2. Tested by principles of equity judicially established, the order of the Commission can not be sustained. P. 88.

3. It is immaterial that the Commission might have made findings which would justify its order as an appropriate safeguard of interests which the Act was designed to protect. Such findings are essential to the validity of the order, and here there is none. P. 94.

4. Such an administrative order can not be upheld if not sustainable by the grounds upon which it was based by the Commission. P. 95.

75 U. S. App. D. C. 374, 128 F. 2d 303, remanded.

CERTIORARI, 317 U. S. 609, to review a judgment setting aside an order of the Securities and Exchange Commission under the Public Utility Holding Company Act of 1935.

Mr. Chester T. Lane, with whom *Solicitor General Fahy* and *Messrs. Richard S. Salant, John F. Davis, Homer Kripke,* and *Theodore L. Thau* were on the brief, for petitioner.

Mr. Spencer Gordon for respondents.

Mr. Allen S. Hubbard was on a brief for the Federal Water and Gas Corporation, respondent.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

The respondents, who were officers, directors, and controlling stockholders of the Federal Water Service Corporation (hereafter called Federal), a holding company registered under the Public Utility Holding Company Act of 1935, c. 687, 49 Stat. 803, 15 U. S. C. § 79, brought this proceeding under § 24(a) of the Act to review an order made by the Securities and Exchange Commission on September 24, 1941, approving a plan of reorganization for the company. Under the Commission's order, preferred stock acquired by the respondents during the period in which successive reorganization plans proposed by the management of the company were before the Commission, was not permitted to participate in the reorganization on an equal footing with all other preferred stock. The Court of Appeals for the District of Columbia, with one judge dissenting, set the Commission's order aside, 128 F. 2d 303, and because the question presented looms large in the administration of the Act, we brought the case here.

The relevant facts are as follows. In 1937, Federal was a typical public utility holding company. Incorporated in Delaware, its assets consisted of securities of subsidiary water, gas, electric, and other companies in thirteen states and one foreign country. The respondents controlled Federal through their control of its parent, Utility Operators Company, which owned all of the outstanding shares of Federal's Class B common stock, representing the controlling voting power in the company. On November 8, 1937, when Federal registered as a holding company under the Public Utility Holding Company Act of 1935, its management filed a plan for reorganization under §§ 7 and 11 of the Act, the relevant portions of which are copied in the margin.[1] This plan, as well as two other plans later

[1] "SEC. 7. (a) A registered holding company or subsidiary company thereof may file a declaration with the Commission, regarding any of the acts enumerated in subsection (a) of section 6, in such form as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers. Such declaration shall include—

"(1) such of the information and documents which are required to be filed in order to register a security under section 7 of the Securities Act of 1933, as amended, as the Commission may by rules and regulations or order prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers; and

"(2) such additional information, in such form and detail, and such documents regarding the declarant or any associate company thereof, the particular security and compliance with such State laws as may apply to the act in question as the Commission may by rules and regulations or order prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers. . . .

"(d) If the requirements of subsections (c) and (g) are satisfied, the Commission shall permit a declaration regarding the issue or sale of a security to become effective unless the Commission finds that—

. . . . . .

"(6) the terms and conditions of the issue or sale of the security are detrimental to the public interest or the interest of investors or consumers.

"(e) If the requirements of subsection (g) are satisfied, the Commission shall permit a declaration to become effective regarding the exercise

submitted by Federal, provided for participation by Class B stockholders in the equity of the proposed reorganized company. This feature of the plans was unacceptable to the Commission, and all were ultimately withdrawn.

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of a privilege or right to alter the priorities, preferences, voting power, or other rights of the holders of an outstanding security unless the Commission finds that such exercise of such privilege or right will result in an unfair or inequitable distribution of voting power among holders of the securities of the declarant or is otherwise detrimental to the public interest or the interest of investors or consumers.

"(f) Any order permitting a declaration to become effective may contain such terms and conditions as the Commission finds necessary to assure compliance with the conditions specified in this section. . . .

"SEC. 11. (a) It shall be the duty of the Commission to examine the corporate structure of every registered holding company and subsidiary company thereof, the relationships among the companies in the holding-company system of every such company and the character of the interests thereof and the properties owned or controlled thereby to determine the extent to which the corporate structure of such holding-company system and the companies therein may be simplified, unnecessary complexities therein eliminated, voting power fairly and equitably distributed among the holders of securities thereof, and the properties and business thereof confined to those necessary or appropriate to the operations of an integrated public-utility system. . . .

"(e) In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon

On March 30, 1940, a fourth plan was filed by Federal. This plan, proposing a merger of Federal, Utility Operators Company, and Federal Water and Gas Corporation, a wholly-owned inactive subsidiary of Federal, contained no provision for participation by the Class B stock. Instead, that class of stock was to be surrendered for cancellation, and the preferred and Class A common stock of Federal were to be converted into common stock of the new corporation. As the Commission pointed out in its analysis of the proposed plan, "except for the 5.3% of new common allocated to the present holders of Class A stock, substantially all of the equity of the reorganized company will be given to the present preferred stockholders."

During the period from November 8, 1937, to June 30, 1940, while the successive reorganization plans were before the Commission, the respondents purchased a total of 12,407 shares of Federal's preferred stock. (The total number of outstanding shares of Federal's preferred stock was 159,269.) These purchases were made on the over-the-counter market through brokers at prices lower than the book value of the common stock of the new corporation into which the preferred stock would have been converted under the proposed plan. If this feature of the plan had been approved by the Commission, the respondents through their holdings of Federal's preferred stock would

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any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed. . . ."

have acquired more than 10 per cent of the common stock of the new corporation. The respondents frankly admitted that their purpose in buying the preferred stock was to protect their interests in the company.

In ascertaining whether the terms of issuance of the new common stock were "fair and equitable" or "detrimental to the interests of investors" within § 7 of the Act, the Commission found that it could not approve the proposed plan so long as the preferred stock acquired by the respondents would be permitted to share on a parity with other preferred stock. The Commission did not find fraud or lack of disclosure, but it concluded that the respondents, as Federal's managers, were fiduciaries and hence under a "duty of fair dealing" not to trade in the securities of the corporation while plans for its reorganization were before the Commission. It recommended that a formula be devised under which the respondents' preferred stock would participate only to the extent of the purchase prices paid plus accumulated dividends since the dates of such purchases. Accordingly, the plan was thereafter amended to provide that the preferred stock acquired by the respondents, unlike the preferred stock held by others, would not be converted into stock of the reorganized company, but could only be surrendered at cost plus 4 per cent interest. The Commission, over the respondents' objections, approved the plan as thus amended, and it is this order which is now under review.

We completely agree with the Commission that officers and directors who manage a holding company in process of reorganization under the Public Utility Holding Company Act of 1935 occupy positions of trust. We reject a lax view of fiduciary obligations and insist upon their scrupulous observance. See *Wormley* v. *Wormley,* 8 Wheat. 421, 441; *Southern Pacific Co.* v. *Bogert,* 250 U. S. 483, 487–88; and see Stone, *The Public Influence of the Bar,* 48 Harv. L. Rev. 1, 8–9. But to say that a man is a fidu-

ciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect has he failed to discharge these obligations? And what are the consequences of his deviation from duty?

The Commission did not find that the respondents as managers of Federal acted covertly or traded on inside knowledge, or that their position as reorganization managers enabled them to purchase the preferred stock at prices lower than they would otherwise have had to pay, or that their acquisition of the stock in any way prejudiced the interests of the corporation or its stockholders. To be sure, the new stock into which the respondents' preferred stock would be converted under the plan of reorganization would have a book value—which may or may not represent market value—considerably greater than the prices paid for the preferred stock. But that would equally be true of purchases of preferred stock made by other investors. The respondents, the Commission tells us, acquired their stock as the outside world did, and upon no better terms. The Commission dealt with this as a specific case, and not as the application of a general rule formulating rules of conduct for reorganization managers. Consequently, it is a vital consideration that the Commission conceded that the respondents did not acquire their stock through any favoring circumstances. In its own words, "honesty, full disclosure, and purchase at a fair price" characterized the transactions. The Commission did not suggest that, as a result of their purchases of preferred stock, the respondents would be unjustly enriched. On the contrary, the question before the Commission was whether the respondents, simply because they were reorganization managers, should be denied the benefits to be received by the 6,000 other preferred stockholders. Some technical rule of law must have moved the Commission to single out the respondents and deny their preferred

stock the right to participate equally in the reorganization. To ascertain the precise basis of its determination, we must look to the Commission's opinion.

The Commission stated that "in the process of formulation of a 'voluntary' reorganization plan, the management of a corporation occupies a fiduciary position toward all of the security holders to be affected, and that it is subjected to the same standards as other fiduciaries with respect to dealing with the property which is the subject matter of the trust." Applying by analogy the restrictions imposed on trustees in trafficking in property held by them in trust for others, *Michoud* v. *Girod,* 4 How. 503, 557, the Commission ruled that even though the management does not hold the stock of the corporation in trust for the stockholders, nevertheless the "duty of fair dealing" which the management owes to the stockholders is violated if those in control of the corporation purchase its stock, even at a fair price, openly and without fraud. The Commission concluded that "honesty, full disclosure, and purchase at a fair price do not take the case outside the rule."

In reaching this result the Commission stated that it was merely applying "the broad equitable principles enunciated in the cases heretofore cited," namely, *Pepper* v. *Litton,* 308 U. S. 295; *Michoud* v. *Girod,* 4 How. 503, 557; *Magruder* v. *Drury,* 235 U. S. 106, 119–20, and *Meinhard* v. *Salmon,* 249 N. Y. 458, 164 N. E. 545. Its opinion plainly shows that the Commission purported to be acting only as it assumed a court of equity would have acted in a similar case. Since the decision of the Commission was explicitly based upon the applicability of principles of equity announced by courts, its validity must likewise be judged on that basis. The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.

In confining our review to a judgment upon the validity of the grounds upon which the Commission itself based its action, we do not disturb the settled rule that, in reviewing the decision of a lower court, it must be affirmed if the result is correct "although the lower court relied upon a wrong ground or gave a wrong reason." *Helvering* v. *Gowran,* 302 U. S. 238, 245. The reason for this rule is obvious. It would be wasteful to send a case back to a lower court to reinstate a decision which it had already made but which the appellate court concluded should properly be based on another ground within the power of the appellate court to formulate. But it is also familiar appellate procedure that where the correctness of the lower court's decision depends upon a determination of fact which only a jury could make but which has not been made, the appellate court cannot take the place of the jury. Like considerations govern review of administrative orders. If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment. For purposes of affirming no less than reversing its orders, an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency.

If, therefore, the rule applied by the Commission is to be judged solely on the basis of its adherence to principles of equity derived from judicial decisions, its order plainly cannot stand. As the Commission concedes here, the courts do not impose upon officers and directors of a corporation any fiduciary duty to its stockholders which precludes them, merely because they are officers and directors, from buying and selling the corporation's stock.[2]

[2] See 1 Dodd and Baker, Cases on Business Associations (1940) 498–500, 583–86, 621–22; 1 Morawetz on Private Corporations (2d ed. 1886) §§ 516–21, pp. 482–89.

The cases upon which the Commission relied do not establish principles of law and equity which in themselves are sufficient to sustain its order. The only question in *Pepper* v. *Litton,* 308 U. S. 295, was whether claims obtained by the controlling stockholders of a bankrupt corporation were to be treated equally with the claims of other creditors where the evidence revealed "a scheme to defraud creditors reminiscent of some of the evils with which 13 Eliz. c. 5 was designed to cope," 308 U. S. at 296. Another case relied upon, *Woods* v. *City Bank Co.,* 312 U. S. 262, held only that a bankruptcy court, in the exercise of its plenary power to review fees and expenses in connection with a reorganization proceeding under Chapter X of the Chandler Act, 52 Stat. 840, could deny compensation to protective committees representing conflicting interests. *Michoud* v. *Girod,* 4 How. 503, and *Magruder* v. *Drury,* 235 U. S. 106, dealt with the specific obligations of express trustees and not with those of persons in control of a corporate enterprise toward its stockholders.

Determination of what is "fair and equitable" calls for the application of ethical standards to particular sets of facts. But these standards are not static. In evolving standards of fairness and equity, the Commission is not bound by settled judicial precedents. Congress certainly did not mean to preclude the formulation by the Commission of standards expressing a more sensitive regard for what is right and what is wrong than those prevalent at the time the Public Utility Holding Company Act of 1935 became law. But the Commission did not in this case proffer new standards reflecting the experience gained by it in effectuating the legislative policy. On the contrary, it explicitly disavowed any purpose of going beyond those which the courts had theretofore recognized. Since the Commission professed to decide the case before it according to settled judicial doctrines, its action must be judged by the standards which the Commission itself invoked.

And judged by those standards, *i. e.*, those which would be enforced by a court of equity, we must conclude that the Commission was in error in deeming its action controlled by established judicial principles.

But the Commission urges here that the order should nevertheless be sustained because "the effect of trading by management is not measured by the fairness of individual transactions between buyer and seller, but by its relation to the timing and dynamics of the reorganization which the management itself initiates and so largely controls." Its argument lays stress upon the "strategic position enjoyed by the management in this type of reorganization proceeding and the vesting in it of statutory powers available to no other representative of security holders." It contends that these considerations warrant the stern rule applied in this case since the Commission "has dealt extensively with corporate reorganizations, both under the Act, and other statutes entrusted to it," and "has, in addition, exhaustively studied protective and reorganization committees," and that the situation was therefore "peculiarly within the Commission's special administrative competence."

In determining whether to approve the plan of reorganization proposed by Federal's management, the Commission could inquire, under § 7 (d) (6) and (e) of the Act, whether the proposal was "detrimental to the public interest or the interest of investors or consumers," and, under § 11 (e), whether it was "fair and equitable." That these provisions were meant to confer upon the Commission broad powers for the protection of the public plainly appears from the reports of the Congressional committees in charge of the legislation. The provisions of § 7 were "designed to give adequate protection to investors and consumers . . . and are in accord with the underlying purpose of the legislation to give to investors and consumers full protection against the deleterious practices

which have characterized certain holding-company finance in the past." Sen. Rep. No. 621, 74th Cong., 1st Sess., p. 28. Similarly, the authority given the Commission by § 11 was intended to be responsive to the demands of the particular situations with which the Commission would be faced: "Under these subsections [11 (d), (e), and (f)], Commission approval of reorganization plans and supervision of the conditions under which such plans are prepared will make it impossible for a group of favored insiders to continue their domination over inarticulate and helpless minorities, or even as is often the case, majorities . . ." *Id.*, p. 33.

In view of this legislative history, reflecting the range of public interests committed to the care of the Commission, § 17 (a) and (b), which requires officers and directors of any holding company registered under the Act to file statements of their security holdings in the company and provides that profits made from dealing in such securities within any period of less than six months shall inure to the benefit of the company, cannot be regarded as a limitation upon the power of the Commission to deal with other situations in which officers and directors have failed to measure up to the standards of conduct imposed upon them by the Act. The Act vests in the officers and directors of a holding company registered under the Act broad powers as representatives of all the stockholders. Besides the Commission, only the management can initiate a proceeding before the Commission to simplify the corporate structure and to effect a fair and equitable distribution of voting power among security holders. Only the management can amend a plan under §§ 7 and 11 (e), and this it may do at any time; only the management can withdraw the plan, and this too it may do at will; and even after the Commission has approved a plan, it cannot be carried out without the consent of the management.

Notwithstanding § 17 (a) and (b), therefore, the Commission could take appropriate action for the correction of reorganization abuses found to be "detrimental to the public interest or the interest of investors or consumers." It was entitled to take into account those more subtle factors in the marketing of utility company securities that gave rise to the very grave evils which the Public Utility Holding Act of 1935 was designed to correct. See the concurring opinion of Judge Learned Hand in *Morgan Stanley & Co.* v. *Securities & Exchange Commission,* 126 F. 2d 325, 332.

But the difficulty remains that the considerations urged here in support of the Commission's order were not those upon which its action was based. The Commission did not rely upon "its special administrative competence"; it formulated no judgment upon the requirements of the "public interest or the interest of investors or consumers" in the situation before it. Through its preoccupation with the special problems of utility reorganizations the Commission accumulates an experience and insight denied to others. Had the Commission, acting upon its experience and peculiar competence, promulgated a general rule of which its order here was a particular application, the problem for our consideration would be very different. Whether and to what extent directors or officers should be prohibited from buying or selling stock of the corporation during its reorganization, presents problems of policy for the judgment of Congress or of the body to which it has delegated power to deal with the matter. Abuse of corporate position, influence, and access to information may raise questions so subtle that the law can deal with them effectively only by prohibitions not concerned with the fairness of a particular transaction. But before transactions otherwise legal can be outlawed or denied their usual business consequences, they must fall under the ban of some standards of conduct prescribed by an agency of

government authorized to prescribe such standards—either the courts or Congress or an agency to which Congress has delegated its authority. Congress itself did not proscribe the respondents' purchases of preferred stock in Federal. Established judicial doctrines do not condemn these transactions. Nor has the Commission, acting under the rule-making powers delegated to it by § 11(e), promulgated new general standards of conduct. It purported merely to be applying an existing judge-made rule of equity. The Commission's determination can stand, therefore, only if it found that the specific transactions under scrutiny showed misuse by the respondents of their position as reorganization managers, in that as such managers they took advantage of the corporation or the other stockholders or the investing public. The record is utterly barren of any such showing. Indeed, such a claim against the respondents was explicitly disavowed by the Commission.

In view of the conditions imposed by the Commission in approving the plan, it is clear that the respondents were charged with violation of a positive command of law rather than with any moral wrong. If there has been a wrong, it would be against the stockholders from whom they purchased the preferred stock at less than the book value of the new stock—which, as we have already said, may or may not be its real value. But the Commission did not regard such stockholders as beneficiaries of the respondents' "trust" and hence entitled to restitution. The Commission did not undo the purchases deemed by it to have been made by the respondents in violation of their fiduciary obligations. Instead, the Commission confirmed the purchases and ordered that the stock be surrendered to the corporation.

Judged, therefore, as a determination based upon judge-made rules of equity, the Commission's order cannot be upheld. Its action must be measured by what the Com-

mission did, not by what it might have done. It is not for us to determine independently what is "detrimental to the public interest or the interest of investors or consumers" or "fair or equitable" within the meaning of §§ 7 and 11 of the Public Utility Holding Company Act of 1935. The Commission's action cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order as an appropriate safeguard for the interests protected by the Act. There must be such a responsible finding. Compare *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 510–11. There is no such finding here.

Congress has seen fit to subject to judicial review such orders of the Securities and Exchange Commission as the one before us. That the scope of such review is narrowly circumscribed is beside the point. For the courts cannot exercise their duty of review unless they are advised of the considerations underlying the action under review. If the action rests upon an administrative determination—an exercise of judgment in an area which Congress has entrusted to the agency—of course it must not be set aside because the reviewing court might have made a different determination were it empowered to do so. But if the action is based upon a determination of law as to which the reviewing authority of the courts does come into play, an order may not stand if the agency has misconceived the law. In either event the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained. "The administrative process will best be vindicated by clarity in its exercise." *Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177, 197. What was said in that case is equally applicable here: "We do not intend to enter the province that belongs to the Board, nor do we do so. All we ask of the Board is to give clear indication that it has exercised the discretion with

which Congress has empowered it. This is to affirm most emphatically the authority of the Board." *Ibid.* Compare *United States* v. *Carolina Carriers Corp.*, 315 U. S. 475, 488–90. In finding that the Commission's order cannot be sustained, we are not imposing any trammels on its powers. We are not enforcing formal requirements. We are not suggesting that the Commission must justify its exercise of administrative discretion in any particular manner or with artistic refinement. We are not sticking in the bark of words. We merely hold that an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained.

The cause should therefore be remanded to the Court of Appeals with directions to remand to the Commission for such further proceedings, not inconsistent with this opinion, as may be appropriate.

So ordered.

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

MR. JUSTICE BLACK, with whom MR. JUSTICE REED and MR. JUSTICE MURPHY concur, dissenting.

For reasons set out in the Court's opinion and the dissenting opinion below, I agree that these respondents, officers and directors of the Corporations seeking reorganization, acted in a fiduciary capacity in formulating and managing plans they submitted to the Commission, and that, as fiduciaries, they should be held to a scrupulous observance of their trust. I further agree that Congress conferred on the Commission "broad powers for the protection of the public," investors and consumers; and that the Commission, not the Court, was invested by Congress with authority to determine whether a proposed reorganization or merger would be "fair and equitable," or whether

it would be "detrimental to the public interest or the interest of investors or consumers."

The conclusions of the Court with which I disagree are those in which it holds that while the Securities and Exchange Commission has abundant power to meet the situation presented by the activities of these respondents, it has not done so. This conclusion is apparently based on the premise that the Commission has relied upon the common law rather than on "new standards reflecting the experience gained by it in effectuating legislative policy," and that the common law does not support its conclusion; that the Commission could have promulgated "a general rule of which its order here was a particular application," but instead made merely an ad hoc judgment; and that the Commission made no finding that these practices would prejudice anyone.

The Commission's actual finding was that "The plan of reorganization herein considered, like the previous plans filed with us over the past several years, was formulated by the management of Federal, and discussions concerning the reorganization of this corporation have taken place between the management and the staff of the Commission over the past several years;" that C. T. Chenery purchased 8,618 shares of preferred stock during this period; that other officers and directors of the concerns involved acquired 3,789 shares during the same period; that for this stock these respondent fiduciaries paid $328,346.89 and then submitted their latest reorganization plan, under which this purchased stock would have a book value in the reorganization company of $1,162,431.90. In the light of these and other facts the Commission concluded that the new plan would be "unfair, inequitable, and detrimental, so long as the preferred stock purchased by the management at low prices is to be permitted to share on a parity with other preferred stock." The Commission declined to give "effectiveness" to the proposed plan and entered

"adverse findings" against it under §§ 7(d)(1) and 7(d)(2) of the controlling Act, resting its refusal to approve on this statement: "We find that the provisions for participation by the preferred stock held by the management result in the terms of issuance of the new securities being detrimental to the interests of investors and the plan being unfair and inequitable."

The grounds upon which the Commission made its findings seem clear enough to me. Accepting, as the Court does, the fiduciary relationship of these respondents in managing the Commission proceedings, it follows that their peculiar information as to the stock values under their proposed plan afforded them opportunities for stock purchase profits which other stockholders did not have. While such fiduciaries, they bought preferred stock and then offered a reorganization plan which would give this stock a book value of four times the price they had paid for it. What the Commission has done is to say that no such reward shall be reaped by these fiduciaries. At the same time they are permitted to recover the full purchase price with interest. To permit their reorganization plan to put them in the same position as the old stockholders gives to these fiduciaries an unconscionable profit for trading with inside information.

I can see nothing improper in the Commission's findings and determinations. On the contrary, the rule they evolved appears to me to be a salutary one, adequately supported by cogent reasons and thoroughly consistent with the high standards of conduct which should be required of fiduciaries. That the Commission saw fit to draw support for its own administrative conclusion from decisions of courts should not detract from the validity of its findings. Entrusted as the Commission is with the responsibility of lifting the standard of transactions in the market place in order that the managers of financial ventures may not impose upon the general investing pub-

lic, it seems wholly appropriate that the Commission should have recognized the influence of admonitory language like the following it approvingly quoted from *Meinhard* v. *Salmon,* 249 N. Y. 458, 164 N. E. 545:

"A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. . . . Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd."

The decisions cited by the Commission seem to me to show the soundness of the conclusion it reached. As judges we are entitled to a sense of gratification that the common law has been able to make so substantial a contribution to the development of the administrative law of this field. See e. g. *Pepper* v. *Litton,* 308 U. S. 295; *Michoud* v. *Girod,* 4 How. 503; *Magruder* v. *Drury,* 235 U. S. 106. Of course the Commission is not limited to common law principles in protecting investors and the public, but even if it were so limited the *Magruder* case would in my opinion provide complete support for the position taken by the Commission: "The intention is to provide against any possible selfish interest exercising an influence which can interfere with the faithful discharge of the duty which is owing in a fiduciary capacity. . . . It makes no difference that the estate was not a loser in the transaction or that the commission was no more than the services were reasonably worth." pp. 119, 120. The distinction now seen by the Court between these cases and the instant problem comes to little more than that the fact situations are similar but not identical.

While I consider that the cases on which the Commission relied give full support to the conclusion it reached, I do not suppose, as the Court does, that the Commission's rule is not fully based on Commission experience. The

Commission did not "explicitly disavow" any reliance on what its members had learned in their years of experience, and of course they, as trade experts, made their findings that respondent's practice was "detrimental to the interests of investors" in the light of their knowledge. That they did not unduly parade fact data across the pages of their reports is a commendable saving of effort since they meant merely to announce for their own jurisdiction an obvious rule of honest dealing closely related to common law standards. Of course, the Commission can now change the form of its decision to comply with the Court order. The Court can require the Commission to use more words; but it seems difficult to imagine how more words or different words could further illuminate its purpose or its determination. A judicial requirement of circumstantially detailed findings as the price of court approval can bog the administrative power in a quagmire of minutiae. Hypercritical exactions as to findings can provide a handy but an almost invisible glideway enabling courts to pass "from the narrow confines of law into the more spacious domain of policy." *Phelps Dodge Corp.* v. *Labor Board,* 313 U. S. 177, 194. Here for instance, the Court apparently holds that the Commission has full power to do exactly what it did; but the Court sends the matter back to the Commission to revise the language of its opinion, in order, I suppose, that the Court may reappraise the reasons which moved the Commission to determine that the conduct of these fiduciaries was detrimental to the public and investors. The Act under which the Commission proceeded does not purport to vest us with authority to make such a reappraisal.

That the Commission has chosen to proceed case by case rather than by a general pronouncement does not appear to me to merit criticism. The intimation is that the Commission can act only through general formulae rigidly adhered to. In the first place, the rule of the single case is obviously a general advertisement to the trade,

and in the second place the briefs before us indicate that this is but one of a number of cases in which the Commission is moving to an identical result on a broad front. But aside from these considerations the Act gives the Commission wide powers to evolve policy standards, and this may well be done case by case, as under the Federal Trade Commission Act. *Federal Trade Commission* v. *Keppel & Bro.*, 291 U. S. 304, 310–312.

The whole point of the Commission finding has been lost if it is criticized for a failure to show injury to particular shareholders. The Commission holding is that it should not "undertake to decide case by case whether the management's trading has in fact operated to the detriment of the persons whom it represents," because the "tendency to evil" from this practice is so great that the Commission desires to attach to it a conclusive presumption of impropriety.

The rule the Commission adopted here is appropriate. Protection of investors from insiders was one of the chief reasons which led to adoption of the law which the Commission was selected to administer.[1] That purpose can be greatly retarded by overmeticulous exactions, exactions which require a detailed narration of underlying reasons which prompt the Commission to require high standards of honesty and fairness. I favor approving the rule they applied.

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[1] "Among the most vicious practices unearthed at the hearings before the subcommittee was the flagrant betrayal of their fiduciary duties by directors and officers of corporations who used their positions of trust and the confidential information which came to them in such positions, to aid them in their market activities. Closely allied to this type of abuse was the unscrupulous employment of inside information by large stockholders who, while not directors and officers, exercised sufficient control over the destinies of their companies to enable them to acquire and profit by information not available to others." Report of the Senate Committee on Banking and Currency on Stock Exchange Practices, Report No. 1455, 73d Cong., 2d Sess., p. 55.

JEROME *v.* UNITED STATES.

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

No. 325. Argued January 7, 1943.—Decided February 1, 1943.

In § 2 (a) of the federal Bank Robbery Act, which provides that "whoever shall enter or attempt to enter any bank, or any building used in whole or in part as a bank, with intent to commit in such bank or building, or part thereof, so used, any felony or larceny" shall be subject to the penalty therein prescribed, the word "felony" embraces only offenses which are felonies under federal law and affect banks protected by the Act. P. 108.

130 F. 2d 514, reversed.

CERTIORARI, 317 U. S. 606, to review the affirmance of a conviction for violation of the federal Bank Robbery Act.

Mr. John T. Sapienza for petitioner.

Assistant Attorney General Berge, with whom *Solicitor General Fahy* and *Messrs. Robert S. Erdahl* and *Archibald Cox* were on the brief, for the United States.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Sec. 2 (a) of the Bank Robbery Act (48 Stat. 783, 50 Stat. 749, 12 U. S. C. § 588b) provides in part that "whoever shall enter or attempt to enter any bank,[1] or any building used in whole or in part as a bank, with intent to commit in such bank or building, or part thereof, so used, any felony or larceny, shall be fined not more than $5,000 or impris-

[1] The term "bank" is defined in § 1 of the Act (12 U. S. C. § 588a) to include "any member bank of the Federal Reserve System, and any bank, banking association, trust company, savings bank, or other banking institution organized or operating under the laws of the United States and any insured bank as defined in subsection (c) of Section 12B, of the Federal Reserve Act, as amended."

oned not more than twenty years, or both." Petitioner was indicted under that section for entering a national bank in Vermont with intent to utter a forged promissory note and thereby to defraud the bank. He was convicted after trial before a jury and was sentenced to imprisonment for one year and a day. The utterance of a forged promissory note is a felony under the laws of Vermont (P. L. 1933, § 8485, § 8750) but not under any federal statute. The Circuit Court of Appeals affirmed the conviction by a divided vote, holding that "felony" as used in § 2 (a) includes offenses which are felonies under state law. 130 F. 2d 514. We granted the petition for a writ of certiorari because of the importance of the problem in the administration of justice and because of the diversity of views which have developed as respects the meaning of "felony" in § 2 (a). Compare with the decision below *Hudspeth* v. *Melville,* 127 F. 2d 373; *Hudspeth* v. *Tornello,* 128 F. 2d 172.

Prior to 1934, banks organized or operating under federal law were protected against embezzlement and like offenses by R. S. 5209, 40 Stat. 972, 12 U. S. C. § 592. But such crimes as robbery, burglary, and larceny [2] directed against such banks were punishable only under state law. By 1934 great concern had been expressed over interstate operations by gangsters against banks—activities with which local authorities were frequently unable to cope. H. Rep. No. 1461, 73d Cong., 2d Sess., p. 2. The Attorney General, in response to that concern, recommended legislation embracing certain new federal offenses. S. 2841, 73d Cong., 2d Sess. And see 78 Cong. Rec. 5738. Sec. 3 of that bill made it a federal crime to break into or attempt to break into such banks with intent to commit "any offense defined by this Act, or any felony under any law

[2] To the extent that acts constituting larceny would not also constitute a federal crime under R. S. 5209. See *United States* v. *Northway,* 120 U. S. 327, 335.

of the United States or under any law of the State, District, Territory, or possession" in which the bank was located. Sec. 2 made it an offense to take or attempt to take money or property belonging to or in the possession of such a bank without its consent or with its consent obtained "by any trick, artifice, fraud, or false or fraudulent representation." This bill was reported favorably by the Senate Judiciary Committee (S. Rep. No. 537, 73d Cong., 2d Sess.) and passed the Senate. 78 Cong. Rec. 5738. The House Judiciary Committee, however, struck out § 2, dealing with larceny, and § 3, dealing with burglary. H. Rep. No. 1461, *supra,* p. 1. And the bill was finally enacted without them. But it retained the robbery provision [3] now contained in the first clause of § 2 (a) of the Bank Robbery Act.

In 1937 the Attorney General recommended the enlargement of the Bank Robbery Act "to include larceny and burglary of the banks" protected by it. H. Rep. No. 732, 75th Cong., 1st Sess., p. 1. The fact that the 1934 statute was limited to robbery was said to have produced "some incongruous results—a "striking instance" of which was the case of a man who stole a large sum from a bank but who was not guilty of robbery because he did not display force or violence and did not put any one in fear. *Id.,* pp. 1–2. The bill as introduced (H. R. 5900, 75th Cong., 1st Sess., 81 Cong. Rec. 2731) added to § 2 (a) two new clauses—one defining larceny and the other making it a federal offense to enter or attempt to enter any bank with intent to commit therein "any larceny or other depredation." For reasons not disclosed in the legislative history,

[3] "Whoever, by force and violence, or by putting in fear, feloniously takes, or feloniously attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank shall be fined not more than $5,000 or imprisoned not more than twenty years, or both."

the House Judiciary Committee substituted "any felony or larceny" for "any larceny or other depredation." H. Rep. No. 732, *supra*, p. 2. With that change and with an amendment to the larceny clause [4] distinguishing between grand and petit larceny (81 Cong. Rec. 5376–5377), § 2 (a) was enacted in its present form.

We disagree with the Circuit Court of Appeals. We do not think that "felony" as used in § 2 (a) incorporates state law.

At times it has been inferred from the nature of the problem with which Congress was dealing that the application of a federal statute should be dependent on state law. Examples under federal revenue acts are common. *Douglas* v. *Willcuts*, 296 U. S. 1; *Helvering* v. *Stuart*, 317 U. S. 154, and cases cited. But we must generally assume, in the absence of a plain indication to the contrary, that Congress when it enacts a statute is not making the application of the federal act dependent on state law. That assumption is based on the fact that the application of federal legislation is nationwide (*United States* v. *Pelzer*, 312 U. S. 399, 402) and at times on the fact that the federal program would be impaired if state law were to control. *Seaboard Air Line Ry.* v. *Horton*, 233 U. S. 492, 503. When it comes to federal criminal laws such as the present one, there is a consideration in addition to the desirability of uniformity in application which supports the general principle. Since there is no common law offense against the United States (*United States* v. *Hudson*,

[4] ". . . whoever shall take and carry away, with intent to steal or purloin, any property or money or any other thing of value exceeding $50 belonging to, or in the care, custody, control, management, or possession of any bank, shall be fined not more than $5,000 or imprisoned not more than ten years, or both; or whoever shall take and carry away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $50 belonging to, or in the care, custody, control, management, or possession of any bank, shall be fined not more than $1,000 or imprisoned not more than one year, or both."

7 Cranch 32; *United States* v. *Gradwell,* 243 U. S. 476, 485), the administration of criminal justice under our federal system has rested with the states, except as criminal offenses have been explicitly prescribed by Congress. We should be mindful of that tradition in determining the scope of federal statutes defining offenses which duplicate or build upon state law. In that connection it should be noted that the double jeopardy provision of the Fifth Amendment does not stand as a bar to federal prosecution though a state conviction based on the same acts has already been obtained. See *United States* v. *Lanza,* 260 U. S. 377; *Hebert* v. *Louisiana,* 272 U. S. 312. That consideration gives additional weight to the view that where Congress is creating offenses which duplicate or build upon state law, courts should be reluctant to expand the defined offenses beyond the clear requirements of the terms of the statute.

There is no plain indication in the legislative history of § 2 (a) that Congress used "felony" in a sense sufficiently broad to include state offenses. Though the legislative data are meager, the indications are to the contrary. In the first place, the 1934 bill expressly provided, as we have noted, that state felonies were included in the definition of the new federal offense of burglary. That provision was stricken in the House. The 1934 bill also defined larceny to include larceny by trick or fraud. That provision was likewise eliminated in the House. The 1934 Act was passed without either of them. The 1937 bill did not renew the earlier proposals to include them but substituted "any larceny or other depredation." Larceny, like robbery, is defined in § 2 (a). And "depredation" is not devoid of meaning in such a setting (cf. *Deal* v. *United States,* 274 U. S. 277, 283) apart from any special significance which it may have in local law. It is difficult to conclude in the face of this history that Congress, having rejected in 1934 an express provision making

state felonies federal offenses, reversed itself in 1937, and, through the phrase "any felony or larceny," adopted the penal provisions of forty-eight states with respect to acts committed in national or insured banks. It is likewise difficult to believe that Congress, through the same clause, adopted by indirection in 1937 much of the fraud provision which it rejected in 1934. Cf. *United States* v. *Patton*, 120 F. 2d 73.

In the second place, Congress defined in § 2 (a) robbery, burglary, and larceny but not felony. We can hardly believe that, having defined three federal offenses, it went on in the same section to import by implication a miscellaneous group of state crimes as the definition of the fourth federal offense. In this connection it should be noted that when Congress has desired to incorporate state laws in other federal penal statutes, it has done so by specific reference or adoption.[5] The omission of any such provision in this Act is a strong indication that it had no such purpose here. Cf. *United States* v. *Coppersmith*, 4 F. 198, 207. The Act extends protection to hundreds of banks located in every state. If state laws are incorporated in § 2 (a), Congress has gone far toward putting these banks on a basis somewhat equivalent to "lands reserved or acquired for the use of the United States" as described in § 272 of the Criminal Code, 18 U. S. C. § 451. In such a case all violations of penal laws of the state within which the lands are located become federal offenses. Criminal Code § 289, 18 U. S. C. § 468. Such an expansion of federal criminal jurisdiction should hardly be left to implication and conjecture.

Moreover, the difficulty of giving "felony" in § 2 (a) a state law meaning is emphasized when we turn to the law

[5] See e. g., Act of March 4, 1909, 35 Stat. 1137, 49 Stat. 380, 18 U. S. C. § 392; Act of May 18, 1934, 48 Stat. 782, 18 U. S. C. § 408e; Act of June 11, 1932, 47 Stat. 301, 18 U. S. C. § 662a; Act of February 22, 1935, 49 Stat. 31, 15 U. S. C. § 715b; Act of June 25, 1936, 49 Stat. 1928, 27 U. S. C. § 223.

of such a state as New Jersey. There we find crimes classified as "misdemeanors" and "high misdemeanors." Rev. Stat. (1937) § 2:103–5, § 2:103–6. See *United States* v. *Slutzky,* 79 F. 2d 504, 505. Uttering a promissory note with a forged endorsement is a "high misdemeanor." Rev. Stat. (1937) § 2:132–1b. The inference is strong that if Congress had designed § 2 (a) to include the more serious state offenses committed in or against national or insured banks or only such state offenses as affected those banks (*Hudspeth* v. *Melville, supra,* p. 376), it would have used language which would have afforded that protection in all the states.

Finally, the inclusion of state crimes in the word "felony" neither comports with the scheme of the Act nor is necessary to give the Act meaning and vitality. As we have noted, the purpose of the 1934 Act was to supplement local law enforcement in certain respects. And the 1937 amendments were designed "to include larceny and burglary of the banks protected by this statute." H. Rep. No. 732, *supra,* p. 1. But there is not the slightest indication that the interstate activities of gangsters against national and insured banks had broken down or rendered ineffective enforcement of state laws covering all sorts of felonies. On the contrary, the bill introduced in 1937 was much more selective and revealed no purpose to make a comprehensive classification of all crimes against the banks. Moreover, the run of state felonies—forgery, rape, adultery, and the like—would seem to have little or no relevancy to the need for protection of banks against the wholesale activities of the gangsters of that day. A related objection could of course be made if "felony" as used in § 2 (a) were taken to mean any federal felony so as to bring within the scope of the Bank Robbery Act miscellaneous federal felonies ranging from the sale of narcotics

to white slave traffic.[6] But as indicated by Judge Frank in his dissenting opinion below, § 2 (a) is not deprived of vitality if it is interpreted to exclude state felonies and to include only those federal felonies which affect the banks[7] protected by the Act. That is in our opinion the correct construction.

Reversed.

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[6] It has frequently been held that when a federal statute uses a term which it does not define but which was a common law offense, it will be given its common law meaning. *United States* v. *Palmer,* 3 Wheat. 610, 630; *United States* v. *Smith,* 5 Wheat. 153, 160; *Harrison* v. *United States,* 163 U. S. 140, 142. In this case, however, Congress has not punished an offense by its common law name. Moreover, at common law murder, manslaughter, arson, burglary, robbery, rape, sodomy, mayhem, and larceny were felonies. Wharton, Criminal Law (12th ed.) § 26. And see *Bannon* v. *United States,* 156 U. S. 464, 467. Since those miscellaneous crimes as a group do not suggest on their face that they constitute an appropriate base on which to build a federal criminal code for protection of national and insured banks, we will not readily infer that Congress used the word "felony" in its common law meaning. That conclusion is fortified by the further circumstance that Congress has defined numerous offenses in other federal penal statutes and has classified such offenses as felonies or misdemeanors according to the severity of the punishmeint. Criminal Code § 335, 18 U. S. C. § 541. Hence we need not look elsewhere for the meaning of the term. Cf. *Reagan* v. *United States,* 157 U. S. 301, 303. As stated in *Adams* v. *McCann,* 317 U. S. 269, nt. 2, the term "felony" is a "verbal survival which has been emptied of its historic content." Thus we conclude that the word "felony" as used in § 2 (a) takes its meaning from federal statutes rather than from the common law.

Forgery at common law was a misdemeanor. Wharton, *supra,* § 861.

[7] One such instance would be violation of the National Stolen Property Act, 48 Stat. 794, 53 Stat. 1178, 18 U. S. C. § 413, especially 18 U. S. C. § 416.

Syllabus.

PALMER ET AL., TRUSTEES, *v.* HOFFMAN, ADMINISTRATOR.

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

No. 300. Argued January 7, 8, 1943.—Decided February 1, 1943.

1. A signed statement of a railroad engineer, since deceased, giving his version of a grade crossing accident in which the locomotive he was operating was involved, and made, two days after the accident, when he was interviewed by an official of the company and a representative of a state commission, *held* not made "in the regular course" of business within the meaning of the Act of June 20, 1936, and not admissible as evidence thereunder. P. 111.
2. A ruling of the trial court that if the defendant called for and inspected a signed statement which on cross-examination a witness for the plaintiff stated he had given to the plaintiff's lawyer, the plaintiff would then be entitled to put the statement in evidence, *held* not a ground for reversal in this case, since the document was not marked for identification and is not a part of the record, and this Court is therefore unable to determine whether the contents would have served to impeach the witness. P. 116.
3. Rule 8 (c) of the Rules of Civil Procedure does not make contributory negligence an affirmative defense, but relates only to the manner of pleading. P. 117.
4. The question of the burden of establishing contributory negligence is a question of local law which federal courts in diversity of citizenship cases must apply. P. 117.
5. The ruling of a lower federal court upon a question of local law will not here be set aside except on a plain showing of error. P. 118.
6. In a suit in a federal court in New York, in which two of the causes of action were based on a Massachusetts statute and two were based on the common law, the court charged the jury that the burden of proving contributory negligence was on the defendants. The defendants' exception to the charge did not differentiate between the causes of action based on the statute and those based on the common law. Again without differentiating between the statutory and the common law causes of action, the defendants requested a charge that the burden was on the plaintiff to establish freedom from contributory negligence. In this situation, this Court, assuming that the charge so far as the common law counts are concerned was

erroneous, but being unable to say that the charge was incorrect so far as the statutory causes of action are concerned, does not reverse and remand the cause. P. 119.

7. Where a party might have obtained a correct charge to the jury by specifically calling the attention of the trial court to the error and where a part of the charge was correct, he may not through a general exception obtain a new trial. P. 119.

129 F. 2d 976, affirmed.

CERTIORARI, 317 U. S. 611, to review the affirmance of a judgment against the petitioners in an action for damages on account of injury and death alleged to have been due to negligence. The jurisdiction of the federal court was invoked on the ground of diversity of citizenship.

Mr. Edward R. Brumley for petitioners.

Mr. William Paul Allen, with whom *Mr. Benjamin Diamond* was on the brief, for respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This case arose out of a grade crossing accident which occurred in Massachusetts. Diversity of citizenship brought it to the federal District Court in New York. There were several causes of action. The first two were on behalf of respondent individually, one being brought under a Massachusetts statute (Mass. Gen. L. (1932) c. 160, §§ 138, 232), the other at common law. The third and fourth were brought by respondent as administrator of the estate of his wife and alleged the same common law and statutory negligence as the first two counts. On the question of negligence the trial court submitted three issues to the jury—failure to ring a bell, to blow a whistle, to have a light burning in the front of the train. The jury returned a verdict in favor of respondent individually for some $25,000 and in favor of respondent as administrator for $9,000. The District Court entered judgment on the

verdict. The Circuit Court of Appeals affirmed, one judge dissenting. 129 F. 2d 976. The case is here on a petition for a writ of certiorari which presents three points.

I. The accident occurred on the night of December 25, 1940. On December 27, 1940, the engineer of the train, who died before the trial, made a statement at a freight office of petitioners where he was interviewed by an assistant superintendent of the road and by a representative of the Massachusetts Public Utilities Commission. See Mass. Gen. L. (1932) c. 159, § 29. This statement was offered in evidence by petitioners under the Act of June 20, 1936, 49 Stat. 1561, 28 U. S. C. § 695.[1] They offered to prove (in the language of the Act) that the statement was signed in the regular course of business, it being the regular course of such business to make such a statement. Respondent's objection to its introduction was sustained.

We agree with the majority view below that it was properly excluded.

We may assume that if the statement was made "in the regular course" of business, it would satisfy the other provisions of the Act. But we do not think that it was made "in the regular course" of business within the meaning of the Act. The business of the petitioners is the railroad business. That business like other enterprises

[1] "In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of said act, transaction, occurrence, or event, if it shall appear that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term 'business' shall include business, profession, occupation, and calling of every kind."

entails the keeping of numerous books and records essential to its conduct or useful in its efficient operation. Though such books and records were considered reliable and trustworthy for major decisions in the industrial and business world, their use in litigation was greatly circumscribed or hedged about by the hearsay rule—restrictions which greatly increased the time and cost of making the proof where those who made the records were numerous.[2] 5 Wigmore, Evidence (3d ed., 1940) § 1530. It was that problem which started the movement towards adoption of legislation embodying the principles of the present Act. See Morgan et al., The Law of Evidence, Some Proposals for its Reform (1927) c. V. And the legislative history of the Act indicates the same purpose.[3]

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[2] The problem was well stated by Judge Learned Hand in *Massachusetts Bonding & Ins. Co.* v. *Norwich Pharmacal Co.*, 18 F. 2d 934, 937: "The routine of modern affairs, mercantile, financial and industrial, is conducted with so extreme a division of labor that the transactions cannot be proved at first hand without the concurrence of persons, each of whom can contribute no more than a slight part, and that part not dependent on his memory of the event. Records, and records alone, are their adequate repository, and are in practice accepted as accurate upon the faith of the routine itself, and of the self-consistency of their contents. Unless they can be used in court without the task of calling those who at all stages had a part in the transactions recorded, nobody need ever pay a debt, if only his creditor does a large enough business."

[3] Thus the report of the Senate Committee on the Judiciary incorporates the recommendation of the Attorney General who stated in support of the legislation, "The old common-law rule requires that every book entry be identified by the person making it. This is exceedingly difficult, if not impossible, in the case of an institution employing a large bookkeeping staff, particularly when the entries are made by machine. In a recent criminal case the Government was prevented from making out a prima-facie case by a ruling that entries in the books of a bank, made in the regular course of business, were not admissible in evidence unless the specific bookkeeper who made the

The engineer's statement which was held inadmissible in this case falls into quite a different category.[4] It is not a record made for the systematic conduct of the business as a business. An accident report may affect that business in the sense that it affords information on which the management may act. It is not, however, typical of entries made systematically or as a matter of routine to record events or occurrences, to reflect transactions with others, or to provide internal controls. The conduct of a business commonly entails the payment of tort claims incurred by the negligence of its employees. But the fact that a company makes a business out of recording its employees' versions of their accidents does not put those statements in the class of records made "in the regular course" of the business within the meaning of the Act. If it did, then any law office in the land could follow the same course, since business as defined in the Act includes the professions. We would then have a real perversion of a rule designed to facilitate admission of records which experience has shown to be quite trustworthy. Any business by installing a regular system for recording and preserving its version of accidents for which it was potentially liable could qualify those reports under the Act. The result would be that the Act would cover any system of recording events or occurrences provided it was "regular" and though it had little or nothing to do with the management or operation of the business as such. Preparation of cases for trial by virtue of being a "business" or incidental thereto would obtain the benefits of this liberalized version of the early shop book rule. The probability of

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entry could identify it. Since the bank employed 18 bookkeepers, and the entries were made by bookkeeping machines, this was impossible." S. Rep. No. 1965, 74th Cong., 2d Sess., pp. 1–2.

[4] It is clear that it does not come within the exceptions as to declarations by a deceased witness. See *Shepard* v. *United States*, 290 U. S. 96; Wigmore, *supra*, chs. XLIX–LIV.

trustworthiness of records because they were routine reflections of the day to day operations of a business would be forgotten as the basis of the rule. See *Conner* v. *Seattle, R. & S. Ry. Co.*, 56 Wash. 310, 312–313, 105 P. 634. Regularity of preparation would become the test rather than the character of the records and their earmarks of reliability (*Chesapeake & Delaware Canal Co.* v. *United States*, 250 U. S. 123, 128–129) acquired from their source and origin and the nature of their compilation. We cannot so completely empty the words of the Act of their historic meaning. If the Act is to be extended to apply not only to a "regular course" of a business but also to any "regular course" of conduct which may have some relationship to business, Congress not this Court must extend it. Such a major change which opens wide the door to avoidance of cross-examination should not be left to implication. Nor is it any answer to say that Congress has provided in the Act that the various circumstances of the making of the record should affect its weight, not its admissibility. That provision comes into play only in case the other requirements of the Act are met.

In short, it is manifest that in this case those reports are not for the systematic conduct of the enterprise as a railroad business. Unlike payrolls, accounts receivable, accounts payable, bills of lading and the like, these reports are calculated for use essentially in the court, not in the business. Their primary utility is in litigating, not in railroading.

It is, of course, not for us to take these reports out of the Act if Congress has put them in. But there is nothing in the background of the law on which this Act was built or in its legislative history which suggests for a moment that the business of preparing cases for trial should be included. In this connection it should be noted that the Act of May 6, 1910, 36 Stat. 350, 45 U. S. C. § 38, requires officers of common carriers by rail to make under oath

monthly reports of railroad accidents to the Interstate Commerce Commission, setting forth the nature and causes of the accidents and the circumstances connected therewith. And the same Act (45 U. S. C. § 40) gives the Commission authority to investigate and to make reports upon such accidents. It is provided, however, that "Neither the report required by section 38 of this title nor any report of the investigation provided for in section 40 of this title nor any part thereof shall be admitted as evidence or used for any purpose in any suit or action for damages growing out of any matter mentioned in said report or investigation." 45 U. S. C. § 41. A similar provision (36 Stat. 916, 54 Stat. 148, 45 U. S. C. § 33) bars the use in litigation of reports concerning accidents resulting from the failure of a locomotive boiler or its appurtenances. 45 U. S. C. §§ 32, 33. That legislation reveals an explicit Congressional policy to rule out reports of accidents which certainly have as great a claim to objectivity as the statement sought to be admitted in the present case. We can hardly suppose that Congress modified or qualified by implication these long standing statutes when it permitted records made "in the regular course" of business to be introduced. Nor can we assume that Congress having expressly prohibited the use of the company's reports on its accidents impliedly altered that policy when it came to reports by its employees to their superiors. The inference is wholly the other way.

The several hundred years of history behind the Act (Wigmore, *supra*, §§ 1517–1520) indicate the nature of the reforms which it was designed to effect. It should of course be liberally interpreted so as to do away with the anachronistic rules which gave rise to its need and at which it was aimed. But "regular course" of business must find its meaning in the inherent nature of the business in question and in the methods systematically employed for the conduct of the business as a business.

II. One of respondent's witnesses testified on cross-examination that he had given a signed statement to one of respondent's lawyers. Counsel for petitioners asked to see it. The court ruled that if he called for and inspected the document, the door would be opened for respondent to offer the statement in evidence, in which case the court would admit it. See *Edison Electric Light Co.* v. *U. S. Electric Lighting Co.*, 45 F. 55, 59. Counsel for petitioners declined to inspect the statement and took an exception. Petitioners contend that that ruling was reversible error in light of Rule 26 (b) and Rule 34 of the Rules of Civil Procedure. We do not reach that question. Since the document was not marked for identification and is not a part of the record, we do not know what its contents are. It is therefore impossible, as stated by the court below, to determine whether the statement contained remarks which might serve to impeach the witness. Accordingly, we cannot say that the ruling was prejudicial even if we assume it was erroneous. Mere "technical errors" which do not "affect the substantial rights of the parties" are not sufficient to set aside a jury verdict in an appellate court. 40 Stat. 1181, 28 U. S. C. § 391. He who seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted. That burden has not been maintained by petitioners.

III. The final question presented by this case relates to the burden of proving contributory negligence. As we have noted, two of the causes of action were based on the common law and two on a Massachusetts statute. The court, without distinguishing between them, charged that petitioners had the burden of proving contributory negligence. To this petitioners excepted, likewise without distinguishing between the different causes of action. And again without making any such distinction, peti-

tioners requested the court to charge that the burden was on respondent. This was refused and an exception noted.

Respondent contends, in the first place, that the charge was correct because of the fact that Rule 8 (c) of the Rules of Civil Procedure makes contributory negligence an affirmative defense. We do not agree. Rule 8 (c) covers only the manner of pleading. The question of the burden of establishing contributory negligence is a question of local law which federal courts in diversity of citizenship cases (*Erie R. Co.* v. *Tompkins,* 304 U. S. 64) must apply. *Cities Service Oil Co.* v. *Dunlap,* 308 U. S. 208; *Sampson* v. *Channell,* 110 F. 2d 754. And see *Central Vermont Ry. Co.* v. *White,* 238 U. S. 507, 512.

Secondly, respondent contends that the courts below applied the rule of conflict of laws which obtains in New York. So far as the causes of action based on the Massachusetts statute are concerned, we will not disturb the holding below that as a matter of New York conflict of laws which the trial court was bound to apply (*Klaxon Co.* v. *Stentor Co.,* 313 U. S. 487) petitioners had the burden of proving contributory negligence. That ruling was based on *Fitzpatrick* v. *International Ry. Co.,* 252 N. Y. 127, 169 N. E. 112, which involved an action brought in New York under a statute of the Province of Ontario. That statute gave a plaintiff in a negligence action, though guilty of contributory negligence, a recovery if the defendant was more negligent, the damages being proportioned to the degree of fault imputable to the defendant. The New York Court of Appeals held that the New York courts were justified in applying the Ontario rule, growing out of the statute, that the burden was on the defendant to show contributory negligence. The Massachusetts statute on which two of the present causes of action were founded makes a railroad corporation liable for its neglect in giving certain signals. It provides that tort damages for injuries or death from collisions at crossings may be

recovered where such neglect "contributed" to the injury, "unless it is shown that, in addition to a mere want of ordinary care, the person injured . . . was, at the time of the collision, guilty of gross or wilful negligence, or was acting in violation of the law, and that such gross or wilful negligence or unlawful act contributed to the injury." Mass. Gen. L. (1932) c. 160, § 2342. That statute, like the Ontario statute, creates rights not recognized at common law. *Brooks* v. *Fitchburg & L. St. Ry. Co.,* 200 Mass. 8, 86 N. E. 289; *Duggan* v. *Bay State Street Ry. Co.,* 230 Mass. 370, 381–382, 119 N. E. 757; *Sullivan* v. *Hustis,* 237 Mass. 441, 446, 130 N. E. 247; *Lewis* v. *Boston & Maine Railroad,* 263 Mass. 87, 91, 160 N. E. 663. And in actions under it the burden of proving contributory neglicence is on the defendant. *Manley* v. *Boston & Maine Railroad,* 159 Mass. 493, 34 N. E. 951; *Phelps* v. *New England R. Co.,* 172 Mass. 98, 51 N. E. 522; *McDonald* v. *New York C. & H. R. R. Co.,* 186 Mass. 474, 72 N. E. 55; *Kenny* v. *Boston & Maine Railroad,* 188 Mass. 127, 74 N. E. 309. And see Mass. Gen. L. (1932) c. 231, § 85. Moreover, the measure of damages for death is "the sum of not less than five hundred nor more than ten thousand dollars, to be assessed with reference to the degree of culpability of the" railroad. Mass. Gen. L. (1932) c. 229, § 3. We are referred to no New York decision involving the point. The propriety of applying the rule of the *Fitzpatrick* case to the causes of action based on the Massachusetts statute may be arguable. But it is not the type of ruling under *Erie R. Co.* v. *Tompkins, supra,* which we will readily disturb. Where the lower federal courts are applying local law, we will not set aside their ruling except on a plain showing of error.

The question which is raised on the common law counts is more serious. The court below did not distinguish between the conflict of laws rule in a case like the *Fitzpatrick* case and the rule which apparently obtains in cases where

the foreign cause of action is not founded on such a statute. It was intimated in the *Fitzpatrick* case (252 N. Y. p. 135) and stated in other cases in New York's intermediate appellate courts (*Wright* v. *Palmison,* 237 App. Div. 22, 260 N. Y. S. 812; *Clark* v. *Harnischfeger Sales Corp.,* 238 App. Div. 493, 495, 264 N. Y. S. 873) that in the latter situation the burden of proving freedom from contributory negligence is on the plaintiff. *Fitzpatrick* v. *International Ry. Co., supra,* p. 134. But we do not reverse and remand the case to the court below so that it may examine and make an appropriate application of the New York law on the common law counts, for the following reason: As we have noted, petitioners in their exceptions to the charge given and in the requested charge did not differentiate between the causes of action based on the Massachusetts statute and those on the common law. Even if we assume that the charge on the latter was erroneous, we cannot say that the charge was incorrect so far as the statutory causes of action were concerned. Likewise we must assume that it would have been error to give the requested charge on the statutory causes of action even though we accept it as the correct charge on the others. Under these facts a general exception is not sufficient. In fairness to the trial court and to the parties, objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error. Where a party might have obtained the correct charge by specifically calling the attention of the trial court to the error and where part of the charge was correct, he may not through a general exception obtain a new trial. See *Lincoln* v. *Claflin,* 7 Wall. 132, 139; *Beaver* v. *Taylor,* 93 U. S. 46, 54–55; *Mobile & Montgomery Ry. Co.* v. *Jurey,* 111 U. S. 584, 596; *McDermott* v. *Severe,* 202 U. S. 600, 611; *Norfolk & W. Ry. Co.* v. *Earnest,* 229 U. S. 114, 122; *Pennsylvania R. Co.* v. *Minds,* 250 U. S. 368, 375. That long standing rule of federal practice is as applicable in this

type of case as in others. That rule cannot be avoided here by reason of the requested charge. For, as we have said, it was at most only partially correct and was not sufficiently discriminating.

Affirmed.

UNITED STATES *v.* BROOKS-CALLAWAY CO.

CERTIORARI TO THE COURT OF CLAIMS.

No. 366. Argued January 4, 1943.—Decided February 1, 1943.

Under the proviso to Article 9 of the Standard Form of Government Construction Contract, which provides that the contractor shall not be charged with liquidated damages because of delays due to unforeseeable causes, including floods, the remission of liquidated damages is not warranted where the "flood" was not unforeseeable but was due to conditions normally to be expected. P. 122.

97 Ct. Cls. 689, reversed.

CERTIORARI, 317 U. S. 615, to review a judgment against the United States in a suit upon a contract.

Mr. Valentine Brookes, with whom *Solicitor General Fahy* and *Assistant Attorney General Shea* were on the brief, for the United States.

Mr. George R. Shields, with whom *Messrs. Herman J. Galloway, John W. Gaskins,* and *Frederick W. Shields* were on the brief, for respondent.

MR. JUSTICE MURPHY delivered the opinion of the Court.

We are asked to decide whether the proviso to Article 9 of the Standard Form of Government Construction Contract,[1] which provides that a contractor shall not be

[1] In general, Article 9 gives the Government the option of terminating the contractor's right to proceed, or of allowing him to proceed

charged with liquidated damages because of delays due to unforeseeable causes beyond the control and without the fault of the contractor, including floods, requires the remission of liquidated damages for delay caused by high water found to have been customary and foreseeable by the contracting officer.

Respondent brought this suit in the Court of Claims to recover the sum of $3,900 which was deducted from the contract price as liquidated damages for delay in the completion of a contract for the construction of levees on the Mississippi River. The contract was not completed until 290 days after the date set, and liquidated damages in the amount of $5,800 (figured at the contract rate of $20 for each day of delay) were originally assessed. Respondent protested, and upon consideration the contracting officer found that respondent had been delayed a total of 278 days by high water, 183 days of which were due to conditions normally to be expected and 95 of which were unforeseeable. He recommended that liquidated damages in the amount of $1,900 (representing 95 days of unforeseeable delay at $20 per day) be remitted and that the balance of $3,900 be retained. Payment was made on this basis.[2]

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subject to liquidated damages if he fails to proceed with diligence or to complete the work in time. The full text of the proviso is:

". . . *Provided,* That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes: . . ."

[2] The contracting officer found that the remaining delay of 12 days (the difference between the total delay of 290 days and the 278 days due to high water) was not excusable, as claimed by respondent, on account of the Government's failure to secure a necessary right of way, or on account of the requirement by the contracting officer that re-

The Court of Claims held that liquidated damages should not have been assessed for any of the 278 days of delay caused by high water because the high water was a "flood" and under the proviso all floods were unforeseeable *per se*. Accordingly, it gave judgment in respondent's favor in the sum of $3,660.[3] No findings were made as to whether any of the high water was in fact foreseeable. We granted certiorari because the case presents an important question in the interpretation of the Standard Form of Government Construction Contract.

We believe that the construction adopted below is contrary to the purpose and sense of the proviso and may easily produce unreasonable results. The purpose of the proviso is to remove uncertainty and needless litigation by defining with some particularity the otherwise hazy area of unforeseeable events which might excuse nonperformance within the contract period. Thus contractors know they are not to be penalized for unexpected impediments to prompt performance, and, since their bids can be based on foreseeable and probable, rather than possible hindrances, the Government secures the benefit of lower bids and an enlarged selection of bidders.

To avoid a narrow construction of the term, "unforeseeable causes," limiting it perhaps to acts of God, the proviso sets forth some illustrations of unforeseeable interferences. These it describes as "including, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather, or delays of subcontractors due to such causes." The purpose of the proviso to protect the contractor against the unexpected, and its grammatical sense, both

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spondent build a tie-in levee. On these points the court below sustained the conclusions of the contracting officer. Respondent has not appealed and this phase of the case is not before us.

[3] 97 Ct. Cls. 689.

militate against holding that the listed events are always to be regarded as unforeseeable, no matter what the attendant circumstances are. Rather, the adjective "unforeseeable" must modify each event set out in the "including" phrase. Otherwise, absurd results are produced, as was well pointed out by Judge Madden, dissenting below:

". . . Not every fire or quarantine or strike or freight embargo should be an excuse for delay under the proviso. The contract might be one to excavate for a building in an area where a coal mine had been on fire for years, well known to everybody, including the contractor, and where a large element of the contract price was attributable to this known difficulty. A quarantine, or freight embargo, may have been in effect for many years as a permanent policy of the controlling government. A strike may be an old and chronic one whose settlement within an early period is not expected. In any of these situations there would be no possible reason why the contractor, who of course anticipated these obstacles in his estimate of time and cost, should have his time extended because of them.

"The same is true of high water or 'floods.' The normally expected high water in a stream over the course of a year, being foreseeable, is not an 'unforeseeable' cause of delay. Here plaintiff's vice-president testified that in making its bid plaintiff took into consideration the fact that there would be high water and that when there was, work on the levee would stop. . . ." [4]

A logical application of the decision below would even excuse delays from the causes listed although they were within the control, or caused by the fault of the contractor, and this despite the proviso's requirement that the events be "beyond the control and without the fault or negli-

[4] 97 Ct. Cls. 701, 702.

gence of the contractor." If fire is always an excuse, a contractor is free to use inflammable materials in a tinderbox factory and escape any damages for delay due to a resulting fire. Any contractor could shut his eyes to the extremest probability that any of the listed events might occur, submit a low bid, and then take his own good time to finish the work free of the compulsion of mounting damages, thus making the time fixed for completion practically meaningless and depriving the Government of all recompense for the delay.

We intimate no opinion on whether the high water amounted to a "flood" within the meaning of the proviso. Whether high water or flood, the sense of the proviso requires it to be unforeseeable before remission of liquidated damages for delay is warranted. The contracting officer found that 183 days of delay caused by high water were due to conditions normally to be expected. No appeal appears to have been taken from his decision to the head of the department, and it is not clear whether his findings were communicated to respondent so that it might have appealed. The Court of Claims did not determine whether respondent was concluded by the findings of the contracting officer under the second proviso to Article 9,[5] and not having made this threshold determination, of course made no findings itself as to foreseeability. We think these matters should be determined in the first instance by the Court of Claims. Accordingly

[5] The second proviso to Article 9 immediately follows the unforeseeability proviso and states:

"*Provided further,* That the contractor shall within ten days from the beginning of any such delay notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay, and his findings of facts thereon shall be final and conclusive on the parties thereto, subject only to appeal, within thirty days, by the contractor to the head of the department concerned, whose decision on such appeal as to the facts of delay shall be final and conclusive on the parties hereto."

the judgment is reversed and the cause remanded with instructions to determine whether respondent is concluded by the findings of the contracting officer, and, if not, for a finding by the court whether the 183 days of high water or any part of that time were in fact foreseeable.

Reversed.

OVERSTREET ET AL. *v.* NORTH SHORE CORPORATION.

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

No. 284. Argued January 11, 1943.—Decided February 1, 1943.

1. The Fair Labor Standards Act is applicable to employees who are engaged in interstate commerce, but not to those whose activities merely affect interstate commerce. P. 128.
2. The Fair Labor Standards Act is applicable to employees (of a private corporation) who are engaged in the operation and maintenance of a drawbridge which is part of a toll road used extensively by persons and vehicles traveling in interstate commerce, and which spans an intercoastal waterway used in interstate commerce. P. 130.

   So *held* as to one employee who attended to the raising and lowering of the bridge; another who was engaged in the maintenance and repair of the bridge; and a third who collected tolls from users of the road and bridge.
3. The applicability of the Fair Labor Standards Act does not depend upon the nature of the employer's business, but upon the character of the employees' activities. P. 132.
4. That a corporation which owns and operates a toll road and drawbridge is subject to state taxation does not imply that it is free from federal regulation or that its road and drawbridge are not instrumentalities of interstate commerce. P. 132.

128 F. 2d 450, reversed.

CERTIORARI, 317 U. S. 606, to review the affirmance of a judgment (43 F. Supp. 445) dismissing, as to the petitioners here, a complaint in an action for wages, overtime, and damages under the Fair Labor Standards Act.

Mr. Lucien H. Boggs for petitioners.

By special leave of Court, *Assistant Attorney General Shea* argued the cause (*Solicitor General Fahy* and *Messrs. Irving J. Levy* and *Peter Seitz* were on the brief) for the Administrator of the Wage and Hour Division, U. S. Department of Labor, as *amicus curiae*.

Mr. Roswell P. C. May, with whom *Mr. W. Gregory Smith* was on the brief, for respondent.

Mr. Harry J. Gerrity filed a brief on behalf of the American Toll Bridge Association et al., as *amici curiae*, urging affirmance.

MR. JUSTICE MURPHY delivered the opinion of the Court.

This is another case in which we must define the scope of the Fair Labor Standards Act.[1] 52 Stat. 1060, 29 U. S. C. §§ 201 *et seq.* The precise question is whether petitioners, who are engaged in maintaining or operating a toll road and a drawbridge over a navigable waterway which together constitute a medium for the interstate movement of goods and persons, are "engaged in commerce" within the meaning of §§ 6 and 7 of the Act.[2]

Petitioners, together with others not parties to this petition, brought this action against respondent and a subsidiary under § 16 (b) of the Act for the recovery of unpaid minimum wages, overtime compensation, and liquidated damages. Respondent moved to dismiss as to all the plaintiffs, and the motion as to petitioners was

[1] Compare *Kirschbaum Co.* v. *Walling*, 316 U. S. 517; *Warren-Bradshaw Drilling Co.* v. *Hall*, 317 U. S. 88; *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564; *Higgins* v. *Carr Brothers Co.*, 317 U. S. 572.

[2] 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."

granted by the district court, leave to amend being given to the other complainants who are not before us. 43 F. Supp. 445. Petitioners appealed to the Circuit Court of Appeals which affirmed the order of dismissal. 128 F. 2d 450. The important question raised as to the coverage of the Act caused us to grant certiorari.

The relevant facts alleged in the complaint as amended, which are to be taken as true for purposes of the motion to dismiss, may be summarized as follows:

Respondent owns and operates a toll road and a drawbridge which is part of the road. The toll road connects United States Highway No. 17, an interstate arterial Highway, with Fort George Island, which lies off the northern coast of Florida, being separated from the mainland by the Intercoastal Waterway. The toll road crosses the Waterway at Sisters' Creek by means of the drawbridge, which must be raised frequently to permit the passage of boats engaged in interstate commerce. The toll road constitutes an integral part of the highway system of the United States and provides the only means of land communication between Fort George Island and the Florida mainland. It is used extensively by persons and vehicles traveling between the island and points outside Florida in interstate commerce. Mail to and from other States, as well as goods produced outside Florida and consigned to merchants on the island, are transported over the toll road. Each of the petitioners was employed by respondent in connection with the operation of the toll road and drawbridge. Overstreet operated the drawbridge, raising it for the passage of boats through Sisters' Creek and lowering it for the resumption of traffic over the road; Brazle was engaged in maintenance and repair work on the road and the bridge; and Garvin sold and collected toll tickets from "vehicles using said toll road in interstate commerce." Petitioners received neither the

minimum wages nor the overtime compensation prescribed by §§ 6 and 7 of the Act.

We think these allegations bring petitioners within the coverage of the Act and entitle them to recover if proved.

Our starting point is respondent's concession that no question of constitutional power is involved, but only the ascertainment of Congressional intent, that is, did Congress mean to include employees such as petitioners within the Act. In arriving at that intent it must be remembered that Congress did not choose to exert its power to the full by regulating industries and occupations which affect interstate commerce. See *Kirschbaum Co.* v. *Walling,* 316 U. S. 517, 522–23; *Walling* v. *Jacksonville Paper Co.,* 317 U. S. 564. Respondent contends that petitioners are in this category, that their activities are local and at most only affect commerce. But the policy of Congressional abnegation with respect to occupations affecting commerce is no reason for narrowly circumscribing the phrase "engaged in commerce." We said in the *Jacksonville Paper Co.* case, *supra,* "It is clear that the purpose of the Act was to extend federal control in this field throughout the farthest reaches of the channels of interstate commerce." And in determining what constitutes "commerce" or "engaged in commerce" we are guided by practical considerations. *Jacksonville Paper Co.* case, *supra,* and see also *Shanks* v. *Delaware, L. & W. R. Co.,* 239 U. S. 556, 558, dealing with what will shortly be pointed out as a similar question in the coverage of the Federal Employers' Liability Act.

A practical test of what "engaged in interstate commerce" means has been evolved in cases arising under the Federal Employers' Liability Act (45 U. S. C. §§ 51 *et seq.*) which, before the 1939 amendment (see 53 Stat. 1404), applied only where injury was suffered while the carrier was engaging in interstate or foreign commerce and

the injured employee was employed by the carrier "in such commerce." 35 Stat. 65. In determining the reach of that phrase, the case of *Pedersen* v. *Delaware, L. & W. R. Co.*, 229 U. S. 146, held that an employee who was injured while carrying bolts to be used in repairing a railroad bridge over which interstate trains passed was engaged in interstate commerce within the meaning of the Liability Act. It was pointed out that tracks and bridges were indispensable to interstate commerce and "that the work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it." *Id.* at p. 151. See also *Philadelphia, B. & W. R. Co.* v. *Smith*, 250 U. S. 101; *Southern Ry. Co.* v. *Puckett*, 244 U. S. 571; *New York Cent. R. Co.* v. *Porter*, 249 U. S. 168; *Kinzell* v. *Chicago, M. & St. P. Ry. Co.*, 250 U. S. 130; *Southern Pacific Co.* v. *Industrial Accident Comm'n*, 251 U. S. 259; *Philadelphia & Reading Ry. Co.* v. *Di Donato*, 256 U. S. 327; *Rader* v. *Baltimore & Ohio R. Co.*, 108 F. 2d 980. Compare *Shanks* v. *Delaware, L. & W. R. Co.*, 239 U. S. 556; *Chicago & North Western Ry. Co.* v. *Bolle*, 284 U. S. 74; *Chicago & Eastern Illinois R. Co.* v. *Commission*, 284 U. S. 296.

We think that practical test should govern here.[3] Vehicular roads and bridges are as indispensable to the interstate movement of persons and goods as railroad tracks and bridges are to interstate transportation by rail. If they are used by persons and goods passing between the various States, they are instrumentalities of interstate

[3] This has been the administrative interpretation. See Interpretative Bulletin No. 5 of the Wage and Hour Division of the Department of Labor, issued in November, 1939, at p. 7. This is set forth in the 1941 Edition of the Wage and Hour Manual at p. 34. See also p. 54.

Compare the dissenting opinion in *Pedersen* v. *Fitzgerald Construction Co.*, 262 App. Div. 665, 668, 30 N. Y. S. 2d 989, affirmed without opinion, 288 N. Y. 211, 687, 43 N. E. 2d 83.

commerce. Cf. *Covington & Cincinnati Bridge Co.* v. *Kentucky,* 154 U. S. 204, 218. Those persons who are engaged in maintaining and repairing such facilities should be considered as "engaged in commerce" even as was the bolt-carrying employee in the *Pedersen* case, *supra,* because without their services these instrumentalities would not be open to the passage of goods and persons across state lines. And the same is true of operational employees whose work is just as closely related to the interstate movement. Of course, all this is subject to the qualification that the Act does not consider as an employer the United States or any State or political subdivision of a State, and hence does not apply to their employees. § 3 (d).

The allegations of petitioners' complaint satisfy this practical test. The road and bridge allegedly afford passage to an extensive movement of goods and persons between Florida and other States, and moreover the drawbridge presents an obstacle to interstate traffic by water over the Intercoastal Waterway if not properly operated. The operational and maintenance activities of petitioners are vital to the proper functioning of these structures as instrumentalities of interstate commerce. The services of Overstreet are necessary to prevent the drawbridge from being either a barrier to interstate navigation or else a gap in the vehicular way. Without the services of Brazle the facilities would fall into disrepair, and both operation and maintenance would seem to depend upon Garvin's collecting the toll from users of the structures. The work of each petitioner in providing a means of interstate transportation and communication is so intimately related to interstate commerce "as to be in practice and in legal contemplation a part of it" (*Pedersen's* case, *supra*) and justifies regarding petitioners as "engaged in commerce" within the meaning of the Fair Labor Standards Act.

Respondent resists the application of the test of the *Pedersen* and related cases, cited above, pointing out that there may be pitfalls in translating implications from the special aspects of one statute to another (see *Federal Trade Comm'n* v. *Bunte Bros.*, 312 U. S. 349, 353), and claiming that significant differences exist between the Federal Employers' Liability Act and the Fair Labor Standards Act. The outstanding difference asserted is that a railroad company is actually engaged in commerce as a carrier of goods and persons, and since it is difficult to consider the business other than as a whole and to separate maintenance from transportation employees, there is good reason for treating maintenance employees as engaged in commerce. (Compare the *Pedersen* case, *supra*, at pp. 151-152.) As regards itself respondent says that it is not engaged in commerce, but only in providing facilities which those carrying on commerce may use, and therefore there is no sound basis for treating its maintenance and operational employees as engaged in commerce—rather they only affect commerce. Reliance is placed upon *Henderson Bridge Co.* v. *Kentucky*, 166 U. S. 150, and *Detroit Bridge Co.* v. *Tax Board*, 294 U. S. 83, where in sustaining the power of the States of Kentucky and Michigan, respectively, to tax the franchise of domestic corporations operating bridges between Kentucky and Indiana and between Michigan and Canada, it was said that the respective bridge companies were not engaged in interstate or foreign commerce. We do not regard these objections as well taken.

The Federal Employers' Liability Act and the Fair Labor Standards Act are not strictly analogous, but they are similar. Both are aimed at protecting commerce from injury through adjustment of the master-servant relationship, the one by liberalizing the common law rules pertaining to negligence and the other by eliminating substandard working conditions. We see no persuasive rea-

son why the scope of employed or engaged "in commerce" laid down in the *Pedersen* and related cases, cited above, should not be applied to the similar language in the Fair Labor Standards Act, especially when Congress in adopting the phrase "engaged in commerce" had those Federal Employers' Liability Act cases brought to its attention.[4]

The *Henderson* and *Detroit* bridge cases, *supra*, do not affect our conclusion. We have pointed out that decisions such as those, dealing with various assertions of state or federal power in the commerce field, are not particularly helpful in determining the scope of the Act. *Kirschbaum Co.* v. *Walling, supra*, pp. 520–21; *Walling* v. *Jacksonville Paper Co., supra.* But even if we accept the premise of the *Bridge* cases and regard respondent as not engaged in commerce, the result is not changed. The nature of the employer's business is not determinative, because as we have repeatedly said, the application of the Act depends upon the character of the employees' activities. *Kirschbaum Co.* v. *Walling, supra*, p. 524; *Warren-Bradshaw Drilling Co.* v. *Hall*, 317 U. S. 88; *Walling* v. *Jacksonville Paper Co., supra.* The fact that respondent may be subject to state taxation does not imply that it is free from federal regulation or that its road and drawbridge are not instrumentalities of interstate commerce. Petitioners, who are engaged in operating and maintaining respondent's facilities so that there may be interstate passage of persons and goods over them, are so closely related to that interstate movement as a practical matter that we think they must be regarded, under the allegations of their complaint, as "engaged in commerce" within the meaning of §§ 6 and 7 of the Act.

[4] See 83 Cong. Rec., 75th Cong., 3d Sess., Pt. 7, p. 7434, and Pt. 8, pp. 9168–71. See also Joint Hearings before the Senate Committee on Education and Labor and the House Committee on Labor on S. 2475 and H. R. 7200, 75th Cong., 1st Sess. (1937), Pt. 1, pp. 42–43.

We conclude that petitioners' complaint was erroneously dismissed. Accordingly, the judgment below is reversed and the cause remanded to the district court for further proceedings in conformity with this opinion.

Reversed.

MR. JUSTICE ROBERTS and MR. JUSTICE JACKSON dissent.

C. J. HENDRY CO. ET AL. *v.* MOORE ET AL., AS THE FISH AND GAME COMMISSION OF CALIFORNIA.

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

No. 60. Argued November 10, 1942.—Decided February 8, 1943.

1. Forfeiture by procedure *in rem* of a net which, while being used by a fishing vessel in navigable coastal waters of a State, had been seized for violation of a law of the State forbidding fishing by net in those waters, is "a common law remedy" which "the common law is competent to give," within the statutory exception to the exclusive jurisdiction in admiralty conferred on district courts of the United States by § 9 of the Judiciary Act of 1789, and the State may provide for such forfeiture in a proceeding in a state court. Pp. 134, 153.
2. The common law, as received in this country at the time of the adoption of the Constitution, gave a remedy *in rem* in cases of forfeiture. P. 153.

18 Cal. 2d 835, affirmed.

CERTIORARI, 316 U. S. 643, to review the affirmance of a judgment of forfeiture of a net used in violation of a state law.

Mr. Alfred T. Cluff, with whom *Mr. Arch E. Ekdale* was on the brief, for petitioners.

Messrs. Everett W. Mattoon, Assistant Attorney General of California, and *Eugene M. Elson*, Deputy Attorney General, with whom *Mr. Earl Warren*, Attorney General, was on the brief, for respondents.

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

The Fish and Game Commission of California, having seized a purse net while it was being used for fishing in the navigable waters of the state in violation of the State Fish and Game Code, brought the present proceeding under § 845 of the Code for forfeiture of the net. The question for decision is whether the state court's judgment, directing that the net be forfeited and ordering the commission to sell or destroy it, is a "common law remedy" which the "common law is competent to give" within the statutory exception to the exclusive jurisdiction in admiralty conferred on district courts of the United States by § 9 of the Judiciary Act of 1789, 1 Stat. 76–77, 28 U. S. C. §§ 41 (3) and 371 (Third).

Section 845 of the California Fish and Game Code declares that a net used in violation of the provisions of the Code is a public nuisance and makes it the duty of any arresting officer to seize the net and report its seizure to the commission. The statute requires the commission to institute proceedings in the state superior court for the forfeiture of the seized net and authorizes the court, after a hearing and determination that the net was used unlawfully, to make an order forfeiting it and directing that it be sold or destroyed by the commission.

In this case the commission seized the net while it was being used by the fishing vessel *Reliance* in navigable coastal waters of the state in violation of §§ 89 and 842, which prohibit fishing by net in the area in question, and respondents, the members of the commission, brought this proceeding in the state superior court for the forfeiture of the net. Petitioners appeared as claimants and after a trial the court gave judgment that the net be forfeited, ordering respondents to sell or destroy it. The Supreme Court of California at first set the judgment aside, but after rehearing affirmed, 18 Cal. 2d 835,

118 P. 2d 1, holding that the remedy given by the judgment is a "common law remedy" which "the common law is competent to give," and that the case is not within the exclusive jurisdiction in admiralty conferred on the federal courts by the Judiciary Act and hence was properly tried in the state court. Cf. *Knapp, Stout & Co.* v. *McCaffrey,* 177 U. S. 638; *The Hamilton,* 207 U. S. 398, 404; *Red Cross Line* v. *Atlantic Fruit Co.,* 264 U. S. 109, 123. We granted certiorari, 316 U. S. 643, the question being of importance in defining the jurisdiction of state courts in relation to the admiralty jurisdiction.

Only a single issue is presented by the record and briefs—whether the state is precluded by the Constitution and laws of the United States from entertaining the present suit. It is not questioned that the state has authority to regulate fishing in its navigable waters, *Manchester* v. *Massachusetts,* 139 U. S. 240; *Lawton* v. *Steele,* 152 U. S. 133, 139; *Lee* v. *New Jersey,* 207 U. S. 67; *Skiriotes* v. *Florida,* 313 U. S. 69, 75; and it is not denied that seizure there of a net appurtenant to a fishing vessel is cognizable in admiralty. But petitioners insist that the present proceeding is not one which can be entertained by a state court since the judgment *in rem* for forfeiture of the net is not a common law remedy which the common law is competent to give, and that the case is therefore not within the statutory exception to the exclusive admiralty jurisdiction of the federal courts. In this posture of the case, and in the view we take, we find it necessary to consider only this contention.

Section 371 (Third) of 28 U. S. C., derived from § 9 of the Judiciary Act of 1789, confers exclusive jurisdiction on the federal courts "of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it . . ." A characteristic feature of the maritime law is its use of the procedure *in rem* derived from

the civil law, by which a libellant may proceed against the vessel, naming her as a defendant and seeking a judgment subjecting the vessel, and hence the interests of all persons in her, to the satisfaction of the asserted claim. Suits *in rem* against a vessel in cases of maritime tort and for the enforcement of maritime liens are familiar examples of a procedure by which a judgment *in rem* is sought, "good against all the world."

The question whether a maritime cause of action can be prosecuted in the state courts by such a procedure was first discussed by this Court seventy-seven years after the adoption of the Constitution and the Judiciary Act, in *The Moses Taylor,* 4 Wall. 411, which held that a lien upon a vessel, created by state statute, could not be enforced by a proceeding *in rem* in the state courts. Decision was rested on the ground that exclusive jurisdiction of the suit was vested in the federal courts by the Judiciary Act, since a judgment *in rem* to enforce a lien is not a remedy which the common law is competent to give, a ruling which has since been consistently followed. *The Hine* v. *Trevor,* 4 Wall. 555; *The Belfast,* 7 Wall. 624; *The Glide,* 167 U. S. 606; *The Robert W. Parsons,* 191 U. S. 17, 36-38; *Rounds* v. *Cloverport Foundry Co.,* 237 U. S. 303, 307–08. Eleven years earlier this Court in *Smith* v. *Maryland,* 18 How. 71, without discussion of the point now at issue, had sustained the seizure and forfeiture of a vessel in a state court proceeding *in rem,* all pursuant to state statutes, for violation of a Maryland fishing law within the navigable waters of the state. The Court declared that the statute, which prescribed the procedure *in rem* in the state court, conflicted "neither with the admiralty jurisdiction of any court of the United States conferred by Congress, nor with any law of Congress whatever" (p. 76). The authority of that decision has never been questioned by this Court.

The common law as it was received in the United States at the time of the adoption of the Constitution did not afford a remedy *in rem* in suits between private persons. Hence the adoption of the saving clause in the Judiciary Act, as this Court has held in the cases already cited, did not withdraw from the exclusive jurisdiction of admiralty that class of cases in which private suitors sought to enforce their claims by the seizure of a vessel in proceedings *in rem*. But to the generalization that a judgment *in rem* was not a common law remedy there is an important exception. Forfeiture to the Crown of the offending object, because it had been used in violation of law, by a procedure *in rem* was a practice familiar not only to the English admiralty courts but to the court of Exchequer. The Exchequer gave such a remedy for the forfeiture of articles seized on land for the violation of law. And, concurrently with the admiralty, it entertained true proceedings *in rem* for the forfeiture of vessels for violations on navigable waters.[1] Such suits in the Exchequer were begun on information and were against the vessel or article to be condemned. Under the provisions of many statutes the suit might be brought by an informer *qui tam*, who was permitted to share in the proceeds of the for-

[1] We are not concerned here with the question whether the admiralty jurisdiction was fully concurrent with that of the Exchequer even in the case of seizures on navigable waters. During the historic struggle between the admiralty and the common law courts, the latter sought, with varying success, to restrict the admiralty jurisdiction to the high seas and to exclude it from harbors, estuaries, and other arms of the sea. See Justice Story's elaborate discussion in *DeLovio* v. *Boit*, 2 Gall. 398, especially at 425 *et seq.*; *Waring* v. *Clarke*, 5 How. 441; Mears, The History of the Admiralty Jurisdiction, in 2 Select Essays in Anglo-American Legal History, p. 312, especially pp. 353, *et seq.*; Roscoe's Admiralty Practice (5th ed.), pp. 4–15; Marsden, Introduction, 2 Select Pleas in the Court of Admiralty (11 Selden Soc. Publ.); Marsden, Law and Custom of the Sea, vol. 2, pp. vii–xxii. Compare Hoon, The Organization of the English Customs System 1696-1786, p. 276.

feited article; the judgment was of forfeiture and the forfeited article was ordered to be sold. This was the established procedure certainly as early as the latter part of the seventeenth century.[2] Proceedings *in rem,* closely paralleling those in the Exchequer, were also entertained by justices of the peace in many forfeiture cases arising under the customs laws (see Hoon, The Organization of the English Customs System, 1696–1786, pp. 277, 280–83), and the Act of 8 Geo. I, c. 18, § 16, placed within that jurisdiction the condemnation of vessels up to fifteen tons charged with smuggling.

While the English Acts of Navigation and Trade and numerous other forfeiture statutes conferred jurisdiction on all the English common law courts of record [3] to enter-

[2] Blackstone, Commentaries, Bk. III, p. 262; Sir Geoffrey Gilbert, A Treatise on the Court of Exchequer (1758) pp. 180–91; "B. Y.", Modern Practice of the Court of Exchequer (1730) pp. 139–50; Hale, Treatise, printed in Hargrave's Law Tracts (1787), vol. 1, pp. 226–27. See also Harper, The English Navigation Laws, ch. 10; Hoon, The Organization of the English Customs System 1696–1786, ch. 8.

For some 18th century cases in the Exchequer involving the condemnation of ships, see *Idle qui tam* v. *Vanheck,* Bunb. 230; *Attorney General* v. *Jackson, id.* 236; *Scott qui tam* v. *A'Chez,* Park. 21; *Mitchell qui tam* v. *Torup, id.* 227; *Attorney General* v. *Le Merchant,* 1 Anstr. 52; *Attorney General* v. *Appleby,* 3 Anstr. 863. See also cases referred to in Masterson, Jurisdiction in Marginal Seas, pp. 42, 68–71; Reeves, Law of Shipping and Navigation (2d ed. 1807) pp. 197–208.

[3] Statutory provision for the forfeiture of nets or boats used in unlawful fishing may be found as early as 1285, Act of 13 Edw. I, c. 47. See also 1 Eliz. c. 17; 3 Jac. I, c. 12; 13 & 14 Car. II, c. 28; 15 Car. II, c. 16, § 1 (5), (8); 1 Geo. I, c. 18. The Act of 15 Car. II, c. 16, § 1 (8), provided for the forfeiture of seines or nets used in Newfoundland harbors, to be recovered "in any of His Majesty's courts in Newfoundland, or in any court of record in England or Wales."

The Navigation Acts commonly provided that a forfeiture proceeding might be brought, in addition to others, "in any court of record," e. g., 12 Car. II, c. 18, §§ 1, 3, 6, 18, or "in any of his Majesty's Courts of Record at Westminster," 8 Geo. I, c. 18, § 23; 6 Geo. II, c. 13, § 4. Some Acts included as the place for such suits "any Court of Admi-

tain suits for forfeiture, nevertheless suitors having ready access to the convenient procedure of exchequer or admiralty in *qui tam* actions seem to have had little occasion to resort to the King's Bench or Common Pleas. In the occasional reported forfeiture cases brought in King's Bench, the English reports give us little light on the procedure followed or the precise form of judgment entered. In one case, *Roberts* v. *Withered,* 5 Mod. 193, 12 Mod. 92, the court seems to have adapted the common law action of detinue to forfeiture cases by resort to the fiction that bringing the action was the equivalent of a seizure which vested the property in the Crown so that a suit in detinue or replevin *in personam* to gain possession would lie. See Stephen, Pleading (3rd Am. ed.) pp. 47, 52, 69, 74; Ames, Lectures on Legal History, pp. 64, 71. Cf. *Wilkins* v. *Despard,* 5 Term Rep. 112.

Separate courts exercising the jurisdiction of the Court of Exchequer were never established in the American Colonies. Instead, that jurisdiction was absorbed by the common law courts which entertained suits for the forfeiture of property under English or local statutes authorizing its condemnation. Long before the adoption of the Constitution the common law courts in the Colonies—and later in the states during the period of Confederation—were exercising jurisdiction *in rem* in the enforcement of forfeiture statutes. Like the Exchequer, in cases of seizure on navigable waters they exercised a jurisdiction concurrently with the courts of admiralty. But the vice-admiralty courts in the Colonies did not begin to function with any real continuity until about 1700 or shortly after-

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ralty . . . or . . . any Court of Record" in the American Colonies or Plantations. E. g., 6 Geo. II, c. 13, § 3; 4 Geo. III, c. 15, § 41. The important Act of 1696 (7 & 8 Wm. III, c. 22, § 2) provided that forfeitures of ships and goods might be enforced "in any of his Majesty's courts of record at Westminster, or in any court in his Majesty's plantations, where such offence shall be committed."

ward. See Andrews, Vice-Admiralty Courts in the Colonies, in Records of the Vice-Admiralty Court of Rhode Island, 1617–1752 (ed. Towle, 1936), p. 1; Andrews, The Colonial Period of American History, vol. 4, ch. 8; Harper, The English Navigation Laws, ch. 15; Osgood, The American Colonies in the 18th Century, vol. 1, pp. 185–222, 299–303. By that time, the jurisdiction of common law courts to condemn ships and cargoes for violation of the Navigation Acts had been firmly established, apparently without question, and was regularly exercised throughout the colonies. In general the suits were brought against the vessel or article to be condemned, were tried by jury, closely followed the procedure in Exchequer, and if successful resulted in judgments of forfeiture or condemnation with a provision for sale.[4]

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[4] VIRGINIA: In the 1670s forfeitures under the Navigation Acts were declared by the Council. See Minutes of the Council and General Court of Colonial Virginia, 1622–1632 and 1670–1676 (ed. McIlwaine, 1924), pp. 212, 214, 216, 242–44, 445–46. But by the 1690s such cases were tried at common law in the General Court before a jury. Although the records of the General Court were destroyed by fire during the evacuation of Richmond in 1865, copies of some of its more important proceedings during the 1690s, contemporaneously transmitted to England, have been preserved, and are reprinted in Executive Journals of the Council of Colonial Virginia (ed. McIlwaine, 1925), vol. I. See the cases of *The Anne & Catherine*, pp. 173–75; *The William & Mary*, pp. 241–43; *The Content*, pp. 379–80; *Cole* v. *Three Pipes of Brandy*, pp. 204–05; cf. *The Crane*, pp. 233–34, 300; *The Catherine*, pp. 263–64; *The Society*, pp. 196–97, 219, 235–36, 252–53. See also the cases of *The Elezabeth* and *The Mary & Ellery*, in Edward Randolph, Including His Letters and Official Papers (ed. Toppan, 1899), vol. 5, p. 139; *The Crown*, condemned by a jury at a special court in 1687, 12 Va. Mag. of Hist. & Biog. 189. The Governor exercised a power to commission a special admiralty court in the case of a prize (*The St. Ignace*, Exec. J., vol. I, pp. 366–67, 368–69), but apparently not for condemnation cases under the Acts of Navigation. An admiralty court, for Virginia and North Carolina, was es-

The rise of the vice-admiralty courts—prompted in part by the Crown's desire to have access to a forum not controlled by the obstinate resistance of American juries—did not divest the colonial common law courts of their

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tablished in 1698. Id., p. 379; Chitwood, Justice in Colonial Virginia, pp. 71–73.

MARYLAND: A commission for a special court of admiralty to try forfeiture cases under the Navigation Acts for a limited period of time is to be found as early as 1684, 17 Archives of Maryland 360–62, (cf. 20 id. 72, 75, 165), some admiralty jurisdiction having previously been exercised by the Provincial Court, 49 Archives xv, xxi–xxiii. But forfeiture cases were tried generally at courts of oyer and terminer, acting with a jury. See Andrews, Vice-Admiralty Courts in the Colonies, *supra*, p. 8, n. 2; 57 Archives lvii; Morriss, Colonial Trade of Maryland 1689–1715, pp. 121–22; case of *The John*, 1687, 8 Archives 9; *The Providence*, 1692, 13 id. 320, 327 (see also Edward Randolph, vol. 5, p. 139); *The Ann of New Castle*, 1692, 8 Archives 445–47; *The Margaret*, 1692, 8 id. 489–91, and again in 1694, 20 id. 42–43, 65, 142, 184. *The Ann of Maryland* was acquitted at a special court of oyer and terminer in 1694; she was tried before the Provincial Court later the same year and acquitted by the jury; the judgment was reversed on appeal in May 1695; upon a second trial in the Provincial Court on a new information the jury again acquitted her in August 1695, but the proceedings on the second appeal are incomplete. Proceedings of the Maryland Court of Appeals 1695–1729 (ed. Bond, 1933), pp. xlvii–xlviii, 7–12, 22–24, 647–53; 20 Archives 64, 128–30, 155, 181, 188, 243–44, 438–45, 461; Edward Randolph, vol. 5, p. 139. *The Anna Helena* was acquitted by a jury in the Provincial Court, 1694, 20 Archives 134, 180–81, 383–85. See also the full report of *Blackiston qui tam* v. *Carroll*, 1692, in Proc. Md. Ct. of App., pp. 29–41, where the judgment upon a jury's verdict condemning some casks of beer in the court of oyer and terminer (p. 34) was reversed on appeal (p. 40). Compare *The Charles*, 1696, 23 Archives 3.

MASSACHUSETTS: Like the New York Mayor's Court, the Massachusetts Court of Assistants was invested with admiralty jurisdiction and it was authorized to dispense with jury trial in such cases. See Crump, Colonial Admiralty Jurisdiction in the Seventeenth Century, ch. 3; Noble, Admiralty Jurisdiction in Massachusetts, 8 Publ. Colonial Society of Mass., 150, 154–57; Davis, History of the Judiciary of Massachusetts, p. 75; argument of counsel in *Insurance Co.* v. *Dunham*, 11 Wall. 1, 8–9. Forfeiture cases under the Navigation Acts were, how-

jurisdiction to proceed *in rem* in cases of forfeiture and condemnation. The trial records have not yet been made available for all the Colonies, and in some instances perhaps can never be. But there is no reason to suppose that

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ever, regularly tried by that court before juries, apparently in the same manner as other common law cases. Records of the Court of Assistants of the Colony of the Massachusetts Bay, 1630–1692 (ed. Noble, 1901), vol. 1, pp. 149, 150, 160, 168, 169, 170–71, 175–77, 209–10, 219, 230–31, 342–44, 355–56; and especially pp. 219–20, 349, 366, four cases—*The Swallow, The Newbery, The Two Brothers,* and *The Mary*—of trials de novo before a jury on appeal from the county court, which is not known to have been invested with any admiralty jurisdiction. The Privy Council upheld an appeal in the case of *The Two Brothers,* ordering the ship forfeited, but affirmed the judgment of the Court of Assistants releasing *The Mary,* 2 Acts of the Privy Council, Colonial, No. 480. See Edward Randolph, vols. 1–7; passim; Crump, *supra,* 140–44.

New Jersey: Full records of several condemnation proceedings will be found in Journal of the Courts of Common Right and Chancery of East New Jersey, 1683–1702 (ed. Edsall, 1937). See Introduction, pp. 133–37; *The Thomas and Benjamin,* condemned on confession of judgment, 1685, pp. 192–94; *The Dolphin,* acquitted by a jury, 1685, pp. 198–200 and 138; *Goodman qui tam* v. *Dounham,* and *Goodman qui tam* v. *Powel,* calicoes condemned in default of a claimant, 1699, p. 319. See also the reference at pp. 136–37 to the condemnation of *The Unity* in 1688 in the Middlesex court of common pleas.

Pennsylvania: In the closing years of the 17th century, admiralty jurisdiction in Pennsylvania was vested in the Provincial Council. Loyd, Early Courts of Pennsylvania, p. 68; Eastman, Courts and Lawyers of Pennsylvania, vol. 1, p. 165; Lewis, The Courts of Pennsylvania in the Seventeenth Century, 1 Rep. Pa. Bar Assn. 353, 383, 389. Forfeiture cases under the Navigation Acts were nevertheless tried in the common law courts. See the case of *The Dolphin,* cleared by a jury at a special court in the County of Chester, 1695, Edward Randolph, vol. 5, pp. 108–14, 139; *The Pennsylvania Merchant,* condemned by a jury in the court of common pleas at Chester, 1695, Record of the Courts of Chester County, 1681–1697 (1910) pp. 366–69. Cf. Root, The Relations of Pennsylvania with the British Government, 1696–1765, pp. 108–11.

New Hampshire: *The George,* condemned by a jury at a special court in 1682. Calendar of State Papers, Colonial, America and West

in this respect the judicial history of forfeiture proceedings in New York, manuscript records of which we have examined, is not typical of the others, and there is ample support for the conclusion that in the seaboard states forfeiture proceedings *in rem*, extending to seizures on navigable waters of the state, were an established procedure of the common law courts before the Revolution. It was the admiralty courts, not the common law courts, which had difficulty in establishing their jurisdiction, although in 1759 the Board of Trade was able to write that "With regard to breaches of the Law of Trade they are cognizable either in the courts of common law in the plantations, or in the courts of Admiralty, which have in such cases, if not in all, a concurrent jurisdiction with the courts of common law" (quoted in Andrews, Vice-Admiralty Courts in the Colonies, *supra*, at p. 7); and Stokes reported that the same situation prevailed at the outbreak of the Revolution. See Stokes, A View of the Constitution of the British Colonies (1783), pp. 270, 357 *et seq.*

In New York, admiralty jurisdiction was vested in the Mayor's Court in 1678, and that court continued to exercise jurisdiction in all maritime cases, including those

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Indies, 1681–1685, Nos. 868–70; Edward Randolph, vol. 3, pp. 256–58. *The Hopewell* was acquitted by a jury in the court of common pleas in 1699; the cargo of *The Speedwell* was condemned by a jury in the same court in 1701, but the superior court reversed the judgment. See Andrews, Vice-Admiralty Courts in the Colonies, *supra*, pp. 10, n. 1, 49–50, and cf. p. 11, n. 1; Andrews, The Colonial Period of American History, vol. 4, p. 123; Aldrich, Admiralty Jurisdiction of New Hampshire, 3 Proc. N. H. Bar Assn. (N. S.) 31, 50–51. See also *The Industry*, cleared by a jury in 1679. Edward Randolph, vol. 3, pp. 84, 343.

CONNECTICUT: The cargo of *The Adventure* was condemned by a jury in the county court at Hartford, 1692. See 3 Coll. of the Conn. Hist. Soc., pp. 264–66 n.

MAINE: See case of *The Gift of God*, cleared by jury, 1680 (court not specified). Edward Randolph, vol. 3, pp. 85, 348. This ship was tried again in 1683. Id., pp. 350, 351.

arising under the Navigation Acts, throughout the colonial period even after the establishment of a court of vice-admiralty. See Select Cases of the Mayor's Court of New York City, 1674–1784 (ed. Morris, 1935), pp. 39–40, 566 *et seq.* But cases of forfeiture were also regularly prosecuted before the common law courts of the colony—in the General Quarter Sessions of the Peace in New York City during the 1680s,[5] and, after the reorganization of the judiciary in 1691, in the Supreme Court of Judicature,[6] which was given jurisdiction "of all pleas, Civill Criminall,

[5] See *Larkin qui tam* v. *Sloop Lewis,* condemned upon a confession of judgment, August 4, 1685 (Mss. in Hall of Records, N. Y. C., Pleadings K 456 and K 452), and compare Documentary History of New York (ed. O'Callaghan, 1850), vol. 1, p. 116; *Ludgar qui tam* v. *Sloop Fortune,* May 5, 1685, condemned on confession of judgment (Ms. Minutes N. Y. C. Quarter Sessions 1683/4–1693/4, fol. 40); *Meine qui tam* v. *Sloop Unity,* August 3, 1686, condemned on confession of judgment (id. fol. 93); *Santen qui tam* v. *The Two Sisters,* August 2, 1686, acquitted by the jury (id., fol. 95). See also *Ludgar qui tam* v. *Pinke Charles,* August 4, 1685, acquitted by the jury of violating an act of the provincial assembly (id., fol. 48–50).

There is some record of courts of admiralty in New York before 1700, apparently acting under special commissions. Doc. Hist. N. Y., vol. 1, p. 60, vol. 2, pp. 164–68, 172, 176–77; Crump, Colonial Admiralty Jurisdiction in the Seventeenth Century, pp. 122–24.

[6] The published Minutes of the Supreme Court of Judicature 1693–1701, 45 N. Y. Hist. Soc. Coll., disclose at least nine such cases during that period: *Brooke* v. *Barquenteen Roberts,* p. 55; *Brooke qui tam* v. *Barquenteen Orange and Jacobs,* pp. 59, 61, 62, 63, 65, 68, 73 (and see the more complete accounts of this case in Harper, The English Navigation Laws, p. 193, and in Cal. St. Pap., Col., Am. & W. I. 1693–1696, Nos. 1133, 1546, 1891 and 2033); *Brooke qui tam* v. *Iron Bars,* pp. 59, 63; *Hungerford* v. *Briganteen Swift,* pp. 154, 156, 158; *R.* v. *The Concord and Blake,* pp. 156, 160, 162; *R.* v. *Pipe Staves,* pp. 157, 158; *Hungerford* v. *East Indian Goods,* pp. 166, 176; *Hungerford qui tam* v. *Sundry Goods,* p. 168 (see the information in N. Y. Misc. Mss. Box 3, N. Y. Hist. Soc.); *Lott qui tam* v. *Sundry Goods and Allison,* pp. 168, 173, 176, 183, 184. See also a confession of judgment, October 8, 1698, on an information filed in the court in *Cortlandt qui tam* v. *The Fortune,* Hall of Records, N. Y. C., Parchment 210 G–1.

and Mixt, as fully & amply to all Intents & purposes whatsoever, as the Courts of Kings Bench, Common Pleas, & Exchequer within their Majestyes Kingdome of England, have or ought to have," 1 Colonial Laws of New York (1894) p. 229.

The Navigation Acts did not constitute the only authority for forfeiture proceedings in the common law courts. New York's own colonial legislation shows frequent use of the forfeiture sanction, applied sometimes to vessels as well as to commodities, as a means of enforcement of provincial laws fixing customs duties, regulating or prohibiting the exportation or importation of commodities, or requiring a specified manner of marking, storing or selling.[7] A common provision in these statutes was that the forfeitures imposed might be prosecuted in any court of record in the colony.

The records of the New York Supreme Court of Judicature contain numerous instances of forfeiture proceedings during the eighteenth century. One is *Hammond qui tam* v. *Sloop Carolina,*[8] a prosecution in 1735 for a

[7] See Colonial Laws of New York 1664–1775 (1894): Vol. 1, pp. 252, 291, 292, 422–23, 451, 787, 850–51, 1017, 1022. Vol. 2, pp. 20, 21, 26, 27, 28, 33, 258, 260, 284, 287, 357, 358, 424, 435, 436, 477–79, 655, 778, 800, 853, 878–79, 909–10, 963, 1055. Vol. 3, pp. 33, 79, 95, 99, 108, 113, 115, 119, 245, 250–51, 356, 361–62, 442, 569, 790–91, 949–50, 972, 975. Vol. 4, pp. 107, 366, 1092. Vol. 5, pp. 316, 364–65, 547, 836, 857–58.

[8] Hall of Records, N. Y. C., Parchments 159 D 2 (judgment roll); Ms. Minutes Sup. Ct. of Jud. 1732–1737, fol. 172–75.

In 1739 the Supreme Court of Judicature issued a writ of prohibition restraining prosecution of a forfeiture proceeding under 15 Car. II, c. 7, against *The Mary and Margaret* in the court of vice-admiralty. Four years later the Privy Council upheld the issuance of the writ, apparently accepting the view that a seizure in any part of New York harbor which was "within the body of the county" rather than on the high seas came within the exclusive jurisdiction of the common law courts—a ruling which probably left to the vice-admiralty court but a small role in cases under the Navigation Acts, except when the particular Act

false customs certificate, which resulted in the discharge of the ship and her cargo for failure of proof. Later cases show more in detail how closely that court's procedure in forfeiture cases followed the essentials of the procedure *in rem* which had been developed in the English Exchequer.[9] Nor did the creation of a state Court of Admiralty after the Revolution effect a withdrawal of such jurisdiction from the common law courts. Statutes enacted in New York during the period of the Confederation, like the English and local legislation which preceded them, continued to employ forfeiture as a sanction,[10] and

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contained an express grant of such jurisdiction (cf. Note 3, *supra*). See Reports of Cases in the Vice-Admiralty and Admiralty of New York 1715–1788 (ed. Hough, 1925) p. 16; Documents Relative to the Colonial History of New York (1855), vol. 6, pp. 154–55; 3 Acts of the Privy Council, Colonial, No. 538. See also Root, The Relations of Pennsylvania with the British Government 1696–1765, p. 117, n. 100; Washburne, Imperial Control of the Administration of Justice in the Thirteen American Colonies, 1684–1776, p. 168. Compare later cases in Hough's Reports, in which the vice-admiralty court took a similar narrow view of its jurisdiction,—*Kennedy qui tam* v. *32 Barrels of Gunpowder* (1754) p. 82; *Spencer qui tam* v. *Richardson* (1760) p. 181. See Note 1, *supra*.

[9] The following are all cases of judgments taken by default: *Harison qui tam* v. *Several Parcels of Tobacco*, Ms. Minutes Sup. Ct. of Jud., Engrossed, 1750–54, pp. 124, 127, 130 (April 23–25, 1752); *Kennedy qui tam* v. *77 Cases of Bottles, etc.*, id. 1754–57, pp. 254, 260, (April 29, 1756); *Allen qui tam* v. *Two Tons etc. of Sugar*, id. 1766–69, pp. 607–08 (January 21, 1769); *Elliott & Moore qui tam* v. *Seven Casks of Tea*, Hall of Records, N. Y. C., Pleadings K 474 (information), Parchments 120 G 1 (judgment roll) (August 1772); *Elliott & Moore qui tam* v. *Nineteen Casks of Tea, etc.*, id., Parchments 29 F 9 (August 1772); *Elliott & Moore qui tam* v. *Twenty Pipes of Wine*, id., Parchments 93 H 2 (August 1772).

[10] See Laws of New York, 1777–1801 (1886), Vol. 1, pp. 19, 112, 601 and 604, 627–28, 666–67. Vol. 2, pp. 516–17, 786, 789, 806–07. Similar legislation shortly after the adoption of the Constitution will be found in Vol. 4, p. 592; Vol. 5, p. 468.

Much of the colonial and state customs legislation before 1789 is collected in Hill, The First Stages of the Tariff Policy of the United

forfeiture proceedings continued to be brought in the Supreme Court and other common law tribunals.[11] The Act of April 11, 1787, 2 Laws of New York 509, 517, imposing import duties, provided that "all ships and vessels, goods and merchandize which shall become forfeited by virtue of this act, shall be prosecuted by the collector, or officer or other person who shall seize the same, by information in the court of admiralty,[12] or in the court of exchequer,[13] or in any mayors court or court of common pleas in this State, in order to condemnation thereof." There was provision for proclamations to be made "in the accustomed manner," with detailed specification of the methods of making an appraisal and proceeding to judgment, and a

States, 8 Publ. American Economic Assn., 453; Kelley, Tariff Acts under the Confederation, 2 Quarterly J. of Economics, 473; Ripley, The Financial History of Virginia 1609–1776, ch. 3.

[11] For example, see *Lamb qui tam* v. *Sylsbee*, information to condemn three thousand gallons of rum for violation of the Act of March 22, 1784 (filed September 14, 1785). Hall of Records, N. Y. C., Parchments P 9 B 1 (issue roll). The proceedings are incomplete, but a subsequent entry, October 27, 1785, indicates that the jury brought in a verdict for the plaintiff. Ms. Minutes Sup. Ct. of Jud., Jan. 1785–Nov. 1785, fol. 52.

[12] During the Confederation, courts of admiralty existed in each state and appeals in prize cases were taken to the Committee of Appeals in the Continental Congress, and after 1780 to the Court of Appeals. See 131 U. S., Appendix, pp. xix–xlix; Jameson, The Predecessor of the Supreme Court, in Essays in the Constitutional History of the United States in the Formative Period, p. 1; Wiener, Notes on the Rhode Island Admiralty, 1727–1790, 46 Harv. L. Rev. 44, 59. The New York Court of Admiralty was established in 1776 (see Hough's Reports p. xxiv), and its jurisdiction was restricted by the Act of February 14, 1787 (2 Laws of New York, p. 394).

[13] The Court of Exchequer was created by the Act of February 9, 1786 (2 Laws of New York, p. 185), to entertain only prosecutions instituted by its clerk or by the state attorney general. It was presided over by the junior justice of the Supreme Court of Judicature, who was authorized to transfer "all cases of difficulty" to the Supreme Court of Judicature.

further provision (p. 518) leaving it to the discretion of the collector of the port of New York or the attorney general "to direct in which of the courts aforesaid any information shall be brought touching such forfeiture."

In Pennsylvania we have a record of a similar exercise of jurisdiction in 1787 by the Philadelphia Court of Common Pleas in *Phile qui tam* v. *The Ship Anna*, 1 Dall. 197, where the jury condemned the ship.[14]

Examination of the legislative history of the Judiciary Act of 1789 does not disclose precisely what its framers

[14] *The Fame* was condemned in the Supreme Court of Pennsylvania in 1726. Osgood, The American Colonies in the 18th Century, vol. 2, p. 541; Root, The Relations of Pennsylvania with the British Government 1696–1765, p. 169; Pennsylvania Statutes at Large, 1682–1801 (1897 ed.), vol. 4, pp. 422–26, 429–31; 6 Acts of the Privy Council, Colonial, Nos. 328, 333. For the case of *The Sarah*, acquitted at the New Castle Court of Common Pleas in 1727, see Root, p. 120; Board of Trade Papers, Proprieties 1697–1776, vol. XII, R: 119, 122 and 131 (copy in possession of the Historical Society of Pennsylvania). See also *The Richard & William*, acquitted in the Philadelphia Court of Common Pleas, 1728, id., R: 93; *The Hope*, apparently acquitted by the jury in the Philadelphia Court of Common Pleas, the collector's appeal to the Privy Council being dismissed in 1737, 3 Acts of the Privy Council, Colonial, No. 381.

A number of cases tried in the common law court in Jamaica during the Revolutionary period are reported in Grant, Notes of Cases Adjudged in Jamaica, 1774 to 1787 (one of the few known copies of this work is in the Gerry Collection of the Library of this Court). See *Rex qui tam* v. *Schooner Revenge*, p. 116; *Rex* v. *Sloop Tryal*, p. 155; *Woolfrys qui tam* v. *Ship Tartar*, pp. 156, 163; *Macfarquhar qui tam* v. *Sloop Flying Fish*, pp. 156, 188; *Flowerdew qui tam* v. *Sloop La Depeche*, p. 258; *Macallister qui tam* v. *The Greyhound*, p. 310; see also *Ex parte Oliveres Daniel*, p. 293. Compare Andrews, The Colonial Period of American History, vol. 4, p. 249, n. 3. See also cases of *The Dolphin* and *The Mercury*, condemned in the Jamaica Supreme Court of Judicature, 1742, judgments reversed and new trials ordered by the Privy Council, 1743, 3 Acts of the Privy Council, Colonial, Nos. 566–67; *The Lawrence*, condemned by the Jamaica Superior Court, 1769, reversed by the Privy Council, 1777, 5 id. No. 217.

had in mind when in § 9 they used the phrase "common law remedy." But it is unlikely that, in selecting this phrase as the means of marking the boundary of the jurisdiction of state courts over matters which might otherwise be within the exclusive jurisdiction of admiralty, the draftsmen of § 9 intended to withdraw from the state courts a jurisdiction and remedy in forfeiture cases which had been so generally applied by non-admiralty courts both in England and America, and which had become a recognized part of the common law system as developed in England and received in this country long before the American Revolution. Nor can we accept the suggestion that Congress, in this use of the phrase "common law remedy," was harking back some hundreds of years to a period before the Exchequer had taken its place as one of the three great courts administering the common law, and was likewise disregarding the experience of the common law courts in America with which it was familiar—all without any indication of such a purpose. Considerations of practical convenience in the conduct of forfeiture proceedings for violations of local statutes occurring on state waters, as well as the contemporary and later history of the exercise of the admiralty jurisdiction, indicate that there was no purpose to limit such proceedings to the exclusive jurisdiction of the admiralty.

Shortly after the adoption of the Constitution, state legislation was enacted regulating state tidal waters and authorizing forfeiture in the state courts of fish nets and vessels illegally used in fishing there. Such a statute was considered in 1823 in *Corfield* v. *Coryell,* 4 Wash. C. C. 371, Fed. Cas. No. 3230, (cited in *Smith* v. *Maryland, supra,* 18 How. at 75), where a New Jersey state court forfeiture of a vessel under a statute regulating the Delaware Bay was upheld as constitutional by Justice Washington, without question of the state court's jurisdiction because of the *in rem* nature of the proceeding. No suggestion

is to be found in that case or elsewhere that the Judiciary Act struck down the large body of state legislation, enacted shortly after 1789, which provided for the forfeiture in state courts of vessels or nets seized in navigable waters of a state for violating state fishing laws.[15] And such legislation has become rooted in the law enforcement programs

[15] *The Hiram,* subject of the litigation in *Corfield* v. *Coryell* (and in *Kean* v. *Rice,* 12 Searg. & Rawl. 203), had been condemned under §§ 6 and 7 of the New Jersey Act of June 9, 1820, whose forfeiture provisions were derived from §§ 5 and 6 of the Act of January 26, 1798 (Paterson, New Jersey Laws 1703–1799, p. 263), in turn derived from §§ 2–6 of a Provincial Act of 1719, 5 Geo. I, c. 30 (Nevill, New Jersey Acts 1703–1752, pp. 86–88). Compare the forfeiture provisions of the Delaware River fishing legislation, in New Jersey Acts of November 26, 1808, § 4, and November 28, 1822, § 13, and in Pennsylvania Acts of February 8, 1804, § 5, of February 23, 1809, and January 29, 1823; see *Shoemaker* v. *State,* 20 N. J. L. 153 (1843).

Massachusetts enacted early legislation restricting fishing in navigable waters, including Taunton Great River and the Merrimack, and providing that any nets used unlawfully should be forfeited. Act of February 22, 1790 (forfeiture to be in a "trial in law"); Act of March 4, 1790 (forfeiture proceeding to be conducted in specified manner by justice of the peace); Act of March 27, 1793.

Delaware regulated the taking of oysters and other shellfish by the Act of February 12, 1812 (see Revised Laws, 1829, p. 274), imposed as a penalty the forfeiture of vessels and their equipment, and by § 2 provided that the condemnation proceeding should be before two justices of the peace in an action qui tam.

Rhode Island provided that, in the case of unlawful taking of oysters in any waters in the state, the vessel together with all its implements should be forfeited in an action qui tam in the court of common pleas or general sessions of the peace. See the 1798 revision of Public Laws, pp. 488–89, derived from an Act of August 1773 (R. I. Acts and Resolves, August 1773, pp. 63–64). Compare an Act of 1803, appearing in the 1822 revision of Public Laws, p. 516; an Act of 1802, § 1, in R. I. Public Laws 1798–1813 (Newport, printed by H. & O. Farnsworth) p. 83; Act of June 23, 1810, § 1, id., p. 194.

The 1808 compilation of the Statute Laws of Connecticut, Book I, Title LXX, Fisheries, contains several statutes passed between 1783 and 1798, regulating fishing on certain rivers, including the Connecticut, and punishing violations by both fine and a forfeiture of the seines or

of about half the states,[16] without intimation from this or any other court that the Judiciary Act prohibited it. See *Boggs* v. *Commonwealth,* 76 Va. 989, 993–96; *Dize* v. *Lloyd,* 36 F. 651, 652–53; *Johnson* v. *Loper,* 46 N. J. L. 321; *Bradford* v. *DeLuca,* 90 N. J. L. 434, 103 A. 692; *Doolan* v. *The Greyhound,* 79 Conn. 697, 66 A. 511; *Ely* v. *Bugbee,* 90 Conn. 584, 98 A. 121; *State* v. *Umaki,* 103 Wash. 232, 174 P. 447; *State* v. *Mavrikas,* 148 Wash. 651, 269 P. 805; *Osborn* v. *Charlevoix,* 114 Mich. 655, 663–66, 72 N. W. 982.

It is noteworthy that Blackstone's Commentaries, more read in America before the Revolution than any other law book, referred to the information *in rem* in the Court

other implements used. See c. I, §§ 7, 10, 13; c. IV, § 1; *Boles* v. *Lynde,* 1 Root 195 (1790).

See also *Trueman* v. *403 Quarter Casks etc. of Gunpowder,* Thacher's Cr. Cas., p. 14 (Boston, 1823).

[16] In addition to California, there are at least twenty-two states whose laws now make provision for the condemnation, in state court proceedings, of nets or vessels used in state waters, including navigable waters, in violation of state fishing laws. Arkansas, Pope's Digest, 1942 Suppl., § 5958; Connecticut Gen. Stat. 1930, § 3175; Delaware Rev. Code 1935, §§ 2904–2905, 2955, 2957–2958, 2990, 2991, 2993–2995, 2997, 3000–3002, 3004, 3007, 3015, 3024, 3030, 3035, 3037; Florida Stat. 1941, §§ 372.31, 374.41; Illinois Rev. Stat. 1941, ch. 56, § 109; Iowa Code 1939, §§ 1794.099–1794.102; Kentucky Rev. Stat. 1942, § 150.120; Louisiana Gen. Stat., Dart 1939, §§ 3074, 3108, 3118; Maine Rev. Stat. 1930, ch. 50, §§ 50, 81; Maryland Ann. Code, Flack 1939, art. 39, §§ 10–12, 25, 65, 66, 67, 69, 72, 73; Massachusetts Gen. Laws 1932, ch. 130, § 74; Michigan Stat. Ann., Henderson 1937, §§ 13.1221–13.1225; Minnesota Stat. 1941, § 102.06 (21); Mississippi Code Ann. 1930, § 6908; New Jersey Rev. Stat. 1937, Title 23, ch. 9, §§ 9–11, 14, 15, 20, 27–29, 32, 33, 44–46, 48, 49, 55, 63, 67, 110, 112, ch. 10, § 21; North Carolina Code 1939, § 1965 (a); Ohio Gen. Code Ann., Page 1937, §§ 1416, 1450 (see 1942 Suppl.), 1451; Oregon Comp. Laws Ann. 1940, §§ 82–347, 83–318, 83–415, 83–520, 83–523; South Dakota Code 1939, § 25.0422; Virginia Code 1942, §§ 3159, 3169 (and see ch. 131), 3171, 3176, 3180, 3182, 3188, 3206, 3214, 3248, 3305a, 3305b, 3305c; Washington Rev. Stat. Ann., Remington 1932, §§ 5692, 5671–10 (1940 Suppl.); Wisconsin Stat. 1941, § 29.05 (7).

of Exchequer as the procedure by which forfeitures were inflicted for violation of Acts of Parliament. Bk. III, p. 262. And Kent, in his Commentaries, pointed out that "seizures, in England, for violation of the laws of revenue, trade or navigation, were tried by a jury in the Court of Exchequer, according to the course of the common law; and though a proceeding be *in rem,* it is not necessarily a proceeding or cause in the admiralty" (12th ed., Vol. 1, p. 374). He declared that, within the meaning of § 9 of the Judiciary Act, the common law was competent to give such a remedy "because, under the vigorous system of the English law, such prosecutions *in rem* are in the Exchequer, according to the course of the common law" (p. 376).

Upon the adoption of the Constitution the national government took over the regulation of trade, navigation and customs duties which had been prolific sources of forfeiture proceedings in the state courts. This Court in suits brought in admiralty sustained the admiralty jurisdiction over forfeitures prescribed by Congress for the violation of federal revenue and other laws where the seizure had occurred on navigable waters. *United States* v. *La Vengeance,* 3 Dall. 297; *United States* v. *Schooner Sally,* 2 Cranch 406; *United States* v. *Schooner Betsey and Charlotte,* 4 Cranch 443; *Whelan* v. *United States,* 7 Cranch 112; *The Samuel,* 1 Wheat. 9. Those decisions held that when the seizure occurred on navigable waters the cause was maritime and hence triable without a jury in the federal courts.[17] But they obviously did not determine, and there was no occasion to determine, whether forfeiture proceedings belonged in the category of maritime causes that might also be tried in state courts be-

[17] Section 9 of the Judiciary Act of 1789, 1 Stat. 77, provided that "the trial of issues in fact, in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury."

cause, within the meaning of the saving clause, the common law was competent to give the remedy.

The Court has never held or said that the admiralty jurisdiction in a forfeiture case is exclusive, and it has repeatedly declared that, in cases of forfeiture of articles seized on land for violation of federal statutes, the district courts proceed as courts of common law according to the course of the Exchequer on informations *in rem* with trial by jury. *The Sarah,* 8 Wheat. 391, 396, n. A; *443 Cans of Egg Product* v. *United States,* 226 U. S. 172, and cases cited. In *United States* v. *422 Casks of Wine,* 1 Pet. 547, Justice Story defined such an action as a libel or information *in rem* on the Exchequer side of the court. And see Chief Justice Marshall's reference, in *Schooner Hoppet* v. *United States,* 7 Cranch 389, 393, to "proceedings in Courts of common law, either against the person or the thing, for penalties or forfeitures." In all this we perceive a common understanding of judges, lawyers and text writers, both before and after the adoption of the Constitution, of the common law nature of the procedure and judgment *in rem* in forfeiture cases and of its use in such proceedings in the Exchequer and in the American common law courts.

We conclude that the common law as received in this country at the time of the adoption of the Constitution gave a remedy *in rem* in cases of forfeiture, and that it is a "common law remedy" and one which "the common law is competent to give" within the meaning of § 9 of the Judiciary Act of 1789. By that Act the states were left free to provide such a remedy in forfeiture cases where the articles are seized upon navigable waters of the state for violation of state law. It follows that *Smith* v. *Maryland, supra,* was rightly decided and is not in conflict with *The Moses Taylor, supra,* and cases following it, and that the judgment of the Supreme Court of California should be

Affirmed.

MR. JUSTICE BLACK, dissenting:

If this case involved only a fishnet, I should be inclined to acquiesce in the holding of the Court. Indeed, we have held that a state may seize and condemn a fishnet of trifling value without following the formal procedure of court action at all. *Lawton* v. *Steele*, 152 U. S. 133. But the principle laid down here involves far more than a fishnet, for under it state courts are authorized through *in rem* proceedings to seize and condemn, for violation of local law, any equipment or vessel employed in maritime activity. Today's *in rem* action is against a fishnet used in patently illegal fashion; tomorrow's may be an action against a tramp-steamer or ocean liner which violates a harbor regulation or otherwise offends against the police regulations of a state or municipality. Persons guilty of violating state laws affecting maritime activity may be prosecuted by *in personam* actions in state courts,[1] and the admiralty courts themselves can helpfully enforce state laws through *in rem* proceedings.[2] I do not believe, however, that the Judiciary Act permits states, through state common law courts which cannot reasonably be expected to have knowledge of admiralty law and practice, to give permanent halt to any portion of the maritime trade and commerce of the nation by bringing *in rem* proceedings against ships.[3]

[1] For a fact situation analogous to the instant case in which the state protected its fishing grounds through an *in personam* action, see *Manchester* v. *Massachusetts*, 139 U. S. 240. See also, as cases concerning the state criminal jurisdiction in the maritime field, *United States* v. *Bevans*, 3 Wheat. 336, and *Wildenhus's Case*, 120 U. S. 1.

[2] See, e. g., as cases on liens in wrongful death actions, *The J. E. Rumbell*, 148 U. S. 1, and *The Hamilton*, 207 U. S. 398.

[3] It is particularly important in time of war, when every vessel is in constant use, that *in rem* proceedings be strictly controlled. This is partially done by the Suits in Admiralty Act, 41 Stat. 525, for a brief discussion of which see *Clyde-Mallory Lines* v. *The Eglantine*, 317 U. S. 395.

The Judiciary Act of 1789 places in the federal admiralty courts exclusive jurisdiction over admiralty cases except where the common law provides an equivalent remedy. It is conceded that as a general proposition the common law courts have no *in rem* remedy in maritime cases. However, the Court holds squarely, for the first time in its history, that there is an exception to this rule which permits states to bring *in rem* forfeiture proceedings in common law courts. The Court brushes aside as mere generalizations the many cases hereafter considered which declare that *no* equivalent of an admiralty *in rem* proceeding may be brought at common law. Today's holding is rested principally on the English and colonial practice prior to 1789 and on one case in this Court. I disagree, believing that the English practice is irrelevant, that the colonial law was not in accord with the English practice, and that a long series of cases since 1789 have clearly considered the proposition put by the Court, and have given the Judiciary Act a meaning squarely opposite to that now announced.

The English Exchequer practice on which the Court appears to rely so heavily seems to me to be irrelevant because it was not in conformity with our own early American development. The colonists, of course, did not establish admiralty courts the moment they stepped from the vessels which brought them to the New World, and for a substantial portion of the seventeenth century maritime forfeitures were collected in the fashion of the English courts. However, toward the end of that century, it became acutely apparent in England that colonial juries would not enforce the navigation laws as England desired to see them enforced. This was particularly true in Massachusetts Bay [4] and in other colonies where commercial

[4] "But the laws of navigation were nowhere disobeyed and contemned so openly as in New England. The people of Massachusetts Bay were from the first disposed to act, as if independent of the mother-country;

interests dominated. Hence in 1697, Vice Commissioners of Admiralty were established throughout the colonies to enforce the navigation laws of England without jury procedure. It was conceded by the earliest writers that the Vice Admiralty courts in the colonies "obtained in a singular manner a jurisdiction in revenue causes, totally foreign to the original jurisdiction of the admiralty, and unknown to it." [5] Yet, with the great adaptability of the early courts, this jurisdiction in the colonies was fitted into the judicial system so as to allow appeal, as in purely admiralty cases, to the High Court of Admiralty in England. *The Vrouw Dorothea* (1754) reported in *The Fabius,* 2 C. Robinson 246.[6]

The same conflict which took place in England between Coke as champion of the common law jurisdiction, and the admiralty courts also was carried on in the colonies. Cf. *Talbot* v. *The Three Brigs,* 1 Dall. 95. As a result there was, throughout the eighteenth century, marked confusion as to the proper jurisdiction of each in forfeiture cases. For example, in 1702, the Board of Trade asked the advice of the Attorney General as to whether all forfeitures in connection with colonial trading matters under the Navigation Act of 1696 were to be prosecuted exclusively in courts of admiralty, and the Attorney General replied in the affirmative.[7] On the other hand it is clear, as the cases

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and having a governor and magistrates of their own choice, it was very difficult to enforce any regulations which came from the English parliament, and were adverse to their colonial interests." Reeves, The Law of Shipping, 56 (1807).

[5] 2 Brown, Civil and Admiralty Law, 2d ed., 491 (1802).

[6] For an account of the development of admiralty jurisdiction in the colonies, see 4 Andrews, The Colonial Period of American History, Chap. 8; Root, Relations of Pennsylvania with the British Government, 1696–1765, Chap. 4; the argument made by Daniel Webster as counsel in *United States* v. *Bevans,* 3 Wheat. 336, 379, *et seq.;* the Reporter's note to *United States* v. *Wiltberger,* 5 Wheat. 76, 113.

[7] 2 Chalmers, Opinions of Eminent Lawyers, 187 (1814); Andrews, *supra,* 169; Webster, *supra,* 3 Wheat. at 383.

cited by the Court show, that this view was not always maintained. One can only conclude that there was in 1789 no completely clear resolution of the conflict between admiralty and common law courts in forfeiture cases, though the cases hereafter considered indicate that the admiralty courts were winning the dominant role. At the same time it must be conceded by the proponents of the Court's view that American practice had come to be markedly different from the English.

It is settled beyond question that the general admiralty law of the United States in 1789 was the law as developed in the colonies and not the law as it came from England. Prior to the middle of the nineteenth century a contrary view was often pressed upon the Court and was as often rejected with adequate reference to the differences between the two.[8] The early American courts therefore were faced with the task of determining whether forfeiture actions should be brought exclusively in the common law courts, exclusively in the admiralty courts, or concurrently in either. In repeated decisions relating to forfeitures under federal laws, this Court, within a few years of the adoption of the Judiciary Act of 1789, held that forfeiture jurisdiction was exclusively in the admiralty courts.

The leading case for this proposition is *La Vengeance,* 3 Dall. 297 (1796). In that case the United States brought an action of forfeiture for exporting arms and ammunition. The United States contended in this Court that the action was criminal in its nature and that, in any case, it was not a civil suit within the admiralty and maritime jurisdiction and therefore should have been tried before a jury as at common law. The Court held that the action was clearly civil since it was an *in rem* proceeding and that

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[8] See e. g. *Manro* v. *Almeida,* 10 Wheat. 473, 489; *Waring* v. *Clarke,* 5 How. 441, 454; *New Jersey Steam Navigation Co.* v. *Merchants' Bank.* 6 How. 344. 389: and see *The Genesee Chief.* 12 How. 443.

it was subject to the maritime jurisdiction because the basic transportation activity involved was "entirely a water transaction." There is no suggestion whatever, in the brief opinion of the Court, of the possibility of a concurrent common law jurisdiction. This rule was followed in *The Sally*, 2 Cranch 406, where the government again contended that it was entitled to try forfeiture actions before a jury since the "cause was of common law, and not of admiralty and maritime jurisdiction," and the same result was reached in *The Samuel*, 1 Wheat. 9.[9]

One of the most elaborate arguments ever made in this Court on the issue now before us was presented in 1808 in *United States* v. *Schooner Betsey and Charlotte*, 4 Cranch 443. That case arose on an action for forfeiture. Counsel for the claimant, who had also been the losing counsel in *La Vengeance*, contended that the action should have been tried as at common law. He strongly emphasized the Exchequer practice in England and said, "There is nothing in the course of proceedings *in rem* which requires that they should be in a court of admiralty." *Id.* 447. The argument he made was almost identical with that which the Court adopts in the instant case. He emphasized particularly that "We have seen that in all cases of seizure for breaches of the law of revenue, trade or navigation, the common law is competent to give a remedy; and consequently this suitor is entitled to it." *Id.* 449.

The Court rejected entirely the argument of the counsel, held *The Betsey and Charlotte* indistinguishable from *La Vengeance*, and interpreted the Judiciary Act to mean that Congress had placed forfeitures "among the civil causes of

[9] In *The Samuel*, the claimant contended that since the action was begun by an information rather than a libel, the case was not subject to the admiralty jurisdiction. The Court held that "Where the cause is of admiralty jurisdiction, and the proceeding is by information, the suit is not withdrawn, by the nature of the remedy, from the jurisdiction *to which it otherwise belongs*." p. 14.

admiralty and maritime jurisdiction." *La Vengeance* was held conclusive of the proposition that in such cases there could be no right to trial by jury—in other words that under the American law as repeatedly declared between 1796 and 1808, the common law was not, within the meaning of the Judiciary Act, competent to give a remedy in forfeiture cases.[10] When the question of a right to a common law trial in a forfeiture case was certified to the Supreme Court in 1812, the Court found it unnecessary to hear any argument and counsel became so convinced that the authorities were conclusive that he did not press the case.[11]

These cases were reviewed many times in this Court and elsewhere, and cited for the proposition that in the United States, in noteworthy distinction from England, the admiralty forfeiture jurisdiction was exclusive.[12] This cul-

[10] Justice Chase in the course of argument commented from the bench that he thought *La Vengeance* a well considered case. His comment leaves no doubt that he considered the admiralty jurisdiction for forfeiture exclusive: "The reason of the legislature for putting seizures of this kind on the admiralty side of the court was the great danger to the revenue, if such cases should be left to the caprice of juries." p. 446.

[11] *Whelan* v. *United States*, 7 Cranch 112.

[12] "This Court decided, as early as 1805 (2 Cranch 405), in the case of the *Sally*, that the forfeiture of a vessel, under the Act of Congress against the slave-trade, was a case of admiralty and maritime jurisdiction, and not of common law. And so it had done before, in the case of *La Vengeance*." *Waring* v. *Clarke*, 5 How. 441, 458. "All the cases thus arising under the revenue and navigation laws were held to be civil causes of admiralty and maritime jurisdiction within the words of the Constitution, and, as such, were properly assigned to the District Court, in the Act of 1789, as part of its admiralty jurisdiction." *New Jersey Steam Navigation Co.* v. *Merchants' Bank*, 6 How. 344, 389. And see to the same effect *The Margaret*, 9 Wheat. 421, 427; *The Sarah*, 8 Wheat. 391, 394; *The Belfast*, 7 Wall. 624, 638. For acceptance of this view and a criticism of the result see the dissenting opinion in *Jackson* v. *The Magnolia*, 20 How. 296, 309. It is worthy of note that this opinion by Mr. Justice Daniel makes an argument very similar to that now made by the Court and relies as does the

minated in a holding in 1868, *The Eagle,* 8 Wall. 15, 25, 26, that the words in the 1789 Act giving admiralty jurisdiction in forfeiture cases were superfluous and of no effect since "the general jurisdiction in admiralty exists without regard to it."

Against the background of these cases we may consider *Smith* v. *Maryland,* 18 How. 71, which the Court cites for the existence of the forfeiture exception to the general rule as to exclusive admiralty jurisdiction of *in rem* proceedings. In that case the power of the state to protect a fishery by making it unlawful to catch oysters in a certain manner and to inflict a penalty of forfeiture upon a vessel employed in violation of the law was upheld. The entire argument was directed at considerations foreign to the issue of this case and the Judiciary Act was not even mentioned; the opinion of the Court deals almost exclusively with the question of whether the state statute was in conflict with the commerce clause of the Constitution. The Court held in passing that the mere existence of federal admiralty jurisdiction does not *per se* bar the state from legislating for the protection of its fisheries, a proposition which no one can doubt. It is apparent that the issue now before us, interpretation of the Judiciary Act, was not presented to the Court nor decided by it in the *Smith* case. The Court in the instant case treats *Smith* v. *Maryland* as a holding for a proposition which can flow from it only by accident.

Court on a passage from Kent. The majority of the Court did not accept Daniel's position. Kent himself acknowledged that the view he held was not the law as declared in this Court but he felt that *La Vengeance* was not "sufficiently considered." 1 Kent's Commentaries, 12th ed., 376. In *De Lovio* v. *Boit,* Fed. Cas. No. 3,776, 2 Gallis. 398, 474, Justice Story sitting as a Circuit Judge said: "It has . . . been repeatedly and solemnly held by the Supreme Court, that all seizures under laws of impost, navigation and trade, . . . are causes of admiralty and maritime jurisdiction."

If *Smith* v. *Maryland* accidentally interpreted the Judiciary Act, it did so in a manner in conflict not only with all the cases decided before it in which the issue was squarely considered but with the great number of cases decided since. In *The Moses Taylor*, 4 Wall. 411, 431 (1866), our leading case, the Court declared that "a proceeding *in rem*, as used in the admiralty courts, is not a remedy afforded by the common law." The considerations of policy which underlay this interpretation of the Judiciary Act were attributed to Justice Story: " 'The admiralty jurisdiction,' says Mr. Justice Story, 'naturally connects itself, on the one hand, with our diplomatic relations and the duties to foreign nations and their subjects; and, on the other hand, with the great interests of navigation and commerce, foreign and domestic. There is, then, a peculiar wisdom in giving to the national government a jurisdiction of this sort which cannot be yielded, except for the general good, and which multiplies the securities for the public peace abroad, and gives to commerce and navigation the most encouraging support at home.' " *The Moses Taylor*, *supra*, 430–431.

The language of *The Moses Taylor* has been repeated so often that I should have thought it to be a truism of the law. In *The Belfast*, 7 Wall. 624, 644: "There is no form of action at common law which, when compared with the proceeding *in rem* in the admiralty, can be regarded as a concurrent remedy." In *Rounds* v. *Cloverport Foundry Co.*, 237 U. S. 303, 306: "The proceeding *in rem* . . . is within the exclusive jurisdiction of admiralty." In *Knapp, Stout & Co.* v. *McCaffrey*, 177 U. S. 638, 648: "The true distinction between such proceedings as are and such as are not invasions of the exclusive admiralty jurisdiction is this: If the cause of action be one cognizable in admiralty, *and* the suit be *in rem* against the thing itself . . . the proceeding is essentially one in admiralty."

In *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109, 124: "A State may not provide a remedy *in rem* for any cause of action within the admiralty jurisdiction." [13]

Cases prior to *Smith* v. *Maryland* explicitly held that forfeitures were not to be enforced by an *in rem* action at common law. Cases since *Smith* v. *Maryland* have repeatedly declared that admiralty's *in rem* jurisdiction is exclusive of state court action. I therefore see no reason for placing any reliance on the *Smith* case which only consequentially affected an issue to which it gave no consideration at all; and for purposes of settling a jurisdictional issue such as this, the English practice, which need give no consideration to the complexities of dual sovereignty and diverse state laws, seems peculiarly inapplicable. By permitting maritime suits against persons in state courts and by denying the state courts jurisdiction of suits against vessels, the right to trial by jury is adequately preserved at the same time that the policy of ultimate exclusive national regulation of ships in commerce is saved.

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[13] Additional statements to the same effect are: *Hine* v. *Trevor*, 4 Wall. 555, 571; *Leon* v. *Galceran*, 11 Wall. 185, 188; *Steamboat Co.* v. *Chase*, 16 Wall. 522, 530; *The Lottawanna*, 20 Wall. 201, 218; *Edwards* v. *Elliott*, 21 Wall. 532, 556; *Norton* v. *Switzer*, 93 U. S. 355, 365; *Johnson* v. *Chicago & Pacific Elevator Co.*, 119 U. S. 388, 397; *The J. E. Rumbell*, 148 U. S. 1, 12; *Moran* v. *Sturges*, 154 U. S. 256, 276; *The Glide*, 167 U. S. 606, 615; *The Robert W. Parsons*, 191 U. S. 17, 37; *Chelentis* v. *Luckenbach S. S. Co.*, 247 U. S. 372, 383; *Panama R. Co.* v. *Vasquez*, 271 U. S. 557, 561.

Syllabus.

RECONSTRUCTION FINANCE CORPORATION *v.* BANKERS TRUST CO., TRUSTEE.

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

Nos. 387–388. Argued January 8, 1943.—Decided February 8, 1943.

1. The term "debtor's estate" as used in § 77 (c) (12) of the Bankruptcy Act embraces cash deposited with an indenture trustee. P. 167.
2. The services and expenses of the indenture trustee in this case were rendered and incurred "in connection with the proceedings and plan" of reorganization, within the meaning of § 77 (c) (12) of the Bankruptcy Act. P. 167.
3. Section 77 (c) (12) of the Bankruptcy Act, which authorizes, within such maximum as may be fixed by the Interstate Commerce Commission, an allowance out of the debtor's estate for reasonable expenses incurred in connection with the proceedings and plan of reorganization, and for reasonable compensation for services in connection therewith by trustees under indentures, *held* applicable to the claim here of an indenture trustee for services and expenses. P. 167.

   That the claim is based upon a provision of the indenture; is secured by a lien on the trust estate under the indenture; and is for services required by the indenture to be rendered the trust estate in fulfillment of the trustee's obligations, does not render § 77 (c) (12) inapplicable.
4. The function of the Interstate Commerce Commission under § 77 (c) (12) of the Bankruptcy Act is that of a fact-finding body. The bankruptcy court may not set aside the Commission's findings of fact when they are supported by the evidence, but may determine all questions of law. The only question of law which can arise with respect to a maximum amount fixed by the Commission is whether there is substantial evidence to support the Commission's finding. If there is not, the court may set aside the finding and refer the matter back to the Commission. The court's action upon the claim is appealable, independently of other issues, to the Circuit Court of Appeals. P. 170.

5. As here construed and applied, § 77 (c) (12) does not contravene Art. III, § 1 of the Federal Constitution, or the Fifth Amendment. P. 168.

129 F. 2d 122, reversed.

CERTIORARI, 317 U. S. 615, to review the affirmance of an order of the bankruptcy court making an allowance of expenses to a trustee under a mortgage of property of a railroad company in reorganization under § 77 of the Bankruptcy Act.

Mr. Paul A. Freund, with whom *Solicitor General Fahy,* and *Mr. James L. Homire* and *Mrs. Florence de Haas Dembitz* were on the brief, for petitioner.

Mr. Joseph M. Hartfield, with whom *Messrs. Jesse E. Waid* and *Fitzhugh McGrew* were on the brief, for respondent.

Briefs of *amici curiae* were filed by *Solicitor General Fahy* and *Messrs. Daniel W. Knowlton* and *Daniel H. Kunkel* on behalf of the Interstate Commerce Commission; by *Messrs. Fred N. Oliver* and *Willard P. Scott* on behalf of the Mutual Savings Bank Group on New Haven Railroad Bonds; and by *Mr. Hermon J. Wells* on behalf of Howard S. Palmer et al., Trustees, urging reversal; by *Mr. H. C. McCollom* on behalf of the Irving Trust Co., urging affirmance; and by *Mr. Frank C. Nicodemus, Jr.,* on behalf of the Chicago, Milwaukee, St. Paul & Pacific Railroad Co. et al.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

This controversy arises in a proceeding under § 77 of the Bankruptcy Act[1] for the reorganization of the St. Louis-San Francisco Railway Company system, part of which is the Kansas City, Fort Scott & Memphis Railway, under a mortgage of whose property the respondent Bank-

[1] March 3, 1933, c. 204, 47 Stat. 1474, as amended; 11 U. S. C. § 205.

ers Trust Company is trustee. The respondent obtained leave to intervene in the District Court and before the Interstate Commerce Commission,[2] and participated in the proceedings.

The Commission approved a plan of reorganization, and the District Court, with the plan before it, directed the filing of all petitions for allowance of "compensation for services rendered or for expenses (including reasonable attorneys' fees) incurred either under clause (12) of subsection (c) of Section 77[3] . . . or otherwise . . ."

The respondent filed two such petitions, numbered respectively 266 and 267, each praying stated amounts as compensation for services as indenture trustee, for counsel fees, and for expenses. The sums named and the services recited in the two petitions were identical, but in 267 the compensation was claimed under § 77 (c) (12), and the right was reserved to object to the jurisdiction of the Commission. That petition was sent by the court to the Commission for the fixing of a maximum allowance. Prior to the Commission's action thereon, 266 came on for hearing by the court.

In 266 the respondent alleged that the services had "not been rendered or incurred 'in connection with the proceedings and plan' " for reorganization, but by respondent as trustee under the mortgage in performance of its fiduciary duties, for the benefit of the trust estate, as distinguished from the debtor's estate.

Over opposition by petitioner, a creditor and an intervenor, the court ruled that § 77(c)(12) did not apply, that the mortgage rendered the claim a proper charge on the mortgaged property, and directed the respondent to pay itself the amounts claimed out of cash deposited with it as indenture trustee.

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[2] Pursuant to § 77 (c) (13); 11 U. S. C. § 205 (c) (13).

[3] 11 U. S. C. § 205 (c) (12).

The Commission held hearings on 267 and on other claims for allowances under § 77(c)(12). In a report it held that it had jurisdiction to fix a maximum amount to cover the items embraced in respondent's claim in 267, which it found were rendered in connection with the proceedings and the plan during the pendency of the § 77 proceeding.[4] It fixed maxima below the amounts claimed for the several items of service and expense.

The court refrained from passing on this portion of the Commission's report. The petitioner appealed from the order in 266, and the Circuit Court of Appeals affirmed the judgment.[5] Due to the importance of the questions raised in the administration of the statute and a conflict of decision,[6] we granted certiorari.

Section 77(c)(12), which appears in the margin,[7] em-

[4] St. Louis-San Francisco Ry. Co. Reorganization, 249 I. C. C. 195, 218.

[5] 129 F. 2d 122.

[6] *In re New York, N. H. & H. R. Co.*, 46 F. Supp. 236.

[7] "Within such maximum limits as are fixed by the Commission, the judge may make an allowance, to be paid out of the debtor's estate, for the actual and reasonable expenses (including reasonable attorney's fees) incurred in connection with the proceedings and plan by parties in interest and by reorganization managers and committees or other representatives of creditors and stockholders, and within such limits may make an allowance to be paid out of the debtor's estate for the actual and reasonable expenses incurred in connection with the proceedings and plan and reasonable compensation for services in connection therewith by trustees under indentures, depositaries and such assistants as the Commission with the approval of the judge may especially employ. Appeals from orders of the court fixing such allowances may be taken to the circuit court of appeals independently of other appeals in the proceeding and shall be heard summarily. The Commission shall, at such time or times as it may deem appropriate, after hearing, fix the maximum allowances which may be allowed by the court pursuant to the provisions of paragraph (12) of this subsection (c) and, after hearing if the Commission shall deem it necessary, the maximum compensation which may be allowed by the court pursuant to the provisions of paragraph (2) of this subsection (c)."

powers the Commission to fix a maximum allowance "out of the debtor's estate" for the expenses (including attorneys' fees) and services of "trustees under indentures," for expenses incurred and services rendered "in connection with the proceedings and plan." It emphasizes that the expenses, the fees, and the services must be "reasonable" and the allowance therefor "reasonable." The court is to make the allowance "within such maximum limits as are fixed by the Commission."

The questions presented are: (1) does the subsection apply to the respondent's claims, and (2) if it does, is it valid? We answer both in the affirmative.

First. The respondent contends that the expenses and services for which compensation was allowed were not those referred to in § 77 (c) (12). This, notwithstanding acquiescence in the holdings of the court below, which we think correct, that the term "debtor's estate" as used in the act embraces cash deposited with the indenture trustee and that the services and expenses in question were rendered and incurred "in connection with the proceedings and plan." [8]

The basis of the contention and of the decision below is that the services and expenses in question are "not within the meaning of" the subsection as the claim for their allowance is based upon the contract expressed in the mortgage [9] and is for services required by the mortgage

[8] None of the services were routine administrative services currently rendered by the trustee; none were of non-routine character rendered prior to the inception of the reorganization proceeding. If they had been of these descriptions the petitioner concedes allowance for them would be a matter for the court under § 77 (e), 11 U. S. C. 205 (e).

[9] Article Twenty-third of the Indenture: "The Trustees shall be entitled to reasonable compensation for all services rendered by them in the execution of the trusts hereby created, which compensation as well as all reasonable expenses necessarily incurred and actually disbursed hereunder, the Railway Company agrees to pay and hereby charges on the trust estate."

to be rendered the trust estate in fulfilment of the respondent's obligations.

The subsection applies in terms to allowance of claims such as those here in issue. No legislative history is cited to the contrary. The statute deals with other claims arising out of contract and secured by liens fixed or inchoate, and no basis is suggested for excluding the respondent's claim from its sweep.

Second. The main argument advanced in support of the judgment is that to apply § 77 (c) (12) to the respondent's claims would violate the Fifth Amendment of the Constitution, by depriving the courts of power to determine whether the Commission's decision was contrary to law or without evidence to support it; and by destroying respondent's vested property rights. In addition, it is urged that by Art. III, § 1, the judicial power of the United States is vested exclusively in the courts and matters of private right may not be relegated to administrative bodies for trial. The statute, fairly applied, in the circumstances disclosed by the record does not contravene any constitutional provision.

Three diverse conclusions respecting the effect of § 77 (c) (12) have been expressed by the courts. It has been held that the maximum fixed by the Commission is in all circumstances binding and unalterable.[10] The court below has concluded that the subsection has no application to the claims of an indenture trustee, secured by a lien on the trust estate pursuant to the mortgage contract. The District Court of Connecticut has decided that the

[10] *In re Chicago, M., St. P. & P. R. Co.*, 121 F. 2d 371; *In re Chicago & N. W. Ry. Co.*, 35 F. Supp. 230; *In re Chicago G. W. R. Co.*, 29 F. Supp. 149. It is suggested this view is sustained by the legislative history of the section. But the changes made by amendment in another section (77 (e)) are not helpful; and the testimony before the Judiciary Committee of the House is neither the sort of legislative material this court holds relevant to the construction of a statute, nor is it clear or definite upon the point at issue.

court may set aside the maximum named by the Commission, if found unreasonably low, and return the matter to the Commission for a fresh determination.[11] The petitioner states its view that "while the statute is not entirely clear, judicial review of the maximum is permitted." After mentioning matters of law which are for the court's determination on review of the Commission's report, such as whether the services in question are to be compensated under the provisions of the Act, and others we need not mention, the petitioner refers to § 77 (e)[12] which provides that the judge shall approve the plan if satisfied, *inter alia,* that the "amounts to be paid . . . for expenses and fees incident to the reorganization . . . are reasonable, [and] are within such maximum limits as fixed by the Commission . . ." It is suggested that if the judge finds that any allowance within the maximum would be unreasonably low he may thereupon, under § 77 (e), disapprove the plan and either dismiss the proceeding or refer the cause back to the Commission for further action.

None of these views seems to us rightly to construe the statute. We think the Congress did not intend to deny the courts all power of review of Commission action in such cases. The statute plainly requires reference to the Commission of claims of the class under consideration, a hearing by that body, the setting of a maximum and action by the court on the footing of the Commission's report. It does not contemplate a hearing *de novo* on the issue of the reasonable worth of the services rendered or the propriety of the expenses incurred, or a reappraisal by the court of the facts. Moreover the procedure suggested by petitioner does not comport with the evident purpose of § 77 (c) (12) which appears to treat the court's action with respect to such claims as a matter distinct from his final action on the plan as a whole under § 77 (e).

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[11] *In re New York, N. H. & H. R. Co., supra,* note 6.

[12] 11 U. S. C. 205 (e).

Our conclusion is that the function committed by the law to the Commission is the ordinary one reposed in a fact finding body and that its findings, supported by evidence, may not be disturbed by a court. This construction of the Act leaves the court free to decide upon the basis of the Commission's report all questions of law. With respect to the amount set as a maximum the only question of law which can arise is whether there is substantial evidence to support the Commission's finding. If there is not the court may so hold, set aside the finding and return the matter to the Commission. Under the terms of the subsection the judge's action upon the claim is subject to appeal independently of other issues, to the Circuit Court of Appeals.

Thus understood, we find no infirmity in the statute. The committal to the Commission of the fact finding office raises no substantial question under the Fifth Amendment. In actions at law a jury is the traditional trier of facts, whose function as such is preserved and guaranteed by the fundamental law. But courts of equity, of admiralty and of bankruptcy, by themselves and their mandatories examine and decide disputed questions of fact; and no reason is perceived why claims of the sort here involved should not be litigated, as are other claims against bankrupt estates, by such machinery and in such manner as Congress shall prescribe, saving to the claimant the right of notice and hearing, and such review as is provided by the statute as we construe it.

At law the jury's verdict settles issues of fact and defines rights, subject only to questions of law. In administrative procedure, the findings of the administrative body may likewise be made conclusive of fact issues, and equally define rights and duties subject only to questions of law. No question is made as to the competency of the Interstate Commerce Commission to appraise evidence and to draw an informed and intelligent conclusion as to what is a

maximum reasonable compensation for services rendered. Indeed, since most of the services are performed in connection with its activities it is probably in a better position to judge of their value to the reorganization than any court or other fact finding instrumentality.

To prescribe a method of trial of facts, subject to a court's supervision in matters of law, is not, as respondent suggests, to destroy vested rights, but to provide a method of appraising and liquidating them. The statute awards the claim priority of payment, so that respondent is not called upon, as are some other classes of creditors, to suffer an abatement of its claim.

The judgment is reversed and the cause remanded to the District Court with instructions to proceed in conformity with this opinion.

Reversed.

MR. JUSTICE DOUGLAS, concurring:

While I concur in the result and in most of the opinion of the Court, I am in disagreement with the majority on one phase of the case.

I do not think that the maximum allowance made by the Commission for fees and expenses is subject to review by the District Court. Sec. 77 (e) (2) now provides that the judge shall approve the plan if satisfied that the amounts to be paid for fees and expenses have been disclosed, "are reasonable, are within such maximum limits as are fixed by the Commission, and are within such maximum limits to be subject to the approval of the judge." Prior to the 1935 amendments to § 77, that provision, then contained in subsection (g) (2), read differently. Though subsection (f) then stated that the Commission had to "fix the maximum compensation and reimbursement" which might be allowed by the court, subsection (g) (2) provided for approval of the plan by the judge if he was satisfied that all such amounts "have been

fully disclosed and are reasonable, or are to be subject to the approval of the judge." The changes made by the 1935 amendments are significant. The total amount of fees and expenses fixed by the Commission became a ceiling beneath which the judge could make readjustments but above which he could not go. Prior to those amendments judicial review of the maximum fixed by the Commission might have been permissible. But the changes made in 1935 clearly indicate, as Judge Evans said in *In re Chicago, M., St. P. & P. R. Co.*, 121 F. 2d 371, 374, that the "court was ultimately to determine the amount of the fees," its action however being "limited by the maximum fixed by the Commission." The legislative history of the 1935 amendments supports that view.[1] Indeed the Com-

[1] The testimony of Mr. Craven, the draftsman of the bill, is illuminating:

"Mr. Burgess. That is the provision of this act that the maximum is to be approved by the Commission. The objection that I was making was directed to Commissioner Mahaffie's addition to that. It seems to me that the provision for the approval is adequate. I am not sure whether that maximum is appealable. Are you, Mr. Craven? That is, can the fixation of a maximum by the Commission be appealed under this act?

Mr. Craven. I think not.

Mr. Burgess. You think not?

Mr. Craven. That is my recollection of it.

Mr. Celler. Even if the court would accept the maximum there would be no appeal from the court's ruling?

Mr. Burgess. I do not know of any appeal that you can take from the Commission's fixation of a maximum under this act.

Mr. Celler. That does not seem right.

Mr. Burgess. That (sic) is an appeal from the court's fixation, of course, but that would have to be within the maximum, so I do not know of any appeal.

Mr. Michener. There are a number of powers from which you cannot appeal so far as the decision of the Commission is concerned. They are really given more power in some particulars than the judge.

Mr. Celler. That leaves the entire matter in the hands of the Inter-

mittee Reports stated [2] that the "allowances to be made by the court" were to be "within the maximum prescribed by the Commission." H. Rep. No. 1283, 74th Cong., 1st Sess., p. 3; S. Rep. No. 1336, 74th Cong., 1st Sess., p. 4.

That construction also squares with other provisions of § 77. Thus subsection (c) (12) provides that the judge may make an allowance "within such maximum limits as are fixed by the Commission." It also requires the Commission to "fix the maximum allowances which may be allowed by the court." They indicate to me that in line with the minority views in *United States* v. *Chicago, M., St. P. & P. R. Co.*, 282 U. S. 311, which § 77 adopted (see Congressman LaGuardia, 76th Cong. Rec., 72nd Cong., 2d Sess., p. 5358), the drain on the cash resources of railroads was to be controlled by entrusting to the Commission the responsibility for determining the total amount of cash which should be expended for fees and expenses. Within those limits the courts could make a fair allocation among

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state Commerce Commission, practically speaking.

Mr. Michener. Yes.

Mr. Burgess. Yes.

Mr. Celler. With no right of appeal at all if the maximum is accepted by the court?

Mr. Burgess. That is my understanding. If Mr. Craven has a different view, I should be glad to accept his view.

Mr. Craven. That is my understanding of it."

Hearings on H. R. 6249, House Committee on the Judiciary, 74th Cong., 1st Sess., Ser. 3, p. 86. And see the testimony of Commissioner Mahaffie at p. 70, which is also quoted in *In re Chicago, M., St. P. & P. R. Co., supra*, p. 374.

[2] The committee print of the bill provided for allowances of expenses and of compensation. See subsections (c)(12) and (e)(2) of H. R. 6249, 74th Cong., 1st Sess., Hearings on H. R. 6249, *supra*, pp. 6, 7. As recommended by both the House and Senate committees, allowances for expenses but not for compensation were provided. The provision for allowances of fees was later restored. 79 Cong. Rec., 74th Cong., 1st Sess., p. 13765.

the various claimants. But beyond those limits the courts could not go. There might of course be questions of law affecting the aggregate maximum allowances made by the Commission which the District Court could review. Thus if in this case the Commission had held that the services rendered by respondent were not within the scope of § 77 (c) (12), that ruling could be reviewed and the matter would then have to be remanded to the Commission for a new determination. § 77 (e). But apart from such instances, the Commission's finding as to the aggregate maximum allowances is conclusive.

It is of course the duty of the Commission not only to fix the maximum amount of the aggregate allowances for fees and expenses but also to determine in the first instance how much each claimant should receive. That is made evident not only by subsection (c) (12) but also by subsection (d) which requires the Commission in its approval of a plan to find that it meets the requirements of subsections (b) and (e). The latter, as has been noted, requires that the amounts to be paid by the debtor or the reorganized company for expenses and fees be "reasonable" as well as "within such maximum limits as are fixed by the Commission." Since the main services rendered in connection with a plan of reorganization under § 77 occur before the Commission, it is in a much better position than the District Court to determine the value, if any, of the services rendered by each claimant. That fact gives great weight to the findings made by the Commission on each claim. But the requirement in subsection (e) (2) that the judge find that the awards are "reasonable" negatives the idea that the findings of the Commission are conclusive. Hence within the maximum limits of the total allowances for fees and expenses the judge can make readjustments—increasing or decreasing amounts awarded to the various claimants or granting allowances where none were made by the Commission. The contrary view was

adopted in *In re Chicago, M., St. P. & P. R. Co., supra,* pp. 374–375. The court felt that since subsection (c) (12) spoke of the "maximum limits" and "maximum allowances" fixed by the Commission, the findings of the Commission as to the maximum amount which each claimant could receive were conclusive. But that interpretation is difficult to reconcile with the requirement of subsection (e) (2) that the judge must find the allowances "reasonable." The use of the plural in subsection (e) (12) only indicates that the maximum allowance for fees and the maximum allowance for expenses are both to be fixed by the Commission.

My conclusion that the aggregate maximum allowances fixed by the Commission are not reviewable does not make § 77 (c) (12) and (e) (2) unconstitutional. It is Congress which has the power under the Constitution to establish "uniform Laws on the subject of Bankruptcies throughout the United States." Article I, § 8, Cl. 4. The scope of the bankruptcy power is not restricted to that which has been exercised. *Continental Bank* v. *Chicago, R. I. & P. Ry. Co.,* 294 U. S. 648, 670–671. The fact that Congress has customarily entrusted administration of the various bankruptcy acts to the courts does not mean that it must do so. As stated by Judge Evans in *In re Chicago, M., St. P. & P. R. Co., supra,* p. 375, "the power of Congress to deal with bankruptcy carries with it the right to select the tribunal, even going outside of courts, to administer debtors' estates." When it comes to fees for services rendered or expenses incurred in connection with bankruptcy proceedings, Congress has plenary power. In § 48 of the general bankruptcy Act Congress has prescribed the schedule of fees for receivers, marshals, and trustees. It could provide that no fees for services rendered during the bankruptcy proceedings might be paid from the estate. The 1935 amendments to § 77 originally were recommended by the committees

on that basis. H. Rep. No. 1283, *supra,* p. 3; S. Rep. No. 1336, *supra,* p. 4. Having that power Congress could fix fees for attorneys and others on a *per diem* or other basis. Cf. *Hines* v. *Lowrey,* 305 U. S. 85. In lieu of any such rigid system of control it could bring to its aid the services of the Commission and vest in it complete authority over all allowances. That clearly would not involve any question of delegation of judicial power. See *Sunshine Coal Co.* v. *Adkins,* 310 U. S. 381, 400. Hence, when Congress granted the Commission exclusive authority over the maximum amount of allowances, it did not give § 77 a constitutional infirmity.

MR. JUSTICE BLACK joins in this opinion.

SMITH *v.* SHAUGHNESSY, COLLECTOR OF INTERNAL REVENUE.

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

No. 429. Argued January 14, 1943.—Decided February 15, 1943.

1. Under an irrevocable transfer of property in trust, the income was to be paid to the grantor's wife for life; upon her death, the corpus was to go to the grantor if living or, if not, to the wife's heirs. Concededly, the wife's life interest was subject to the federal gift tax. *Held* that the remainder interest, less the value of the grantor's reversionary interest, was subject to the gift tax imposed by §§ 501, 506 of the Revenue Act of 1932. P. 180.
2. The gift tax under the Revenue Act of 1932 amounts in some instances to a security for the payment eventually of the federal estate tax; it is in no sense double taxation. P. 179.
3. The language of the provision of the Revenue Act of 1932 imposing a tax upon every transfer of property by gift, whether the property is "real or personal, tangible or intangible," is broad enough to include a contingent remainder; and the provisions of the Treasury regulations for application of the tax to, and determination of the

value of, "a remainder . . . subject to an outstanding life estate" are consistent with the purpose of the Act. P. 180.

4. In a case such as this, where the grantor has neither the form nor substance of control over the trust property, and never will have unless he outlives his wife, it must be concluded that the grantor has relinquished economic control over the trust property and that the gift was complete except for the value of his reversionary interest. P. 181.

128 F. 2d 742, affirmed.

CERTIORARI, 317 U. S. 617, to review the reversal of a judgment, 40 F. Supp. 19, ordering a refund of a federal gift tax.

Mr. Ellsworth C. Alvord, with whom *Messrs. Floyd F. Toomey, John H. Hughes,* and *Willis H. Michell* were on the brief, for petitioner.

Mr. Arnold Raum, with whom *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key, J. Louis Monarch,* and *L. W. Post* were on the brief, for respondent.

MR. JUSTICE BLACK delivered the opinion of the Court.

The question here is the extent of the petitioner's liability for a tax under §§ 501, 506 of the Revenue Act of 1932, 47 Stat. 169, which imposes a tax upon every transfer of property by gift, "whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; . . ."

The petitioner, age 72, made an irrevocable transfer in trust of 3,000 shares of stock worth $571,000. The trust income was payable to his wife, age 44, for life; upon her death, the stock was to be returned to the petitioner, if he was living; if he was not living, it was to go to such persons as his wife might designate by will, or in default of a will

by her, to her intestate successors under applicable New York law. The petitioner, under protest, paid a gift tax of $71,674.22, assessed on the total value of the trust principal, and brought suit for refund in the district court. Holding that the petitioner had, within the meaning of the Act, executed a completed gift of a life estate to his wife, the court sustained the Commissioner's assessment on $322,423, the determined value of her life interest; but the remainder was held not to be completely transferred and hence not subject to the gift tax. 40 F. Supp. 19. The government appealed and the Circuit Court of Appeals reversed, ordering dismissal of the petitioner's complaint on the authority of its previous decision in *Herzog* v. *Commissioner,* 116 F. 2d 591. We granted certiorari because of alleged conflict with our decisions in *Helvering* v. *Hallock,* 309 U. S. 106, and *Sanford* v. *Commissioner,* 308 U. S. 39. In these decisions, and in *Burnet* v. *Guggenheim,* 288 U. S. 280, we have considered the problems raised here in some detail, and it will therefore be unnecessary to make any elaborate re-survey of the law.

Three interests are involved here: the life estate, the remainder, and the reversion. The taxpayer concedes that the life estate is subject to the gift tax. The government concedes that the right of reversion to the donor in case he outlives his wife is an interest having value which can be calculated by an actuarial device, and that it is immune from the gift tax. The controversy, then, reduces itself to the question of the taxability of the remainder.

The taxpayer's principal argument here is that under our decision in the *Hallock* case, the value of the remainder will be included in the grantor's gross estate for estate tax purposes; and that in the *Sanford* case we intimated a general policy against allowing the same property to be taxed both as an estate and as a gift.

This view, we think, misunderstands our position in the *Sanford* case. As we said there, the gift and estate tax laws are closely related and the gift tax serves to supplement the estate tax.[1] We said that the taxes are not "always mutually exclusive," and called attention to § 322 of the 1924 Act there involved (reënacted with amendments in § 801 of the 1932 Act) which charts the course for granting credits on estate taxes by reason of previous payment of gift taxes on the same property. The scope of that provision we need not now determine. It is sufficient to note here that Congress plainly pointed out that "some" of the "total gifts subject to gift taxes . . . may be included for estate tax purposes and some not." House Report No. 708, 72d Cong., 1st Sess., p. 45. Under the statute the gift tax amounts in some instances to a security, a form of down-payment on the estate tax which secures the eventual payment of the latter; it is in no sense double taxation as the taxpayer suggests.

We conclude that under the present statute, Congress has provided as its plan for integrating the estate and gift taxes this system of secured payment on gifts which will later be subject to the estate tax.[2]

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[1] The gift tax was passed not only to prevent estate tax avoidance, but also to prevent income tax avoidance through reducing yearly income and thereby escaping the effect of progressive surtax rates. House Report No. 708, 72d Cong., 1st Sess., p. 28; Brandeis, J., dissenting in *Untermyer* v. *Anderson*, 276 U. S. 440, 450; Stone, J., dissenting in *Heiner* v. *Donnan*, 285 U. S. 312, 333.

[2] It has been suggested that the congressional plan relating the estate and gift taxes may still be incomplete. See e. g., Griswold, A Plan for the Coordination of the Income, Estate, and Gift Tax Provisions etc., 56 Harv. L. Rev. 337; Magill, The Federal Gift Tax, 40 Col. L. Rev. 773, 792; Kauper, The Revenue Act of 1942: Estate and Gift Tax Amendments, 41 Mich. L. Rev. 369, 388; and see *Commissioner* v. *Prouty*, 115 F. 2d 331, 337; *Higgins* v. *Commissioner*, 129 F. 2d 237, 239.

Unencumbered by any notion of policy against subjecting this transaction to both estate and gift taxes, we turn to the basic question of whether there was a gift of the remainder. The government argues that for gift tax purposes the taxpayer has abandoned control of the remainder and that it is therefore taxable, while the taxpayer contends that no realistic value can be placed on the contingent remainder and that it therefore should not be classed as a gift.

We cannot accept any suggestion that the complexity of a property interest created by a trust can serve to defeat a tax. For many years Congress has sought vigorously to close tax loopholes against ingenious trust instruments.[3] Even though these concepts of property and value may be slippery and elusive they can not escape taxation so long as they are used in the world of business. The language of the gift tax statute, "property . . . real or personal, tangible or intangible," is broad enough to include property, however conceptual or contingent. And lest there be any doubt as to the amplitude of their purpose, the Senate and House Committees, reporting the bill, spelled out their meaning as follows:

"The terms 'property,' 'transfer,' 'gift,' and 'indirectly' [in § 501] are used in the broadest and most comprehensive sense; the term 'property' reaching every species of right or interest protected by law and having an exchangeable value." [4]

The Treasury regulations, which we think carry out the Act's purpose, made specific provisions for application of

[3] 2 Paul, Federal Estate & Gift Taxation, Chap. 17; Schuyler, Powers of Appointment and Especially Special Powers: The Estate Taxpayer's Last Stand, 33 Ill. L. Rev. 771; Leaphart, The Use of the Trust to Escape the Imposition of Federal Income & Estate Taxes, 15 Corn. L. Q. 587.

[4] Senate Report No. 665, 72d Cong., 1st Sess., p. 39; House Report No. 708, *supra*, p. 27.

the tax to, and determination of the value of, "a remainder . . . subject to an outstanding life estate." [5]

The essence of a gift by trust is the abandonment of control over the property put in trust. The separable interests transferred are not gifts to the extent that power remains to revoke the trust or recapture the property represented by any of them, *Burnet* v. *Guggenheim, supra,* or to modify the terms of the arrangement so as to make other disposition of the property, *Sanford* v. *Commissioner, supra.* In the *Sanford* case the grantor could, by modification of the trust, extinguish the donee's interest at any instant he chose. In cases such as this, where the grantor has neither the form nor substance of control and never will have unless he outlives his wife, we must conclude that he has lost all "economic control" and that the gift is complete except for the value of his reversionary interest.[6]

The judgment of the Circuit Court of Appeals is affirmed with leave to the petitioner to apply for modification of its mandate in order that the value of the petitioner's reversionary interest may be determined and excluded.

It is so ordered.

MR. JUSTICE ROBERTS:

I dissent. I am of opinion that, except for the life estate in the wife, the gift *qua* the donor was incomplete and not within the sweep of §§ 501 and 506. A contrary conclusion might well be reached were it not for *Helvering*

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[5] Treas. Regulations 79 (1936 Ed.), Arts. 2, 3, 17, 19. Cf. *Commissioner* v. *Marshall,* 125 F. 2d 943, 945.

[6] The conclusion reached here is in accord with that of the several Circuit Courts of Appeals which have considered the problem: *Commissioner* v. *Marshall,* 125 F. 2d 943 (C. C. A. 2d); *Commissioner* v. *Beck's Estate,* 129 F. 2d 243 (C. C. A. 2d); *Commissioner* v. *McLean,* 127 F. 2d 942 (C. C. A. 5th); *Helvering* v. *Robinette,* 129 F. 2d 832 (C. C. A. 3d), affirmed, *post,* p. 184; *Hughes* v. *Commissioner,* 104 F. 2d 144 (C. C. A. 9th); and see the cases cited in Note 2, *supra.*

v. *Hallock*, 309 U. S. 106. But the decisions in *Burnet* v. *Guggenheim*, 288 U. S. 280, and *Sanford* v. *Commissioner*, 308 U. S. 39, to which the court adheres, require a reversal in view of the ruling in the *Hallock* case.

The first of the two cases ruled that a transfer in trust, whereby the grantor reserved a power of revocation, was not subject to a gift tax, but became so upon the renunciation of the power. The second held that where the grantor reserved a power to change the beneficiaries, but none to revoke or to make himself a beneficiary, the transfer was incomplete and not subject to gift tax. At the same term, in *Porter* v. *Commissioner*, 288 U. S. 436, the court held that where a decedent had given property *inter vivos* in trust, reserving a power to change the beneficiaries but no power to revoke or revest the property in himself, the transfer was incomplete until the termination of the reserved power by the donor's death and hence the corpus was subject to the estate tax.

When these cases were decided, the law, as announced by this court, was that where, in a complete and final transfer *inter vivos*, a grantor provided that, in a specified contingency, the corpus should pass to him, if living, but, if he should be dead, then to others, the gift was complete when made, he retained nothing which passed from him at his death, prior to the happening of the contingency, and that no part of the property given was includible in his gross estate for estate tax. *McCormick* v. *Burnet*, 283 U. S. 784; *Helvering* v. *St. Louis Union Trust Co.*, 296 U. S. 39; *Becker* v. *St. Louis Union Trust Co.*, 296 U. S. 48. So long as this was the law the transfer might properly be the subject of a gift tax for the gift was, as respects the donor, complete when made.

In 1940 these decisions were overruled and it was held that such a transfer was so incomplete when made, and the grantor retained such an interest, that the cessation of that interest at death furnished the occasion for im-

posing an estate tax. Thus the situation here presented was placed in the same category as those where the grantor had reserved a power to revoke or a power to change beneficiaries. By analogy to the *Guggenheim* and *Sanford* cases, I suppose the gift would have become complete if the donor had, in his life, relinquished or conveyed the contingent estate reserved to him.

In the light of this history, the *Sanford* case requires a holding that the gifts in remainder, after the life estate, create no gift tax liability. The reasoning of that decision, the authorities, and the legislative history relied upon, are all at war with the result in this case. There is no need to quote what was there said. A reading of the decision will demonstrate that, if the principles there announced are here observed, the gifts in question are incomplete and cannot be the subject of the gift tax.

It will not square with logic to say that where the donor reserves the right to change beneficiaries, and so delays completion of the gift until his death or prior relinquishment of the right, the gift is incomplete, but where he reserves a contingent interest to himself the reverse is true,—particularly so, if the criterion of estate tax liability is important to the decision of the question, as the *Sanford* case affirms.

The question is not whether a gift which includes vested and contingent future interests in others than the donor is taxable as an entirety when made, but whether a reservation of such an interest in the donor negatives a completion of the gift until such time as that interest is relinquished.

All that is said in the *Sanford* case about the difficulties of administration and probable inequities of a contrary decision there, applies here with greater force. Indeed a system of taxation which requires valuation of the donor's retained interest, in the light of the contingencies involved, and calculation of the value of the subsequent remainders

by resort to higher mathematics beyond the ken of the taxpayer, exhibits the artificiality of the Government's application of the Act. This is well illustrated in the companion cases of *Robinette* and *Paumgarten, infra,* p. 184. Such results argue strongly against the construction which the court adopts.

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

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

No. 499. Argued January 14, 1943.—Decided February 15, 1943.

A woman, contemplating marriage, created an irrevocable trust of property, under which she was to receive the income during her life; upon her death, her mother and stepfather were to have a life interest in the income; the remainder was to go to her issue upon their reaching the age of 21, and, in default of issue, then to whomever the last surviving life tenant should appoint by will. Her mother created a similar trust, reserving a life interest to herself and her husband, with a second life interest to the daughter, and remainder to the daughter's issue. Concededly, the secondary life interests were subject to the federal gift tax. *Held:*

1. The remainders (after the life interests) were taxable gifts under the Revenue Act of 1932. *Smith* v. *Shaughnessy, ante,* p. 176 P. 186.

2. The fact that on the date of the creation of the trust there were in existence no eligible remaindermen does not defeat the gift tax. P. 186.

3. The transfers in this case can not be regarded as supported by "full consideration in money or money's worth" within the meaning of § 503 of the Act; nor as "in the ordinary course of business" within the meaning of Art. 8 of Treasury Regulations 79. P. 187.

4. The value of the reversionary interests of the grantors in this case, being incapable of ascertainment by recognized actuarial meth-

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*Together with No. 500, *Paumgarten* v. *Helvering, Commissioner of Internal Revenue,* also on writ of certiorari, 317 U. S. 620, to the Circuit Court of Appeals for the Third Circuit.

ods, is not deductible in computing the gift tax. *Smith* v. *Shaughnessy, ante,* p. 176, distinguished. P. 188.
129 F. 2d 832, affirmed.

CERTIORARI, 317 U. S. 620, to review the reversal of a decision of the Board of Tax Appeals, 44 B. T. A. 701, which reversed in two cases, consolidated for hearing before the Board and in the court below, determinations of deficiencies in federal gift taxes.

Mr. Henry A. Mulcahy, with whom *Mr. Guilford S. Jameson* was on the brief, for petitioners.

Mr. Arnold Raum, with whom *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key, J. Louis Monarch,* and *L. W. Post* were on the brief, for respondent.

MR. JUSTICE BLACK delivered the opinion of the Court.

This is another case [1] under the gift tax provisions of the Revenue Act of 1932, §§ 501, 506, which, while presenting certain variants on the questions decided in *Smith* v. *Shaughnessy, ante,* p. 176, is in other respects analogous to and controlled by that case.

In 1936, the petitioner, Elise Paumgarten (nee Robinson), was thirty years of age and was contemplating marriage; her mother, Meta Biddle Robinette, was 55 years of age and was married to the stepfather of Miss Robinson. The three, daughter, mother and stepfather, had a conference with the family attorney, with a view to keeping the daughter's fortune within the family. An agreement was made that the daughter should place her property in trust, receiving a life estate in the income for herself, and creating a second life estate in the income for her mother and stepfather if she should predecease them. The remainder

[1] These two matters have been considered as one case below and will be so treated here.

was to go to her issue upon their reaching the age of 21, with the further arrangement for the distribution of the property by the will of the last surviving life tenant if no issue existed. Her mother created a similar trust, reserving a life estate to herself and her husband and a second or contingent life estate to her daughter. She also assigned the remainder to the daughter's issue. The stepfather made a similar arrangement by will. The mother placed $193,000 worth of property in the trust she created, and the daughter did likewise with $680,000 worth of property.

The parties agree that the secondary life estates in the income are taxable gifts, and this tax has been paid. The issue is whether there has also been a taxable gift of the remainders of the two trusts. The Commissioner determined that the remainders were taxable, the Board of Tax Appeals reversed the Commissioner, and the Circuit Court of Appeals reversed the Board of Tax Appeals. 129 F. 2d 832.

The petitioners argue that the grantors have not relinquished economic control and that this transaction should not be subject both to the estate and to the gift tax. What we have said in the *Smith* case determines these questions adversely to the petitioners. However, the petitioners emphasize certain other special considerations.

First. Petitioners argue that since there were no donees in existence on the date of the creation of the trust who could accept the remainders, the transfers cannot be completed gifts. The gift tax law itself has no such qualifications. It imposes a tax "upon the transfer . . . of property by gift." And Treasury Regulations 79, Art. 3, provide that "The tax is a primary and personal liability of the donor, is an excise upon his act of making the transfer, is measured by the value of the property passing from the donor, and attaches regardless of the fact that the identity of the donee may not then be known or ascertainable." We are asked to strike down this regulation

as being invalid because inconsistent with the statute. We do not think it is. As pointed out in the *Smith* case, the effort of Congress was to reach every kind and type of transfer by gift. The statute "is aimed at transfers of the title that have the quality of a gift." *Burnet* v. *Guggenheim,* 288 U. S. 280, 286. The instruments created by these grantors purported on their face wholly to divest the grantors of all dominion over the property; it could not be returned to them except because of contingencies beyond their control. Gifts of future interests are taxable under the Act, § 504 (b), and they do not lose this quality merely because of the indefiniteness of the eventual recipient. The petitioners purported to give the property to someone whose identity could be later ascertained and this was enough.

Second. It is argued that the transfers were not gifts but were supported by "full consideration in money or money's worth." [2] This contention rests on the assumption that an agreement between the parties to execute these trusts was sufficient consideration to support the transfers. We need not consider or attempt to decide what were the rights of these parties as among themselves. Petitioners think that their transaction comes within the permissive scope of Art. 8 of Regulations 79 (1936 edition) which provides that "a sale, exchange, or other transfer of property made in the ordinary course of

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[2] Section 503 of the 1932 Act, 47 Stat. 169, provides that "Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall, for the purpose of the tax imposed by this title, be deemed a gift, . . ." This language is interpreted in the House and Senate Committee Reports as follows: "The tax is designed to reach all transfers to the extent that they are donative, and to exclude any consideration not reducible to money or money's worth." House Report No. 708, 72d Cong., 1st Sess., p. 29; Senate Report No. 665, 72d Cong., 1st Sess., p. 41.

business (a transaction which is bona fide at arm's length, and free from any donative intent) will be considered as made for an adequate and full consideration in money or money's worth." The basic premise of petitioner's argument is that the moving impulse for the trust transaction was a desire to pass the family fortune on to others. It is impossible to conceive of this as even approaching a transaction "in the ordinary course of business."

Third. The last argument is that "in any event, in computing the value of the remainders herein, allowance should be made for the value of the grantor's reversionary interest." Here, unlike the *Smith* case, the government does not concede that the reversionary interest of the petitioner should be deducted from the total value. In the *Smith* case, the grantor had a reversionary interest which depended only upon his surviving his wife, and the government conceded that the value was therefore capable of ascertainment by recognized actuarial methods. In this case, however, the reversionary interest of the grantor depends not alone upon the possibility of survivorship but also upon the death of the daughter without issue who should reach the age of 21 years. The petitioner does not refer us to any recognized method by which it would be possible to determine the value of such a contingent reversionary remainder. It may be true, as the petitioners argue, that trust instruments such as these before us frequently create "a complex aggregate of rights, privileges, powers and immunities and that in certain instances all these rights, privileges, powers and immunities are not transferred or released simultaneously." But before one who gives his property away by this method is entitled to deduction from his gift tax on the basis that he had retained some of these complex strands it is necessary that he at least establish the possibility of approximating what value he holds. Factors to be considered in fixing the value of this contingent reservation as of the date of the

gift would have included consideration of whether or not the daughter would marry; whether she would have children; whether they would reach the age of 21; etc. Actuarial science may have made great strides in appraising the value of that which seems to be unappraisable, but we have no reason to believe from this record that even the actuarial art could do more than guess at the value here in question. *Humes* v. *United States*, 276 U. S. 487, 494.

The judgment of the Circuit Court of Appeals is

Affirmed.

MR. JUSTICE ROBERTS dissents for the reasons set forth in his opinion in *Smith* v. *Shaughnessy*, *ante*, p. 176.

JOHNSON v. UNITED STATES.

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

No. 273. Argued January 15, 1943.—Decided February 15, 1943.

1. Where a defendant in a criminal prosecution in a federal court voluntarily testifies, and upon cross-examination asserts a claim of privilege against self-incrimination which the court unqualifiedly grants, albeit mistakenly, it is error for the court thereafter to permit the prosecutor to comment upon the claim of privilege and to permit the jury to draw any inference therefrom, if, as here, it can be said that the defendant's choice of claiming or waiving the privilege would have been materially affected had he known that the claim though granted would be used to his prejudice. P. 196.
2. Objection to the prosecutor's comment on an allowed claim of privilege in this case was expressly waived by the defendant's withdrawing his exception to it and acquiescing in the court's treatment of the matter, and a new trial is not granted. P. 199.
3. Rulings of the trial court excluding the defendant from the court room while counsel were arguing the question of the propriety of a line of cross-examination, and requiring that he resume the stand without conferring with his counsel concerning a claim of privilege, to which rulings no exceptions were taken, and which did not result

in a loss of the privilege, *held*, even if assumed to be erroneous, not prejudicial. P. 201.
129 F. 2d 954, affirmed.

CERTIORARI, 317 U. S. 610, to review the affirmance of a conviction of wilfully attempting to defeat and evade federal income taxes.

Mr. William A. Gray, with whom *Mr. Benjamin M. Golder* was on the brief, for petitioner.

Solicitor General Fahy, with whom *Assistant Attorney General Clark* and *Messrs. Sewall Key, Joseph W. Burns*, and *Archibald Cox* were on the brief, for the United States.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioner was convicted of wilfully attempting to defeat and evade his federal income taxes for the years 1936 and 1937. He was acquitted for 1935. Petitioner was a political leader in Atlantic City and Atlantic County, New Jersey. The prosecution's theory was that he had received large sums of money from those conducting the numbers game for protection against police interference and had not reported those sums in his income tax returns for 1935, 1936, and 1937. The defense was that his failure to return all the income he had received resulted from the mistaken but sincere belief that he was bound to return only the net balance remaining after deducting amounts expended for political purposes. The evidence was that one Weloff and one Towhey, acting alternately, delivered to petitioner on behalf of the numbers syndicate $1,200 a week from July 1935 to November 1937. About November 1, 1937, Weloff and Towhey were displaced by one Jack Southern to whom the syndicate delivered $1,200 a week. Neither the prosecution nor

the defense would sponsor Southern's testimony. At the request of the prosecution the court called Southern as a witness. He testified that during November and December, 1937, he delivered the $1,200 a week to an inspector of police named Ferretti, who was dead at the time of the trial. He denied that he ever made any weekly payments to petitioner. No evidence was adduced that petitioner received any sums from the syndicate during November or December, 1937. Petitioner took the stand and on direct examination admitted that he had received the weekly payments from Weloff and Towhey up to November, 1937. For 1937 these admitted payments totalled $50,400. Petitioner accounted for this sum by stating that he had reported $30,189.99 in his 1937 return as "Other commissions" and that he had paid out the balance, roughly $21,000, as political contributions for that year. On cross-examination he denied that he had received payments from Southern during November and December, 1937.[1] He was then asked "Did you receive any money from numbers in 1938?" Counsel for the defense objected to the question on the ground that it was not relevant to the issue and would tend to prove a different offense than the one charged in the indictment. The court overruled the objection. Petitioner then answered the question in the affirmative. He was then asked, "Who gave it to you?" Counsel for the defense objected. The court had the jury withdraw. The prosecutor asked that petitioner "also be excused from the court room during the argument, and that when he resumes the stand he should do so without having any opportunity to hear what the argument is about." The court said "that is a fair request" and ordered petitioner to retire, which he

[1] The indictment charged that the defendant had received $62,400 from the numbers game in 1937. It was the difference between that amount and $50,400 admittedly received which was in dispute.

did. No objection was made to that action. Counsel for the prosecution argued that the questions asked in cross-examination were proper to establish a continuous practice of receiving the numbers income throughout 1937. Counsel for the defense insisted that the cross-examination should be limited to the subjects opened up by the examination in chief. The court expressed the view that the cross-examination was permissible since it bore directly upon credibility. Counsel for the defense then pressed the point that even if it otherwise might be proper cross-examination, nevertheless it was "improper cross-examination for the reason that it is directed to a future prosecution." He asserted that he made the claim of privilege on behalf of the accused "in view of the avowed threat of the government to prosecute him for the very years concerning which he is now asked to testify." The court replied that it was for the accused, not his counsel, to make the claim and added, "You may advise him of his rights, of course, but it is for him to determine whether or not he wishes to take advantage of them." After further argument, the court stated:

"It seems to me that the testimony is perfectly relevant and material as cross examination directed to credibility.

"In view of the witness' testimony, unless it runs afoul of his right not to be required to incriminate himself, it seems to me that that is a right which he may waive or claim, and that that is a personal right that he may be advised by counsel when a question is asked, and that he will have to determine himself whether he is going to claim it or not."

Petitioner resumed the stand. The question "Who gave it to you?" was repeated. Counsel for petitioner then advised him of his constitutional privilege, which he thereupon claimed. The court ruled, "You may decline to answer."

The prosecutor in his address to the jury commented at some length on petitioner's assertion of his constitutional privilege:

> I asked him, "Did you get the money in 1938?" and he said, "Yes." Well, of course, then a lot of little things happened. They didn't like that because naturally you say, "Well, I don't understand that, Mr. Johnson." I wish you could have asked him questions then. You say, "Mr. Johnson, you say that suddenly November 1st, 1937 you stopped getting the $1200 from numbers; then in 1938 you started to get it again? How come?" You don't get it, you don't get it because it isn't the truth. That is what cross examination is for.
>
> So then we went beyond that. We said, "Who did you get it from?" He said, "I claim my privilege against self-incrimination. I violated the income tax law of 1938; I don't want to tell you about that. I am having enough trouble with 1935, six and seven." If he could have claimed his privilege on the stand here with respect to 1935, six and seven he would have done it. He would claim anything that is necessary to get him out of any predicament he is in. Well, now, ladies and gentlemen, if he got that numbers money in 1938 who did he get it from? He must have got it from Jack Southern. Maybe he got it from Inspector Ferretti, but he admits he got it. Well, then, if he got it he got it during the last two months of 1937. They didn't say anything about that to you because they were trapped. No need of them talking about it. It is for me to point that out to you.
>
> Now, ladies and gentlemen, can you believe that man told you the truth about anything on the witness stand when he admits that he got numbers money in 1938 but won't tell you who he got it from on the ground it would incriminate him? If you can believe that that man is innocent of this charge when he stands right up in front of you and says he cannot answer a question about 1938, that he just got through

> answering for 1937 on the ground it would incriminate him, well, then, I just don't get it.

An objection was made to these statements and overruled and an exception was noted. The next morning before the court charged the jury various other objections were submitted. During the colloquy the court stated that there "were a number of matters referred to last evening . . . I ruled on some of them, all of which rulings I indicated I would reconsider. Now, have you mentioned to me now all the points you desire to refer to?" Counsel for petitioner replied, "We withdraw whatever was said last night . . . I think the only fair thing to do is to forget everything that happened last night and start this morning." The objection previously made to the prosecutor's comment on the accused's failure to testify was not renewed. Nor was any request made to the court to charge the jury to disregard petitioner's refusal to testify. Though the prosecutor's comment on the accused's failure to testify was again adverted to, it was in a different connection. Counsel for petitioner contended that the prosecutor's statement that the claim of privilege amounted to an admission of income tax violation in 1938 was "an entire misconception of . . . the claim of privilege" inasmuch as the basis of the claim "is that the testimony . . . would have a tendency to incriminate him," and "not that it would prove him guilty." The court indicated that this objection was well taken and should be called to the attention of the jury. The court added, "He is not being charged with any 1938 tax." The prosecutor then said, "It is a question of his good faith and his credibility, and the answers he has already given on similar questions. That is the purpose for which the questions were permitted." The court thereupon stated, "I think I probably should indicate to the jury that that is the full extent of it." Counsel for petitioner remained silent, making no objection. No error was asserted in the

motion for a new trial or in the assignments of error on the ground that the prosecutor's comment or the court's charge on the inference from the claim of privilege was improper.

The court in its charge stated that petitioner's refusal to answer the question on the ground that it would tend to incriminate him "may only be considered by you in testing his credibility as to the answers which he did give and his good faith in the matter" and that petitioner was not being tried for anything he did in 1938. To this charge no objection was made.

The Circuit Court of Appeals affirmed the judgment of conviction, one judge dissenting. 129 F. 2d 954. The court held that the exclusion of petitioner from the court room during the colloquy did not result in prejudice; that the cross-examination covering 1938 income was proper; and that the allowance of comment on the claim of privilege was justified. The case is here on a petition for a writ of certiorari.

The case of an accused who voluntarily takes the stand and the case of an accused who refrains from testifying (*Bruno* v. *United States,* 308 U. S. 287) are of course vastly different. *Raffel* v. *United States,* 271 U. S. 494. His "voluntary offer of testimony upon any fact is a waiver as to *all other relevant facts,* because of the necessary connection between all." 8 Wigmore, Evidence (3d ed., 1940) § 2276 (2). And see *Fitzpatrick* v. *United States,* 178 U. S. 304, 315–316; *Powers* v. *United States,* 223 U. S. 303, 314. The cross-examination did not run afoul of the rule which prohibits inquiry into a collateral crime unconnected with the offense charged. *Boyd* v. *United States,* 142 U. S. 450. Inquiry into petitioner's income for 1938 was relevant to the issue in the case. As contended by the prosecution, the receipt of money from the numbers syndicate prior to November, 1937 and after December, 1937 might well support a finding of the jury

that in view of all the circumstances the payments were not in fact interrupted during the last two months of 1937. The amount and source of the 1938 income accordingly were relevant to show the continuous nature of the transactions in question. That line of inquiry therefore satisfied the test of relevancy and was a proper part of cross-examination. See *Cravens* v. *United States,* 62 F. 2d 261, 273; *Mehan* v. *United States,* 112 F. 2d 561, 563; *Weiss* v. *United States,* 122 F. 2d 675, 682; *Bullock* v. *State,* 65 N. J. L. 557, 575. Though the issue might have been more aptly phrased by the court in terms other than credibility, the meaning of the ruling in its context is plain. Thus we may assume that it would not have been error for the court to deny petitioner's claim of privilege. In such a case his failure to explain the source of his numbers income in 1938 could properly be the subject of comment and inference. As stated by this Court in *Caminetti* v. *United States,* 242 U. S. 470, 494, an accused who takes the stand "may not stop short in his testimony by omitting and failing to explain incriminating circumstances and events already in evidence, in which he participated and concerning which he is fully informed, without subjecting his silence to the inferences to be naturally drawn from it." But where the claim of privilege is asserted and unqualifiedly granted, the requirements of fair trial may preclude any comment. That certainly is true where the claim of privilege could not properly be denied. The rule which obtains when the accused fails to take the stand (*Wilson* v. *United States,* 149 U. S. 60) is then applicable. As stated by the Supreme Court of Pennsylvania, "If the privilege claimed by the witness be allowed, the matter is at an end. The claim of privilege and its allowance is properly no part of the evidence submitted to the jury, and no inferences whatever can be legitimately drawn by them from the legal assertion by the witness of his constitutional right. The allowance of the privilege

would be a mockery of justice, if either party is to be affected injuriously by it." *Phelin* v. *Kenderdine,* 20 Pa. 354, 363; *Wireman* v. *Commonwealth,* 203 Ky. 57, 62–63, 261 S. W. 862. And see *State* v. *Vroman,* 45 S. D. 465, 473, 188 N. W. 746; *Carne* v. *Litchfield,* 2 Mich. 340; *People* v. *McGungill,* 41 Cal. 429. We also think that the same result should obtain in any case where the court grants the claim of privilege and then submits the matter to the jury, if that action may be said to affect materially the accused's choice of claiming or waiving the privilege and results in prejudice. The fact that the privilege is mistakenly granted is immaterial.

The ruling of the court gave the petitioner the choice between testifying and refusing to testify as to his 1938 income. An accused having the assurance of the court that his claim of privilege would be granted might well be entrapped if his assertion of the privilege could then be used against him. His real choice might then be quite different from his apparent one. In this case it would lie between protection against an indictment for 1938 and the use of his claim of privilege as evidence that he did in fact receive the income during the last two months of 1937. Elementary fairness requires that an accused should not be misled on that score. If advised by the court that his claim of privilege though granted would be employed against him, he well might never claim it. If he receives assurance that it will be granted if claimed, or if it is claimed and granted outright, he has every right to expect that the ruling is made in good faith and that the rule against comment will be observed. Certainly the question whether petitioner had received income from the syndicate during November and December, 1937, was an extremely material issue in the case. As we have noted, petitioner admitted receiving $50,400 from the numbers syndicate during 1937. And all of this amount according to the testimony was received prior to

November 1, 1937. Of this amount he reported only $30,189.99 in his 1937 income tax return. He testified, however, that he had paid out $21,000 in political contributions for that year. Thus he attempted to account for all the numbers income which he had received that year and defended on the ground that his failure to return the $21,000 was due to his mistaken but sincere belief that he was bound to return only the net balance remaining after deducting amounts expended for political purposes. The indictment, however, charged that he had received $62,400 from the numbers syndicate during 1937. And the prosecution claimed that the weekly payments of $1,200 continued during November and December, 1937. If that were established, it would plainly destroy his defense and would be cogent evidence of his wilful attempt to evade the tax. All of the direct evidence in the record was to the effect that he had not received income from the numbers syndicate during November and December, 1937. There was no basis for concluding that he had unless that fact was to be inferred from the evidence that he had received the income until November, 1937 and that he received it again in 1938. Hence it would be highly valuable to the prosecution and equally damaging to the accused to have his failure to testify employed to bolster such an inference.

It is no answer to say that comment on a defendant's refusal to testify does not in any way place him in jeopardy of being charged with or convicted of the crime protected by his privilege. That may be admitted. The problem here is a different one. It is whether a procedure will be approved which deprives an accused on facts such as these of an intelligent choice between claiming or waiving his privilege. Knowledge that a failure to testify though permitted by the court would be submitted to the jury might seriously affect that choice. If the accused makes the choice without that knowledge, he may well be misled

on one of the most important decisions in his defense. We would of course not be concerned with the matter if it turned only on the quality of legal advice which he received. But the responsibility for misuse of the grant of the claim of privilege is the court's. It is the court to whom an accused properly and necessarily looks for protection in such a matter. When it grants the claim of privilege but allows it to be used against the accused to his prejudice, we cannot disregard the matter. That procedure has such potentialities of oppressive use that we will not sanction its use in the federal courts over which we have supervisory powers.

We are mindful of the fact that there is eminent authority which may be said to represent the contrary view. *State* v. *Ober,* 52 N. H. 459. That case stands for the general proposition that when the accused took the stand "without claiming his constitutional privilege, it was too late for him to halt at that point which suited his own convenience." *Id.,* p. 465. With that rule we agree. Whether the facts of that case and the stage of the proof when the privilege was claimed made the comment on the accused's failure to testify prejudicial, cannot be determined from the report of the case. The point with which we are here concerned was not adverted to in the opinion. Indeed the court stated (52 N. H. p. 465) that the "whole argument of his counsel now proceeds upon the erroneous assumption that the ruling of the court [granting the claim of privilege] was right. That assumption being groundless, his argument fails." But as we have indicated, the problem in this case is quite different.

We have considered this matter at length because the Circuit Court of Appeals ruled upon it and approved the procedure followed by the District Court. But we do not grant a new trial because of one circumstance which seems to us controlling. As we have noted, though an exception was taken to the prosecutor's comment on petitioner's

refusal to testify, it was later withdrawn. And when the court invited counsel to bring to its attention any objections or requests to charge, counsel did not renew the objection. Nor was any request made to charge the jury on the matter. Moreover, though the question of the prosecutor's comment was again adverted to by the defense, the objection was of a wholly different character and one which the court indicated its willingness to correct. And when the court stated what charge it would give the jury on the point, counsel for the defense stood by and voiced no protest or objection. We can only conclude that petitioner expressly waived any objection to the prosecutor's comment by withdrawing his exception to it and by acquiescing in the treatment of the matter by the court. It is true that we may of our own motion notice errors to which no exception has been taken if they would "seriously affect the fairness, integrity or public reputation of judicial proceedings." See *United States* v. *Atkinson,* 297 U. S. 157, 160; *Clyatt* v. *United States,* 197 U. S. 207, 221–222. But we are not dealing here with inadvertence or oversight. This is a case where silent approval of the course followed by the court (*Boyd* v. *United States,* 271 U. S. 104, 108) is accompanied by an express waiver of a prior objection to the method by which the claim of privilege was treated. In such a situation the rule stated by Mr. Justice Sutherland in *United States* v. *Manton,* 107 F. 2d 834, 848, is applicable:

"If the failure to enter an exception or assign error had been a mere inadvertence the matter might stand in a different light. But that view cannot be indulged. Plainly enough, counsel consciously and intentionally failed to save the point and led the trial judge to understand that counsel was satisfied. We see no warrant for the exercise of our discretion to set aside standing rules, so necessary to the due and orderly administration of

justice, and review the challenge to the legal accuracy of the charge where, as here, the failure of the judge to follow the text of the requested instruction was, at the last, induced by the action of counsel . . ."

Any other course would not comport with the standards for the administration of criminal justice. We cannot permit an accused to elect to pursue one course at the trial and then, when that has proved to be unprofitable, to insist on appeal that the course which he rejected at the trial be reopened to him. However unwise the first choice may have been, the range of waiver is wide. Since the protection which could have been obtained was plainly waived, the accused cannot now be heard to charge the court with depriving him of a fair trial. The court only followed the course which he himself helped to chart and in which he acquiesced until the case was argued on appeal. The fact that the objection did not appear in the motion for new trial or in the assignments of error makes clear that the point now is a "mere afterthought." *United States* v. *Manton, supra,* p. 847.

The remaining objections may be briefly disposed of. It is claimed that the expulsion of petitioner from the court room while counsel were arguing the question of the propriety of the cross-examination on his 1938 income deprived him of his right to be present during the trial. Cf. *Snyder* v. *Massachusetts,* 291 U. S. 97. It is also urged that petitioner was denied the advice of counsel in that the court directed that when he resumed the stand he do so without having an opportunity to confer with his counsel about claiming the privilege. But there is a simple answer to these objections. Not only were no exceptions taken to these rulings; it also appears that they did not result in a loss of the privilege which the court had indicated it would recognize. For when petitioner resumed the stand, he was advised of his right to claim the priv-

ilege, he claimed it, and it was granted. Accordingly we cannot see where any prejudice resulted even if we assume, *arguendo*, that the rulings of the court were not correct.

Affirmed.

MR. JUSTICE MURPHY and MR. JUSTICE JACKSON did not participate in the consideration or disposition of this case.

MR. JUSTICE FRANKFURTER, concurring:

In reviewing criminal cases, it is particularly important for appellate courts to re-live the whole trial imaginatively and not to extract from episodes in isolation abstract questions of evidence and procedure. To turn a criminal appeal into a quest for error no more promotes the ends of justice than to acquiesce in low standards of criminal prosecution.

An examination of the entire record of the proceedings leaves me without doubt that Judge Maris conducted the trial with conspicuous fairness, and that he committed no error in the rulings complained of unless it be one in favor of the defendant. In allowing the defendant to withhold testimony regarding gambling receipts for 1938, the trial court, in recognizing the threat of future prosecution of the defendant for evading taxes in that year, was exercising a merciful discretion. For this avenue of inquiry plainly was relevant to the truth of the charges against Johnson in the present proceeding. In view of all that took place at the trial, to have denied the jury an opportunity to consider the significance of the defendant's desire not to testify regarding gambling receipts in 1938 would have been to withhold from them a factor relevant in determining whether Johnson's explanation of what he did with the "protection" money received by him in 1936 and 1937 was the truth or just a cock-and-bull story.

That the defendant's senior counsel, a lawyer of long experience in federal criminal practice, did not take exception to the manner in which Judge Maris tempered concern for the proper administration of justice with solicitude for the rights of the defendant, indicates not "waiver" of a right which had been denied but recognition that the action of the trial judge was unexceptionable. The claim that the trial was conducted improperly is obviously an afterthought. Only after conviction and in an effort to upset the jury's verdict on appeal was the fair conduct of the trial court sought to be distorted into an impropriety.

LEISHMAN *v.* ASSOCIATED WHOLESALE ELECTRIC CO.

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

No. 332. Argued February 2, 1943.—Decided February 15, 1943.

1. Where a motion under Rule 52 (b) of the Rules of Civil Procedure (made within an enlargement of time under Rule 6 (b)) to amend and supplement the findings and conclusions relates to matters of substance and would, if granted, require an amendment of the judgment to conform thereto, even though amendment of the judgment was not specifically requested, the time for taking an appeal from the judgment (28 U. S. C. § 230) runs from the date of the order disposing of the motion. P. 205.
2. Rule 59 of the Rules of Civil Procedure, relating to new trials, *held* inapplicable. P. 206.

128 F. 2d 204, reversed.

CERTIORARI, 317 U. S. 612, to review a decree dismissing an appeal for want of jurisdiction.

Mr. John Flam for petitioner.

Mr. Samuel E. Darby, Jr., with whom *Mr. Marston Allen* was on the brief, for respondent.

MR. JUSTICE MURPHY delivered the opinion of the Court.

The question in this case is whether petitioner appealed to the Circuit Court of Appeals within the time provided by law (28 U. S. C. § 230).

This is a suit brought by petitioner for infringement of certain claims of a reissue patent. The district court made findings of fact that the claims in issue did not embody any invention over the prior art and entered judgment dismissing the complaint on May 1, 1941. On May 28, 1941, after securing an enlargement of time under Rule 6 (b) of the Rules of Civil Procedure (28 U. S. C. A. following § 723c), petitioner filed a motion under Rule 52 (b)[1] asking that the findings "be amended and supplemented." Petitioner requested that some of the findings relating to non-invention be amended in certain respects set out in the motion so as to show invention and to include a specific finding that the claims in issue did define invention over the prior art. Supplemental findings, intended to dispose of various other defenses asserted by respondent but not passed upon by the court, were also requested. The motion concluded with the statement that: "Consistently with these findings, the conclusions of law should be amended to state that the claims . . . in suit, are valid; that an injunction shall issue in the usual form, and that there be an accounting for past infringement." This motion was denied on June 9, 1941.

On September 4, 1941, petitioner filed his notice of appeal in the district court.[2] The Circuit Court of Appeals *sua sponte* held it had no jurisdiction because the appeal was taken more than three months after the entry of

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[1] So far as is here material Rule 52 (b) provides: "Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly."

[2] This is the proper method of taking an appeal. Rule 73 (a).

judgment, contrary to 28 U. S. C. § 230. In so holding that court recognized the general rule that where a petition for rehearing, a motion for a new trial, or a motion to vacate, amend, or modify a judgment is seasonably made and entertained, the time for appeal does not begin to run until the disposition of the motion.[3] But this case was differentiated on the ground that the instant motion was not one to amend the judgment but merely one to amend and supplement the findings and conclusions. 128 F. 2d 204. We granted certiorari to settle the important question of practice presented under the Rules of Civil Procedure.

We think that petitioner's time to appeal did not begin to run until the disposition of his motion under Rule 52 (b) on June 9, 1941, and accordingly that his appeal was timely. The motion was not addressed to mere matters of form but raised questions of substance since it sought reconsideration of certain basic findings of fact and the alteration of the conclusions of the court. In short the necessary effect was to ask that rights already adjudicated be altered. Consequently it deprived the judgment of that finality which is essential to appealability. Cf. *Zimmern* v. *United States,* 298 U. S. 167; *Department of Banking* v. *Pink,* 317 U. S. 264. It is immaterial that petitioner did not specifically request the amendment of the judgment, and the distinction based on this failure to request by the court below is artificial and untenable. If the motion had been granted and the requested amended and supplemental findings made, the

[3] *Morse* v. *United States,* 270 U. S. 151, 153–54, and cases cited. Compare *Joplin Ice Co.* v. *United States,* 87 F. 2d 174; *Suggs* v. *Mutual Benefit Assn.,* 115 F. 2d 80; *Neely* v. *Merchants Trust Co.,* 110 F. 2d 525; *United States* v. *Steinberg,* 100 F. 2d 124. See also *Citizens Bank* v. *Opperman,* 249 U. S. 448; *Gypsy Oil Co.* v. *Escoe,* 275 U. S. 498; *Pfister* v. *Northern Illinois Finance Corp.,* 317 U. S. 144.

judgment would have to be amended or altered to conform to those findings and the conclusions resulting from them. We conclude that a motion under Rule 52 (b) such as the instant one which seeks to amend or supplement the findings of fact in more than purely formal or mechanical aspects tolls the appeals statute, and that the time for taking an appeal runs from the date of the order disposing of the motion. Cf. *Continental Oil Co.* v. *United States,* 299 U. S. 510.

The motion was not one for a new trial under Rule 59 and respondent's argument, based on that premise, that it was not filed in time,[4] is not pertinent.

The judgment below is

Reversed.

UNITED STATES *v.* OKLAHOMA GAS & ELECTRIC CO.

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

No. 171. Argued December 9, 1942.—Decided February 15, 1943.

1. A permit granted by the Secretary of the Interior under § 4 of the Act of March 3, 1901, to the State of Oklahoma to open and establish a public highway over Indian allotted lands, is to be construed, in the absence of any governing administrative ruling, statute, or Congressional policy to the contrary, as authorizing the State to license the erection and maintenance of a rural electric service line, a proper use of the highway under state law. P. 209.
2. The Indian allotted lands involved in this case were not within a "reservation" as used in the Acts of February 15, 1901, and March 4, 1911. P. 215.

127 F. 2d 349, affirmed.

CERTIORARI, 317 U. S. 608, to review the affirmance of a judgment, 37 F. Supp. 347, dismissing a complaint.

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[4] The 10 day limit for filing fixed in Rule 59 cannot be enlarged under Rule 6 (b) except as provided in subsection (c) of Rule 59.

Mr. Valentine Brookes argued the cause, and *Solicitor General Fahy, Assistant Attorney General Littell,* and *Mr. Vernon L. Wilkinson* were on the brief, for the United States.

Mr. Streeter B. Flynn, with whom *Mr. R. M. Rainey* was on the brief, for respondent.

Mr. Justice Jackson delivered the opinion of the Court.

The United States sued the Oklahoma Gas and Electric Company in the United States District Court asking a declaratory judgment that the Company illegally occupies with its pole line certain Indian land, and a mandatory injunction to terminate such occupation. The case turns on whether permission to the State of Oklahoma to establish a highway over allotted Indian land given under § 4 of the Act of March 3, 1901,[1] includes the right to permit maintenance of rural electric service lines within the highway bounds.

The United States at all relevant times held title to half of a quarter section of land in Oklahoma in trust for She-pah-tho-quah, a Mexican Kickapoo Indian allottee thereof; and since her death, for her heirs. The State of Oklahoma applied to the Secretary of the Interior "to grant permission in accordance with § 4 of the Act of March 3, 1901 (31 Stat. L. 1058, 1084), to open and establish a public highway" across the land in question. The highway width was 80 feet, and it extended 2,577 feet on these lands, occupying 4.55 acres thereof. The State paid therefor $1,275 as compensation to the heirs of She-pah-tho-quah, and on January 20, 1928, the map of definite location was on behalf of the Secretary endorsed "Approved subject to the provisions of the Act of March 3, 1901 (31 Stat. L. 1058, 1084), Department regulations

[1] 31 Stat. 1058, 1084, 25 U. S. C. § 311.

thereunder; and subject also to any prior valid existing right or adverse claim."

Section 4 of the Act of March 3, 1901, under which the application was specifically made and granted, provides:

"That the Secretary of the Interior is hereby authorized to grant permission, upon compliance with such requirements as he may deem necessary, to the proper State or local authorities for the opening and establishment of public highways, in accordance with the laws of the State or Territory in which the lands are situated, through any Indian reservation or through any lands which have been allotted in severalty to any individual Indians under any laws or treaties but which have not yet been conveyed to the allottees with full power of alienation."

Apparently the Secretary has never issued a regulation applicable to this case. Cf. 25 Code of Federal Regulations § 261.1 *et seq.*

The highway was opened, and in 1936 the Oklahoma State Highway Commission, with statutory authority to act in the matter,[2] granted respondent the license under which it occupies a portion of the highway with its rural electric service line. The license is in terms revocable at will, provides for location of the poles 38 feet from the center of the highway, and requires all lines to be kept in good repair. The licensee assumes all liability for damage, and the license recites that it is "granted subject to any and all claims made by adjacent property owners as compensation for additional burden on such adjacent and abutting property."

The Secretary considered this use of the property not warranted by his permission to the State to establish a highway under § 4 of the Act of March 3, 1901. He demanded that the Company apply to him under the Acts

[2] 69 Oklahoma Stat. (1941) § 57.

of February 15, 1901 and March 4, 1911 [3] for permission to maintain its lines and, when the Company refused, instituted this action. The District Court dismissed the complaint, and the Circuit Court of Appeals for the Tenth Circuit affirmed. 37 F. Supp. 347, 127 F. 2d 349. The question appeared important to the administration of Indian affairs, and we granted certiorari.

It is not denied that under the laws of Oklahoma the use made of the highway by respondent, the State's licensee, is a lawful and proper highway use, imposing no additional burden for which a grantor of the highway easement would be entitled to compensation. But the Government denies that the Act of March 3, 1901, providing "for the opening and establishment of public highways, in accordance with the laws of the State or Territory in which the lands are situated," submits the scope of the highway use to state law. Its interpretation gives the Act a very limited meaning and substantially confines state law to governing procedures for "opening and establishment" of the highway. It offers as examples of what is permitted to state determination, whether a state or county agency builds the road, whether funds shall be raised by bond issue or otherwise, and the terms and specifications of the construction contract. The issue is between this narrow view of the State's authority and the broader one which recognizes its laws as determining the various uses which go to make up the "public highway," opening and establishment of which are authorized.

We see no reason to believe that Congress intended to grant to local authorities a power so limited in a matter so commonly subject to complete local control.

It is well settled that a conveyance by the United States of land which it owns beneficially or, as in this case, for

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[3] 31 Stat. 790, 43 U. S. C. § 959; 36 Stat. 1235, 1253, 43 U. S. C. § 961. These are set out and discussed *infra*, pp. 213 *et seq.*

the purpose of exercising its guardianship over Indians, is to be construed, in the absence of any contrary indication of intention, according to the law of the State where the land lies.[4] Presumably Congress intended that this case be decided by reference to some law, but the Government has cited and we know of no federal statutory or common-law rule for determining whether the running of the electric service lines here involved was a highway use. These considerations, as well as the explicit reference in the Act to state law in the matter of "establishment" as well as of "opening" the highway, indicate that the question in this case is to be answered by reference to that law, in the absence of any governing administrative ruling, statute, or dominating consideration of Congressional policy to the contrary. We find none of these.

Apparently the Secretary has never sought to solve the problem of this case by an administrative ruling, and whether he might do so is a question which the parties have neither raised nor discussed, and upon which we intimate no opinion.

In construing this statute as to the incidents of a highway grant we must bear in mind that the Act contemplated a conveyance to a public body, not to a private interest. There was not the reason to withhold continuing control over the uses of the strip that might be withheld wisely in a grant of indefinite duration to a private grantee. It is said that the use here permitted by the State is private and commercial, and so it is. But a license to use the highway by a carrier of passengers for hire, or by a motor freight line, would also be a private

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[4] *Grand Rapids & Indiana R. Co.* v. *Butler*, 159 U. S. 87; *Whitaker* v. *McBride*, 197 U. S. 510; *Oklahoma* v. *Texas*, 258 U. S. 574, 595–596; see *Brewer Oil Co.* v. *United States*, 260 U. S. 77, 88–89; *United States* v. *Oregon*, 295 U. S. 1, 28; cf. *Board of Commissioners* v. *United States*, 308 U. S. 343.

and commercial use in the same sense. And it has long been both customary and lawful to stimulate private self-interest and utilize the profit motive to get needful services performed for the public. The State appears to be doing no more than that.

This is not such a transmission line as might endanger highway travel or abutting owners with no compensating advantage. It is a rural service line, and to bring electric energy in to the countryside is quite as essential to modern life as many other uses of the highway. The State has granted nothing not revocable at will, has alienated nothing obtained under the Act, has permitted no use that would obstruct or interfere with the use for which the highway was established, and has not purported to confer any right not subsidiary to its own or which would survive abandonment of the highway.

The interpretation suggested by the Government is not shown to be necessary to the fulfillment of the policy of Congress to protect a less-favored people against their own improvidence or the overreaching of others; nor is it conceivable that it is necessary, for the Indians are subjected only to the same rule of law as are others in the State, and then only by permission of the Secretary, subject to compliance with "such requirements as he may deem necessary."

Oklahoma is spotted with restricted lands held in trust for Indian allottees. Complications and confusion would follow from applying to highways crossing or abutting such lands rules differing from those which obtain as to lands of non-Indians. We believe that if Congress had intended this it would have made its meaning clear.

The Government relies, however, on the Acts of February 15, 1901, and of March 4, 1911, which it says require the Secretary's consent to cross Indian land with electric lines, regardless of the prior grant of permission for the

highway. We believe that they are inapplicable to the land in suit, and therefore need not determine what would be their effect if they did apply.

The Act of February 15, 1901, "An Act Relating to rights of way through certain parks, reservations, and other public lands," [5] authorizes the Secretary of the Interior "to permit the use of rights of way through the public lands, forest and other reservations of the United States, and the Yosemite, Sequoia, and General Grant national parks, California, for electrical plants, poles, and lines for the generation and distribution of electrical power, and for telephone and telegraph purposes . . . to the extent of . . . not to exceed fifty feet on each side of the center line of such . . . electrical, telegraph, and telephone lines and poles . . .: *Provided,* That such permits shall be allowed within or through any of said parks or any forest, military, Indian, or other reservation only upon the approval of the chief officer of the Department under whose supervision such park or reservation falls and upon a finding by him that the same is not incompatible with the public interest: *Provided further,* That all permits given hereunder for telegraph and telephone purposes shall be subject to the provision of title sixty-five of the Revised Statutes of the United States, and amendments thereto, regulating rights of way for telegraph companies over the public domain: *And provided further,* That any permission given by the Secretary of the Interior under the provisions of this Act may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park." [6]

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[5] H. R. Rep. No. 1850, 56th Cong., 1st Sess., indicates that the title of the Act, referring to public lands, was advisedly chosen.

[6] 31 Stat. 790, 43 U. S. C. § 959.

For all present purposes the Act of March 4, 1911 is the same as the above Act.[7]

Neither statute makes any reference whatever to lands allotted to Indians in which the United States holds title in trust only to prevent improvident alienation. Their general tenor and particularly the second proviso of the Act of February 15, 1901, repel any inference that they

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[7] 36 Stat. 1235, 1253, 43 U. S. C. § 961, providing:

"That the head of the department having jurisdiction over the lands be, and he hereby is, authorized and empowered, under general regulations to be fixed by him, to grant an easement for rights of way, for a period not exceeding fifty years from the date of the issuance of such grant, over, across, and upon the public lands, national forests, and reservations of the United States for electrical poles and lines for the transmission and distribution of electrical power, and for poles and lines for telephone and telegraph purposes, to the extent of twenty feet on each side of the center line of such electrical, telephone and telegraph lines and poles, to any citizen, association, or corporation of the United States, where it is intended by such to exercise the right of way herein granted for any one or more of the purposes herein named: *Provided*, That such right of way shall be allowed within or through any national park, national forest, military, Indian, or any other reservation only upon the approval of the chief officer of the department under whose supervision or control such reservation falls, and upon a finding by him that the same is not incompatible with the public interest: *Provided*, That all or any part of such right of way may be forfeited and annulled by declaration of the head of the department having jurisdiction over the lands for nonuse for a period of two years or for abandonment."

See 40 L. D. 30, 31: "It will be observed that this act, which authorizes the granting of easements for electrical power transmission, and telephone and telegraph lines for stated periods not to exceed 50 years, follows, as closely as is possible in the accomplishment of its purposes, the language of the act of February 15, 1901 (31 Stat., 790), which authorizes mere revocable permits or licenses for such lines, and for other purposes. This act, therefore, merely authorizes additional or larger grants and does not modify or repeal the act of 1901, and should be construed and applied in harmony with it." See also, 46 Cong. Rec. 4014–4015.

were intended to govern the grant of rights of way over such lands. The effect of this proviso was to make any telephone or telegraph company which availed itself of the Act subject, as to Government business, to the rates set by the Postmaster General, and to make "all the . . . lines, property, and effects" of such a company subject to purchase by the Government at a value to be ascertained by an appraisal of five persons, two selected by the Postmaster General, two by the company, and one by the four so chosen.[8] It is rather difficult to believe that Congress ever intended to exact such conditions as part of the price of running a line across land in which the Government is interested only to the extent of holding title for the protection of an individual Indian allottee. It is particularly difficult in the context of the Acts, for if such were the intent it was defeated by giving an option to obtain the same rights by condemnation under state law and free of such restrictions. § 3 of the Act of March 3, 1901.[9]

The Government seeks to repel the force of these implications by asserting that the word "reservation" as employed in these Acts includes such land.

Section 4 of the Act of March 3, 1901 authorizes permission to run a highway "through any Indian reservation or through any lands which have been allotted in severalty to any individual Indians under any laws or treaties but which have not been conveyed to the allottees with full power of alienation." The Act in § 3 also refers to "lands allotted in severalty," after already employing the word "reservation." If it included allotted lands without these words, Congress was employing language to no discernible purpose. We think Congress employed this language in the Act of March 3, 1901, to a purpose and with a clear distinction between reservations and allotted lands. Sec-

[8] Comp. Stat. (1901) §§ 5266, 5267.

[9] 31 Stat. 1083–1084, 25 U. S. C. § 357.

tion 3 made allotted lands, but not reservations, subject to condemnation for any public purpose; § 4 made both reservations and allotted lands subject to highway permits by the Secretary. We think that the almost contemporaneous Act of February 15, 1901, in authorizing permits for electric companies through reservations, but not allotted lands, meant just what it said.

We have no purpose to decide anything more than the case before us. We do not say that "reservation" may never include allotted lands; all we hold is that if there is a distinction in fact, that distinction is carried into the Act. So we turn to the question whether these particular allotted lands were in fact within or without a "reservation."

She-pah-tho-quah, the allottee, was of the Kickapoo Tribe. In earlier times the Kickapoo Tribe occupied a treaty reservation in Kansas.[10] They became torn by internal dissensions. One faction remained on the old reservation in Kansas and received allotments there.[11] Others migrated, chiefly in 1852 and 1863, to Mexico and located on a reservation set apart for them by that Government. The Oklahoma Kickapoos comprise those who left Mexico, mostly in 1873, and returned to the United States. Ten years later a reservation was established for them by Executive Order in what was then Indian Territory, now Oklahoma. *United States* v. *Reily*, 290 U. S. 33, 35–36.

In 1891, however, these restless people negotiated a sale of their reservation to the Government "except the Commissioners insist on the Indians taking lands in allotment, while the Indians insist on taking an equal amount of land as a diminished reservation, the title to be held in common." [12] This disagreement was submitted to the Secre-

[10] Treaties of October 24, 1832, 7 Stat. 391; May 18, 1854, 10 Stat. 1078.

[11] Treaty of June 28, 1862, 13 Stat. 623.

[12] 27 Stat. 560.

tary of the Interior and he decided that the "Indians take their lands in allotment and not to be held in common." [13] The Kickapoo Tribe thereupon, on September 9, 1891 did "cede, convey, transfer, and relinquish, forever, and absolutely, without any reservation whatever, all their claim, title, and interest" to the reservation lands.[14] In consideration each of the Kickapoos, estimated at about 300 in number, was allotted 80 acres of such land with a per capita cash payment.[15] The transaction was ratified, and carried out on the part of the United States and the land acquired by the United States was opened to settlement.[16] Thus, the Kickapoo reservation was obliterated, the tribal lands were no more, and only individual allotments survived. We think it clear that the term "reservation" as used in the statutes in question had no application to such lands.

It is true that the opinion in *United States* v. *Reily, supra,* at 35, used the term "Kickapoo Reservation" to describe a region of Oklahoma as of a time subsequent to the dissolution. It is clear from the context of the opinion, however, that this term was used in a geographical and not a legal sense, much as one still speaks of the Northwest Territory. Congress has frequently referred to the "Kickapoo Reservation" in Kansas.[17] And it has often, usually in the same statute, referred to the Kickapoo Indians of Oklahoma; but never since the dissolution has it referred to a Kickapoo Reservation as existing in

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[13] 27 Stat. 561.

[14] 27 Stat. 557.

[15] 27 Stat. 558–559.

[16] 27 Stat. 562–563, 29 Stat. 868.

[17] 28 Stat. 909; 30 Stat. 590, 909, 943; 33 Stat. 213, 1074, 1254; 35 Stat. 80, 791; 36 Stat. 275, 1064; 37 Stat. 524; 38 Stat. 87, 590; 39 Stat. 133, 977; 40 Stat. 571; 41 Stat. 13, 66, 419, 523; 42 Stat. 57.

Oklahoma.[18] If descriptive nomenclature has any weight in this case, we think that the usage of Congress preponderates.

The dissolution of the reservation distinguishes the situation before us from that before the court relating to allotted lands within the Tulalip Reservation, *United States* v. *Celestine,* 215 U. S. 278; allotted lands within the Yakima Reservation, *United States* v. *Sutton,* 215 U. S. 291; those within the Colville Reservation, *United States* v. *Pelican,* 232 U. S. 442; and the many situations in which the departmental rulings have held that the phrase "Indian, or other reservation" includes individual allotments.[19]

On the argument inquiry was made of counsel whether a consistent departmental practice existed in reference to grants of permission to electric companies to maintain lines along established highways. Both have called attention to a few instances of applications and grants, or of assurances none were necessary, said to favor their respective positions.[20] We find no consistent departmental

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[18] 30 Stat. 77, 937; 33 Stat. 203, 1057; 34 Stat. 363, 1043; 35 Stat. 88, 802; 36 Stat. 280, 1069; 37 Stat. 529; 38 Stat. 93, 596; 39 Stat. 145, 982; 40 Stat. 578; 41 Stat. 20, 425, 1039, 1240; 42 Stat. 573, 1195; 43 Stat. 409, 708, 1160.

[19] 27 L. D. 421; 35 L. D. 550; 40 L. D. 30; 42 L. D. 419; 45 L. D. 563; 49 L. D. 396; 51 L. D. 41.

[20] The Government calls attention to permits given as to allotments within the Yakima and Colville reservations, which are inapplicable under our view of the case. Also to one permit to this respondent for a transmission line across a Kickapoo allotment within the boundaries of a previously authorized highway and one to it not within a highway. Respondent sets up correspondence in 1922, 1927, 1929 and 1930 claimed to indicate a contrary practice. None of this material is part of the record; and it is incomplete, and in no sense satisfactory establishment of a basis for any conclusion.

practice which can be said to amount to an administrative construction of the Acts in question.

The judgment below is

Affirmed.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS dissent.

FEDERAL SECURITY ADMINISTRATOR *v.* QUAKER OATS CO.

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

No. 424. Argued February 4, 5, 1943.—Decided March 1, 1943.

The Federal Security Administrator, acting under §§ 401 and 701 (e) of the Federal Food, Drug and Cosmetic Act, promulgated regulations establishing "standards of identity" for various milled wheat products, excluding vitamin D from the defined standard of "farina" and permitting it only in "enriched farina," which was required to contain vitamin B_1, riboflavin, nicotinic acid and iron. The validity of the regulations was challenged as applied to the respondent, who for ten years had manufactured and marketed, under an accurate and informative label, a food product consisting of farina, as defined by the Administrator's regulations, but with vitamin D added. Under the Act as supplemented by the regulations, respondent's product could not be marketed as "farina," since, by reason of the presence of vitamin D as an ingredient, it would not conform to the standard of identity prescribed for "farina"; nor could it be marketed as "enriched farina" unless the prescribed minimum quantities of vitamin B_1, riboflavin, nicotinic acid and iron were added. *Held,* that the Administrator did not depart from statutory requirements in choosing the standards of identity for the purpose of promoting "fair dealing in the interest of consumers"; that the standards which he selected are adapted to that end; and that they are adequately supported by findings and evidence. Pp. 220, 235.

1. Upon review of an order of the Federal Security Administrator issuing regulations under § 401 of the Federal Food, Drug and Cosmetic Act, the findings of the Administrator as to the facts are conclusive if supported by substantial evidence. P. 227.

(a) It is appropriate that a reviewing court accord proper scope to the discretion and informed judgment of an administrative agency where the review is of regulations of general application adopted by the administrative agency under its rule-making power in carrying out the policy of a statute with whose enforcement it is charged. P. 227.

(b) The judgment exercised by the Administrator under § 401, if based on substantial evidence of record, and if within statutory and constitutional limitations, is controlling even though the reviewing court might on the same record have arrived at a different conclusion. P. 228.

2. Taking into account the evidence of public demand for vitamin-enriched foods, their increasing sale, their variable vitamin composition and dietary value, and the general lack of consumer knowledge of such values, there was in this case sufficient evidence, of rational probative force, to support the Administrator's judgment that, in the absence of appropriate standards of identity, consumer confusion would ensue; and to support the Administrator's conclusion that the standards of identity adopted will promote honesty and fair dealing in the interest of consumers. P. 228.

3. The text and the legislative history of the Act show that its purpose was not confined to requiring informative labeling, but was to authorize the Administrator to promulgate definitions and standards of identity "under which the integrity of food products can be effectively maintained" and to require informative labeling only where no such standard had been promulgated, where the food did not purport to comply with a standard, or where the regulations permitted optional ingredients and required their mention on the label. P. 230.

4. The Court cannot say that such a standard of identity, designed to eliminate a source of confusion to purchasers—which otherwise would be likely to facilitate unfair dealing and make protection of the consumer difficult—will not "promote honesty and fair dealing" within the meaning of the Act. P. 231.

5. The Act does not preclude a regulation which would exclude a wholesome and beneficial ingredient from the definition and standard of identity of a food. P. 232.

6. It was not unreasonable to prohibit the addition to "farina" of vitamin D as an optional ingredient, while permitting its addition as an optional ingredient to "enriched farina." P. 234.

7. On the record in this case, it does not appear that the increased cost of adding the minute quantities of the four ingredients required

for "enriched farina" is sufficient to have any substantial bearing on the reasonableness of the regulations. P. 235.

129 F. 2d 76, reversed.

CERTIORARI, 317 U. S. 616, to review a judgment setting aside an order of the Federal Security Administrator under the Federal Food, Drug and Cosmetic Act.

Mr. Valentine Brookes argued the cause, and *Solicitor General Fahy, Assistant Attorney General Berge,* and *Messrs. Louis B. Schwartz, Irwin L. Langbein, Richard S. Salant, Jack B. Tate,* and *Patrick D. Cronin* were on the brief, for petitioner.

Mr. George I. Haight, with whom *Mr. William D. McKenzie* was on the brief, for respondent.

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

The Federal Security Administrator, acting under §§ 401 and 701 (e), of the Federal Food, Drug and Cosmetic Act, 52 Stat. 1040, 1046, 1055 (21 U. S. C. §§ 341, 371), promulgated regulations establishing "standards of identity" for various milled wheat products, excluding vitamin D from the defined standard of "farina" and permitting it only in "enriched farina," which was required to contain vitamin B_1, riboflavin, nicotinic acid and iron. The question is whether the regulations are valid as applied to respondent. The answer turns upon (a) whether there is substantial evidence in support of the Administrator's finding that indiscriminate enrichment of farina with vitamin and mineral contents would tend to confuse and mislead consumers; (b) if so, whether, upon such a finding, the Administrator has statutory authority to adopt a standard of identity, which excludes a disclosed non-deleterious ingredient, in order to promote honesty and fair dealing in the interest of consumers; and (c) whether the

Administrator's treatment, by the challenged regulations, of the use of vitamin D as an ingredient of a product sold as "farina" is within his statutory authority to prescribe "a reasonable definition and standard of identity."

Section 401 of the Act provides that "Whenever in the judgment of the Administrator such action will promote honesty and fair dealing in the interest of consumers, he shall promulgate regulations fixing and establishing for any food, under its common or usual name so far as practicable, a reasonable definition and standard of identity . . . In prescribing a definition and standard of identity for any food or class of food in which optional ingredients are permitted, the Administrator shall, for the purpose of promoting honesty and fair dealing in the interest of consumers, designate the optional ingredients which shall be named on the label." By § 701 (e) the Administrator, on his own initiative or upon application of any interested industry or a substantial part of it, is required to "hold a public hearing upon a proposal to issue, amend, or repeal any regulation contemplated by" § 401. At the hearing "any interested person may be heard." The Administrator is required to promulgate by order any regulation he may issue to "base his order only on substantial evidence of record at the hearing," and to "set forth as part of his order detailed findings of fact on which the order is based." [1]

Any food which "purports to be or is represented as a food for which a definition and standard of identity has been prescribed" pursuant to § 401 is declared by § 403 (g)

[1] As enacted, the Act vested the foregoing powers in the Secretary of Agriculture. By §§ 12 and 13 of Reorganization Plan No. IV, 54 Stat. 1234, 1237, approved April 11, 1940, the Federal Food and Drug Administration and all functions of the Secretary of Agriculture relating thereto were transferred to the Federal Security Agency and the Federal Security Administrator.

to be misbranded "unless (1) it conforms to such definition and standard, and (2) its label bears the name of the food specified in the definition and standard, and, insofar as may be required by such regulations, the common names of optional ingredients . . . present in such food." The shipment in interstate commerce of "misbranded" food is made a penal offense by §§ 301 and 303. "In a case of actual controversy as to the validity" of an order issuing regulations under § 401 any person "adversely affected" by it may secure its review on appeal to the Circuit Court of Appeals for the circuit of his residence or principal place of business. On such review the findings of the Administrator "as to the facts, if supported by substantial evidence, shall be conclusive." § 701 (f) (1), (f) (3).

After due notice [2] and a hearing in which respondent participated, the Administrator by order promulgated regulations establishing definitions and standards of identity for sixteen milled wheat products, including "farina" and "enriched farina." Regulation 15.130 defined "farina" as a food prepared by grinding and bolting cleaned wheat, other than certain specified kinds, to a prescribed fineness with the bran coat and germ of the wheat berry removed to a prescribed extent. The regulation made no provision for the addition of any ingredients to "farina." Regulation 15.140 defined "enriched farina" as conforming to the regulation defining "farina," but with added prescribed minimum quantities of vitamin

[2] Respondent contended in the court below that the notice was inadequate. It appears to have abandoned that contention here, but in any event we think that it is without merit in view of respondent's participation in the original hearing, and in view of the publication of notice of a reconvened hearing devoted solely to the "propriety of the addition of vitamins and minerals to . . . (I) farina . . ."

B_1, riboflavin,[3] nicotinic acid (or nicotinic acid amide) and iron. The regulation also provided that minimum quantities of vitamin D, calcium, wheat germ or disodium phosphate might be added as optional ingredients of "enriched farina," and required that ingredients so added be specified on the label. In support of the regulations the Administrator found that "unless a standard" for milled wheat products "is promulgated which limits the kinds and amounts of enrichment, the manufacturers' selection of the various nutritive elements and combinations of elements on the basis of economic and merchandising considerations is likely to lead to a great increase in the diversity, both qualitative and quantitative, in enriched flours offered to the public. Such diversity would tend to confuse and mislead consumers as to the relative value of and need for the several nutritional elements, and would impede rather than promote honesty and fair dealing in the interest of consumers."

On respondent's appeal from this order the Court of Appeals for the Seventh Circuit set it aside, 129 F. 2d 76, holding that the regulations did not conform to the statutory standards of reasonableness, that the Administrator's findings as to probable consumer confusion in the absence of the prescribed standards of identity were without support in the evidence and were "entirely speculative and conjectural," and that in any case such a finding would not justify the conclusion that the regulations would "promote honesty and fair dealing in the interest of consumers." We granted certiorari, 317 U. S. 616, because of the importance of the questions involved to the administration of the Food, Drug and Cosmetic Act.

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[3] The effective date of the riboflavin requirement has been postponed until April 20, 1943, because it appeared that the available supply was inadequate. 7 Fed. Reg. 3055.

Respondent, The Quaker Oats Company, has for the past ten years manufactured and marketed a wheat product commonly used as a cereal food, consisting of farina as defined by the Administrator's regulation, but with vitamin D added. Respondent distributes this product in packages labeled "Quaker Farina Wheat Cereal Enriched with Vitamin D," or "Quaker Farina Enriched by the Sunshine Vitamin." The packages also bear the label "Contents 400 U. S. P. units of Vitamin D per ounce, supplied by approximately the addition of ⅛ of 1 percent irradiated dry yeast."

Respondent asserts, and the Government agrees, that the Act as supplemented by the Administrator's standards will prevent the marketing of its product as "farina" since, by reason of the presence of vitamin D as an ingredient, it does not conform to the standard of identity prescribed for "farina," and that respondent cannot market its product as "enriched farina" unless it adds the prescribed minimum quantities of vitamin B_1, riboflavin, nicotinic acid and iron. Respondent challenges the validity of the regulations on the grounds sustained below and others so closely related to them as not to require separate consideration.

As appears from the evidence and the findings, the products of milled wheat are among the principal items of the American diet, particularly among low income groups.[4] Farina, which is a highly refined wheat product resembling flour but with larger particles, is used in macaroni, as a breakfast food, and extensively as a cereal food for children. It is in many cases the only cereal consumed by them during a period of their growth. Both farina and flour are manufactured by grinding the whole wheat and discarding its bran coat and germ. This process

[4] One witness at the hearing referred to estimates that over 95% of human consumption of wheat products is in the form of white flour.

removes from the milled product that part of the wheat which is richest in vitamins and minerals, particularly vitamin B_1, riboflavin, nicotinic acid and iron, valuable food elements which are often lacking in the diet of low income groups. In their diet, especially in the case of children, there is also frequently a deficiency of calcium and vitamin D, which are elements not present in wheat in significant quantities. Vitamin D, whose chief dietary value is as an aid to the metabolism of calcium, is developed in the body by exposure to sunlight. It is derived principally from cod liver and other fish oils. Milk is the most satisfactory source of calcium in digestible form, and milk enriched by vitamin D is now on the market.

In recent years millers of wheat have placed on the market flours and farinas which have been enriched by the addition of various vitamins and minerals. The composition of these enriched products varies widely.[5] There was testimony of weight before the Administrator, prin-

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[5] The report of the officer presiding at the hearing enumerates the following varieties disclosed by the testimony:

"Flours, phosphated flours, and self-rising flours—

1. One with added vitamin D;

2. One with added calcium;

3. One with added vitamin B_1, nicotinic acid, and calcium [produced by some 23 mills];

4. One with added vitamin B_1, calcium, and iron;

5. One containing wheat germ and wheat germ oil, said to furnish vitamin B_1, vitamin E and riboflavin;

6. One 'long extraction' flour containing B_1, riboflavin, calcium and iron."

"Farinas—

7. One with added vitamin D;

8. One with added vitamin B_1, calcium and iron."

The labels used, and advertising claims made, for those products were not in the record. However, there was testimony that certain of them were sold under such names as "Sunfed," "Vitawhite," "Holwhite."

cipally by expert nutritionists, that such products, because of the variety and combination of added ingredients, are widely variable in nutritional value; and that consumers generally lack knowledge of the relative value of such ingredients and combinations of them.

These witnesses also testified, as did representatives of consumer organizations which had made special studies of the problems of food standardization, that the number, variety and varying combinations of the added ingredients tend to confuse the large number of consumers who desire to purchase vitamin-enriched wheat food products but who lack the knowledge essential to discriminating purchase of them; that because of this lack of knowledge and discrimination they are subject to exploitation by the sale of foods described as "enriched," but of whose inferior or unsuitable quality they are not informed. Accordingly a large number of witnesses recommended the adoption of definitions and standards for "enriched" wheat products which would ensure fairly complete satisfaction of dietary needs, and a somewhat lesser number recommended the disallowance, as optional ingredients in the standards for unenriched wheat products, of individual vitamins and minerals whose addition would suggest to consumers an adequacy for dietary needs not in fact supplied.

The court below characterized this evidence as speculative and conjectural, and held that because there was no evidence that respondent's product had in fact confused or misled anyone, the Administrator's finding as to consumer confusion was without substantial support in the evidence. It thought that, if anything, consumer confusion was more likely to be created, and the interest of consumers harmed, by the sale of farinas conforming to the standard for "enriched farina," whose labels were not required to disclose their ingredients, than by the sale of respondent's product under an accurate and informative label such as that respondent was using.

The Act does not contemplate that courts should thus substitute their own judgment for that of the Administrator. As passed by the House it appears to have provided for a judicial review in which the court could take additional evidence, weigh the evidence, and direct the Administrator "to take such further action as justice may require." H. R. Rep. No. 2139, 75th Cong., 3d Sess., pp. 11–12. But before enactment, the Conference Committee substituted for these provisions those which became § 701 (f) of the Act. While under that section the Administrator's regulations must be supported by findings based upon "substantial evidence" adduced at the hearing, the Administrator's findings as to the facts if based on substantial evidence are conclusive. In explaining these changes the chairman of the House conferees stated on the floor of the House that "there is no purpose that the court shall exercise the functions that belong to the executive or the legislative branches." 83 Cong. Rec., p. 9096. See also H. R. Rep. No. 2716, 75th Cong., 3d Sess., p. 25. Compare *Federal Radio Comm'n* v. *General Electric Co.*, 281 U. S. 464.

The review provisions were patterned after those by which Congress has provided for the review of "quasi-judicial" orders of the Federal Trade Commission and other agencies, which we have many times had occasion to construe.[6] Under such provisions we have repeatedly emphasized the scope that must be allowed to the discre-

[6] The provision adopted by the Conference Committee is one which was proposed as an amendment from the floor of the House by Mr. Mapes, a minority member of the House Committee and one of the House conferees. In proposing it he said that it was "the same as the court review section in the Federal Trade Commission Act with only such changes as are necessary to adapt it to the pending bill," and he referred to "similar" provisions in the Bituminous Coal Commission Act, National Labor Relations Act, Securities Exchange Act, and Federal Communications Act. 83 Cong. Rec., 7892, 7777–8.

tion and informed judgment of an expert administrative body. *Federal Trade Comm'n* v. *Education Society*, 302 U. S. 112, 117; *Gray* v. *Powell*, 314 U. S. 402, 412; *Labor Board* v. *Link Belt Co.*, 311 U. S. 584, 597; see *Federal Communications Comm'n* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 141, 144. These considerations are especially appropriate where the review is of regulations of general application adopted by an administrative agency under its rule-making power in carrying out the policy of a statute with whose enforcement it is charged. Compare *Houston* v. *St. Louis Independent Packing Co.*, 249 U. S. 479, 487; *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126, 156. Section 401 calls for the exercise of the "judgment of the Administrator." That judgment, if based on substantial evidence of record, and if within statutory and constitutional limitations, is controlling even though the reviewing court might on the same record have arrived at a different conclusion.

None of the testimony which we have detailed can be said to be speculative or conjectural unless it be the conclusion of numerous witnesses, adopted by the Administrator, that the labeling and marketing of vitamin-enriched foods, not conforming to any standards of identity, tend to confuse and mislead consumers. The exercise of the administrative rule-making power necessarily looks to the future. The statute requires the Administrator to adopt standards of identity which in his judgment "will" promote honesty and fair dealing in the interest of consumers. Acting within his statutory authority he is required to establish standards which will guard against the probable future effects of present trends. Taking into account the evidence of public demand for vitamin-enriched foods, their increasing sale, their variable vitamin composition and dietary value, and the general lack of consumer knowledge of such values, there was sufficient evidence of

"rational probative force" (see *Consolidated Edison Co.* v. *Labor Board,* 305 U. S. 197, 229, 230), to support the Administrator's judgment that, in the absence of appropriate standards of identity, consumer confusion would ensue. *Federal Trade Comm'n* v. *Raladam Co.,* 283 U. S. 643, 651; *Federal Trade Comm'n* v. *Raladam Co.,* 316 U. S. 149, 151, 152; *Pacific States Box Co.* v. *White,* 296 U. S. 176, 181. Compare *McLean* v. *Fleming,* 96 U. S. 245, 251, 253–4, 255.

Respondent insists, as the court below held, that the consumer confusion found by the Administrator affords no basis for his conclusion that the standards of identity adopted by the Administrator will promote honesty and fair dealing. But this is tantamount to saying, despite the Administrator's findings to the contrary, either that in the circumstances of this case there could be no such consumer confusion or that the confusion could not be deemed to facilitate unfair dealing contrary to the interest of consumers. For reasons already indicated we think that the evidence of the desire of consumers to purchase vitamin-enriched foods, their general ignorance of the composition and value of the vitamin content of those foods, and their consequent inability to guard against the purchase of products of inferior or unsuitable vitamin content, sufficiently supports the Administrator's conclusions.

We have recognized that purchasers under such conditions are peculiarly susceptible to dishonest and unfair marketing practices. In *United States* v. *Carolene Products Co.,* 304 U. S. 144, 149, 150, we upheld the constitutionality of a statute prohibiting the sale of "filled milk"—a condensed milk product from which the vitamin content had been extracted—although honestly labeled and not in itself deleterious. Decision was rested on the ground that Congress could reasonably conclude

that the use of the product as a milk substitute deprives consumers of vitamins requisite for health and "facilitates fraud on the public" by "making fraudulent distribution easy and protection of the consumer difficult."

Both the text and legislative history of the present statute plainly show that its purpose was not confined to a requirement of truthful and informative labeling. False and misleading labeling had been prohibited by the Pure Food and Drug Act of 1906. But it was found that such a prohibition was inadequate to protect the consumer from "economic adulteration," by which less expensive ingredients were substituted, or the proportion of more expensive ingredients diminished, so as to make the product, although not in itself deleterious, inferior to that which the consumer expected to receive when purchasing a product with the name under which it was sold. Sen. Rep. No. 493, 73d Cong., 2d Sess., p. 10; Sen. Rep. No. 361, 74th Cong., 1st Sess., p. 10. The remedy chosen was not a requirement of informative labeling. Rather it was the purpose to authorize the Administrator to promulgate definitions and standards of identity "under which the integrity of food products can be effectively maintained" (H. R. Rep. 2139, 75th Cong., 3d Sess., p. 2; H. R. Rep. 2755, 74th Cong., 2d Sess., p. 4), and to require informative labeling only where no such standard had been promulgated, where the food did not purport to comply with a standard, or where the regulations permitted optional ingredients and required their mention on the label. §§ 403 (g), 403 (i); see Sen. Rep. No. 361, 74th Cong., 1st Sess., p. 12; Sen. Rep. No. 493, 73d Cong., 2d Sess., pp. 11–12.

The provisions for standards of identity thus reflect a recognition by Congress of the inability of consumers in some cases to determine, solely on the basis of informative labeling, the relative merits of a variety of products

superficially resembling each other.[7] We cannot say that such a standard of identity, designed to eliminate a source of confusion to purchasers—which otherwise would be likely to facilitate unfair dealing and make protection of the consumer difficult—will not "promote honesty and fair dealing" within the meaning of the statute.

Respondent's final and most vigorous attack on the regulations is that they fail to establish reasonable definitions and standards of identity, as § 401 requires, in that they prohibit the marketing, under the name "farina," of a wholesome and honestly labeled product consisting of farina with vitamin D added, and that they prevent the addition of vitamin D to products marketed as "enriched farina" unless accompanied by the other prescribed vitamin ingredients which do not co-act with or have any dietary relationship to vitamin D. Stated in another form, the argument is that it is unreasonable to prohibit the addition to farina of vitamin D as an optional ingredient while permitting its addition as an optional ingredient to enriched farina, to the detriment of respondent's business.

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[7] A Message of the President, dated March 22, 1935, urging passage of the bill and particularly of the standard of identity provision, pointed out that "The various qualities of goods require a kind of discrimination which is not at the command of consumers. They are likely to confuse outward appearances with inward integrity. In such a situation as has grown up through our rising level of living and our multiplication of goods, consumers are prevented from choosing intelligently and producers are handicapped in any attempt to maintain higher standards." H. R. Rep. No. 2755, 74th Cong., 2d Sess., pp. 1–2.

The Chairman of the Food and Drug Administration testified before the Senate Committee that the provision for standards of identity which would reflect "the expectation of the buyer" was "one of the most important provisions of the Act." Hearings before a Subcommittee of the Senate Committee on Commerce on S. 1944, Dec. 7 and 8, 1933, pp. 35, 36.

The standards of reasonableness to which the Administrator's action must conform are to be found in the terms of the Act construed and applied in the light of its purpose. Its declared purpose is the administrative promulgation of standards of both identity and quality in the interest of consumers. Those standards are to be prescribed and applied, so far as is practicable, to food under its common or usual name, and the regulations adopted after a hearing must have the support of substantial evidence. We must reject at the outset the argument earnestly pressed upon us that the statute does not contemplate a regulation excluding a wholesome and beneficial ingredient from the definition and standard of identity of a food. The statutory purpose to fix a definition of identity of an article of food sold under its common or usual name would be defeated if producers were free to add ingredients, however wholesome, which are not within the definition. As we have seen, the legislative history of the statute manifests the purpose of Congress to substitute, for informative labeling, standards of identity of a food, sold under a common or usual name, so as to give to consumers who purchase it under that name assurance that they will get what they may reasonably expect to receive. In many instances, like the present, that purpose could be achieved only if the definition of identity specified the number, names and proportions of ingredients, however wholesome other combinations might be. The statute accomplished that purpose by authorizing the Administrator to adopt a definition of identity by prescribing some ingredients, including some which are optional, and excluding others, and by requiring the designation on the label of the optional ingredients permitted.[8]

[8] The standard of identity provision was repeatedly stated in the Committee reports to have been patterned on the Butter Standards Act of 1923, 42 Stat. 1500. Sen. Rep. No. 361, 74th Cong., 1st Sess.,

Since the definition of identity of a vitamin-treated food, marketed under its common or usual name, involves the inclusion of some vitamin ingredients and the exclusion of others, the Administrator necessarily has a large range of choice in determining what may be included and what excluded. It is not necessarily a valid objection to his choice that another could reasonably have been made. The judicial is not to be substituted for the legislative judgment. It is enough that the Administrator has acted within the statutory bounds of his authority, and that his choice among possible alternative standards adapted to the statutory end is one which a rational person could have made. *Houston* v. *St. Louis Independent Packing Co., supra,* 487.

The evidence discloses that it is well known that the milling process for producing flours and farinas removes

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p. 10; Sen. Rep. No. 646, 74th Cong., 1st Sess., p. 4; Sen. Rep. No. 493, 73d Cong., 2nd Sess., p. 10; H. R. Rep. No. 2139, 75th Cong., 3rd Sess., p. 5. That Act was entitled "An Act to define butter and provide a standard therefor," and establish a legislative definition and standard for butter. The Chairman of the House Committee which reported it said "The only things you can put into [butter] are salt, casein, the butter fat, and water. That is what the definition provides." Hearings, House Committee on Agriculture on H. R. 12053, 67th Cong., 2nd Sess., p. 25; see also H. R. Rep. No. 1141, 67th Cong., 2nd Sess., p. 4.

Also referred to as models for the standards to be promulgated under the present act were the advisory standards then being promulgated by the Pure Food and Drug Administration under the authority given by the Appropriation Act of June 3, 1902, 32 Stat. 286, 296, and subsequent acts. Hearing before a Subcommittee of the Senate Committee on Commerce on S. 1944, Dec. 7 and 8, 1933, p. 36. (Statement of Walter B. Campbell, Chief of Food and Drug Administration, Dept. of Agriculture.) The announcements promulgating these standards stated that they were "so framed as to exclude substances not mentioned in the definition." E. g., Dept. of Agriculture, Food and Drug Administration, Service and Regulatory Announcement No. 2, Revision 4 (1933) p. 1; *id.*, Rev. 5 (1936) p. 1.

from the wheat a substantial part of its health-giving vitamin contents, which are concededly essential to the maintenance of health, and that many consumers desire to purchase wheat products which have been enriched by the restoration of some of the original vitamin content of the wheat. In fixing definitions and standards of identity in conformity with the statutory purpose the Administrator was thus confronted with two related problems. One was the choice of a standard which would appropriately identify unenriched wheat products which had long been on the market. The other was the selection of a standard for enriched wheat products which would both assure to consumers of vitamin-enriched products some of the benefits to health which they sought, and protect them from exploitation through the marketing of vitamin-enriched foods of whose dietary value they were ignorant. In finding the solution the Administrator could take into account the facts that whole wheat is a natural and common source of the valuable dietary ingredients which he prescribed for enriched farina; that wheat is not a source of vitamin D; that milk, a common article of diet, is a satisfactory source of an assimilable form of calcium; that the principal function of vitamin D is to aid in the metabolism of calcium; and that milk enriched with vitamin D was already on the market.

We cannot say that the Administrator made an unreasonable choice of standards when he adopted one which defined the familiar farina of commerce without permitting addition of vitamin enrichment, and at the same time prescribed for "enriched farina" the restoration of those vitamins which had been removed from the whole wheat by milling, and allowed the optional addition of vitamin D, commonly found in milk but not present in wheat. Consumers who buy farina will have no reason to believe that it is enriched. Those who buy enriched farina are assured of receiving a wheat product containing those vitamins

naturally present in wheat, and, if so stated on the label, an additional vitamin D, not found in wheat.

Respondent speaks of the high cost of vitamin B_1 ($700 per pound), but there was evidence that the cost of adding to flour the minute quantities of the four ingredients required for enriched farina would be about 75 cents per barrel, and respondent concedes that the cost to it may be but a fraction of a cent per pound. The record is otherwise silent as to the probable effect of the increased cost on the marketing of respondent's product. On this record it does not appear that the increased cost has any substantial bearing on the reasonableness of the regulation.

We conclude that the Administrator did not depart from statutory requirements in choosing these standards of identity for the purpose of promoting fair dealing in the interest of consumers, that the standards which he selected are adapted to that end, and that they are adequately supported by findings and evidence.

Reversed.

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

MR. JUSTICE ROBERTS is of opinion that the judgment should be affirmed for the reasons stated by the Circuit Court of Appeals, 129 F. 2d 76.

VIERECK *v.* UNITED STATES.

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

No. 458. Argued February 1, 2, 1943.—Decided March 1, 1943.

1. Where the charge of the trial court in a criminal prosecution for violation of the Act of June 8, 1938, as amended by the Act of August 7, 1939, authorized the jury to return a verdict of guilty if it found that the defendant had willfully failed to disclose activities which were wholly on his own behalf, the conviction can be sustained only if the failure to disclose such activities was a criminal offense, even though the evidence might warrant a finding that all of the defendant's activities were in fact in behalf of foreign principals. P. 240.
2. The Act of June 8, 1938, as amended by the Act of August 7, 1939, *held* not to require, or authorize the Secretary of State to require, registrants to make any statement of their activities other than those in which they have engaged "as agent" of a foreign principal. P. 243.
3. The unambiguous words of a criminal statute are not to be altered by judicial construction so as to punish one not otherwise within its reach, however deserving of punishment his conduct may seem. P. 243.
4. The application of the amendatory Act of April 29, 1942, to impose upon the defendant in this case a duty which the words of the prior Act plainly exclude, can not be justified by denominating the amendatory legislation as clarifying or declaratory. P. 247.
5. The defendant's right to a fair trial in this case was prejudiced by the conduct of the prosecutor, who, in his closing remarks to the jury, indulged in an appeal wholly irrelevant to any facts or issues in the case, and the only purpose and effect of which could have been to arouse passion and prejudice. Such remarks should have been stopped by the trial judge *sua sponte*. P. 247.
6. It is as much the duty of the prosecutor to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. P. 248.

130 F. 2d 945, reversed.

CERTIORARI, 317 U. S. 618, to review the affirmance of a conviction for violation of a federal Act requiring the registration of certain agents of foreign principals.

Mr. O. R. McGuire for petitioner.

Assistant Attorney General Berge, with whom *Solicitor General Fahy* and *Messrs. Oscar A. Provost* and *Andrew F. Oehmann* were on the brief, for the United States.

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

Petitioner was convicted on three counts of an indictment, each charging him with the willful omission to state a material fact required to be stated in a supplemental registration statement filed by him with the Secretary of State, in violation of the penal provisions of the Act of June 8, 1938, 52 Stat. 631, as amended by the Act of August 7, 1939, 53 Stat. 1244, requiring the registration of certain agents of foreign principals. The question decisive of petitioner's challenge to the validity of his conviction is whether the statute or any authorized regulation of the Secretary required the statement which petitioner omitted to make.

Section 2 of the Act of 1938, as amended, provides that every person acting as "agent of a foreign principal," either as public-relations counsel, publicity agent or representative, with exceptions not now relevant, must file with the Secretary of State a registration statement, on a form prescribed by the Secretary, containing certain specified items of information. These include a copy of the registrant's contract with his principal, or a statement of its terms and conditions if oral, the compensation to be paid under the contract, and the names of all who have contributed or promised to contribute to the compensa-

tion. Beyond the terms and conditions of the registrant's contracts with foreign principals, the statute made no requirement that the original registration statement contain any information as to the registrant's services or activities either in performance of his contract of employment or otherwise.

By § 3 every registrant is required to file at the end of each six months' period, following his original registration, a supplemental statement "on a form prescribed by the Secretary, which shall set forth with respect to such preceding six months' period—(a) Such facts as may be necessary to make the information required under section 2 hereof accurate and current with respect to such period," and "(c) A statement containing such details required under this Act as the Secretary shall fix, of the activities of such person as agent of a foreign principal during such six months' period." And by § 6, "The Secretary is authorized and directed to prescribe such rules, regulations, and forms as may be necessary to carry out this Act." Section 5 imposes penal sanctions upon "any person who willfully fails to file any statement required to be filed under this Act, or in complying with the provisions of this Act, makes a false statement of a material fact, or willfully omits to state any material fact required to be stated therein."

In purported conformity to the statute, the Secretary, on September 15, 1939, promulgated regulations and prescribed a form of "Supplemental Registration Statement." Chapter IV, regulation 12, of the regulations provided: "Agents of foreign principals who engage, whether or not on behalf of their foreign principal, in activities not included among the exceptions set forth in the act and regulations shall be considered subject to the requirement of registration." The prescribed form of Supplemental Registration Statement directed the registrant to make a statement giving certain items of information, No. 11 of

which was "Comprehensive statement of nature of business of registrant."

The three counts of the indictment on which petitioner was convicted charged that in three successive supplemental registration statements filed by him on April 23, 1940, October 25, 1940, and April 25, 1941, as the agent of German principals, he had knowingly and willfully failed to disclose, in response to item 11 which called for a "Comprehensive statement of nature of business of registrant," numerous activities in which he had engaged during the period covered by the supplemental registration statement. On the trial it appeared that petitioner, on September 26, 1939, had registered as agent and United States correspondent for the *Münchner Neueste Nachrichten*, a Munich newspaper, and had later lodged with the State Department a copy of his contract, dated September 27, 1939, as agent and editorial writer for the German Library of Information, an agency of the German government, to do editorial work in connection with "Facts in Review," a publication of the Library. On March 17, 1941, petitioner registered his contract, with a person associated with the Munich newspaper, to act as agent for the publication in the United States of a book "The One Hundred Families Who Rule Great Britain."

There was also evidence from which the jury could have found that during the eighteen months' period covered by petitioner's three supplemental registration statements, and from August 3, 1940, he had controlled and financed Flanders Hall, a corporation which published numerous books and pamphlets from manuscripts furnished by petitioner; that it had also published other books furnished by petitioner which purported to be English translations of French or Dutch publications, or to have been compiled from English sources, but which were in fact translations of German books published by the

Deutsche Informationsstelle of Berlin. All were highly critical of British foreign and colonial policy. During this period petitioner actively participated in the formation of the "Make Europe Pay War Debts Committee," and the "Islands for War Debts Committee," and made use of these organizations as a means of distributing propaganda through the press and radio and under Congressional frank. He also consulted with and was active in writing speeches for various members of Congress, and in securing distribution of the speeches under Congressional frank.

In making the statement required by item 11 in each of his three supplemental registration statements, petitioner responded to the request for a comprehensive statement of the nature of his business by the single phrase "Author and journalist." He made no further disclosure of his various activities during the period covered by the supplemental registration statements.

When submitting the case to the jury, the trial court, at the Government's request, charged that "if you find that the defendant engaged in the activities set forth in the indictment, it is not necessary that you find that he engaged in such activities on behalf of his foreign principal or principals. It is sufficient if you find that he engaged in the activities, whether on behalf of his foreign principal or principals or on his own behalf." On appropriate objection and exception to this instruction, petitioner contended that under the statute he was not required to disclose his activities on his own behalf but only those for foreign principals. The jury returned a verdict of guilty, the judgment of conviction was affirmed by the Court of Appeals for the District of Columbia, 130 F. 2d 945, and we granted certiorari. 317 U. S. 618.

As the charge left the jury free to return a verdict of guilty if it found that petitioner had willfully failed to disclose activities which were wholly on his own behalf,

the conviction can be sustained only if the failure to disclose such activities was a criminal offense. In its brief and on the argument here the Government accordingly conceded that—even though the evidence might warrant a jury's finding that all petitioner's activities were in fact in behalf of his foreign principals—the conviction cannot stand if the charge was erroneous. See *Williams* v. *North Carolina,* 317 U. S. 287, 292; *Pierce* v. *United States,* 314 U. S. 306, 310. We are thus brought to the question whether the statute, supplemented by the regulations of the Secretary, required such information to be given and imposed penal sanctions for petitioner's willful failure to give it.

The Act of 1938 requiring registration of agents for foreign principals was a new type of legislation adopted in the critical period before the outbreak of the war. The general purpose of the legislation was to identify agents of foreign principals who might engage in subversive acts or in spreading foreign propaganda, and to require them to make public record of the nature of their employment. But the means adopted to accomplish that end are defined by the statute itself, which, as will presently appear more in detail, followed the recommendations of a House Committee which had investigated foreign propaganda. These means included the requirement of registration of agents for foreign principals—with which it appears that petitioner complied—and the requirement that the registrant give certain information concerning his activities as such agent.

One may be subjected to punishment for crime in the federal courts only for the commission or omission of an act defined by statute, or by regulation having legislative authority, and then only if punishment is authorized by Congress. *United States* v. *George,* 228 U. S. 14, 20–22; *Williamson* v. *United States,* 207 U. S. 425, 453–62; *United States* v. *Standard Brewery,* 251 U. S.

210, 219–20; *United States* v. *Eaton*, 144 U. S. 677; *United States* v. *Grimaud*, 220 U. S. 506; *United States* v. *Smull*, 236 U. S. 405; *In re Kollock*, 165 U. S. 526. Penal sanctions attach here for willful failure to file a statement when required, or if the registrant "willfully omits to state any material fact required to be stated." Unless the statute, fairly read, demands the disclosure of the information which petitioner failed to give, he cannot be subjected to the statutory penalties.

It is to be noted that although the statute required registration of contracts already entered into at the time of its adoption, it did not include, in its enumeration of information to be given in the original registration statement, any disclosure of a registrant's activities either under his agency contract or otherwise. And the only mention in the statute of a statement of such activities is in § 3 (c), which directed that supplemental registration statements contain "such details required under this Act as the Secretary shall fix, of the activities of such person as agent of a foreign principal." The requirement of this section is subject to two limitations. One is that the statement is to be of such details of the registrant's activities "as the Secretary shall fix"; the other is that the details are to be of activities of the registrant "as agent of a foreign principal."

Neither limitation can be disregarded in determining what statement the statute, and any regulation which it authorizes the Secretary to promulgate, called on petitioner to make. The Secretary's regulation 12 of chapter IV, already quoted, on which the Government relies, plainly does not call for any statement of a registrant's activities. It only declares that agents who engage in activities "whether or not on behalf of their foreign principal" are subject to registration. It requires no statement of their activities and adds nothing to the command of §§ 2 and 3 that all agents of foreign principals shall

register, a requirement with which petitioner complied. Whatever the undisclosed purpose of this regulation, a fair reading of it would not indicate to a registrant that it required any statement of his activities in any capacity.

But treating item 11 of the Supplemental Registration Statement ("Comprehensive statement of nature of business of registrant"), prescribed by the Secretary, as a regulation fixing the details of the registrant's activities which he is required to state, it must either be taken as limited to a statement of his activities as agent, to which § 3 (c) alone refers, or to exceed the authority conferred upon the Secretary by that section. In neither case does the statute command, or authorize the Secretary to command, registrants to make any statement of their activities other than those in which they have engaged "as agent."

We cannot read that phrase as though it had been written "while an agent" or "who is an agent." The unambiguous words of a statute which imposes criminal penalties are not to be altered by judicial construction so as to punish one not otherwise within its reach, however deserving of punishment his conduct may seem. Nor is such an alteration by construction aided by reference to § 6, which directs the Secretary to prescribe rules and regulations "to carry out this Act." For, as we have seen, the only provision of the Act relating to statements of the registrant's activities is § 3 (c), which defines its own and the Secretary's limitations. Section 6 does not give to the Secretary any authority not to be found in the Act, and especially not an authority which overrides the specific limitations of § 3 (c).

While Congress undoubtedly had a general purpose to regulate agents of foreign principals in the public interest by directing them to register and furnish such information as the Act prescribed, we cannot add to its provisions other requirements merely because we think

they might more successfully have effectuated that purpose. And we find nothing in the legislative history of the Act to indicate that anyone concerned in its adoption had any thought of requiring, or authorizing the Secretary to require, more than a statement of registrants' activities in behalf of their foreign principals.

In 1935 the McCormack committee, reporting on its Investigation of Nazi and Other Propaganda, recommended: "That the Congress should enact a statute requiring all publicity, propaganda, or public-relations agents or other agents or agencies, who represent in this country any foreign government or a foreign political party or foreign industrial or commercial organization, to register with the Secretary of State of the United States, and to state name and location of such foreign employer, the character of the service to be rendered, and the amount of compensation paid or to be paid therefor." H. R. Rep. No. 153, 74th Cong., 1st Sess., p. 23. The House and Senate committee reports, urging enactment of the McCormack bill which became the 1938 Act, both declare that its purpose was to carry out these recommendations of the McCormack committee. H. R. Rep. No. 1381, 75th Cong., 1st Sess., p. 1; S. Rep. No. 1783, 75th Cong., 3d Sess., p. 2.

As may be seen from the text which we have quoted, these recommendations were limited to the proposal of specific measures for achieving the committee's general purpose, by requiring disclosure of the identity of the agent and of his foreign principal and the agent's relationship to the principal. They give no hint of an intention to require agents to disclose activities not in behalf of their foreign principals. And in supporting the amendatory legislation enacted in 1942, which, among other additions, required registrants to make "a comprehensive statement of the nature of registrant's business" (Act of April 29, 1942, § 2 (a) (3)), Representative McCormack stated:

"The present bill strengthens the McCormack Act. I was experimenting at that time, and, naturally, when you are experimenting you cannot go as far as you can after you have had experience, and in the light of the experience gained from the administration of the McCormack Act, these amendments are necessary to strengthen the Act for the best interests of our country." 88 Cong. Rec., Jan. 28, 1942, p. 802.

Even though the specific restriction of § 3 (c) were due to defective draftsmanship or to inadvertence, which hardly seems to be the case, men are not subjected to criminal punishment because their conduct offends our patriotic emotions or thwarts a general purpose sought to be effected by specific commands which they have not disobeyed. Nor are they to be held guilty of offenses which the statutes have omitted, though by inadvertence, to define and condemn. For the courts are without authority to repress evil save as the law has proscribed it and then only according to law.

The Government argues that the statute would have been a "halfway measure" had it not required, or at least authorized the Secretary to require, the registrant to reveal the propaganda which he put out other than on behalf of his foreign principal. Congress itself has recognized that the legislation was in this sense a halfway measure when in 1942 the Act was amended so as to require both original and supplemental registration statements to contain a "comprehensive statement of the nature of registrant's business," together with other specifically required information as to the character of registrants' activities. Act of April 29, 1942, c. 263, 56 Stat. 248, §§ 2 (a) (3), 2 (a) (4), 2 (a) (8), 2 (a) (10), 2 (b).

The Senate Judiciary Committee in recommending the 1942 legislation said that "the present Act is also improved by explicit enlargement of the registration provisions so as to render them more efficacious for disclosure and investi-

gative purposes." S. Rep. No. 913, 77th Cong., 1st Sess., p. 9. The House Judiciary Committee declared "the existing law is also believed to have been bolstered by explicit enlargement of the registration provisions so as to render them more efficacious for disclosure and investigative purposes. . . . All of these additions have been prompted by experience in cases under the present act." H. Rep. No. 1547, 77th Cong., 1st Sess., pp. 3–4.[1]

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[1] This statement, which omitted to point out that the activities referred to in § 3 (c) were the registrant's activities "as agent," was copied verbatim from a statement which had been submitted at a hearing on November 28, 1941, by the Chief of the Special Defense Unit of the Department of Justice, who had a large share in drafting the 1942 legislation. See Hearings before Subcommittee No. 4 of the House Committee on the Judiciary, 77th Cong., 1st Sess., on H. R. 6045, pp. 26, 12. There is some language in his statement, also copied in the House Report at p. 4, which may indicate that the Department of Justice thought that the existing law required disclosure of "information about the nature of the registrant's business," and that the provision in the 1942 law would be "declaratory." If such was its meaning, the statement ignored and did not point out to the committee the explicit limitation of § 3 (c) of the old Act to the registrant's activities "as agent." Moreover, the statement was submitted by the Department after the institution of the prosecution of this case (the indictment was filed October 8, 1941). Hence in some measure it may have represented the Department's view of the law, which we think inadmissible, reflected in its requested charge to the jury in this case.

A like indefiniteness as to the extent to which the new legislation might be regarded as declaratory is suggested by the letter of the Attorney General of November 24, 1941, recommending the new legislation to the chairmen of the Senate and House Judiciary Committees. The Attorney General, however, seems to have thought that the provisions of the new bill would be declaratory, not of the provisions of the old Act, but of the "requirements of the registration statement of foreign agents as now prescribed or may be prescribed by the Secretary." Indication that the Attorney General did not regard the Act, before the 1942 amendment, as embodying this requirement of the Secretary is to be found in the first paragraph of his letter: "Under existing law, every person who is an agent of a foreign principal is required to file a registration statement with the Secretary of State, setting forth certain

While we find in the committee reports no mention of the explicit restriction of the application of § 3 (c) of the old Act to the registrant's activities "as agent," the reports reveal a clear purpose to make the registration requirements of the new Act extend to all his activities.[2] We think that in this respect the new Act extends beyond the old, and that the application, *ex post facto*, of the new, to impose on petitioner a duty which the words of the old plainly exclude, is not to be justified by denominating the amendment as clarifying or declaratory legislation.

As the case must be remanded to the district court for further proceedings, we direct attention to conduct of the prosecuting attorney which we think prejudiced petitioner's right to a fair trial, and which independently of the error for which we reverse might well have placed the judgment of conviction in jeopardy. In his closing remarks to the jury he indulged in an appeal wholly irrelevant to any facts or issues in the case, the purpose and effect of which could only have been to arouse passion and prejudice.[3] The trial judge overruled, as coming too late,

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information disclosing the nature of his relationship to such foreign principal." Hearings, *supra*, pp. 55–56; S. Rep. No. 913, 77th Cong., 1st Sess., pp. 10–11.

[2] The committee reports referred to are reports on H. R. 6269, which was passed by Congress, but vetoed by the President because our entrance into the war had made it necessary to alter the bill in certain respects, not material here. A new bill, S. 2399, containing such changes, became the Act of April 29, 1942. See S. Rep. No. 1227, 77th Cong., 2d Sess.; H. R. Rep. No. 2038, 77th Cong., 2d Sess.

[3] "In closing, let me remind you, ladies and gentlemen, that this is war. This is war, harsh, cruel, murderous war. There are those who, right at this very moment, are plotting your death and my death; plotting our death and the death of our families because we have committed no other crime than that we do not agree with their ideas of persecution and concentration camps.

"This is war. It is a fight to the death. The American people are relying upon you ladies and gentlemen for their protection against this sort of a crime, just as much as they are relying upon the protection

petitioner's objection first made in the course of the court's charge to the jury.

At a time when passion and prejudice are heightened by emotions stirred by our participation in a great war, we do not doubt that these remarks addressed to the jury were highly prejudicial, and that they were offensive to the dignity and good order with which all proceedings in court should be conducted. We think that the trial judge should have stopped counsel's discourse without waiting for an objection. "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger* v. *United States,* 295 U. S. 78, 88. Compare *New York Central R. Co.* v. *Johnson,* 279 U. S. 310, 316–18.

Reversed.

MR. JUSTICE JACKSON and MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this case.

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of the men who man the guns in Bataan Peninsula, and everywhere else. They are relying upon you ladies and gentlemen for their protection. We are at war. You have a duty to perform here.

"As a representative of your Government I am calling upon every one of you to do your duty."

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS concurs, dissenting.

The petitioner, having registered with the Secretary of State as a foreign agent, was convicted of willful refusal to inform the Secretary of certain business activities in which he systematically attempted to influence the political thought of this country on behalf of Germany. The trial judge charged the jury not to convict the petitioner unless he had actual knowledge that the Act and the regulations required him to supply this information to the Secretary, and that having such knowledge he had refused to answer the Secretary's question with the "deliberate intention of avoiding the requirement of the statute." The jury found, and it is not questioned here, that the petitioner was a paid German propagandist engaged in various business activities, in all of which he made use of the same kind of propaganda calculated to further the interests of Germany in the United States. The Court holds that the Congressional enactment required petitioner to reveal to the Secretary only the particular propaganda activities in which he engaged pursuant to his agency. It holds that the petitioner could keep secret, without violating the law, those propaganda activities undertaken on his own behalf, which were of exactly the same type and were intended to accomplish exactly the same purpose as those for which he had been hired by his German principals.

To this construction of the Act I cannot agree. I think that § 3 (c) of the Act, which authorizes the Secretary to require statements "of the activities of such person as agent of a foreign principal" must be read in the light of the general purpose of the Act and in close connection with § 6, which permits the Secretary to prescribe the "rules, regulations, and forms" necessary to carry out the

Act. By such a reading, the Secretary was authorized to ask the question the petitioner failed to answer.

The general intent of the Act was to prevent secrecy as to any kind of political propaganda activity by foreign agents. Both the House and Senate Committees reporting the Bill under consideration declared it to be their purpose to turn "the spotlight of pitiless publicity" upon the propaganda activities of those who were hired by foreign principals. Appreciating that "propaganda efforts of such a nature are usually conducted in secrecy," they wanted to make full information concerning it "available to the American public" and sought by "the passage of this bill" to "force propaganda agents representing foreign agencies to come out 'in the open' in their activities, or to subject themselves to the penalties provided in said bill." [1] They declared that the purpose of the Bill was to require all such hired agents "to register with the State Department and to supply information about their *political activities,* their employers, and the terms of their contracts." [2]

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[1] Senate Report No. 1783, House Report No. 1381, 75th Cong., 3d Sess.

[2] The House Committee hearings, which are available in manuscript form only, show the same broad purpose. In explaining the Bill to the House Committee, its author pointed out that it was particularly aimed at firms, groups, or businesses, used "as a means for that particular country or political party to hide its identity" and that the Bill covered "all activities of all kinds, that is, all propaganda activities, no matter from what source it emanates." The Congressional Committee, whose Chairman was the author of this Bill, had discovered through hearings, that business enterprises had been utilized as a means for propagandizing, and that many persons including the petitioner here had published articles in various magazines, concealing their identity behind pseudonyms. The purpose of these activities, the Committee found, had been to influence "the policies, external and internal, of this country, through group action. They were employing the same method that they had employed in Germany for the purpose of obtaining control of the government over there."

What emerged from extended Congressional investigations, hearings and deliberations was this Act, intended to provide an appropriate method to obtain information essential for the proper evaluation of political propaganda emanating from hired agents of foreign countries. As the House and Senate Committees considering the Bill said, it "does not in any way impair the right of freedom of speech, or of a free press, or other constitutional rights." Resting on the fundamental constitutional principle that our people, adequately informed, may be trusted to distinguish between the true and the false, the bill is intended to label information of foreign origin so that hearers and readers may not be deceived by the belief that the information comes from a disinterested source. Such legislation implements rather than detracts from the prized freedoms guaranteed by the First Amendment. No strained interpretation should frustrate its essential purpose.

Section 6 of the Act provides that "The Secretary is authorized and directed to prescribe such rules, regulations, and forms as may be necessary to carry out this Act." Congress did not set out in the Act the questions to be answered, and it surely did not intend to entrust the Secretary with no more than the power to copy the Act in seeking information. Such latitude as he has, the Secretary immediately used to require that "agents of foreign principals who engage, whether or not on behalf of their foreign principal," in political propaganda activity should register; and he asked the registrants to make a "comprehensive statement of nature of business." In view of the general purpose of the Act, such a question seems eminently reasonable. As a practical matter, the very fact that in the instant case it is extremely difficult to determine with conviction which activities the petitioner carried on in his own behalf and which he carried on in behalf of Germany is reason enough for requiring

him to report on both. The Act did not contemplate that a foreign agent could evade its terms by claiming that all unreported political activities, upon their discovery by this government, were undertaken on his own behalf. Under the general power given the Secretary by § 6 to determine the form of questions, he was entitled to ask such questions as would make the enforcement of § 3 (c) possible. I think the Secretary was authorized to ask the question under consideration in this case and that the Act required the petitioner to answer it.

As is pointed out in the opinion of the Court, the 1942 amendment to the Act explicitly authorizes the Secretary to ask the question which is involved in the instant case. The addition of this provision to the Act, however, I consider purely declaratory. The 1942 Bill was passed, as shown by the Senate and House reports, to serve four major purposes: It required the labeling of foreign propaganda mailed in the United States; transferred the administration of the Act from the Department of State to the Department of Justice; extended the application of the Act to certain propaganda affecting Latin America; and improved the enforcement provisions. The Attorney General, in expressing his views on the bill, declared that the registration provisions of the amendment, which includes specific authorization to ask the very question now before us, were "merely declaratory." [3] If so, the Secretary had the authority to ask the same question under the 1938 Act.

The reversal here apparently does not rest on the concluding remarks of counsel for the government set forth in the Court's opinion. I am in accord with the sentiments expressed in *Berger* v. *United States,* 295 U. S. 78, 88, which the Court today repeats. In that case the Court declared that counsel had misstated the facts; put words

[3] Sen. Report No. 913, 77th Cong., 1st Sess.

into the mouths of witnesses which they had not said; intimated that statements had been made to him personally out of court in respect of which no proof was offered; pretended to understand that a witness had said something which he had not; bullied and argued with the witnesses; and committed other offenses. This Court properly declared that his conduct called for stern rebuke by the trial judge, for repressive measures, and "perhaps, if these were not successful, for the granting of a mistrial."

A prosecutor must draw a careful line. On the one hand, he should be fair; he should not seek to arouse passion or engender prejudice. On the other hand, earnestness or even a stirring eloquence cannot convict him of hitting foul blows.[4]

MARSHALL FIELD & CO. *v.* NATIONAL LABOR RELATIONS BOARD.

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

No. 453. Argued February 3, 1943.—Decided March 1, 1943.

1. Benefits received under the Illinois Unemployment Compensation Act were not "earnings" within the meaning of an order of the National Labor Relations Board requiring an employer to pay to certain discharged employees sums equal to what they normally would have earned, less their "net earnings," during the prescribed period. P. 255.
2. Since it does not appear from the record that the question of the National Labor Relations Board's authority to award back pay

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[4] "To shear him [the prosecutor] of all oratorical emphasis, while leaving wide latitude to the defense, is to load the scales of justice; it is to deny what has always been an accepted incident of jury trials, except in those jurisdictions where any serious execution of the criminal law has yielded to a ghostly phantom of the innocent man falsely convicted." *Di Carlo* v. *United States*, 6 F. 2d 364, 368.

without deduction of benefits received under the Illinois Unemployment Compensation Act was, at any stage of the proceedings before the Board, presented to the Board or to any member or agent thereof, or that there were any "extraordinary circumstances" which would excuse such failure, its consideration on review was precluded by § 10 (e) of the National Labor Relations Act. P. 255.

3. Assuming that the requirements of § 10 (e) may with the consent of the court be waived, the reservation in the consent decree of "jurisdiction" to consider the question in this case was not a waiver, but left the matter to be determined according to law. P. 256.

129 F. 2d 169, affirmed.

CERTIORARI, 317 U. S. 617, to review a decree ordering enforcement of an order of the National Labor Relations Board.

Mr. Ralph E. Bowers, with whom *Mr. Preston B. Kavanagh* was on the brief, for petitioner.

Mr. Robert W. Watts, with whom *Solicitor General Fahy* and *Messrs. Valentine Brookes* and *Ernest A. Gross,* and *Miss Ruth Weyand* were on the brief, for the respondent.

PER CURIAM.

In this case the Labor Board ordered petitioner to compensate certain of its employees for loss of pay suffered as a result of their discriminatory discharge in violation of the National Labor Relations Act. Paragraph 2 (b) of the order directed that petitioner "make whole" the employees by payment to them of a sum "equal to that which they would normally have earned as wages" during the specified period, less their "net earnings" during the period (34 N. L. R. B. 1, 21). On consent of the parties, the Circuit Court of Appeals for the Seventh Circuit enforced the other provisions of the Board's order, and reserved "jurisdiction" to determine whether Paragraph 2 (b) permitted petitioner to deduct benefits received by the em-

ployees under the Illinois Unemployment Compensation Act, and, if not, whether to that extent the order was within the power of the Board. On consideration of the questions reserved, the court construed the order as not permitting such a deduction, and held that so construed it was within the Board's authority. 129 F. 2d 169. An appropriate enforcement decree was entered, and we granted certiorari. 317 U. S. 617.

We agree with the court below that the benefits received under the state compensation act were plainly not "earnings" which, under the terms of the Board's order, could be deducted from the back pay awarded. And upon examination of the record we think the Board's order should be enforced without considering the question whether such a provision is within the Board's authority.

Section 10 (e) of the Act, 29 U. S. C. § 160 (e), provides that "No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." We do not find that, at any stage of the proceedings before the Board, the objection now urged as to the Board's lack of power was presented to it or to any member or agent of the Board, or that there are any "extraordinary circumstances" which would excuse such failure.

Paragraph 2 (b) of the Board's order is in substance the recommendation of the intermediate report of the trial examiner. Yet petitioner's only objection to this part of the examiner's report was that the examiner had erred "in making each and every recommendation." Such a general objection did not apprise the Board that petitioner intended to press the question now presented, and may well account for the Board's failure to consider this question in its decision and to make findings with respect to it.

The present case gives emphasis to the salutary policy adopted by § 10 (e) of affording the Board opportunity to consider on the merits questions to be urged upon review of its order. In objecting to Paragraph 2 (b) for its want of support in the Board's findings, petitioner contends that the Illinois unemployment compensation fund is in substance an unemployment insurance fund built up wholly from tax contributions by employers; that the benefits received from the fund by the employees cannot under state law be reclaimed or refunded; and that the eligibility of these employees for future benefits from the fund has not been impaired because of the benefits already paid to them. Findings with respect to these contentions are an appropriate if not indispensable basis for judicial review of the question sought to be raised. We think § 10 (e) makes its presentation to the Board a prerequisite to judicial review.

The reservation in the consent decree of "jurisdiction" to consider this objection was not a waiver by the Board or the court of conformity to the requirements of § 10 (e). Assuming that such a waiver might be made with the assent of the court, we cannot read in the consent decree anything more than a reservation of the court's jurisdiction to decide the question according to law.

For the reason that the record does not show compliance with § 10 (e) with respect to the question raised as to the Board's authority, the decree is

Affirmed.

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

WELLS *v.* UNITED STATES.

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

No. 11, Original. Argued February 10, 1943.—Decided March 1, 1943.

1. Even though, in the light of all the circumstances, the Circuit Court of Appeals in this case could have allowed an appeal in forma pauperis to review the adequacy of the District Court's certificate (pursuant to the Act of June 25, 1910, as amended) that the appeal was not taken in good faith, it does not appear that an appeal was sought on that ground or that there is anything of record to support such an appeal, and the order of the Circuit Court of Appeals denying leave to appeal in forma pauperis is therefore affirmed. P. 260.
2. What effect should be given to a certificate of bad faith in a case where the jurisdiction of the Circuit Court of Appeals attaches upon the mere filing of a notice of appeal, independently of any application for leave to appeal in forma pauperis, is not here decided. P. 260.

Affirmed.

CERTIORARI, 317 U. S. 616, to review an order of the Circuit Court of Appeals denying leave to appeal in forma pauperis.

Mr. Henry J. Friendly for petitioner.

Assistant Attorney General Berge, with whom *Solicitor General Fahy* and *Messrs. Oscar A. Provost* and *Robert S. Erdahl,* and *Miss Melva M. Graney* were on the brief, for the United States.

PER CURIAM.

In 1938 petitioner, in the Western District of Texas, pleaded guilty to an indictment in four counts charging him with violation of the Bank Robbery Act, 12 U. S. C. § 588b, and was sentenced to consecutive terms of imprisonment aggregating 90 years. On May 6, 1942, the trial court, after petitioner's successful appeal to the Cir-

cuit Court of Appeals, 124 F. 2d 334, granted his motion for resentence and sentenced him on two of the counts on which he had been convicted, for consecutive terms aggregating 45 years. On the same day he began the present proceeding by a petition in the trial court to set aside his conviction on the ground that his plea of guilty had been induced by threats and false statements on the part of government officers having him in custody, and that on entering his plea of guilty he had been denied the benefit of counsel.

The district court denied the petition on May 7, without calling for a response from the Government, without making findings or writing an opinion, and apparently without holding a hearing. Its order recited that the court "is of the opinion that said petition is wholly insufficient as a matter of law; that the matters and things therein contained have heretofore been adjudicated and that said petition should in all things be denied."

On May 28 petitioner moved in the district court that he be allowed to appeal in forma pauperis. The court denied the motion, and certified that "in the opinion of the court such an appeal is not taken in good faith."

Petitioner later presented to the Circuit Court of Appeals for the Fifth Circuit an application for allowance of an appeal in forma pauperis, which was likewise denied. That order does not set forth the ground on which the denial was rested, but an earlier opinion, *In re Wragg*, 95 F. 2d 252, 253, states the court's view that it is without power to allow an appeal in forma pauperis when the trial court has certified that the appeal is not taken in good faith. We granted certiorari to the Circuit Court of Appeals upon a timely petition which asked that the writ be issued to that court and to the district court. 317 U. S. 616.

The Government admits that the allegations in the petition to set aside the conviction raise an issue as to

the constitutional validity of the judgment of conviction which could be tried on habeas corpus (see *Waley* v. *Johnston,* 316 U. S. 101). But it denies that the Court of Appeals had jurisdiction to pass upon the point in this proceeding for the reason, among others, that consideration of the merits of the appeal by any appellate court was foreclosed by the district court's certification that the appeal was not in good faith.

The Act of June 25, 1910, 36 Stat. 866, as amended, 28 U. S. C. § 832, provides that any citizen, upon filing an affidavit of poverty, "may, upon the order of the court, commence and prosecute or defend to conclusion any suit or action, or an appeal to the circuit court of appeals, or to the Supreme Court in such suit or action, including all appellate proceedings, unless the trial court shall certify in writing that in the opinion of the court such appeal is not taken in good faith, without being required to prepay fees or costs . . ." The Government argues that, under the Act of 1910, when the trial court certifies that the appeal is not taken in good faith, the action of the judge in issuing the certificate is final, and not reviewable on appeal.

For purposes of this case, we shall assume, as petitioner contends, that the Act of 1910 does not foreclose all appellate review in forma pauperis when the trial court has certified its opinion that the appeal is not taken in good faith. But we think that where, as in this case, leave is necessary to perfect the appeal, the certification must be given effect at least to the extent of being accepted by appellate courts as controlling in the absence of some showing that the certificate is made without warrant or not in good faith.

Neither from the record nor from petitioner's application to the Circuit Court of Appeals, which he has filed in this Court, does it appear that he attacked the sufficiency of the district court's certificate upon these or any other

grounds. Nor can we say that there is want of support for the district court's recital in its order that "the matters and things" contained in the application to set aside the conviction "have heretofore been adjudicated." For the Government's brief points out that petitioner, before his application to the district court in this proceeding, had unsuccessfully sought release from custody in two habeas corpus proceedings, of which the federal courts may take judicial notice, both brought in the Northern District of California. In the second, there was a hearing in which he testified in his own behalf; other evidence was taken both oral and documentary, and the court made findings of fact contrary to the allegations of fact on which petitioner now relies. We cannot say that the district court in this case was unfamiliar with those proceedings, merely because they do not appear in the record before us.

Even though the Circuit Court of Appeals could allow an appeal in forma pauperis to review, in the light of all the circumstances, the adequacy of the district court's certificate, it does not appear that appeal was sought on that ground or that there is anything of record to support such an appeal. The Circuit Court of Appeals' order denying leave to appeal in forma pauperis must therefore be affirmed.

Apart from the in forma pauperis statute, petitioner's appeal to the Circuit Court of Appeals from the order denying his application to vacate the conviction was governed not by Rule III of the Rules in Criminal Cases, but by § 8 (c) of the Act of February 13, 1925, 28 U. S. C. § 230, which requires that proper application be made for the allowance of an appeal. *United States ex rel. Coy* v. *United States*, 316 U. S. 342, 344; *Nye* v. *United States*, 313 U. S. 33, 44. We have no occasion to decide now what effect should be given to a certificate of bad faith in a case where the jurisdiction of the Circuit Court of Appeals attaches upon the mere filing of a notice of appeal, inde-

pendently of any application for leave to appeal in forma pauperis. Cf. *Walleck* v. *Hudspeth,* 128 F. 2d 343.

Affirmed.

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

PENN DAIRIES, INC., ET AL. *v.* MILK CONTROL COMMISSION OF PENNSYLVANIA.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

No. 399. Argued January 13, 1943.—Decided March 1, 1943.

1. Pursuant to the Pennsylvania Milk Control Law, a renewal of the license of a milk dealer was refused by the Milk Control Commission because the dealer, in violation of the state law, had sold milk to the United States at prices below the minima fixed by the Commission. The sales and deliveries were made within the State, under a contract awarded the dealer, as the lowest bidder, for supplying milk for consumption by troops at an Army camp established by the United States, on land belonging to the State, under a permit which involved no surrender of the State's jurisdiction or authority over the area. *Held* that such application of the state law to the dealer in these circumstances was not precluded by the Constitution or laws of the United States. Pp. 271, 278.

   Congressional legislation, either as read in the light of its history or as construed by the executive officers charged with the exercise of the contracting power, does not disclose a purpose to immunize government contractors from local price-fixing regulations; nor, in the circumstances of this case, does the Constitution, unaided by Congressional enactment, confer such immunity.
2. Those who contract to furnish supplies or render services to the Government are not federal agencies and do not perform governmental functions; and the mere fact that non-discriminatory taxation or regulation of the contractor imposes an increased economic burden on the Government is no longer regarded as bringing the contractor within any implied immunity of the Government from state taxation or regulation. P. 269.
3. Since the Constitution has left Congress free to set aside local taxation and regulation of government contractors, there is no basis

for implying from the Constitution alone a restriction upon such regulations which Congress has not seen fit to impose, unless the regulations are shown to be inconsistent with Congressional policy. P. 271.

4. The language and legislative history of the Acts of Congress requiring competitive bidding in the purchase of supplies for the Army, and of related statutes regulating government contracts, do not evidence a purpose to set aside local price regulations or to prohibit the States from taking punitive measures against violators of such regulations. P. 272.
5. An unexpressed purpose of Congress to set aside statutes of the States regulating their internal affairs is not lightly to be inferred and ought not to be implied where the legislative command, read in the light of its history, remains ambiguous. P. 275.
6. The same considerations which sustain the rule against statutory repeals by implication apply as well when the question is one of nullification of state power by congressional legislation. P. 275.
7. Assuming that the Secretary of War could by regulation set aside the state's price legislation which it has made applicable to government contractors, it appears plainly from a consideration of pertinent regulations that he has not done so. P. 278.

344 Pa. 635, 26 A. 2d 431, affirmed.

APPEAL from the affirmance of a judgment, 148 Pa. Super. 261, 24 A. 2d 717, sustaining an order of the Milk Control Commission denying an application for renewal of a license.

Solicitor General Fahy argued the cause for the United States; *Mr. Harris C. Arnold* for Penn Dairies, Inc. *Assistant Attorney General Shea* and *Messrs. Archibald Cox, Morton Liftin,* and *Gerald A. Gleeson* were with them on the brief, for appellants.

The United States is immune from state regulation of the price term of its purchase contracts. When the dual system of government results in conflict between state regulation and federal activities, the former must yield under the supremacy clause of Article VI. *McCulloch* v. *Maryland,* 4 Wheat. 316, 427.

The statute and order are equivalent to a direction to the United States not to purchase milk in Pennsylvania at prices below those specified by state authorities.

Though the enforcement provisions of the statute are aimed exclusively at the seller, the impact of the regulation is upon the purchaser. Cf. *Federal Land Bank* v. *Bismarck Co.*, 314 U. S. 95; *Alabama* v. *King & Boozer*, 314 U. S. 1.

So vital a federal function as the purchase of supplies for the armed forces is within the constitutional immunity. *Johnson* v. *Maryland*, 254 U. S. 51, 56.

Whatever may be the propriety of the test of discrimination in determining the validity of state tax laws applied to persons dealing with the United States, the test has no application to sustain the validity of a direct regulation of the activities of the United States itself.

The Constitution reflects the determination of the Founders that the procurement of supplies for the Army is a matter of national concern, to be regulated by the elected or appointed representatives of all the people and not controlled by single States in their local interests. It vests the power "To raise and support Armies" in Congress and not in the States. Const., Art. I, § 8, cl. 11.

Where the legal incidence of the state regulation is on the United States because the state law itself fixes for local economic reasons the terms on which the United States may come into the State and purchase Army supplies from its citizens, then the state law passes beyond the line of local affairs and becomes a direct regulation of the United States and of the support of the Army.

The decisions of this court concerning intergovernmental tax immunity also show that the price regulation is invalid because its incidence is on the United States.

The price regulation here involved does not rest exclusively upon the contractor, as did the sales tax which was upheld in *Alabama* v. *King & Boozer*, 314 U. S. 1. The regulation impinges upon the federal government as

fully and directly as did the sales tax invalidated in *Federal Land Bank* v. *Bismarck Co.*, 314 U. S. 95, which was required by law to be passed on to the purchasing land bank.

Congress has regulated federal purchases in a way essentially inconsistent with the Pennsylvania price regulation. The policy of the federal competitive bidding statutes, and the purchasing procedure adopted under the authorization of Title II of the First War Powers Act, 1941, 55 Stat. 838, cannot be harmonized with the application of the Pennsylvania law to federal purchases. Since Congress undoubtedly has power to regulate the subject, the inconsistent state regulation must yield. Const., Art. VI; *Northern Securities Co.* v. *United States*, 193 U. S. 197; *Florida* v. *Mellon*, 273 U. S. 12. Cf. *Cloverleaf Butter Co.* v. *Patterson*, 315 U. S. 148.

If minimum prices established under state authority bind bidders for government contracts, there will be no "*lowest* responsible bidder," for where the minimum fixed by state law is above the economic minimum, several bidders will quote the fixed price. Thus, the United States will be denied the full benefit of price competition.

While the necessities of war have compelled some relaxation of the competitive bidding requirements for public procurement, the Pennsylvania price regulation also conflicts with the emergency methods of purchase. Title II of the First War Powers Act, 1941, 55 Stat. 838, empowers the President to authorize government agencies exercising functions related to the war effort "to enter into contracts . . . without regard to the provisions of law relating to the making . . . of contracts." By Executive Order No. 9001 of December 27, 1941 (6 F. R. 6787), the President authorized the War and Navy Departments and the United States Maritime Commission to exercise such powers, and provided that, in the absence of any other limitation fixed by law, "the fixed fee to be paid the Contractor as a result of any cost-plus-a-fixed-fee contract

entered into under the authority of this Order shall not exceed seven per centum of the estimated cost of the contract . . ." Tit. II, § 7. A minimum price to be charged uniformly by all distributors, regardless of their individual costs, may of course be more than the "cost plus a fixed fee" envisaged by the Executive Order.

Mr. Frank E. Coho, Deputy Attorney General of Pennsylvania, with whom *Messrs. Claude T. Reno,* Attorney General, and *E. Russell Shockley* were on the brief, for appellee.

When the Government enters into a contract, it generally has the same rights and obligations as individuals. *Cooke* v. *United States,* 91 U. S. 389; *Christie* v. *United States,* 237 U. S. 234; *United States* v. *Spearin,* 248 U. S. 132; *United States* v. *Atlantic Dredging Co.,* 253 U. S. 1; *United States* v. *Bethlehem Steel Corp.,* 315 U. S. 289; E. E. Naylor, Liability of the United States Government in Contract, 14 Tulane Law Review 580, 584 (1940). *Kemp* v. *United States,* 38 F. Supp. 568, 570.

The immunity of the United States and its agents does not extend to those with whom it contracts to furnish material or to render services. *James Stewart & Co.* v. *Sadrakula,* 309 U. S. 94, 105; *James* v. *Dravo Contracting Co.,* 302 U. S. 134, 152.

If the result of such contracts is to induce cut-throat competition among milk dealers competing for the federal business, the final result may well be that all but a few dealers will be driven out of business.

That the Government may have to pay more than it would under the contract is not such a burden upon the Government that the contractor is excused from obeying the order. *James* v. *Dravo Contracting Co.,* 302 U. S. 134.

Indiantown Gap Military Reservation, although now being used by the United States Government, is subject

to the jurisdiction of Pennsylvania. No law, sale or lease from Pennsylvania has conveyed exclusive jurisdiction to the United States. No Act of Congress has taken away from Pennsylvania the right to enforce the Milk Control Law. See *James Stewart & Co.* v. *Sadrakula*, 309 U. S. 94.

Enforcement of the Commission's minimum price order does not conflict with federal statutes requiring competitive bidding.

The United States is required to let contracts to the lowest responsible bidders. A contractor who does not comply with state laws to which he is subject should not be considered a "responsible bidder."

The United States has not exercised any war or emergency power that would oust the state Commission of authority to regulate the appellant. Congress has not attempted to make regulations concerning the production, processing, bottling and distribution of milk in and about its reservations, and the power to make such regulations remains with the States. See *United States* v. *Bethlehem Steel Corp.*, 315 U. S. 289.

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

Decision of this case turns on the question whether the minimum price regulations of the Pennsylvania Milk Control Law of April 28, 1937, P. L. 417, Purdon's Pa. Stat. Ann., Tit. 31, § 700j, may constitutionally be applied to the sale of milk by a dealer to the United States, the sale being consummated within the territorial limits of the state in a place subject to its jurisdiction.

The Pennsylvania Milk Control Law establishes a milk control commission, § 201, with authority to fix prices for milk sold within the state wherever produced, §§ 801–803, including minimum wholesale and retail prices for milk sold by milk dealers to consumers, § 802, and to issue rules, regulations and orders to effectuate this authority, § 307.

In the fall of 1940 the United States established, under a permit from the Commonwealth of Pennsylvania, a military encampment on lands belonging to the Commonwealth. As is conceded, the permit involved no surrender of state jurisdiction or authority over the area occupied by the camp. On February 1, 1941, the purchasing and contracting officer at the encampment, an officer of the Quartermaster Corps of the United States Army, invited bids for a supply of milk for the period from March 1 to June 30, 1941, for consumption by troops stationed at the camp. On February 4, the Milk Control Commission sent a notice to interested parties, including appellant, Penn Dairies, Inc., a Pennsylvania corporation, addressed to "all milk dealers interested in submitting bids to furnish milk to the United States Government" at the encampment. The notice was accompanied by the Commission's Official General Order No. A–14, § 4–B of which prescribed the "minimum wholesale prices to be charged by or paid to milk dealers." The notice announced that the unit prices specified for sales to institutions by that section of the order should be considered in the preparation of bids and that sales of milk at prices below the prescribed minima would be construed as violations of the milk control law. The dairy submitted a bid offering to sell milk in wholesale quantities at prices substantially below those prescribed by the Commission. Its bid was accepted by a War Department Purchase Order of March 1, 1941, the contract was awarded to it as the lowest bidder, and it performed the contract by deliveries of the milk at the contract price—all within the state.

On March 5, 1941, the Commission, pursuant to §§ 404 and 405 of the Milk Control Act, issued a citation to the dairy to show cause why its application for a milk dealer's license for the year beginning May 1, 1941, should not be denied because of its sale and delivery of the milk at prices below the minima fixed by the Commission's order.

Section 404 makes the grant of a license mandatory save in circumstances not now material, but provides that the Commission may deny or cancel a license where the applicant or licensee "has violated any of the provisions of this Act or any of the rules, regulations or orders of the Commission . . ."

The dairy's answer to the citation challenged the constitutional authority of the state to regulate prices charged to the United States. After a hearing the Commission denied the dairy's license application because of its sale of milk to the United States at prices below those fixed by the Commission. The Commission's order was sustained on review by the Court of Common Pleas of Lancaster County. The Superior Court affirmed this judgment, 148 Pa. Super. 261, 24 A. 2d 717, in an opinion which was adopted by the Supreme Court of Pennsylvania, 344 Pa. 635, 26 A. 2d 431, both courts holding that the Commission's price-fixing order was applicable to sales of milk made to the United States, and that as thus applied the statute did not impose an unconstitutional burden on the United States or otherwise infringe the Constitution or laws of the United States. The case comes here on appeal under § 237 of the Judicial Code. The government was granted leave to intervene in the Court of Common Pleas, and has participated in all subsequent stages of the litigation.

Appellants urge that the Pennsylvania Milk Control Act, as applied to a dealer selling to the United States, violates a constitutional immunity of the United States, and also conflicts with federal legislation regulating purchases by the United States and therefore cannot constitutionally apply to such purchases.

Appellants' first proposition proceeds on the assumption that local price regulations normally controlling milk dealers who carry on their business within the state, when applied to sales made to the government, so burden it

or so conflict with the Constitution as to render the regulations unlawful. We may assume that Congress, in aid of its granted power to raise and support armies, Article I, § 8, cl. 12, and with the support of the supremacy clause, Article VI, § 2, could declare state regulations like the present inapplicable to sales to the government. Cf. *Pittman* v. *Home Owners' Loan Corp.*, 308 U. S. 21, 33; *Federal Land Bank* v. *Bismarck Co.*, 314 U. S. 95, 101–04; *Parker* v. *Brown*, 317 U. S. 341, 350–351, and cases cited. But there is no clause of the Constitution which purports, unaided by Congressional enactment, to prohibit such regulations, and the question with which we are now concerned is whether such a prohibition is to be implied from the relationship of the two governments established by the Constitution.

We may assume also that, in the absence of Congressional consent, there is an implied constitutional immunity of the national government from state taxation and from state regulation of the performance, by federal officers and agencies, of governmental functions. *Ohio* v. *Thomas*, 173 U. S. 276; *Johnson* v. *Maryland*, 254 U. S. 51; *Hunt* v. *United States*, 278 U. S. 96; *Arizona* v. *California*, 283 U. S. 423. But those who contract to furnish supplies or render services to the government are not such agencies and do not perform governmental functions, *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514, 524–5; *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 149; *Buckstaff Co.* v. *McKinley*, 308 U. S. 358, 362–63 and cases cited; cf. *Susquehanna Co.* v. *Tax Comm'n*, 283 U. S. 291, 294; *Helvering* v. *Mountain Producers Corp.*, 303 U. S. 376, 385–86, and the mere fact that non-discriminatory taxation or regulation of the contractor imposes an increased economic burden on the government is no longer regarded as bringing the contractor within any implied immunity of the government from state taxation or regulation. *Alabama* v. *King & Boozer*, 314 U. S. 1, 9, and cases cited;

Baltimore & Annapolis R. Co. v. *Lichtenberg,* 176 Md. 383, 4 A. 2d 734, s. c., *United States* v. *Baltimore & Annapolis R. Co.,* 308 U. S. 525.

Here the state regulation imposes no prohibition on the national government or its officers. They may purchase milk from whom and at what price they will, without incurring any penalty. See the opinion below, 148 Pa. Super. 270–71. As in the case of state taxation of the seller, the government is affected only as the state's regulation may increase the price which the government must pay for milk. By the exercise of control over the seller, the regulation imposes or may impose an increased economic burden on the government, for it may be assumed that the regulation if enforcible and enforced will increase the price of the milk purchased for consumption in Pennsylvania, unless the government is able to procure a supply from without the state, see *Baldwin* v. *Seelig,* 294 U. S. 511. But in this burden, if Congress has not acted to forbid it, we can find no different or greater impairment of federal authority than in the tax on sales to a government contractor sustained in *Alabama* v. *King & Boozer, supra;* or the state regulation of the operations of a trucking company in performing its contract with the government to transport workers employed on a Public Works Administration project, upheld in *Baltimore & Annapolis R. Co.* v. *Lichtenberg, supra;* or the local building regulations applied to a contractor engaged in constructing a postoffice building for the government, sustained in *Stewart & Co.* v. *Sadrakula,* 309 U. S. 94.

The trend of our decisions is not to extend governmental immunity from state taxation and regulation beyond the national government itself and governmental functions performed by its officers and agents. We have recognized that the Constitution presupposes the continued existence of the states functioning in coördination with the national government, with authority in the states to lay

taxes and to regulate their internal affairs and policy, and that state regulation like state taxation inevitably imposes some burdens on the national government of the same kind as those imposed on citizens of the United States within the state's borders, see *Metcalf & Eddy* v. *Mitchell, supra,* 523–24. And we have held that those burdens, save as Congress may act to remove them, are to be regarded as the normal incidents of the operation within the same territory of a dual system of government, and that no immunity of the national government from such burdens is to be implied from the Constitution which established the system, see *Graves* v. *New York ex rel. O'Keefe,* 306 U. S. 466, 483, 487.

Since the Constitution has left Congress free to set aside local taxation and regulation of government contractors which burden the national government, we see no basis for implying from the Constitution alone a restriction upon such regulations which Congress has not seen fit to impose, unless the regulations are shown to be inconsistent with Congressional policy. Even in the case of agencies created or appointed to do the government's work we have been slow to infer an immunity which Congress has not granted and which Congressional policy does not require. *Reconstruction Finance Corp.* v. *Menihan Corp.,* 312 U. S. 81, and cases cited; *Colorado Bank* v. *Bedford,* 310 U. S. 41, 53, and cases cited; cf. *Baltimore National Bank* v. *Tax Commission,* 297 U. S. 209. Our inquiry here, therefore, must be whether the state's regulation of this contractor in a matter of local concern conflicts with Congressional legislation or with any discernible Congressional policy.

To establish such a conflict the government places its reliance on Acts of Congress requiring competitive bidding in the purchase of supplies for the Army. Section 3709 of the Revised Statutes, 41 U. S. C. § 5, requires public advertising for all government purchases save "when immediate delivery or performance is required by the public ex-

igency." [1] A similar provision had appeared in § 5 of the Act of March 3, 1809, 2 Stat. 536, which required all purchases by the Treasury, War or Navy Departments to be made "by open purchase, or by previously advertising for proposals respecting the same." The Appropriation Act of March 2, 1901, 31 Stat. 905, and subsequent appropriation acts, included a provision requiring public advertising for the purchase of all supplies for the use of the Army, with exceptions not now material, "except in case of emergency or where it is impracticable to secure competition" and requiring the purchase of such supplies "where the same can be purchased the cheapest, the quality and cost of transportation and the interests of the Government considered." 10 U. S. C. § 1201. And a provision enacted as part of the Appropriation Act of July 5, 1884, 23 Stat. 109, 10 U. S. C. § 1200, requires that all purchases of quartermaster's supplies be made by contract after public notice and that the award be made to "the lowest responsible bidder for the best and most suitable article, the right being reserved to reject any and all bids."

It is to be noted that while these statutes direct government officials to invite competitive bidding by contractors undertaking to furnish Army supplies, and also require them to accept the lowest responsible bid if any is accepted, they do not purport to set aside local price regulations or to prohibit the states from taking punitive measures for violations of such regulations. They are wholly consistent with the continued existence of such price regulations, and with the acceptance by government officers of the regulated price where that is the low-

[1] This provision was derived from § 10 of the Appropriation Act of Mar. 2, 1861, 12 Stat. 220, which in turn was a reënactment of § 3 of the Appropriation Act of June 23, 1860, 12 Stat. 103. Like the Act of March 2, 1901, R. S. § 3709 has been construed as inapplicable where competition is impracticable. 38 Op. Atty. Gen. 164, 174; 39 Op. Atty. Gen. 111; 17 Op. Atty. Gen. 84, 87.

est bid, or the omission of competitive bidding in circumstances where local price regulations render it "impracticable to secure competition." Nor are we able to discern, in the language or legislative history of these or related statutes regulating government contracts, any indication that low cost was such a controlling consideration with Congress as to justify an inference that Congress intended to displace state regulations affecting the price of articles purchased by the government. The reason for the passage of § 5 of the Act of March 3, 1809, has been said to be "to throw additional safeguards around this subject; to prevent favoritism, and to give to the United States the benefit of competition . . ." 2 Op. Atty. Gen. 257, 259.

We are not advised of any statute in which Congress has undertaken to set aside state laws affecting the price of goods supplied to the government in order to secure a lower price than would otherwise be obtainable. And Congress has often required the inclusion in government contracts of terms not directly related to the interests of the government as purchaser, which have the effect of increasing cost. Title III, § 2 of the Act of March 3, 1933, 47 Stat. 1520, 41 U. S. C. §§ 10 (a)–10 (c), requires the use of American-produced goods on all public works contracts unless the head of the department finds that the use of such materials is "impracticable" or would "unreasonably increase the cost." The Eight Hour Law of August 1, 1892, 27 Stat. 340, as amended, 40 U. S. C. §§ 321–326, limits to eight hours per day the work of persons employed by contractors with the government and requires all government contracts to include provisions to that effect. The Davis-Bacon Act of March 3, 1931, 46 Stat. 1494, as amended, 40 U. S. C. § 276 (a), requires all contracts for public buildings to contain prevailing minimum wage provisions, and the Walsh-Healey Act, 49 Stat. 2036, 41 U. S. C. § 35, requires the inclusion in all gov-

ernment contracts in excess of $10,000 of provisions requiring the contractor's adherence to prescribed minimum wages, maximum hours, restrictions on employment of child labor and requirements for safety of working conditions.[2]

Evidence is wanting that Congress, in authorizing competitive bidding, has been so concerned with securing the lowest possible price for articles furnished to the government that it wished to set aside all local regulations affecting price. On the contrary Congress has regarded the field of public contracts as one over which to exercise its supervisory legislative powers in safeguarding interests

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[2] The Military Appropriation Act of 1941, 55 Stat. 372, requires the purchase of food and clothing produced in the United States unless none of satisfactory quality is available in sufficient quantity and at "reasonable prices." And successive Appropriation Acts materially restrict the use of appropriated funds by the Quartermaster Corps to purchase oleomargarine or butter substitutes. E. g. 49 Stat. 1285, 50 Stat. 449, 52 Stat. 649, 53 Stat. 600, 54 Stat. 358, 55 Stat. 372. See also R. S. § 3716, 10 U. S. C. § 1202 (preference to articles of domestic production "conditions of price and quality being equal").

The War Department, by Procurement Circular No. 4, February 9, 1938, and Procurement Circular No. 10, January 26, 1942, issued pursuant to Par. 5 (h) of AR 5-140, provided for the inclusion in Army contracts of provisions requiring the bidder to certify to his compliance with any applicable marketing agreement, license, or order, executed or issued by the Secretary of Agriculture pursuant to the Agricultural Marketing Agreement Act of 1937, 7 U. S. C. §§ 601 *et seq.* All Procurement Circulars have since been rescinded, see *infra* n. 3.

See also Executive Order No. 325-A, May 18, 1905 (convict labor), temporarily suspended by Executive Order No. 9196, July 9, 1942; Executive Orders Nos. 6246, Aug. 10, 1933, and 6646, March 14, 1934 (compliance with Codes of Fair Competition).

Despite the enactment of § 201 of the First War Powers Act, Dec. 18, 1941, 55 Stat. 839, empowering the President to authorize contracts to be entered into without regard to provisions of existing law, the Walsh-Healey Act, the Davis-Bacon Act, and the Eight Hour Law remain applicable to all government contracts, Executive Order No. 9001, Dec. 27, 1941.

which may conflict with the needs of the government viewed solely as purchaser. An unexpressed purpose of Congress to set aside statutes of the states regulating their internal affairs is not lightly to be inferred and ought not to be implied where the legislative command, read in the light of its history, remains ambiguous. Considerations which lead us not to favor repeal of statutes by implication, *United States* v. *Borden Co.*, 308 U. S. 188, 198–9; *United States* v. *Jackson*, 302 U. S. 628, 631; *Posadas* v. *National City Bank*, 296 U. S. 497, 503–5, should be at least as persuasive when the question is one of the nullification of state power by Congressional legislation.

Hence, in the absence of some evidence of an inflexible Congressional policy requiring government contracts to be awarded on the lowest bid despite noncompliance with state regulations otherwise applicable, we cannot say that the Pennsylvania milk regulation conflicts with Congressional legislation or policy and must be set aside merely because it increases the price of milk to the government. It would be no more than speculation for us to say that Congress would consider the government's pecuniary interest as a purchaser of milk more important than the interest asserted by Pennsylvania in the stabilization of her milk supply through control of price. Courts should guard against resolving these competing considerations of policy by imputing to Congress a decision which quite clearly it has not undertaken to make. Furthermore we should be slow to strike down legislation which the state concededly had power to enact, because of its asserted burden on the federal government. For the state is powerless to remove the ill effects of our decision, while the national government, which has the ultimate power, remains free to remove the burden.

The government, in support of its position, points to Army Regulation 5–100, Paragraph 11d, which was in

effect at the time this contract was entered into and performed,[3] and which read as follows:

"State price-fixing laws.—Appropriated funds may not be used for payments under awards upon invitations for bids containing restrictive requirements of showing compliance with State price-fixing laws relating to services, commodities, or articles necessary to be purchased by the United States until there has been an authoritative and final judicial determination that such State statutes are applicable to such contracts. It is not the duty or responsibility of contracting officers of the Federal Government, by means of restrictive specifications, to enforce contractors to comply with the requirements of price-fixing acts of a State. See 16 Comp. Gen. 97, 348; 17 id. 287; 19 id. 614."

Two observations are to be made with respect to this regulation. The statutes authorizing the Secretary of War "to prescribe rules and regulations to be observed in the preparation and submission and opening of bids for contracts under the War Department," 20 Stat. 36, 22 Stat. 487, 5 U. S. C. § 218, give no hint of any delegation to the Secretary or his subordinates of power to do what Congress has failed to do—restrict the application of local regulations, otherwise applicable to government contractors, which increase price. And the regulation itself is at most a direction to contracting officers not to

[3] All of the Army Regulations and Procurement Circulars referred to in this opinion were rescinded on the adoption of War Department Procurement Regulations, effective July 1, 1942, Code of Federal Regulations, Title 10, § 81, 7 Fed. Reg. 8082. See Procurement Regulation 1, Pars. 102, 103. Paragraph 209 of Procurement Regulation 2—issued under the authority of § 201 of the First War Powers Act, December 18, 1941, 55 Stat. 839, and Executive Order No. 9001, December 27, 1941—provides that all contracts shall be placed by negotiation save where formal advertising is authorized by the Director of Purchases of the War Production Board.

assume by their specifications for bids any responsibility for requiring compliance with local price regulations before it is judicially determined whether such regulations are applicable to government contracts.

That such is the meaning of the regulation is made plain by reference to the opinions of the Comptroller General, cited in the regulation. All rest on the reasoning of *Panhandle Oil Co.* v. *Knox,* 277 U. S. 218, and like cases, which were overruled in *Alabama* v. *King & Boozer, supra.* The Comptroller General held that since the constitutional applicability of local price regulations to government contractors was doubtful, the right of the government to challenge their validity should not be foreclosed by contractual provisions, and that in the absence of a judicial determination of their applicability a bid which failed to comply with such price regulations could not for that reason be rejected.

When Paragraph 11d was adopted, Paragraph 4g of Army Regulation 5–240 defined the situations in which, because it was deemed "impracticable to secure competition," supplies might, under 10 U. S. C. § 1201, be purchased in the open market without advertising. Paragraph 4g (3) declared that such a situation arose "when the price is fixed by federal, state, municipal or other competent legal authority," a clear indication that state price regulations were not thought to be inapplicable to sales under Army contracts.[4] After the present suit

[4] In a memorandum to the Undersecretary of War dated April 16, 1941, after the present litigation had been instituted, the Judge Advocate General expressed the opinion that in view of the apparent conflict between the terms of AR 5–240, Par. 4g (3) and AR 5–100, Par. 11d (at that time renumbered as Par. 11e), the former regulation applied only in exceptional situations and was not effective to make applicable to government contractors price-fixing regulations such as that here involved. The Judge Advocate General referred to the "consistent position" taken by the War Department "that price-fixing

was begun subparagraph 3 was eliminated. The only effect of this elimination was to remove the conflict of that paragraph with the "hands off policy" of the War Department adopted by Army Regulation 5–100, Paragraph 11d.

Even though it be assumed that the Secretary could by regulation set aside the state's price legislation which it has made applicable to government contractors, he plainly has not done so. He has left the question of its applicability to be settled by this Court's determination of the scope of the government's immunity under the laws and Constitution of the United States. In the meantime he has adopted a specific policy of not including, in government contracts, terms requiring the contractor's compliance with state price-fixing legislation, thus avoiding any action which could be construed as an assent to the application of such legislation to government contractors in circumstances, if any, where it would without affirmative assent be inapplicable.

We are unable to find in Congressional legislation, either as read in the light of its history or as construed by the executive officers charged with the exercise of the contracting power, any disclosure of a purpose to immunize government contractors from local price-fixing regulations which would otherwise be applicable. Nor, in the circumstances of this case, can we find that the Constitution, unaided by Congressional enactment, confers such an immunity. It follows that the Pennsylvania courts rightly held that the Constitution and laws of the United States did not preclude the application of the Pennsylvania Milk

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measures of the states have no application to procurements by the War Department." But we do not understand from this or other memoranda of the Judge Advocate General that the position referred to is any broader than that expressed in Par. 11d of AR 5–100 and in the opinions of the Comptroller General to which that paragraph refers.

Control Law to appellant Penn Dairies, Inc., by denial of its license application.

Affirmed.

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

MR. JUSTICE MURPHY, concurring:

I agree with the opinion of the Court that neither Congressional legislation nor the implications of the Constitution prevent the application of the minimum price requirements of the Pennsylvania Milk Control Law to the sale of milk by a dealer to the United States, but wish to emphasize a phase of the question which I believe is most important.

We are not concerned here with just an ordinary state regulatory statute of non-discriminatory character which affects the federal government in some degree, but with a general measure designed to safeguard the health and well-being of the public by insuring an adequate supply of wholesome milk at stable prices.[1] The preservation of public health is a matter of grave and primary concern to the states and the nation at all times, but even more so in time of war. Then indeed a healthy citizenry is essential to national survival, for the waging of modern "total war," if it is to be done with maximum effectiveness, requires a sound and healthy people, as well as a sturdy fighting force.

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[1] Section 101 of the Pennsylvania law declares that the milk industry "is a business affecting the public health and affected with a public interest," and that the purpose of the Act is to regulate and control the industry "for the protection of the public health and welfare and for the prevention of fraud." Section 801 requires the Milk Control Commission to ascertain and maintain such prices for milk "as will be most beneficial to the public interest, best protect the milk industry of the Commonwealth and insure a sufficient quantity of pure and wholesome milk to inhabitants of the Commonwealth, having special regard to the health and welfare of children residing therein."

In this country with its heterogeneous population living under diverse conditions in widely separated areas, state and local authorities are best qualified to determine what measures are most appropriate and necessary to promote the health and well-being of the people within their borders, and they should be given the widest possible latitude to solve their special problems as they think best. The whole framework of our federal system is based upon this principle. It has contributed to our strength and solidarity as one people. It should be the aim of all federal procurement officers, military or civilian, to harmonize their work so far as possible with this broad policy of government. Such an aim is in accord with the spirit of our laws and the character of our institutions and will best insure whole-hearted support of the military program.

In my opinion it is of greater importance to the nation at war and to its military establishment that high standards of public health be maintained than that the military procurement authorities have the benefit of unrestrained competitive bidding and lower prices in the purchase of needed milk supplies. That the United States must pay 1.6¢ more per quart for milk in Pennsylvania hardly means the collapse of the war effort. But it is common knowledge that armies frequently suffer more from the ravages of disease and sickness than from the perils of combat, and, if milk vendors dealing with the United States need not comply with Pennsylvania's minimum price requirements, the effectiveness of Pennsylvania's law is considerably reduced for it is conceded that the instant order is the largest single one ever given for milk within the State. This reduced effectiveness may have serious and unwanted repercussions not only upon civilian health but that of the military personnel stationed there as well.

In the conduct of the war as well as in other relations, the larger interests of the federal government and the

nation as a whole will not suffer, nor will constitutional arrangements be prejudiced, if procurement officers are obliged to conduct their activities within the general framework of state laws enacted within reasonable limits to safeguard the public health and safety. If Alabama for the purpose of revenue can, consistently with the Constitution, require government contractors to pay sales and use taxes upon materials used in a cost plus a fixed fee construction contract, the effect of which is to increase the cost of construction to the federal government (*Alabama* v. *King & Boozer*, 314 U. S. 1; *Curry* v. *United States*, 314 U. S. 14), there is all the more reason why Pennsylvania, acting to protect the public health, can require, until Congress makes clear its wishes otherwise, a dealer selling milk to the United States to adhere to its minimum price requirements. This is not to say that the States may exercise direct control over the actions of federal officials, military or otherwise, or that Congress may not invalidate or suspend local regulations insofar as they affect transactions with the federal authorities. If Congress determines that the enforcement of the Pennsylvania law against dealers selling to the United States interferes with its power to wage war, and forbids its application to them, we have a different question. See *Federal Land Bank* v. *Bismarck Co.*, 314 U. S. 95. As yet it has not done so, and in the absence of such a measure, I can perceive no necessity or adequate justification either in law or constitutional theory for holding Pennsylvania's regulation void as applied here.

MR. JUSTICE DOUGLAS, dissenting:

The contract with Penn Dairies was made by the War Department acting through the Quartermaster of the Army. The Quartermaster Corps, one of the statutory branches of the Regular Army (41 Stat. 759, 10 U. S. C. § 4) is charged "under the authority of the Secretary of

War" with the "purchase and procurement for the Army of all supplies of standard manufacture and of all supplies common to two or more branches" of the Army, with exceptions not material here. 39 Stat. 170, 41 Stat. 766, 10 U. S. C. § 72. The procedure which controls purchases of supplies by the Quartermaster Corps is governed by the statutes and by the Army Regulations. There are statutory requirements for competitive bidding as respects the purchase of "all supplies" [1] and with particular reference to supplies purchased "for immediate use." [2] The only exception relevant here is the case "where it is impracticable to secure competition." 10 U. S. C. § 1201. The policy is plain—it is intended that the United States should get the full benefit of price competition in its

[1] "Except in cases of emergency or where it is impracticable to secure competition, or in cases otherwise provided for, the purchase of all supplies for the use of the various departments, and posts of the Army and of the branches of the Army service shall only be made after advertisement; and said supplies shall be purchased where the same can be purchased the cheapest, quality and cost of transportation and the interests of the Government considered." 31 Stat. 905, 32 Stat. 514, 10 U. S. C. § 1201. And see R. S. § 3709, 41 U. S. C. § 5.

[2] "All purchases of regular and miscellaneous supplies for the Army furnished by the Quartermaster Corps for immediate use shall be made by the officers of such corps, under direction of the Secretary of War, at the places nearest the points where they are needed, the conditions of cost and quality being equal: *Provided*, That all purchases of said supplies, except in cases otherwise provided for, and except in cases of emergency, which must be at once reported to the Secretary of War for his approval, shall be made by contract after public notice of not less than ten days for small amounts for immediate use, and of not less than from thirty to sixty days whenever, in the opinion of the Secretary of War, the circumstances of the case and conditions of the service shall warrant such extension of time. The award in every case shall be made to the lowest responsible bidder for the best and most suitable article, the right being reserved to reject any and all bids." 23 Stat. 109, 37 Stat. 591, 10 U. S. C. § 1200.

purchases of Army supplies. See *United States* v. *Purcell Envelope Co.*, 249 U. S. 313, 318.

Statutory authority is vested in the Secretary of War to prescribe rules and regulations covering the preparation, submission, and opening of bids "for contracts under the War Department." 20 Stat. 36, 22 Stat. 487, 5 U. S. C. § 218. The Secretary pursuant to this authority has issued numerous regulations governing competitive bidding. Regulation No. 5–100, Par. 11d, August 7, 1940, specifically prohibits use of appropriated funds for payments under contracts containing prices fixed by state law "until there has been an authoritative and final judicial determination that such State statutes are applicable to such contracts." [3] The policy of the War Department has been well established. The Judge Advocate General stated in April 1941 that "the War Department has consistently taken and maintained the position that price-fixing measures of the states have no application to procurements by the War Department." Whatever ambiguity may have existed in other regulations has been removed.[4]

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[3] This Regulation reads as follows: "Appropriated funds may not be used for payments under awards upon invitations for bids containing restrictive requirements of showing compliance with State price-fixing laws relating to services, commodities, or articles necessary to be purchased by the United States until there has been an authoritative and final judicial determination that such State statutes are applicable to such contracts. It is not the duty or responsibility of contracting officers of the Federal Government, by means of restrictive specifications, to enforce contractors to comply with the requirements of price-fixing acts of a State."

[4] Army Reg. No. 5–240, February 11, 1936, as amended July 6, 1938, provided in paragraph (4) (g) (3) that "purchase may be made in the open market without competition" when the "price is fixed by Federal, State, municipal, or other competent legal authority." It should be noted that this was a permissive and not a mandatory requirement. On May 10, 1941, paragraph (4) (g) was amended so as to omit any reference to governmental price fixing.

We have then regulations of the War Department made pursuant to powers delegated by Congress and which prohibit the Army's contracting officers from waiving competitive bidding merely because prices are fixed by the states. I am unable to see why they are not valid regulations. Congress has said that competitive bidding "shall" be required except where it is "impracticable to secure competition." 10 U. S. C. § 1201. The word "impracticable" does not suggest that wherever there is state price-fixing competitive bidding is not required. A thing is "impracticable" to do when it is infeasible or incapable of being done. The contract which the Quartermaster made with Penn Dairies is conclusive of the fact that it was not "impracticable" to obtain the milk through competitive bidding. A regulation which interprets "impracticable" so as not to preclude competitive bidding because of state price-fixing stays well within the scope of the rule making power. These War Department regulations accordingly "have the force of law." *Standard Oil Co.* v. *Johnson,* 316 U. S. 481, 484, and cases cited. Their application in this case therefore has no less force and effect than if it was specifically directed by Congress. We have then an assertion of federal power in the field of price control which by reason of the supremacy clause excludes any exercise of a conflicting state power. See *Sinnot* v. *Davenport,* 22 How. 227; *McDermott* v. *Wisconsin,* 228 U. S. 115; *Pennsylvania R. Co.* v. *Illinois Brick Co.,* 297 U. S. 447; *Hines* v. *Davidowitz,* 312 U. S. 52; *Cloverleaf Butter Co.* v. *Patterson,* 315 U. S. 148.

MR. JUSTICE BLACK and MR. JUSTICE JACKSON join in this dissent.

PACIFIC COAST DAIRY, INC. *v.* DEPARTMENT OF AGRICULTURE OF CALIFORNIA ET AL.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 275. Argued January 12, 13, 1943.—Decided March 1, 1943.

1. The State of California is precluded by the Federal Constitution (Art. I, § 8, cl. 17, and the supremacy clause) from revoking the license of a milk dealer for selling milk to the War Department at less than the minimum price fixed by state law, where the sales and deliveries were made on Moffett Field, which is subject to the exclusive jurisdiction of the United States. *Penn Dairies* v. *Milk Control Comm'n, ante,* p. 261, distinguished. P. 294.
2. Although, by the terms of the federal Government's acquisition, local law not inconsistent with federal policy was to remain in effect until altered by federal legislation, the state law here involved was enacted long after the transfer of sovereignty and was without force in the enclave. P. 294.
3. As sought here to be applied, the state law was not a regulation of conduct wholly within the state's jurisdiction. P. 295.

19 Cal. 2d 818, 123 P. 2d 442, reversed.

APPEAL from a judgment denying a writ of mandamus to compel the dismissal of a proceeding pending before the state Department of Agriculture for the revocation of petitioner's license as a distributor of milk.

Mr. Carey Van Fleet for appellant.

By special leave of Court, *Solicitor General Fahy,* with whom *Assistant Attorney General Shea* and *Messrs. Archibald Cox* and *Morton Liftin* were on the brief, for the United States, as *amicus curiae.*

The State of California may not regulate the price at which milk is sold to the United States. See brief for appellants in *Penn Dairies* v. *Milk Control Comm'n, ante,* p. 261.

California may not, consistently with due process, revoke appellant's license because it handled milk in California which was subsequently sold on Moffett Field at

prices below those fixed by the state law. First, in handling the milk appellant was guilty of no act or omission in California which was itself contrary to the public policy of California; California has seized upon such acts for the sole purpose of regulating contracts made beyond its borders, which it lacks jurisdiction to control directly. Second, while a State may forbid conduct within its borders that is itself contrary to its public policy regardless of the repercussions beyond its borders, it may not regulate conduct, otherwise within its competence to control, for the sole purpose of regulating matters beyond its jurisdiction, even though the repercussions of the conduct beyond its jurisdiction in turn affect local policies.

It is immaterial that California was seeking to regulate the selling price of milk in the federal enclave in order to effectuate a reasonable state policy. It is no more permissible for a State to carry out local policies by indirectly regulating matters beyond its competence than it is for the State to do so by direct control.

The question is not whether California may interfere in the domestic affairs of another State in order to carry out her policies, but whether it can exercise by indirection the power of exclusive legislation which the Constitution vests in Congress. No form of words enables a State to reach "beyond her borders to regulate a subject which was none of her concern because the Constitution has placed control elsewhere." *Osborn* v. *Ozlin,* 310 U. S. 53, 62. The direction not to handle in California milk sold in the federal enclave at prices below those fixed by state law was therefore a nullity. It would be arbitrary, unreasonable and a denial of due process for the appellees' officials to revoke the license without lawful grounds.

California may not erect barriers to commerce between California and territory subject to the exclusive jurisdiction of the United States for the purpose of fixing the price at which her products are sold in such territory.

The conduct which the statute attempts to regulate is the preparation and transportation of milk which is to move outside the State; the statute expressly forbids the movement of milk from California into the federal enclave unless the price at which it is sold in the enclave is considered adequate by California authorities to build up the economy of the State. California has no more authority to regulate such commerce than it would have if Moffett Field were in another State.

Art. I, § 8, cl. 17 grants to Congress the power of "exclusive legislation" over territory ceded by a State, and this authority is enlarged by the "necessary and proper clause" to include power to enact all appropriate incidental legislation. In respect of such territory, therefore, Congress has "the combined powers of a general and of a State government." *Stoutenburgh* v. *Hennick,* 129 U. S. 141, 147. It may regulate the local affairs of a federal enclave in a local way or it may extend the legislation into the States to achieve its purposes wherever "necessary and proper." *Cohens* v. *Virginia,* 6 Wheat. 264, 424–428, 447; *O'Donoghue* v. *United States,* 289 U. S. 516, 538–539. Consequently Congress certainly has an affirmative power over commerce between a State and a federal enclave, which is at least as great as its power over commerce between two States. It may determine the terms and conditions upon which goods may enter and leave an enclave and may remove any obstructions to the flow of goods into an enclave even though the obstruction exists on state territory. Moreover, as *Stoutenburgh* v. *Hennick, supra,* shows, this power is possessed by the Congress as part of the powers of the general government and not as one of the powers of a State.

The grant of affirmative power to Congress to regulate commerce between a State and a federal enclave by implication forbids a State to regulate such commerce. The power of Congress is exclusive at least to the same extent

that the power of Congress over commerce between two States is exclusive.

That the California legislature regarded the statute as a measure for protecting the public health does not sustain it. An argument based upon such considerations was made by New York and rejected in *Baldwin* v. *Seelig,* 294 U. S. 511.

The effect on the income of California producers of sales in the federal enclave at a competitive price is certainly more remote than the effect upon the New York farmer of the availability of cheaper milk in Vermont. In California the danger is said to be that California dealers will so impoverish themselves by selling milk at too low a price on federal enclaves as to disable themselves from complying with the state law fixing the price which they must pay to producers for the milk. It has been the judgment of Congress and of the Department of Agriculture that milk prices can be fixed and enforced at the producer level alone. But whatever the danger, it does not justify California in dealing with a local problem which is at first economic, and only indirectly a matter of public health, by seeking to "neutralize the economic consequences of free trade among the States." *Baldwin* v. *Seelig, supra,* p. 525.

Mr. Walter L. Bowers, Deputy Attorney General of California, with whom *Messrs. Robert W. Kenny,* Attorney General, *W. R. Augustine,* Deputy Attorney General, *William T. Sweigert,* Assistant Attorney General, and *Bartley C. Crum* were on the brief, for appellees.

The California law is a valid exercise of the police power for the protection of the health and welfare of the people of the State. *In re Willing,* 12 Cal. 2d 591, 594; *Ray* v. *Parker,* 15 Cal. 2d 275.

The purpose of the statute is to eliminate economic disturbances and unfair practices, and to insure to producers the necessary costs of production so that an adequate sup-

ply of pure and healthful milk may be assured. Such economic security is necessary in order to maintain essential sanitary standards. *In re Willing, supra,* p. 594.

The statute is not primarily aimed at what the consumer shall pay, but at what must be received in order to maintain an adequate supply of pure and wholesome milk. *United Milk Producers* v. *Cecil,* 47 Cal. App. 2d 758.

The incidence of the statute is upon the distributor and not upon the Government. The legislation is not aimed at the Government but is designed to meet a local situation which, if left unregulated, presents a menace to the milk supply of the State and to the health of its inhabitants. The statute in question is not unreasonable, arbitrary, or capricious, and the means adopted bear a real and substantial relation to the object sought to be attained. The mere fact that state action may have repercussions beyond state lines is of no judicial significance. *Nebbia* v. *New York,* 291 U. S. 502; *Osborn* v. *Ozlin,* 310 U. S. 53; *Alaska Packers Assn.* v. *Industrial Accident Comm'n,* 294 U. S. 532.

The statute is not rendered invalid merely because its practical effect might be to interfere to some extent with the functioning of an instrumentality of the Government, so long as such interference or burden is reasonable. The alleged interference here is reasonable. The statute does not discriminate against the Government, but is applicable to the State itself and to its political subdivisions. If the objectives of the statute are realized, the Government will benefit in common with the community in general. *Milk Control Board* v. *Gosselin's Dairy,* 301 Mass. 174; *Paterson Milk & Cream Co.* v. *Milk Control Board,* 118 N. J. L. 383; *James* v. *Dravo Contracting Co.,* 302 U. S. 134.

The only specific burden claimed to be cast upon the Government is that of increased cost. Such increased cost "at most gives rise to a burden which is consequential and remote and not to one that is necessary, immediate or

direct." It is merely incidental to the proper exercise of the police power. *James* v. *Dravo Contracting Co., supra; Alabama* v. *King & Boozer,* 314 U. S. 1; *James Stewart & Co.* v. *Sadrakula,* 309 U. S. 94.

The state statute does not run counter to the federal statutes requiring competitive bidding, since it fixes minimum prices only.

The state statute does not run counter to the commerce clause of the federal Constitution.

To hold at this late date that commerce between a State and such federal areas within that State is interstate commerce, after nearly a century and a half during which the States and the federal Government have treated that commerce as intrastate commerce, would only result in utter, hopeless confusion. *Grayburg Oil Co.* v. *State,* 286 S. W. (Tex.) 489; *Grayburg Oil Co.* v. *State,* 3 S. W. 2d (Tex.) 427; *People* v. *Standard Oil Co.,* 218 Cal. 123.

Even if it be assumed that such commerce is interstate, and that under the Agricultural Marketing Agreement Act of 1937 the Secretary of Agriculture has the power to regulate the distribution of milk moving into such federal areas, the fact remains that he has not exercised such power. Under such conditions the State is not deprived of its power unless and until Congress has actually acted in a manner hostile to or directly in conflict with the state regulation. *Kelly* v. *Washington,* 302 U. S. 1, 10; *Allen-Bradley Local* v. *Wisconsin Board,* 315 U. S. 740.

Mr. Justice Roberts delivered the opinion of the Court.

The appellant challenges a judgment of the Supreme Court of California [1] dismissing a writ of alternative mandamus and denying a permanent writ to prevent the

[1] 19 Cal. 2d 818, 123 P. 2d 442.

Department of Agriculture of the State from conducting a proceeding to revoke its license as a distributor of milk. The court, in denying relief, overruled several contentions, based upon the federal Constitution which are here renewed.

Chapter 10 of the Agricultural Code of California [2] provides a plan for the "stabilization and marketing of fluid milk and fluid cream." It declares their production and distribution a business affected with a public interest, and the regulation of the business an exercise of the police power; states that existing unjust, unfair, destructive and demoralizing practices menace the health and welfare of the people, despite sanitary regulations; and that it is necessary to promote intelligent production and orderly marketing by eliminating the evil practices existing in the industry.

The law empowers the Director of Agriculture to license distributors and to establish marketing areas within which uniform prices and regulations for the sale of milk shall prevail.

The appellant was a licensed distributor doing business in the Santa Clara County marketing area, in which there were in effect a stabilization and marketing plan and schedules of minimum wholesale and retail prices. It entered into a contract with the War Department of the United States, signed by the Quartermaster's Department of Moffett Field, to sell milk to the Department at Moffett Field, which lies within the boundaries of the Santa Clara County marketing area, at less than the minimum price fixed for the area. Sales and deliveries under the contract took place on Moffett Field.

A complaint was filed with the Department of Agriculture charging the appellant violated § 736.3 (a) (6) of

[2] Deering, 1937, Div. 4, c. 10, §§ 735–738, as amended, Deering, 1941 Supp., pp. 462–467.

the Code which provides that an unfair practice, warranting revocation of license or prosecution is:

"The purchasing, processing, bottling, transporting, delivering or otherwise handling in any marketing area of any fluid milk or fluid cream which is to be or is sold or otherwise disposed of by such distributor at any place in the geographical area within the outer, outside and external boundaries or limits of such marketing area, whether such place is a part of the marketing area or not, at less than the minimum wholesale and minimum retail prices effective in such marketing area."

This section did not appear in the Code until 1941,[3] when it was added as an amendment. California recognized its lack of power to fix retail prices for milk sold within federal enclaves located in the State.[4] But the legislature desired to accomplish this. In 1941 it memorialized Congress, requesting passage of a federal law requiring purchasing officers of the armed services purchasing food supplies for troops or agencies of the United States located in the State to refuse bids for milk at prices below those fixed under the California Milk Stabilization Law or amendments thereof.[5] The memorial was referred to the Committee on Agriculture of the House and to the Committee on Agriculture and Forestry of the Senate,[6] but was never acted upon by either committee. Congress having failed to act, § 736.3 (a) (6) and others were added to the Code, July 16, 1941, for the purpose of reaching sales on federally owned lands.

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[3] Cal. Stats. 1941, Chap. 1214, p. 3008.

[4] Opinions of California Atty.-Gen. N. S. 1905, N. S. 1950 [1939]; *Consolidated Milk Producers* v. *Parker*, 19 Cal. 2d 815, 123 P. 2d 440; cf. *Standard Oil Co.* v. *California*, 291 U. S. 242.

[5] Cal. Stats. 1941, Chap. 65, p. 3402.

[6] 87 Cong. Rec., Part 5, 5644, 5698.

Moffett Field was acquired by the United States under an Act of Congress,[7] and it is conceded that it has always been under the exclusive jurisdiction of the federal government.[8]

The appellant sought a writ of mandamus from the court below to restrain the Department of Agriculture from proceeding to hear and act upon the pending complaint. An alternative writ issued. After return by the appellees, setting up only that the complaint failed to state facts sufficient to constitute a cause of action, the court discharged the alternative writ and denied a peremptory writ. The facts we have recited appear in the petition for the writ or are matters of which the court below and this court take judicial notice.

The Supreme Court of California overruled the appellant's contentions that the state's conceded control of activities within its jurisdiction gave it no authority to penalize transactions occurring on Moffett Field; that the state law violates the commerce clause of Article I, § 8 of the federal Constitution; that it runs afoul of Congressional action embodied in the federal Agricultural Marketing Agreement Act,[9] and that it unlawfully burdens a federal instrumentality. We find it necessary to consider only the contention first stated.

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[7] Act of February 12, 1931, c. 122, 46 Stat. 1092. This act provides that the tract which is now called Moffett Field shall be accepted by the United States without cost to the government. The petition for mandamus alleges that, more than fifteen years ago, Moffett Field "was purchased by the Government of the United States for erecting forts, magazines, arsenals, dockyards and other needful buildings. . . ." The appellant and the government treat this allegation as conclusive, since it was not denied by the appellees. Nothing turns, in our view, on the method of acquisition.

[8] See Cal. Stats. 1897, p. 51; Political Code of California, § 34; U. S. Constitution, Art. I, § 8, clause 17.

[9] 50 Stat. 246, 7 U. S. C. 608c.

The exclusive character of the jurisdiction of the United States on Moffett Field is conceded. Article I, § 8, clause 17 of the Constitution of the United States declares the Congress shall have power "To exercise exclusive Legislation in all Cases whatsoever, over" the District of Columbia, "and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; . . ."

When the federal government acquired the tract, local law not inconsistent with federal policy remained in force until altered by national legislation.[10] The state statute involved was adopted long after the transfer of sovereignty and was without force in the enclave. It follows that contracts to sell and sales consummated within the enclave cannot be regulated by the California law. To hold otherwise would be to affirm that California may ignore the Constitutional provision that "This Constitution, and the laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; . . ."[11] It would be a denial of the federal power "to exercise exclusive Legislation."[12] As respects such federal territory Congress has the combined powers of a general and a state government.[13]

The answer of the State and of the court below is one of confession and avoidance,—confession that the law in fact operates to affect action by the appellant within federal territory, but avoidance of the conclusion of invalidity by the assertion that the law in essence is the regulation of conduct wholly within the state's jurisdiction.

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[10] *Stewart & Co.* v. *Sadrakula,* 309 U. S. 94, 99.

[11] Art. VI, clause 2.

[12] *James* v. *Dravo Contracting Co.,* 302 U. S. 134, 141.

[13] *Stoutenburgh* v. *Hennick,* 129 U. S. 141, 147.

The court below points out that the statute regulates only the conduct of California's citizens within its own territory; that it is the purchasing, handling, and processing by the appellant in California of milk to be sold below the fixed price—not the sale on Moffett Field—which is prohibited, and entails the penalties prescribed by the statute. And reliance is placed upon the settled doctrine that a state is not disenabled from policing its own concerns, by the mere fact that its regulations may beget effects on those living beyond its borders.[14] We think, however, that it is without application here, because of the authority granted the federal government over Moffett Field.

In the light of the history of the legislation, we are constrained to find that the true purpose was to punish California's own citizens for doing in exclusively federal territory what by the law of the United States was there lawful, under the guise of penalizing preparatory conduct occurring in the State,—to punish the appellant for a transaction carried on under sovereignty conferred by Art. I, § 8, clause 17 of the Constitution, and under authority superior to that of California by virtue of the supremacy clause.

We have this day held in *Penn Dairies* v. *Milk Control Commission, ante,* p. 261, that a different decision is required where the contract and the sales occur within a state's jurisdiction, absent specific national legislation excluding the operation of the state's regulatory laws. The conclusions may seem contradictory; but in preserving the balance between national and state power, seemingly inconsequential differences often require diverse results. This must be so, if we are to accord to various provisions of fundamental law their natural effect in the circumstances disclosed. So to do is not to make subtle or tech-

[14] *Alaska Packers Assn.* v. *Commission,* 294 U. S. 532, 541; *Osborn* v. *Ozlin,* 310 U. S. 53, 62–63.

nical distinctions or to deal in legal refinements. Here we are bound to respect the relevant constitutional provision with respect to the exclusive power of Congress over federal lands. As Congress may, if it find the national interest so requires, override the state milk law of Pennsylvania as respects purchases for the Army, so it may, if not inimical to the same interest subject its purchasing officers on Moffett Field to the restrictions of the milk law of California. Until it speaks we should enforce the limits of power imposed by the provisions of the fundamental law.

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

Reversed.

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

MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS and MR. JUSTICE JACKSON:

While we have joined in the opinion of the Court, we are also of the view that the judgment below should be reversed for the additional reason set forth in the dissenting opinion in *Penn Dairies* v. *Milk Control Commission, ante,* p. 261.

MR. JUSTICE FRANKFURTER, dissenting:

Both Pennsylvania and California, as part of their control over the supply and distribution of milk for the needs of their people, regulate the prices at which milk may be sold within the state. In both states, more particularly at Indiantown Gap Military Reservation, Pennsylvania, and at Moffett Field, California, units of the United States Army are stationed. At each of these sites the contracting officer, a junior officer in the Quartermaster Corps, invites bids for the sale of milk to the Army. Are these two con-

tracting officers authorized under existing federal law to accept bids that undercut the prices fixed by Pennsylvania and California for the supply of milk within their borders and thereby dislocate, in part at least, the regulatory systems established by the two states?

In *Penn Dairies* v. *Milk Control Commission, ante,* p. 261, Penn Dairies, a milk dealer of Lancaster, Pennsylvania, supplied milk for the use of the Army at Indiantown Gap Military Reservation. Their sales were the result of successful bidding at prices below the minima fixed by the Pennsylvania Milk Control Law. Subsequently, when Penn Dairies applied for renewal of its license to do business under state law, the Pennsylvania Milk Control Commission denied the application on the ground that the sales to the Army were not immune from the minimum price provisions of the Pennsylvania law. The Pennsylvania Supreme Court sustained this determination.

In this case, Pacific Coast Dairy, a milk dealer of San Francisco, California, supplied milk for the use of the Army at Moffett Field, about thirty-five miles from San Francisco. Their sales, too, were the result of successful bidding at prices below those fixed by California law. For thus departing from the price provisions of the state law under which it was licensed to do business, the California Department of Agriculture instituted proceedings to revoke Pacific Coast Dairy's license. To stay these proceedings the dairy sought a writ of mandamus, which was denied by the Supreme Court of California.

In my view, the Court in upholding the refusal by Pennsylvania to renew a license because of an arrangement made on behalf of the Government must imply that the contracting officer of the Indiantown Military Gap Reservation was not authorized to accept bids below the minimum price requirements set by Pennsylvania for the sale of milk within the state. In the California case, how-

ever, the Court holds that the contracting officer for Moffett Field may, in the case of sales and deliveries made on Moffett Field, contract at prices below those fixed by California for the sale of milk within its borders. Opposite legal results are thus reached for precisely the same practical situations. The justification for this incongruity in defining the scope of the authority of the two contracting officers is attributed to the difference in the nature of the Government's proprietary interest in each of the two Army sites. Indiantown Gap Military Reservation is held by the United States under lease from the Commonwealth of Pennsylvania. Moffett Field belongs to the United States outright. On the basis of this difference in the federal Government's proprietary interest in the two Army facilities, Indiantown Gap Military Reservation is deemed not to be within the "exclusive jurisdiction" of the Government while Moffett Field is deemed within such "exclusive jurisdiction." And from this classification it is deduced that milk sold to the Army for the use of our soldiers at Indiantown Gap Military Reservation must comply with the price provisions of Pennsylvania law, but that milk may be sold to the Army for the use of our soldiers at Moffett Field in disregard of the minimum prices set by California.

Legal refinements are not always the worse for eluding the quick understanding of a layman. But I do not believe that in determining the duty of contracting officers serving the same Army function—a matter that turns on considerations of policy in the relation of the various Army posts to the states in which they are situated—legal categories compel a difference in result where practical judgment and experience lead to an identity in result. The power given to Congress by Article I, § 8 of the Constitution, to "exercise exclusive Legislation" over federal enclaves is not so tyrannical as to preclude in law what good sense requires.

The so-called exclusive jurisdiction drawn from the grant to Congress of power to legislate exclusively has, as a matter of historical fact, become increasingly less and less exclusive. In early days when the activities of the federal Government made only negligible inroads upon territorial areas within the states, it was assumed that federal exclusiveness was a fact rather than a potentiality, and that the states were precluded from reserving authority in lands within the state which were ceded to the Government. But this notion never became law, and has now been formally repudiated. "The possible importance of reserving to the State jurisdiction for local purposes which involve no interference with the performance of governmental functions is becoming more and more clear as the activities of the Government expand and large areas within the States are acquired." *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 148; and see *Silas Mason Co.* v. *Tax Comm'n*, 302 U. S. 186. Indeed, in the case of Moffett Field itself the authority of the United States is not in any true sense exclusive, even as to matters of political authority, for California's act of cession provided that both criminal and civil process issued by California should have the same sanction on Moffett Field as elsewhere in the state.

Since exclusive authority need not be exercised by Congress, there is at times "uncertainty and confusion" whether jurisdiction belongs to the federal Government or has been left with the state. *Bowen* v. *Johnston*, 306 U. S. 19, 27. And although the acts of cession may leave "no room for doubt" that "jurisdiction" "remained with the State," "administrative construction" may nevertheless generate federal jurisdiction. *Id.*, at 29. Even where the federal Government supposedly has "exclusive" jurisdiction, a close examination of complicated legislation may uphold excise tax provisions of a state alcoholic beverage control law but not provisions that "go beyond aids

to the collection of taxes and are truly regulatory in character." *Collins* v. *Yosemite Park Co.*, 304 U. S. 518, 533. And while lip service is paid to the doctrine of "exclusive jurisdiction" by professing to absorb for federal enclaves those laws of the state which were enforced there prior to its cession, the liberality with which state social measures are deemed not to impinge upon the national purposes for which the enclave was established, is a recognition in fact that the Constitution permits sensible adjustments between state and federal authority although activities subject to legal control take place on federal territory within a state. See, *e. g.*, *Stewart & Co.* v. *Sadrakula*, 309 U. S. 94.

Enough has been said to show that the doctrine of "exclusive jurisdiction" over federal enclaves is not an imperative. The phrase is indeed a misnomer for the manifold legal phases of the diverse situations arising out of the existence of federally-owned lands within a state—problems calling not for a single, simple answer but for disposition in the light of the national purposes which an enclave serves. If Congress speaks, state power is of course determined by what Congress says. If Congress makes the law of the state in which there is a federal site as foreign there as is the law of China, then federal jurisdiction would really be exclusive. But short of such Congressional assertion of overriding authority, the phrase "exclusive jurisdiction" more often confounds than solves problems due to our federal system.

It is certainly an irrelevant factor in the legal equation before us. For in neither the Pennsylvania nor the California case is the power of Congress or of appropriately exercised military authority called into question. As to Pennsylvania, the Court has found that neither Congressional legislation nor discernible legislative policy immunized a government contractor from state regulation. Of course, if Congressional policy, howsoever expressed,

authorized the Quartermaster to enter into such a contract in disregard of local milk price control legislation, the contractor would be immune from obedience to local requirements. Nor has controlling assertion of military authority to disregard local price control been found. There is no suggestion that Congress or the Army has a policy regarding the purchase of milk for soldiers stationed in California which differs from that in Pennsylvania. State regulation, we have held in the case of Pennsylvania, "imposes no prohibition on the national government or its officers." Neither does the California regulation. It clearly does not as to federal sites in California which have been leased to the Government, like the Indiantown Gap Military Reservation, or to sites where the state has reserved concurrent jurisdiction, like those in the *Dravo* and *Mason* cases, *supra*, or to federal territory where jurisdiction is doubtful or ambiguous, like the reservation in *Bowen* v. *Johnston, supra*. The California Supreme Court advises us that within the confines of California the United States is engaged in a great variety of activities: "The federal territory within the state is so fragmented that there may be several federal islands within a single marketing area. If they are citadels of immunity from state jurisdiction, they are also exceptional segments in areas that are otherwise subject to that jurisdiction. They stand out like colored pins on the map of California, and range from military reservations to soldiers' homes, from court houses to penitentiaries, from post offices to Indian reservations, from national parks to regional dams." 19 Cal. 2d 818, 828.

Can it be that the considerations of policy which resulted in a finding that neither the Constitution nor Congressional authority nor appropriate military regulation enabled the Army contracting officer in Pennsylvania, in supplying milk to the soldiers stationed in Pennsylvania, to free local dealers from the necessity of complying with

a social measure not unrelated to health and deemed important to the welfare of the people of Pennsylvania, are present in some parts of California and not in others? And must a junior contracting officer of the Quartermaster Corps now attempt to ascertain whether these considerations of policy do or do not apply, depending upon whether the particular enclave is within the "exclusive jurisdiction" of the federal Government—a question so recondite, as the cases show, that it may be settled only by this Court after long travail? Is the result to turn upon the niceties of the law of sales and contracts? Suppose, for example, that the negotiations occur and the contracts are signed off Moffett Field, but delivery takes place there. Must inquiry be made as to where title has "passed" and the sale consummated?

These are not far-fetched suppositions. They are the inevitable practical consequences of making decision here depend upon technicalities of "exclusive jurisdiction"—legal subtleties which may become relevant in dealing with prosecution for crime, devolution of property, liability for torts, and the like, but which as a matter of good sense surely are wholly irrelevant in defining the duty of contracting officers of the United States in making contracts in the various States of the Union, where neither Congress nor the authoritative voice of the Army has spoken. In the absence of such assertion of superior authority, state laws such as those here under consideration appear, as a matter of sound public policy, equally appropriate whether the federal territory encysted within a state be held on long or short term lease or be owned by the Government on whatever terms of cession may have been imposed.

We are not dealing here with the authority of Congress, about which there can be no controversy, but with the authority of Government contracting officers. It is surely the policy of neither Congress nor the Army that such

authority should vary from state to state or from post to post within the same state. On the contrary, there is every reason for assuming that, in the matter here involved, uniformity throughout the land is deemed an essential element of the national policy. Since, as the Court holds in the Pennsylvania case, the national interest is furthered rather than impaired by requiring the Quartermaster at the Indiantown Military Reservation to observe the Pennsylvania Milk Control Law, there is every reason why the Quartermaster at Moffett Field should likewise observe the similar California law. And since he should observe the state law, California has a right to insist that the milk dealer licensed by it should not participate in a violation of the law of his state, by license from which he does business.

MR. JUSTICE MURPHY, dissenting:

I dissent for reasons stated in concurrence in *Penn Dairies* v. *Milk Control Commission, ante,* p. 261. The fact that Moffett Field is a federal enclave instead of a leasehold does not justify denying California the power to protect the public health by requiring milk dealers selling to the United States to receive a minimum price, a power which we have today held that Pennsylvania possesses. True, Congress is given the power "to exercise exclusive legislation" over federal areas such as Moffett Field (Constitution, Art. I, § 8, cl. 17), but that does not necessarily mean that the States, no matter what their interest or need, are absolutely without power to enact legislation, not inconsistent with Congressional policy or Constitutional dictates, which will apply in some measure to those areas which are within their boundaries. Before holding that this clause invalidates important state legislation like that now before us, especially at a time when federal activities are greatly expanding and vast areas are being acquired within the States by the federal

government, the reasonableness and necessity of such a decision should be thoughtfully examined.

We derive much of our strength as a nation from our dual system of federal government. To promote the harmonious working of that system the general clauses of the Constitution which broadly delineate the boundaries of state and national power should be construed by appraising the respective state and national interests involved and striking a balance which gives appropriate recognition to the legitimate concerns of each government. Since those boundaries are not absolutes, the question necessarily is one of reasonableness and degree. Cf. Holmes, J., dissenting in *Panhandle Oil Co.* v. *Knox,* 277 U. S. 218, 222, and again in *Springer* v. *Philippine Islands,* 277 U. S. 189, 209–210. This is the method which we have applied in testing state regulation of interstate commerce,[1] and it should govern the construction of the "exclusive legislation" clause. If a state is acting in matters normally within its competence, with which it is especially equipped to deal, to achieve important governmental ends such as the protection of the public health and welfare or the maintenance of orderly marketing conditions, the effects of its action should be allowed to extend into federal areas within its

[1] While it is Congress that is given the power to regulate commerce among the States, some state regulation of that commerce is permissible. "When Congress has not exerted its power under the Commerce Clause, and state regulation of matters of local concern is so related to interstate commerce that it also operates as a regulation of that commerce, the reconciliation of the power thus granted with that reserved to the state is to be attained by the accommodation of the competing demands of the state and national interests involved." *Parker* v. *Brown,* 317 U. S. 341, 361–363. State regulation is to be upheld if "upon a consideration of all the relevant facts and circumstances it appears that the matter is one which may appropriately be regulated in the interest of the safety, health and well-being of local communities, and which, because of its local character and the practical difficulties involved, may never be adequately dealt with by Congress." *Ibid.,* p. 362.

boundaries unless inconsistent with an act of Congress or the provisions or necessary implications of the Constitution. This formula allows the States to carry out important programs which must be of state-wide application to be effective and adequately recognizes the paramount character of federal power. Since we have held the comparable Pennsylvania statute does not contravene any act of Congress or the Constitution (*Penn Dairies* v. *Milk Control Commission, supra*), the instant California legislation satisfies this test.

The "exclusive legislation" clause has not been regarded as absolutely exclusory,[2] and no convincing reason has been advanced why the nature of the federal power is such that it demands that all state legislation adopted subsequent to the acquisition of an enclave must have no application in the area. In waging war under modern conditions it is essential that state and national, military and civilian authorities, work together as a unit, each complementing the others. The state governments have functions to perform that are vital to the war program, including those functions pertaining to the public health. So long as there is no overriding national purpose to be served, nothing is gained by making federal enclaves thorns in the side of the States and barriers to the effective state-wide performance of those functions. Indeed both the federal government and the nation as a whole suffer if the solution of legitimate matters of local concern is thus thwarted and local animosity created for no purpose.

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[2] The common sense view has been taken that even though Congress has not legislated to that effect, local law existing at the time an enclave is acquired, which does not defeat the national purpose, remains in effect within the enclave until altered by Congress. *Stewart & Co.* v. *Sadrakula*, 309 U. S. 94. And the States may qualify their consent to the federal government's purchase by retaining some measure of jurisdiction. *James* v. *Dravo Contracting Co.*, 302 U. S. 134.

A disposition on the part of the federal government or its military arm to ignore local regulations such as the present one is not only fraught with danger to the public health, but also may create a public feeling of distrust which itself will hamper the military effort.

If Congress exercises its paramount legislative power over Moffett Field to deny California the right to do as it has sought to do here, the matter is of course at an end. But until Congress does so, it should be the aim of the federal military procurement officers to observe statutes such as this established by state action in furtherance of the public health and welfare, and otherwise so conduct their affairs as to promote public confidence and good will.

HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* SABINE TRANSPORTATION CO., INC.

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

No. 518. Argued February 4, 1943.—Decided March 1, 1943.

1. In 1937, a corporation paid dividends partly in its own promissory notes. Pursuant to § 27 (d) of the Revenue Act of 1936, it claimed and was allowed, in respect of its liability for undistributed profits tax, the face amount of the notes as part of its "dividends paid credit." In 1938, it retired the notes by payment of their face amount. *Held* that the amounts thus paid in retiring the notes were includible in the "dividends paid credit" under § 24 (a) (4) of the Revenue Act of 1938, as "amounts used . . . to pay or to retire indebtedness of any kind." P. 310.

   Section 27 (e) of the Revenue Act of 1938 does not limit or qualify § 27 (a) (4).

2. To the extent that Art. 27 (a)–3 of Treasury Regulations 101 forbids (as a "double credit") the credit claimed in this case, it is inconsistent with the plain terms of the Act and invalid. P. 311.

128 F. 2d 945, affirmed.

CERTIORARI, 317 U. S. 620, to review the reversal of a decision of the Board of Tax Appeals sustaining an order of the Commissioner disallowing a credit in the computation of respondent's tax under the Revenue Act of 1938.

Mr. Arnold Raum, with whom *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key, J. Louis Monarch, Arthur A. Armstrong,* and *Valentine Brookes* were on the brief, for petitioner.

Mr. Chas. I. Francis for respondent.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

In this case the Circuit Court of Appeals held the respondent entitled to include in its dividends paid credit, pursuant to § 27 [1] of the Revenue Act of 1938, the amount paid to redeem notes given for dividends in a prior year.[2] The Circuit Court of Appeals of the Ninth Circuit had held to the contrary.[3] To resolve the conflict we granted certiorari.

In 1937 the respondent paid dividends, $30,000 in cash and $530,000 in its ten year eight per cent notes. As respects its liability for undistributed profits tax, it claimed and was allowed, pursuant to § 27 (d) of the Revenue Act of 1936,[4] as part of its "dividends paid credit," the face value of the notes. In 1938 the respondent paid off the notes, and in its return for that year claimed the sum paid as a part of its "dividends paid credit" under the Revenue Act of 1938, § 27 (a) (4).[5] The Commissioner's disallowance of the claim was sustained by the Board of

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[1] Act of May 28, 1938, c. 289, 52 Stat. 447, 468.

[2] 128 F. 2d 945.

[3] *Spokane Dry Goods Co.* v. *Commissioner,* 125 F. 2d 865.

[4] 49 Stat. 1648, 1665.

[5] 52 Stat. 468.

Tax Appeals, but the Circuit Court of Appeals reversed the Board's decision.

The position of the petitioner is that the second credit claimed would duplicate the earlier one allowed and that § 27 of the Revenue Act of 1938 does not permit the duplication.

The Revenue Act of 1936, by § 13, imposed on corporations a tax ranging from eight to fifteen per cent of the so-called "normal-tax net income," consisting of net income less certain permitted deductions. It then laid a graduated surtax on "undistributed net income" which it defined as the adjusted net income (the normal-tax net income after credits) less the so-called "dividends paid credit." By § 27 the Act defined the latter as comprising dividends paid during the taxable year including (27 (d)) dividends in obligations of the company to be reckoned at face value or market value, whichever was lower. The subsection also provided that, if such obligations were redeemed in any subsequent year, the excess of the redemption payment over the fair market value of the obligations as of the date of their issue should be treated as a dividend paid in the year of redemption.

The purpose of these provisions is clear and is a matter of common knowledge. Congress desired to encourage the payment of dividends so that the earnings of corporations might be subjected not only to normal tax as against the corporation, but also to taxation as income to the stockholders.[6] The means adopted was to relieve the corporation from surtax to the extent of dividends paid in cash or

[6] It appears that respondent's sole stockholders are two corporations, but we do not understand petitioner to contend that this circumstance affects the operation or application of § 27. It is assumed that these two corporations are bona fide stockholders of respondent and paid taxes on the dividends they received. The section in terms applies to every corporate taxpayer whether it has but two stockholders which are corporations or two thousand who are natural persons.

in obligations. The latter would be taxed to stockholders at their market value. If they were redeemed in a later year, at a figure above such value as of the date of their issue, the excess would be taxed to the holder as income to him in the year of redemption. Fairness dictated that in such case the corporation should have a further dividends paid credit for this excess of value paid by it.

The Revenue Act of 1938 adopted a different plan of corporate taxation. With respect to a corporation having the amount of income earned by the respondent, § 13 imposed a tentative tax of 19% of "adjusted net income," which was the entire net income less certain deductions not here material. This tentative tax was to be reduced by the sum of two deductions. One of these is not in issue here. The other is 2½% of the "dividends paid credit," not however to exceed 2½% of the adjusted net income. The dividends paid credit is defined by § 27. It consists of four items, two of which are carry-overs from previous years, which need not concern us; and two others which are important in this case,—first, the "basic surtax credit," § (a) (1), and, secondly, "amounts used . . . to pay or to retire indebtedness of any kind, if such amounts are reasonable with respect to the size and terms of such indebtedness," § (a) (4).[7] Indebtedness is defined as indebtedness existing at the close of business December 31, 1937, and evidenced by bond, note, debenture, certificate of indebtedness, mortgage or deed of trust issued by the corporation and in existence at the close of business December 31, 1937, or a bill of exchange accepted prior to and in existence at that time. The term is further defined as covering principal only and not interest thereon.

The basic surtax credit is the sum of several items, including cash dividends paid and certain other specified

[7] No question is made in this case as to the reasonableness of the amount paid.

credits. Dividends in kind are to be valued and treated as cash dividends. Subsection (e) provides that, in computing the basic surtax credit, a dividend paid in obligations of the corporation shall be treated as a cash dividend in the amount of the face value of the obligations or their market value, whichever is lower, and that, if the obligations are redeemed in a subsequent year, any excess paid the holders over the market value at date of issue shall be treated as a dividend paid in that year. This provision, it will be noted, is similar to § 27 (d) of the Revenue Act of 1936. But the credit of which it forms a part differs from that of the earlier Act as it is against the tax and not against income and is limited to 2½% of adjusted income. The use of the credit, may, therefore, produce results materially different from the use of the credit granted by the 1936 Act.

The petitioner asserts that Congress did not intend the taxpayer to have two credits as a result of payment of a dividend in its own obligations, that exemptions or credits should be strictly construed as against the taxpayer, and that the regulations promulgated under the Revenue Act of 1938 clearly deny the deduction claimed in this case.

On the face of the 1938 Act the items which go toward making up the basic surtax credit under § 27 (b) are distinct from the credit for indebtedness paid under § 27 (a) (4). Although the note obligations paid by the respondent were issued in payment of dividends for a prior year they, nevertheless, fall within the precise terms of § 27 (a) (4). In this connection § 27 (e) might have application if the redemption of the notes had been at a figure greater than their face or market value at the time they were issued to the stockholders, for in that case § 27 (e) would have permitted the respondent to take a credit for the excess of the redemption price over the value at date of issue as a dividend paid in the current year. But we

think that § 27 (e) does not otherwise bear on a payment such as that in question and does not qualify the plain intent of § 27 (a) (4).

The Congress had in the 1936 Act encouraged the payment of dividends in obligations. It knew that many corporations had done so. With this knowledge it adopted the sweeping language of § 27 (a) (4) of the Act of 1938. As introduced the section spoke only of indebtedness. It was amended by the Senate Finance Committee by adding the words "of any kind" after the word "indebtedness," for the purpose of clarification.[8] These facts, without more, make plain the scope of the provision, and answer the contentions that no credit was intended to be granted for the payment in the taxable year of obligations issued for dividends in a prior year. If more were needed, it should be noted that had the corporation borrowed money in a prior year to pay a dividend, the payment of the debt in a later year would clearly have entitled it to credit for the payment under § 27 (a) (4). There is no reason for assuming that Congress intended to treat the two cases differently, and it has, in plain terms, granted a credit in both.

What has been said respecting § 27 (e) indicates that it does not limit or qualify § 27 (a) (4). It may supplement it in a case where the payment of the obligations issued for dividends is in excess of the market value of those obligations when they were issued. The argument that it is a specific provision, qualifying an earlier general provision of § 27, must be rejected.

It remains to consider the Treasury Regulations promulgated under the 1938 Act.[9] These forbid a credit such as that claimed in this case, calling it a "double credit." We think the regulations are in the teeth of the unambiguous mandate of the statute, are contradictory of its plain

[8] Senate Finance Committee Report, S. R. 1242, 75th Cong., 1st Sess.

[9] Regulations 101, Art. 27 (a)–3.

terms, and amount to an attempt to legislate. They cannot prevail to preclude the credit claimed.[10] The Judgment is

Affirmed.

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

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MURPHY concur, dissenting.

The taxpayer, Sabine Transportation Co., Inc., is a Delaware corporation doing business in Texas. Its stock is held in equal amounts by two other corporations, Sabine Towing Co., Inc., and The Pure Oil Corporation. In 1937, a dividend of $530,000.00 was declared, amounting to $35.33⅓ per share on the common stock. The dividend was paid to the two corporate owners by execution of ten year, eight per cent notes. The taxpayer then claimed and was allowed a "dividend paid credit" under the 1936 Act on its 1937 tax. In 1938 the taxpayer paid to its two corporate stockholders the full face value of the ten year notes. It is now given a second "dividends paid credit" under the 1938 Act on its 1938 tax.

This $530,000.00 has left the corporate treasury only once. Bookkeeping devices and paper contrivances should not be permitted to make two payments out of one; and if two deductions are permitted, why not three or more? The possibilities of manipulation of notes, bonds, stocks, and every other cash substitute imaginable, are particularly apparent when, as here, the taxpayer and its stockholders are so closely interrelated. Congress has passed no tax statutes which compel me to conclude that it intended to reward ingenuity in paper work by granting multiple tax reductions for a single money payment to discharge a single corporate obligation.

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[10] *Helvering* v. *Credit Alliance Corp.*, 316 U. S. 107.

Syllabus.

HOOPESTON CANNING CO. ET AL. *v.* CULLEN, SUPERINTENDENT OF INSURANCE OF NEW YORK, ET AL.

APPEAL FROM THE SUPREME COURT OF NEW YORK, ALBANY COUNTY.

No. 358. Argued February 3, 4, 1943.—Decided March 1, 1943.

1. In determining whether there is being done within a State a business in insurance which is subject to regulation by the State, considerations of the location of activity prior to and subsequent to the making of the contract, of the degree of interest of the regulating State in the object insured, and of the location of the property insured are separately and collectively of great weight. P. 319.
2. Reciprocal insurance associations which insured property located in New York, although their attorneys-in-fact were located in Illinois and the contracts of insurance were signed and checks in payment of losses were mailed in Illinois, *held* subject to regulation by New York. Pp. 315, 319.

   The reciprocal insurance associations in this case had many actual contacts (detailed in the opinon) with subscribers and the insured property in New York; much of the insurance covered immovables located in New York; and the associations had for years been licensed to do business in New York.
3. *Allgeyer v. Louisiana,* 165 U. S. 578, distinguished. P. 318.
4. The New York regulations of foreign reciprocal insurance associations here challenged—regulations aimed at the protection of the solvency of such associations or at promoting the convenience of residents of the State in doing their insurance business—*held* not violative of the due process or equal protection clauses of the Fourteenth Amendment. P. 321.

   (1) That the regulations affect business activities which are carried on outside of the State does not in itself render them invalid. P. 320.

   (2) Since each subscriber is an insurer and other subscribers are dependent on his financial responsibility, the requirement that each new subscriber must have assets in excess of $10,000 does not violate the equal protection clause. P. 321.

   (3) Reciprocal insurance associations are not denied equal protection by the imposition upon them of requirements different from those imposed upon mutual companies. P. 321.

(4) The requirements that an office be maintained in the State and that policies be countersigned by a resident agent are valid. P. 321.

(5) The argument that reciprocals give complete security with substantial economy to their members, and that New York subscribers may lose the benefits of this form of insurance by reason of the inability of the reciprocals to comply with the New York law, can not affect the validity of the challenged regulations. P. 321.

288 N. Y. 291, 43 N. E. 2d 49, affirmed.

APPEAL from a judgment entered on remittitur of the Court of Appeals of New York, which sustained the validity of provisions of the state Insurance Law as applied to the appellants. See also 262 App. Div. 446, 29 N. Y. S. 2d 300, and 24 N. Y. S. 2d 312.

Mr. Franklin D. Trueblood, with whom *Messrs. Craig R. Johnson* and *Carl O. Olson* were on the brief, for appellants.

Mr. John C. Crary, Jr., Assistant Attorney General of New York, with whom *Messrs. Nathaniel L. Goldstein,* Attorney General, and *Wendell P. Brown,* Assistant Attorney General, were on the brief, for appellees.

MR. JUSTICE BLACK delivered the opinion of the Court.

The New York Insurance Law (Cons. Laws, ch. 28), as amended in 1939, provides a comprehensive and detailed plan for regulation of all types of insurance and insurance companies "doing an insurance business" (§ 41) in that state. Article 12, applicable to reciprocal insurance associations, defines them as aggregations of persons, firms, or corporations, who under a common name engage in the business of exchanging contracts of insurance on the reciprocal plan through an attorney in fact.[1]

[1] Inter-insurance, or reciprocal insurance, has been described as "that system of insurance whereby several individuals, partnerships and corporations underwrite each other's risks against loss by fire or

The issue in this case is whether the appellants, reciprocal insurance associations which insure against fire and related risks and whose attorneys in fact are located in Illinois, may constitutionally be made subject to the laws of New York as a condition of insuring property in that state. The New York Law, § 422, requires that these coöperative insurance associations must obtain a license or be prohibited from doing "any act which effects, aids or promotes the doing of an insurance business" in New York, § 410 (2). As a condition of the license, submission to the New York regulations is required. The appellants contend that the law as applied to them violates the due process and equal protection clauses of the Fourteenth Amendment. They raised these questions appropriately in a declaratory judgment action in New York state courts, the Court of Appeals upheld the law, and the case is here on appeal under § 237 (a) of the Judicial Code.

These reciprocals have been annually licensed to do business in New York since 1930 and allege that they are "desirous of qualifying under the valid provisions of the Insurance Law of 1939, and of securing a license thereunder." More than 50,000 contracts affecting New York state risks have been executed since the reciprocals began business, and the gross payments made by New York concerns as premiums or deposits amounted to more than $2,000,000 for the period from 1931 to 1938. The total of

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other hazard, through an attorney in fact, common to all, under an agreement that each underwriter acts separately and severally, and not jointly with any other." 58 Central L. J. 323. The nature of the business of these particular reciprocals is fully discussed in the opinion of the court below and is described to some extent in this opinion. The opinion of the trial court is reported at 24 N. Y. S. 2d 312; the opinion of the Appellate Division is reported at 262 App. Div. 446, 29 N. Y. S. 2d 300; and the opinion of the Court of Appeals is reported at 288 N. Y. 291, 43 N. E. 2d 49. For a general discussion of the nature of inter-insurers and some of their legal problems, see 94 A. L. R. 836.

premiums or deposits from insurance affecting New York property is more than that from Illinois, the state in which the associations have their headquarters and whose laws they insist must govern their contracts.

Two principal contentions are urged against the constitutionality of the New York law as applied to these reciprocals: (a) Since the contracts of insurance are signed in Illinois and losses are paid by checks mailed from that state, the associations do no business in New York which therefore has no power to regulate them. (b) Assuming that New York does have general power to regulate, nevertheless certain of the provisions of the statute do not accord with due process and deny equal protection of the law.

First. Business in New York. Assuming that the formalities of contract are carried on in Illinois, the issue remains whether the insurance enterprise as a whole so affects New York interests as to give New York the power it claims.

In determining the power of a state to apply its own regulatory laws to insurance business activities, the question in earlier cases became involved by conceptualistic discussion of theories of the place of contracting or of performance.[2] More recently it has been recognized that a state may have substantial interests in the business of insurance of its people or property regardless of these isolated factors. This interest may be measured by highly realistic considerations such as the protection of the citizen insured or the protection of the state from the incidents of loss. *Alaska Packers Assn.* v. *Industrial Accident Comm'n,* 294 U. S. 532, 542. To insure the protection of state interests it is now recognized that a state may not be required to enforce in its own courts the terms

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[2] *Allgeyer* v. *Louisiana,* 165 U. S. 578, 587. See, A Factual Approach to the Constitutional Law Aspect of the Conflict of Laws, 35 Col. L. R. 751. Cf. *Frene* v. *Louisville Cement Co.,* 134 F. 2d 511.

of an insurance policy normally subject to the law of another state where such enforcement will conflict with the public policy of the state of the forum. *Griffin* v. *McCoach,* 313 U. S. 498.[3]

The actual physical signing of contracts may be only one element in a broad range of business activities. Business may be done in a state although those doing the business are scrupulously careful to see that not a single contract is ever signed within that state's boundaries.[4] Important as the execution of written contracts may be, it is ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction.

The facts of the instant case give clear proof of these statements. The contracts are made in this way: A canner or wholesale grocer in New York signs an application to become a "subscriber." This is sent to the attorney in fact at the head office in Chicago. One of a group of insurance engineers may be sent to New York to investigate the risk, and if accepted, the applicant signs a power of attorney and sends it and the application back to the attorney in fact. The attorney in fact then issues a policy of inter-insurance which is mailed to the subscriber in New York, and the subscriber thus becomes the insurer and the insured. The insurance engineers may visit the subscriber

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[3] This rule was not applied where the state had no actual contact with the insurance contract; i. e., where neither the original insured nor the company were residents of the state, the property insured was elsewhere, and the contract was made elsewhere. *Home Insurance Co.* v. *Dick,* 281 U. S. 397. Cf. *Kryger* v. *Wilson,* 242 U. S. 171, where, under similar circumstances, a state was entitled to apply its own law in a non-insurance situation where the property which was the subject of the litigation was within its bounds.

[4] *International Harvester Co.* v. *Kentucky,* 234 U. S. 579. For an example of the refusal of a court to permit evasion of the law of a state by a contract made just over its borders, see *Ocean Accident & G. Corp.* v. *Industrial Commission,* 32 Ariz. 275, 285, 257 P. 644.

from time to time to encourage the reduction of fire hazards or to investigate the cause and extent of losses, and on such trips the engineer may give information concerning the enterprise to prospective participants, although he does not actively solicit business. The contracts reserved the right of the reciprocals to go into New York to repair, rebuild, or replace lost or damaged property. Cf. *Lumbermen's Insurance Co.* v. *Meyer*, 197 U. S. 407, 417. Surely the object of all this activity is not the signing of a contract or a check, but the protection of property and payment of indemnity in case of loss by fire. These business transactions neither begin nor end with the contract.

The intimacy of the relation of these insurance contracts to the state of New York becomes even more apparent when it is remembered that the property insured is in the state of New York. The states have long held great authority over property within their borders. A state may make flood control, quarantine, conservation and zoning regulations affecting property within its bounds. It is the source of law for the forms of conveyances, for the nature of covenants, future interests and easements, for the construction of wills, trusts, and mortgages, and for many other legal principles affecting property interests. Contracts formally made in other states may remain subject to the law of the state of the situs of the property, particularly in respect to immovables.[5] There is no more reason to bar the state from authority over the insurance of the property within it than to exclude it from control of all the other property interests mentioned.

The appellants draw counter conclusions from *Allgeyer* v. *Louisiana*, 165 U. S. 578, and the cases which follow it.

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[5] *Carpenter* v. *Strange*, 141 U. S. 87, 106; *Watkins* v. *Holman*, 16 Pet. 25, 57; *Fall* v. *Eastin*, 215 U. S. 1, 9, 12; cf. *Union Transit Co.* v. *Kentucky*, 199 U. S. 194; *Curry* v. *McCanless*, 307 U. S. 357, 363; *Graves* v. *Elliott*, 307 U. S. 383. For a discussion of this subject, see Cook, 'Immovables' and the 'Situs,' 52 Harvard L. Rev. 1246.

While the wisdom of the *Allgeyer* case has occasionally been doubted, it is in any case clearly distinguishable here. In that case, no act was done in the state of Louisiana except that of mailing a letter advising the insurance company of a shipment of goods, the goods themselves were in the state only temporarily, and the insurance company never purported to do business in the state. In the instant case, the reciprocals have the many actual contacts with the New York subscribers and the New York property outlined above, much of the insurance covers permanent immovables, and the reciprocals have been licensed to do business there for years. The *Allgeyer* and subsequent insurance cases have been recently considered in *Griffin* v. *McCoach, supra,* at 506, 507, and in *Osborn* v. *Ozlin,* 310 U. S. 53, 66; as the analysis in those opinions clearly indicates, the *Allgeyer* line of decisions cannot be permitted to control cases such as this, where the public policy of the state is clear, the insured interest is located in the state, and there are many points of contact between the insurer and the property in the state.

We conclude that in determining whether insurance business is done within a state for the purpose of deciding whether a state has power to regulate the business, considerations of the location of activity prior and subsequent to the making of the contract, *Osborn* v. *Ozlin, supra,* of the degree of interest of the regulating state in the object insured, and of the location of the property insured are separately and collectively of great weight. Applying any of these tests, it is apparent that the reciprocals are doing business in New York and are thereby subject to regulation by that state.

Second. Validity of the Regulations. The assailed requirements are in substance these.[6] Reciprocals' sub-

[6] The sections of the Insurance Law which appellants contend are invalid are §§ 130, 168 (2), 410 (1), 412 (1), 413 (2), 415 (1), 417 (1), 418 (1) (3), 420, 421, and 422 (1).

scribers in every state must execute their powers of attorney in accordance with specified forms and a standard form of contract must be used by all subscribers wherever they are located. Certain forms of accounting are also required. Advisory committees of the subscribers themselves, rather than appointed attorneys in fact, must have ultimate powers of management of the reciprocals' affairs and must provide regulations for the control and custody of their funds. The advisory committee must be elected at an annual meeting of the subscribers, held after notice to them, where they can be present either in person or by proxy. Provision must be made for stipulated operating reserves for payment of losses, for a contingent liability of subscribers of not less than one nor more than ten times the amount of the annual premium expressed in the contract, and for a surplus to be maintained unimpaired. No subscriber is to be granted a secured or preferred claim against the operating reserve. No new agreements are to be made with subscribers who do not have net assets in excess of ten thousand dollars. At least one office must be maintained in New York and policies must be countersigned by a resident New York agent.

These regulations can not be attacked merely because they affect business activities which are carried on outside the state. Of necessity, any regulations affecting the solvency of those doing an insurance business in a state must have some effect on business practices of the same company outside the state. Nothing in the Constitution requires a state to nullify its own protective standards because an enterprise regulated has its headquarters elsewhere. The power New York may exercise to regulate domestic insurance associations may be applied to foreign associations which New York permits to conduct the same kind of business. The appellants can not, "by spreading their business and activities over other states

. . . set at naught the public policy" of New York, *Atlantic & Pacific Tea Co.* v. *Grosjean,* 301 U. S. 412, 427. Where as here the state has full power to prescribe the forms of contract, the terms of protection of the insured, and the type of reserve funds needed, "the mere fact that state action may have repercussions beyond state lines is of no judicial significance." *Osborn* v. *Ozlin, supra,* at 62. Neither New York nor Illinois loses the power to protect the interests of its citizens because these associations carry on activities in both places. *Alaska Packers Assn.* v. *Industrial Accident Comm'n, supra.* We think the regulations themselves, since they are aimed at the protection of the solvency of the reciprocals or at promoting the convenience with which New York residents may do their insurance business, are all within the scope of state power. *Osborn* v. *Ozlin, supra,* at 65, 66.

It is argued that the provision requiring each new subscriber to have net assets of $10,000 violates the equal protection clause, but since each subscriber is also an insurer and other subscribers are dependent on his financial responsibility, there is no reason why the legislature might not think this provision necessary. It is also complained that different requirements have been put upon reciprocals than mutual companies; but we have previously held that a coöperative insurance company may be subject to separate classification for the purpose of determining how it shall be regulated. *German Alliance Ins. Co.* v. *Kansas,* 233 U. S. 389, 418. Cf. *Tigner* v. *Texas,* 310 U. S. 141. The provisions requiring an office in the state and counter signature of the contracts by an agent in the state are no more stringent than those approved in *La Tourette* v. *McMaster,* 248 U. S. 465.

The appellants earnestly insist that theirs is a successful system of coöperative insurance which gives complete security with substantial economy to their members, and that their New York subscribers may lose the benefits of

this form of insurance by reason of the reciprocals' inability to comply with the requirements of the New York law. That the reciprocals save for their members from 25 to 50 per cent of the cost of ordinary commercial insurance and that the members are well satisfied with the system they have created is not controverted by counsel for the state of New York. However persuasive such arguments might be if addressed to the state legislature, they present no constitutional barrier which prevents New York from enforcing these regulations if it chooses.

Affirmed.

The CHIEF JUSTICE and MR. JUSTICE JACKSON concur in the result.

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

HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* AMERICAN DENTAL CO.

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

No. 303. Argued January 5, 6, 1943.—Decided March 1, 1943.

1. The finding of the Board of Tax Appeals that the cancellation of indebtedness in question occurred in 1937 is accepted here. P. 324.
2. The term "gift" in § 22 (b) (3) of the Revenue Act of 1936 denotes the receipt of financial advantages gratuitously. P. 330.
3. A cancellation of items of indebtedness owed by a corporation (rent and interest on notes), though the items had been accrued and served to offset income in prior years, and though the corporation was solvent, *held*, under § 22 (b) (3) of the Revenue Act of 1936, a "gift" exempt from federal income tax. P. 330.
4. A finding of the Board of Tax Appeals that the debt cancellation in question was not a "gift" within the meaning of § 22 (b) (3) of the Revenue Act of 1936 is not conclusive here, because the Board

reached its conclusion by application of erroneous legal standards. P. 330.

5. That the motives for cancellation of indebtedness were those of business, or even selfish, is of no significance in determining whether there was a "gift" under § 22 (b) (3). P. 331.

128 F. 2d 254, affirmed.

CERTIORARI, 317 U. S. 612, to review the reversal of a decision of the Board of Tax Appeals, 44 B. T. A. 425, sustaining a determination of deficiency in income tax.

Mr. Samuel H. Levy, with whom *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Newton K. Fox,* and *Miss Helen R. Carloss* were on the brief, for petitioner.

Mr. John E. Hughes, with whom *Mr. James A. O'Callaghan* was on the brief, for respondent.

MR. JUSTICE REED delivered the opinion of the Court.

This writ of certiorari brings here for review the question of the taxability, as income, of rent and interest on accounts owed by the taxpayer which were cancelled by its creditors.

The taxpayer, a corporation, respondent here, owed certain past due bills for merchandise. This indebtedness was represented by interest-bearing notes. Interest upon these notes had been accrued for the years prior to 1937 and deducted in the taxpayer's income tax returns, to the amount of $11,435.22. In November, 1936, the creditors agreed to cancel all interest accruing after January 1, 1932. The first entry on the taxpayer's books which records the cancellation appears in December, 1937, the tax year here involved, when over $16,000 was credited.

The taxpayer in December, 1933, also owed back rent amounting to $15,298.99. This back rent had been accrued as an expense. A new lease was negotiated at that

time and the lessor promised to make an adjustment of the accumulated obligation. The following April the lessor advised the taxpayer that he would accept $7,500 in payment of the back rent and would cancel the rest. The reduced sum was paid in February, 1937, by cash and notes which were met the same year. In 1937 the first entries were made on both the lessor's and the taxpayer's books, showing the partial forgiveness of the back rent.

The date of the book entries of the cancellations and the deduction of the interest for the whole of 1936 by the taxpayer led the Board of Tax Appeals to uphold the Commissioner's determination that the cancellation of all items of indebtedness involved here took place in 1937. This determination is accepted by us. *Wilmington Trust Co.* v. *Commissioner,* 316 U. S. 164, 168.

The taxpayer credited the total amount of the cancelled debts, $25,219.65, to earned surplus.[1] It did not return any of the sum as taxable income. No proof appears of the insolvency of the taxpayer before or after the cancellation. Its balance sheets show assets exceeding liabilities at the opening and close of 1937 with net assets greater than the asserted adjustment of income. Under these circumstances the Commissioner increased the taxpayer's reported income by $19,234.21, the sum of the items of the cancelled indebtedness which the Board of Tax Appeals found had served to offset income in like amounts in prior years. The taxpayer had accrued the rent and interest in former years. No claim for additional taxes is made by the Commissioner.

The taxpayer sought a redetermination on the ground that the cancellations were exempt gifts and that it was not enriched beyond the tax advantages gained by the deductions in former tax returns. The Board of Tax

[1] There is an unexplained and immaterial variance between the sum of the items cancelled and the total credited to surplus.

Appeals found that the cancellations were not gifts, concluded that the tax benefits in dollars obtained by the deductions of former years did not limit the 1937 tax springing from the cancellation and affirmed the Commissioner's determination of a deficiency. The Court of Appeals reversed on the ground that the cancellations constituted exempt gifts. 128 F. 2d 254. On account of a variety of views in the circuits as to the taxability of similar adjustments of indebtedness, we granted certiorari.[2]

The applicable statutory provisions are § 22 (a) and (b) (3) of the Revenue Act of 1936.[3] The general definition of gross income has varied little in the successive revenue acts, and, from the earliest, gifts have been excluded by substantially identical statutory language. Act of October 3, 1913, 38 Stat. 166. The Treasury Department Regulations 94, relating to the Revenue Act of 1936,

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[2] *Dallas Transfer & Warehouse Co.* v. *Commissioner,* 70 F. 2d 95; *Commissioner* v. *Coastwise Transp. Corp.,* 71 F. 2d 104; *Hirsch* v. *Commissioner,* 115 F. 2d 656; *Helvering* v. *A. L. Killian Co.,* 128 F. 2d 433; *Haden Co.* v. *Commissioner,* 118 F. 2d 285.

[3] 49 Stat. 1648, 1657, § 22, Gross income:

"(a) *General Definition.*—'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. . . .

"(b) *Exclusions from Gross Income.*—The following items shall not be included in gross income and shall be exempt from taxation under this title:

. . . . . .

"(3) *Gifts, Bequests, and Devises.*—The value of property acquired by gift, bequest, devise, or inheritance (but the income from such property shall be included in gross income); . . ."

Art. 22 (a)–14, covered cancellation of indebtedness.[4] This regulation first appeared in Regulations 86 under the 1934 Act. It marked a change in the Treasury's concept of the tax effect of debt forgiveness. The old article as it appeared in Regulations 77, relating to the 1932 Act, read in part:

"If, however, a creditor merely desires to benefit a debtor and without any consideration therefor cancels the debt, the amount of the debt is a gift from the creditor to the debtor and need not be included in the latter's gross income." [5]

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[4] "Art. 22 (a)–14. Cancellation of indebtedness.—The cancellation of indebtedness, in whole or in part, may result in the realization of income. If, for example, an individual performs services for a creditor, who in consideration thereof cancels the debt, income in the amount of the debt is realized by the debtor as compensation for his services. A taxpayer realizes income by the payment or purchase of his obligations at less than their face value. (See article 22 (a)–18.) If a shareholder in a corporation which is indebted to him gratuitously forgives the debt, the transaction amounts to a contribution to the capital of the corporation. Income is not realized by a taxpayer by virtue of the discharge of his indebtedness as the result of an adjudication in bankruptcy, or by virtue of a composition agreement among his creditors, if immediately thereafter the taxpayer's liabilities exceed the value of his assets."

The article relating to the exclusion of gifts from gross income is not helpful. It merely says gifts are exempt from the income tax. Art. 22 (b) (3)–1.

[5] The whole article was as follows:

"Art. 64. Forgiveness of indebtedness.—The cancellation and forgiveness of indebtedness may amount to a payment of income, to a gift, or to a capital transaction, dependent upon the circumstances. If, for example, an individual performs services for a creditor, who in consideration thereof cancels the debt, income to that amount is realized by the debtor as compensation for his services. If, however, a creditor merely desires to benefit a debtor and without any consideration therefor cancels the debt, the amount of the debt is a gift from the creditor to the debtor and need not be included in the latter's gross income. If a shareholder in a corporation which is indebted to him

The same language appeared in the former Regulations.[6]

In fields closely related to the cancellation of indebtedness which we are considering here, this Court has treated gains in net assets as income. In *United States* v. *Kirby Lumber Co.*, 284 U. S. 1, the taxpayer purchased its own bonds at a discount. It was held taxable on the increase in net assets which resulted.[7] This holding was confirmed by *Helvering* v. *American Chicle Co.*, 291 U. S. 426. See also *Commissioner* v. *Coastwise Transp. Corp.*, 71 F. 2d 104. Forfeiture or surrender of a lease by which the lessor gains property or money makes such gain taxable. *Helvering* v. *Bruun*, 309 U. S. 461; *Hort* v. *Commissioner*, 313 U. S. 28. The narrow line between taxable bonuses and tax free gifts is illuminated by *Bogardus* v. *Commissioner*, 302 U. S. 34, on the one side and upon the other by *Noel* v. *Parrott*, 15 F. 2d 669, as approved in *Old Colony Trust Co.* v. *Commissioner*, 279 U. S. 716, 730.

Normally cancellations of indebtedness occur only when the beneficiary is insolvent or at least in financial straits. Possibly because it seems beyond the legislative purpose to exact income taxes for savings on debts, the courts have been astute to avoid taxing every balance sheet improvement brought about through a debt reduction. Where the indebtedness has represented the purchase price of property, a partial forgiveness has been treated as a readjust-

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gratuitously forgive the debt, the transaction amounts to a contribution to the capital of the corporation."

[6] Regulations 74, Art. 64 (1931); Regulations 69, Art. 49 (1926); Regulations 65, Art. 49 (1924), for individuals; Regulations 62, Art. 50 (1922), for individuals; Regulations 45 (1920 ed.), Art. 51, for individuals.

When the gift tax was revived in 1932, the House Report gave as an example of a gift "the forgiveness or payment by A of B's indebtedness." H. Rep. No. 708, 72nd Cong., 1st Sess., p. 28 (5).

[7] The fact that the purchase was made in the taxable year of issue is immaterial. *Burnet* v. *Sanford & Brooks Co.*, 282 U. S. 359, 364, 365; *Commissioner* v. *Norfolk Southern R. Co.*, 63 F. 2d 304.

ment of the contract rather than a gain. *Hirsch* v. *Commissioner,* 115 F. 2d 656; *Helvering* v. *A. L. Killian Co.,* 128 F. 2d 433; Gehring Publishing Co. *v.* Commissioner, 1 T. C. 345. Where a stockholder gratuitously forgives the corporation's debt to himself, the transaction has long been recognized by the Treasury as a contribution to the capital of the corporation. Regulations 45, Art. 51, through to Regulations 94, Art. 22 (a)–14. *Commissioner* v. *Auto Strop Safety Razor Co.,* 74 F. 2d 226.[8]

The uncertainties of the effect of the remission of indebtedness on income tax brought about legislation to clarify the problems. The Chandler Bankruptcy Act of June 22, 1938, instituted adjustments deemed desirable.[9] The provisions of Chapter X of the Bankruptcy Act relating to corporate reorganizations are typical. They declare that no income should be recognized "in respect to the adjustment of the indebtedness of a debtor" under reorganization proceedings, § 268, 52 Stat. 904, provided that the basis of the property should be reduced correspondingly as specified in § 270 as amended July 1, 1940, 54 Stat. 709. The basis requirements do not appear throughout the sections, e. g., Chapter XV. The Revenue Act of 1939[10] amended the Internal Revenue Code, §§ 22 (b) and 113 (b), so as to extend similar relief to all corporate taxpayers "in an unsound financial condition." [11]

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[8] For discussions of the general problem see "The Revenue Act of 1939 and the Income Tax Treatment of Cancellation of Indebtedness," 49 Yale L. J. 1153; "Cancellation of Indebtedness and Its Tax Consequences," 40 Col. L. Rev. 1326; "Discharge of Indebtedness and the Federal Income Tax," 53 Harv. L. Rev. 977.

[9] Corporate reorganizations under Chap. X or 77B, §§ 268, 270, 276 (c) (3), 52 Stat. 904, 905; arrangements under Chap. XI, §§ 395, 396, 52 Stat. 915; real property arrangements under Chap. XII, §§ 520, 521, 522, 52 Stat. 929; wage earners plans under Chap. XIII, § 679, 52 Stat. 938; railroad adjustments under Chap. XV, § 735, 53 Stat. 1140.

[10] 53 Stat. 875, § 215.

[11] See S. Rep. No. 648, 76th Cong., 1st Sess., p. 5; H. Rep. No. 855, 76th Cong., 1st Sess., p. 23.

It was provided that § 215 should not apply to any discharge of indebtedness occurring prior to the enactment of the Revenue Act of 1939. No further explanation for this limitation appears beyond the language of the House Report:

"The amendments made by section 215 of the bill are applicable only to taxable years beginning after December 31, 1938. They are not applicable to discharges of corporate indebtedness occurring prior to the date of the enactment of the bill. They are also not applicable to a discharge occurring in any taxable year beginning after December 31, 1942. They likewise do not apply to any discharge of corporate indebtedness occurring in any proceeding under section 77B, or under chapter X or XI, of the Bankruptcy Act of 1898, as amended, since such discharges are governed by other provisions of law." P. 25.

The Revenue Act of 1942, 56 Stat. 798, 811, § 114, amended § 22 (b) (9) of the Internal Revenue Code so as to make the exclusion from gross income of income arising from discharge of indebtedness applicable generally to all corporations, whether or not financially sound.[12]

In the light of these views upon gain, profit and income, we must construe the meaning of the statutory exemption of gifts from gross income by § 22 (b) (3). The broad import of gross income in § 22 (a)[13] admonishes us to be chary

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[12] See S. Rep. No. 1631, 77th Cong., 2d Sess., p. 77; 26 U. S. C. § 22:

"(b) Exclusions from gross income. The following items shall not be included in gross income and shall be exempt from taxation under this chapter:

. . . . . .

"(9) Income from discharge of indebtedness.—In the case of a corporation, the amount of any income of the taxpayer attributable to the discharge, within the taxable year, of any indebtedness of the taxpayer . . . evidenced by a security. . . . This paragraph shall not apply to any discharge occurring before the date of enactment of the Revenue Act of 1939, or in a taxable year beginning after December 31, 1945."

[13] *Helvering* v. *Clifford*, 309 U. S. 331, 334.

of extending any words of exemption beyond their plain meaning. Cf. *Heiner* v. *Colonial Trust Co.*, 275 U. S. 232, 235; *United States* v. *Stewart*, 311 U. S. 60, 63. "Gifts," however, is a generic word of broad connotation, taking coloration from the context of the particular statute in which it may appear. Its plain meaning in its present setting denotes, it seems to us, the receipt of financial advantages gratuitously.

The release of interest or the complete satisfaction of an indebtedness by partial payment by the voluntary act of the creditor is more akin to a reduction of sale price than to financial betterment through the purchase by a debtor of its bonds in an arm's-length transaction. In this view, there is no substance in the Commissioner's differentiation between a solvent or insolvent corporation or the taxation of income to the extent of assets freed from the claims of creditors by a gratuitous cancellation of indebtedness. Lakeland Grocery Co. *v.* Commissioner, 36 B. T. A. 289. Cf. Madison Railways Co. *v.* Commissioner, 36 B. T. A. 1106; Spokane Office Supply Co. *v.* Commissioner, B. T. A. Docket No. 86762, memo. op. of April 29, 1939; Model Laundry *v.* Commissioner, B. T. A. Docket No. 93493, memo. op. of January 15, 1940. See also *Haden Co.* v. *Commissioner*, 118 F. 2d 285, which supports the Commissioner.

The Board of Tax Appeals decided that these cancellations were not gifts under § 22 (b) (3). It was said:

"No evidence was introduced to show a donative intent upon the part of any creditor. The evidence indicates, on the contrary, that the creditors acted for purely business reasons and did not forgive the debts for altruistic reasons or out of pure generosity." 44 B. T. A. 425, 428.

With this conclusion we cannot agree. We do not feel bound by the finding of the Board because it reached its conclusions, in our opinion, upon an application of erroneous legal standards. Section 22 (b) (3) exempts

gifts. This does not leave the Tax Court of the United States free to determine at will or upon evidence and without judicial review the tests to be applied to facts to determine whether the result is or is not a gift. The fact that the motives leading to the cancellations were those of business or even selfish, if it be true, is not significant. The forgiveness was gratuitous, a release of something to the debtor for nothing, and sufficient to make the cancellation here gifts within the statute.

Affirmed.

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

MR. JUSTICE FRANKFURTER, dissenting:

When Congress wished to exempt income "attributable to the discharge . . . of any indebtedness" it did so explicitly. It defined such exemption with particularity and only to a limited extent, as illustrated by the various enactments, including § 114 of the Revenue Act of 1942, all of which appear to throw light leading away from and not towards the conclusion drawn from them by the Court. In the absence of such specific exemption of what as a practical matter may be income, determination of whether it is or is not income should be left to the tribunal whose special business it is to ascertain the controverted facts and the reasonable inferences from them. In deciding that, in the circumstances of the present case, the debt cancellations were not gifts and therefore taxable, the Board of Tax Appeals (now the Tax Court of the United States) did not invoke wrong legal standards. It knew well enough the difference between taxable income and gifts. It applied these legal concepts to its interpretation of the facts. That its judgment should not be upset is counselled by wise fiscal as well as judicial administration.

MR. JUSTICE JACKSON joins in this dissent.

McNABB ET AL. *v.* UNITED STATES.

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

No. 25. Argued October 22, 1942.—Decided March 1, 1943.

1. The power of this Court upon review of convictions in the federal courts is not limited to the determination of the Constitutional validity of such convictions. P. 340.
2. Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. P. 340.
3. The principles governing the admissibility of evidence in criminal cases in the federal courts are not restricted to those derived solely from the Constitution. P. 341.
4. In the exercise of its authority over the administration of criminal justice in the federal courts, this Court, from its beginning, has formulated applicable rules of evidence; and has been guided therein by considerations of justice not limited to strict canons of evidentiary relevance. P. 341.
5. The circumstances (detailed in the opinion) under which federal officers obtained incriminating statements from the defendants in this case, together with the flagrant disregard of Acts of Congress requiring that accused persons arrested by federal officers be taken before a United States Commissioner or other judicial officer, rendered the evidence thus obtained inadmissible in a criminal prosecution in a federal court, and convictions resting upon such evidence must be set aside. P. 341.
6. Although Congress has not explicitly forbidden the use of evidence so procured, yet to permit such evidence to be made the basis of a conviction in the federal courts would stultify the policy which Congress has enacted into law. P. 345.

123 F. 2d 848, reversed.

CERTIORARI, 316 U. S. 658, to review the affirmance of convictions of second-degree murder for the killing of a federal officer while he was engaged in the performance of his official duties, 18 U. S. C. § 253.

Mr. E. B. Baker, with whom *Messrs. W. H. Norvell, J. M. C. Townsend,* and *Wilkes T. Thrasher* were on the brief, for petitioners.

Assistant Attorney General Berge, with whom *Solicitor General Fahy* and *Messrs. Oscar A. Provost* and *Archibald Cox,* and *Miss Melva M. Graney* were on the brief, for the United States.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

The petitioners are under sentence of imprisonment for forty-five years for the murder of an officer of the Alcohol Tax Unit of the Bureau of Internal Revenue engaged in the performance of his official duties. (18 U. S. C. § 253.) They were convicted of second-degree murder in the District Court for the Eastern District of Tennessee, and on appeal to the Circuit Court of Appeals for the Sixth Circuit the convictions were sustained. 123 F. 2d 848. We brought the case here because the petition for certiorari presented serious questions in the administration of federal criminal justice. 316 U. S. 658. Determination of these questions turns upon the circumstances relating to the admission in evidence of incriminating statements made by the petitioners.

On the afternoon of Wednesday, July 31, 1940, information was received at the Chattanooga office of the Alcoholic Tax Unit that several members of the McNabb family were planning to sell that night whiskey on which federal taxes had not been paid. The McNabbs were a clan of Tennessee mountaineers living about twelve miles from Chattanooga in a section known as the McNabb Settlement. Plans were made to apprehend the McNabbs while actually engaged in their illicit enterprise. That evening four revenue agents, accompanied by the Government's informers, drove to the McNabb Settlement. When they approached the rendezvous arranged between the McNabbs and the informers, the officers got out of the car. The informers drove on and met five of the McNabbs, of whom three—the twin brothers Freeman and Raymond, and their cousin Benjamin—are the petitioners here.

(The two others, Emuil and Barney McNabb, were acquitted at the direction of the trial court.) The group proceeded to a spot near the family cemetery where the liquor was hidden. While cans containing whiskey were being loaded into the car, one of the informers flashed a prearranged signal to the officers who thereupon came running. One of these called out, "All right, boys, federal officers!", and the McNabbs took flight.

Instead of pursuing the McNabbs, the officers began to empty the cans. They heard noises coming from the direction of the cemetery, and after a short while a large rock landed at their feet. An officer named Leeper ran into the cemetery. He looked about with his flashlight but discovered no one. Noticing a couple of whiskey cans there, he began to pour out their contents. Shortly afterwards the other officers heard a shot; running into the cemetery they found Leeper on the ground, fatally wounded. A few minutes later—at about ten o'clock—he died without having identified his assailant. A second shot slightly wounded another officer. A search of the cemetery proved futile, and the officers left.

About three or four hours later—between one and two o'clock Thursday morning—federal officers went to the home of Freeman, Raymond, and Emuil McNabb and there placed them under arrest. Freeman and Raymond were twenty-five years old. Both had lived in the Settlement all their lives; neither had gone beyond the fourth grade in school; neither had ever been farther from his home than Jasper, twenty-one miles away. Emuil was twenty-two years old. He, too, had lived in the Settlement all his life, and had not gone beyond the second grade.

Immediately upon arrest, Freeman, Raymond, and Emuil were taken directly to the Federal Building at Chattanooga. They were not brought before a United States commissioner or a judge. Instead, they were placed in a detention room (where there was nothing they

could sit or lie down on, except the floor), and kept there for about fourteen hours, from three o'clock Thursday morning until five o'clock that afternoon. They were given some sandwiches. They were not permitted to see relatives and friends who attempted to visit them. They had no lawyer. There is no evidence that they requested the assistance of counsel, or that they were told that they were entitled to such assistance.

Barney McNabb, who had been arrested early Thursday morning by the local police, was handed over to the federal authorities about nine or ten o'clock that morning. He was twenty-eight years old; like the other McNabbs he had spent his entire life in the Settlement, had never gone beyond Jasper, and his schooling stopped at the third grade. Barney was placed in a separate room in the Federal Building where he was questioned for a short period. The officers then took him to the scene of the killing, brought him back to the Federal Building, questioned him further for about an hour, and finally removed him to the county jail three blocks away.

In the meantime, direction of the investigation had been assumed by H. B. Taylor, district supervisor of the Alcohol Tax Unit, with headquarters at Louisville, Kentucky. Taylor was the Government's chief witness on the central issue of the admissibility of the statements made by the McNabbs. Arriving in Chattanooga early Thursday morning, he spent the day in study of the case before beginning his interrogation of the prisoners. Freeman, Raymond, and Emuil, who had been taken to the county jail about five o'clock Thursday afternoon, were brought back to the Federal Building early that evening. According to Taylor, his questioning of them began at nine o'clock. Other officers set the hour earlier.[1]

[1] Officer Burke testified that the questioning Thursday night began at 6 P. M., Officer Kitts, at 7 P. M., and Officer Jakes, at "possibly 6 or 7 o'clock."

Throughout the questioning, most of which was done by Taylor, at least six officers were present. At no time during its course was a lawyer or any relative or friend of the defendants present. Taylor began by telling "each of them before they were questioned that we were Government officers, what we were investigating, and advised them that they did not have to make a statement, that they need not fear force, and that any statement made by them would be used against them, and that they need not answer any questions asked unless they desired to do so."

The men were questioned singly and together. As described by one of the officers, "They would be brought in, be questioned possibly at various times, some of them half an hour, or maybe an hour, or maybe two hours." Taylor testified that the questioning continued until one o'clock in the morning, when the defendants were taken back to the county jail.[2]

The questioning was resumed Friday morning, probably sometime between nine and ten o'clock.[3] "They were brought down from the jail several times, how many I don't know. They were questioned one at a time, as we would finish one he would be sent back and we would try to reconcile the facts they told, connect up the statements they made, and then we would get two of them together. I think at one time we probably had all five together trying to reconcile their statements . . . When

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[2] Here again Taylor's testimony is at variance with that of other officers. Officer Kitts estimated that the questioning Thursday night ended at 10 P. M., Officer Burke, at 11 P. M., and Officer Jakes, at midnight. No officer testified that the questioning that night lasted less than three hours.

[3] Taylor testified that the McNabbs were brought back Friday morning "probably about nine or nine-thirty." None of the other officers could recall the exact time. Officer Burke thought "it must have been after nine o'clock," while Officer Jakes guessed that it was "somewhere around ten or eleven o'clock in the morning."

I knew the truth I told the defendants what I knew. I never called them damned liars, but I did say they were lying to me. . . . It would be impossible to tell all the motions I made with my hands during the two days of questioning, however, I didn't threaten anyone. None of the officers were prejudiced towards these defendants nor bitter toward them. We were only trying to find out who killed our fellow officer."

Benjamin McNabb, the third of the petitioners, came to the office of the Alcohol Tax Unit about eight or nine o'clock Friday morning and voluntarily surrendered. Benjamin was twenty years old, had never been arrested before, had lived in the McNabb Settlement all his life, and had not got beyond the fourth grade in school. He told the officers that he had heard that they were looking for him but that he was entirely innocent of any connection with the crime. The officers made him take his clothes off for a few minutes because, so he testified, "they wanted to look at me. This scared me pretty much."[4] He was not taken before a United States Commissioner or a judge. Instead, the officers questioned him for about five or six hours. When finally in the afternoon he was confronted with the statement that the others accused him of having fired both shots, Benjamin said, "If they are going to accuse me of that, I will tell the whole truth; you may get your pencil and paper and write it down." He then confessed that he had fired the first shot, but denied that he had also fired the second.

Because there were "certain discrepancies in their stories, and we were anxious to straighten them out," the

[4] Taylor testified that the reason for having Benjamin remove his clothes was that "I was informed that he had gotten an injury running through the woods or that he had been hit by a stray shot. We didn't know whether or not this was true, and asked him to take his clothes off in order to examine him and find out."

defendants were brought to the Federal Building from the jail between nine and ten o'clock Friday night. They were again questioned, sometimes separately, sometimes together. Taylor testified that "We had Freeman McNabb on the night of the second [Friday] for about three and one-half hours. I don't remember the time but I remember him particularly because he certainly was hard to get anything out of. He would admit he lied before, and then tell it all over again. I knew some of the things about the whole truth and it took about three and one-half hours before he would say it was the truth, and I finally got him to tell a story which he said was true and which certainly fit better with the physical facts and circumstances than any other story he had told. It took me three and one-half hours to get a story that was satisfactory or that I believed was nearer the truth than when we started."

The questioning of the defendants continued until about two o'clock Saturday morning, when the officers finally "got all the discrepancies straightened out." Benjamin did not change his story that he had fired only the first shot. Freeman and Raymond admitted that they were present when the shooting occurred, but denied Benjamin's charge that they had urged him to shoot. Barney and Emuil, who were acquitted at the direction of the trial court, made no incriminating admissions.

Concededly, the admissions made by Freeman, Raymond and Benjamin constituted the crux of the Government's case against them, and the convictions cannot stand if such evidence be excluded. Accordingly, the question for our decision is whether these incriminating statements, made under the circumstances we have summarized,[5] were properly admitted. Relying upon the

[5] To determine the admissibility of the statements secured from the defendants while they were in the custody of the federal officers, the trial court conducted a preliminary examination in the absence of

guarantees of the Fifth Amendment that no person "shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law," the petitioners contend that the Constitution itself forbade the use of this evidence against them. The Government counters by urging that the Constitution proscribes only "involuntary" confessions, and that judged by appropriate criteria of "voluntariness" the petitioners' admissions were voluntary and hence admissible.

It is true, as the petitioners assert, that a conviction in the federal courts, the foundation of which is evidence obtained in disregard of liberties deemed fundamental by the Constitution, cannot stand. *Boyd* v. *United States,* 116 U. S. 616; *Weeks* v. *United States,* 232 U. S. 383; *Gouled* v. *United States,* 255 U. S. 298; *Amos* v. *United States,* 255 U. S. 313; *Agnello* v. *United States,* 269 U. S. 20; *Byars* v. *United States,* 273 U. S. 28; *Grau* v. *United*

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the jury. After hearing the evidence (consisting principally of the testimony of the defendants and the officers), the court concluded that the statements were admissible. An exception to this ruling was taken. When the jury was recalled, the witnesses for the Government repeated their testimony. The defendants rested upon their claim that the trial court erred in admitting these statements, and stood on their constitutional right not to take the witness stand before the jury. At the conclusion of the Government's case the defendants moved to exclude from the consideration of the jury the evidence relating to the admissions made by them. This motion was denied. The motion was renewed at the conclusion of the defendants' case, and again was denied. The court charged the jury that the defendants' admissions should be disregarded if found to have been involuntarily made. The issue of law which was decided by the trial court in admitting the statements made by the petitioners did not become, therefore, a question of fact foreclosed by the jury's general verdict of guilty. Under these circumstances we have treated as facts only the testimony offered on behalf of the Government and so much of the petitioners' evidence as is neither contradicted by nor inconsistent with that of the Government.

States, 287 U. S. 124. And this Court has, on Constitutional grounds, set aside convictions, both in the federal and state courts, which were based upon confessions "secured by protracted and repeated questioning of ignorant and untutored persons, in whose minds the power of officers was greatly magnified," *Lisenba* v. *California,* 314 U. S. 219, 239–40, or "who have been unlawfully held incommunicado without advice of friends or counsel," *Ward* v. *Texas,* 316 U. S. 547, 555, and see *Brown* v. *Mississippi,* 297 U. S. 278; *Chambers* v. *Florida,* 309 U. S. 227; *Canty* v. *Alabama,* 309 U. S. 629; *White* v. *Texas,* 310 U. S. 530; *Lomax* v. *Texas,* 313 U. S. 544; *Vernon* v. *Alabama,* 313 U. S. 547.

In the view we take of the case, however, it becomes unnecessary to reach the Constitutional issue pressed upon us. For, while the power of this Court to undo convictions in state courts is limited to the enforcement of those "fundamental principles of liberty and justice," *Hebert* v. *Louisiana,* 272 U. S. 312, 316, which are secured by the Fourteenth Amendment, the scope of our reviewing power over convictions brought here from the federal courts is not confined to ascertainment of Constitutional validity. Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as "due process of law" and below which we reach what is really trial by force. Moreover, review by this Court of state action expressing its notion of what will best further its own security in the administration of criminal justice demands appropriate respect for the deliberative judgment of a state in so basic an exercise of its jurisdiction. Considerations of large policy in making the necessary accommodations in our federal system are wholly irrele-

vant to the formulation and application of proper standards for the enforcement of the federal criminal law in the federal courts.

The principles governing the admissibility of evidence in federal criminal trials have not been restricted, therefore, to those derived solely from the Constitution. In the exercise of its supervisory authority over the administration of criminal justice in the federal courts, see *Nardone* v. *United States,* 308 U. S. 338, 341–42, this Court has, from the very beginning of its history, formulated rules of evidence to be applied in federal criminal prosecutions. *E. g., Ex parte Bollman & Swartwout,* 4 Cranch 75, 130–31; *United States* v. *Palmer,* 3 Wheat. 610, 643–44; *United States* v. *Furlong,* 5 Wheat. 184, 199; *United States* v. *Gooding,* 12 Wheat. 460, 468–70; *United States* v. *Wood,* 14 Pet. 430; *United States* v. *Murphy,* 16 Pet. 203; *Funk* v. *United States,* 290 U. S. 371; *Wolfle* v. *United States,* 291 U. S. 7; see 1 Wigmore on Evidence (3d ed. 1940) pp. 170–97; Note, 47 Harv. L. Rev. 853.[6] And in formulating such rules of evidence for federal criminal trials the Court has been guided by considerations of justice not limited to the strict canons of evidentiary relevance.

Quite apart from the Constitution, therefore, we are constrained to hold that the evidence elicited from the petitioners in the circumstances disclosed here must be excluded. For in their treatment of the petitioners the arresting officers assumed functions which Congress has

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[6] The function of formulating rules of evidence in areas not governed by statute has always been one of the chief concerns of courts: "The rules of evidence on which we practise today have mostly grown up at the hands of the judges; and, except as they may be really something more than rules of evidence, they may, in the main, properly enough be left to them to be modified and reshaped." J. B. Thayer, A Preliminary Treatise on Evidence at the Common Law (1898) pp. 530–31.

explicitly denied them. They subjected the accused to the pressures of a procedure which is wholly incompatible with the vital but very restricted duties of the investigating and arresting officers of the Government and which tends to undermine the integrity of the criminal proceeding. Congress has explicitly commanded that "It shall be the duty of the marshal, his deputy, or other officer, who may arrest a person charged with any crime or offense, to take the defendant before the nearest United States commissioner or the nearest judicial officer having jurisdiction under existing laws for a hearing, commitment, or taking bail for trial . . ." 18 U. S. C. § 595. Similarly, the Act of June 18, 1934, c. 595, 48 Stat. 1008, 5 U. S. C. § 300a, authorizing officers of the Federal Bureau of Investigation to make arrests, requires that "the person arrested shall be immediately taken before a committing officer." Compare also the Act of March 1, 1879, c. 125, 20 Stat. 327, 341, 18 U. S. C. § 593, which provides that when arrests are made of persons in the act of operating an illicit distillery, the arrested persons shall be taken forthwith before some judicial officer residing in the county where the arrests were made, or if none, in the county nearest to the place of arrest. Similar legislation, requiring that arrested persons be promptly taken before a committing authority, appears on the statute books of nearly all the states.[7]

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[7] Alabama—Code, 1940, Tit. 15, § 160; Arizona—Code, 1939, §§ 44–107, 44–140, 44–141; Arkansas—Digest of Statutes, 1937, §§ 3729, 3731; California—Penal Code, 1941, §§ 821–29, 847–49; Colorado—Statutes, 1935, c. 48, § 428; Connecticut—Gen. Stats., 1930, § 239; Delaware—Rev. Code, 1935, §§ 4456, 5173; District of Columbia—Code, 1940, §§ 4–140, 23–301; Florida—Statutes, 1941, §§ 901.06, 901.23; Georgia—Code, 1933, §§ 27–210, 27–212; Idaho—Code, 1932, §§ 19–515, 19–518, 19–614, 19–615; Illinois—Rev. Stats., 1941, c. 38, §§ 655, 660; Indiana—Baldwin's Stats. Ann., 1934, § 11484; Iowa—Code, 1939, §§ 13478, 13481, 13486, 13488; Kansas—Gen. Stats.,

The purpose of this impressively pervasive requirement of criminal procedure is plain. A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process. Zeal in tracking down crime is not in itself an assurance of soberness of judgment. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience has therefore counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic. The awful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication. Legisla-

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1935, § 62–610; Kentucky—Code, 1938, §§ 45–46; Louisiana—Code of Criminal Procedure, 1932, §§ 66, 79, 80; Maine—Rev. Stats., 1930, c. 145, § 9; Massachusetts—Gen. Laws, 1932, c. 276, §§ 22, 29, 34; Michigan—Stats. Ann., 1938, §§ 28.863, 28.872, 28.873, 28.885; Minnesota—Mason's Stats., 1927, c. 104, §§ 10575, 10581; Mississippi—Code, 1930, c. 21, § 1230; Missouri—Rev. Stats., 1939, §§ 3862, 3883; Montana—Rev. Code, 1935, §§ 11731, 11739–40; Nebraska—Comp. Stats., 1929, § 29–412; Nevada—Comp. Laws, 1929, §§ 10744–48, 10762–64; New Hampshire—Pub. Laws, 1926, c. 364, § 13; New Jersey—Rev. Stats., 1937, § 2:216–9; New York—Code of Criminal Procedure, 1939, §§ 158–59, 165, 185; North Carolina—Code, 1939, §§ 4528, 4548; North Dakota—Comp. Laws, 1913, §§ 10543, 10548, 10576, 10578; Ohio—Throckmorton's Code, 1940, §§ 13432–3, 13432–4; Oklahoma—Statutes, 1941, Tit. 22, §§ 176–77, 181, 205; Oregon—Code, 1930, §§ 13–2117, 13–2201; Pennsylvania—Purdon's Stats. Ann., Perm. ed., Tit. 19, §§ 3, 4; Rhode Island—Gen. Laws 1938, c. 625, § 68; South Carolina—Code, 1942, §§ 907, 920; South Dakota—Code, 1939, §§ 34.1608, 34.1619–24; Tennessee—Michie's Code, 1938, §§ 11515, 11544; Texas—Code of Criminal Procedure, 1936, Arts. 233–35; Utah—Rev. Stats., 1933, §§ 105–4–4, 105–4–5, 103–26–51; Virginia—Code, 1942, §§ 4826, 4827a; Washington—Rev. Stats., 1932, § 1949; West Virginia—Code, 1937, § 6150; Wisconsin—Statutes, 1941, § 361.08; Wyoming—Rev. Stats., 1931, §§ 33–108, 33–110, 33–115.

tion such as this, requiring that the police must with reasonable promptness show legal cause for detaining arrested persons, constitutes an important safeguard—not only in assuring protection for the innocent but also in securing conviction of the guilty by methods that commend themselves to a progressive and self-confident society. For this procedural requirement checks resort to those reprehensible practices known as the "third degree" which, though universally rejected as indefensible, still find their way into use. It aims to avoid all the evil implications of secret interrogation of persons accused of crime. It reflects not a sentimental but a sturdy view of law enforcement. It outlaws easy but self-defeating ways in which brutality is substituted for brains as an instrument of crime detection.[8] A statute carrying such purposes is expressive of a general legislative policy to which courts should not be heedless when appropriate situations call for its application.

The circumstances in which the statements admitted in evidence against the petitioners were secured reveal a plain disregard of the duty enjoined by Congress upon federal law officers. Freeman and Raymond McNabb were arrested in the middle of the night at their home. Instead of being brought before a United States commissioner or a judicial officer, as the law requires, in order to determine the sufficiency of the justification for their de-

[8] "During the discussions which took place on the Indian Code of Criminal Procedure in 1872 some observations were made on the reasons which occasionally lead native police officers to apply torture to prisoners. An experienced civil officer observed, 'There is a great deal of laziness in it. It is far pleasanter to sit comfortably in the shade rubbing red pepper into a poor devil's eyes than to go about in the sun hunting up evidence.' This was a new view to me, but I have no doubt of its truth." Sir James Fitzjames Stephen, A History of the Criminal Law of England (1883), vol. 1, p. 442 note. Compare §§ 25 and 26 of the Indian Evidence Act (1872).

tention, they were put in a barren cell and kept there for fourteen hours. For two days they were subjected to unremitting questioning by numerous officers. Benjamin's confession was secured by detaining him unlawfully and questioning him continuously for five or six hours. The McNabbs had to submit to all this without the aid of friends or the benefit of counsel. The record leaves no room for doubt that the questioning of the petitioners took place while they were in the custody of the arresting officers and before any order of commitment was made. Plainly, a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of law. Congress has not explicitly forbidden the use of evidence so procured. But to permit such evidence to be made the basis of a conviction in the federal courts would stultify the policy which Congress has enacted into law.

Unlike England, where the Judges of the King's Bench have prescribed rules for the interrogation of prisoners while in the custody of police officers,[9] we have no specific

[9] In 1912 the Judges of the King's Bench, at the request of the Home Secretary, issued rules for the guidance of police officers. See *Rex* v. *Voisin*, L. R. [1918] 1 K. B. 531, 539. These rules were amended in 1918, and in 1930 a circular was issued by the Home Office, with the approval of the Judges, in order to clear up difficulties in their construction. 6 Police Journal (1933) 352–56, containing the texts of the Judge's Rules and the Circular. See Report of the Royal Commission on Police Powers and Procedure (1929) Cmd. 3297. Although the Rules do not have the force of law, *Rex* v. *Voisin*, *supra*, the English courts insist that they be strictly observed before admitting statements made by accused persons while in the custody of the police. See 1 Taylor on Evidence (12th ed. 1931), pp. 556–62; "Questioning an Accused Person," 92 Justice of the Peace and Local Government Review 743, 758 (1928); Keedy, Preliminary Examination of Accused Persons in England, 73 Proceedings of American Philosophical Society

provisions of law governing federal law enforcement officers in procuring evidence from persons held in custody. But the absence of specific restraints going beyond the legislation to which we have referred does not imply that the circumstances under which evidence was secured are irrelevant in ascertaining its admissibility. The mere fact that a confession was made while in the custody of the police does not render it inadmissible. Compare *Hopt* v. *Utah,* 110 U. S. 574; *Sparf* v. *United States,* 156 U. S. 51, 55; *United States ex rel. Bilokumsky* v. *Tod,* 263 U. S. 149, 157; *Wan* v. *United States,* 266 U. S. 1, 14. But where in the course of a criminal trial in the federal courts it appears that evidence has been obtained in such violation of legal rights as this case discloses, it is the duty of the trial court to entertain a motion for the exclusion of such evidence and to hold a hearing, as was done here, to determine whether such motion should be granted or denied. Cf. *Gouled* v. *United States,* 255 U. S. 298, 312–13; *Amos* v. *United States,* 255 U. S. 313; *Nardone* v. *United States,* 308 U. S. 338, 341–42. The interruption of the trial for this purpose should be no longer than is required for a competent determination of the substantiality of the motion. As was observed in the *Nardone* case, *supra,* "The civilized conduct of criminal trials cannot be confined within mechanical rules. It necessarily demands the authority of limited direction entrusted to the judge presiding in federal trials, including a well-established range of judicial discretion, subject to appropriate review on appeal, in ruling upon preliminary questions of fact. Such a system as ours must, within the

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103 (1934). For a dramatic illustration of the English attitude towards interrogation of arrested persons by the police, see Inquiry in Regard to the Interrogation by the Police of Miss Savidge (1928), Cmd. 3147.

limits here indicated, rely on the learning, good sense, fairness and courage of federal trial judges." 308 U. S. at 342.

In holding that the petitioners' admissions were improperly received in evidence against them, and that having been based on this evidence their convictions cannot stand, we confine ourselves to our limited function as the court of ultimate review of the standards formulated and applied by federal courts in the trial of criminal cases. We are not concerned with law enforcement practices except in so far as courts themselves become instruments of law enforcement. We hold only that a decent regard for the duty of courts as agencies of justice and custodians of liberty forbids that men should be convicted upon evidence secured under the circumstances revealed here. In so doing, we respect the policy which underlies Congressional legislation. The history of liberty has largely been the history of observance of procedural safeguards. And the effective administration of criminal justice hardly requires disregard of fair procedures imposed by law.

Reversed.

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

MR. JUSTICE REED, dissenting:

I find myself unable to agree with the opinion of the Court in this case. An officer of the United States was killed while in the performance of his duties. From the circumstances detailed in the Court's opinion, there was obvious reason to suspect that the petitioners here were implicated in firing the fatal shot from the dark. The arrests followed. As the guilty parties were known only to the McNabbs who took part in the assault at the bury-

ing ground, it was natural and proper that the officers would question them as to their actions.[1]

The cases just cited show that statements made while under interrogation may be used at a trial if it may fairly be said that the information was given voluntarily. A frank and free confession of crime by the culprit affords testimony of the highest credibility and of a character which may be verified easily. Equally frank responses to officers by innocent people arrested under misapprehension give the best basis for prompt discharge from custody. The realization of the convincing quality of a confession tempts officials to press suspects unduly for such statements. To guard accused persons against the danger of being forced to confess, the law admits confessions of guilt only when they are voluntarily made. While the connotation of voluntary is indefinite, it affords an understandable label under which can be readily classified the various acts of terrorism, promises, trickery and threats which have led this and other courts to refuse admission as evidence to confessions.[2] The cases cited in the Court's opinion show the broad coverage of this rule of law. Through it those coerced into confession have found a ready defense from injustice.

Were the Court today saying merely that in its judgment the confessions of the McNabbs were not voluntary, there would be no occasion for this single protest. A notation of dissent would suffice. The opinion, however, does more. Involuntary confessions are not constitu-

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[1] *Hopt* v. *Utah*, 110 U. S. 574, 584; *Sparf and Hansen* v. *United States*, 156 U. S. 51, 55; *Pierce* v. *United States*, 160 U. S. 355; *Wilson* v. *United States*, 162 U. S. 613, 623; cf. *Bilokumsky* v. *Tod*, 263 U. S. 149, 157.

[2] "In short, the true test of admissibility is that the confession is made freely, voluntarily and without compulsion or inducement of any sort." *Wilson* v. *United States*, 162 U. S. 613, 623; *Lisenba* v. *California*, 314 U. S. 219, 239.

tionally admissible because violative of the provision of self-incrimination in the Bill of Rights. Now the Court leaves undecided whether the present confessions are voluntary or involuntary and declares that the confessions must be excluded because in addition to questioning the petitioners, the arresting officers failed promptly to take them before a committing magistrate. The Court finds a basis for the declaration of this new rule of evidence in its supervisory authority over the administration of criminal justice. I question whether this offers to the trial courts and the peace officers a rule of admissibility as clear as the test of the voluntary character of the confession. I am opposed to broadening the possibilities of defendants escaping punishment by these more rigorous technical requirements in the administration of justice. If these confessions are otherwise voluntary, civilized standards, in my opinion, are not advanced by setting aside these judgments because of acts of omission which are not shown to have tended toward coercing the admissions.

Our police officers occasionally overstep legal bounds. This record does not show when the petitioners were taken before a committing magistrate. No point was made of the failure to commit by defendant or counsel. No opportunity was given to the officers to explain. Objection to the introduction of the confessions was made only on the ground that they were obtained through coercion. This was determined against the accused both by the court, when it appraised the fact as to the voluntary character of the confessions preliminarily to determining the legal question of their admissibility, and by the jury. The court saw and heard witnesses for the prosecution and the defense. The defendants did not take the stand before the jury. The uncontradicted evidence does not require a different conclusion. The officers of the Alcohol Tax Unit should not be disciplined by overturning this conviction.

ANDERSON ET AL. *v.* UNITED STATES.

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

No. 10. Argued October 21, 22, 1942.—Decided March 1, 1943.

1. The circumstances (detailed in the opinion) under which confessions were obtained from defendants in this case rendered the confessions inadmissible in evidence in a criminal prosecution in the federal court, and convictions resting upon such evidence must be set aside. *McNabb* v. *United States, ante,* p. 332. P. 355.
2. The detention of the defendants by state officers in this case was in violation of a statute of Tennessee which provides that "No person can be committed to prison for any criminal matter, until examination thereof be first had before some magistrate." P. 355.
3. That federal officers themselves were not formally guilty of illegal conduct in this case does not make admissible the evidence which they secured improperly through collaboration with state officers. P. 356.
4. The admission in evidence of the confessions of certain of the defendants in this case *held* to have vitiated the convictions of all, since the jury, in ascertaining the guilt or innocence of each, was warranted, by the trial court's charge, in considering the whole proof made at the trial. P. 356.

124 F. 2d 58, reversed.

CERTIORARI, 316 U. S. 651, to review the affirmance of convictions of conspiracy to damage property of a corporation in which the United States was a stockholder.

Mr. Daniel William Leider argued the cause, and *Messrs. Lee Pressman* and *Nathan Witt* were on the brief, for petitioners.

Assistant Attorney General Berge, with whom *Solicitor General Fahy* and *Messrs. Oscar A. Provost, Archibald Cox,* and *Andrew F. Oehmann* were on the brief, for the United States.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

The petitioners were convicted, in the District Court for the Eastern District of Tennessee, of conspiring to damage property owned by the Tennessee Valley Authority, a corporation in which the United States is a stockholder, in violation of §§ 35 (C) and 37 of the Criminal Code as amended (18 U. S. C. §§ 82, 88). The Circuit Court of Appeals for the Sixth Circuit affirmed the convictions, 124 F. 2d 58, and we brought the case here because it presented serious questions in the administration of federal criminal justice, 316 U. S. 651. The questions are similar to those decided in *McNabb* v. *United States*, *ante*, p. 332. The two cases were argued at the same time and, as will appear from a short summary of a long record, are governed by the same considerations.[1]

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[1] As in the *McNabb* case, there are no specific findings here as to the circumstances in which the incriminating statements in controversy were admitted against the petitioners. When these statements (excepting the confessions of three petitioners) were offered in evidence, the petitioners objected, and the trial court held a hearing in the absence of the jury to determine whether the statements were "voluntary." At the conclusion of this preliminary examination, the court overruled objections to the admissibility of these statements. The jury was recalled and the same testimony was repeated. The evidence relating to the confessions of three of the petitioners was, by stipulation, heard only once and in the presence of the jury. Referring to all this evidence as "certain parts of the proof," the judge thus charged the jury regarding the admission of these incriminating statements: "There has been allowed for your consideration certain statements, confessions, or admissions alleged to have been made by some of the defendants. It is primarily for the Court to determine whether or not such statements are admissible for your consideration but it is wholly for you to determine how much weight or credit you will give to these statements." We shall assume as facts, therefore, only the testimony of Government witnesses and so much of the petitioners' evidence as is uncontradicted.

In July 1939, the International Union of Mine, Mill and Smelter Workers struck against the Tennessee Copper Company's mines at Copperhill, Polk County, Tennessee. The strike was followed by a shut-down, but the mines were reopened in August after the sheriff brought in a number of special deputies who were in the company's pay. It was one of those obdurate mining strikes, and it continued into April of 1940, when the violence which gave rise to this prosecution occurred. On April 1st the company's operations were interrupted by the dynamiting of two power lines, owned by the TVA, from which the company obtained the power necessary for its activities. On April 14th two steel towers were dynamited. Two days later two special agents of the Federal Bureau of Investigation arrived in Copperhill to investigate the explosions. On April 24th two more power lines were blown down.

Thereupon, on the same day, the sheriff on his own initiative began to take into custody strikers, including the eight petitioners, whom he suspected of participation in the dynamiting. These arrests were made without warrant. With commendable candor in regard to this and other misconduct of officers of the law, the Government does not defend the legality of the arrests.[2] The men were not taken before any magistrate or other committing officer, as required by Tennessee law. Michie's Code (1938) § 11515. Instead they were taken to the company-owned Y. M. C. A. building in Copperhill, which was being used by the sheriff and his special deputies as their headquarters. On April 24th and 25th six more special agents of the Federal Bureau of Investigation arrived in Copperhill to assist in the investigation.

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[2] Under Tennessee law an officer may arrest without a warrant when a felony has in fact been committed, and he has reasonable grounds for believing that the person arrested has committed it. Michie's Code (1938) § 11536. But willful destruction of power lines is only a misdemeanor under state law. *Id.*, § 10863 (8).

While the petitioners, with at least thirteen others, were thus held in custody at the Y. M. C. A. by the state officers, they were questioned by the federal agents intermittently over a period of six days during which they saw neither friends, relatives, nor counsel. Incriminating statements from six of the petitioners were the fruit of this interrogation. To determine whether these statements were properly admitted in evidence, it is necessary to particularize the circumstances under which each confession was made.

Simonds. Simonds was arrested by two deputies on the afternoon of Wednesday, April 24th, and taken directly to the Y. M. C. A. After spending the night at the county jail, he was questioned by one of the federal agents for about an hour Thursday morning at the Y. M. C. A. The questioning was resumed at two o'clock in the afternoon by three agents who talked with him for about two hours; at seven o'clock that evening he was again questioned by two agents for another two hours. On Friday morning he was questioned for about an hour. And on Saturday he was questioned at three different periods throughout the afternoon and evening, each period lasting about half an hour. He was again questioned on Sunday afternoon for about an hour by two agents, one of whom described what occurred then as follows: "We went over the entire case with him, and pointed out the discrepancies in his story and the information we had developed on investigation, which knocked down his alibi, and out of a clear sky he said 'well, I want to tell you I am guilty.' " One of the agents thereupon took Simonds' written statement.

Hubbard. Hubbard was arrested by two deputies on Wednesday evening, April 24th, and taken to the Y. M. C. A. He, too, spent the night in the county jail. He was questioned by four agents at the Y. M. C. A. on Thursday afternoon for about two hours. Two of the

agents questioned him again that evening for about two hours. At two o'clock Friday afternoon he was questioned for about forty-five minutes; at five o'clock he was questioned for another hour and a half. At seven-thirty Friday evening two agents questioned him for two more hours. He was questioned intermittently all day Saturday. One agent questioned him for periods of fifteen minutes two or three times during the morning and afternoon. Another questioned him for half an hour in the morning. A third agent talked with him for another two hours sometime during the day. And he was questioned again for about twenty minutes at six o'clock in the evening. He was not questioned on Sunday, but he was present during the questioning of Simonds by the federal officers that morning. After hearing Simonds admit his guilt, Hubbard also confessed.

Woodward. Woodward was also arrested on Wednesday afternoon, April 24th, by two deputies who took him first to the Y. M. C. A. and then to the county jail. He was questioned by four federal officers for about two hours Thursday afternoon, and questioned again for another two hours that night. The officers questioned him for about fifteen minutes on Saturday. On Sunday he was brought into the room where Simonds and Hubbard were, and upon being confronted with their confessions, also confessed. On Monday the officers spent about five hours, from 11 a. m. until 2 p. m. and from about 3:30 until 7 or 7:30 p. m., questioning him in order to reduce his confession to writing. The manner of Woodward in giving his statement was thus described by the agent who questioned him: "He had considerable difficulty in recalling the details, he said his mind was not exactly clear on all of it, it took a good while in order to get the details of it, of how it happened, everything in the chronological order of events, and he also complained on occasions that his mind was befuddled in making the statement, upon

relating about what he had done, and that is the reason it took so long to do it. It took the morning and the greater part of the afternoon."

Rhodes. Rhodes was arrested Sunday night, April 28th, and spent that night in the jail, sharing a cell with Woodward, Hubbard, Simonds, and Queen. He was questioned for about two hours by two agents on Monday morning, and then confessed.

Queen. Queen was arrested by two deputies on Sunday afternoon, April 28th, and was taken to the Y. M. C. A. After spending the night in jail, he was questioned for about an hour the following night by three agents. Upon being confronted with the confessions of the others, he admitted his guilt.

Ballew. Ballew was arrested by three deputies on Tuesday afternoon, April 30th, and taken to the Y. M. C. A. He was questioned there for about an hour by two federal officers. After spending the night in jail, he confessed the following morning.

The question for decision is whether these confessions—repudiated when those who made them took the witness stand at the trial—were properly admitted in evidence against all the petitioners, including Anderson and Ellis who did not confess. In the *McNabb* case we have held, *ante,* p. 332, that incriminating statements obtained under the circumstances set forth in that opinion cannot be made the basis of convictions in the federal courts. The considerations which led to that decision also govern this case. The detention of the petitioners by state officers was, as the Government concedes, in violation of the Tennessee statute which provides that "No person can be committed to prison for any criminal matter, until examination thereof be first had before some magistrate." Michie's Code (1938) § 11515. The courts of Tennessee exact scrupulous observance of this prohibition by its law officers. See *Polk* v. *State,* 170 Tenn. 270, 94 S. W. 2d 394; *State*

ex rel. Morris v. *National Surety Co.*, 162 Tenn. 547, 39 S. W. 2d 581.

Unaided by relatives, friends, or counsel, the men were unlawfully held, some for days, and subjected to long questioning in the hostile atmosphere of a small company-dominated mining town. The men were not arrested by the federal officers until April 30th, and only then were they arraigned before a United States commissioner, except for Ballew who was not arraigned until May 2nd or 3rd. There was a working arrangement between the federal officers and the sheriff of Polk County which made possible the abuses revealed by this record. Therefore, the fact that the federal officers themselves were not formally guilty of illegal conduct does not affect the admissibility of the evidence which they secured improperly through collaboration with state officers. *Gambino* v. *United States*, 275 U. S. 310, 314; *Byars* v. *United States*, 273 U. S. 28, 33–34.

The Government urges that, even if the confessions are held to be inadmissible, only the convictions of the six petitioners who confessed should be reversed. The prosecution rested principally on these confessions and the testimony of an informant, Freed Long, whose credibility was under severe attack. The incriminating statement of each petitioner implicated all the others, including those who did not confess. To be sure, the trial court devised a procedure under which the confessions were introduced without mention of the names of the other persons implicated. But their names were in fact revealed in the course of the cross-examination of the confessing petitioners. So also, while the trial judge appeared to admit the confessions "only to be used against the persons who made them," his charge bound the jury to no such restricted use of the confessions. On the contrary, from what the trial judge told them the jury had every right to assume that in ascertaining the guilt or

innocence of each defendant they could consider the whole proof made at the trial. There is no reason to believe, therefore, that confessions which came before the jury as an organic tissue of proof can be severed and given distributive significance by holding that they had a major share in the conviction of some of the petitioners and none at all as to the others. Since it was error to admit these confessions, we see no escape from the conclusion that the convictions of all the petitioners must be set aside.

Reversed.

MR. JUSTICE JACKSON and MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this case.

MR. JUSTICE REED dissents.

MARICOPA COUNTY ET AL. *v.* VALLEY NATIONAL BANK OF PHOENIX.

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

No. 449. Argued February 2, 1943.—Decided March 1, 1943.

1. Under the Constitution, Congress has exclusive authority to determine whether and to what extent its instrumentalities, such as the Reconstruction Finance Corporation, shall be immune from state taxation. P. 361.
2. The Act of March 20, 1936, provided that shares of preferred stock of national banks "heretofore or hereafter acquired by" the Reconstruction Finance Corporation "shall not, so long as Reconstruction Finance Corporation shall continue to own the same, be subject to any taxation . . . by any State, county, municipality, or local taxing authority, whether now, heretofore, or hereafter imposed, levied, or assessed, and whether for a past, present, or future taxing period." *Held:*

   (1) In withdrawing *pro tanto* the consent which by R. S. § 5219 it had previously given to state taxation of shares of stock of national banks, Congress did not invade powers reserved to the States by the Tenth Amendment. P. 361.

(2) As applied to taxes in respect of which liens had attached prior to its passage, the Act operates as a withdrawal of the consent of the United States to be sued. P. 362.

A proceeding against property in which the United States has an interest is a suit against the United States.

(3) The prior grant of the privilege to tax the shares was analogous to a gratuity or bounty, and the withdrawal of the privilege invaded no rights protected by the Fifth Amendment. P. 362.

130 F. 2d 356, affirmed.

CERTIORARI, 317 U. S. 618, to review the affirmance of judgments granting injunctions in two suits to enjoin the collection of state and local taxes.

Messrs. Gerald Jones and *Leslie C. Hardy,* with whom *Messrs. Joe Conway,* Attorney General of Arizona, *Harold R. Scoville, Richard F. Harless* and *J. Mercer Johnson* were on the brief, for petitioners.

Mr. J. L. Gust, with whom *Messrs. Charles L. Rawlins* and *William C. Fitts* were on the brief, for respondent.

Solicitor General Fahy, Assistant Attorney General Clark, and *Messrs. Sewall Key, J. Louis Monarch, John D. Goodloe, Hans A. Klagsbrunn,* and *Max Hersh* filed a brief on behalf of the United States, as *amicus curiae,* urging affirmance.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioners are counties of the state of Arizona and certain county officers. Respondent is a national banking association incorporated under the laws of the United States and having its principal banking house at Phoenix, Maricopa County, Arizona. It sued petitioners [1] to restrain the collection of certain state, county, school dis-

[1] For an earlier phase of this litigation see *Ex parte Bransford,* 310 U. S. 354.

trict and municipal taxes for the years 1935 and 1936 and invoked the jurisdiction of the United States District Court for the District of Arizona under § 24 (1) (a) of the Judicial Code, 28 U. S. C. § 41 (1) (a).

Respondent has two classes of shares of capital stock outstanding—common and preferred. Prior to March 9, 1933, national banks were not authorized to issue preferred shares. On that day they were given such authority and the Reconstruction Finance Corporation was authorized to subscribe for such shares. Act of March 9, 1933, 48 Stat. 1, Title III, as amended by § 2 of the Act of March 24, 1933, 48 Stat. 20, 12 U. S. C. § 51a, § 51d. On February 11, 1935, respondent issued to the Reconstruction Finance Corporation some 198,400 shares of its preferred stock with a par value of $1,240,000. By § 5219 of the Revised Statutes, 12 U. S. C. § 548, Congress consented on certain conditions to state taxation of shares of stock of national banking associations. Arizona taxes shares of stock of banking corporations. The tax is paid in the first instance by the bank which is entitled to reimbursement from the shareholder on whom the tax liability ultimately rests. Ariz. Code (1939) § 73–204, § 73–205. The Arizona statutes also provide that a lien for all taxes levied shall attach as of the first Monday in January of each year on the property assessed. § 73–506. Assessments of personal property are made by the county assessor between the first Monday in January and the first day in May of each year. § 73–402. State and local taxes levied on the basis of this assessment are collected by the county treasurer as *ex officio* tax collector. § 73–605, § 73–702. Petitioners' assessments for 1935 included respondent's preferred shares owned and held by the Reconstruction Finance Corporation. On the basis of those assessments, taxes were levied in 1935 against respondent which thereupon filed its bill of complaint in the federal District Court. While the cause was pend-

ing this Court decided *Baltimore National Bank* v. *State Tax Comm'n,* 297 U. S. 209, which held that preferred shares of a national bank held by the Reconstruction Finance Corporation were subject to state taxation by reason of the consent given by Congress in § 5219 of the Revised Statutes. That decision was rendered on February 3, 1936. On March 20, 1936, Congress enacted a statute providing that shares of preferred stock of national banks "heretofore or hereafter acquired by" the Reconstruction Finance Corporation "shall not, so long as Reconstruction Finance Corporation shall continue to own the same, be subject to any taxation by the United States, by any Territory, dependency, or possession thereof, or the District of Columbia, or by any State, county, municipality, or local taxing authority, whether now, heretofore, or hereafter imposed, levied, or assessed, and whether for a past, present, or future taxing period." 49 Stat. 1185, 12 U. S. C. § 51d. On the authority of that Act, the District Court, after finding that respondent's remedy at law was inadequate, issued a permanent injunction against the collection by petitioners of that portion of the 1935 taxes levied on respondent's preferred stock owned by the Reconstruction Finance Corporation. A permanent injunction was also issued in a like cause of action based on taxes for the year 1936 which were levied after March 20, 1936. The judgments in the two suits were affirmed by the Circuit Court of Appeals. 130 F. 2d 356. The case is here on a petition for writ of certiorari which we granted because of the public importance of the questions raised. Pursuant to the Act of August 24, 1937, 50 Stat. 751, 28 U. S. C. § 401, the case was certified to the Attorney General as involving the constitutionality of the Act of March 20, 1936. In response to that certification the United States submitted a brief as *amicus curiae.*

Petitioners contend that the Act of March 20, 1936, violates the Fifth and the Tenth Amendments. They further argue that the word "person" as used in the Fifth Amendment includes counties and states; and that they may raise the Tenth Amendment issue since they are asserting the authority of the state of Arizona in assessing and in attempting to collect the taxes in question. We need not decide the last two questions. For even if we assume, *arguendo,* that petitioners are right in those contentions, we are of the view that the judgment below must be affirmed.

Little need be said in answer to the argument that the Act violates the Tenth Amendment. The authority by which the taxes in question were levied did not stem from the powers "reserved to the States" under the Tenth Amendment. It was conferred by Congress which has under the Constitution exclusive authority to determine whether and to what extent its instrumentalities, such as the Reconstruction Finance Corporation, shall be immune from state taxation. *Smith* v. *Kansas City Title & Trust Co.,* 255 U. S. 180, 211–213; *Federal Land Bank* v. *Crosland,* 261 U. S. 374; *Pittman* v. *Home Owners' Loan Corp.,* 308 U. S. 21, 33; *Federal Land Bank* v. *Bismarck Lumber Co.,* 314 U. S. 95. Hence when Congress withdrew the privilege which it had previously granted, it was not curtailing any political power which the Constitution had reserved to Arizona. See *Owensboro National Bank* v. *Owensboro,* 173 U. S. 664; *Des Moines National Bank* v. *Fairweather,* 263 U. S. 103, 106, and cases cited.

The argument that the Act of March 20, 1936, violates the Fifth Amendment is based on its retrospective feature. Petitioners contend that since the liens of the taxes were impressed before the effective date of the Act, they were property rights which Congress could not destroy. We need not consider the case where prior to the withdrawal

of the privilege the tax had been collected or the tax lien foreclosed and the property reduced to the possession of the taxing authority. In the instant case the state taxing authorities are asserting rights which if recognized can be enforced by the maintenance of a suit to establish and foreclose a lien on property of a federal instrumentality, the Reconstruction Finance Corporation. Cf. *New York* v. *Maclay,* 288 U. S. 290. But even a "proceeding against property in which the United States has an interest is a suit against the United States." *United States* v. *Alabama,* 313 U. S. 274, 282. No such suit may be maintained without the consent of the United States. Such consent, though previously granted, has now been withdrawn. And the power to withdraw the privilege of suing the United States or its instrumentalities knows no limitations. *Lynch* v. *United States,* 292 U. S. 571, 581–582, and cases cited. Nor did the prior grant of the privilege to tax the shares rise to a higher level than a gratuity or bounty. Nothing was given in exchange. Cf. *Christ Church* v. *Philadelphia Co.,* 24 How. 300, 302. When Congress authorized the states to impose such taxation, it did no more than gratuitously grant them political power which they theretofore lacked. Its sovereign power to revoke the grant remained unimpaired, the grant of the privilege being only a declaration of legislative policy changeable at will. Cf. *Dodge* v. *Board of Education,* 302 U. S. 74. Hence, as in the case of the recall of other gratuities (*Frisbie* v. *United States,* 157 U. S. 160, 166; *Cummings* v. *Deutsche Bank,* 300 U. S. 115, 122–124), the withdrawal of this privilege invaded no rights protected by the Fifth Amendment.

Affirmed.

Mr. Justice Rutledge did not participate in the consideration or decision of this case.

CLEARFIELD TRUST CO. ET AL. *v.* UNITED STATES.

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

No. 490. Argued February 5, 1943.—Decided March 1, 1943.

1. When the United States disburses its funds or pays its debts, it is exercising a constitutional function or power; and its rights and duties on commercial paper so issued are governed by federal rather than local law. *United States* v. *Guaranty Trust Co.*, 293 U. S. 340, distinguished. P. 366.
2. In the absence of an applicable Act of Congress, it is for the federal courts to fashion the governing rule of federal law according to their own standards. P. 367.
3. Reasons which at times may make state law an appropriate federal rule are singularly inappropriate in determining the rights and duties of the United States on commercial paper which it issues, since the desirability of a uniform rule in such cases is plain. P. 367.
4. Although the federal law merchant, developed under *Swift* v. *Tyson*, represented general commercial law rather than a choice of a federal rule designed to protect a federal right, it nevertheless stands as a convenient source of reference for fashioning federal rules applicable to such federal questions as are here involved. P. 367.
5. The right of a drawee to recover from one who presents for payment a check upon which the endorsement of the payee was forged accrues when the payment is made. P. 368.
6. The drawee, whether it be the United States or another, is not chargeable with the knowledge of the signature of the payee. P. 369.
7. If it is shown that the drawee on learning of the forgery did not give prompt notice of it and that damage resulted, recovery by the drawee is barred. P. 369.

   That the drawee is the United States and the laches that of its employees is immaterial.
8. The United States is not excepted from the general rules governing the rights and duties of drawees by the vastness of its dealings or by the fact that it must act through agents. P. 369.

9. To bar recovery by a drawee, the damage alleged to have been occasioned by delay in giving notice of a forgery must be established and not left to conjecture. P. 369.

10. In this case, the showing as to damage resulting from delay of the United States in giving notice of a forgery, *held* not sufficient to bar recovery. P. 370.

It appeared that the presenting bank could still recover from its endorser; and the only showing on the part of the latter was that if a check cashed for a customer is returned unpaid or for reclamation a short time after the date on which it is cashed, the employees can often locate the person who cashed it.

130 F. 2d 93, affirmed.

CERTIORARI, 317 U. S. 619, to review the reversal of a judgment against the United States in an action brought by it to recover an amount paid on a forged Government check.

Mr. Roswell Dean Pine, Jr., submitted for petitioners.

Mr. Paul A. Freund, with whom *Solicitor General Fahy*, *Assistant Attorney General Shea*, and *Mr. Paul A. Sweeney* were on the brief, for the United States.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

On April 28, 1936, a check was drawn on the Treasurer of the United States through the Federal Reserve Bank of Philadelphia to the order of Clair A. Barner in the amount of $24.20. It was dated at Harrisburg, Pennsylvania, and was drawn for services rendered by Barner to the Works Progress Administration. The check was placed in the mail addressed to Barner at his address in Mackeyville, Pa. Barner never received the check. Some unknown person obtained it in a mysterious manner and presented it to the J. C. Penney Co. store in Clearfield, Pa., representing that he was the payee and identifying himself to the satisfaction of the employees of J. C. Penney

Co. He endorsed the check in the name of Barner and transferred it to J. C. Penney Co. in exchange for cash and merchandise. Barner never authorized the endorsement nor participated in the proceeds of the check. J. C. Penney Co. endorsed the check over to the Clearfield Trust Co. which accepted it as agent for the purpose of collection and endorsed it as follows: "Pay to the order of Federal Reserve Bank of Philadelphia, Prior Endorsements Guaranteed." [1] Clearfield Trust Co. collected the check from the United States through the Federal Reserve Bank of Philadelphia and paid the full amount thereof to J. C. Penney Co. Neither the Clearfield Trust Co. nor J. C. Penney Co. had any knowledge or suspicion of the forgery. Each acted in good faith. On or before May 10, 1936, Barner advised the timekeeper and the foreman of the W. P. A. project on which he was employed that he had not received the check in question. This information was duly communicated to other agents of the United States and on November 30, 1936, Barner executed an affidavit alleging that the endorsement of his name on the check was a forgery. No notice was given the Clearfield Trust Co. or J. C. Penney Co. of the forgery until January 12, 1937, at which time the Clearfield Trust Co. was notified. The first notice received by Clearfield Trust Co. that the United States was asking reimbursement was on August 31, 1937.

This suit was instituted in 1939 by the United States against the Clearfield Trust Co., the jurisdiction of the federal District Court being invoked pursuant to the provisions of § 24 (1) of the Judicial Code, 28 U. S. C. § 41 (1). The cause of action was based on the express guaranty of prior endorsements made by the Clearfield Trust Co.

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[1] Guarantee of all prior indorsements on presentment for payment of such a check to Federal Reserve banks or member bank depositories is required by Treasury Regulations. 31 Code of Federal Regulations § 102.32, § 202.33.

J. C. Penney Co. intervened as a defendant. The case was heard on complaint, answer and stipulation of facts. The District Court held that the rights of the parties were to be determined by the law of Pennsylvania and that since the United States unreasonably delayed in giving notice of the forgery to the Clearfield Trust Co., it was barred from recovery under the rule of *Market Street Title & Trust Co.* v. *Chelten Trust Co.*, 296 Pa. 230, 145 A. 848. It accordingly dismissed the complaint. On appeal the Circuit Court of Appeals reversed. 130 F. 2d 93. The case is here on a petition for a writ of certiorari which we granted because of the importance of the problems raised and the conflict between the decision below and *Security-First Nat. Bank* v. *United States*, 103 F. 2d 188, from the Ninth Circuit.

We agree with the Circuit Court of Appeals that the rule of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, does not apply to this action. The rights and duties of the United States on commercial paper which it issues are governed by federal rather than local law. When the United States disburses its funds or pays its debts, it is exercising a constitutional function or power. This check was issued for services performed under the Federal Emergency Relief Act of 1935, 49 Stat. 115. The authority to issue the check had its origin in the Constitution and the statutes of the United States and was in no way dependent on the laws of Pennsylvania or of any other state. Cf. *Board of Commissioners* v. *United States*, 308 U. S. 343; *Royal Indemnity Co.* v. *United States*, 313 U. S. 289. The duties imposed upon the United States and the rights acquired by it as a result of the issuance find their roots in the same federal sources.[2] Cf. *Deitrick* v. *Greaney*, 309 U. S. 190;

[2] Various Treasury Regulations govern the payment and endorsement of government checks and warrants and the reimbursement of the Treasurer of the United States by Federal Reserve banks and member bank depositories on payment of checks or warrants bearing

D'Oench, Duhme & Co. v. *Federal Deposit Ins. Corp.*, 315 U. S. 447. In absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards. *United States* v. *Guaranty Trust Co.*, 293 U. S. 340, is not opposed to this result. That case was concerned with a conflict of laws rule as to the title acquired by a transferee in Yugoslavia under a forged endorsement. Since the payee's address was Yugoslavia, the check had "something of the quality of a foreign bill" and the law of Yugoslavia was applied to determine what title the transferee acquired.

In our choice of the applicable federal rule we have occasionally selected state law. See *Royal Indemnity Co.* v. *United States, supra.* But reasons which may make state law at times the appropriate federal rule are singularly inappropriate here. The issuance of commercial paper by the United States is on a vast scale and transactions in that paper from issuance to payment will commonly occur in several states. The application of state law, even without the conflict of laws rules of the forum, would subject the rights and duties of the United States to exceptional uncertainty. It would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states. The desirability of a uniform rule is plain. And while the federal law merchant, developed for about a century under the regime of *Swift* v. *Tyson*, 16 Pet. 1, represented general commercial law rather than a choice of a federal rule designed to protect a federal right, it nevertheless stands as a convenient source of reference for fashioning federal rules applicable to these federal questions.

United States v. *National Exchange Bank*, 214 U. S. 302, falls in that category. The Court held that the United

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a forged endorsement. See 31 Code of Federal Regulations §§ 202.0, 202.32–202.34. Forgery of the check was an offense against the United States. Criminal Code § 148, 18 U. S. C. § 262.

States could recover as drawee from one who presented for payment a pension check on which the name of the payee had been forged, in spite of a protracted delay on the part of the United States in giving notice of the forgery. The Court followed *Leather Manufacturers Bank* v. *Merchants Bank,* 128 U. S. 26, which held that the right of the drawee against one who presented a check with a forged endorsement of the payee's name accrued at the date of payment and was not dependent on notice or demand. The theory of the *National Exchange Bank* case is that he who presents a check for payment warrants that he has title to it and the right to receive payment.[3] If he has acquired the check through a forged endorsement, the warranty is breached at the time the check is cashed. See *Manufacturers Trust Co.* v. *Harriman National Bank Trust Co.,* 146 Misc. 551, 262 N. Y. S. 482; *Bergman* v. *Avenue State Bank,* 284 Ill. App. 516, 1 N. E. 2d 432. The theory of the warranty has been challenged. Ames, *The Doctrine of Price* v. *Neal,* 4 Harv. L. Rev., 297, 301–302. It has been urged that "the right to recover is a quasi contractual right, resting upon the doctrine that one who confers a benefit in misreliance upon a right or duty is entitled to restitution." Woodward, Quasi Contracts (1913) § 80; *First National Bank* v. *City National Bank,* 182 Mass. 130, 134, 65 N. E. 24. But whatever theory is taken, we adhere to the conclusion of the *National Exchange Bank* case that the drawee's right to recover accrues when the payment is

[3] We need not determine whether the guarantee of prior endorsements adds to the drawee's rights. See Brannan's Negotiable Instruments Law (6th ed.) pp. 330–331, 816–817; *First National Bank* v. *City National Bank,* 182 Mass. 130, 134, 65 N. E. 24. Cf. *Home Ins. Co.* v. *Mercantile Trust Co.,* 219 Mo. App. 645, 284 S. W. 834. Under the theory of the *National Exchange Bank* case, the warranty of the title of him who presents the check for payment would be implied in any event. See *Philadelphia National Bank* v. *Fulton National Bank,* 25 F. 2d 995, 997.

made. There is no other barrier to the maintenance of the cause of action. The theory of the drawee's responsibility where the drawer's signature is forged (*Price* v. *Neal,* 3 Burr. 1354; *United States* v. *Chase National Bank,* 252 U. S. 485) is inapplicable here. The drawee, whether it be the United States or another, is not chargeable with the knowledge of the signature of the payee. *United States* v. *National Exchange Bank, supra,* p. 317; *State* v. *Broadway National Bank,* 153 Tenn. 113.

The *National Exchange Bank* case went no further than to hold that prompt notice of the discovery of the forgery was not a condition precedent to suit. It did not reach the question whether lack of prompt notice might be a defense. We think it may. If it is shown that the drawee on learning of the forgery did not give prompt notice of it and that damage resulted, recovery by the drawee is barred. See *Ladd & Tilton Bank* v. *United States,* 30 F. 2d 334; *United States* v. *National Rockland Bank,* 35 F. Supp. 912; *United States* v. *National City Bank,* 28 F. Supp. 144. The fact that the drawee is the United States and the laches those of its employees are not material. *Cooke* v. *United States,* 91 U. S. 389, 398. The United States as drawee of commercial paper stands in no different light than any other drawee. As stated in *United States* v. *National Exchange Bank,* 270 U. S. 527, 534, "The United States does business on business terms." It is not excepted from the general rules governing the rights and duties of drawees "by the largeness of its dealings and its having to employ agents to do what if done by a principal in person would leave no room for doubt." *Id.,* p. 535. But the damage occasioned by the delay must be established and not left to conjecture. Cases such as *Market St. Title & Trust Co.* v. *Chelten Trust Co., supra,* place the burden on the drawee of giving prompt notice of the forgery—injury to the defendant being presumed by the mere fact of delay. See *London & River Plate*

Bank v. *Bank of Liverpool,* [1896] 1 Q. B. 7. But we do not think that he who accepts a forged signature of a payee deserves that preferred treatment. It is his neglect or error in accepting the forger's signature which occasions the loss. See *Bank of Commerce* v. *Union Bank,* 3 N. Y. 230, 236. He should be allowed to shift that loss to the drawee only on a clear showing that the drawee's delay in notifying him of the forgery caused him damage. See Woodward, Quasi Contracts (1913) § 25. No such damage has been shown by Clearfield Trust Co. who so far as appears can still recover from J. C. Penney Co. The only showing on the part of the latter is contained in the stipulation to the effect that if a check cashed for a customer is returned unpaid or for reclamation a short time after the date on which it is cashed, the employees can often locate the person who cashed it. It is further stipulated that when J. C. Penney Co. was notified of the forgery in the present case none of its employees was able to remember anything about the transaction or check in question. The inference is that the more prompt the notice the more likely the detection of the forger. But that falls short of a showing that the delay caused a manifest loss. *Third National Bank* v. *Merchants' National Bank,* 76 Hun 475, 27 N. Y. S. 1070. It is but another way of saying that mere delay is enough.

Affirmed.

MR. JUSTICE MURPHY and MR. JUSTICE RUTLEDGE did not participate in the consideration or decision of this case.

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

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

No. 467. Argued December 7, 1942.—Decided March 1, 1943.

A holder of common stock in a corporation which had but the one class of stock outstanding received, in 1939, stock dividends (based on earnings and profits subsequent to February 28, 1913) in common stock identical with the stock on which they were declared. The dividend stock was in no way realized upon in 1939. *Held*, upon consideration of the legislative history and administrative construction, that Congress, by §§ 22 (a) and 115 (f) (1) of the Internal Revenue Code, did not intend to tax such stock dividends; and that there is no occasion to reconsider *Eisner* v. *Macomber*, 252 U. S. 189. Pp. 372, 404.

129 F. 2d 321, affirmed.

CERTIORARI, 317 U. S. 619, to review the affirmance of a decision of the Board of Tax Appeals which reversed the Commissioner's determination of a deficiency in respondent's income tax.

Mr. Arnold Raum, with whom *Solicitor General Fahy*, *Assistant Attorney General Clark*, and *Messrs. Sewall Key* and *Bernard Chertcoff* were on the brief, for petitioner.

Mr. Roland L. Redmond, with whom *Mr. Allin H. Pierce* was on the brief, for respondent.

Mr. John E. Hughes filed a brief as *amicus curiae*, in support of respondent.

MR. JUSTICE JACKSON delivered the opinion of the Court.

The question in this case is whether the Acts of Congress and the administrative regulations thereunder afford a basis on which we may reconsider the decision in

Eisner v. *Macomber*, 252 U. S. 189, and pass on the Government's request that it be overruled.

During the calendar year 1939 respondent owned 101 shares of common stock of the Standard Oil Company of New Jersey. Twice during the year that corporation made appropriate transfers from earned surplus to its capital accounts, in amounts less than the net accumulation of earnings and profits subsequent to February 28, 1913, and against them issued stock dividends. On June 15, 1939, respondent received a dividend of 1.01 such shares having a fair market value of $42.93. On December 15, 1939, she received a further dividend of 1.53 shares, which had a fair market value of $66.08. These dividends were in common stock identical with the stock on which they were declared, which was the only stock outstanding at the time they were made. The dividend stock was not sold, redeemed, or in any way realized upon, and the taxpayer did not include it as income in her return for 1939. The Commissioner did so include it, and on December 8, 1941, sent her a notice of deficiency in the amount of $9.60. The Board of Tax Appeals reversed his determination, and the Circuit Court of Appeals for the Second Circuit affirmed on the authority of *Eisner* v. *Macomber, supra.* 129 F. 2d 321. Because of the importance of the question we granted certiorari.

The tax is asserted under the general provision of § 22 (a) of the Internal Revenue Code that income includes "dividends," together with the specific provision of § 115 (f) (1) that: "A distribution made by a corporation to its shareholders in its stock or in rights to acquire its stock shall not be treated as a dividend to the extent that it does not constitute income to the shareholder within the meaning of the Sixteenth Amendment to the Constitution." [1]

[1] 53 Stat. 1, 9, 47. Sec. 22 (a) provides that " 'Gross income' includes gains, profits, and income derived from . . . dividends . . ."

Sec. 115 (a) provides that "The term 'dividend' . . . means any distribution made by a corporation to its shareholders, whether in money or in other property. . . ." 53 Stat. 1, 46.

Was Congress thereby saying that such a dividend as we have here is not being taxed, in view of the *Eisner* v. *Macomber* decision, or was it saying that regardless of that decision it is being taxed? Events which must be considered to determine which Congress intended begin with the enactment of the Revenue Act of 1913, which taxed corporate "dividends" in general but said nothing of stock dividends in particular.[2] The Treasury attempted to tax them, and this Court held that a dividend of common stock paid on stock of the same kind was not income within the meaning of the Act, intimating, however, that as used in the Sixteenth Amendment "income" might have a wider scope. *Towne* v. *Eisner,* 245 U. S. 418 (1918). Congress had meanwhile provided that a "stock dividend shall be considered income, to the amount of its cash value." [3] Under that Act the Commissioner asserted that a dividend in common stock paid on common stock constituted income when received. This Court held it was not income within the meaning of the Sixteenth Amendment, chiefly for the reason that income had not been severed from capital or realized by such a distribution. *Eisner* v. *Macomber,* 252 U. S. 189 (1920). This decision was by a divided Court, Justices Holmes and Brandeis each writing a dissenting opinion, in which respectively Justices Day and Clarke joined. It was promptly and sharply criticised.[4]

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[2] Sec. II B of this Act, 38 Stat. 114, 167, provided that "net income . . . shall include gains, profits, and income derived from . . . dividends . . ."

[3] § 2 (a) of the Revenue Act of 1916, 39 Stat. 756, 757.

[4] Seligman, Implications and Effects of the Stock Dividend Decision, (1921) 21 Columbia Law Review 313; Warren, Taxability of Stock Dividends as Income, (1920) 33 Harvard Law Review 885; cf. Powell, Constitutional Aspects of Federal Income Taxation, in The Federal Income Tax (Columbia University Lectures, 1921) 51; Ballantine, Corporate Personalty in Income Taxation, (1921) 34 Harvard Law Review 573; Powell, Income from Corporate Dividends, (1922) 35 Harvard Law Review 363; Clark, Eisner v. Macomber and Some In-

Although *Eisner* v. *Macomber* dealt only with a dividend of common stock to common stockholders, it was at once accepted as the basis for a broader exemption. The Treasury ruled that receipt of dividend stock generally was not income, and Congress provided in § 201 (d) of the Revenue Act of 1921 that "A stock dividend shall not be subject to tax . . ."[5] Treasury Regulations under this statute and subsequent reënactments construed it as covering all dividends paid in stock of the distributing corporation.[6]

There the matter stood for nearly fifteen years, although in the meantime this Court pointed out in reorganization cases that a distinction existed between the type of stock dividend before it in *Eisner* v. *Macomber* and one which gave the stockholder a different stock, or different proportionate interests, than before. *United States* v. *Phellis*, 257 U. S. 156 (1921); *Rockefeller* v. *United States*, 257 U. S. 176 (1921); *Cullinan* v. *Walker*, 262 U. S. 134 (1923); *Weiss* v. *Stearn*, 265 U. S. 242 (1924); *Marr* v. *United States*, 268 U. S. 536 (1925).

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come Tax Problems, (1920) 29 Yale Law Journal 735. But cf. Fairchild, The Stock Dividend Decision, (1920) 5 National Tax Association Bulletin 208.

[5] T. D. 3052, 3059, 3 Cum. Bull. 38; O. D. 732, 3 Cum. Bull. 39; O. D. 801, 4 Cum. Bull. 24; 42 Stat. 227, 228. The House Report stated that this Act modified "the definition of dividends in existing law by exempting stock dividends from the income tax, as required by the decision of the Supreme Court in *Eisner* v. *Macomber*." H. R. Rep. No. 350, 67th Cong., 1st Sess., pp. 8–9. The Senate Report was to the same effect. S. Rep. No. 275, 67th Cong., 1st Sess., p. 9.

[6] See Article 1548, Treasury Regulations 62 (promulgated under the Revenue Act of 1921), 65 (promulgated under the Revenue Act of 1924) and 69 (promulgated under the Revenue Act of 1926); Article 628, Treasury Regulations 74 (promulgated under the Revenue Act of 1928) and 77 (promulgated under the Revenue Act of 1932); Article 115–8 of Treasury Regulations 86 (promulgated under the Revenue Act of 1934).

Inaction did not mean, however, that persons who received stock dividends were escaping all support of the revenues. Taxation was only postponed, as is taxation of many securities taken in corporate reorganizations, until sale or other realization has occurred. Their proceeds when realized have always been taxable as income. The Treasury had come to compute the postponed tax under Regulations which as to some classes of stock apportioned the cost basis between the old stock and the dividend stock in accordance with their respective fair market values at the time the stock dividend was issued.[7] On March 30, 1936, this Court granted certiorari in *Koshland* v. *Helvering,* 298 U. S. 441, in which the taxpayer challenged the validity of the apportionment Regulations. 297 U. S. 702. She had owned certain preferred stock and had received a dividend of common shares thereon. The preferred was thereafter redeemed, and the Commissioner applied the allocation rule, which reduced the cost basis of this old stock. This, of course, increased her gain on the redemption of the old stock and added to her tax. She argued that her dividend, notwithstanding *Eisner* v. *Macomber,* to which she gave a narrow reading, was constitutionally taxable as income at the time received. The Court held unanimously and squarely that the dividend in question did constitute income within the Sixteenth Amendment, and in effect limited *Eisner* v. *Macomber* to the kind of dividend there dealt with. But it did not overrule that decision or question its authority as to dividends such as we have in this case. With two Justices dissenting it struck down the apportionment regulations as being beyond statutory authorization.

[7] Article 1548, Treasury Regulations 62; Articles 1548, 1599, Treasury Regulations 65 and 69; Articles 600, 628, Treasury Regulations 74.

While the Court was considering stock dividends in the *Koshland* case, Congress was considering them in connection with the pending Revenue Act for 1936.

On March 3, 1936, the President had suggested the enactment of a tax upon the undistributed income of corporations.[8] On March 26, 1936, and while the taxpayer's petition for certiorari in the *Koshland* case was pending, a Subcommittee of the House Ways and Means Committee recommended that such a tax be enacted in lieu of the existing capital-stock, excess-profits, and income taxes on corporations.[9] It was thought by some authorities that imposition directly upon shareholders of a tax based on their pro rata shares of corporate earnings would be more satisfactory than the undistributed-profits tax.[10] Serious consideration of this method, which had been employed in

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[8] H. Doc. No. 418, 74th Cong., 2d Sess., pp. 2–3.

[9] H. R. Committee Print, March 26, 1936, 74th Cong., 2d Sess., Hearings on the Revenue Act, 1936, House Ways and Means Committee, 74th Cong., 2d Sess., pp. 5–8.

[10] See statement of Congressman Vinson, 83 Cong. Rec. 2780: "After the decision of the Supreme Court in 1920, it was no longer possible for us to impose a tax upon the shareholder with respect to the undivided profits of a domestic corporation. We were forced to adopt the system of levying a special penalty tax on the corporation itself, which has been exceedingly difficult to enforce in the courts and is nothing like as effective as if we could ignore the corporation and tax the shareholder direct upon his undistributed earnings in the profits of the corporation."

See also, Hearings on the Revenue Act, 1936, House Ways and Means Committee, 74th Cong., 2d Sess., pp. 193, 745; cf. Hearings on the Revenue Act, 1936, Senate Finance Committee, 74th Cong., 2d Sess., pp. 210–211, 256–257; H. R. Rep. No. 1860, 75th Cong., 3d Sess., pp. 2–3; Report of Subcommittee of the House Committee on Ways and Means, Proposed Revision of the Revenue Laws, 75th Cong., 3d Sess., January 14, 1938, pp. 2–3. For earlier proposals, see statement of Oliphant, General Counsel of the Treasury, Hearings on the Revenue Act, 1936, House Ways and Means Committee, 74th Cong., 2d Sess., p. 658; *id.* at 820; Martin, Taxation of Undistributed Corporate Profits, (1936) 35 Michigan Law Review 44, 45 *et seq.*

earlier times,[11] was foreclosed by the belief that *Eisner* v. *Macomber* made it "impossible" to put into effect.[12]

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[11] The Revenue Act of 1864, 13 Stat. 218, 282, provided that "gains and profits of all companies, whether incorporated or partnership, . . . shall be included in estimating the annual gains, profits, or income of any person entitled to the same, whether divided or otherwise." Compare *The Collector* v. *Hubbard*, 12 Wall. 1, 17, with *Pollock* v. *Farmers' Loan & Trust Co.*, 158 U. S. 601, and *Eisner* v. *Macomber*, 252 U. S. 189, 218, 230–232. See also, 13 Stat. 480; 14 Stat. 5, 478; 16 Stat. 258.

[12] Congressman Hill objected to a proposal that stockholders be taxed like partners, on the ground that *Eisner* v. *Macomber* stood in the way. Hearings on the Revenue Act, 1936, House Ways and Means Committee, 74th Cong., 2d Sess., pp. 96, 97, 98. Congressman Lewis stated: "I do not know that it is fully understood by the public that this roundabout device of compelling the distribution of the real income of the corporation to its shareholders, so that the shareholders may be called upon to pay taxes upon their income, is due to a decision of a divided court. Some years ago the Supreme Court in a sharp decision determined that we could not do in the United States with regard to earned dividends that were not distributed what they do in other countries, especially in England, require the shareholder to pay his tax on his income just the same whether his company had refused to distribute it or not.

"Now, if that decision of the Court should be reversed, what we are doing here, or attempting to do in order to reach the taxpayer here, the method of our attempt, would not be necessary. Not ours the fault of all this clumsiness and indirection of approach to a necessary public object." *Id.* at 193.

Later he said: "Of course, we cannot reach the net earnings of the corporations as earnings of the individual stockholders until the earnings are distributed as dividends." *Id.* at 321. See also, *id.* at 745, 83 Cong. Rec. 3125.

In the Senate debates, Senator Black stated in response to a question whether it was "legally possible to say to each corporation, 'Make a report of the proportionate earnings of each stockholder,' as we would to a partnership, and then let the stockholder make his return?" that "Unfortunately that was done about 60 years ago, and while it is my recollection that the Supreme Court itself sustained the act, it later, by another divided opinion, changed its mind and struck down the act as being in contravention of the Constitution. So that it is impossible to tax the undistributed profits which remain in the corporate Treasury as

The statements of members of Congress and of responsible Treasury officials at the hearings and debates on the Act are at variance with the present assertion of the Government that Congress intended § 115 (f) (1) to challenge or override the decision to which it had in other sections of the Act accommodated itself.

At the hearings of the Congressional Committees the proposed tax was attacked as being a measure which would have the effect of forcing the distribution by corporations of assets needed in their business. Its supporters anticipated the decision of this Court in the *Koshland* case and countered with statements that dividends taxable as income to the shareholders—which would have the effect of avoiding the undistributed-profits tax on the corporation [13]—could be declared and the undistributed-profits tax avoided without the necessity of distributing assets.[14] No testimony was given, however, that divi-

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a part of the individual incomes of the stockholders." 80 Cong. Rec. 8813.

Compare colloquy between Congressman Lewis and Alvord, *infra*, note 37; *Helvering* v. *National Grocery Co.*, 304 U. S. 282; *Heiner* v. *Mellon*, 304 U. S. 271; *Helvering* v. *Gerhardt*, 304 U. S. 405, 425. But see Powell, The Stock-Dividend Decision and the Corporate Nonentity, (1920) 5 National Tax Association Bulletin 201; Clark, *supra*, note 4, at 742; Traynor, Tax Decisions of the Supreme Court, 1937 Term, (1938) 33 Illinois Law Review 371, 388.

[13] Sec. 27 (f) of H. R. 12395, 74th Cong., 2d Sess., which became § 27 (e) of the Revenue Act of 1936, 49 Stat. 1648, 1665.

[14] In questioning Kent, Acting Chief Counsel of the Bureau of Internal Revenue, at the House hearings, Congressman Vinson of Kentucky said: "in reference to the retention of the cash in the business by the use of taxable stock dividends, I would like you to develop that, because I think it is very interesting. I think that it will allay a major portion of the fear that some folks have that in this favored treament of corporations declaring large percentages of dividends the capital structure of a corporation would be in danger, or that thereby it would not have the money for the rainy day." Kent replied: "There have been several decisions recently—I may say that one of

dends such as we have in this case were legally taxable or intended to be taxed.[15]

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them has now reached the Supreme Court of the United States—that have taken the position that the constitutional immunity of the true stock dividend recognized or declared in *Eisner* v. *Macomber* does not apply to all types and varieties of so-called stock dividends; for instance, that if the directors of a corporation instead of paying a large cash dividend to the preferred shareholders of the corporation see fit to give them common stock instead, that dividend of common stock is taxable so far as the Constitution is concerned.

"I may say that in a case which is pending before the Supreme Court there is a question also of the statutory interpretation, but assuming, as I believe is a proper legal view of the case, that so far as the Constitution is concerned, there are types of stock dividends that may be taxed under the Constitution, that would provide a loophole. Then, also, of course, there is the so-called optional stock dividend in which the stockholder is given the option of taking cash or taking stock. For any shareholder who wishes to maintain his proportionate equity in the enterprise there is a very powerful incentive to take stock." Congressman Vinson said: "Such option is property that has a value and, in your opinion, takes that entirely out of the stock dividend which was involved in the case of *Eisner* v. *Macomber;* is that right?" Mr. Kent: "That is correct." Hearings on the Revenue Act, 1936, House Ways and Means Committee, 74th Cong., 2d Sess., pp. 592–593.

See also, similar statements at the Senate hearings by Haas, Director of Research and Statistics for the Treasury Department; and Oliphant, General Counsel of the Treasury. Hearings on the Revenue Act, 1936, Senate Finance Committee, 74th Cong., 2d Sess., pp. 38, 909, 917–918.

[15] The Government calls attention to a memorandum submitted to the Senate Finance Committee by Graham, Lecturer in Finance at Columbia University, which stated that: "The most suitable method of capitalizing reinvested earnings and making them taxable to the stockholders, would be through the declaration of taxable dividends in common stock. While the decision in *Eisner* v. *Macomber* stands in the way of this ideal arrangement, I believe that in view of the different philosophy of taxation embodied in the pending bill, this decision might be overcome by treating such stock dividends as an administrative vehicle for allocating earnings to the various taxpayers." Hearings on the Revenue Act, 1936, Senate Finance Com-

As reported by the House Ways and Means Committee and passed in the House, § 115 (f) (1) of the bill provided: "A distribution made by a corporation to its shareholders in stock of the corporation or in rights to acquire stock of the corporation shall be treated as a taxable dividend to the extent that such distribution constitutes income to the shareholder within the meaning of the Sixteenth Amendment to the Constitution and represents a distribution of earnings or profits accumulated after February 28, 1913." [16] The Committee Report stated that: "It is provided in § 115 (f) that stock dividends shall be subject to tax to the extent that such dividends constitute income to the shareholder within the meaning of the sixteenth amendment to the Constitution." [17]

The manager of the Bill, Congressman Vinson of Kentucky, stated on the floor of the House, with reference to § 115 (f) (1): "In no sense is this an attack upon the Eisner against Macomber decision. There are many dividends received in stock and stock rights that are distinguishable from the character of stock dividend in the *Macomber* case, *supra,* and are actual realized taxable income. As we see it, a stock dividend that is not taxable is one in which the relative interest of each shareholder of a corporation is unchanged in his stock ownership." [18] He submitted a legal memorandum furnished by Arthur Kent,

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mittee, 74th Cong., 2d Sess., p. 696. Graham did not testify at the hearings, and it is not clear from this statement that he had reference to a dividend of common stock on common stock. Compare his later statement in The Undistributed Profits Tax and the Investor, (1936) 46 Yale Law Journal 1, 6, note 17: "Payments on common in additional common are, of course, non-taxable." Compare Hearings on the Revenue Act, 1936, House Ways and Means Committee, 74th Cong., 2d Sess., pp. 93 *et seq.*

[16] H. R. 12395, 74th Cong., 2d Sess.

[17] H. Rep. No. 2475, 74th Cong., 2d Sess., p. 10.

[18] 80 Cong. Rec. 6214–6215.

Acting Chief Counsel of the Bureau of Internal Revenue, setting forth cases dealing with the taxability of stock dividends, sixteen of which, including *Eisner* v. *Macomber,* had held stock dividends nontaxable, and twelve of which had held that the dividends were not true stock dividends and thus were taxable. This memorandum was in support of Kent's statement in response to Congressman Vinson's questioning at the hearings before the House Ways and Means Committee, to the effect that "the constitutional immunity of the true stock dividend recognized or declared in *Eisner* v. *Macomber* does not apply to all types and varieties of so-called stock dividends." [19] Congressman Vinson called particular and favorable attention to an article approving the decision in *Eisner* v. *Macomber,* published in the same month by Professor Magill, who had served as Special Assistant to the Secretary of the Treasury in tax matters and has also served as Undersecretary of the Treasury.[20] Congressman Vinson reiterated his views on the following day in response to questions by Congressman Treadway, leader of the opposition to the bill.[21]

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[19] See note 14, *supra.*

[20] Magill, Realization of Income through Corporate Distributions, (1936) 36 Columbia Law Review 519.

[21] Mr. Vinson. The case of Eisner against Macomber, as I recall, involved a corporation with $1,000,000 common stock. There was a declaration of a $500,000 stock dividend to the common-share holders. The Court held, and I think correctly, that where each shareholder got his proportionate part of the new stock there was no change in his ownership in the corporation. That, in a corporation with a million-dollar capital, the distribution of another half million to the holders of the common stock made no change in ownership. The shareholder who owned a share of stock would own one and a half shares in the increased structure, and therefore there was no change in the ownership so far as he and the corporation were concerned.

It has been evidenced throughout the years that there are innumerable stock dividends that are taxable. The issuance of stock, either

The opinion of this Court in the *Koshland* case was announced on May 18, 1936, six days after the Senate Finance

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common or preferred, or bonds, in payment of dividends may change the proportion of ownership among the shareholders. For instance, let us take this illustration: You issue preferred stockholders common stock to satisfy dividends declared to preferred stockholders. You have introduced additional common stock. It is in the hands of persons other than the present common-stock holders; consequently there is a change in the proportion of ownership in the common-stock holders.

The Supreme Court in one case laid down the rule that the yardstick in respect of the taxability of stock dividends was the character or kind of stock and the change in proportion of ownership. I submitted in the RECORD yesterday a statement prepared for me by Mr. Kent, Acting General Counsel of the Bureau of Internal Revenue, setting forth decisions of the Supreme Court where stock dividends were held to be nontaxable; and other cases where the Supreme Court and the Board of Tax Appeals held that stock dividends were taxable. In this connection I pointed out that in the April volume of the Columbia University Law Review a gentleman, in whom we have great faith and confidence, the Honorable Roswell Magill, wrote a very comprehensive and illuminating article on the taxability of stock dividends.

Mr. Treadway. . . .

As I recall it, in the present law there was just one line, 115, which read "stock dividends shall not be subject to tax." That is correct?

Mr. Vinson. That is right.

Mr. Treadway. It has been stricken out in this bill, and you are substituting therefor section (f), on page 107, of which the gentleman has given a history.

. . . . .

Mr. Vinson. The section to which I refer states that the only stock dividends we seek to tax are those which are taxable income within the sixteenth amendment.

Mr. Treadway. The language stricken out, I may say, reads as follows:

"(b) Stock dividends: A stock dividend shall not be subject to tax."

That is the existing law and has been the law most of the time since the Eisner against Macomber decision. In the next tax bill after that decision that language was included.

I understand the gentleman's explanation to be that the language of the act was too broad. I do not mean too broad in the sense it is

Committee concluded its hearings. This Committee reported out § 115 (f) (1) in the form in which it is found in the Act: "A distribution made by a corporation to its shareholders in its stock or in rights to acquire its stock shall not be treated as a dividend to the extent that it does not constitute income to the shareholder within the meaning of the sixteenth amendment to the Constitution." It stated in explanation of the change: "This subsection of the House bill, under which stock dividends are made taxable to the full extent permitted by the Constitution, is retained by your committee, except for changes made necessary by virtue of the reported amendment of section 115 (a) and in the interest of greater clarity." [22]

Senators Black and La Follette of the Senate Finance Committee submitted a minority report recommending an increase in the undistributed-profits tax rates, and also that § 115 (f) (1) specifically adopt the formula of the recently decided *Koshland* case, for no apparent reason other than a belief that in its present form it did not clearly have the effect of taxing even the type of stock dividends which the Court held in that case could be taxed.

To this end they recommended that § 115 (f) (1) "Specifically provide that there shall be no undistributed-prof-

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not legal, but it goes further than the Eisner against Macomber decision.

Mr. Vinson. That is correct.

Mr. Treadway. The language now substituted for the stricken language describes new stock dividends that can be taxed or what portion of stock dividends under the sixteenth amendment can in the future be taxed. Is that the right conception of the intention?

Mr. Vinson. Well, we take the broad position that stock dividends that are taxable income within the sixteenth amendment are subject to taxation, and if they are not such stock dividends and not any taxable income under the sixteenth amendment, they are not subject to taxes. 80 Cong. Rec. 6309–6310.

[22] S. Rep. No. 2156, 74th Cong., 2d Sess., pp. 18–19.

its tax on stock dividends which are taxable income for the individual recipient because the stock 'gives the stockholder an interest different from that which his former stockholdings represented.' " [23] In debate on the floor of the Senate, Senator Black said that: "As all Senators know, until about 2 weeks ago it was generally believed that it was impossible to tax stock dividends as income of the recipient of those stock dividends. About 2 weeks ago, however, the Supreme Court of the United States rendered an opinion which appeared in the Record, in which it decided if those stock dividends were declared in a different type of stock than the stock which was originally held by the owner, that those dividends did constitute actual income—taxable income, if you please—in the hands of the stockholder recipient.

"That being true, we have provided in such manner as to avoid any possible misunderstanding, that stock dividends declared in such manner that they are taxable in the hands of the recipient will be considered as distributed profits against which no undistributed-profits tax is imposed." [24]

Senator Bone asked: "Would it not be possible for corporations to evade the effect of that kind of decision of the Supreme Court by distributing stock of a character that would escape taxation?" Senator Black answered

[23] S. Rep. No. 2156, 74th Cong., 2d Sess., Pt. 2, p. 5, reprinted together with the opinion of this Court in the *Koshland* case, 80 Cong. Rec. 8526–8529. Their Report stated that: "Under the opinion of the Supreme Court in *Koshland* v. *Helvering*, decided May 18, 1936, the Supreme Court decided that stock dividends represented taxable income where they give 'the stockholder an interest different from that which his former stockholdings represented.' It is, therefore, beyond any question of doubt, that under our proposal, corporations would be able to retain all money profits needed for carrying on their business without any additional corporate tax."

[24] 80 Cong. Rec. 8811.

that they could, but that they would then be subject to the undistributed-profits tax.[25]

In response to a question by Senator Adams whether it would not be possible to tax stockholders in corporations upon undistributed corporate earnings, as partnerships were taxed upon undistributed partnership earnings, Senator Black stated that this was "impossible," [26] but that "in order to achieve the same result we have suggested a proposal which imposes no corporate tax on undistributed profits if the corporation declares a stock dividend of such nature as to be taxable under the recent Supreme Court opinion. In that case, the case of Koshland against Helvering, the Court distinguished clearly and unequivocally between a normal stock dividend of the same kind and nature as the stock on which the dividend was declared and a stock dividend of a distinctly different nature from the stock on which the dividend was declared. In order to carry out and obtain the full benefit of that, so that we can permit every corporation, if it desires, to retain 100 cents of every dollar in its treasury, if its stockholders wish, we have provided that there shall not be one dollar of corporate undistributed profit tax imposed upon that corporation if it distributes its dividends in a stock dividend which is taxable in the hands of the stockholders." [27]

Senator La Follette said on the floor of the Senate that "under all these measures—under the House bill, under the Senate committee bill, and under this amendment—any corporation desiring to retain 100 percent of its statutory net income free from increased tax may do so by paying out to its stockholders a dividend which is taxable under the sixteenth amendment." [28]

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[25] 80 Cong. Rec. 8811.

[26] See footnote 12, *supra*.

[27] 80 Cong. Rec. 8813.

[28] 80 Cong. Rec. 9048. See also, *id.* at 9045, 9047.

Senator Robinson stated his approval of the proffered amendment, but suggested that it be withdrawn and the matter taken up in conference. The amendment was accordingly withdrawn, but was not acted upon by the conference.[29]

The meaning of § 115 (f) (1) was critical in the administration both of the undistributed-profits tax upon corporations and of the income tax upon shareholders. This was not its only importance, however. Like the earlier Revenue Acts, the Revenue Act of 1936 contained provisions intended to cope with the problem of evasion of income taxes by shareholders through failure to distribute corporate income.[30] These provisions had been drafted to avoid the limitations set upon Congressional power by

[29] 80 Cong. Rec. 9052.

[30] Sec. 102, 49 Stat. 1648, 1676, laid a graduated additional tax upon the income of corporations other than personal holding companies as defined in § 351, formed or availed of for the purpose of preventing the imposition of the surtax upon their shareholders or the shareholders of any other corporation, through the medium of permitting earnings or profits to accumulate instead of being divided or distributed.

Sec. 351, 49 Stat. 1648, 1732, laid a graduated surtax upon income of personal holding companies.

Under the Revenue Acts of 1913, 1916 and 1918, if a corporation was availed of for the purpose of evading taxation by accumulation of gains and profits the shareholders were taxed on their pro rata shares of income, whether or not distributed. 38 Stat. 166; 39 Stat. 758; 40 Stat. 1072.

Sec. 220 of the Revenue Act of 1921 employed instead a tax against the corporation. 42 Stat. 227, 247. H. R. Rep. No. 350, 67th Cong., 1st Sess., pp. 12–13, stated in explanation of the change that: "Section 220 of the existing law provides that if any corporation is formed or availed of for the purpose of evading the surtax upon its stockholders through the medium of permitting its gains and profits to accumulate instead of being divided, the stockholders shall be taxed in the same manner as partners. By reason of the recent decision of the Supreme Court in the stock dividend case (*Eisner* v. *Macomber*, 252 U. S. 189),

Eisner v. *Macomber*. It was generally believed that they had failed, and would fail, fully to accomplish their purpose, and that fully effective provisions would entail a challenge of the authority of *Eisner* v. *Macomber*.[31]

In this state of affairs, the Treasury issued Regulations which plainly construed § 115 (f) (1) not as repudiating *Eisner* v. *Macomber* by taxing stock dividends but as exempting them and adopting the existing decisions, including *Eisner* v. *Macomber*. Article 115–7 of Regulations 94, issued under the Revenue Act of 1936, set forth references to the Court's decisions in many cases, and said: "A stock dividend does not constitute income if the new shares confer no different rights or interests than did the old—the new certificates plus the old representing

considerable doubt exists as to the constitutionality of the existing law." See also, S. Rep. No. 275, 67th Cong., 1st Sess., p. 16.

See also, § 220 of the Revenue Acts of 1924 and 1926, 43 Stat. 253, 277; 44 Stat. 9, 34; § 104 of the Revenue Acts of 1928 and 1932, 45 Stat. 791, 814; 47 Stat. 169, 195; and §§ 102 and 351 of the Revenue Act of 1934, 48 Stat. 680, 702, 751.

The 1926 and subsequent Acts permitted the avoidance of tax on the corporation by inclusion of undistributed corporate income in the gross income of its shareholders.

[31] Thus, Senator Black said on the floor of the Senate that "It is a vain and an illusory hope to anticipate that the Government of the United States will ever be able to prevent tax avoidance on the part of corporate officials by the simple expedient of charging and proving against them that they have withheld a distribution of profits to avoid taxes." 80 Cong. Rec. 8811. See also statement by Oliphant, General Counsel of the Treasury, Hearings on the Revenue Act, 1936, House Ways and Means Committee, 74th Cong., 2d Sess., pp. 658–659; footnotes 10 and 12, *supra*; cf. Report of Subcommittee of the House Committee on Ways and Means, Tax Revision, 1938, January 14, 1938, 75th Cong., 3d Sess., pp. 20 *et seq.*; H. R. Rep. No. 1860, 75th Cong., 3d Sess., p. 53; 65 Cong. Rec. 8014 *et seq.*; Martin, Taxation of Undistributed Corporate Profits, (1936) 35 Michigan Law Review 44, 50, 62.

the same proportionate interest in the net assets of the corporation as did the old." Three examples followed, the second relating to a dividend identical with the one before us. The example concluded: "The stock so distributed does not constitute a taxable stock dividend to the shareholders." The Treasury also issued a statement of general policy as to stock dividends, to the effect that it would allow a dividends-paid credit against the undistributed-profits tax with respect to stock dividends which were clearly taxable to stockholders and refuse such credit with respect to stock dividends which were "clearly nontaxable to the shareholder"; and where taxability was a debatable question, it would tentatively allow a dividends-paid credit if the corporation claiming the credit should file proper waivers or agreements to protect the interests of the Government pending final determination of the taxability to shareholders of the distribution, either by closing agreement executed by all shareholders or by a final adjudication in court.[32]

Administration of § 115 (f) (1) was undertaken and continued upon the basis of this construction, and no effort was made to obtain a different one. On the contrary, the Government in this Court took the position that the meaning of § 115 (f) (1) was correctly stated by Congressman Vinson on the floor of the House as quoted *infra,* p. 380.[33]

Other agencies of the Government accepted this same view of the meaning of the statute, authorizing the issuance by corporations subject to their supervision of securities other than common stock, at variance with their usual policy and in order to permit the corporations to

[32] I. T. 3037, Cum. Bull. 1937–1, p. 90.

[33] See Government's Brief in *Helvering* v. *Gowran,* 302 U. S. 238, p. 20 (October, 1937).

do what the Treasury assured them was necessary to avoid the payment of undistributed-profits taxes.[34]

The undistributed-profits tax evoked a voluminous literature, which showed almost universal agreement with the correctness of the Treasury's contemporaneous statement of the meaning of the statute.[35]

We think if Congress had passed or intended to pass an Act challenging a well known constitutional decision of this Court there would appear at least one clear statement of that purpose either from its proponents or its adversaries. Not one contemporaneous word in or out of Congress discloses the purpose which the Government says we should find that this legislation accomplished.

Against this background, it was proposed to incorporate an undistributed-profits tax in the pending Revenue Act for 1938. As proposed and enacted, § 115 (f) (1) was the same as in the 1936 Act.[36] Like earlier Acts, the Revenue Act of 1938, as proposed and enacted, contained provisions

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[34] The Greyhound Corporation—Issuance of Preference Stock, 1 M. C. C. 357; Mission Oil Co., 1 S. E. C. 940; cf. International Paper & Power Co., 2 S. E. C. 274; Southwestern Development Co., 2 S. E. C. 930.

[35] McLaren, Management of Capital Distributions under the Revenue Act of 1936, (1936) 62 Journal of Accountancy, 334, 354–355; Schulman, Undistributed Profits Tax after the Koshland Case, (1936) 14 Tax Magazine 703, 705; Anderson, The Taxability of Stock Dividends, (1937) 15 Tax Magazine 74, 77; Graham, The Undistributed Profits Tax and the Investor, (1936) 46 Yale Law Journal 1, 6–7; Note (1936) 50 Harvard Law Review 332, 334; cf. Hendricks, The Undistributed Profits Tax, (1936) 46 Yale Law Journal 19, 38–41.

In an article published in April of 1940, Surrey, Assistant Legislative Counsel of the Treasury Department, later advanced the contrary view. The Supreme Court and the Federal Income Tax, 35 Illinois Law Review 779, 794.

[36] § 115 (f) (1), H. R. 9682, 75th Cong., 3d Sess.; 52 Stat. 447, 497.

intended to conform with the authority of *Eisner* v. *Macomber*,[37] and it was attacked as embodying the principle

[37] § 102, 52 Stat. 447, 483; § 401, 52 Stat. 447, 557 (similar to § 351 of the Revenue Act of 1936). The Revenue Act of 1938, as proposed and enacted, contained a "consent dividends" provision allowing shareholders to permit the corporation to avoid the undistributed-profits tax by consenting to include in their returns amounts as though actual distributions had been made in cash. § 28, 52 Stat. 447, 470–472. See Report of Subcommittee of House Committee on Ways and Means, Proposed Revision of the Revenue Laws, 75th Cong., 3d Sess., Jan. 14, 1938, pp. 18–20; H. R. Rep. No. 1860, 75th Cong., 3d Sess., pp. 24 *et seq.*

The following colloquy between Alvord, representing the Committee of Federal Finance, Chamber of Commerce of the United States, and Congressman Lewis, took place at the House Hearings. Hearings on the Revenue Act, 1938, House Ways and Means Committee, pp. 505–506:

Mr. Lewis. Do you realize that these extra taxes on the corporations as such, including the personal holding company and the others, are due to the decision in *Eisner* v. *Macomber?*

Mr. Alvord. Yes.

Mr. Lewis. I am just asking that by way of preface.

Mr. Alvord. Yes, sir. I discussed that quite at length, I think, back in 1936.

Mr. Lewis. Unhappily, it is not being discussed at the present time in the press as fully as it should be in order that the procedure of the committee be fairly understood. You will recall, of course, that under that decision, a 5-to-4 decision, it was held that, notwithstanding the general terms of the income-tax amendment, that tax on paid-up stock dividends was unconstitutional.

Now, before I go any further, I want to say that certainly so far as I am concerned there would be no support for any of these extra taxes if that decision were reversed and the earned income of shareholders in corporations were left subject to taxation, just as the earned income of partners is subject to tax, although that income may be plowed into the partnership business.

Mr. Alvord. I think if you will read my testimony back in 1936 you will find that I agree with you absolutely in principle. But bear in mind that we have some very practical problems in addition to consider.

Mr. Lewis. Very well.

of forcing the distribution of needed corporate assets. The rate of the undistributed-profits tax was, however,

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Mr. Alvord. Because I do not think you can afford to exempt the corporation entirely for example, which the following of that decision would require.

Mr. Lewis. Now, of course, the general public wants to be fair in this matter, and even your clients realize that the Government of the United States must in some way secure revenues. I am a little curious to know why voices as influential as yours, or especially as the voice of your clients—I read all their reports, profit by them, I am glad to say—have never been raised asking a reversal of that decision so that we can go back and tax shareholders normally as we do other individuals and partners.

All this trouble we are discussing today will disappear in a moment if that result is obtained.

Mr. Alvord. I think, Mr. Lewis, I can explain to you fully why that has not been done up to the present time. If I recall correctly, *Eisner* v. *Macomber* was decided in the late spring of 1921, just while the 1921 act was under consideration, just before it passed; whereupon a specific provision was written into the statute, saying that stock dividends escape taxes; and that provision has stayed in the statute.

Mr. Lewis. Yes.

Mr. Alvord. It has been whittled down, it is true.

Mr. Lewis. Yes. But the decision also carries a provision against taxing even undistributed income to the shareholder.

Mr. Alvord. No; I do not think that is true, Mr. Lewis.

Mr. Lewis. Well, that is the view of others, and that is the view of the committee. If you will provide me a way by which the shareholder in the corporation can be required to pay his taxes like individuals and partners on earned income, I will promise you my support in an effort to repeal all these extra tax provisions.

Mr. Alvord. Well, I think your position is almost unassailable in that respect, Mr. Lewis.

Mr. Lewis. Very well.

Mr. Alvord. It is a position that many of us have taken for a long time.

Mr. Lewis. But will you hear this question in the spirit it is put: Do you not think the Government under such circumstances is under a duty to try in some way to recoup itself for these lost taxes in the shareholder group who would be subject to them? If we are, isn't it natural that we should go to the corporation that is shielding them, in

very materially lower than in the 1936 Act.[38] This would have had the effect of diminishing the amount which would be collected from the corporation as undistributed-profits tax despite the declaration of a nontaxable stock dividend. Despite these factors, again there was not the slightest suggestion of the view that § 115 (f) (1) had made or had intended to make all stock dividends taxable; on the contrary, there was continued recognition of the

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most cases, of course, unintentionally, but still go to the corporation and say: "Now please distribute those dividends so that we can get at this shareholder who is dodging his burden under *Eisner* v. *Macomber*"? Isn't that all very natural, sir?

Title II of the Revenue Act of 1937 amended the Revenue Act of 1936 by adding § 334, which provided for the inclusion in the gross income of shareholders in foreign personal holding companies the undistributed corporate income. The abuses incident to the employment of this device had been brought out at Hearings before a Joint Committee on Tax Evasion and Avoidance, 75th Cong., 1st Sess. The Committee Reports on the Bill cite the practical necessity for this form of tax in support of its constitutionality. H. R. Rep. No. 1546, 75th Cong., 1st Sess., pp. 13–14; S. Rep. No. 1242, 75th Cong., 1st Sess., pp. 15–16; Report of the Joint Committee on Tax Evasion and Avoidance, House Doc. No. 337, 75th Cong., 1st Sess., pp. 16–19. See statement of Congressman Vinson on the floor of the House, 81 Cong. Rec. 9035: "The philosophy in regard to foreign personal holding companies is based upon the inherent power in the Government to protect itself from devices to avoid and evade its law. The Supreme Court has said that the Congress has the power to regulate interstate rates, and that it can regulate intrastate rates when such exercise of power is to protect the plenary power over interstate rates. We feel certain that the jurisdiction over American taxpayers and income to our citizens, together with the power to protect our revenues are ample legal support for our position." See also, statement of Congressman Treadway, 81 Cong. Rec. 9024.

The foreign personal holding company tax was retained in the Revenue Act for 1938. 52 Stat. 447, 545 *et seq.*

[38] See Report of Subcommittee of the House Committee on Ways and Means, 75th Cong., 3d Sess., pp. 2 *et seq.*; H. R. Rep. No. 1860, 75th Cong., 3d Sess., pp. 4–6; S. Rep. No. 1567, 75th Cong., 3d Sess., pp. 2–5; H. R. Rep. No. 2330, 75th Cong., 3d Sess., pp. 1 *et seq.*, 23.

authority of *Eisner* v. *Macomber*.[39] Section 115 (f) (1) was reënacted while the Treasury Regulation and rulings on its meaning stood unamended and in their original form.[40]

The Treasury adhered to its earlier views of the meaning of § 115 (f) (1) by repromulgating its former Regulation under the Revenue Act of 1938 and under the Internal Revenue Code,[41] and it stood unamended at the time of the receipt of the stock dividends here in question. Congress in 1939 enacted basis provisions incorporating the language of § 115 (f)(1).[42] It was not until November 15, 1940, and after the receipt of the dividends here involved, that the Treasury amended the Regulation, and then only by striking out all after the first sentence.[43] This action followed the decision of this Court in *Helvering* v. *Bruun,* 309 U. S. 461, on March 25, 1940, which rejected the concept that taxable gain could arise only when the taxpayer was able to sever increment from his original capital. It preceded by ten days the decision in *Helvering* v. *Horst,* 311 U. S. 112, which held that there was no exemption from taxation where economic gain is enjoyed "by some event other than the taxpayer's personal receipt of money or property." *Id.* at 116. Each of these deci-

[39] See statement of Congressman Vinson of Kentucky on the floor of the House, 83 Cong. Rec. 2780, and colloquy set forth in footnote 37, *supra.*

[40] 52 Stat. 447, 497.

[41] Article 115–7 of Regulations 101; § 19.115–7 of Regulations 103.

[42] § 214 of the Revenue Act of 1939, 53 Stat. 862, 872.

[43] T. D. 5020, Cum. Bull. 1940–2, p. 118, amending § 19.115–7 of Regulations 103, promulgated under the Internal Revenue Code.

Amendment of Regulations 101 and 94 did not come until January 19, 1942, by T. D. 5110, Cum. Bull. 1942–1, p. 160.

As amended, the Regulation read: "A distribution made by a corporation to its shareholders in its stock or in rights to acquire its stock shall be treated as a dividend to the full extent that it constitutes income to the shareholders within the meaning of the sixteenth amendment to the Constitution."

sions undermined further the original theoretical bases of the decision in *Eisner* v. *Macomber*.

The Government says that the time has come when *Eisner* v. *Macomber* must be overruled, and that we should construe § 115 (f) (1) as intended to tax the dividends here in question and thus to require reconsideration of that decision. It should be observed that the question of the constitutional validity of *Eisner* v. *Macomber* is plainly one of the first magnitude, but this is not to say that it is presented in this case. Under our judicial tradition we do not decide whether a tax may constitutionally be laid until we find that Congress has laid it. Unless the tax asserted by the Commissioner has been authorized by Congress, it fails of validity before we even reach the constitutional question. To reach that question we must decide whether Congress intended by § 115 (f) (1) to do what *Eisner* v. *Macomber* squarely held that it could not. We cannot find that it did.

The Government cannot sustain its position on a literal reading of § 115 (f) (1). Unlike the Revenue Act of 1916,[44] it does not state that all stock dividends are taxable. Instead, § 115 (f) (1) qualifies the generality of § 22 (a) by providing that a distribution made in shares of the corporation's stock "shall not be treated as a dividend to the extent that it *does* not constitute income to the shareholder within the meaning of the Sixteenth Amendment. . . ." (Italics supplied.) If the statute is to be literally read, use of "does" instead of some word of futurity indicates that the time of enactment or at the latest the time of receipt of the dividend is the critical one for determining taxability. Under either view these dividends would not be taxable. The parties are agreed that for the purposes of this decision the meaning of the Constitution must be found in the decisions of this Court,

[44] See note 3, *supra*.

and when these dividends were received *Eisner* v. *Macomber* fixed the meaning contrary to the Government's position.

The administrative and legislative history of the statute squarely conflict with the Government's position in this case.

The Treasury Regulation issued under § 115 (f) (1) immediately after it was first enacted states in terms that the statute was not intended to lay a tax on the facts of this case and of *Eisner* v. *Macomber*, and the Treasury advised taxpayers by another ruling that some stock dividends were "clearly" nontaxable. In *White* v. *Winchester Club*, 315 U. S. 32, 41, we said that such "substantially contemporaneous expressions of opinion are highly relevant and material evidence of the probable general understanding of the times and of the opinions of men who probably were active in the drafting of the statute." [45] The statute was reënacted in its original form after having been in force for two years, and after a long controversy centering around the meaning of the statute which assumed throughout the correctness of the administrative construction. This Court has denied retroactive effects to amendments to valid Treasury Regulations which have survived reënactment of the statute, even in the absence of any affirmative indication that the subject-matter of the statute and Regulation was called to the attention of Congress.[46] The effect of reënactment in the absence of

[45] See also, *Edwards* v. *Darby*, 12 Wheat. 206, 210; *United States* v. *Moore*, 95 U. S. 760, 763; *Fawcus Machine Co.* v. *United States*, 282 U. S. 375, 378; *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 315.

[46] *Helvering* v. *R. J. Reynolds Tobacco Co.*, 306 U. S. 110; cf. *Helvering* v. *Wilshire Oil Co.*, 308 U. S. 90; *Helvering* v. *Reynolds*, 313 U. S. 428; *White* v. *Winchester Club*, *supra*.

The problems in this field have evoked extensive commentary. Paul, Use and Abuse of Tax Regulations in Statutory Construction, 49 Yale

such affirmative indications of agreement has been stated in various and not entirely consistent terms.[47] This is a question we do not now need to examine, for there are in this case many indications that Congress was in complete

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Law Journal 660, reprinted with some changes in Paul, Studies in Federal Taxation, Third Series (1940), 420; Alvord, Treasury Regulations and the Wilshire Oil Case, 40 Columbia Law Review 252; Surrey, The Scope and Effect of Treasury Regulations under the Income, Estate and Gift Taxes, 88 University of Pennsylvania Law Review 556; Brown, Regulations, Reenactment, and the Revenue Acts, 54 Harvard Law Review 377; Griswold, A Summary of the Regulations Problem, 54 Harvard Law Review 398; Feller, Addendum to the Regulations Problem, 54 Harvard Law Review 1311.

[47] *Helvering* v. *Winmill,* 305 U. S. 79, 83: "Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially reënacted statutes, are deemed to have received congressional approval and have the effect of law." In *Helvering* v. *R. J. Reynolds Tobacco Co.,* 306 U. S. 110, 116, it was said that: "Since the legislative approval of existing regulations by reënactment of the statutory provision to which they appertain gives such regulations the force of law, we think that Congress did not intend to authorize the Treasury to repeal the rule of law that existed during the period for which the tax is imposed," and the question of the validity of prospective amendment was left open. In *Helvering* v. *Wilshire Oil Co.,* 308 U. S. 90, the Court carefully examined the taxpayer's position for equities and found it wanting; and after citing the *Reynolds Tobacco* case with approval, stated with reference to the view that reënactment of a statute carried legislative approval of its existing valid administrative construction, that: "It does not mean that a regulation interpreting a provision of one act becomes frozen into another act merely by reënactment of that provision, so that that administrative interpretation cannot be changed prospectively through exercise of appropriate rule-making powers." *Id.* at 100. *Helvering* v. *Reynolds,* 313 U. S. 428, qualified the *Reynolds Tobacco* case and distinguished it on the grounds that "The transactions there in question took place at a time when a regulation was in force which expressly negatived any tax liability. The regulation remained outstanding for a long time and was followed by several reënactments of the statute. About five years after the transactions in question took place, the prior regulation was amended so as to impose a tax liability. There are no such circumstances here." *Id.* at 432–433.

agreement with the Treasury on the question of the taxability of the stock dividends here involved. We would think it unquestionable that in this case the Treasury could not retroactively amend the Regulation to the prejudice of the respondent, except for the Government's assertion that it should be disregarded upon the authority of *Helvering* v. *Hallock,* 309 U. S. 106, 121, note 8, and that, in any event, under § 3791 (b) of the Internal Revenue Code the Secretary or Commissioner must be held to have authority in any case to make a retroactive amendment of a Regulation.

The *Hallock* case is clearly inapposite. There it was held that Treasury Regulations issued more than 11 years after the enactment of the governing Revenue Act of 1926,[48] in submission to the decision of this Court in 1935 of the *St. Louis Trust Co.* cases, 296 U. S. 39, 48, could not prevent the Court from overruling those cases on facts entirely antedating them. That Regulation did not purport to construe the meaning of the statute, as did this one, but simply to acknowledge a constitutional limit imposed by this Court upon the operation of a previously enacted statute; it was not in effect when the transactions involved were entered upon; and there had been no reënactment of the statute while the Regulation was in force.

Nor do we concur in the Government's argument that the legislative history of § 3791 (b) of the Internal Revenue Code requires reconsideration of our decision as to the effect of a corresponding provision of the Revenue Act of 1928 in *Helvering* v. *R. J. Reynolds Tobacco Co.,* 306 U. S. 110, 116.[49] We think that in the circumstances of this

[48] T. D. 4729, Cum. Bull. 1937–1, p. 284.

[49] Section 3791 (b) of the Internal Revenue Code provides that: "The Secretary, or the Commissioner with the approval of the Secretary, may prescribe the extent, if any, to which any ruling, regulation, or Treasury Decision, relating to the internal revenue laws, shall be applied without retroactive effect."

This provision has been in its present form since § 506 of the Revenue Act of 1934, 48 Stat. 680, 757, amended § 1108 (a) of the Revenue

case the administrative construction in effect at the time of the receipt of the stock dividends here in issue must be given controlling effect.

Act of 1926. It is the final statute of a series intended to relieve the Treasury from the effect of the view that its administrative rulings, like court decisions, must have retroactive as well as prospective operation.

During and after the first World War the Treasury had been burdened with a great volume of tax business. Perfect consistency in rulings was impossible, and the view that each change in administrative construction must be given retroactive effect deprived both the Government and the taxpayers of any assurance that cases once settled would stay settled. See statement by Dr. Adams, Tax Adviser to the Treasury, Hearings, Revenue Revision, House Ways and Means Committee, 67th Cong., 3d Sess., pp. 38–40; H. R. Rep. No. 1035, 66th Cong., 2d Sess., p. 3.

To remedy this situation Congress provided in § 1314 of the Revenue Act of 1921, 42 Stat. 227, 314, that: "in case a regulation or Treasury decision" should be reversed by a subsequent "regulation or Treasury decision, and such reversal is not immediately occasioned or required by a decision of a court of competent jurisdiction," the subsequent regulation or decision might be applied without retroactive effect. This provision was carried into the Revenue Acts of 1924 and 1926. 43 Stat. 253, 340; 44 Stat. 9, 114. The 1928 Act expanded it to include cases where the new Regulation or Treasury decision was occasioned or required by a court decision. 45 Stat. 791, 874; S. Rep. No. 960, 70th Cong., 1st Sess., p. 40. The Conference Committee stated that: "It is hoped that this provision will prevent the constant reopening of cases on account of changes in regulations or Treasury decisions, and it is believed that sound administration properly places upon the Government the responsibility and burden of interpreting the law and of prescribing regulations upon which the taxpayers may rely." H. R. Rep. No. 1882, 70th Cong., 1st Sess., p. 22.

The Committee Reports state that § 506 of the Revenue Act of 1934, now § 3791 (b) of the Internal Revenue Code, was intended to permit the Treasury to avoid inequities to persons who had closed transactions in reliance upon "existing practice," and that the "amendment extends the right granted by existing law to the Treasury Department to give regulations and Treasury Decisions amending prior regulations or Treasury Decisions prospective effect only, by allowing the Secretary, or the Commissioner with the approval of the Secretary, to

We would be reluctant, in any event, to find that Congress intended to hold the effect of § 115 (f) (1) in abeyance until the Treasury should decide that the time was ripe to challenge *Eisner* v. *Macomber* and carry its challenge to this Court. Such an intention would be a serious departure from the usual policy of Congress to provide the taxpayers and tax-gatherers with a practical basis for the timely settlement of questions of taxation arising each year. At the times of enactment, the problem of delay in obtaining decisions of this Court was a matter of grave concern to those concerned with the administration and furnishing of the revenues.[50]

The Government's assertion that Congress intended to hold the meaning of § 115 (f) (1) in suspense until the termination of years of litigation is in conflict with our recent decision in *Parker* v. *Motor Boat Sales Co.*, 314 U. S. 244. There we were called upon to construe § 3 (a) of the Longshoremen's and Harbor Workers' Act, 44 Stat. 1424, which made compensation payable only if "recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law." Its statement in such terms was due to this Court's decision in *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, a much criticized and somewhat impaired, but not over-

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prescribe the exact extent to which any regulation or Treasury Decision, *whether or not it amends a prior regulation or Treasury Decision*, will be applied without retroactive effect. The amendment furthermore permits internal revenue rulings as well as regulations or Treasury Decisions to be applied without retroactive effect." (Italics supplied.) H. R. Rep. No. 704, 73d Cong., 2d Sess., p. 38; S. Rep. No. 558, 73d Cong., 2d Sess., p. 48.

Thus it appears that this legislation was intended to permit escape from the retroactive effects of administrative action by the Treasury, rather than to increase its power to make retroactive rulings. Cf. 69 Cong. Rec. 7881.

[50] Traynor, Administrative and Judicial Procedure for Federal Income, Estate, and Gift Taxes, 38 Columbia Law Review 1393.

ruled, decision which held federal power exclusive and state compensation laws forbidden in an area of "shadowy limits." The Court, speaking through Mr. Justice Black, said, "An interpretation which would enlarge or contract the effect of the proviso in accordance with whether this Court rejected or reaffirmed the constitutional basis of the *Jensen* and its companion cases cannot be acceptable. The result of such an interpretation would be to subject the scope of protection that Congress wished to provide, to uncertainties that Congress wished to avoid." *Id.* at 248, 250.

The Government urges that we read into the Congressional Act an intent to tax these dividends because of considerations that we do not think are entitled to any weight. It argues that the form of § 115 (f) (1) is attributable to "embarrassment" which would have been incident to a "frontal attack" on *Eisner* v. *Macomber.* There is ample ground to know that the prospect of conflict in opinion with this Court on constitutional questions was not sufficient so to mute the 74th and 75th Congresses.[51] This was as it should be. There is no reason to doubt that this Court may fall into error as may other branches of the Government. Nothing in the history or attitude of this Court should give rise to legislative embarrassment if in the performance of its duty a

[51] Thus, the Congress which first enacted § 115 (f) (1) also substantially reënacted provisions of the Municipal Bankruptcy Act held unconstitutional in *Ashton* v. *Cameron County District,* 298 U. S. 513. It did so after Chairman Sumners of the Judiciary Committee, in charge of the bill, frankly stated on the floor of the House that it implied certain proceedings which would be unconstitutional under that decision. He went on to say, however, that it was not only the right but the duty of Congress to present this question once more to the Court, since the decision, if allowed to stand, had certain consequences which he described and deplored. This history was called to the attention of the Court, and the Act was sustained. *United States* v. *Bekins,* 304 U. S. 27, 33.

legislative body feels impelled to enact laws which may require the Court to reëxamine its previous judgments or doctrine.[52] The Court differs, however, from other branches of the Government in its ability to extricate itself from error. It can reconsider a matter only when it is again properly brought before it in a case or controversy; and if the case requires, as a tax case does,[53] a statutory basis for a case, the new case must have sufficient statutory support.

And, if we were to assume Congressional "embarrassment" and take it into consideration, we would also be required to weigh the many other political factors which may have motivated the choice employed in the language of § 115 (f) (1). Those in favor of the bill may have believed that the adoption of existing decisions was the

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[52] Thus, *O'Malley* v. *Woodrough*, 307 U. S. 277, overruled *Miles* v. *Graham*, 268 U. S. 501, as to the constitutionality of taxation of salaries of federal judges; *United States* v. *Darby*, 312 U. S. 100, overruled *Hammer* v. *Dagenhart*, 247 U. S. 251, as to Congressional power over labor in manufacture; *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, overruled *Adkins* v. *Children's Hospital*, 261 U. S. 525, and *Morehead* v. *Tipaldo*, 298 U. S. 587, as to power to enact minimum wage laws. Compare also *Wright* v. *Vinton Branch*, 300 U. S. 440, with *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S. 555, as to farmer bankruptcy statutes; *Labor Board* v. *Jones & Laughlin Corp.*, 301 U. S. 1, with *Schechter Corp.* v. *United States*, 295 U. S. 495, as to commerce power; and *United States* v. *Darby*, *supra*, and *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, with *Carter* v. *Carter Coal Co.*, 298 U. S. 238, as to commerce power. See also, cases cited by Mr. Justice Brandeis in *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 406–408, notes 1 and 2.

[53] Article I, § 8, cl. 1, of the Constitution provides that "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . ." Article I, § 7, cl. 1, provides that "All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills."

most that was politically possible; those who opposed it may have thought it desirable as matter of tax policy to defer taxation of the stock dividend until realization.[54] Needless to say, speculation upon such factors has no place in the construction of Acts of Congress.

We are asked to make a retroactive holding that for some seven years past a multitude of transactions have been taxable although there was no source of law from which the most cautious taxpayer could have learned of the liability. If he consulted the decisions of this Court, he learned that no such tax could be imposed; if he read the Delphic language of the Act in connection with existing decisions, it, too, assured him there was no intent to tax; if he followed the Congressional proceedings and debates, his understanding of nontaxability would be confirmed; if he asked the tax collector himself, he was bound by the Regulations of the Treasury to advise that no such liability existed. It would be a pity if taxpayers could not rely on this concurrent assurance from all three branches of the Government. But we are asked to brush all this aside and simply to decree that these transactions are taxable anyway.

[54] The considerations which underlay the decisions in *Towne* v. *Eisner* and *Eisner* v. *Macomber* may have had their influence in the judgment of Congress itself. Compare the question put by Senator Bone to Senator Black, set forth *supra*, p. 384. Before the decision in *Eisner* v. *Macomber*, the Supreme Judicial Court of Massachusetts had held that stock dividends could be taxed, *Tax Commissioner* v. *Putnam*, 227 Mass. 522, 116 N. E. 904 (1917); but the Massachusetts legislature had also specifically exempted them from income taxation. Mass. Stat. 1920, c. 352, now G. L. c. 62 § 1 (b). After the decision of *Eisner* v. *Macomber*, the Supreme Court of Wisconsin rejected its reasoning in *State ex rel. Dulaney* v. *Nygaard*, 174 Wis. 597, 183 N. W. 884 (1921), but since 1927 stock dividends have been exempted from income taxation. Wis. Stat. § 71.02. In 1926, the New York legislature adopted a provision retroactive to January 1, 1919, the effective date of the first state income-tax law, exempting all stock dividends. See *People ex rel. Clark* v. *Gilchrist*, 243 N. Y. 173, 153 N. E. 39.

Nor is the effect on taxpayers the only consequence of accepting such a proposal. It would unsettle tax administration and subject the Treasury itself to many demands in ways that we cannot anticipate and provide for. Many have sold dividend stocks and paid the postponed tax at higher rates than if they had been taxed as is now proposed. Many have paid on the sale of the original stock because of allocation of part of the dividend to reduce the cost base thereof. Many corporations have been refused deductions on account of this type of stock dividend in computing their undistributed corporate earnings tax, which would become entitled to them. Overhanging the whole effort to accommodate these past transactions to a new retroactive law would be the statute of limitations barring sometimes the Government and sometimes the taxpayer with capricious effects. To rip out of the past seven years of tax administration a principle of law on which both Government and taxpayers have acted would produce readjustments and litigation so extensive we would contemplate them with anxiety. We have recently held as to another questioned decision of this Court that a long period of accommodations to an older decision sometimes requires us to adhere to an unsatisfactory rule to avoid unfortunate practical results from a change. *Davis* v. *Department of Labor*, 317 U. S. 249. We think this another example of the same principle.

The Government acknowledges the hardship which would be incident to the rule we are now asked to declare, and promises its assistance in obtaining legislative correction. It says that: "We are informed by the Treasury that it has no intention of harassing taxpayers with respect to liability for past years, and that if *Eisner* v. *Macomber* is overruled it intends immediately to recommend to Congress legislation which would relieve taxpayers of any unfair retroactive burden that might result from such overruling. . . ."

Of course, if there were an adequate basis in statute and regulation for the tax in question, it is difficult to understand why its collection should be regarded as "harassing." This assurance that if we will but find that Congress has intended to lay the tax it will be asked to declare that it does not intend it to be collected is hardly reassuring that the decision contended for would be what Congress intended. Since it is acknowledged that legislation would be required to adjust equities that are beyond judicial power and to prevent our decision's being used to harass taxpayers, we may well inquire why the legislation should not precede the judicial decision. Why should we be asked to impose by interpretation a tax which the Treasury intends to ask Congress to lift?

We are unable to find that Congress intended to tax the dividends in question, and without Congressional authority we are powerless to do so. That being the case, we cannot reach the reconsideration of *Eisner* v. *Macomber* on the basis of the present legislation and Regulations.

The decision below is

Affirmed.

MR. JUSTICE RUTLEDGE did not participate in the consideration or decision of this case.

MR. JUSTICE DOUGLAS, dissenting:

Eisner v. *Macomber* dies a slow death. It now has a new reprieve granted under circumstances which compel my dissent.

I.

In 1936, Congress provided that stock dividends were taxable as income when they constituted "income to the shareholder within the meaning of the Sixteenth Amendment to the Constitution."[1] § 115 (f)(1). That statutory

[1] Sec. 115 (a) defines "dividend" as follows: "The term 'dividend' when used in this title . . . means any distribution made by a cor-

provision is now rewritten so as to permit stock dividends to be taxable when they constitute "income to the shareholder within the meaning of the Sixteenth Amendment to the Constitution as construed by *Eisner* v. *Macomber*." That extraordinary result is reached in the face of the plain language of the Act and in face of clear statements of its purpose made in Committee Reports. The report of the House Ways and Means Committee (H. Rep. No. 2475, 74th Cong., 2d Sess., p. 10) stated that stock dividends were to be taxable when they constituted "income to the shareholder within the meaning of the sixteenth amendment to the Constitution." The report of the Senate Finance Committee (S. Rep. No. 2156, 74th Cong., 2d Sess., p. 18) contained the unequivocal statement that "stock dividends are made taxable *to the full extent permitted by the Constitution*." That purpose is now thwarted. Reliance is placed on certain statements made by Mr. Vinson who managed the bill on the floor of the House. Yet the most that can be said is that his statements in explanation of the bill were ambiguous. He stated, to be sure, that the new provision was not to be

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poration to its shareholders, whether in money or in other property, (1) out of its earnings or profits accumulated after February 28, 1913, or (2) out of the earnings or profits of the taxable year (computed as of the close of the taxable year without diminution by reason of any distributions made during the taxable year), without regard to the amount of the earnings and profits at the time the distribution was made."

Sec. 115 (f) (1) is entitled "General Rule" and reads as follows: "A distribution made by a corporation to its shareholders in its stock or in rights to acquire its stock shall not be treated as a dividend to the extent that it does not constitute income to the shareholder within the meaning of the Sixteenth Amendment to the Constitution."

Sec. 115 (j) sets forth the formula for valuation of dividends other than cash dividends: "If the whole or any part of a dividend is paid to a shareholder in any medium other than money the property received other than money shall be included in gross income at its fair market value at the time as of which it becomes income to the shareholder."

regarded as "an attack upon the Eisner against Macomber decision." 80 Cong. Rec., Pt. 6, p. 6215. But in answer to an inquiry from Mr. Treadway whether the new provision "describes new stock dividends that can be taxed or what portion of stock dividends under the sixteenth amendment can in the future be taxed," he made the following statement: "Well, we take the broad position that stock dividends that are taxable income within the sixteenth amendment are subject to taxation, and if they are not such stock dividends and not any taxable income under the sixteenth amendment, they are not subject to taxes." *Id.*, p. 6310. I fail to see in that declaration even any intimation that *Eisner* v. *Macomber* rather than the Constitution marked the reach of the new legislation. Furthermore, a reading of the whole discussion on the floor of the House indicates to me that his denial that the legislation made an "attack" on *Eisner* v. *Macomber* fell far short of suggesting that the House intended to *foreclose* this Court from reëxamining *Eisner* v. *Macomber*. If Congress had that purpose, the Act hardly would have been phrased in terms which embrace the full scope of the Sixteenth Amendment. To me, the disavowal of an intent to "attack" *Eisner* v. *Macomber* meant no more than a disclaimer of any purpose to propose unconstitutional legislation. *Eisner* v. *Macomber* is a decision of this Court. Under the traditional conceptions of the place of judicial review in our constitutional system, this Court and only this Court can change the rule of that case in absence of an amendment to the Constitution. Congress here was merely respecting that traditional view. It wanted to go as far as it could. But it could have no idea how far that would be until this Court spoke. No one could predict whether this Court would overrule, modify, or sustain *Eisner* v. *Macomber* when the 1936 legislation came before

it. Indeed, when the 1936 bill passed the House,[2] *Koshland* v. *Helvering,* 298 U. S. 441, which narrowed the application of *Eisner* v. *Macomber,* had not been decided by this Court. And *Helvering* v. *Gowran,* 302 U. S. 238, which somewhat extended the rule of the *Koshland* case was not decided until after the 1936 Act was passed. But numerous decisions by lower courts had made inroads on the *Eisner* v. *Macomber* doctrine. The rule of that case was in flux; a process of erosion had set in; and none knew where that erosion would cease. Accordingly, Congress drafted § 115 (f) of the 1936 Act in the most flexible of terms. It used sweeping language incorporating the full coverage of the Sixteenth Amendment so that those stock dividends would be taxed which this Court would permit to be taxed. There are probably other ways in which the same idea could have been phrased. But the one chosen is clear enough.

The only Treasury Regulations applicable to the taxable year in question—1939—are Regulations 103. These were originally promulgated on January 29, 1940. Sec. 19.115–7 provided: "A distribution made by a corporation to its shareholders in its stock or in rights to acquire its stock shall be treated as a dividend to the full extent that it constitutes income to the shareholders within the meaning of the sixteenth amendment to the Constitution." That sentence was followed by the statement, "The Supreme Court has pointed out some of the characteristics distinguishing a stock dividend which constitutes income from one which does not constitute income within the meaning of the Constitution." Then followed a summary of our decisions, ending with three examples based on the *Koshland* case, *Eisner* v. *Macomber,* and the *Gow-*

[2] April 29, 1936. See 80 Cong. Rec., p. 6367. The *Koshland* case was decided by this Court on May 18, 1936.

ran case. On November 15, 1940, this regulation was amended by striking out everything following the first sentence. This regulation, however, even in its original form did not and could not foreclose inquiry into the validity of the decision in *Eisner* v. *Macomber.* It did no more than state the constitutional principles on which the decided cases rested. It certainly did not indicate that the Treasury construed the statute more narrowly than the Constitution itself. However that may be, this Court on more than one occasion has refused to follow a Treasury regulation which it felt to be "in the teeth" of the statute. *Helvering* v. *Sabine Transportation Co., ante,* p. 306; *Helvering* v. *Credit Alliance Corp.,* 316 U. S. 107. If this regulation be construed to narrow the Act so as to tax only stock dividends permitted by *Eisner* v. *Macomber,* I would have less reluctance in striking it down than I have had in other instances.

But there is said to be lack of wisdom in this interpretation of the Act. It is argued that it would be disruptive of tax administration. It is urged that a decision which now overruled *Eisner* v. *Macomber* would be unfair because it would be retroactive. Those matters are none of our business. Every revenue act which Congress has passed has a retroactive effect. It is something on which taxpayers of necessity take their chances. *Milliken* v. *United States,* 283 U. S. 15, 23. And many of the uncertainties in revenue acts necessarily are not resolved until this Court passes on them years later. Here there is no possible basis for complaint. These stock dividends were declared in 1939, three years after the Act making them taxable was passed. Of course, the taxpayer no more than Congress could predict what interpretation this Court would give the new statute. Sec. 115 (f) (1), however, made the risks apparent. The fact that some guessed wrong is wholly irrelevant to this litigation. Inequities may result from a holding in 1943 that *Eisner* v.

Macomber has not been the law since 1936. But the relief against them lies with Congress. Our task ends if we erase *Eisner* v. *Macomber* and give Congress a clean slate on which to write. Then and only then can Congress design a tax system treating stock dividends consistently. So long as Congress has to guess whether or not this Court will overrule *Eisner* v. *Macomber*, any interim treatment which it gives stock dividends may have to be readjusted after this Court speaks, so as to remove inequities which may have resulted.

II.

I think *Eisner* v. *Macomber* should be overruled. The Sixteenth Amendment gives Congress the power "to lay and collect taxes on incomes, from whatever source derived." As Mr. Justice Brandeis stated in his dissent in *Eisner* v. *Macomber*, 252 U. S., p. 237, that Amendment was designed to include "everything which by reasonable understanding can fairly be regarded as income." Stock dividends representing profits certainly are income in the popular sense. "From a practical common-sense point of view there is something strange in the idea that a man may indefinitely grow richer without ever being subject to an income tax." Powell, *Income From Corporate Dividends*, 35 Harv. L. Rev. 363, 376. The wealth of stockholders normally increases as a result of the earnings of the corporation in which they hold shares. I see no reason why Congress could not treat that increase in wealth as "income" to them.[3] See *Collector* v. *Hubbard*,

[3] Cf. the income tax of partners. Sec. 182 of the Internal Revenue Code provides: "In computing the net income of each partner, he shall include, whether or not distribution is made to him . . . (c) His distributive share of the ordinary net income or the ordinary net loss of the partnership, computed as provided in section 183 (b)." A partner is chargeable with his allocable share of the partnership earnings even where they could not be distributed to him by reason of

12 Wall. 1, 18; *Helvering* v. *National Grocery Co.*, 304 U. S. 282, 288; Powell, *The Stock-Dividend Decision and The Corporate Nonentity*, 5 Nat. Tax Assoc. Bull. 201. The notion that there can be no "income" to the shareholders in such a case within the meaning of the Sixteenth Amendment unless the gain is "severed from" capital and made available to the recipient for his "separate use, benefit and disposal" (*Eisner* v. *Macomber*, 252 U. S., pp. 207, 211) will not stand analysis. In cases like *Koshland* v. *Helvering* and *Helvering* v. *Gowran* where stock dividends were held to be taxable as income, both the original investment and the accumulations were retained by the company. Yet those cases hold that stockholders may receive "income" from the operations of their corporation though the corporation makes no distribution of assets to them. And see *United States* v. *Phellis*, 257 U. S. 156; *Rockefeller* v. *United States*, 257 U. S. 176; *Cullinan* v. *Walker*, 262 U. S. 134; *Marr* v. *United States*, 268 U. S. 536. Other cases make plain that there may be "income" though neither money nor property has been received by the taxpayer. Benefits accruing as the result of the discharge

local law. *Heiner* v. *Mellon*, 304 U. S. 271, 281: "The tax is thus imposed upon the partner's proportionate share of the net income of the partnership, and the fact that it may not be currently distributable, whether by agreement of the parties or by operation of law, is not material." As stated by Mr. Justice Brandeis in his dissent in *Eisner* v. *Macomber*, 252 U. S., p. 231: "The stockholder's interest in the property of the corporation differs, not fundamentally but in form only, from the interest of a partner in the property of the firm. There is much authority for the proposition that, under our law, a partnership or joint stock company is just as distinct and palpable an entity in the idea of the law, as distinguished from the individuals composing it, as is a corporation. No reason appears why Congress, in legislating under a grant of power so comprehensive as that authorizing the levy of an income tax, should be limited by the particular view of the relation of the stockholder to the corporation and its property which may, in the absence of legislation, have been taken by this court."

of the taxpayer's indebtedness or obligations constitute familiar examples. *Old Colony Trust Co.* v. *Commissioner,* 279 U. S. 716; *Douglas* v. *Willcuts,* 296 U. S. 1; *United States* v. *Hendler,* 303 U. S. 564. And increases in the value of property as a result of improvements made by the lessee are taxable income to the lessor even though the taxpayer could not "sever the improvement begetting the gain from his original capital." *Helvering* v. *Bruun,* 309 U. S. 461, 469. The declaration of a stock dividend normally will not increase the wealth of the stockholders. Its accrual will usually antedate that event. See Haig et al., The Federal Income Tax (1921) p. 8. For it is the accumulation of corporate earnings over a period of time which marks any real accrual of wealth to the stockholders. The narrow question here is whether Congress has the power to make the receipt of a stock dividend based on earnings an occasion for recognizing that accrual of wealth for income tax purposes. Congress has done so through the formula of computing the "income" to the stockholders at the "fair market value" of the stock dividends received. § 115 (j). Whether that is the most appropriate procedure which could be selected for the purpose may be arguable. But I can see no constitutional reason for saying that Congress cannot make that choice if it so desires. That is one way—though perhaps at times a crude one—of measuring for income tax purposes the wealth which normally accrues to stockholders as a result of the earning of their corporation.

MR. JUSTICE BLACK and MR. JUSTICE MURPHY join in this dissent.

EX PARTE ELMER DAVIS.

ON MOTION FOR LEAVE TO FILE PETITION FOR HABEAS CORPUS.

No. —, Original. Decided March 8, 1943.

The applicant not having fully exhausted the remedies afforded by state appellate procedure, the application for leave to file a petition for habeas corpus in this case is denied without prejudice. Leave denied.

Elmer Davis, pro se.

PER CURIAM.

After we denied, without prejudice, petitioner's previous application for leave to file in this Court a petition for habeas corpus, 317 U. S. 592, the Circuit Court of Vigo County, Indiana, on December 29, 1942, sustained a demurrer to his petition for a writ of error coram nobis. Petitioner now alleges that he has filed an appeal from that court to the Supreme Court of Indiana. He also alleges that his request that a transcript of the coram nobis proceeding be furnished free of charge, because he is a poor person, has been denied. He contends that in the absence of a transcript of the coram nobis proceeding, he is left without a remedy by appeal in the courts of Indiana. But we cannot assume that the Supreme Court of Indiana will refuse to use its process to bring before it such parts of the record as may be necessary for a decision of the case, or that, in that event, it will refuse to enter an order finally disposing of the appeal. Until the Supreme Court of Indiana has acted upon an application for an order finally disposing of the appeal—which, if adverse to petitioner, he could make the subject of a petition for certiorari to this Court—the remedies afforded by state appellate procedure have not been fully exhausted. Accordingly, we deny petitioner's present application without prejudice.

Leave denied.

JAMISON *v.* TEXAS.

APPEAL FROM THE CRIMINAL COURT OF DALLAS COUNTY, TEXAS.

No. 558. Argued February 12, 1943.—Decided March 8, 1943.

1. Under the state law, the appellant in this case could appeal to no higher state court than that from which the appeal here was taken; and, since the judgment sustained a municipal ordinance the validity of which under the Federal Constitution was challenged, this Court has jurisdiction of the appeal under Jud. Code § 237 (a). P. 414.
2. A municipal ordinance is a "statute" of the State, within the meaning of Jud. Code § 237 (a). *King Mfg. Co.* v. *Augusta*, 277 U. S. 100, followed. P. 414.
3. A municipal ordinance which, as construed and applied, prohibits the dissemination of information by handbills, *held* a denial of the freedom of the press and violative of the Fourteenth Amendment. P. 415.
4. A State may not, consistently with the Fourteenth Amendment, prohibit the distribution of handbills in the pursuit of a clearly religious activity merely because the handbills invite the purchase of books for the improved understanding of the religion or because they seek to promote the raising of funds for religious purposes. P. 416.

Reversed.

APPEAL from a conviction and sentence for violation of a municipal ordinance.

Mr. Hayden C. Covington for appellant.

Mr. H. P. Kucera for appellee.

MR. JUSTICE BLACK delivered the opinion of the Court.

The appellant, a member of the Jehovah's Witnesses, was charged with distributing handbills on the streets of Dallas, Texas, in violation of an ordinance of that city which prohibits their distribution. She was convicted in the Corporation Court of Dallas, and appealed to the

County Criminal Court where, after a trial de novo, she was again convicted and a fine of $5.00 and costs was imposed. Under Texas law she could appeal to no higher state court,[1] and since she properly raised federal questions of substance in both courts, the case is rightfully here on appeal under § 237 (a) of the Judicial Code. *King Manufacturing Co.* v. *Augusta,* 277 U. S. 100. The appellee has asked us to reconsider the doctrine of the *King Manufacturing Co.* case under which this Court takes jurisdiction on appeal from judgments sustaining the validity of municipal ordinances. We see no reason for reconsidering the *King Manufacturing Co.* case and follow it here.

We think the judgment below must be reversed because the Dallas ordinance denies to the appellant the freedom of press and of religion guaranteed to her by the First and Fourteenth Amendments of the Federal Constitution.

The stipulated facts show that the appellant, after three years of special training, had devoted many years to the work of the Jehovah's Witnesses. At the time of her arrest, the appellant was distributing handbills in an orderly and quiet manner to pedestrians whom she met on the street. On one side of the handbill was an invitation to attend a gathering in a Dallas park, which was to be one of fifty simultaneous gatherings of Jehovah's Witnesses in as many cities, to hear an address by a leader of the group on "Peace, Can It Last." The other side of the handbill repeated the invitation and described at the bottom two books which explained the Jehovah's Witnesses' interpretation of the Bible and set out their religious views. This was followed by a statement that the books would be mailed "Postage Prepaid on your contribution of 25¢." While the books were not actually sold on the streets, the

[1] The Texas practice under which this is the highest state court to which appellant could appeal is considered in *Largent* v. *Texas, post,* p. 418.

appellant would have delivered them to the home of anyone who made the twenty-five cents contribution. The books would have cost her more than twenty-five cents.

The Dallas ordinance, which is set forth in the margin,[2] has been construed by the state court to forbid the distribution of leaflets by the appellant in the fashion outlined above.[3] The city seeks to uphold the ordinance here on the contention (a) that it is justified as an exercise of the city's plenary control of its streets, and (b) that appellant's activity may be forbidden because the leaflets include "commercial advertising of books which the distributor is offering for sale."

First. The city contends that its power over its streets is not limited to the making of reasonable regulations for the control of traffic and the maintenance of order, but that it has the power absolutely to prohibit the use of the streets for the communication of ideas. It relies primarily on *Davis* v. *Massachusetts*, 167 U. S. 43. This same argu-

[2] "Scattering handbills, etc.—It shall be unlawful for any person to carry or hold by hand or otherwise, any billboard, show card, placard or advertisement, or to wear any costume for the purpose of attracting attention of the public, or to scatter or throw any handbills, circulars, cards, newspapers or any advertising device of any description, along or upon any street or sidewalk in the city of Dallas. Any person violating any of the provisions of this article shall be deemed guilty of a misdemeanor, and upon conviction, may be fined in any sum not exceeding one hundred dollars."

[3] The complaint under which the appellant was convicted alleged that she did "carry, hold by hand, distribute, scatter and throw handbills as an advertising medium" in violation of the ordinance. It will be noted that the word "distribute," which does not appear in the ordinance, is a part of the complaint; and that the words "carry or hold by hand," which appear in the first clause of the ordinance as relating to billboards, et cetera, have been applied in the complaint as though relating to "handbills," which appears in the second clause of the ordinance in connection with papers scattered or thrown on the street.

ment, made in reliance upon the same decision, has been directly rejected by this Court. *Hague* v. *C. I. O.*, 307 U. S. 496, 514–516. Of course, states may provide for control of travel on their streets in order to insure the safety and convenience of the traveling public. *Cox* v. *New Hampshire,* 312 U. S. 569, 574. They may punish conduct on the streets which is in violation of a valid law. *Chaplinsky* v. *New Hampshire,* 315 U. S. 568. But one who is rightfully on a street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion. This right extends to the communication of ideas by handbills and literature as well as by the spoken word. *Hague* v. *C. I. O., supra; Schneider* v. *Irvington,* 308 U. S. 147, 162. Here, the ordinance as construed and applied prohibits the dissemination of information by handbills. As such, it cannot be sustained.

Second. The right to distribute handbills concerning religious subjects on the streets may not be prohibited at all times, at all places, and under all circumstances. This has been beyond controversy since the decision in *Lovell* v. *Griffin,* 303 U. S. 444. The city contends, however, that in the instant case the prohibition is permissible because the handbills, although they were distributed for the unquestioned purpose of furthering religious activity, contained an invitation to contribute to the support of that activity by purchasing books related to the work of the group. The mere presence of an advertisement of a religious work on a handbill of the sort distributed here may not subject the distribution of the handbill to prohibition. In *Schneider* v. *Irvington, supra,* we held that the city of Irvington might not forbid conduct almost precisely the same as that with which the appellant in the instant case is charged. Even where handbills carrying notice of a public gathering contained a statement of an admission

fee, we held that they could not be barred from distribution on the streets. *Schneider* v. *Irvington, supra,* 154, 162, 163. No admission was to be charged at the meeting for which the appellant was circulating leaflets in the instant case. In *Cantwell* v. *Connecticut,* 310 U. S. 296, 305, we said that a state might not prevent the collection of funds for a religious purpose by unreasonably obstructing or delaying their collection.

The states can prohibit the use of the streets for the distribution of purely commercial leaflets, even though such leaflets may have "a civic appeal, or a moral platitude" appended. *Valentine* v. *Chrestensen,* 316 U. S. 52, 55. They may not prohibit the distribution of handbills in the pursuit of a clearly religious activity merely because the handbills invite the purchase of books for the improved understanding of the religion or because the handbills seek in a lawful fashion to promote the raising of funds for religious purposes.

Reversed.

MR. JUSTICE FRANKFURTER acquiesces in the refusal to reconsider *King Mfg. Co.* v. *Augusta,* 277 U. S. 100, although, for the reasons set forth by Holmes and Brandeis, JJ., dissenting, he deems that case to have been erroneously decided. Otherwise he agrees with the opinion in this case.

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

LARGENT *v.* TEXAS.

APPEAL FROM THE COUNTY COURT OF LAMAR COUNTY, TEXAS.

No. 559. Argued February 12, 1943.—Decided March 8, 1943.

1. Since the decision of the county court in this case was not reviewable, on the record made in that court, by any higher court of the State, and since the decision sustained a municipal ordinance against a claim of its invalidity under the Federal Constitution, this Court has jurisdiction on appeal under Jud. Code § 237 (a). P. 421.

   That the appellant might obtain release by a subsequent and distinct proceeding in the same or another court of the State does not affect the reviewability of the present judgment.

2. A municipal ordinance which, as construed and applied, forbids the distribution of religious publications except upon a permit, the issuance of which is in the discretion of a municipal officer, *held* an abridgment of the freedom of religion, speech, and press guaranteed by the Fourteenth Amendment. P. 422.

   It is unnecessary to determine whether the distribution of the publications in question constituted sales or the acceptance of contributions.

Reversed.

APPEAL from a conviction and sentence for violation of a municipal ordinance.

Mr. Hayden C. Covington for appellant.

No appearance for appellee.

MR. JUSTICE REED delivered the opinion of the Court.

This appeal brings here for review the conviction of appellant for violation of Ordinance No. 612 of the City of Paris, Texas, which makes it unlawful for any person to solicit orders or to sell books, wares or merchandise within the residence portion of Paris without first filing an application and obtaining a permit. The ordinance goes on to provide that

"if after investigation the Mayor deems it proper or advisable he may issue a written permit to said person for the purpose of soliciting, selling, canvassing or census taking within the residence portion of the city which permit shall state on its face that it has been issued after a thorough investigation." [1]

A complaint in the Corporation Court of Paris charged Mrs. Largent, the appellant, with violating this ordinance by unlawfully offering books for sale without making application for a permit. She was convicted and appealed to the County Court of Lamar County, Texas, where a trial de novo was had.[2] There a motion was filed to quash the

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[1] The applicable section of the ordinance reads as follows:

"Section 1: From and after the passage of this ordinance it shall be unlawful for any person, firm or corporation to solicit orders for books, wares, merchandise, or any household article of any description whatsoever within the residence portion of the City of Paris, or to sell books, wares, merchandise or any household article of any description whatsoever within the residence district of the City of Paris, or to canvass, take census without first filing an application in writing with the Mayor and obtaining a permit, which said application shall state the character of the goods, wares, or merchandise intended to be sold or the nature of the canvass to be made, or the census to be taken, and by what authority. The application shall also state the name of the party desiring the permit, his permanent street address and number while in the city and if after investigation the Mayor deems it proper or advisable he may issue a written permit to said person for the purpose of soliciting, selling, canvassing or census taking within the residence portion of the city which permit shall state on its face that it has been issued after a thorough investigation."

[2] Vernon's Texas Stat. 1936, Art. 876 (Code of Criminal Procedure), provides:

"Appeals from a corporation court shall be heard by the county court except in cases where the county court has no jurisdiction, in which counties such appeals shall be heard by the proper court. In such appeals the trial shall be de novo. Said appeals shall be governed by the rules of practice and procedure for appeals from justice courts to the county court, so far as applicable."

complaint because the ordinance violated the Fourteenth Amendment to the Constitution of the United States; and, at the conclusion of the evidence, there was filed a motion on the same grounds for a finding of not guilty and the discharge of the appellant from custody. Both were overruled.

Appellant's evidence shows that she carries a card of ordination from the Watch Tower Bible and Tract Society, an organization incorporated for the purpose of preaching the Gospel of God's Kingdom. The Society is an organization for Jehovah's Witnesses, an evangelical group, founded upon and drawing inspiration from the tenets of Christianity. The Witnesses spread their teachings under the direction of the Society by distributing the books and pamphlets obtained from the Society by house to house visits. They believe that they have a covenant with Jehovah to enlighten the people as to the truths accepted by the Witnesses by putting into their hands, for study, various religious publications with titles such as *Children, Hope, Consolation, Kingdom News, Deliverance, Government* and *Enemies.*

Mrs. Largent offered some of these books to those upon whom she called for a contribution of not to exceed 25 cents for a bound book and several magazines or tracts. If the contribution was not made, the appellant, in accordance with the custom of the Witnesses, would frequently leave a book and tracts without receiving any money. Appellant was making such distributions when arrested. She had not filed an application for or received a permit under the ordinance.

The Witnesses look upon their work as Christian and charitable. To them it is not selling books or papers but accepting contributions to further the work in which they are engaged. The prosecuting officer contended that the offer of the publications and the acceptance of the

money was a solicitation or sale of books, wares or merchandise. At the conclusion of the hearing, which was without a jury, the judge found appellant guilty of violating the ordinance of the City of Paris and fined her one hundred dollars.

The appeal was brought here under § 237 (a) of the Judicial Code which provides for review of a final judgment of the highest court of a state in which a decision could be had. By our order of December 21, 1942, we requested counsel to discuss whether this judgment could be fully reviewed on this record by a higher state court by habeas corpus or other proceeding. Under the statutes of Texas, no appeal lies from the judgment of the County Court imposing a fine of this amount. Vernon's Texas Stat. 1936, Article 53 (Code of Criminal Procedure);[3] *Ex parte Largent,* 162 S. W. 2d 419, 421, and cases cited. The appellant, under Texas practice, apparently could test by habeas corpus the constitutionality on its face of the ordinance under which she was convicted but may not use that writ to test the constitutionality of the ordinance as applied to the act of distributing religious literature. Cf. *Ex parte Largent, supra.* Since there is, by Texas law or practice, no method which has been called to our attention for reviewing the conviction of appellant, on the record made in the county court, we are of the opinion the appeal is properly here under § 237 (a) of the Judicial Code. The proceeding in the county court was a distinct suit. It disposed of the charge. The possibility that the appellant might obtain release by a subsequent and dis-

[3] "Court of Criminal Appeals.—The Court of Criminal Appeals shall have appellate jurisdiction co-extensive with the limits of the State in all criminal cases. This article shall not be so construed as to embrace any case which has been appealed from any inferior court to the county court or county court at law, in which the fine imposed by the county court or county court at law shall not exceed one hundred dollars."

tinct proceeding, and one not in the nature of a review of the pending charge, in the same or a different court of the State does not affect the finality of the existing judgment or the fact that this judgment was obtained in the highest state court available to the appellant. Cf. *Bandini Co.* v. *Superior Court,* 284 U. S. 8, 14; *Bryant* v. *Zimmerman,* 278 U. S. 63, 70.

Upon the merits, this appeal is governed by recent decisions of this Court involving ordinances which leave the granting or withholding of permits for the distribution of religious publications in the discretion of municipal officers.[4] It is unnecessary to determine whether the distributions of the publications in question are sales or contributions. The mayor issues a permit only if after thorough investigation he "deems it proper or advisable." Dissemination of ideas depends upon the approval of the distributor by the official. This is administrative censorship in an extreme form. It abridges the freedom of religion, of the press and of speech guaranteed by the Fourteenth Amendment.[5]

Reversed.

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

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[4] *Lovell* v. *Griffin,* 303 U. S. 444, 447, 451; *Schneider* v. *State,* 308 U. S. 147, 157, 163; *Cantwell* v. *Connecticut,* 310 U. S. 296, 302.

[5] *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 570, 571; *Cantwell* v. *Connecticut,* 310 U. S. 296, 303; *Gitlow* v. *New York,* 268 U. S. 652.

CHOCTAW NATION OF INDIANS *v.* UNITED STATES ET AL.

CERTIORARI TO THE COURT OF CLAIMS.

No. 80. Argued December 7, 8, 1942.—Decided March 8, 1943.

1. In construing Indian treaties, their plain terms may not be disregarded in order to remedy a claimed injustice or to arrive at what is asserted to be the understanding of the parties. P. 432.
2. Under the agreement of 1902 between the United States and the Chickasaw and Choctaw Nations, which superseded the Treaty of 1866 and supplemented the Atoka agreement of 1897, allotments of common tribal lands to Choctaw freedmen were to be made without deduction from the Choctaw Nation's proportionate interest in the common lands remaining and the Chickasaw Nation is not entitled to compensation in respect of such allotments. P. 433.

95 Ct. Cls. 192, reversed.

CERTIORARI, 317 U. S. 607, to review a judgment against the Choctaw Nation in a suit brought by the Chickasaw Nation against the United States under a special jurisdictional Act, in which suit the Choctaw Nation was impleaded as a defendant on motion of the United States.

Mr. William G. Stigler for petitioner.

Mr. Robert E. Mulroney, with whom *Solicitor General Fahy, Assistant Attorney General Littell,* and *Messrs. Vernon L. Wilkinson* and *Roger P. Marquis* were on the brief, for the United States; and *Mr. Melven Cornish* for the Chickasaw Nation,—respondents.

MR. JUSTICE MURPHY delivered the opinion of the Court.

On August 5, 1929, this suit was begun against the United States by the Chickasaw Nation under the jurisditional Act of June 7, 1924, 43 Stat. 537.[1] By order of

[1] As amended by 44 Stat. 568, and 45 Stat. 1229.

January 2, 1940, the Choctaw Nation was impleaded as a defendant on motion of the United States. The question is whether the Chickasaw Nation is entitled to compensation for its one-fourth interest in the common lands of the two nations allotted to the Choctaw freedmen, and, if so, who should compensate the Chickasaw Nation. The Court of Claims held that the Chickasaws were entitled to compensation and that the primary liability, the amount of which was reserved for future determination, rested upon the Choctaw Nation. Since there was no indication that it would be unable to satisfy whatever judgment might be made, the Court of Claims declined to consider or decide the liability, if any, of the United States.[2] We granted certiorari because the case was thought to raise important questions concerning the relations between the two tribes and the United States.

At the time of the Civil War, the Chickasaws and the Choctaws were slave-owning tribes holding their lands in common, their respective interests being one-fourth and three-fourths. Both fought on the side of the Confederacy, and, after the cessation of hostilities, they entered into the Treaty of April 28, 1866, 14 Stat. 769, with the United States. That treaty abolished slavery among them and provided in Article III for a fund of $300,000 which was to be held in trust for the two nations and paid to them (one-fourth to the Chickasaws and three-fourths to the Choctaws) when they conferred tribal rights and privileges upon their former African slaves and gave them each forty acres of the common lands. If such laws were not adopted within two years, the fund was to be held for the benefit of those former slaves whom the United States should remove from the territory, instead of for the two

[2] 95 Ct. Cls. 192. The United States, while insisting that the Court of Claims correctly decided that the primary liability rests upon the Choctaw Nation, has joined that nation in urging before this Court that no liability in fact exists.

nations. However, the Treaty also provided in Article XLVI that $200,000 of the fund was to be paid over immediately to the two nations and this was done. See Act of July 26, 1866, 14 Stat. 255, 259.

In 1882, neither nation having acted in accordance with the Treaty and the United States having taken no steps to remove the freedmen, an act was passed by Congress which provided that either tribe might adopt and provide for their freedmen in accordance with Article III of the Treaty. Act of May 17, 1882, 22 Stat. 68, 72–73. In 1883 the Choctaws adopted their freedmen and declared them each entitled to forty acres of the nation's lands, but no allotments were actually made.[3] Congress thereupon appropriated for the Choctaws their share of the balance of the $300,000 fund. See Act of March 3, 1885, 23 Stat. 362, 366. The Chickasaws never adopted their freedmen although they took an abortive step in that direction in 1873. See *The Chickasaw Freedmen,* 193 U. S. 115, and H. Ex. Doc. No. 207, 42d Cong., 3d Sess. Despite this failure the Chickasaws received some of the balance of their share of the original fund.[4]

In 1897, the Commission of the Five Civilized Tribes[5] negotiated the Atoka agreement with the two Indian nations. That provided for the allotment in severalty of the common tribal lands, including forty-acre allotments to the Choctaw freedmen, and contained a provision for the reduction of allotments to Choctaw Indian

[3] The act of adoption is set forth in the annual report of the Commissioner of Indian Affairs for 1884. See H. Ex. Doc. No. 1, pt. 5, 48th Cong., 2d Sess., pp. 36–37.

[4] See Act of July 26, 1866, 14 Stat. 255, 259; Act of April 10, 1869, 16 Stat. 13, 39; Act of May 17, 1882, 22 Stat. 68, 72.

[5] This Commission, commonly known as the Dawes Commission, was created by the Act of March 3, 1893, 27 Stat. 612, 645, to negotiate with the Creeks, Cherokees, Choctaws, Chickasaws and Seminoles for the extinguishment of tribal titles to land and the allotment of their lands in severalty.

citizens on account of the allotments to the Choctaw freedmen, as follows:

"Provided that the lands allotted to the Choctaw freedmen, are to be deducted from the portion to be allotted under this agreement to the members of the Choctaw tribe, so as to reduce the allotments to the Choctaws by the value of the same and not affect the value of the allotments to the Chickasaws."

No provision was made in the original Atoka agreement for allotments to the Chickasaw freedmen, but in confirming the Atoka agreement as part of the Curtis Act of 1898 (30 Stat. 495) Congress stipulated in § 21 that forty-acre allotments were to be made to the Chickasaw freedmen as well, to be used until their rights under the Treaty of 1866 were determined in such manner as Congress might direct. It also provided in § 29 that all the lands of the two tribes were to be allotted to the members of the tribes so as to give each one a fair and equal share, and that the lands allotted to the Choctaw and Chickasaw freedmen were "to be deducted from the portion to be allotted under this agreement to the members of the Choctaw and Chickasaw tribe so as to reduce the allotment to the Choctaws and Chickasaws by the value of the same." (30 Stat. 505–06.) This confirmed agreement was approved by both tribes.

Before any allotments were made, however, a supplementary agreement was entered into by the United States and the two nations in 1902 (32 Stat. 641), which radically changed matters by providing for the allotment to each member of the two tribes of but three hundred and twenty acres instead of the aliquot allotment of all the land, as provided in the Atoka agreement. Permanent allotments of forty acres were to be made to each Chickasaw and Choctaw freedman, the remaining unallotted land was to be sold and the proceeds were to be used to equal-

ize allotments as far as necessary, the balance being paid into the Treasury of the United States to the credit of the two tribes and distributed per capita as their other funds.[6] That agreement also contained elaborate provisions in §§ 36–40, inclusive, under a subheading entitled "Chickasaw Freedmen," for a suit in the Court of Claims to determine whether the Chickasaw freedmen had any right to allotments under the Treaty of 1866 and subsequent Congressional and tribal legislation, the United States to pay the value of those allotments to the two nations according to their respective interests if the Chickasaw freedmen were held to be without such rights.

The 1902 agreement contained no express provision concerning the deduction of allotments to the Choctaw freedmen from allotments to the members of the Choctaw Nation or from that nation's proportionate share in the common lands. Section 40 concluded with a proviso that: "nothing contained in this paragraph shall be construed to affect or change the existing status or rights of the two tribes as between themselves respecting the lands taken for allotment to freedmen, or the money, if any, recovered as compensation therefor, as aforesaid." A further provision of the agreement, § 68, declared that: "No act of Congress or treaty provision, nor any provision of the Atoka agreement, inconsistent with this agreement, shall be in force in said Choctaw and Chickasaw nations."

Following the 1902 agreement, allotments were made from the common lands to the citizens and the freedmen of the two tribes. The Chickasaws received no compensation for their one-fourth interest in the common lands allotted to the Choctaw freedmen either by reduction of

[6] The balance was distributed according to the historic proportionate interests of the tribes, one-fourth to the Chickasaws and three-fourths to the Choctaws. *Choctaw Nation* v. *United States,* 83 Ct. Cls. 140, 144.

the allotments to the Choctaw citizens or of that tribe's proportionate share, or by any other settlement or adjustment. In the litigation authorized by §§ 36–40 of the 1902 agreement, the Chickasaw freedmen were held without rights to the allotments which had been given them, and accordingly judgment was rendered against the United States for the value of their allotments in the sum of $606,936.08, which was paid to the two nations in the proportion of one-fourth to the Chickasaws and three-fourths to the Choctaws. *United States* v. *Choctaw Nation,* 38 Ct. Cls. 558, affirmed *sub nom., The Chickasaw Freedmen,* 193 U. S. 115; and see Act of June 25, 1910, 36 Stat. 774, 807–08.

The Court of Claims held that the Treaty of 1866 was not determinative, that the confirmed Atoka agreement required that allotments to Choctaw freedmen be deducted from the allotments to the Choctaw citizens and that the proviso to § 40 of the supplemental agreement of 1902, while "not well chosen" for the purpose, preserved this requirement. We take a different view.

The Treaty of 1866, in Article III of which the Chickasaws unconditionally consented to allotments from the common lands to Choctaw freedmen who might be adopted in conformity with the treaty requirements, is not determinative because it was superseded, before any allotments were made, by the confirmed Atoka agreement which required the deduction of all freedmen's allotments, both Choctaw and Chickasaw, from those of the members of their respective tribes. The Atoka agreement was in turn supplemented by the 1902 agreement, which omitted the deduction requirement of the Atoka agreement and contained not a word about deducting freedmen's allotments from the respective tribal shares in the common lands. In view of § 68 of the 1902 agreement, which

repealed all inconsistent provisions of the Atoka agreement, these omissions were fatal. When the differences between the Atoka agreement and that of 1902 are considered, it is clear that the deduction provision of the former was inconsistent with the latter. The Atoka agreement provided for the allotment of all the land with the members of the tribes sharing equally, and the allotments to their freedmen were to be deducted from their portion so as to reduce their allotments *pro tanto*. But under the 1902 agreement the members of both tribes were to receive definite allotments of three hundred and twenty acres instead of equal shares of the whole. If the forty-acre allotments to freedmen were deducted from the specific allotments to members of their tribes so as to reduce those allotments "by the value of the same," as required by the Atoka agreement, the members would not have received their designated acreage. Also, an attempt to shift the deduction burden from members' allotments to the proportionate shares of the tribes in the unallotted lands which were to be sold is barred by the fact that the Atoka agreement required deduction to reduce the value of members' allotments, not to reduce the respective interests of the tribes in the proceeds from the sale of unallotted lands, a provision wholly foreign to the Atoka agreement.

Further proof of the inconsistency between the 1902 agreement and the deduction requirement of the Atoka agreement is the fact that allotments to Chickasaw freedmen were made from the common lands and both tribes were to and did share, "according to their respective interests," in the ultimate recovery of the value of those lands from the United States, as promised in § 40. Only the Chickasaws should have been compensated for the

allotments to their freedmen if the deduction requirement of the Atoka agreement was carried over into the 1902 agreement, whether that provision be taken as requiring the reduction of members' allotments (which it did), or as requiring the reduction of the tribes' proportionate shares in the common lands (which it did not). The circumstance that both tribes were to and did share in the award supports the conclusion that allotments to all freedmen were to be charged to the common holdings without deduction from the respective tribal interests.

Despite these inconsistencies, the Chickasaws urge that the proviso to § 40 of the 1902 agreement preserved the deduction requirement of the Atoka agreement. The terms of the proviso, however, do not support this conclusion. It does not read, as the Chickasaws would have it, that "nothing contained in this *agreement* shall be construed to affect or change the existing status or rights of the two tribes as between themselves respecting the lands taken for allotment to freedmen, or the money, if any, recovered as compensation therefor, as aforesaid." Actually the proviso concerns itself only with the possible effect of "this paragraph" which must mean §§ 36–40, grouped under the heading "Chickasaw Freedmen." That "paragraph" merely required that allotments to the Chickasaw freedmen were to be permanent, that their right to allotments be litigated in the Court of Claims, and that any resulting award be paid to both tribes by the United States. Not once in the entire "paragraph" is there a reference to Choctaw freedmen. And, since the proviso concludes with a reference to "the money, if any, recovered as compensation therefor, as aforesaid," it even more clearly was not concerned with allotments to Choctaw freedmen because no provision was made in the 1902 agreement for money recovery in the case of allotments to Choctaw freedmen. If the proviso is construed as pre-

serving the deduction requirement, it is rewritten in effect, and this should not be done.

In so construing the proviso, the Court of Claims relied heavily upon certain findings of fact, set forth below,[7] to show that was the intention and understanding of the parties. Of course, treaties are construed more liberally than private agreements, and to ascertain their meaning

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[7] The court found:

(a) That the Chickasaws objected to allotments to the Choctaw freedmen out of the commonly owned lands;

(b) That the Chickasaws insisted that the 1902 Agreement contain some provision saving their rights not to have allotments to the Choctaw freedmen made at the expense of the Chickasaws' interest in the common lands, and after a conference with the assistant attorney general who was legal adviser to the Department of the Interior, it was agreed that the proviso to § 40 be included to protect their interests;

(c) That the Choctaw Nation, prior to the entry of final judgment on January 24, 1910, in the proceeding authorized by §§ 36–40 (see 38 Ct. Cls. 558; 193 U. S. 115), filed an "Application for Additional Decree" in which it set out that the Chickasaws were entitled to compensation for their proportionate interest in the commonly owned lands allotted to the Choctaw freedmen and requested the court to enter a supplemental decree deducting from their proportionate share of the judgment one-fourth of the value of the jointly held lands allotted to the Choctaw freedmen and add that amount to the amount to be apportioned to the Chickasaw Nation under the judgment. (No action was taken on this request.)

(d) That on March 11, 1910, the Governor of the Chickasaw Nation wrote to the Commissioner of Indian Affairs requesting permission to employ separate counsel for the Chickasaw Nation and setting out in support of this request the Chickasaws' claim for compensation for lands allotted to the Choctaw freedmen out of the common domain of the two nations without the consent of the Chickasaws and pointed out that the Chickasaws had had no attorney to represent them at the time that judgment was entered in the suit brought pursuant to the Supplemental Agreement. The Commissioner recommended denial of the request on the ground that in view of the admission of the Choctaws in their request for an additional decree, judicial action did not seem to be necessary to settle the controversy.

we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties. *Factor* v. *Laubenheimer,* 290 U. S. 276, 294–95; *Cook* v. *United States,* 288 U. S. 102, 112. Especially is this true in interpreting treaties and agreements with the Indians; they are to be construed, so far as possible, in the sense in which the Indians understood them, and "in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people." *Tulee* v. *Washington,* 315 U. S. 681, 684–85. See also *United States* v. *Shoshone Tribe,* 304 U. S. 111, 116; *Choctaw Nation* v. *United States,* 119 U. S. 1, 28. But even Indian treaties cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties. Cf. *United States* v. *Choctaw and Chickasaw Nations,* 179 U. S. 494, 531–33; *United States* v. *Mille Lac Chippewas,* 229 U. S. 498, 500. Here the words of the proviso are inapposite to the proposed construction and we do not believe the findings are enough to warrant departing from the language used. The findings are merely findings as to evidence. There is no finding as to the ultimate fact whether or not the two tribes intended to agree on something different from that appearing on the face of the 1902 agreement. Without such a finding the agreement must be interpreted according to its unambiguous language. Furthermore, if we were to find the ultimate fact, we seriously doubt whether we could discover from these evidentiary findings what the agreement among the two tribes and the United States was, if other than that expressed in the 1902 agreement. For the most part, the findings are concerned with the assertions and claims of the Chickasaws. The only indication that the Choctaws ever shared those views at any time is their request for an "Additional Decree," upon which no action was ever taken.

Equitable considerations do not dictate a different result. By the Treaty of 1866 both tribes shared in the $200,000 advance payment for the adoption of their freedmen and the allotment of forty acres of land to them. Even though the Chickasaws never adopted their freedmen, they did receive a portion of their share of the balance of the original $300,000 treaty fund.[8] When they contested the right of their freedmen to allotments, the United States explicitly promised in the 1902 agreement to reimburse them if there were an adverse judicial decision. The agreement contained no promise to reimburse them for allotments to Choctaw freedmen, and, in view of the specific promise with regard to their own freedmen, none should be implied.

We conclude that allotments from the common tribal lands were to be made under the 1902 agreement to Choctaw freedmen without deducting those allotments from the Choctaw Nation's share of the lands or otherwise compensating the Chickasaws for their interest in the lands so allotted. Since no liability exists, it is unnecessary to consider whether the Choctaw Nation or the United States is primarily liable, or whether the Court of Claims had power under the jurisdictional act (43 Stat. 537) to place liability upon the Choctaw Nation.

The judgment below is reversed and the cause remanded with instructions to dismiss the petition.

Reversed.

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

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[8] See note 4, *ante*.

CORN EXCHANGE NATIONAL BANK & TRUST CO. ET AL. *v.* KLAUDER, TRUSTEE IN BANKRUPTCY.

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

No. 452. Argued February 2, 3, 1943.—Decided March 8, 1943.

Within four months of bankruptcy the debtor had assigned accounts receivable as security for concurrent loans. Notice to those who owed the accounts was not given, although under applicable local law notice was necessary in order to preclude possible superior rights in subsequent bona fide purchasers of the accounts. *Held*, that the assignments were preferential under § 60 (a) of the Bankruptcy Act and thus avoidable by the trustee in bankruptcy under § 60 (b) thereof. P. 439.

129 F. 2d 24, 894, affirmed.

CERTIORARI, 317 U. S. 617, to review the reversal of an order of the bankruptcy court which affirmed orders of the Referee allowing certain claims of the petitioners as secured claims against the bankrupt estate.

Mr. Charles J. Biddle, with whom *Messrs. Maurice Bower Saul, William E. Mikell, Jr., Allen S. Olmsted, 2d,* and *James McMullan* were on the brief, for petitioners.

Mr. Bertram Bennett, with whom *Mr. Rawdon Libby* was on the brief, for respondent.

MR. JUSTICE JACKSON delivered the opinion of the Court.

This case requires us to determine the application of the preference provisions of § 60 (a) of the Bankruptcy Act as amended by the Chandler Act of June 22, 1938,[1] to loans made on assignments of accounts receivable.

[1] 52 Stat. 840, 869–870; 11 U. S. C. § 96 (a).

The Quaker City Sheet Metal Company became embarrassed for want of working capital in 1938. Creditors representing a large percentage of claims later proved in bankruptcy agreed to subordinate their claims to those which might be incurred for new working capital. A creditor's committee took supervision of the business and in 1938 arranged with the petitioner Bank to advance from time to time money for payroll and other needs on concurrently made assignments of accounts receivable. At the time of bankruptcy the Company was indebted to the Bank for loans so made on contemporary assignments between January 19, 1940, and April 5, 1940. On April 12, 1940, petitioner Dearden made a loan on similar security. An involuntary petition in bankruptcy was filed against the Company on April 18, 1940, followed by adjudication on May 7, 1940. When the assignments were made they were recorded on the Company's books, but neither petitioner had ever given notice of assignment to the debtors whose obligations had been taken as security. Because of this omission the trustee challenged their right to the benefits of their security. He was overruled by the referee and the District Court, but his position was sustained by the Circuit Court of Appeals for the Third Circuit,[2] on an interpretation of § 60 (a) which conflicts with an interpretation by the Circuit Court of Appeals for the Fifth Circuit.[3] Hence we granted certiorari.[4]

Section 60 (a) as amended and applicable reads:

"A preference is a transfer, as defined in this Act, of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four

[2] 129 F. 2d 894.

[3] *Adams* v. *City Bank & Trust Co.*, 115 F. 2d 453.

[4] 317 U. S. 617.

months before the filing by or against him of the petition in bankruptcy, . . . the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class. For the purposes of subdivisions a and b of this section, a transfer shall be deemed to have been made at the time when it became so far perfected that no bona-fide purchaser from the debtor and no creditor could thereafter have acquired any rights in the property so transferred superior to the rights of the transferee therein, and, if such transfer is not so perfected prior to the filing of the petition in bankruptcy . . ., it shall be deemed to have been made immediately before bankruptcy."

Section 1 (30) specifically provides that "transfer" includes an assignment.[5]

The Circuit Court of Appeals has determined, and we accept its conclusion, that at all relevant times it was the law of Pennsylvania, where these transactions took place, that because of the failure of these assignees to give notice to the debtors whose obligations were taken, a subsequent good-faith assignee, giving such notice, would acquire a right superior to theirs.[6] It held that the assignments were preferences under § 60 (a) and therefore, under the terms of § 60 (b),[7] inoperative against the trustee.

This is undoubtedly the effect of a literal reading of the Act. Its apparent command is to test the effectiveness of a transfer, as against the trustee, by the standards which

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[5] 52 Stat. 840, 842, 11 U. S. C. § 1 (30).

[6] *Phillips's Estate (No. 3)*, 205 Pa. 515, 55 A. 213; cf. *Phillips's Estate (No. 4)*, 205 Pa. 525, 55 A. 216. Pennsylvania has since provided by statute that notice of the assignment on the assignor's books will protect the assignee. Pa. Laws, 1941, No. 255, p. 606 (July 31, 1941), 69 Purd. Stat. Ann. § 561.

[7] 52 Stat. 840, 870, 11 U. S. C. § 96 (b).

applicable state law [8] would enforce against a good-faith purchaser. Only when such a purchaser is precluded from obtaining superior rights is the trustee so precluded. So long as the transaction is left open to possible intervening rights to such a purchaser, it is vulnerable to the intervening bankruptcy. By thus postponing the effective time of the transfer, the debt, which is effective when actually made, will be made antecedent to the delayed effective date of the transfer and therefore will be made a preferential transfer in law, although in fact made concurrently with the advance of money. In this case the transfers, good between the parties, had never been perfected as against good-faith purchasers by notice to the debtors as the law required, and so the conclusion follows from this reading of the Act that the petitioners lose their security under the preference prohibition of § 60 (b).

Such a construction is capable of harsh results,[9] and it is said that it will seriously hamper the business of "non-notification financing," of which the present case is an instance. This business is of large magnitude and it is said to be of particular benefit to small and struggling borrow-

[8] Questions of this sort arising in bankruptcy cases were solved by reference to state law even before the decision of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64. *Holt* v. *Crucible Steel Co.*, 224 U. S. 262; *Benedict* v. *Ratner*, 268 U. S. 353. The decision in *Salem Trust Co.* v. *Manufacturers' Finance Co.*, 264 U. S. 182, that, as a matter of "general law," absence of notice to the debtor of the assignment of his account did not open the door to a subsequent assignee to obtain superior rights, was not rendered in a bankruptcy case, and is in any event inapplicable since the decision of the *Tompkins* case.

[9] Whether the petitioners have any rights under the agreement of some of the creditors to subordinate their claims to those which might be incurred for new working capital is a question which has neither been raised by the parties nor considered by the Court.

ers.[10] Such consequences may, as petitioners argue, be serious, but we find nothing in Congressional policy which warrants taking this case out of the letter of the Act.

The Committee of the House of Representatives which reported § 60 (a) as quoted above was fully aware of the vicissitudes of its predecessors.[11] These are recited in detail elsewhere, and need not be repeated here beyond a general statement that for thirty-five years Congress has consistently reached out to strike down secret transfers, and the courts have with equal consistency found its efforts faulty or insufficient to that end.[12] Against such a

[10] Petitioners cite and rely upon Saulnier and Jacoby, Accounts Receivable Financing (National Bureau of Economic Research, 1943), for an estimate that in 1941 commercial finance companies advanced $536,000,000 on this basis; and commercial banks, $952,000,000. Of the borrowers, it was estimated that 63% had total (not net) assets of less than $200,000; and 31%, less than $50,000. Their borrowing was estimated, however, to amount to less than 19% of the total. *Id.* at 17, 32, 64.

"Factoring," a system involving notice to the trade debtors, and confined principally to the textile industry, amounted in 1941 to $1,150,000,000. *Id.* at 3, 17, 58 *et seq.*

[11] See statement of Professor McLaughlin, Hearings, Revision of the Bankruptcy Act, House Judiciary Committee, 75th Cong., 1st Sess., pp. 122–125. He stated *Thompson* v. *Fairbanks*, 196 U. S. 516, as applying a rule of state law that a mortgagee by taking possession of the mortgaged property at a time subsequent to the execution of the mortgage thereby validated it as of the time of execution. He said that § 60 (a) would prevent such validation by relation back. Similar disapproving reference was made to *Bailey* v. *Baker Ice Machine Co.*, 239 U. S. 268; *Carey* v. *Donohue*, 240 U. S. 430; and *Martin* v. *Commercial National Bank*, 245 U. S. 513; with the explanation that "You are going to have taken away some advantages that some people have enjoyed, and certain practices are going to be altered to some extent. But you have that every time you pass any kind of a commercial law."

[12] See cases cited in the note above; *Hirschfeld* v. *Nogle*, 5 F. Supp. 234; 3 Collier on Bankruptcy (14th Ed.) §§ 60.05, 60.37. The his-

background, § 60 (a) was drawn and reported to Congress with this explanation of its purpose and effect: "The new test is more comprehensive and accords with the contemplated purpose of striking down secret liens. It is provided that the transfer shall be deemed to have been made when it has become so far perfected that neither a bona-fide purchaser nor creditor could thereafter have acquired rights superior to those of the transferee. As thus drafted, it includes a failure to record and any other ground which could be asserted by a bona-fide purchaser or a creditor of the transferor, as against the transferee. A provision also has been added which makes the test effective even though the transfer may never have actually become perfected." [13]

Whatever advantages may inhere in non-notification financing which might have made Congress reluctant to jeopardize it, the system also has characteristics which make it impossible for us to conclude that it is to be distinguished from the secret liens Congress was admittedly trying to reach.

Receivables often are assigned only when credit in a similar amount is not available through other channels.[14]

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tory and meaning of the present § 60 (a) are discussed in 3 Collier, *op. cit. supra,* § 60.48; 2 Glenn, Fraudulent Conveyances and Preferences (1940) § 534; Hanna, Some Unsolved Problems under Section 60A of the Bankruptcy Act, 43 Columbia Law Review 58; McLaughlin, Aspects of the Chandler Bill to Amend the Bankruptcy Act, 4 University of Chicago Law Review 369; Neuhoff, Assignment of Accounts Receivable as Affected by the Chandler Act, 34 Illinois Law Review 538; Mulder, Ambiguities in the Chandler Act, 89 University of Pennsylvania Law Review 10; Hamilton, The Effect of Section Sixty of the Bankruptcy Act upon Assignments of Accounts Receivable, 26 Virginia Law Review 168.

[13] H. R. Rep. No. 1409, 75th Cong., 1st Sess., p. 30.

[14] Saulnier and Jacoby, *op. cit. supra,* note 10, pp. 6, 21 *et seq.,* 61 *et seq.*

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Interest and other charges are high,[15] and an assignment often is correctly understood as a symptom of financial distress.[16] The borrower does not wish his customers to learn of his borrowing arrangement for the reason, among others, that customers, particularly in placing orders for future delivery, prefer to rely on solvent suppliers. And often the borrower desires to conceal the fact that he is being financed by this method, lest knowledge lead to a withdrawal of further credit or refusal of new credit.[17] The borrower and the lender on assigned accounts receivable thus have a mutual interest in not making the transaction known. So long as the transaction may remain a secret, it is not apt to become known to the trade. When the transaction is communicated to the trade debtors it is known where there is less motive to keep it under cover. Commercial and trade reporting agencies are diligent to

[15] Effective rates are estimated to range from approximately 9% per annum on money in use for the best borrowers to 20% per annum for those whose accounts present the financing company with the heaviest operating costs and whose receivables are of a quality to command only a relatively low percentage advance. *Id.* at 86, 131 *et seq.*

[16] *Id.* at 22, 99.

[17] "Another reason for the use of the non-notification procedure, although less important than other motives and less relevant at present than formerly, seems to have been the desire on the part of the concern being financed to keep the fact of its use of this source of funds from becoming known to its creditors. Presumably these creditors would be less likely to grant the concern further credit on the ground that resort to accounts receivable financing reflected an unsatisfactory financial position and impaired their own security. It seems likely that this attitude toward non-notification financing may be traced to a mixture of simple prejudice and genuine experience with cases where creditors' meetings disclosed for the first time that the bankrupt had secretly assigned his most liquid assets and made unproductive use of the funds so acquired. Genuine experience must have been the more important basis of the two for it is unlikely that an attitude and prejudice so deeply embedded could be founded entirely on misinformation and irrational judgment." *Id.* at 22.

obtain credit information of this character. Its dissemination may often have adverse effects upon both the borrower and the lender, but they are not the only interested parties. Secrecy has the effect of inducing others to go along with the borrower in ignorance, where they would not do so if informed.

It is said that assignments such as are involved in this case could not have been within the contemplation of the Act, since its application will have but little effect in remedying whatever secrecy attends them. It is true that notice to the debtors sufficient to satisfy the requirements of applicable state law might never have been communicated to the creditors, and that many states do not require notice to the debtor to foreclose possible superior rights of subsequent assignees.[18] So also is it true that conflicts and confusion may result where the transaction or location of the parties is of such a nature that doubt arises as to which of different state laws is applicable. But the fact that the remedy may fall short in these respects does not justify denying it all effect.

That the assignments in this case were made with the knowledge and acquiescence of many creditors does not cure the failure to meet the requirements of notice laid down by the applicable state law. Neither the words nor the policy of § 60 (a) afford any warrant for creating exceptions to fit isolated hard cases.

The judgment below is

Affirmed.

MR. JUSTICE RUTLEDGE did not participate in the consideration or decision of this case.

MR. JUSTICE ROBERTS is of opinion that the judgment should be reversed for reasons stated in the dissenting

[18] See 2 Williston, Contracts (Rev. Ed.) § 435, and Hamilton, *loc. cit. supra,* note 12.

opinion below, 129 F. 2d 897, and in *Adams* v. *City Bank & Trust Co.*, 115 F. 2d 453; *Girand* v. *Kimbell Milling Co.*, 116 F. 2d 999, *In re Talbot Canning Corp.*, 35 F. Supp. 680; *Associated Seed Growers* v. *Geib*, 125 F. 2d 683, and *In re E. H. Webb Grocery Co.*, 32 F. Supp. 3.

UNITED STATES *v.* SWIFT & CO. ET AL.

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

No. 529. Argued February 11, 12, 1943.—Decided March 15, 1943.

1. The decision of the District Court in this case, setting aside an indictment for violation of the Sherman Act, rests not alone upon a construction of the statute but also upon the independent ground of the insufficiency of the indictment as a pleading, and it is therefore not appealable directly to this Court under the Criminal Appeals Act. P. 444.
2. Pursuant to the Act of May 9, 1942, the cause is remanded to the Circuit Court of Appeals, which thereupon will have authority to pass upon the construction of both the indictment and the statute. P. 445.

Remanded to the C. C. A.

APPEAL from a judgment, 46 F. Supp. 848, dismissing an indictment for violation of the Sherman Act.

Mr. Charles H. Weston, with whom *Solicitor General Fahy*, *Assistant Attorney General Arnold*, and *Mr. Richard S. Salant* were on the brief, for the United States.

Mr. Kenneth W. Robinson, with whom *Messrs. Edgar B. Kixmiller*, *Robert G. Bosworth*, *C. C. Dawson, Jr.*, *Charles J. Faulkner, Jr.*, *John R. Coen*, *W. W. Grant*, *Morrison Shafroth*, *Henry W. Toll*, and *Harry S. Silverstein* were on the brief, for appellees.

PER CURIAM.

This is a direct appeal under the Criminal Appeals Act, 18 U. S. C. § 682, as amended by the Act of May 9, 1942, 56 Stat. 271, from a judgment of the district court setting aside an indictment under the Sherman Act. By the statute our jurisdiction is restricted to review of a decision or judgment based upon the invalidity or construction of the statute on which the indictment is founded. Included among the defendants are the commission firms which receive and sell fat lambs on the Denver Livestock Exchange, and three packing companies which purchase fat lambs on the Denver market for shipment interstate to their manufacturing plants.

The indictment charges that the defendants agreed among themselves to purchase lambs only on the Exchange, and to abandon the previously prevailing practice of making direct purchases from producers in the country, for interstate shipment, "thereby restraining the channels of distribution within the Denver marketing area through which said fat lambs for eastbound shipment move, and . . . restraining the interstate trade and commerce described in this indictment, in violation of § 1 of the Sherman Act." It also alleges that the agreement or conspiracy among the defendants is "in restraint of the hereinbefore described trade and commerce in fat lambs among the several States of the United States and in violation of § 1" of the Sherman Act.

The district court dismissed the indictment on the ground that the alleged agreement and practices under it are not in any way shown to have affected the price of lambs or the amount of lambs raised or produced, or to have lessened their flow in interstate commerce. While its decision was rested in part upon the construction of the Sherman Act, the court also relied on the insufficiency

of the pleading, in that it failed to allege any injury to or effect upon interstate commerce resulting from the alleged agreement or conspiracy. It said: "the indictment is defective in that it does not go far enough in its charges to bring the agreement within any of the recognized canons of construction of the Sherman Anti-Trust Act, because, as stated before, there is no allegation that the defendants intended to or in any way harmed anyone or affected the price of fat lambs, the amount of them that could be sold, or the places where they could be sold"; and again, "the government has gone beyond the extent and meaning of that law as interpreted by the Supreme Court, for, as stated, there is no allegation that anyone has been injured or the flow of interstate commerce in any way affected." 46 F. Supp. 848, 852.

From this we must take it that the court found that the general allegations with respect to the effect of the alleged agreement on commerce were not sufficiently specific. It thus placed its decision, in part at least, on the inadequacy of the allegations of the indictment, which we have quoted, to charge that the conspiracy or agreement affected commerce within the meaning of the Sherman Act. These we think were rulings upon the sufficiency of the indictment as a matter of pleading, the correctness of which cannot under the statute be reviewed here on direct appeal from the district court. And such an appeal to this Court does not lie when the district court has considered the construction of the statute but has also rested its decision upon the independent ground of a defect in the pleading. *United States* v. *Hastings*, 296 U. S. 188; *United States* v. *Halsey, Stuart & Co.*, 296 U. S. 451; *United States* v. *Borden Co.*, 308 U. S. 188, 193; *United States* v. *Wayne Pump Co.*, 317 U. S. 200, and cases cited.

This practice was recognized and confirmed by the adoption of the amendment of May 9, 1942 to the Crim-

inal Appeals Act. The amendment authorized the Government to appeal to the circuit court of appeals from a decision of the district court sustaining a demurrer to the indictment in any case "except where a direct appeal to the Supreme Court of the United States is provided by this Act," and provided that where an appeal is taken to the Supreme Court "which, in the opinion of that Court, should have been taken to a circuit court of appeals, . . . the Supreme Court . . . shall remand the cause to the circuit court of appeals . . ., which shall then have jurisdiction to hear and determine the same as if the appeal had been taken to that court in the first instance . . ." In urging the passage of this legislation the Attorney General, in his letter to the Speaker of the House of January 10, 1941, pointed out that "It not infrequently happens that a demurrer to an indictment is sustained or a motion in arrest of judgment is allowed on grounds other than the invalidity or construction of the statute upon which the prosecution is based. (*United States* v. *Hastings*, 296 U. S. 188; *United States* v. *Halsey, Stuart & Co.*, 296 U. S. 451.)" He accordingly recommended the proposed amendment as the appropriate means of securing appellate review in cases like those cited—cases which had laid down the principle that a direct appeal to this Court is not authorized when the decision of the district court rests in part on grounds independent of the invalidity or construction of the statute on which the indictment is founded. H. R. Rep. No. 45, 77th Cong., 1st Sess., p. 2; S. Rep. No. 868, 77th Cong., 1st Sess., p. 2.

As we are without jurisdiction to entertain the appeal, we remand the cause, in compliance with the Act of May 9, 1942, to the Circuit Court of Appeals for the Tenth Circuit, which will have authority to pass upon the construction both of the indictment and the statute.

So ordered.

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

MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, and MR. JUSTICE MURPHY think that the ruling of the district court was based on a "construction" of the Sherman Act and that this Court therefore has jurisdiction to review the judgment.

MR. JUSTICE JACKSON, concurring:

I agree with the dissenting Justices that the decision of the District Court is "based" upon the construction of the Sherman Act. The District Court has also drawn conclusions from the language of the indictment which can no doubt be said to amount to a construction of the indictment. But I do not think that the court's construction of the indictment constitutes an independent ground of decision such as this Court has held precludes its review on direct appeal.

However, one-half of the membership of the Court as constituted at the time this case was submitted do not agree with this view, which is certainly not free from doubt and is based on inferences from an oral and informal announcement of the District Court. In connection with the difficult problems that come up as a result of a dual appeal, we would be greatly aided if the District Courts in dismissing an indictment would indicate in the order the ground, and, if more than one, would separately state and number them. I am confident that a request from the Government to do so would generally be granted and that to do so would be of assistance to the Government in taking, and to us in passing on, appeals.

If the Court is to dispatch its business as an institution, some accommodation of views is necessary and, where no principle of importance is at stake, there are times when an insistence upon a division is not in the interests of the best administration of justice.

Such a case I consider this to be. To persist in my dissent would result either in affirmance of the judgment by an equally divided Court or in a reargument. There is difference of opinion as to whether, if we have jurisdiction, we may proceed beyond the construction of the Act and review opinions about the indictment which the lower court expressed but did not rely upon as an independent ground of decision. On that question I reserve opinion.

If, upon reargument in this Court, it should be decided that our review is limited to the correctness of the District Court's construction of the Act, and that it erred in this respect, the views which the District Court has expressed as to the sufficiency of the allegations of the indictment would be likely to embarrass the trial court in passing on offers of proof, admissibility of evidence, motions going to the sufficiency of the evidence, and other questions. It is not unlikely that the trial court would regard the statements of the District Court about this indictment as "the law of the case."

However the case may be disposed of, reargument seems to be in order, and I believe that the practical advantages favor rearguing it before the Circuit Court of Appeals, where there is no doubt that all of the questions can be decided.

Under these circumstances, to persist in my dissent would seem a captious insistence upon my reading of a District Court's informal opinion as to which there is reasonable ground for difference. I should not desire to appear committed to this case as a precedent. I concur in the result only because it seems the most sensible way out of our impasse in the immediate case.

ECKER ET AL., CONSTITUTING INSTITUTIONAL BONDHOLDERS COMMITTEE, *v.* WESTERN PACIFIC RAILROAD CORP. ET AL.*

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

No. 7. Argued October 13, 14, 1942.—Decided March 15, 1943.

1. Section 77 of the Bankruptcy Act, providing for the reorganization of railroads engaged in interstate commerce, *construed* with respect to the functions of the District Court and the Interstate Commerce Commission. P. 466.
2. In respect of a plan of reorganization for the Western Pacific Railroad Company, certified to it by the Interstate Commerce Commission, the District Court functioned in accordance with the requirements of § 77 of the Bankruptcy Act. P. 475.
3. In a railroad reorganization proceeding under § 77 of the Bankruptcy Act, the Interstate Commerce Commission's determination of value, supported by evidence and in accordance with legal standards, is not subject to reëxamination by the court. P. 472.
4. The determination of whether a plan of reorganization under § 77 is "compatible with the public interest" is for the Commission. P. 473.
5. The phrase "compatible with the public interest" includes questions as to the character and amount of the capitalization of the reorganized corporation; and, so long as legal standards are followed, the judgment of the Commission on such questions is final. P. 473.
6. In passing upon a plan of reorganization under § 77, the District Court acts only upon the issues specifically delegated by subsection (e). P. 474.
7. Section 77 (e) authorizes the elimination from participation in the reorganization of stockholders and creditors whose claims are

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*Together with No. 8, *Crocker First National Bank et al., Trustees,* v. *Western Pacific Railroad Corp. et al.;* No. 20, *Western Pacific Railroad Co.* v. *Ecker et al.;* No. 33, *Reconstruction Finance Corp.* v. *Western Pacific Railroad Corp. et al.;* and No. 61, *Irving Trust Co., Substituted Trustee,* v. *Crocker First National Bank et al.,* also on writs of certiorari, 316 U. S. 654, to the Circuit Court of Appeals for the Ninth Circuit.

valueless. Such authorization is a valid exercise of the power of Congress in respect of bankruptcies and does not deprive such claimants of property without due process of law. P. 475.

8. Neither the Constitution nor the Bankruptcy Act requires the issuance of warrants to stockholders and creditors whose claims, found to be without value, have been eliminated from participation in the reorganization. P. 476.
9. The mere possibility that earnings of the reorganized railroad may exceed expectations does not justify the issue of securities. P. 476.
10. There was no violation of legal standards in the Commission's requirement of a capital fund for future routine additions and betterments; nor in the issue of stock to former holders of interest-bearing securities. P. 476.
11. Although § 77 does not contemplate an independent examination by the court into the determination of value, it does require that the court be satisfied, upon the record before the Commission with such additional evidence as may be pertinent to the objections to the Commission's finding of value, that the statutory requirements have been followed. P. 477.
12. The Commission's conclusion that certain securities owned by the debtor, representing interests in two companies operating connecting lines (which securities the debtor had acquired in order that it might obtain a fair share of the business from and to those lines), were without value and not entitled to participate in the reorganization—it appearing before the Commission that the debtor had for ten years contributed substantial sums annually to meet deficits of each of the companies; although in the District Court it was shown that the companies were useful auxiliaries to the business of the debtor—was supported by material evidence and was properly accepted by the District Court. P. 478.
13. The provision of § 77 (e) that the plan of reorganization need not be submitted to stockholders and creditors when the Commission shall have found their claims to be without value "and the judge shall have affirmed the finding," does not require the court to make an independent appraisal of the valuation found by the Commission. P. 478.
14. The court properly affirms the Commission when it finds no legal objection to the Commission's valuation in determining whether particular claimants are entitled to participate in the reorganization. P. 479.
15. Sound railroad reorganization requires consideration of the interest of the public in an adequate transportation system, properly

financed, and this must be balanced against the satisfaction of claims, without equity, by the issue of securities without reasonable opportunities to earn a return. P. 481.

16. *Consolidated Rock Products Co.* v. *Du Bois,* 312 U. S. 510, distinguished. P. 482.

17. In the circumstances here, the determination by the Commission of the aggregate amount of securities which may be issued by the reorganized company was in substance a finding of total value for reorganization purposes; and the lack of a valuation in dollars is immaterial. P. 483.

18. It was not incumbent upon the Commission to produce data as to the reproduction cost of the debtor's property. P. 483.

19. The allocation to holders of Trustees' Certificates and the First Mortgage, although senior creditors, of preferred and common stock as well as income bonds of the new company, while some of the new bonds are allocated to bondholders secured by the General and Refunding Mortgage, who had a first lien on some assets, did not violate the full priority rule. P. 484.

20. Under the absolute priority rule, the stratification of securities issued to creditors need not follow invariably the relative priority of the claimants, 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. P. 484.

21. The treatment accorded the Reconstruction Finance Corporation in the allocation of new securities, in view of the money advanced by it to the debtor during the reorganization, *held* not inequitable to other creditors. P. 485.

22. The Commission's allocation of securities in the plan of reorganization here, was based upon the relative priority, value, and equity of the various claims of creditors, and its conclusions are in accord with the requirements and standards of subsections (b), (d) and (e) (1) of the Act. P. 488.

23. In the interest of expedition, the Court considers here a question which, though not passed upon by the Circuit Court of Appeals, was fully presented by the petition for certiorari, and the decision of which is essential to a complete review of the District Court. P. 489.

24. The District Court's conclusions adopting the Commission's tentative determinations as to the priority of the First Mortgage with respect to the debtor's equity in certain after-acquired rolling stock and equipment acquired under equipment trusts and a lease; the

debtor's interest in an after-acquired branch line; and the debtor's title to certain "non-carrier" realty, are here affirmed. Pp. 489, 503.

25. The provision of the plan directing that "All collateral pledged by the debtor as security for notes to the Reconstruction Finance Corporation, the Railroad Credit Corporation, and the A. C. James Company shall be reduced to possession by the respective pledgees thereof, and shall be by them surrendered to the reorganized company and canceled," is sustained. P. 503.

26. The showing made before the District Court as to changed conditions since the certification of the plan by the Commission, affords no basis for rejection of the Commission's plan. P. 508.

27. The Commission's selection of January 1, 1939, as the effective date of the plan was within its authority under subsection (b) of § 77. P. 509.

28. On this review of the action of the District Court, costs are here properly assessed against the losing parties, without prejudice to an allowance for disbursements under subsection (c) (12). P. 510.

124 F. 2d 136, reversed.

CERTIORARI, 316 U. S. 654, to review the reversal of an order of the District Court approving a plan of reorganization for the Western Pacific Railroad Company, 34 F. Supp. 493. See also 230 I. C. C. 61; 233 I. C. C. 409, and 236 I. C. C. 1.

Mr. Robert T. Swaine, with whom *Messrs. Herbert W. Clark* and *Benjamin R. Shute* were on the briefs, for the Institutional Bondholders Committee, petitioner in No. 7 and respondent in Nos. 8, 20, 33, and 61. *Mr. Russell L. Snodgrass,* with whom *Solicitor General Fahy* and *Mr. Emmet McCaffery* were on the brief, for petitioner in No. 33. *Mr. Orville W. Wood,* with whom *Mr. Arthur A. Gammell* was on the briefs, for Crocker First National Bank et al., Trustees of First Mortgage, petitioners in No. 8 and respondents in Nos. 7, 20, 33, and 61. *Mr. Frank C. Nicodemus, Jr.,* filed a brief on behalf of the Western Pacific R. Co., petitioner in No. 20 and respondent in Nos. 7, 8, 33, and 61. *Mr. H. C. McCollom,* with

whom *Mr. Orrin G. Judd* was on the briefs, for the Irving Trust Co., Trustee of General Refunding Mortgage, petitioner in No. 61 and respondent in Nos. 7, 8, 20, and 33.

Mr. M. C. Sloss for the Western Pacific Railroad Corporation; *Mr. Robert E. Coulson,* with whom *Mr. Horace E. Whiteside* was on the brief, for A. C. James Co.; and *Mr. Edward G. Buckland,* with whom *Mr. William J. Kane* was on the brief, for the Railroad Credit Corporation,—respondents.

Solicitor General Fahy and *Messrs. Daniel W. Knowlton* and *Daniel H. Kunkel* filed a brief on behalf of the Interstate Commerce Commission as *amicus curiae,* urging reversal.

Mr. Justice Reed delivered the opinion of the Court.

Petitioners seek review of a decree of the Circuit Court of Appeals in the reorganization of the Western Pacific Railroad Company under § 77 of the Bankruptcy Act. That decree reversed the order of the District Court which had approved the plan for reorganization certified to it by the Interstate Commerce Commission.[1]

The petitions for certiorari ask adjudication of questions which are important in the field of railroad reorganization. They involve the respective function of Commission and court, the method of valuation of railroad property by the Commission, the legality of the exclusion of stockholders and certain creditors from participation in the estate, a more favorable participation of a Reconstruction Finance Corporation claim because of new money furnished for the plan, allocation of securities

[1] Sec. 77, Bankruptcy Act, Reorganization of Railroads, 47 Stat. 1474, as amended, 11 U. S. C. § 205; *In re Western Pacific R. Co.,* 124 F. 2d 136; *In re Western Pacific R. Co.,* 34 F. Supp. 493; Western Pacific R. Co. Reorganization, 230 I. C. C. 61; 233 I. C. C. 409; 236 I. C. C. 1.

among claimants, priorities of liens created by different mortgages and subsidiary issues. Heretofore this Court has not passed upon them. For their determination we granted certiorari. 316 U. S. 654.

The debtor railroad company filed its petition in the District Court for the Northern District of California on August 2, 1935, alleging its inability to pay and discharge its indebtedness as it matured and praying for reorganization under § 77. The petition was approved as properly filed, trustees were appointed, their appointment ratified, 207 I. C. C. 793, and the appropriate steps taken to bring the plan of reorganization before the Commission for consideration. Public hearings were held by the Commission at which other plans for reorganization were filed, one by a group of bondholders known as the Institutional Bondholders Committee and one by the A. C. James Company, a secured creditor of the debtor which also was financially interested in the treatment accorded the preferred and common stock of the debtor. After full consideration of the problems of the debtor's reorganization and after the development of a plan deemed in accordance with § 77, the Commission certified its plan to the District Court on September 28, 1939.

The Commission's conclusions and orders were reached upon exceptions to the report of its Bureau of Finance. Its plan was the outgrowth of a study of the financial condition and economic situation of the debtor, viewed in the setting of the public interest in a national transportation system. The competing claims of the various classes of creditors and stockholders were appraised in the light of the requirements of the Act that they be accorded fair and equitable treatment. There is little if any dispute concerning the primary facts from which factual or legal inferences are to be drawn.

The debtor is a California corporation with its principal operating office in San Francisco. It carries on an interstate railroad business between the States of California,

Nevada and Utah.[2] For an understanding of this opinion the obligations of the debtor as of January 1, 1939, the

[2] The summary of the debtor's property prepared by the Interstate Commerce Commission as of October 10, 1938, 230 I. C. C. 62, follows:

"*Location and general description of the property.*—The debtor owns or operates a total of 1,207.51 miles of standard-gage steam railroad. The main lines extend eastward 924.17 miles from Oakland, Calif., to Salt Lake City, Utah, and northward 111.81 miles from Keddie to Bieber, Calif., with operating rights over the Great Northern Railway, 46.38 miles, from Bieber to Hambone, Calif. The debtor also operates 4.2 miles of ferry service from Oakland to San Francisco, and 185.3 miles of second main track, of which 182.91 miles between Weso and Alazon, Nev., are owned by the Southern Pacific. This territory is known as the 'paired-track district,' since the two lines are used as a double-track railroad by both companies. Various branch lines springing from the Oakland-Salt Lake City line are as follows:

	Miles
Niles Junction to San Jose, Calif.	23.07
Calpine Junction to Calpine, Calif.	12.62
Hawley to Loyalton, Calif.	12.79
Reno Junction, Calif., to Reno, Nev.	33.11
Burmester to Warner, Utah	15.52
Miscellaneous	21.79
Total	118.90

"*Owned or controlled and jointly affiliated railroad companies.*—The debtor owns all the outstanding capital stock of the Sacramento Northern Railway, an electrically operated standard-gage freight and passenger railroad, consisting of 276.2 miles of road serving and connecting San Francisco and Oakland with various Sacramento Valley cities, principally Pittsburg, Vacaville, Sacramento, Woodland, Marysville, Colusa, and Oroville, all in California.

"By ownership of more than 99 percent of the outstanding capital stock, the debtor controls the Tidewater Southern Railway, which operates a standard-gage steam freight line 61.38 miles in length, connecting Stockton with Manteca, Escalon, Modesto, and Turlock in the San Joaquin Valley of California.

"The debtor owns all the outstanding capital stock of the Deep Creek Railroad Company, which owns and operates a standard-gage steam railroad extending from Wendover to Gold Hill, Nev., a distance of

date proposed for the beginning of the operation of the plan, may be stated as follows:

Claim or Interest	*Principal of claim or interest*	*Accrued interest at contract rate to effective date of plan*	*Total claim including interest at contract rate to effective date of plan*
Trustees' Certificates (held by Reconstruction Finance Corporation)	$10,000,000.00	$	$10,000,000.00
Equipment obligations	2,750,050.00	94,202.00	2,844,252.00
First Mortgage 5% Bonds	49,290,100.00	13,143,776.66	62,433,876.66
Reconstruction Finance Corporation Collateral Notes (secured by $10,750,000 General and Refunding Mortgage bonds and other collateral*)	2,963,000.00	899,869.98	3,862,869.98
The Railroad Credit Corporation Collateral Notes (secured by $4,000,000 General and Refunding Mortgage bonds and other collateral*)	2,445,609.88	145,314.23	2,590,924.11
A. C. James Co. Collateral Notes (secured by $4,249,500 General and Refunding Mortgage bonds)	4,999,800.00	1,249,950.00	6,249,750.00
Total secured debt	$72,448,559.88	$15,533,112.87	$87,981,672.75
Unsecured Claims	5,818,791.00		
Preferred Stock	28,300,000.00		
Common Stock	47,500,000.00		
	$154,067,350.88		

*The "other collateral" does not belong to the debtor and is unaffected by the plan. See p. 503, *infra*.

Payment of this indebtedness was secured by liens, collateral or priority, as follows:

The trustees' certificates of $10,000,000 are secured by a lien on the entire estate and priority over all claims beyond reorganization expenses.

44.6 miles. In addition it owns 50 percent of the capital stock of the Salt Lake City Union Depot & Railroad Company; 33⅓ percent of the capital stock of the Central California Traction Company, operating an electrically operated freight railroad extending from Stockton to Sacramento, Calif., with a road mileage of 53.78 miles; and 50 percent of the capital stock of the Alameda Belt Line, operating 15.86 miles of terminal switching line in the city of Alameda on San Francisco Bay.

"None of the above subsidiary or affiliated companies has filed a petition under section 77 of the Bankruptcy Act, as amended."

The equipment obligations of $2,750,050 are secured by rolling stock, acquired free of the liens of mortgages, through direct liens or trust arrangements. No one disputes the sound character of any of these securities. They are given priority over the fixed obligations of the reorganized company.

Subject to the trustees' certificates and equipment obligations, the first mortgage 5% bonds of $62,433,876.66, face and interest to the effective date of the plan, are secured by prior liens on all valuable property of the debtor, except (1) money, accounts, operating balances and cash items, and (2) certain assets, referred to in the next paragraph, upon which the general and refunding bonds have a first lien, deemed by the Commission to be of value sufficient to support $732,010 of new income mortgage bonds and new preferred stock of $1,147,955 par. The total face and assumed value of the securities authorized by the plan, as evidence of the entire value of the system, is $84,000,000 plus. See p. 481, *infra.* This paragraph reflects our conclusions as to priorities of the liens of the respective mortgages later discussed. See *Priorities of Conflicting Liens,* p. 489, *infra.*

The later general and refunding mortgage bonds, $18,999,500 in face amount, are secured by a first lien on properties determined by the Commission to be of a value and earning power sufficient to support issues of new income bonds and participating preferred stock of $732,010 and $1,147,955, respectively. See 233 I. C. C. 414 *et seq.* They are further secured, subject to the prior rights and other exceptions of the obligations listed in the preceding paragraphs, by a lien on all valuable property of the debtor. All of this series which were issued are pledged to secure the collateral notes in the amounts indicated in the preceding table.

By reason of an arrangement with the Reconstruction Finance Corporation, detailed later in the section of this

opinion headed *Allocation of Securities,* B, p. 485, *infra,* the distribution of securities to creditors did not reflect absolutely their priority position. The collateral notes owned by the R. F. C. were treated in the distribution of securities on the same basis as were the claims of old First bondholders. The result is summarized by the table on page 461 and footnotes 5 and 6.

By stipulation of the parties, the record shows that the value of the property of the debtor and its subsidiaries, "as found by the Interstate Commerce Commission under Section 19 (a) of the Interstate Commerce Act, with additions and betterments, new lines and extensions, subsequent to date of valuation, plus non-operating properties," was $150,907,623.49 as of December 31, 1938. It is further stipulated that there is no deferred maintenance in the debtor's properties. "Its facilities and equipment are sufficient to handle expeditiously and efficiently all traffic reasonably to be anticipated in the immediate future." The value of the debtor's system, with equipment depreciated, was $144,978,559 as of December 31, 1938.

There is agreement as to the amount of system earnings available for interest for 1922 to 1939, inclusive. The amounts follow: [3]

Adjusted Consolidated Earnings Available for Interest

1922 — $2,404,890	1928 — $4,376,972	1934 — $1,396,353
1923 — 3,412,234	1929 — 3,718,436	1935 — 1,377,026
1924 — 3,241,823	1930 — 2,381,529	1936 — 1,901,423
1925 — 4,557,798	1931 — 220,494 (deficit)	1937 — 1,077,407
1926 — 4,868,390	1932 — 283,912	1938 — 225,431
1927 — 3,470,861	1933 — 474,365	1939 — 1,519,916

It is to be borne in mind that while these figures represent net income of the system, as shown by its combined income account, adjusted as indicated, factors other than

[3] These figures represent reported consolidated earnings "adjusted to take into account (a) rehabilitation expenditures in the years 1927–1931 and 1934–1938, (b) amortization of discount on First Mortgage Bonds of the Debtor in the years 1922–1938, and (c) deductions and credits in the years 1931–1934 made by the Commission to accord with its Accounting Rules and Regulations, . . ."

the net income result were placed before and weighed by the Commission and the District Court. Of course the fluctuating operating revenues for the periods from freight, passenger, mail, express, victualing and miscellaneous were considered, as well as the corresponding labor, power, tax, rental and miscellaneous expenses. Operating ratio percentages for the various years are available in the evidence.

The stipulated operating revenues of the debtor's system for the years 1922–1938 and the first nine months of 1939 are as follows:

1922	$12,736,564	1928	$19,421,851	1934	$13,779,238
1923	14,414,812	1929	20,096,557	1935	14,407,458
1924	14,669,313	1930	18,819,062	1936	16,547,344
1925	15,898,548	1931	14,852,938	1937	17,918,485
1926	17,951,468	1932	12,251,071	1938	16,057,451
1927	18,306,675	1933	12,202,489	1939 (1st 9 mths.)	12,836,985

Furthermore, the record shows the favorable effect upon the system's gross operating revenue of the extension of its lines into Northern California. This new construction, known as the Northern California Extension, was put into operation in 1932 and contributed the following gross revenues from freight originating, terminating and passing over the extension:

1932	$1,098,016	1936	$3,151,734
1933	1,491,466	1937	3,425,601
1934	2,119,427	1938	3,093,676
1935	2,289,858	1939 (first 9 months)	2,463,484

The extension is a link in a Pacific coast route created by this northerly extension and a corresponding southerly extension by the Great Northern Railroad Company which join at Bieber, California. The extension cost over ten million dollars and was built with the expectation, since realized, of materially increasing the value of the debtor's property as an operating road. The Commission gave consideration to this factor in estimating the probabilities of future income.

Prospects for maintaining and increasing the debtor's traffic and so its net for interest and dividends are influenced by the fact that it depends to a considerable extent

upon traffic arrangements with other lines. The debtor's main line from Oakland, California, to Salt Lake City is an important section of a through route from the Pacific coast to the Midwest. In conjunction with the Denver & Rio Grande Western and the Missouri Pacific Railroad Company it offers fast through schedules. The Denver & Rio Grande Western completed, in 1934, the Dotsero Cutoff. This cutoff and the Moffatt Tunnel, a nearby improvement of the Denver and Salt Lake, used together materially shorten the railroad distance between Pacific coast and Midwest points and open to passenger traffic a scenic route of great beauty. The hearings on reorganization make these facts as to the likelihood of increased traffic available to the Commission and court.

These basic factors of physical condition, traffic, gross and net income et cetera were before the Commission and the courts. From them there was to be projected an estimate as to the future from which was to be drawn a present valuation of the property and its ability to carry by its earnings a certain volume in dollars of securities. There are no assets of significant worth which are not in active use as producers of income. Relying largely upon past earnings, the Commission found "that the fixed interest charges of the reorganized company should not initially and substantially exceed $500,000, if the reorganized company is to maintain its property properly and secure necessary new capital in the future." It further determined that the plan should provide a capital fund for future routine additions and betterments. This was estimated to require $500,000 annually.[4] Carrying charges of $94,202 on existing equipment trusts were to be assumed

[4] 230 I. C. C. 91: "Annual payments into the fund should be $500,000 or such lesser sum as may be required, together with unappropriated accumulations in the fund as of the close of the calendar year prior to that for which the payment is to be computed, less charges for additions and betterments during the latter year, to bring the total in the fund to $1,000,000."

by the reorganized corporation. A new $10,000,000 first mortgage 4% bond issue was allotted $400,000 annually. These fixed charges aggregate $994,202. In addition to the fixed charges, the Commission determined the system reasonably could carry another $1,000,000 of contingent charges. Thus the over-all charge for annual fixed and contingent interest, capital and sinking funds was limited to approximately $2,000,000 per annum. Income mortgage 4½% bonds were authorized in the amount of $21,219,075. Their annual interest comes to $954,858 and their one-half per cent sinking fund calls for $106,095.

In view of the foregoing limitation, capitalization of the reorganized company was fixed at $2,750,050 of undisturbed equipment obligations, $10,000,000 of first mortgage 4% bonds, $21,219,075 of income mortgage 4½% bonds, $31,850,297 of 5% preferred stock, and 319,441 shares of common stock without par value.[5] These issues

[5] 233 I. C. C. 409, 413; 236 I. C. C. 1, 4. This is summarized by a petitioner as follows:

Title of Issue	*Presently to be issued*	*Annual Charges*
Undisturbed existing equipment obligations	$2,750,050	$94,202
First Mortgage 4% Bonds, Series A, due January 1, 1974	10,000,000	400,000
Total annual fixed charges		$494,202
Mandatory Capital Fund		500,000
Income Mortgage 4½% Bonds, Series A, due January 1, 2014. Interest cumulative to 13½%, otherwise noncumulative. Convertible at the option of the holder into new Common Stock at the price of $50 per share	21,219,075	954,858
Total funded debt	$33,969,125	
Total annual charges (fixed and contingent) and Capital Fund		$1,949,060
Income Mortgage Sinking Fund (½%)		106,095
Participating 5% Preferred Stock ($100 par value)	31,850,297	1,592,515
Total securities with par value	$65,819,422	
Total annual charges, Capital Fund, and Preferred dividend requirements		$3,647,670
Common Stock (without par value)	319,441 shs.	

of preferred and common were based upon possible earnings in addition to the $2,000,000 plus. These securities were allotted by the Commission upon consideration of "the relative priority, value, and equity of the various claims and the value of the new securities available in exchange therefor," as follows: [6]

	New First Mortgage 4% Bonds Series A	*New Income Mortgage 4¼% Bonds Series A*	*New 5% preferred Stock Series A ($100 Par)*	*New Common Stock (No Par)*
First Mortgage 5% Bonds ($62,433,876.66)	----------	$19,716,040	$29,574,060	230,593 shs.
RFC (In exchange for Trustees' Certificates of $10,000,000 and Collateral Notes of $3,862,869.98)	$10,000,000	1,185,200	1,777,800	15,788 shs.
RCC Collateral Notes ($2,590,924.11)	----------	154,111	241,681	35,425 shs.
ACJ Collateral Notes ($6,249,750)	----------	163,724	256,756	37,635 shs.
Totals	$10,000,000	$21,219,075	$31,850,297	319,441 shs.

[6] The applicable portion of the finding is as follows:

"(1) First-mortgage bondholders, $19,716,040 of income-mortgage bonds, $29,574,060 of preferred stock, and 230,593 shares of common stock, the common stock to be taken at the price of $57 a share; (2) Finance Corporation, $1,185,200 of income-mortgage bonds, $1,777,800 of preferred stock, and 15,788 shares of common stock, the common stock to be taken at a price of $57 a share; (3) Credit Corporation, $154,111 of income-mortgage bonds, $241,681 of preferred stock, and 35,425 shares of common stock, the common stock to be taken at a price of $62 a share; and (4) James Company, $163,724 of income-mortgage bonds, $256,756 of preferred stock, and 37,635 shares of common stock, being the amount of common stock which bears to the amount of common stock allotted to the claim of the Credit Corporation the same proportion that the principal amount of general and refunding bonds of the debtor held by the James Company as collateral for its claim bears to the principal amount of such bonds held by the Credit Corporation for its claim." The result of the distribution per dollar of indebtedness is set out in the Commission's reports. 230 I. C. C. 101 and 233 I. C. C. 417 and 451.

The Commission found, correlative to and as a basis for its allocation of securities, that "the equity of the existing stock has no value, and hence holders of such stock are not entitled to participate in the plan. Further, considering that the reorganized company's income available for interest and dividends must total $4,318,035,[*] plus any undistributed profits tax that will be payable, before dividends of $3 per share may be paid on the new common stock, it is clear that, even though all the securities remaining available for distribution after satisfying the claims of the first-mortgage bondholders are allotted to the other secured creditors, such securities will be inadequate in value to satisfy their claims. For this reason, and for the reasons stated with respect to the finding that the equity of the existing stock has no value, we find that the claims of the unsecured creditors, of the Western Pacific Railroad Corporation, and of the Western Realty Company, have no value, and hence no securities or cash should be distributed under the plan in respect of those claims." 230 I. C. C. 101.

The plan and a transcript of the proceedings before the Commission were duly certified to the District Court. *In re Western Pacific R. Co.*, 34 F. Supp. 493, 495. The plan in complete form and a detailed discussion of the history, property and business prospects of the debtor appear in the various reports of the Commission and the opinion below. See note 1 *supra*. The District Court heard the protests against the action of the Commission and the additional evidence offered, and found that the plan conformed in all respects to the requirements of § 77.[7] All

*This amount now is somewhat larger on account of increased face of securities. 233 I. C. C. at 412.

[7] For the purposes of this controversy, the apposite requirements of § 77, 11 U. S. C. § 205, may be excerpted as follows:

"(b) A plan of reorganization within the meaning of this section (1) shall include provisions modifying or altering the rights of credi-

objections to the plan were therefore overruled and the court directed that a copy of the order and opinion be transmitted to the Commission for use in submitting the plan for action to the first mortgage bondholders, the R. F. C., the A. C. James Co. and the Railroad Credit Corporation, the only creditors found to be entitled to vote on the adoption of the plan.

On appeal to the Circuit Court of Appeals, Judicial Code § 128, 43 Stat. 936, this order was reversed. The court

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tors generally, or of any class of them, secured or unsecured, either through the issuance of new securities of any character or otherwise; (2) may include provisions modifying or altering the rights of stockholders generally, or of any class of them, either through the issuance of new securities of any character, or otherwise; (3) may include, for the purpose of preserving such interests of creditors and stockholders as are not otherwise provided for, provisions for the issuance to any such creditor or stockholder of options or warrants to receive, or to subscribe for, securities of the reorganized company in such amounts and upon such terms and conditions as may be set forth in the plan; (4) shall provide for fixed charges (including fixed interest on funded debt, interest on unfunded debt, amortization of discount on funded debt, and rent for leased railroads) in such an amount that, after due consideration of the probable prospective earnings of the property in light of its earnings experience and all other relevant facts, there shall be adequate coverage of such fixed charges by the probable earnings available for the payment thereof; (5) shall provide adequate means for the execution of the plan, . . .

. . . . . .

"(d) The debtor, after a petition is filed as provided in subsection (a) of this section, shall file a plan of reorganization within six months of the entry of the order by the judge approving the petition as properly filed, . . . After the filing of such a plan, the Commission, unless such plan shall be considered by it to be prima facie impracticable, shall, after due notice to all stockholders and creditors given in such manner as it shall determine, hold public hearings, at which opportunity shall be given to any interested party to be heard, and following which the Commission shall render a report and order in which it shall approve a plan, which may be different from any which has been proposed, that will in its opinion meet with the requirements of sub-

rested upon the necessity of specific valuation of the entire property, of the respective portions of it covered by the First Mortgage and the Refunding Mortgage, of each of the claims and of the new securities allocated to the creditors. Such action was deemed essential to

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sections (b) and (e) of this section, and will be compatible with the public interest; or it shall render a report and order in which it shall refuse to approve any plan. In such report the Commission shall state fully the reasons for its conclusions.

" . . . No plan shall be approved or confirmed by the judge in any proceeding under this section unless the plan shall first have been approved by the Commission and certified to the court. . . .

"(e) Upon the certification of a plan by the Commission to the court, the court shall give due notice to all parties in interest of the time within which such parties may file with the court their objections to such plan, and such parties shall file, within such time as may be fixed in said notice, detailed and specific objections in writing to the plan and their claims for equitable treatment. The judge shall, after notice in such manner as he may determine to the debtor, its trustee or trustees, stockholders, creditors, and the Commission, hear all parties in interest in support of, and in opposition to, such objections to the plan and such claims for equitable treatment. After such hearing, and without any hearing if no objections are filed, the judge shall approve the plan if satisfied that: (1) It complies with the provisions of subsection (b) of this section, is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders; . . .

"If the judge shall not approve the plan, he shall file an opinion, stating his conclusions and the reason therefor, and he shall enter an order in which he may either dismiss the proceedings, or in his discretion and on motion of any party in interest refer the proceedings back to the Commission for further action, in which event he shall transmit to the Commission a copy of any evidence received. . . . If the judge shall approve the plan, he shall file an opinion, stating his conclusions and the reasons therefor, and enter an order to that effect, and shall send a certified copy of such opinion and order to the Commission. The plan shall then be submitted by the Commission to the

enable the District Court to exercise its independent judgment upon matters of valuation and allocation. The failure to make such separate valuations was held to require the setting aside of the District Court's approval of the plan. See note 26, *infra.*

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creditors of each class whose claims have been filed and allowed in accordance with the requirements of subsection (c) of this section, and to the stockholders of each class, and/or to the committees or other representatives thereof, for acceptance or rejection, within such time as the Commission shall specify, together with the report or reports of the Commission thereon or such a summarization thereof as the Commission may approve, and the opinion and order of the judge: *Provided,* That submission to any class of stockholders shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, (a) that at the time of the finding the corporation is insolvent, or that at the time of the finding the equity of such class of stockholders has no value, or that the plan provides for the payment in cash to such class of stockholders of an amount not less than the value of their equity, if any, . . . *Provided further,* That submission to any class of creditors shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, that the interests of such class of creditors will not be adversely and materially affected by the plan, or that at the time of the finding the interests of such class of creditors have no value, or that the plan provides for the payment in cash to such class of creditors of an amount not less than the value of their interests. . . .

. . . . . .

"If it shall be necessary to determine the value of any property for any purpose under this section, the Commission shall determine such value and certify the same to the court in its report on the plan. The value of any property used in railroad operation shall be determined on a basis which will give due consideration to the earning power of the property, past, present, and prospective, and all other relevant facts. In determining such value only such effect shall be given to the present cost of reproduction new and less depreciation and original cost of the property, and the actual investment therein, as may be required under the law of the land, in light of its earning power and all other relevant facts.

"(f) . . . The property dealt with by the plan, when transferred and conveyed to the debtor or to the other corporation or corporations

Function of the Court. The conclusion of the Court of Appeals as to the necessity for a detailed valuation springs from its interpretation of the statute as to the function of the District Court in reorganizations. That court had said in its opinion:

"It cannot be gainsaid that the Commission knows all about the Debtor, its property, its history, financial and otherwise, its traffic and revenue, and its financial structure. No official body in the country is better qualified, by reason of experience, ability and specialized knowledge than is the Commission to find the ultimate facts as to the Debtor in relation to any of the matters mentioned." *In re Western Pacific R. Co.*, 34 F. Supp. 493, 501.

Commenting upon this, the Court of Appeals said:

"The statement indicates a possible misconception. . . .

"In determining whether a plan of reorganization satisfies the requirements of subsection e, the court is not concluded by any determination made by the Commission, but may, and must, exercise its own independent judgment; and this is true whether such determination relates to value or to some other subject. Initially, however, the duty of determining the value of any property for any purpose under § 77 rests on the Commission, not

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provided for by the plan, or when retained by the debtor pursuant to the plan, shall be free and clear of all claims of the debtor, its stockholders and creditors, and the debtor shall be discharged from its debts and liabilities, except such as may consistently with the provisions of the plan be reserved in the order confirming the plan or directing such transfer and conveyance or retention, and the judge may require the trustee or trustees appointed hereunder, the debtor, any mortgagee, the trustee of any obligation of the debtor, and all other proper and necessary parties, to make any such transfer or conveyance, and may require the debtor to join in any such transfer or conveyance made by the trustee or trustees. . . ."

on the court." *In re Western Pacific R. Co.*, 124 F. 2d 136, 140.

Petitioners in Nos. 7, 8 and 33 seek review of this last ruling. Their petitions for certiorari query whether § 77 does not vest

"in the Commission exclusive jurisdiction (subject only to review for arbitrary exercise) to determine whether a railroad reorganization plan is 'compatible with the public interest,' including jurisdiction to determine total capitalization, the classification thereof, and the financial details of each class of proposed capitalization?"

This summary sufficiently identifies the issue without the necessity of elaborating differentiations in the petitioners' present views or of determining the degree of difference between the views of the district and appellate courts as to the function of the court under § 77.

The opinion shows the attitude of the District Court, 34 F. Supp. 493, 503, 504: "The capitalization permitted by these earnings is a mere matter of computation, which will demonstrate that the Commission did not act arbitrarily in limiting capitalization nor the respective classes thereof. . . .

"The determination of the amount and character of the capitalization (a legislative function affecting the public interest) is exclusively within the province of the Commission. The only qualification, if any, is that the court shall independently determine whether, in the exercise of its jurisdiction, the Commission has acted fairly, within the bounds of the Constitution, and not arbitrarily." Upon the other findings of the Commission, the District Court exercised an independent judgment based upon the record and the findings of the Commission together with additional evidence produced before the court by the parties. 34 F. Supp. 493, 505.

These reorganizations require something more than contests between adversary interests to produce plans which are fair and in the public interest. When the public interest, as distinguished from private, bulks large in the problem, the solution is largely a function of the legislative and administrative agencies of government with their facilities and experience in investigating all aspects of the problem and appraising the general interest.[8] Congress outlined the course reorganization is to follow. It established standards for administration and placed in the hands of the Commission the primary responsibility for the development of a suitable plan. When examined to learn the purpose of its enactment, § 77 manifests the intention of Congress to place reorganization under the leadership of the Commission, subject to a degree of participation by the court.

It is clear from the discussions and the statute itself that there was recognition by everyone of the advantages of utilizing the facilities of the Commission for investigation into the many-sided problems of transportation service, finance and public interest involved in even minor railroad reorganizations and utilizing the Commission's experience in these fields for the appraisals of values and the development of a plan of reorganization, fair to the public, creditors and stockholders.[9] The resulting legislation was an attempted balance between the power of the Commission and that of the court.

As to the court's place in reorganization, the present statute does not vary greatly from the first legislative ef-

[8] Cf. Hearings on H. R. 7432, House Committee on Interstate and Foreign Commerce, 72d Cong., 2d Sess. (1933), pp. 11–12; Cushman, The Independent Regulatory Commissions (1941) 45–58.

[9] The need for railroad rehabilitation legislation under the bankruptcy clause of the Constitution was generally recognized. President's Message, January 11, 1933, 76 Cong. Rec. 1615; 46th Annual Report of the I. C. C., Dec. 1, 1932, p. 15; for a statement that the President-elect favored the legislation, see 76 Cong. Rec. 2917.

fort, enacted March 3, 1933, to reorganize railroads unable to meet their obligations.[10] The amendments of 1935 were primarily designed to cure defects disclosed by practical experience.[11] Both acts are bottomed upon the theory of debtor rehabilitation by adjustment of creditors' claims. Such treatment was essential for embarrassed railroads, as ordinary bankruptcy liquidation or judicial sales were impossible because of the size of their indebtedness and the paucity of buyers. The acts were a part of the relief granted financially involved corporations, public and private, in the depression years of the early thirties.[12] Since railroads could not take advantage of the Bankruptcy Act, § 4, 11 U. S. C. § 22, their financial adjustments for years had been carried out in equity receiverships under judicial control. These were cumbersome, costly and privately managed with inadequate consideration for the public interest in a soundly financed transportation system. Chicago, M. & St. P. Investigation, 131 I. C. C. 615, 671; *United States* v. *Chicago, M., St. P. & P. R. Co.*, 282 U. S. 311, 331 dissent.

The first bill was introduced in the House January 21, 1933, as H. R. 14359.[13] It was drafted so as to place "the entire plan of reorganization under the jurisdiction, supervision and control" of the Commission. After Commission approval, which followed stockholder and creditor approval, it was to transmit the "approved plan, its findings and the record to the court. The court's review must

[10] The section was extensively revised in 1935. Compare 47 Stat. 1474 with 49 Stat. 911.

[11] H. Rep. No. 1283, 74th Cong., 1st Sess., p. 1; S. Rep. No. 1336, 74th Cong., 1st Sess., p. 1.

[12] For the twelve months ending Sept. 30, 1932, operating revenues of Class I railroads were $3,321,052,031, a decline of $915,535,318 below those of the calendar year 1931 and about equal to those of the year 1915. 46th Annual Report of the Interstate Commerce Commission, Dec. 1, 1932, p. 6. Cf. 48 Stat. 912, 798.

[13] 76 Cong. Rec. 2905.

be based upon the record made before the Commission." [14] This substitution of the Commission for an equity receivership under court direction was criticized and amendments suggested to "eliminate all confusion in regard to the functions to be exercised by the commission and by the court, . . . and [to] remove the most fundamental objections to the bill in its present form." [15] Notwithstanding the criticism the bill passed the House with the power lodged in the Commission, as originally proposed. When the House bill for the relief of debtors [16] was reported by the Senate Committee, the railroad section was omitted. By a motion from the floor it was reinstated but in a changed form. The Senate adopted changes designed to give more power to the court. 76 Cong. Rec. 4907, 5104–34. Hearings before the court were provided. The judge, it was added, was to be "satisfied that (1) the approved plan complies with the provisions of subsection (b) of this section, is equitable and does not discriminate unfairly in favor of any class of creditors or stockholders." [17] These amendments giving concurrent powers to the court were adopted by the Senate and accepted by the House and the bill became the Act of March 3, 1933, 47 Stat. 1474.

Following the recommendation of the President in his message of June 7, 1935, the Congress adopted amendments to the 1933 Act which were in line with the suggestions of the Federal Coordinator of Transportation

[14] H. Rep. No. 1897, 72d Cong., 2d Sess., pp. 6–7. Subsections (d) and (g), H. R. 14359, 76 Cong. Rec. 2905, 2906.

[15] Solicitor General's Memorandum, 76 Cong. Rec. 2771, 2773.

[16] The bill dealt with the subject matter of what are now Chapters 8–11 of the Bankruptcy Act.

[17] Subsection (g), 47 Stat. 1479. The provisions of subsection (b) were then substantially like they are now.

and the Commission.[18] While the most important amendment was to furnish means to avoid the obstruction of dissatisfied classes of creditors or stockholders by making a fair and equitable plan effective over dissenters, the requirement of coördinated action by Commission and court was retained.

The Senate Report, No. 1336, 74th Cong., 1st Sess., concluded:

"The amendments to section 77 leave unimpaired the power and the duty of the commission and the courts to deal with the most important feature of all reorganization plans, that of the control of the reorganized company; and similarly the commission and courts will continue to have the power and authority of making that thorough investigation which is necessary to assure sound and reliable control for bankrupt companies when they emerge from the courts, in place of the type of control under which some railroads have been wrecked."

Under the present statute the District Court has definite responsibility in reorganization. Subsection (e). After the certification from the Commission is filed, a hearing is authorized at which all interested parties may appear. Additional evidence of opponents and proponents of the plan may be received upon "detailed and specific objections in writing to the plan and their claims for equitable treatment." The judge shall then "approve the plan if satisfied that: (1) It complies with the provisions of subsection (b) of this section, is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will

[18] 79 Cong. Rec. 8851. H. Rep. No. 1283, 74th Cong., 1st Sess., p. 1; compare draft of Coordinator's proposals, Report of the Federal Coordinator of Transportation (1935), H. Doc. No. 89, 74th Cong., 1st Sess., p. 229.

conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders;" and if satisfied as to fees, costs and allowances. If the plan is disapproved, the proceedings may be dismissed or referred back to the Commission for further consideration. On approval by the judge the plan is returned to the Commission for submission to stockholders and creditors for their approval. Submission to classes of stockholders or creditors may be omitted on a finding by the Commission, affirmed by the judge, of a lack of value in the equity of the stockholders or the claims of the creditors. On certification of the results of the submission the judge shall confirm the plan finally, if satisfied the requisite approval has been obtained or is excused for reasons stated in subsection (e). The judge is not empowered to approve or confirm any plan until it has first been approved by the Commission and certified to the court. Subsection (d).

The power of the court does not extend to participation in all responsibilities of the Commission. Valuation is a function limited to the Commission, without the necessity of approval by the court. The first sentence of the last paragraph of subsection (e) provides:

"If it shall be necessary to determine the value of any property for any purpose under this section, the Commission shall determine such value and certify the same to the court in its report on the plan."

The function of valuation thus left to the Commission is the determination of the worth of the property valued, whether stated in dollars, in securities or otherwise. One of the primary objects of the bill was the elimination of obstructive litigation on the issue of valuation [19] and the

[19] Report of the Federal Coordinator, *supra*, n. 18, pp. 100–103; H. Rep. No. 1283, 74th Cong., 1st Sess., p. 3; S. Rep. No. 1336, 74th Cong., 1st Sess., p. 3; Hearings on H. R. 6249, House Committee on the Judiciary, 74th Cong., 1st Sess., Ser. 3, April 15–25, 1935, pp. 26–31.

form finally chosen approached as near to that position as seemed to the draftsmen legally possible. Judicial reëxamination was not considered desirable.[20] None of the findings required of the judge under subsection (e) relate specifically to valuation. Congress apparently intended to leave the determination of valuation "of any property for any purpose under this section" to the Commission.[21] The language chosen leaves to the Commission, we think, the determination of value without the necessity of a reëxamination by the court, when that determination is reached with material evidence to support the conclusion and in accordance with legal standards. It leaves open the question of whether in reaching the result the Commission had applied improper statutory standards. This latter point is discussed under the heading of *Method of Valuation* in this opinion, p. 477, *infra,* where this plan is reviewed and upheld in this respect.

Another restriction on court action is that the determination as to whether the plan is "compatible with the public interest" rests, as valuation does, with the Commission. Subsection (d). Without attempting to forecast the limits of the phrase as used in the setting of this statute, it is sufficient in this case to determine, as we do, that it includes the amount and character of the capitalization of

[20] Cf. Hearings on H. R. 6249, *supra,* n. 19, pp. 249–50, 291–92, 317.

[21] The bill as recommended by the Federal Coordinator of Transportation, H. Doc. 89, *supra,* n. 18, p. 238, and in a different form as considered by the Committee on the Judiciary of the House, Hearings on H. R. 6249, *supra,* n. 19, p. 8, did not contain the quoted sentence. During the hearings, the Chairman sought advice as to whether it would be legally valid to make the valuation of the Commission final in practice. This was not denied although doubt was expressed whether the Commission's finding could preclude a certain limited amount of judicial review. See Hearings on H. R. 6249, *supra,* n. 20. After this discussion, the bill which was to pass the House was introduced on June 20, 1935, 79 Cong. Rec. 9814. It contained the quoted sentence, above referred to, in the form as it now appears in subsection (e).

the reorganized corporation. Cf. *New York Central Securities Co.* v. *United States,* 287 U. S. 12, 24. Leaving the problems of public interest to the Commission was not a departure from precedent. The phrase had been employed long before in the grant of authority to supervise the issue of securities. § 20a, Interstate Commerce Act.[22]

The problems of capitalization are of public interest. The corporate form is universally used for the business of railroading. Railroad securities are widely distributed in investment portfolios and among individual savers. The reasonable earning power of securities, the terms and conditions of the respective issues, and the soundness of the aggregate capitalization affect the public interest immediately and directly. Capitalization is an essential factor bearing on an efficient transportation system for shipper, investor and consumer. The development of the capitalization of the reorganized company which is entrusted solely to the Commission under the requirement that the plan be compatible with the public interest is that relating to the total amount of issuable securities and the quality of the securities to be issued. So long as legal standards are followed, the judgment of the Commission on such capitalization is final.

Thus limited, the District Court acts concerning the plans only upon the issues specifically delegated by subsection (e). As to these, its powers are negative. It may veto the plan in its entirety but may improve it only by suggestion. It becomes a necessary and important factor

[22] "The Commission shall make such order only if it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose." 49 U. S. C. § 20a (2).

in railroad reorganization. These reorganizations may be attained only through properly coördinated action between the Commission and the court.[23] In this case, we are of the view that the District Court performed its required functions in accordance with the requirements of the statute. See page 466, *supra.*

Amount and Character of Capitalization. While the public interest phase of capitalization is not to be independently passed upon by the court, the court does have statutory authority to review for obedience to legal standards.[24] Petitioners in seeking certiorari and now on the merits concede that the exclusive power in the Commission to pass upon the amount and character of capitalization is subject to review for "arbitrary exercise." The respondent A. C. James Company makes the point that the restriction of the amount of capitalization to an aggregate limited by the reasonable probability of a fair return deprives those creditors and stockholders who are barred as holding claims without value, of their property interest in the debtor without due process and contrary to the mandate of § 77. The Commission thought that the public interest required a capital structure which would give the reorganized company "a reasonable opportunity to function efficiently and continuously" and that "proposed charges, whether fixed or contingent, shall be within its probable earning power." 230 I. C. C. at 87.

Assuming at this point that the Commission's valuation is sound and reached by allowable methods, a matter discussed later in this opinion at page 477, we hold that the elimination of the claims of stockholders and creditors

[23] Cf. *Palmer* v. *Massachusetts,* 308 U. S. 79, 87; *Warren* v. *Palmer,* 310 U. S. 132, 138; *United States* v. *Morgan,* 307 U. S. 183, 191; Report of President's Committee to Submit Recommendations upon the General Transportation Situation, Dec. 23, 1938, p. 25.

[24] See *Opp Cotton Mills* v. *Administrator,* 312 U. S. 126, 144.

which are valueless from participation in the reorganization is in accordance with valid provisions of § 77 (e).[25] Actual bankruptcy means a loss to some investors. Subsection (e) recognizes this inevitable result and provides a method for their elimination from the reorganization proceedings. After all of the reasonable value had been exhausted by senior securities, warrants might have been authorized for otherwise unsatisfied claims. Such warrants would represent merely the possibility of recoupment, just as the equity of redemption in judicial sales. But there is no constitutional or statutory requirement that such immediately valueless paper should be issued. A mere possibility that traffic might be found to the limit of the physical capacity of the system is not the kind of earning power which justifies the issue of securities based upon such a possibility. Whatever may be the limits of the power of the Commission to find claims worthless, the present plan may not be successfully attacked on the ground that Congress is powerless to authorize in bankruptcy the elimination of claims without value. *In re 620 Church St. Corp.*, 299 U. S. 24.

Nor do we find violation of legal standards in the requirement by the Commission for a capital fund or the issue of stock to former holders of interest-bearing securities. The Commission is charged with the development of a plan which must balance and choose between public and private interests. The evidence before the Commission gave grounds for the finding of a normal requirement of an annual $500,000 fund for improvements. It is reasonable to agree with the Commission that a substantial share of the securities should be fixed stock investments rather than that the entire aggregate amount, justified by

[25] Such a result was within the contemplation of the Congressional committee. Hearings on H. R. 6249, *supra*, n. 19, pp. 26, 80, 107, 118, 227, 255, 278.

estimates of probable earnings, should be in interest-bearing loans, which ultimately must be redeemed. Stock which has no retirement provisions is the backbone of a corporate structure.

Method of Valuation. While by the terms of the statute the valuation of the property is left to the Commission, without participation by the court, this valuation must be made in accordance with the direction of the statute and as to that valuation is subject to judicial review. This review is limited in character by the direction of subsection (e) that valuation shall be determined by the Commission. The District Court may review to determine whether the Commission has followed the statutory mandates of subsection (e). Subsection (e) requires valuations by the Commission to be "determined on a basis which will give due consideration to the earning power of the property, past, present, and prospective, and all other relevant facts. In determining such value only such effect shall be given to the present cost of reproduction new and less depreciation and original cost of the property, and the actual investment therein, as may be required under the law of the land, in light of its earning power and all other relevant facts." Thus, while judicial review does not involve an independent examination into valuation, it does require that the court shall be satisfied, upon the record before the Commission, with such additional evidence as may be pertinent to the objections to the Commission's finding of value, that the statutory requirements have been followed.

An example of this type of review occurs in this record. The Irving Trust Company, as Refunding Mortgage Trustee in Nos. 7 and 8, and the A. C. James Company object to the finding of the Commission that the bonds, $270,000, and stock, $360,834, par value, of the Central California Traction Company and $465,300, par value,

of the capital stock of the Alameda Belt Line, pledged only under the Refunding Mortgage, had no material value. 233 I. C. C. 414–416. These securities were owned solely by the debtor but in the case of the first company represented a one-third interest in the Traction Company and in the case of the second a one-half interest in the Belt Line. Competing transcontinental railroads owned the other interests. The respective ownerships were acquired to put the debtor in a position to obtain its fair share of the business from and to these feeder lines. The facts before the Commission showed that, over the preceding decade, the debtor had contributed annually substantial sums to meet the deficits of each of the companies. It was shown in the District Court that each of the companies were useful auxiliaries to the business of the debtor. However, valuation is essentially a problem for the Commission. There is material evidence to support its conclusion of lack of value and its conclusion has been accepted by the District Court. This is sufficient.

In the preceding section of this opinion, we discussed the validity of the provision of subsection (e) which permits the elimination from the reorganization of claimants without equity in the debtor's properties. This provision needs also to be considered from the standpoint of statutory review of the Commission's action. As to both stockholders and creditors the section requires that a plan which allows nothing to their claims, need not be submitted to them, if the worthlessness of their claims is found by the Commission, "and the judge shall have affirmed the finding." As to certain creditors and all stockholders in this case, both events took place. The specificity of the direction for reëxamination of the Commission's action points to a wider scope of review than an inquiry as to whether statutory standards for valuation have been followed. It is obvious that the valuation of the whole

of a debtor's property, in a simple case without conflicting or divisional liens, will mark, by a mere mathematical computation as to priorities, the claimants who must be found to be without equity in whole or in part. But we think the requirement of affirmation of the exclusion of claimants does not require an independent appraisal of the valuation which ordained their elimination. The court properly affirms the Commission, when it finds no legal objection to the Commission's use of its own valuation to determine whether particular claimants are entitled to participate in the reorganization. For example, there may arise controversies over the priority or the validity of claims. A Commission finding involving such problems would require an independent examination and an affirmation by the court.

The Circuit Court of Appeals found error in the Commission's failure to make definite valuations. It was of the view that it was necessary to determine the values of the respective claims in order to have a basis for the distribution of new assets.[26] This position respondents de-

[26] *In re Western Pacific R. Co.*, 124 F. 2d 136, 139: "To determine this question, it was necessary to determine, as of the effective date of the plan, the value of (1) each of the claims of Reconstruction Finance Corporation, (2) the claim of Railroad Credit Corporation, (3) the claim of A. C. James Company, (4) the claims of the holders of first mortgage bonds now outstanding, (5) the $10,000,000 of new first mortgage bonds, (6) the $21,219,075 of income bonds, (7) the 318,502.97 shares of new preferred stock and (8) the 319,441 shares of new common stock which the plan provides shall be distributed to said claimants.

"To determine the value of the above-mentioned claims, it was necessary to determine the value of (1) the debtor's entire property, (2) the property subject to the first mortgage now outstanding, (3) the $18,999,500 of refunding bonds pledged to secure the claims of A. C. James Company, Railroad Credit Corporation and Reconstruction Finance Corporation and (4) the other collateral pledged to secure each of said claims. To determine the value of the refunding

fend, at least to the point of saying that claims may not be foreclosed or new securities allocated without a determination of the value of the property and the assets subject to secured claims, as well as earning power. The Commission considered the debtor's investment in its

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bonds, it was necessary to determine the value of (1) the property subject to the refunding mortgage only and (2) the property subject both to the refunding mortgage and to the first mortgage now outstanding. This, of course, necessitated a determination as to which of the debtor's property is, and which is not, subject to each mortgage. *Consolidated Rock Products Co.* v. *Du Bois, supra.*

"To determine the value of the new first mortgage bonds, income bonds, new preferred stock and new common stock mentioned above, it was necessary to determine the value of (1) the debtor's entire property, (2) the property which would be subject to the new first mortgage and (3) the property which would be subject to the income mortgage.

"Subsection e of § 77 provides: 'If it shall be necessary to determine the value of any property for any purpose under this section, the [Interstate Commerce] Commission shall determine such value and certify the same to the court in its report on the plan.' In this case, as has been seen, it was necessary to determine the value of (1) the debtor's entire property, (2) each of the claims of Reconstruction Finance Corporation, (3) the claim of Railroad Credit Corporation, (4) the claim of A. C. James Company, (5) the claims of the holders of first mortgage bonds now outstanding, (6) the $10,000,000 of new first mortgage bonds, (7) the $21,219,075 of income bonds, (8) the 318,502.97 shares of new preferred stock, (9) the 319,441 shares of new common stock, (10) the property subject to the first mortgage now outstanding, (11) the $18,999,500 of refunding bonds pledged to secure the claims of Reconstruction Finance Corporation, Railroad Credit Corporation and A. C. James Company, (12) the other collateral pledged to secure each of said claims, (13) the property subject to the refunding mortgage only, (14) the property subject both to the refunding mortgage and to the first mortgage now outstanding, (15) the property which would be subject to the new first mortgage and (16) the property which would be subject to the income mortgage. It thus became the duty of the Commission to determine these values and certify them to the court. That duty was not performed."

property, 230 I. C. C. 61, 65, its value for rate making purposes, *id.*, 76, and the record of its earnings, *id.*, 73 *et seq.*, together with its volume of traffic and other pertinent data. It concluded that these factors would justify fixed and contingent charges of no more than two million dollars annually. In addition, the Commission's plan provided for five per cent preferred stock and common stock in such amounts that it would require aggregate available annual earnings of a little more than four and a half million dollars to permit payment of a three per cent dividend. Without appraising the effect of income taxation on the remainder of earnings available and partly used for interest, it is significant that only three years in the period from 1922 to 1940 showed earnings available for interest of over four million. See page 457, *supra*. With this data, the Commission determined the new capital structure. See page 461, *supra*. Taking the lowest value for the no par suggested by the Commission, $57 per share, note 6, *supra*, there is a total value of securities of eighty-four million dollars plus. The Commission was thus of the view that the value of the property for purposes of reorganization was around this figure.

The Commission was familiar with railroad securities. Control over their issue by interstate carriers has been for many years in the Commission. § 20 (a), Interstate Commerce Act. The standards for issuance under § 20 (a) include "compatible with the public interest." Cf. *New York Central Securities Corp.* v. *United States*, 287 U. S. 12, 24. The provisions of this § 20 (a) were carried into and made a part of the reorganization section by subsections (c) (3) and (f). To create securities with voting power, in addition to those authorized, might well divorce control from real ownership. Sound railroad reorganization involves more than the partitioning of assets among creditors with valuable claims and the distribution to

creditors and stockholders without equity of so-called securities representing chances for then unforeseeable profits. The interest of the public in an adequate transportation service must receive consideration. *New England Divisions Case,* 261 U. S. 184, 189. Important property rights must be balanced against the need of sound financing. Consequently, the Commission limited the fixed and contingent charges involving the debt which must ultimately be paid, to two million annually, with stock representing the possibility of additional earnings. See note 5, *supra,* 230 I. C. C. 61, 92.

It is said that *Consolidated Rock Co.* v. *Du Bois,* 312 U. S. 510, forbids the substitution of an approved capital structure for determinations of value. In that case there was no finding of the values of the property involved and this Court said: "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," page 520. The District Court, it being a § 77B reorganization, was required to make the requisite valuations. The requirements for valuation are the same in a § 77B proceeding as in a railroad reorganization. There is nothing, however, in the *Du Bois* case to indicate that dollar valuations of the property or claims are essential for recapitalization or the distributions of securities in reorganizations. The defect in *Du Bois* was not the failure to find dollar values but the failure to find the worth of the security behind independent mortgages on distinct properties and of assets subject to the claims of particular groups of creditors. Such findings were required in that case because the court was dealing with a parent and two subsidiaries with inter-company accounts. Each subsidiary entity had its own creditors. The system was a unified operation and we held the claims

against the subsidiaries had priority over stockholders equity in the parent, p. 523. Without a separate valuation of assets, it was impossible to tell what assets of the parent were left to form the basis for the securities distributed to the parent's stockholders. In *Du Bois,* as here, the manner of reaching that valuation, so long as it complies with the statutory standards, is not important. There are subsidiaries here but there are no claimants of the subsidiaries looking to the parent. The aggregate of the authorized securities in the present case is to be equitably distributed among claimants against a single corporation. Findings were made as to the property covered by the different mortgages of the debtor and securities allocated on the basis of that finding. 230 I. C. C. 61, 98, 99, 100, 101; 233 I. C. C. 409, 414. Under such circumstances the lack of a valuation in dollars is immaterial. The important element is the allocation of the securities so as to preserve to creditors the advantages of their respective priorities. That is to say, senior claims first receive securities of a worth sufficient to cover their face and interest before junior claims receive anything. Consequently, we are of the opinion that the determination by the Commission of the aggregate amount of securities which may be issued against the system is in substance a finding of total value for reorganization purposes. In view of the factors of value considered and the opportunity given all parties before the Commission and the court to present all desired evidence, the Commission's determination stands upon a firm basis. There is no more important element in the valuation of commercial properties than earnings.[27] No offer was made to produce figures upon reproduction cost. It was not incumbent upon the Commission to do so. The Commission's conclusions impress us as in accord with the statutory requirements.

[27] Cf. *Consolidated Rock Co.* v. *Du Bois,* 312 U. S. 510, 525.

Allocation of Securities. There are two issues collateral to the Commission's valuation. One relates to adverse claims of prior liens between the holders of bonds secured on the one hand by the General and Refunding Mortgage and on the other by the First Mortgage. See p. 489, *infra.* The other is as to the correctness of the allocation of securities among the creditors. This latter issue is, of course, affected by the former. In considering allocation, we shall assume at this point what we later find, that the Commission's determination as to priorities is correct.

A. The allocation of securities is shown above at page 461. The table sets out that the holders of the Trustees' Certificates and the 5% First Mortgages, although they are senior creditors, receive large quantities of preferred and common stock, as well as new income bonds. These stocks are securities of lower dignity than the income bonds. Some of these bonds on the other hand go to creditors secured by the refunding bonds. This is because the refunding bonds have a first lien on some assets. 233 I. C. C. 414. But at any rate, under the absolute priority rule of the *Boyd* case,[28] the stratification of securities issued to creditors need not follow invariably the relative priority of the claimants.[29] Apropos of a somewhat similar situation, we said in *Consolidated Rock Co.* v. *Du Bois,* 312 U. S. at p. 530:

"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."

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[28] *Northern Pacific Ry. Co.* v. *Boyd,* 228 U. S. 482.

[29] *Group of Institutional Investors* v. *Chicago, M., St. P. & P. R. Co., post,* pp. 562–565.

B. A point is made as to the treatment of the Reconstruction Finance Corporation's claims in the distribution of securities. It is to be noted, p. 455, *supra,* that R. F. C. has two kinds of claims; one for $10,000,000 upon Trustees' Certificates for money advanced to the debtor while in reorganization, the other for $2,963,000 Collateral Notes, secured by refunding mortgage bonds. The Railroad Credit Corporation and the A. C. James Company are holders of similar collateral notes. The amount of bonds, as compared with the face principal of the indebtedness, varies. The R. F. C. has the most valuable collateral per dollar of indebtedness. To retire the Trustees' Certificates and to raise necessary new money for the reorganization, the Commission deemed it essential to sell $10,000,000 of new first mortgage, 4% bonds of 1974. To assure this, the Commission provided:

"That the [R. F. C.] purchase the bonds at par and accrued interest and that, in consideration of such purchase and the value of the collateral securing its claim, the Finance Corporation receive, for the secured notes of the debtor held by it, treatment equal to that accorded the holders of the debtor's existing first-mortgage bonds."

Respondents' objections to this ruling are that the Commission acted without a finding of the value of the new bonds or their marketability at par, that the advancement of the R. F. C. secured claim to priority over the like claims of other holders violates absolute priority and that there is no finding of reasonable equivalence between the preference and the value of R. F. C.'s taking the bonds. It is further urged that securities distributed to the R. F. C. to refinance the Trustees' Certificates "should be in recognition of the priority inherent in that transaction" and not in connection with the loan of R. F. C. to the debtor, which was made prior to reorganization proceedings.

It is admitted that the $10,000,000 Trustees' Certificates or such of them as are presently held by the R. F. C. are worth par. No finding was made by the Commission of the value of the new Firsts. Evidence before the court showed them of a value between 80 and 90 and of poor marketability on account of the system's interest record. The court made no finding as to either.

If the R. F. C. were treated on its notes, on the basis of the proportion of bonds held as collateral, precisely as the other noteholders, it would receive $414,175 of income mortgage bonds and $649,516 of new preferred stock, in addition to its proportion of common stock. 233 I. C. C. 409, 416. This proportion of common stock would allot a much greater aggregate of common stock to the R. F. C. than it obtained by the adjustment. By reason of accepting the less valuable new Firsts in lieu of cash for its $10,000,000 Trustees' Certificates, it will receive for the principal of its claims $1,185,200 of new income bonds and $1,777,800 of new preferred stock. The R. F. C. received its unpaid interest in no par common stock at $57 per share. This is the same allocation given claimants who hold the old Firsts. 233 I. C. C. 409, 452. The other noteholders received a large proportion of the principal of their claims in no par common stock at $62 per share.

It is difficult to appraise in dollars, as of the date of the Commission approval, the advantage secured for the plan by the arrangement with R. F. C. It is equally difficult to appraise similarly as of that date the value of the Trustees' Certificates relinquished by the R. F. C. over the value of the new Firsts or to determine how much of additional worth the R. F. C. obtained. The argument that the Commission does not have statutory authority to pay a creditor, even R. F. C., a government banking corporation, for furnishing new money has little weight. Nor do we see any reason why all claims of R. F. C. may not be considered by the Commission as a single claim. *Consolidated*

Rock Co. v. *Du Bois,* 312 U. S. 510, 520. There is nothing to lead us to a conclusion that the Commission gave any advantage to R. F. C. for which full consideration was not given. New money, the Commission said, "is absolutely necessary to effect a reorganization." 233 I. C. C. 409, 414. We have no reason to think the Commission allowed more compensation for this new money to R. F. C. than it would have been compelled to allow in some way, by interest or additional collateral or otherwise to another supplier. We conclude there was nothing in the discretionary action of the Commission to justify its invalidation.

C. We have held hereinbefore that valuation might be made by a method based primarily upon earnings and that so long as creditors receive "full compensatory treatment" their priorities may be represented by securities of different ranks. The Commission has made allocations of securities to the various creditors according to its judgment of the worth of their creditor position or priority in relation to the total worth of the property. It has found specifically that certain claims, under its valuations, have no value. We have pointed out the evidence before the Commission on the question of value. We cannot see that putting definitive dollar values on the whole and on parts of this property would aid the Commission in its work of valuation or the courts in their limited review of the Commission's action.

By its order of June 21, 1939, section P, 233 I. C. C. 441, 451, confirmed September 19, 1939, 236 I. C. C. 1, the Commission authorized the issue of around eighty-four million dollars of securities against the system property. This treats the equipment trusts and the securities with a face value as worth par and the no par common stock at $57 per share for all recognized creditors except the Railroad Credit Corporation and the A. C. James Company. For distribution to these latter two creditors, the common was valued at $62.

The Commission had before it the data pertaining to past traffic, receipts, earnings and operating ratios, the system's physical condition and prospects for business. This gave an adequate basis for an intelligent estimate of future income likely to be available to meet annual charges before dividends and those dividends themselves.

From this information, a conclusion was reached as to the debts which could be paid in the order of their full or absolute priority. *Case* v. *Los Angeles Lumber Co.*, 308 U. S. 106, 117. The secured claim of A. C. James Company could not be satisfied in full even with the more liberal valuation of the common stock. Claims of lesser dignity were eliminated. Those entitled to priority over the mortgages, that is, current liabilities, trustees obligations and reorganization expenses, were to be satisfied by cash or assumed by the reorganized company as a charge on its assets superior to the new securities. 233 I. C. C. 409, 452; 230 I. C. C. 61, 100, 101, 102. This left as creditors only the holders of the old 5% Firsts, with an underlying mortgage on the greater part of the property, the R. F. C., the Railroad Credit Corporation and the A. C. James Company, the latter three with refunding mortgage bonds as collateral. We have already explained the arrangement whereby R. F. C. acquired the status of a first mortgage bondholder. Here it is sufficient to say that as determined by the Commission the Refundings had a lien superior to the Firsts on some assets (233 I. C. C. 414), and the First superiority over the Refunding on the major portion. 230 I. C. C. 61, 97. See *infra, Priorities of Conflicting Liens.* With the foregoing facts and primary findings before it, the Commission drew the final conclusion as to allocation of securities as set out on page 461, *supra.* This allocation was based upon "the relative priority, value and equity of the various claims." Cf. 233 I. C. C. 414, 416, 417, 451 P. The distribution and report seems in accord with the re-

quirements and standards of subsections (b), (d) and (e) (1), note 7, *supra.*

Priorities of Conflicting Liens. No. 61 is a petition by the Irving Trust Company, trustee of the General and Refunding Mortgage, which raises questions of the priority between the Refunding Mortgage and the First Mortgage as a lien on three classes of property. These are the debtor's equity in certain rolling stock and equipment acquired under equipment trusts and a lease, the debtor's interest in the Northern California Extension and the debtor's title to certain "non-carrier" property. The Commission's plan is predicated on the priority of the First Mortgage as a lien on these properties and the Commission accordingly undertook tentatively to determine the legal questions involved. The Commission held that the First Mortgage, senior to the Refunding Mortgage, should be considered to be a first lien on these three classes of property. Petitioner, the Irving Trust Company, as substituted trustee under the Refunding Mortgage, made appropriate objections but the ruling of the Commission was adopted by the District Court. In reversing on appeal, the Circuit Court of Appeals did not pass on the question though the issue was presented. The point is made here by a party prevailing below, the petitioner Irving Trust Company, on behalf of holders of refunding mortgage bonds. As the matter is fully presented by the petition for certiorari and its decision is essential to a complete review of the District Court we have concluded to consider the question. § 240 (a) Judicial Code, 28 U. S. C. § 347. *United States* v. *Bankers Trust Co.*, 294 U. S. 240, 294, 295. Such action is in the interest of expedition. *Continental Bank* v. *Chicago, R. I. & P. Ry. Co.*, 294 U. S. 648, 685. Cf. *Story Parchment Co.* v. *Paterson Co.*, 282 U. S. 555, 567; *Cole* v. *Ralph*, 252 U. S. 286, 290.

The issues are those of construction of the terms of the First Mortgage. In the case of the first two classes of property, which were acquired after 1916, the year of the mortgage, the question is whether such property is covered by the after-acquired property clauses of that indenture and in the case of the third class, the "non-carrier" real property, the question is the application of the granting clauses to property not intimately connected with the operation of the road at the time of the 1916 reorganization of the debtor. None of the parties relies, at least as to personalty, on the controlling nature of rules of law of a particular jurisdiction. The Commission treated the question as one of the interpretation of the language of the mortgage and we shall do likewise.

A. As to the first class of property, it is the contention of the trustee of the Refunding Mortgage that the debtor's equity in the rolling stock subject to the three equipment trusts and the lease is not subject to the lien of the First Mortgage and that it is subject to the lien of the Refunding Mortgage. Since nothing turns on the difference between the equipment trusts and the lease, they will not further be distinguished. This equity is stipulated to have been worth over $6,000,000 on December 31, 1935, the nearest date available to August 21, 1935, the date of the filing of the petition. Since the obligations secured by all the refunding mortgage bonds outstanding amount to eleven millions it is apparent that determination of this question in favor of the refunding mortgage bondholders would go far towards assuring them equality of treatment with first mortgage bondholders.

The equipment trusts, the usual method of financing the acquisition of rolling stock, were created in 1923, 1924, 1929 and 1931. All are dated between the execution of the First Mortgage and the Refunding Mortgage. Under all, as is usual, the trustee retained title to the equipment,

the debtor's equity in the property increasing as it satisfied the serially maturing obligations. The obligations of two of the trusts have become fully satisfied since the institution of this proceeding.

The first of the granting clauses of the First Mortgage conveys presently owned railroad lines, equipment and other property formerly the property of the debtor's predecessor and specifically enumerating, under the subheading "equipment," several varieties of cars and "other rolling stock." Granting clause third, entitled "after-acquired property," covers

"Any and all property and facilities of any and every kind and description, including . . . equipment . . . and any and all right, title and interest in any of such properties or facilities which may from time to time hereafter be acquired or constructed by or belong to" the debtor, if such property falls into any one of four categories:

(1) Property acquired "by the use of First Mortgage Bonds or proceeds thereof or cash deposited" under the first mortgage "or on account of the purchase, acquisition or construction thereof or work thereon" such bonds or sums are paid out; or

(2) Property constituting "an integral part or parts of lines of railroad, extensions, branches, or other property subject to the lien" of the first mortgage; or

(3) Property "used or acquired for use in or for the maintenance or operation of or appertaining to" any of the property subject to the lien of the first mortgage; or

(4) Property consisting of securities of or other interest in the property of the Salt Lake City Union Depot & Railroad Company or Standard Realty and Development Company, or any subsidiary as defined.

The fifth granting clause covers a great variety of properties and facilities used in the operation of a railroad,

including tracks, bridges, tunnels, telegraph and telephone lines, floating equipment and specifically several kinds of cars "and other rolling stock and equipment" and "all other property of every description and all rights and interests in or with respect to the use of property;

"provided that the foregoing or any thereof, whether now owned by the Company or at any time hereafter acquired by it . . . shall be appurtenant to or used or held for use as, or as a part or as parts of, or to facilitate or safeguard the maintenance or operation of, any lines of railroad, extensions, branches . . . or other properties now or at any time hereafter subject to the lien of this indenture. . . ." [30]

Following the habendum clause is a proviso, hereafter referred to by its two opening words, reading:

"Subject, However, as to all equipment now owned to the equipment trust or conditional sale agreements secured thereon, and as to equipment hereafter acquired, to the equipment trust or conditional sale agreements to which the same shall be subject as permitted hereby, . . ."

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[30] This clause also grants "any and all replacements, renewals, improvements and betterments of and additions to" any of the lines or property subject to the lien of the mortgage. In view of the holding as to the effect of those clauses quoted in the text it will be unnecessary to consider the contention of the trustee of the First Mortgage that this clause, as supplemented by certain covenants, independently subjects the debtor's equity in equipment trust rolling stock to the lien of the mortgage.

There are six granting clauses. The second covers all lines, lands, structures and equipment and other property, interests or rights, legal or equitable, then owned by the Company, and not set forth particularly. The fourth provides for the grant of additional security, and the sixth covers legal and equitable rights, claims and demands, and rents and income in the property subject to the lien of the indenture.

It is stipulated that all the equipment subject to the equipment trusts in question was acquired for use and was used on all of the debtor's lines, including those specifically described in the granting clauses. This would seem to make clear that the debtor's equity in equipment trust rolling stock is covered by the lien of the First Mortgage. Subdivision (3) of the third, after-acquired property clause, as well as the fifth granting clause, applies.

The refunding mortgage trustee relies, however, on a clause found between the sixth granting clause and the habendum, hereafter referred to as the reservation clause, and reading:[31]

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[31] The portion of this clause preceding that quoted in the text provides:

"But nothing express or implied in this indenture shall be construed to limit the right or power of the Company or any successor or purchasing corporation, which right and power is hereby expressly reserved, by the use of its credit or free funds or by the use of First Mortgage Bonds delivered to the Company or any successor or purchasing corporation as in this indenture provided to reimburse the Company or any such successor or purchasing corporation for expenditures theretofore actually made out of its free funds, to construct or acquire free from the lien hereof lines of railroad, extensions or branches or interests therein, equipment, stocks, bonds or other securities or other property, rights, franchises, immunities or privileges provided the same shall not be lines of railroad, extensions, or branches or interests therein, equipment, stocks, bonds or other securities, or other property, rights, franchises, immunities or privileges (a) on account of the purchase, acquisition or construction whereof or work whereon First Mortgage Bonds shall be authenticated and delivered or their proceeds or other cash deposited hereunder shall be paid out as herein provided; or (b) consisting of, or if securities representing, property or facilities constituting an integral part or parts of lines of railroad, extensions, branches or other property subject to the lien of this indenture or some other integral portion whereof is or integral portions whereof are subject to the lien hereof or represented by securities subject to the lien hereof; or (c) consisting of or, if securities, representing property or facilities used or acquired

"and the Company may, unless First Mortgage Bonds shall have been authenticated and delivered or their proceeds or other cash deposited hereunder paid out against the same, purchase and acquire equipment, free from the lien hereof, by lease, conditional sale agreement or under any form of equipment trust, or purchase such equipment and issue obligations therefor secured by mortgage or pledge of such equipment superior to the lien of this indenture."

It is argued that this reservation permits the acquisition of rolling stock entirely free from the lien of the First Mortgage, unless acquired, as was not the case here, by the use of proceeds of the first mortgage bonds.[32]

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for use in or for the maintenance or operation of or appertaining to any of the lines of railroad, extensions, branches or other property subject, or represented by securities subject, to the lien of this indenture; or (d) consisting of shares of stock in or other securities of said The Salt Lake City Union Depot and Railroad Company or said Standard Realty and Development Company or any subsidiary company or of any right, title or interest which the Company or any successor or purchasing corporation may acquire in or to any of the property of either of the companies above named or in or to any line of railroad or other property of any corporation which shall then be or immediately prior thereto shall have been a subsidiary company as the term subsidiary company is defined in Section 2 of Article Second hereof; . . ."

[32] The trustee finds further support for this argument in a comparison of the four limitations on the acquisition of property from free funds found in the opening portion of the reservation clause, quoted in the preceding footnote, with the latter portion of the clause, quoted in the text. The opening portion contains four limitations, of which only two are relevant to this argument. The first of these four limitations is that the property may not be acquired by the use of first mortgage bonds or their proceeds and the third relates to property acquired for use in the operation of the road which is subject to the mortgage. It is only this first limitation which is repeated in the latter portion of the reservation clause. It is argued that the omission to repeat the limitation as to property acquired for use in the operation of the road shows an intention that such a limitation should

We do not so view the reservation. It rather performs the function of authorizing the acquisition of equipment by equipment trust or other method and only to that extent displacing the lien of the First Mortgage arising from the after-acquired property clauses. The granting clauses show a purpose to subject to the First Mortgage all the

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not apply in that latter portion. From this it is said to follow that property acquired for use in the operation of the road but not bought with first mortgage moneys is not subject to the mortgage, i. e., that the words "the Company may . . . purchase . . . equipment, free from the lien hereof, by lease, conditional sale agreement or under any form of equipment trust" should be read literally without regard to the purpose of the clause taken together with the remainder of the mortgage. Thus all but the conclusion of this argument is merely a variation of the argument discussed and rejected in the text, that the words "free from the lien hereof" are to be taken literally and that the purpose of the latter portion of the reservation clause was to accomplish the result contended for by the refunding mortgage trustee.

If it be said that the words "free from the lien hereof" in the opening portion of the reservation clause have a different meaning from that which we give those same words in the latter portion of the clause, the answer must be that, in view of the different functions of the two portions of the reservation clause, the difference is required. The opening portion is entirely consistent with granting clause third and the remainder of the reservation clause.

The four limitations in the opening portion of the reservation clause substantially correspond to the four categories of after-acquired property which are subject to the mortgage under granting clause third. By the third granting clause, after-acquired property in these four categories is subject to the mortgage. By the opening portion of the reservation clause, property not in these categories may be purchased with free funds and will be free from the mortgage. This is so because the categories, as defined in both places, do not comprehend property unconnected with the road of the debtor. Thus the purchase with free funds of a foreign railroad or of domestic real estate unconnected with the road would be permissible under the opening portion of the reservation clause, would not have been covered by the third or fifth granting clauses and might conceivably be the subject of a supplemental indenture under granting clause sixth. See n. 30, *supra*.

property and equipment used in connection with the road. There is repeated general mention of the grant of rolling stock, of legal and equitable interests. The third and fifth granting clauses fully cover this after-acquired equity in rolling stock purchased through equipment trusts and the "Subject, however" clause clearly contemplates that the First Mortgage shall be a lien on equipment second only to equipment trust agreements. That clause provides for the subordination of the First Mortgage to equipment trust agreements to which after-acquired equipment shall be subject "as permitted hereby." These last words, a reference to the reservation clause, confirm our view that the function of the reservation clause is merely to permit the purchase of equipment by that method and not to authorize the completely untrammeled acquisition of such equipment.

It is urged that the words "free from the lien hereof" in the reservation clause must be given their literal significance. The argument must fail aside from the difficulties inherent in a suggestion that these words shall be lifted from context and forcibly applied without reference to an intention fairly to be drawn from three specific clauses of the mortgage and reinforced by the entire scheme of the document. The reservation clause provides that the company may acquire equipment "free from the lien hereof" if the method be by lease, conditional sale or equipment trust but may "purchase such equipment and issue obligations therefor secured by mortgage or pledge of such equipment superior to the lien of this indenture." Why the difference? Equipment acquired for cash would unquestionably become subject to the First Mortgage. Equipment acquired under a purchase money chattel mortgage would under this clause be subject to the mortgage. The First Mortgage would merely be junior to the chattel mortgage. Yet equipment acquired under an equipment trust agreement is said to be entirely

free of the mortgage. The inconsistency [33] of such a result suggests that the phrases "free from the lien hereof" and "superior to the lien of this indenture" are in a sense correlative and were merely suited to the different title situations in the two methods of financing.

B. The Northern California Extension is a 112 mile branch of the debtor's main line and runs from Keddie, California, to the Great Northern Railroad at Bieber, California. It has been profitable since its construction in 1932 and the Commission expects that its traffic will increase. As has been stated the question as to the extension is whether it is covered by the after-acquired property clauses of the First Mortgage. Slightly less than one-half the cost of the extension, or about $5,000,000, was financed by the sale of first mortgage bonds; another $5,000,000 was realized from the sale of unsecured debentures to the A. C. James Co., later replaced by collateral notes secured by refunding mortgage bonds, and the remainder, approximately $500,000, was borrowed from the R. F. C. on the security of refunding mortgage bonds.[34]

[33] No reason suggests itself as to why equipment acquired for cash should have been intended to be covered by the First Mortgage and equipment acquired by the equipment trust method not be subject to the mortgage after the equipment trust obligation is completely satisfied. Yet this is a consequence of the argument pressed upon us.

[34] Construction of the extension was begun in August, 1930, and by the end of December a substantial amount of the work had been completed. Connection with the Great Northern was made on November 10, 1931, and freight service was then inaugurated under the jurisdiction of the construction department. On June 1, 1932, the line was placed in full operation. The cost of construction to May 31, 1932, was $10,183,641.90 and additional sums were later expended. It was financed as follows: First mortgage bonds in the amount of $5,000,000 were sold at 97½ between February 11, 1931, and January 29, 1932, producing $4,875,000. Between February 27, 1931, and May 31, 1932, $5,000,000 of debentures, issued under an indenture dated July 1, 1930, were sold for cash at par to A. C. James Co. These debentures were retired in March and May, 1932, through

In view of this, the refunding mortgage trustee contends that the First Mortgage should as a matter of equity be held a lien on the extension only to the extent of first mortgage moneys used or that it be held a first lien on a portion of the mileage equal to the proportion that first mortgage moneys bore to the total cost, or on an undivided interest in the extension in the same proportion. But here again the terms of the First Mortgage preclude such a contention. The third granting clause covers "any and all property . . . including . . . extensions . . . if

"(a) acquired or constructed by the use of First Mortgage Bonds or proceeds thereof or cash deposited hereunder (except bonds delivered or cash paid out under any of the provisions of this indenture in reimbursement of previous expenditures certified as hereinafter provided) or on account of the purchase, acquisition or construction thereof or work thereon First Mortgage Bonds shall hereafter be authenticated and delivered or the proceeds of First Mortgage Bonds or other cash deposited hereunder shall hereafter be paid out under any of the provisions of this indenture; . . ."

The reservation clause supplements this by its provision that the right to acquire property free of the lien shall not extend to "lines of railroad, extensions or branches . . . (a) on account of the purchase, acquisition or construction whereof or work whereon First Mortgage Bonds shall be authenticated and delivered or their pro-

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the issue of notes to the A. C. James Co. for $4,999,800 ($200 being paid in cash) secured by a pledge of $6,249,500 face amount of refunding mortgage bonds. The Refunding Mortgage was executed and delivered February 29, 1932, as of January 1 of that year. The remainder of the total cost of construction was financed by loans of $559,408 procured from the R. F. C. in March, June and August, 1932. These were parts of larger loans and were secured by refunding mortgage bonds.

ceeds or other cash deposited hereunder shall be paid out as herein provided; . . ." See n. 31, *supra.*

The substantial nature of the financing of the extension by the sale of first mortgage bonds is a matter of record and we hold that the quoted portion of the third granting clause and especially the clause beginning "or on account of the purchase, acquisition or construction thereof or work thereon" bring this extension within the coverage of the First Mortgage. In opposition to this conclusion it is said that it would permit the First Mortgage to become a lien on the extension if only one penny of first mortgage money had been used. That is, of course, not our case. Here we have a considered plan for financing an extension which contemplated that 50% of the necessary moneys be procured through the sale of first mortgage bonds. The terms of the after-acquired property clause disclose an intention that where at least such part of the funds used for the construction of such an extension are first mortgage funds that the entire extension should be subjected to the lien of the mortgage. The refunding mortgage trustee contends that it is inequitable to give the first mortgage bondholders a lien to the extent of all first mortgage bonds outstanding when in fact those bondholders contributed only $5,000,000 to the cost of construction and the refunding mortgage bondholders contributed the remainder. The asserted inequity disappears on a reference to the record where it plainly appears that the parties concerned had no understanding that the lien situation would be different from what we have held it to be.[35]

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[35] The primary parties concerned were The Western Pacific Railroad Corporation, purchaser of the $5,000,000 of first mortgage bonds in question, and the A. C. James Co., purchaser of a like amount of debentures. The A. C. James Co. in 1929 offered to finance the cost of the extension in return for a first lien thereon. It was then believed

C. Lastly, the refunding mortgage trustee makes a limited claim against certain "non-carrier" realty which is alleged to be completely free of the lien of the First Mortgage. The refunding mortgage trustee believes that this property should be given consideration as unmortgaged property in the allocation of securities to the refunding mortgage creditors.

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that the cost of the extension would be approximately $5,000,000. When it developed that it would greatly exceed that amount, the A. C. James Co. withdrew this offer and substituted another offer to advance 50% of the moneys needed, the advances not to exceed $5,000,000. No mention was made in this second offer of a first lien or, indeed, of any lien and the indenture under which the debentures were issued was equally silent. The parties were fully aware that the remaining 50% of the cost would be paid by the sale of first mortgage bonds or other funds. The second offer, in the form of a commitment to bid at public sale, was accepted by the debtor.

The specifications referred to in the notice calling for bids on the debentures contain the following:

"The main line of railroad of the Company extends from San Francisco, California, to Salt Lake City, Utah, with branches, and aggregates 1050.5 miles more or less of first track. Upon the completion of the Company's 'Northern California Extension' its main line of railroad will aggregate 1198.5 miles, more or less. A map of the Company's railroad system is hereto annexed.

"The First Mortgage of this Company dated June 26, 1916, securing this Company's First Mortgage Bonds, whereunder not more than $50,000,000 thereof may be outstanding at any one time, is a first lien on said main line of railroad."

The bid of the A. C. James Co. stated that it was made in accordance with the specifications, which had been examined by the bidder.

The specifications in connection with the offers of the $5,000,000 of first mortgage bonds contain similar statements:

"Said First Mortgage constitutes a first lien on the main line of railroad of the Company extending from San Francisco, California, to Salt Lake City, Utah, and branches, aggregating 1050.5 miles, more or less, of first track, the Company's terminal and other railroad properties in the cities of San Francisco, Oakland and elsewhere, and certain of its rolling stock and equipment. Upon the comple-

The greater part of this property, which was not used for railway purposes, was acquired from the debtor's predecessor, the Western Pacific Railway Company, pursuant to its reorganization in 1916, and the question is whether this property is within the terms of the First Mortgage.[36] We answer this question affirmatively. Despite the fact that it is or was not used for transportation purposes, the mortgage nevertheless covers it by the conveyance of:

"First.—All and singular the following described lines of railroad, terminals, lands, equipment, shares of stock and other real and personal property and interests and rights in property owned by the Company or to which it may be entitled, formerly the property of or belonging to

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tion of the construction and/or acquisition of the Company's 'Northern California Extension' its main line of railroad will aggregate 1198.5 miles, more or less. A map of the Company's railroad system is hereto annexed."

The bids of The Western Pacific Railroad Corporation contain a reference to the specifications similar to that in the bid of the A. C. James Co.

Mr. A. C. James was during this time the president and a director of the A. C. James Co., a director of the Western Pacific Railroad Corporation and a director of the debtor.

It is not suggested that the understanding of the Reconstruction Finance Corporation as to the lien of the refunding mortgage bonds pledged with it to secure the loans made to complete payment for the extension was different. See Western Pac. R. Co. Reconstruction Loan, 180 I. C. C. 645, 646, 648–9, an exhibit herein.

[36] A portion of this "non-carrier" property was acquired after 1916, some of it by the use of first mortgage moneys and some of it in substitution for property released from the lien of the First Mortgage. The refunding mortgage trustee makes no claim to the property acquired by the use of first mortgage moneys. Another small portion of the property was acquired after 1916 but without the use of first mortgage moneys, for use as future industrial sites and for gravel pit purposes. The claim to this last property is not specified in the briefs of the refunding mortgage trustee and it seems to be of such negligible value as would not warrant a reallocation of securities if it were to be held that this property is not subject to the first mortgage lien.

Western Pacific Railway Company, a corporation of the State of California, or its receivers: . . ."

. . . . . .

"III. All terminals and all lands and interests in lands, easements therein and improvements thereon, including, among other things, yards, station and depot grounds, sheds, station houses, freight houses, warehouses, elevators, stock-yards, car-houses, engine houses, oil tanks, water tanks, water supply, shops, hotels, boarding houses, hospitals, docks, wharves, piers, slips, telephone and telegraph lines and other structures and erections and the appurtenances of all and every of the foregoing, whether or not for use in connection with said or any lines of railroad."

The last subdivision of the first granting clause, which follows six subdivisions specifically describing certain properties, conveys:

"other property.

"VII.—All and singular the property, interests and rights, (except cash, accounts and bills receivable, traffic and other operating balances and other cash items) not comprised in the descriptions contained in the foregoing subdivisions of this clause First of these granting clauses, which belong to the Company or to which it may be entitled in any manner and which heretofore were owned by Western Pacific Railway Company or to which said company was or its receivers were entitled."

Reinforcing these provisions is the second granting clause:

"Second.—All other lines of railroad, extensions, branches, terminals, lands, structures, equipment, shares of stock, bonds, notes and other securities, claims, franchises, privileges and immunities and other property and estates, interests and rights (whether legal or equitable) now owned by or belonging to the Company, notwith-

standing the same or any thereof may not be particularly set forth in these granting clauses."

In these clauses it is repeatedly specified that all property, railroad or otherwise, formerly owned by the debtor's predecessor and to which the debtor succeeded, is to be subject to the First Mortgage.

We therefore affirm the District Court's conclusion adopting the Commission's tentative determinations as to the priority of the First Mortgage.

Accommodation Collateral. The debtor, The Western Pacific Railroad Company, objects to the provision of subdivision R of the Commission's final order, approved by the District Court, directing that

"All collateral pledged by the debtor as security for notes to the Reconstruction Finance Corporation, the Railroad Credit Corporation, and the A. C. James Company shall be reduced to possession by the respective pledgees thereof, and shall be by them surrendered to the reorganized company and canceled, . . ." 233 I. C. C. 453; 34 F. Supp. 493, 505.

This order arises from the following circumstances. As is shown on page 455, *infra*, the Reconstruction Finance Corporation, the Railroad Credit Corporation and A. C. James Company have notes of the debtor secured by pledges by the debtor of various amounts of the debtor's General and Refunding Bonds and other collateral.[37]

[37] The claims and security therefor were found by the Commission to be, as of June 30, 1938, as follows: "class 3 items consisted of $4,999,800, face amount, of notes to the A. C. James Company, on which accrued and unpaid interest amounted to $1,124,955, and which are secured by $4,249,500, principal amount, of the debtor's general and refunding bonds, and a second lien upon $2,000,000, principal amount, of the same issue of bonds held by the Railroad Credit Corporation; class 4 items consisted of $2,963,000, face amount, of notes to the Reconstruction Finance Corporation, on which accrued and unpaid

To assist the debtor in obtaining the Reconstruction Finance Corporation and Railroad Credit Corporation loans, the A. C. James Company furnished to the debtor a block of refunding bonds, previously issued to A. C. James Company by the debtor, and Western Pacific Corporation furnished to the debtor other collateral described in the Commission finding. These securities were a part of those then pledged by the debtor to secure the notes held by Railroad Credit Corporation and Reconstruction Finance Corporation, which knew the source of the collateral at the time.

The debtor's objection to the Commission's order is stated by it as follows:

"In substance, the Commission provided that the collateral owned and pledged by the Debtor should be surrendered to the reorganized Company but that the accommodation collateral borrowed from others and pledged by the Debtor should be confiscated; or, to state the proposal somewhat differently, the accommodation collateral is to be resorted to first instead of last as is required by the most elemental principles of equity and by the authorities cited below."

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interest amounted to $649,181, the notes being secured by $10,750,000, principal amount, of the debtor's general and refunding bonds, and voting-trust certificates for half of the voting stock of the Denver & Rio Grande Western Railroad Company, and a second lien upon $2,000,000, principal amount, of the same issue of bonds held by the Railroad Credit Corporation; class 5 items consisted of $2,445,610, face amount, of notes to the Railroad Credit Corporation, on which accrued and unpaid interest amounted to $135,296, which notes are secured by $4,000,000, principal amount, of the debtor's general and refunding bonds, and a second lien upon the security held by the Reconstruction Finance Corporation, an assignment of certain advances by the Western Pacific Railroad Corporation, and an assignment of the distributive share of the debtor under the marshaling and distributing plan, 1931; . . ." 230 I. C. C. 77.

We think, however, that the objection is not sound and that the Commission's order is correct. These are our reasons: The refunding bonds pledged by the debtor to secure the A. C. James Company note and left in that position throughout were pledged directly by the debtor and are not accommodation collateral in any sense. Nor do we need give consideration to the accommodation collateral behind the Reconstruction Finance Corporation and Railroad Credit Corporation notes other than the refunding bonds. In the earlier order approving the plan, the Commission provided that the rights of the Reconstruction Finance Corporation and Railroad Credit Corporation "in collateral pledged with them by parties other than the debtor" should not be disturbed or altered. 230 I. C. C. 102; subdivision O of the order of October 10, 1938, *id.* 114. On consideration of the petitions for modification of this order, the Commission refused to direct that this collateral be "surrendered to the pledgors thereof." 233 I. C. C. 431, 432. In its order, however, promulgating the present plan there is no clause comparable to subdivision O of the previous order preserving the rights of Reconstruction Finance Corporation and Railroad Credit Corporation in the collateral pledged with them by "parties other than the debtor." The sole provision in the final order as to the collateral behind the Reconstruction Finance Corporation and Railroad Credit Corporation is that found in subdivision R and quoted at the opening of this section of this opinion, directing the collateral pledged by the debtor with Reconstruction Finance Corporation, Railroad Credit Corporation and A. C. James Company, be reduced to possession, surrendered to the reorganized company and canceled. This was entirely proper. None of the collateral, other than the refunding bonds, was a claim against the debtor. A. C. James Company and the Western Pacific Corporation

perhaps had unsecured claims against the debtor for their securities and other collateral which the debtor had borrowed but these were held worthless as claims against the debtor. 233 I. C. C. 452. This collateral, other than the refunding bonds, was therefore left with the pledgees with its position unaffected by any direct action of the Commission.

The "collateral pledged by the debtor" referred to in the excerpt from subdivision R of the Commission's final order, 233 I. C. C. 453, quoted above, can be only the general and refunding bonds of the debtor, including those previously furnished by A. C. James Company. The words used in subdivision R to describe them are the same used by the Commission in distinguishing the refunding bonds from the remainder of the accommodation collateral. 233 I. C. C. 431, 432. Of course the collateral loaned to the debtor which was not an obligation of the debtor could not be ordered by the plan to be canceled. It remained with the pledgees. This "collateral pledged by the debtor" was properly to be reduced to possession by the pledgees, surrendered and canceled. For these bonds, furnished by A. C. James Company, held as collateral with other bonds of the debtor, the Reconstruction Finance Corporation and Railroad Credit Corporation received their allotment of new securities, 230 I. C. C. 101, as modified by the Reconstruction Finance Corporation arrangement, described in this opinion at page 485. See 233 I. C. C. 414, 452. The A. C. James Company unsecured claim against the debtor for the loan of the bonds is valueless, 233 I. C. C. 452, and the plan does not deal with any possible claim of accommodation pledgors against pledgees of bonds which were not the property of the debtor.

Change of Conditions. The plan now under consideration was certified to the court on September 28, 1939. To provide for a $3 dividend on the no par stock, the plan

calls for future earnings available for betterments, interest, sinking fund and dividends of over $4,500,000. The table on page 457 shows how difficult it had been for the system to earn that amount. Anticipated earnings was the principal factor governing the valuation of the property and the dollar volume of new securities, and past earnings was an important factor in estimating future earnings. A higher estimate of future earnings available for dividends might have created an equity for unsecured creditors or even stockholders. Furthermore, respondents urge that the "earning power" of the property referred to in subsection (e) means not only realized earnings but the system's ability, utilizing its present facilities to the full, to earn increased returns. This we deem of little weight against the history of past operations. Respondents ask us to take into consideration the changed conditions since the Commission acted. There are a few years of actual experience subsequent to the certification. By stipulation of the parties reports of operating results, combined, have been filed for our consideration for the period beginning December 1938 down to and including July 1942. Since we have agreement among the parties as to the earnings available for interest, as adjusted, through 1939, see page 457, *supra,* we need refer only to subsequent periods. These reports show the following sums available for interest: 1940—$2,513,090; 1941—$4,548,128; 1942 (7 months) $4,830, 986,* less relatively minor deductions which have not been consistently treated in the reports. This last group of figures is utilized by us as a rough extension of the table of earnings on page 457. They are useful to show the striking increases over the old averages but have not been adjusted to conform mathematically with the table of earlier years.

*We have been furnished statements of operating results of the debtor through November, 1942, which show for that part of the year income available for fixed charges of $10,309,517.18.

In the interest of advancing the solution of as many problems in reorganization as possible, we have deliberated upon the effect to be given these unexpectedly large earnings. There are factors in these increased incomes which obviously affect their weight as evidence of continued capacity to produce earnings available for dividends. The effect of taxation is not wholly answered by deductions of tax estimates on the basis of present rates. The reduction by the plan of outstanding interest-bearing securities makes income taxes more likely to affect net earnings. Increased wages and costs must be reckoned with and increased maintenance may reasonably be expected from increased use. Already serious proposals for decrease of tariffs have been advanced. Order of the Interstate Commerce Commission in *Ex parte No. 148*, January 4, 1943.

Respondents, of course, admit that the needs of war have increased traffic. Transcontinental transportation has at the moment displaced a large proportion of that from coast to coast, via the Panama Canal. Buses and trucks have yielded much of their gains in volume to railroads. But respondents point to the Northern California Extension and the Dotsero Cutoff as permanent feeders to the debtor's growing business. They see a post-war reconstruction and rehabilitation period which promises a continuance of heavy railway use into the indefinite future. This, say respondents, is to be appraised in the light of the necessity for a national transportation system adequate for the productive capacity of the war facilities, when they are turned to peaceful pursuits.

The Commission, at the time of its certification to the court, September 28, 1939, acted as the results of increased business were just emerging into increased profits.[38] In

[38] Cf. Florida East Coast Ry. Co. Reorganization, Supplemental Report, August 10, 1942, 252 I. C. C. 731, 733:

"In the report of April 6, 1942, division 4 recognized the fact that 1941 earnings were influenced by the extraordinary conditions existing

objections to the Commission plan filed in the court on December 8, 1939, it was suggested that "any estimate of railroad earnings made prior to the development of war conditions must be revised." The court after considering all of the objections offered, but without specifically discussing the changed conditions, approved the plan on August 15, 1940. 34 F. Supp. 493, 504. The Commission's forecast was made with knowledge and not in disregard of past fluctuations of income, in war and in peace. On the showing as to changed conditions made before the District Court, there was no basis for a disapproval of the Commission plan as unfair to the junior equities. The further evidence of increased earnings, placed in the record by the stipulations, does not lead us to reject the Commission's plan.

Effective Date of Plan. January 1, 1939, was chosen as the effective date of the plan. The debtor objects to this on the ground that subsection (l) fixes the date of filing the petition as the date for the plan.[39] The practical result of the debtor's argument is to make the interest

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as the result of the war and, in the report, stated fully all considerations leading to its conclusions as to justifiable amounts of capitalization and of new general-mortgage bonds. Under present conditions, the fact that the year 1942 gives promise of producing even larger earnings than 1941 affords too uncertain and precarious a basis to justify the increases sought."

Cf., also, *In re Alabama, T. & N. R. Corp.*, 47 F. Supp. 694, 708; *Akron, C. & Y. Ry. Co.* v. *Hagenbuch*, 128 F. 2d 932, 939; *Guaranty Trust Co.* v. *Minneapolis & St. Louis R.* (D. C. Minn.), September 10, 1942, Order No. 968.

[39] Section 77 (l):

"In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition was filed."

rate of the new securities applicable from August 2, 1935, instead of from January 1, 1939. As the new securities bear lower interest rates than the contract securities, a savings to the estate would accrue.[40] But we are of the opinion that the provisions of subsection (b) are sufficiently broad to empower the Commission to select the date for the institution of the reorganization. Cf. *Group of Institutional Investors* v. *Chicago, M., St. P. & P. R. Co.*, *post*, p. 546.

Costs. The Institutional Bondholders Committee in No. 7 and the Trustees of the First Mortgage in No. 8 call our attention to the provision in the decree in the Circuit Court of Appeals for costs against appellees there and suggest that costs should be assessed directly against the estate of the debtor in proceedings under § 77. Our reversal of the decree leaves the appellees below free of this provision of the decree and requires us to assess costs on the review. We see also no reason why costs should not be assessed against the losing parties on this review of the action of the District Court, and it will be so ordered. This assessment is without prejudice to a motion for allowance for disbursements by respondents in accordance with subsection (c) (12).[41]

Other minor objections to the plan as approved by the District Court are advanced but we do not consider them as of sufficient weight to require comment.

From the foregoing it follows that the judgment of the Circuit Court of Appeals should be reversed and that of the District Court affirmed.

Reversed.

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[40] No contention is made that fully secured claims do not bear contract interest to the date of reorganization, whenever it may be. *Ticonic Bank* v. *Sprague*, 303 U. S. 406.

[41] Cf. *Reconstruction Finance Corp.* v. *Bankers Trust Co.*, *ante*, p. 163.

MR. JUSTICE FRANKFURTER agrees with this opinion, barring only the views expressed regarding the respective functions of the Interstate Commerce Commission and the district judge under § 77 of the Bankruptcy Act.

MR. JUSTICE JACKSON and MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this case.

MR. JUSTICE ROBERTS:

I am in agreement with much that is said in the opinion, but I desire separately to state my views as to the respective roles assigned to the Interstate Commerce Commission and to the District Court in the reorganization process.

Section 77 was adopted in the exercise of the power conferred by the Constitution upon Congress to establish uniform laws on the subject of bankruptcies throughout the United States. The proceeding is, from its initiation, one in bankruptcy. The legislation constitutes the Interstate Commerce Commission an arm of the court and clothes the Commission with certain functions as such. No question is made as to the authority of Congress thus to divide responsibilities between the court and the Commission in the formulation of a plan of reorganization. Section 77 is the guide to decision concerning the respective duties of the court and the Commission. The statutory provisions quoted in Note 7 of the majority opinion seem to me clearly to define the boundaries of the powers conferred.

Certain requisites and certain permissible features of the plan, for the formulation of which the Commission has sole responsibility, are prescribed or permitted. Within very broad limits the Commission is given discretion in the application of these in formulating a plan. (Subsection (b).) When the plan is certified to the judge his function is, as the Court holds, merely to see that the

limits set in subsection (b) are not transgressed; that the Commission has observed the standards and limits thereby set. See subsection (e) which directs that the judge shall approve the plan if satisfied that it complies with the provisions of subsection (b).

Other functions are reposed solely in the Commission. It is to determine whether the plan "will be compatible with the public interest." (Subsection (d).) I need not discuss the purport of this direction, which obviously relates, in the main, to the proposed corporate and capital structure of the reorganized company. That structure must be such that the rehabilitated enterprise may have a reasonable prospect of satisfactory public service. The statute will be searched in vain for any mandate to the court to review or overturn the Commission's judgment in this respect; and I agree that the District Court properly held that the protection of the public interest was so far committed to the Commission that, except for the most egregious disregard of relevant considerations, the judge should hold himself bound by the Commission's appraisal of the demands of that interest.

Another vital step in formulating any plan is committed to the judgment of the Commission. This is valuation of property. Subsection (e) states that, if it shall be necessary to determine the value of any property for any purpose under the Act, the Commission shall determine such value and certify the same to the court in its report. It seems clear, as the opinion states, that the court cannot reject the plan for any mere asserted error in valuation. Its power is limited to an examination of the question whether the Commission acted wholly without evidence, arbitrarily, or in disregard of recognized criteria.[1]

[1] I believe this is so as to the valuation of all the assets and as to valuations of property subject to liens or available for the claims of classes of creditors or stockholders. See subsection (e), par. 2.

In equity reorganizations prior to the passage of § 77 the phrase "fair and equitable" had come to have a recognized content. It meant that, in allotting interests in the reorganized company, the priorities existing between lienors and stockholders of the debtor must be substantially preserved. No reorganization could be fair and equitable if, in the new capital structure, junior interests were allowed to participate at the expense of those who had had a senior position in the old.[2]

Section 77 sought to preserve and enforce this rule of law. By subsection (d) the Commission is charged with seeing that a proposed plan meets the requirements of subsection (e) and, by subsection (e) it is provided that, on certification of a plan to the court, all parties may file detailed and specific objections to the plan and their claims for equitable treatment. The judge is to hold a hearing on such objections "and such claims for equitable treatment." Thus the statute provides for the framing in court of sharp and specific issues directed to the plan's compliance with the rule governing allocation, and this fact is emphasized by the leave granted the parties to produce in court additional evidence. After the direction that the judge shall approve the plan "if satisfied" it complies with subsection (b), (which involves only a determination, as above indicated, whether the Commission, in setting up the plan, has respected the limits set by Congress in subsection (b)), subsection (e) goes on to deal with the judge's action on the objections of the parties and their claims for equitable treatment. It provides that he must be satisfied that the plan "is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in

[2] *Northern Pacific Ry. Co.* v. *Boyd*, 228 U. S. 482; *Case* v. *Los Angeles Lumber Co.*, 308 U. S. 106; *Consolidated Rock Products Co.* v. *Du Bois*, 312 U. S. 510.

favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders."

I read this language as placing upon the court a duty quite distinct from any imposed upon it in connection with the general features of the plan or in connection with any findings of the Commission with respect to the value of property. The statute contemplates that the judge shall not only examine the findings of the Commission with respect to the fair equivalent of what is granted to mortgagees or stockholders compared to the interest in the old company that they are to surrender, and the Commission's reasons for its action, but also hear evidence by which he may be more fully informed as to the equity and fairness, as those terms have specific legal connotation, of rights accorded under the plan in relation to those theretofore enjoyed. In my view, Congress intended that the judge should satisfy himself, as in the old equity proceedings he was bound to do, that the relation between the various classes of investors is substantially maintained in the reorganization.

In order to discharge this judicial duty the court obviously may have to pass upon questions of law. In the present case, a decision as to the priority and extent of the respective mortgage liens is a legal prerequisite to an adjudication of the issue whether different classes of mortgage bondholders received fair and equitable treatment in the apportionment of new securities. I agree with the conclusions of the court on the question of law thus presented. It happens that the parties in interest do not challenge the fairness of the allocation as between them, if the Commission was right in its tentative conclusion concerning the coverage of the first mortgage and that of the general and refunding mortgage. In this case, then, the function of the court was fully performed once

it had decided that question of law. In other cases, where the issue of fairness and equity depends upon the facts disclosed, I think it is the duty of the court to go farther and examine the plan sufficiently to satisfy itself that the rule of absolute priority announced in the *Boyd* case and in the *Los Angeles* and *Rock Products* cases has not been violated. In performing this duty the court should accord great weight to the Commission's action. It should require the objector to show that the Commission has failed to respect the doctrine. But it should not accord finality to the Commission's action if there be any evidence to support it. I believe the court is charged by subsection (e) with the duty of determining that, in the allocation of securities in the reorganized company, the Commission has a substantial foundation in the facts for the allocation of securities required by the plan it approves.

I concur in the judgment of the Court.

MR. JUSTICE FRANKFURTER joins in this opinion.

EMIL, TRUSTEE IN BANKRUPTCY, *v.* HANLEY, RECEIVER.

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

No. 551. Argued February 12, 1943.—Decided March 15, 1943.

1. Section 2 (a) (21) of the Bankruptcy Act, which gives to the bankruptcy court the power to require "receivers or trustees appointed in proceedings not under this Act" within four months of bankruptcy (1) "to deliver the property in their possession or under their control to the receiver or trustee appointed under this Act," and (2) "to account to the court for the disposition by them of the property" of the bankrupt, *held* inapplicable in straight bankruptcy proceedings to a receiver appointed by a state court (within four months

of bankruptcy) as an incident to enforcement of a valid mortgage lien. P. 519.

2. Section 69 (d) of the Bankruptcy Act, making a "receiver or trustee, not appointed under this Act, of any of the property" of the bankrupt "accountable" to the bankruptcy court for "any action taken by him subsequent to the filing of such bankruptcy petition," applies only where bankruptcy supersedes the prior proceedings. P. 522.

130 F. 2d 369, affirmed.

CERTIORARI, 317 U. S. 621, to review the affirmance of an order of the bankruptcy court, 43 F. Supp. 128, denying an application for an order requiring a state court receiver to file his account in the bankruptcy court.

Mr. David Haar for petitioner.

Mr. John P. McGrath for respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

John M. Russell, Inc., was the owner of an apartment house in New York. On August 13, 1940, a foreclosure suit by a third mortgagee was filed. On August 17, 1940, the state court appointed respondent receiver of the rents and profits of the apartment house. On August 31, 1940, an involuntary petition in bankruptcy was filed against John M. Russell, Inc., of which petitioner was subsequently appointed as trustee. Respondent collected the rents from the premises from the time of his appointment in August, 1940 to and including August, 1941. While that foreclosure suit was pending, mechanics liens, subordinate to the third mortgage, were foreclosed, a sale was had, and the property purchased by Apartment Investing Corporation. That was in February, 1941. Judgment in the mortgage foreclosure suit was entered in June, 1941, and on August 13, 1941, before the sale was held, the judgment was paid and satisfied by Apartment

Investing Corporation. Thereafter, respondent presented his accounts to the state court for settlement. Petitioner applied to the bankruptcy court for an order directing respondent to file his account in that court. While that motion was pending, the motion in the state court came on for a hearing. Petitioner appeared and filed his objections to respondent's accounts. His objections were overruled,[1] the accounts approved, and respondent discharged by the state court. Thereafter the bankruptcy court denied petitioner's motion. 43 F. Supp. 128. The Circuit Court of Appeals affirmed by a divided vote. 130 F. 2d 369. We granted the petition for a writ of certiorari because of the importance of the problem in the administration of the Bankruptcy Act.

Petitioner contends that § 2 (a) (21) and § 69d make it obligatory on the respondent as a non-bankruptcy receiver to account to the bankruptcy court. These provisions of the Bankruptcy Act are new. They were added in 1938 by the Chandler Act. 52 Stat. 840, 11 U. S. C. § 11 (a) (21), § 109d. Sec. 2 (a) (21) gives to the bankruptcy court the power in straight bankruptcy proceedings to require "receivers or trustees appointed in proceedings not under this Act" within four months of bankruptcy (1) "to deliver the property in their possession or under their control to the receiver or trustee appointed under this Act," and (2) "to account to the court for the disposition by them of the property" of the bankrupt.[2] Sec. 69d makes a "receiver or trustee, not ap-

[1] The court holding that all rights of the bankrupt in the real property were cut off February 24, 1941; that on that day there was a deficit in the receiver's account; and that the balance of rents had accrued subsequent to February 24, 1941.

[2] Sec. 2 (a) (21) sets forth as one of the enumerated powers of courts of bankruptcy, the power to: "Require receivers or trustees appointed in proceedings not under this Act, assignees for the benefit of creditors, and agents authorized to take possession of or to liquidate

pointed under this Act, of any of the property" of the bankrupt "accountable" to the bankruptcy court for "any action taken by him subsequent to the filing of such bankruptcy petition." [3] These sections are in part declaratory of the law as it existed prior to the Chandler Act. Thus, § 2 (a) (21) plainly includes the case where a lien against

a person's property to deliver the property in their possession or under their control to the receiver or trustee appointed under this Act or, where an arrangement or a plan under this Act has been confirmed and such property has not prior thereto been delivered to a receiver or trustee appointed under this Act, to deliver such property to the debtor or other person entitled to such property according to the provisions of the arrangement or plan, and in all such cases to account to the court for the disposition by them of the property of such bankrupt or debtor: *Provided, however,* That such delivery and accounting shall not be required, except in proceedings under chapters X and XII of this Act, if the receiver or trustee was appointed, the assignment was made, or the agent was authorized more than four months prior to the date of bankruptcy. Upon such accounting, the court shall reexamine and determine the propriety and reasonableness of all disbursements made out of such property by such receiver, trustee, assignee, or agent, either to himself or to others, for services and expenses under such receivership, trusteeship, assignment, or agency, and shall, unless such disbursements have been approved, upon notice to creditors and other parties in interest, by a court of competent jurisdiction prior to the proceeding under this Act, surcharge such receiver, trustee, assignee, or agent the amount of any disbursement determined by the court to have been improper or excessive."

[3] Sec. 69d provides: "Upon the filing of a petition under this Act, a receiver or trustee, not appointed under this Act, of any of the property of a bankrupt shall be accountable to the bankruptcy court, in which the proceeding under this Act is pending, for any action taken by him subsequent to the filing of such bankruptcy petition, and shall file in such bankruptcy court a sworn schedule setting forth a summary of the property in his charge and of the liabilities of the estate, both as of the time of and since his appointment, and a sworn statement of his administration of the estate. Such receiver or trustee, with knowledge of the filing of such bankruptcy proceeding, shall not make any disbursements or take any action in the administration of such property without first obtaining authorization therefor from the bankruptcy court."

the debtor's property was acquired by some legal or equitable proceeding within four months of bankruptcy. Prior to 1938 such liens did not survive bankruptcy (*Straton* v. *New*, 283 U. S. 318, 322); and bankruptcy superseded the proceedings out of which they arose. Remington, Bankruptcy (4th ed.) § 2067–§ 2071. But the accountability of the non-bankruptcy receiver or trustee presented some difficulties prior to the Chandler Act. When bankruptcy superseded the prior proceedings, all disbursements subsequent thereto were, of course, subject to the exclusive control of the bankruptcy court. *In re Diamond's Estate*, 259 F. 70; *Moore* v. *Scott*, 55 F. 2d 863; *Lion Bonding & Surety Co.* v. *Karatz*, 262 U. S. 640, 642; *Gross* v. *Irving Trust Co.*, 289 U. S. 342. While such disbursements were generally subject to the summary power of the bankruptcy court (*Taylor* v. *Sternberg*, 293 U. S. 470), an accounting for disbursements made prior to bankruptcy required a plenary suit. *Loveless* v. *Southern Grocer Co.*, 159 F. 415; 1 Collier, Bankruptcy (14th ed.) pp. 320–321. And see *Galbraith* v. *Vallely*, 256 U. S. 46; *In re Jack Stolkin, Inc.*, 42 F. 2d 829. Sec. 2 (a) (21) by substituting a summary proceeding was designed to eliminate the delay and cost of a plenary suit and to provide a more effective control over prior disbursements. See H. Rep. No. 1409, 75th Cong., 1st Sess., p. 20; Weinstein, The Bankruptcy Law of 1938, pp. 16–17.

Does § 2 (a) (21) go further and apply to a case where a receiver is appointed within four months of bankruptcy as an incident to enforcement of a mortgage lien whose validity is not challenged? Prior to the Chandler Act such proceedings were not superseded by bankruptcy. They survived bankruptcy, the interest of the estate in them being protected by the intervention of the bankruptcy trustee. *Straton* v. *New, supra*, pp. 326–327, and cases cited. Under the earlier Act it made no difference whether such a proceeding was instituted prior to or within the

four months period. Where the lien survived bankruptcy, prior proceedings to enforce it would not be enjoined by the bankruptcy court. 1 Collier, *op. cit.*, pp. 306–309; *Straton* v. *New, supra,* p. 326, n. 6. Sec. 2 (a) (21) read literally would call for a different result, in that foreclosure receivers would have to turn over to the bankruptcy court all the property in their possession or under their control, and account to it. In this case, since the receiver was only a receiver for rents and profits, it would mean that the foreclosure would go on apace in the state court while the funds collected by the receiver would be turned over to the bankruptcy court for administration. The argument advanced in support of that view is that with such power the bankruptcy court could better protect the interests of the estate in the foreclosure proceeding.

But we do not think that that was part of the purpose of § 2 (a) (21). As we have stated, the main purpose of § 2 (a) (21) was to give the bankruptcy court control over disbursements made in non-bankruptcy proceedings prior to the filing of the petition. The House Judiciary Committee in its report stated: "There is no logical reason why the bankruptcy court could not supervise these expenditures, since all of the previous proceedings are nullified by the petition in bankruptcy followed by an adjudication. The principle is the same as that involved in section 60d of the act where it is provided that fees paid to the attorney for the debtor prior to bankruptcy and in contemplation thereof are subject to review by the bankruptcy court." H. Rep. No. 1409, *supra,* p. 20. That is as plain an indication as could be made that § 2 (a) (21) was designed to define the powers of the bankruptcy court only where bankruptcy superseded the prior proceedings.[4] The language of § 2 (a) (21) squares with that express

[4] We do not, of course, include that supersession which flows from the fact that state insolvency laws are involved which are "tantamount to bankruptcy." *Straton* v. *New, supra,* p. 327.

declaration. When Congress wrote the four months proviso into § 2 (a) (21) it was not writing on a clean slate. The presence of that proviso suggests the type of problem with which Congress was dealing. *Straton* v. *New, supra,* indicates the importance of that period in a determination of what liens did not survive bankruptcy and when bankruptcy proceedings superseded prior proceedings. The 1938 Act, like its predecessor, makes the four months period part of the critical test for determining what liens do not survive bankruptcy. One example is to be found in § 67a (1) which provides that liens "obtained by attachment, judgment, levy, or other legal or equitable process or proceedings within four months" of bankruptcy are null and void on certain conditions. That section illustrates the relevancy of the four months period to this type of problem. If § 2 (a)(21) is read to extend the power of the bankruptcy court to the present situation,[5] the four months period will have acquired a new significance in bankruptcy law. We cannot help but think that if Congress had set out to make such a major change, some clear and unambiguous indication of that purpose would appear. But we can find none. Moreover, such an interpretation would lead in many cases to a division of authority between state and federal courts. Thus in this case the state court would remain in charge of the foreclosure; the bankruptcy court would have exclusive control over the receiver's receipts. An interpretation which leads to a division of authority so fraught with conflict will not be readily implied.

[5] We do not reach the question, reserved in *Duparquet Huot & Moneuse Co.* v. *Evans,* 297 U. S. 216, 224, whether the appointment of a foreclosure receiver might be an act of bankruptcy under § 3 (a) (5). See *In re 211 East Delaware Place Bldg. Corp.,* 14 F. Supp. 96. It was suggested in *Randolph* v. *Scruggs,* 190 U. S. 533, 536, that bankruptcy superseded a general assignment for the benefit of creditors made within the four months period since the making of the assignment was an act of bankruptcy. And see *Remington, op. cit.,* § 2071.

It is argued, however, that the provision in § 2 (a) (21) concerning proceedings under chapters X and XII indicates a purpose to include the type of receiver we have here. It seems clear that such a foreclosure receiver is included within § 2 (a) (21) where proceedings under Ch. X have supervened. But the fact that a foreclosure receiver is included for one purpose does not necessarily mean that he is included for another. Plans of reorganization under Ch. X may (§ 216) and commonly do affect the rights of mortgagees. Hence § 148 provides that an order approving a petition under Ch. X operates to stay a pending mortgage foreclosure or other proceeding to enforce a lien against the debtor's property.[6] And § 256 and § 257 provide that the trustee (or debtor) acquires all rights in, and the right to immediate possession of, the property of the debtor under the control of a receiver or trustee appointed in a prior proceeding in any federal or state court. That is to say, a Ch. X proceeding supersedes a pending mortgage foreclosure. We thus find § 2 (a) (21) performing the same function when applied to Ch. X proceedings[7] as it does when applied to ordinary bankruptcy. We conclude that the Circuit Court of Appeals was correct in reading the word "receivers" distributively. Such a construction fits the statutory scheme as a whole. The other interpretation results in a distortion which the language of § 2 (a) (21) makes unnecessary and which its history does not warrant.

Little need be said about § 69d. It must be read in connection with § 2 (a) (21). The legislative history suggests that it, too, was designed to apply only where bankruptcy superseded the prior proceedings. H. Rep. No. 1409, *supra*, p. 12. As stated by the draftsman, "It makes

[6] And unlike proceedings under § 77B (*Duparquet Huot & Moneuse Co.* v. *Evans*, 297 U. S. 216), a mortgage foreclosure is adequate under certain conditions for a creditor's petition under Ch. X. § 131 (4).

[7] Similar considerations are applicable to real property arrangements under Ch. XII. §§ 406 (1), 411, 416, 428.

clear and certain the exclusive and paramount jurisdiction of the bankruptcy court over property dealt with in a prior equity receivership or like proceeding which is superseded by a bankruptcy proceeding." Weinstein, *op. cit.*, p. 154. And see 4 Collier, *op. cit.*, pp. 879–882.

Affirmed.

MR. JUSTICE RUTLEDGE did not participate in the consideration or decision of this case.

GROUP OF INSTITUTIONAL INVESTORS ET AL. *v.* CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD CO.*

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

No. 11. Argued October 14, 15, 1942.—Decided March 15, 1943.

Upon review of a judgment of the Circuit Court of Appeals which reversed an order of the District Court approving a plan, certified to it by the Interstate Commerce Commission, for reorganization of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company under § 77 of the Bankruptcy Act, *held:*

1. The Commission's conclusion that the equity of holders of the debtor's preferred and common stock was without value, and that

* Together with No. 12, *Group of Institutional Investors et al.* v. *Union Trust Co. et al.;* No. 13, *Group of Institutional Investors et al.* v. *Abrams et al.;* No. 14, *Group of Institutional Investors et al.* v. *Orton et al.;* No. 15, *Group of Institutional Investors et al.* v. *Guaranty Trust Co. of New York et al.;* No. 16, *Group of Institutional Investors et al.* v. *Chicago, Terre Haute & Southeastern Ry. Co. et al.;* No. 17, *Group of Institutional Investors et al.* v. *United States Trust Co. of New York, Trustee;* No. 18, *Group of Institutional Investors et al.* v. *Trustees of Princeton University et al.;* No. 19, *Group of Institutional Investors et al.* v. *Glines et al.;* and No. 32, *Reconstruction Finance Corporation* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Co. et al.*, also on writs of certiorari, 316 U. S. 659, to the Circuit Court of Appeals for the Seventh Circuit.

they were therefore not entitled to participate in the reorganization, was sustained by the reasons and supporting data set forth in the Commission's report on the plan. P. 536.

(a) The Commission is not required by the Act to formalize in findings the extensive data on which it relied in the exercise of its expert, informed judgment. P. 539.

(b) Nor was the Commission required to make a precise finding as to the value of the company's properties in order to eliminate the old stock from the plan. P. 539.

(c) A finding as to the precise extent of the deficiency is not material or germane to the finding of "no value" prescribed by § 77 (e). P. 539.

(d) If it is established that there is no reasonable probability that the earning power of the road will be sufficient to pay prior claims of interest and principal and leave some surplus for the service of the stock, then the inclusion of the stock would violate the full priority rule, incorporated in § 77 by the phrase "fair and equitable." P. 541.

2. The criteria employed by the Commission for determining the permissible capitalization of the reorganized company were in accord with the Act. P. 539.

(a) Earning power is the primary criterion of value in reorganization proceedings under § 77. P. 540.

(b) The limited extent to which § 77 (e) provides that reproduction cost, original cost, and actual investment may be considered indicates that these factors are relevant, as in § 77B, only so far as they bear on earning power. P. 541.

3. The evidence of changed circumstances since the Commission's approval of the plan, was insufficient to require the District Court to return the plan to the Commission for reconsideration. P. 543.

Earning power in war years is not a reliable criterion for the indefinite future. P. 543.

4. The contention that the ratio of debt to stock in the reorganized company results in unfairness to junior interests, is unsupported. P. 544.

(a) The nature of the capital structure, as well as the amount of the capitalization, is for the determination of the Commission in its formulation of a plan which will be "compatible with the public interest." P. 544.

(b) Questions of the ratio of debt to stock, the amount of fixed as distinguished from contingent interest, and the kind of capital structure which a particular company needs to survive the vicissitudes

of the business cycle,—are by the Act reserved for the expert judgment of the Commission, which the courts must respect. P. 545.

5. There is no justification in this case for further delay in effectuating the reorganization. P. 545.

6. The effective date of a plan of reorganization under § 77 need not be the date of the filing of the petition. P. 546.

Section 77 does not preclude the accrual of interest on secured claims after the date of the filing of the petition for reorganization.

7. The proposed modifications of the lease of the Terre Haute properties, with the alternative of rejection of the lease in the event of failure of acceptance of the modifications, were valid. P. 549.

(a) The provisions of § 77 authorize the Commission (and the District Court), in approving a plan of reorganization, to condition acceptance of a lease on terms which are necessary or appropriate to keep the fixed charges within proper limits or to do equity between claims which arise under the lease and other claims against the debtor. P. 550.

(b) The determination of the Commission and the District Court as to whether a lease should be rejected, or, if not, on what terms it should be accepted, ought not to be set aside upon review, except on a clear showing that the limits of discretion have been exceeded. P. 551.

(c) The provision of the plan that the Terre Haute lease shall be rejected as of the date the District Court determines that the Terre Haute bondholders have not consented to the making of a new lease at a reduced rental, is valid. P. 551.

(d) In the event of rejection of the lease, pursuant to a plan of reorganization, operation subsequent to the commencement of the proceedings and prior to the rejection need not be for the account of the lessor. P. 552.

(e) When a lease is rejected pursuant to a plan, § 77 (c) (6) may not be so applied as to give the lessor or its creditors a disproportionate claim against the estate. P. 555.

8. The findings and conclusions of the Commission and the District Court with respect to the allocation of new securities to the holders of General Mortgage bonds, were adequate and proper. P. 555.

(a) That system mortgages should be substituted for divisional ones was a determination which was peculiarly within the province of the Commission to make. P. 558.

(b) The treatment of the General Mortgage bonds was not inequitable as compared with that accorded the 50-year bonds. P. 562.

(c) The Commission and the District Court had before them sufficient data from which to determine the allocation of new securities as between holders of the General Mortgage bonds and holders of the 50-year bonds; and it can not be said that an incorrect rule of law was applied in concluding that the plan was fair and equitable as between these two classes of bondholders. P. 562.

(d) The determination by the Commission and the District Court that, so far as the holders of the General Mortgage and 50-year bonds were concerned, the requirements of the full priority rule were complied with, is supported by the evidence. P. 563.

(e) The treatment of the General Mortgage bonds, as compared with the Milwaukee & Northern First Mortgage bonds and Consolidated Mortgage bonds, was fair and equitable. P. 563.

9. In order to give "full compensatory treatment" to senior claimants and to appropriate to the payment of their claims the "full value" of the property, it is not essential that a dollar valuation be made of each old security and of each new security. P. 564.

(a) A requirement that dollar values be placed on what each security holder surrenders and on what he receives would create an illusion of certainty where none exists and would place an impracticable burden on the whole reorganization process. P. 565.

(b) It is sufficient that each security holder in the order of his priority receives from that which is available for the satisfaction of his claim the equitable equivalent of the rights surrendered. P. 565.

(c) Whether in a given case senior creditors have been made whole or received "full compensatory treatment" rests in the informed judgment of the Commission and the District Court on consideration of all relevant facts. P. 566.

10. The provision in the plan of reorganization for an additions and betterments fund was proper. P. 566.

11. The contention of the General Mortgage bondholders that, by reason of the after-acquired property clause in their mortgage, they have a first lien on so-called "pieces of lines east," the earnings from which were credited by the Commission to the 50-year bonds—a claim made in both courts below but not determined—should be resolved by the District Court. P. 568.

(a) The objection can not be treated as *de minimis*. Nor can it be concluded that the objection has been waived or that the claim is frivolous. P. 568.

(b) The determination of what assets are subject to the payment of the respective claims has a direct bearing on the fairness of the plan as between two groups of bondholders. P. 569.

12. Since junior interests are participating in the plan, the Commission and the District Court should determine what the General Mortgage bonds should receive in addition to a face amount of inferior securities equal to the face amount of their old ones, as equitable compensation, qualitative or quantitative, for the loss of their senior rights. P. 569.

13. The claims of the 50-year bonds as well as those of the General Mortgage bonds require that findings be made in respect of the matters referred to in paragraphs 11 and 12, *supra;* and final approval of the plan as it affects both groups is dependent thereon. P. 571.

14. Whether earnings segregation, severance, or contributed traffic studies should be made is for the Commission initially to determine. This Court is unable to say that such studies are indispensable in this case. P. 572.

15. The Commission's conclusion that no allowance should be made in the plan for interest on the Adjustment bonds subsequent to the date of the filing of the petition, was justified. P. 573.

124 F. 2d 754, reversed in part.

CERTIORARI, 316 U. S. 659, to review the reversal of an order of the District Court, 36 F. Supp. 193, approving a plan formulated in proceedings under § 77 of the Bankruptcy Act for reorganization of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company.

Messrs. Kenneth F. Burgess and *Fred N. Oliver* (with whom *Messrs. Douglas F. Smith* and *Willard P. Scott* were on the brief) for Group of Institutional Investors and Mutual Savings Bank Group, respectively, petitioners in Nos. 11 to 19, inclusive. *Mr. Russell L. Snodgrass,* with whom *Solicitor General Fahy* and *Mr. Emmet McCaffery* were on the brief, for Reconstruction Finance Corporation, petitioner in No. 32.

Mr. A. N. Whitlock for Henry A. Scandrett et al., Trustees, Chicago, M., St. P. & P. R. Co.; *Mr. John L. Hall,* with whom *Messrs. Frank C. Nicodemus, Jr., James Garfield,* and *Charles P. Curtis, Jr.,* were on the brief, for Chicago, M., St. P. & P. R. Co.; *Mr. Albert K. Orschel,*

with whom *Mr. Edward R. Johnston* was on the brief, for Protective Committee of Holders of Preferred Stock; *Mr. M'Cready Sykes,* with whom *Mr. George L. Shearer* was on the brief, for United States Trust Co., Trustee; *Mr. Frederick J. Moses* for "University Group" of General Mortgage Bondholders; *Messrs. Edwin S. S. Sunderland* and *C. Frank Reavis* (with whom *Messrs. Malcolm Fooshee* and *Henry F. Tenney* were on the brief) for Fifty-Year Mortgage Trustees and Protective Committee for Fifty-Year Mortgage Bonds, respectively; *Mr. Meyer Abrams* for Adjustment Mortgage Bondholders; *Mr. Thomas S. McPheeters* for Gary First Mortgage Group; and *Messrs. Reese D. Alsop* and *Ernest S. Ballard* (with whom *Messrs. Carl Meyer, Donald M. Graham, Frederick Secord, Charles Myers, Robert V. Massey, Jr., W. F. Peter, William A. McSwain,* and *Edwin H. Cassels* were on the brief) for Chicago, Terre Haute & Southeastern Ry. Co. First Lien Bondholders Committee and Massachusetts Mutual Life Ins. Co. et al., respectively,—respondents.

Appearances were entered by *Mr. Thomas O'G. Fitz Gibbon* for Guaranty Trust Co. et al., Trustees; by *Messrs. John B. Marsh* and *Edward E. Watts, Jr.,* for City Bank Farmers Trust Co., Trustee; and by *Mr. Frederic Burnham* for Continental Illinois National Bank & Trust Co., Trustee,—respondents.

Solicitor General Fahy and *Mr. Daniel W. Knowlton* filed a memorandum on behalf of the Interstate Commerce Commission as *amicus curiae. Messrs. John L. Hall, James Garfield,* and *Charles P. Curtis, Jr.,* on behalf of the Chicago, Rock Island & Pacific Ry. Co. et al.; and *Mr. William V. Hodges,* also filed briefs as *amici curiae.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

These cases are companion cases to *Ecker* v. *Western Pacific R. Corp., ante,* p. 448, and are here on writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit. They involve numerous questions relating to a plan of reorganization for the Chicago, Milwaukee, St. Paul & Pacific Railroad Co., formulated in proceedings under § 77 of the Bankruptcy Act. 49 Stat. 911, 11 U. S. C. § 205. The plan was approved by the Interstate Commerce Commission (239 I. C. C. 485, 240 I. C. C. 257) and certified to the District Court. After a hearing and the taking of additional evidence, the District Court approved the plan with certain minor modifications not material here. 36 F. Supp. 193. The Circuit Court of Appeals reversed the order of the District Court (124 F. 2d 754) on the ground that the Commission did not make the findings required by *Consolidated Rock Products Co.* v. *Du Bois,* 312 U. S. 510.

The debtor filed its petition under § 77 in 1935. Hearings on proposed plans were closed in 1938. The plan of reorganization here in issue was approved by the Commission in 1940. It reduced the capitalization and the fixed charges, eliminated the old stock, and substituted system mortgages for so-called divisional mortgages. Its effective date was January 1, 1939. The total debt (including interest accrued to December 31, 1938) was approximately $627,000,000. In addition the debtor had $119,307,300 of preferred stock and 1,174,060 shares of no-par value common stock outstanding. The claims against the debtor which were dealt with by the plan [1] are as follows: The Re-

[1] Equipment obligations totalling $33,322,999 and a note of the trustees for $1,184,000 were undisturbed or extended.

construction Finance Corporation has a claim for loans totalling about $12,000,000, secured as hereinafter described. There are General Mortgage bonds outstanding in the hands of the public in the principal amount of $138,788,000 with accrued and unpaid interest of over $17,500,000. These bonds, bearing interest at various rates from 3½ to 4¾ per cent, have a first lien generally on the debtor's lines east of the Missouri River. In addition to the amount of these bonds publicly held, $11,212,000 principal amount are held by the Reconstruction Finance Corporation as security for its loans. There are $8,923,000 First and Refunding bonds outstanding, all of which are held by the Reconstruction Finance Corporation as security for its loans and claims. These bonds have a first lien generally on the lines west of the Missouri and a second lien on the lines east. There are $106,395,096 principal amount of 50-year bonds outstanding, with accrued and unpaid interest of $20,835,706. These bonds, subject only to the First and Refunding bonds, have a prior lien on the lines west of the Missouri; and they have a lien subordinate to the General Mortgage and the First and Refunding bonds on the lines east. They carry interest at the rate of 5%. There are also 5% Convertible Adjustment bonds outstanding in a principal amount of $182,873,693, with accrued and unpaid interest of $79,550,055. These bonds have the most junior lien on both the lines west and east of the Missouri River. In addition to those four main mortgages, the debtor had assumed liability on the mortgage indebtedness of other companies which it or its predecessor had either purchased or leased. Among these was the Milwaukee & Northern Railroad Co., which had two bond issues: the First Mortgage 4½s in the principal amount outstanding of $2,117,000 and accrued and unpaid interest of $103,204, which were secured by a first lien on 110 miles of line south of Green Bay, Wisconsin; and Consolidated Mortgage 4½s in the principal amount outstanding of $5,072,000 and accrued and unpaid interest of $247,260,

which were secured by a first lien on 286 miles of line north of Green Bay and by a second lien on the line south of that place. There is also in this group a $3,000,000 amount outstanding of First Mortgage 5s of Chicago, Milwaukee & Gary Ry. Co., with accrued and unpaid interest of $562,500. They were secured by a first lien on some 80 miles of portions of track around the Chicago district.

In addition there is $301,000 principal amount of Bellingham Bay & British Columbia Railroad Co. First Mortgage bonds, owned by the debtor and pledged with the Reconstruction Finance Corporation as security for its loans. Furthermore, there are four bond issues of the Chicago, Terre Haute & Southeastern Ry. Co. and its subsidiaries. These are in the principal amount outstanding of $21,929,000, are secured by liens on lines and trackage rights in Indiana and Illinois, and carry either 4% or 5% interest. The debtor operates the lines of the Terre Haute under a 999 year lease executed in 1921, under which the lessee agreed to maintain and replace equipment, pay interest on and the principal of the lessor's bonds and to pay specified annual expenses.[2] The annual rental consists of interest on the Terre Haute bonds, taxes, and the expense of maintaining the corporate existence of the lessor.

The plan approved by the Commission provides for two system mortgages. One is a new First Mortgage [3] which

[2] The debtor also owns 97% of the stock of the Terre Haute which it acquired by purchase. The stock is entitled to 41,730 votes and the holders of certain Terre Haute bonds are entitled under the terms of the mortgage to 63,360 votes.

[3] The bonds secured by this mortgage are unlimited in authorized principal amount, and, subject to limitations and restrictions specified in the mortgage, may be issued from time to time in different series at various interest rates, etc. as the board of directors and the Commission may approve. In addition to the amount of these bonds issued in the reorganization to security holders, it is contemplated that not exceeding $10,000,000 principal amount of them will be issued in the reorganization to provide for reorganization expenses, working capital, and additions and betterments.

will be a first lien on all properties of the debtor, subject only to the lien of equipment obligations, and under which $58,923,171 principal amount of new First Mortgage 4% bonds will be issued in the reorganization. The second is a new General Mortgage which will be a lien on the properties of the debtor subject to the lien of the First Mortgage, and under which two series of bonds bearing 4½% interest contingent on earnings will be issued. Series A bonds will be issued in the principal amount of $57,256,669, and Series B bonds in the principal amount of $51,422,111. The interest on both Series A and Series B bonds is cumulative to the maximum amount at any one time of 13½%, but the interest on Series A bonds has priority to the interest on the Series B.[4] The plan provides for the issuance of $111,347,846 of 5% preferred stock and 2,131,475¼ shares of no-par value common stock.[5] As respects the Terre Haute properties, the plan

[4] The bonds secured by this mortgage are unlimited in authorized principal amount, and, subject to limitations and restrictions contained in the mortgage, may be issued from time to time in different series at various interest rates, etc., as the board of directors and the Commission may approve. Interest on any new series does not have priority over Series A or Series B. Bonds of Series B are convertible into common stock at the option of the holder at any time at the rate for each $1000 bond, of 10 shares of common stock. Both Series A and B are entitled to a sinking fund created by an annual payment out of available net income of an amount equal to ½ of 1% of the aggregate principal amount of Series A and Series B bonds authenticated and delivered.

[5] The new preferred and new common stock are authorized in an unlimited amount. Additional amounts are issuable with approval of the Commission. The shares of preferred issuable in the reorganization are Series A. So long as any shares of Series A are outstanding, the consent of at least two-thirds in number of those shares is necessary for the issuance of any additional shares of preferred ranking either as to dividends or as to liquidation, in priority to or on a parity with the shares of Series A. The dividends on Series A of the preferred are non-cumulative. But no dividends are payable on the common un-

provides for the execution of a new lease between the Terre Haute and the new company on condition that substantially all of the Terre Haute bondholders agree to a modification of their bonds and mortgages. The modifications include an extension of the maturity of the bonds, a waiver of equipment vacancies under the existing mortgages, a provision for the abandonment of lines, and reduction of the interest on the bonds so that there is fixed interest of 2.75% and contingent interest of 1.5%, the payment of the latter being subject to the same limitations as the interest on the Series A, General Mortgage bonds. In case substantially all of the Terre Haute bondholders agree to the modifications, a new lease will be made under which the new company will assume the payment of the principal of, and the interest on, the modified bonds and the corporate expenses of the Terre Haute. If substantially all of the Terre Haute bondholders do not agree to the modifications, the Terre Haute lease will be rejected as of the date when the court determines that the modifications have not been approved. In case of such disaffirmance of the lease, the plan reserves, as we discuss hereafter, 15,837 shares of new common stock for certain

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less there shall have been paid or set apart for payment on the Series A preferred dividends at the rate of 5% per annum for the three consecutive income periods immediately preceding. Series A of the preferred participates with the common to the extent of $1 a share after dividends shall have been paid or set apart for the common at the rate of $3.50 a share. Series A preferred has voting rights and, voting cumulatively as a class, is entitled to elect a majority of the board until full 5% dividends shall have been paid on the Series A for three consecutive, calendar years. Thereafter, each share of Series A votes equally with each share of common, until full dividends have not been paid during three consecutive calendar years in which event the Series A again becomes entitled to elect a majority of the board.

Each share of common stock carries one vote. Approximately 514,221 shares are reserved for the conversion of Series B, General Mortgage bonds.

unsecured claims and the claims which would then arise under the lease. The plan also calls for the establishment of an additions and betterments fund to which $2,500,000 annually would be paid. This annual charge is placed ahead of contingent interest. It is further provided that the board of directors may set aside certain additional amounts for that fund after the payment of full interest on the Series A, General Mortgage bonds and the modified Terre Haute bonds. The plan thus authorizes a capitalization of $548,533,321 for the new company,[6] the percentage of debt to total capitalization being 40.8. The annual charges ahead of dividends, including fixed and contingent interest, the mandatory payment to the additions and betterments fund, and the sinking fund, are approximately $12,532,528. When dividends on the new preferred stock are included, the annual charges ahead of dividends on the common stock are about $18,099,920.

The Commission allocated new First Mortgage bonds to the Reconstruction Finance Corporation for 100% of its claim, after reducing the amount of the claim by certain cash credits. We have already noted the offer which it made to the Terre Haute bondholders. The Milwaukee & Northern First Mortgage bonds were to receive 70% of their claims in First Mortgage bonds and 30% in Series A, General Mortgage bonds. The Milwaukee & Northern Consolidated Mortgage bonds were to be offered 25% of their claims in First Mortgage bonds, 35% in

[6] This total includes the modified bonds of the Terre Haute, which though strictly not a part of the capital structure of the new company will be assumed by it, if the terms of modification are accepted. The total capitalization is made up of the following:

Debt—fixed interest	$108,780,470
Debt—contingent interest	115,257,480
Preferred stock	111,347,846
No-par common stock ($100 per share)	213,147,525

Series A and 20% in Series B, General Mortgage bonds, and 20% in preferred stock. The same participation was afforded holders of the old General Mortgage bonds. The old 50-year bonds were to receive 15% of their claims in Series B, General Mortgage bonds, 60% in preferred stock and 25% in common stock. The Gary First Mortgage bonds were to receive 75% of the amount of their claims in new preferred stock and 25% in new common. The Convertible Adjustment bonds were allotted 1,749,492 shares of common stock for their claim upon the mortgaged assets of the debtor. The Commission noted that the allotment of stock, taken at $100 a share, would fail to satisfy the claim [7] of those bondholders by $55,471,653. For that portion of their claim, the bondholders were permitted to participate with other unsecured creditors in the debtor's free assets. 55,000 shares of common stock were set aside as representing "a fair proportion of the equity of the new company for the unmortgaged assets of the debtor." Of these 55,000 shares, the Convertible Adjustment bondholders were allotted 39,163 shares. Unsecured creditors with claims amounting to $445,162 and the Terre Haute in case of rejection of the lease were allotted the balance—or 15,837 shares. The Commission found that "the equity of the holders of the debtor's preferred stock and its common stock has no value" and that therefore they were not entitled to participation in the plan under the rule of *Case* v. *Los Angeles Lumber Products Co.*, 308 U. S. 106. See § 77 (e).

[7] The Commission computed the amount of the claim by taking the principal and interest to June 29, 1935, the date of the filing of the petition. That amount was $230,420,853. As we discuss hereafter, it concluded that no allowance should be made in the plan for interest on these bonds subsequent to the date of the filing of the petition in view of the insufficiency of the mortgaged assets to meet the claims and the apparent inadequacy of the free assets to satisfy the deficiency with interest.

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We need not stop to discuss the respective functions of the Commission and the District Court in respect to plans of reorganization under § 77. That matter has been fully explored in the *Western Pacific* case, *ante*, p. 448. Against the background of the conclusions there reached, we come to the various objections to the plan, pressed on the courts below and renewed here.

Exclusion of the Stockholders. The objections of the debtor and the preferred stockholders are, in the main, that the findings of the Commission are inadequate; that it did not employ proper criteria in determining the capitalization of the new company and in concluding that there was no equity for the stockholders; and that, however proper the findings of the Commission on this phase of the case may have been when made, the earnings in 1940, 1941, and 1942 demonstrate that the earning power of the road exceeds that which the Commission found.

In determining the permissible capitalization of the new company and the nature of its capital structure, the Commission made an extensive review of the properties, business, and earnings of the debtor. It reviewed freight and total revenues, passenger revenues and their trend, operating revenues and expenses, and maintenance and efficiency of operation for various periods ending in 1938. It gave consideration to estimated future taxes, emergency freight charges, and certain wage factors. It reviewed the amounts of income available for payment of interest in each of the years from 1921 to 1938. It considered the original cost of the properties, the cost of reproduction new, the cost of reproduction less depreciation, and the value for rate making purposes—each of which was substantially in excess of the capitalization which it authorized. It stated that its obligation was "to devise a plan that will serve as a basis for the company's financial structure for the indefinite future." It concluded that a

capitalization not exceeding $548,533,321 was "as high as can reasonably be adopted" after consideration was given to "the past and prospective earnings of the debtor and all other relevant facts." It stated that the fixed interest plus the mandatory payment to the additions and betterments fund should be kept "within the coverage of past average earnings"; that those totals provided in the plan would be covered 1.16 times by the average earnings from 1931 to 1935, and 1.18 times for the period from 1932 to 1936, though they would not have been covered in 1932, 1935 and 1938. It noted that while the year 1939 showed an improvement in earning power, it would regard any increase in fixed charges "as hazardous." It said that a "reasonable margin above fixed charges operates not only to the advantage of the company in times of depressed earnings but also to the benefit of the holders of contingent interest bonds and to the marketability of all classes of the securities." Accordingly, it found that the limitation of fixed interest to $4,269,654 a year was "reasonable and proper" having regard to "the clear demands of a conservative policy in the present reorganization and the claims and rights of the first-lien bondholders" and that there would be "adequate coverage" of the amount of fixed charges provided in the plan "by the probable earnings available for the payment thereof." Furthermore, it stated that the total debt should "bear a proper relation to the total capitalization, and such as to make the payment of contingent interest a probability and of dividends a reasonable prospect, at least on the preferred stock." It concluded that in view of the charges ahead of the preferred stock and the earnings record, it would be "entirely unsound" to increase the amount of the contingent interest debt. As we have noted, the Commission found that the present preferred and common stock have "no value." And the District

Court affirmed that finding, as was necessary if the stock were to be excluded from participation in the plan.[8] As a basis for that finding the Commission noted that, although the original cost and reproduction cost was much higher than the permissible capitalization which it authorized, the earning power of the system did not justify inclusion of the old stock. It said that no dividends had been paid on the stock since 1917, that estimated future "normal earnings" were $15,894,000 a year, and that when "these amounts are compared with the annual interest charges on the principal of the present debt, $23,739,000 a year, it is evident that the earning power of the system since the period of peak earnings [1928–1929] is entirely inadequate to cover the principal of the debt, disregarding more than $118,000,000 of unpaid interest." It added that there was "no evidence whatever" to indicate that a recovery of earning power of the peak periods was "reasonably probable," but that it was "a remote possibility only, which may not be utilized to support a finding" that the stock has "an equity." It also found that, "under all pertinent facts and considerations, the probabilities of the property earning sufficient to pay dividends on any securities that could properly be represented by warrants issued under the plan are too remote to justify provision in the plan for such warrants," even though the warrants provided for their exercise on payment of cash.

Sec. 77 (d) requires the Commission when it renders a report on a plan of reorganization to "state fully the reasons for its conclusions." The summary which we have made on this phase of the case plainly shows that the

[8] Sec. 77 (e) provides that it is not necessary to submit the plan to "any class of stockholders" if the Commission "shall have found, and the judge shall have affirmed the finding, . . . that at the time of the finding the equity of such class of stockholders has no value."

Commission did exactly that. Its finding that the stock had no value was definite and explicit. To require it to go further and formalize in findings the numerous data on which it relied in the exercise of its expert, informed judgment would be to alter the statutory scheme. Apart from the necessity of making a finding for the exclusion of stock or any class of creditors as provided in § 77 (e), the mandate which Congress gave the Commission by § 77 (d) is merely to approve a plan "that will in its opinion meet with the requirements of subsections (b) and (e) of this section, and will be compatible with the public interest." Reasons which underlie the expert opinion which the Commission expresses on a plan of reorganization under § 77 need not be marshalled and labelled as findings in order to make intelligible the Commission's conclusion or ultimate finding or to make possible the performance on the part of the courts of the functions delegated to them. Here, as in other situations (*Colorado* v. *United States,* 271 U. S. 153, 166–169; *United States* v. *Louisiana,* 290 U. S. 70, 76–77; *Florida* v. *United States,* 292 U. S. 1, 8–9), it is the conclusion or ultimate finding of the Commission together with its reasons and supporting data which are essential. Congress has required no more. Nor was it necessary for the Commission to make a precise finding as to the value of the road in order to eliminate the old stock from the plan. A finding as to the precise extent of the deficiency is not material or germane to the finding of "no value" prescribed by § 77 (e).

But it is urged that the Commission employed the incorrect criteria for determining the permissible capitalization of the new company. In this connection, reliance is placed on § 77 (e), which provides in part that the "value of any property used in railroad operation shall be determined on a basis which will give due consideration to the earning power of the property, past, present, and prospec-

tive, and all other relevant facts. In determining such value only such effect shall be given to the present cost of reproduction new and less depreciation and original cost of the property, and the actual investment therein, as may be required under the law of the land, in light of its earning power and all other relevant facts." It is argued that, under this provision, earning power is not the primary criterion of value and that the Commission did not give proper weight to original cost, reproduction cost new, or the valuation for rate making purposes. We disagree. We recently stated in *Consolidated Rock Products Co.* v. *Du Bois, supra,* in connection with a reorganization of an industrial company, that 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." p. 526. That is equally applicable to a railroad reorganization. Mr. Justice Brandeis once stated that "value is a word of many meanings." See *Southwestern Bell Telephone Co.* v. *Public Service Comm'n,* 262 U. S. 276, 310, concurring opinion. It gathers its meaning in a particular situation from the purpose for which a valuation is being made. Thus the question in a valuation for rate making is how much a utility will be allowed to earn. The basic question in a valuation for reorganization purposes is how much the enterprise in all probability can earn. Earning power was the primary test in former railroad reorganizations under equity receivership proceedings. *Temmer* v. *Denver Tramway Co.,* 18 F. 2d 226, 229; *New York Trust Co.* v. *Continental & Commercial Bank,* 26 F. 2d 872, 874. The reasons why it is the appropriate test are apparent. A basic requirement of any reorganization is the determination of a capitalization which makes it possible not only to respect the priorities of the various classes of claimants but also to give the new company a reasonable prospect for survival. See

Commissioner Eastman dissenting, Chicago, M. & St. P. Reorganization, 131 I. C. C. 673, 705. Only "meticulous regard for earning capacity" (*Consolidated Rock Products Co.* v. *Du Bois, supra,* p. 525) can afford the old security holders protection against a dilution of their priorities and can give the new company some safeguards against the scourge of overcapitalization. Disregard of that method of valuation can only bring, as stated by Judge Evans for the court below, "a harvest of barren regrets." 124 F. 2d p. 765. Certainly there is no constitutional reason why earning power may not be utilized as the criterion for determining value for reorganization purposes. And it is our view that Congress when it passed § 77 made earning power the primary criterion. The limited extent to which § 77 (e) provides that reproduction cost, original cost, and actual investment may be considered indicates that (apart from doubts concerning constitutional power to disregard them) such other valuations were not deemed relevant under § 77 any more than under § 77B "except as they may indirectly bear on earning capacity." *Consolidated Rock Products Co.* v. *Du Bois, supra,* p. 526. In this case the Commission followed the statute. While it made earning power the primary criterion, it did not disregard the other valuations. It considered them and concluded in substance that they afforded no reasonable basis for believing that the probable earning power of the road was greater than what the Commission had found it to be by the use of other standards. The Commission need not do more.

The finding of the Commission, affirmed by the District Court under § 77 (e), that the stock had "no value" is supported by evidence. The issue involved in such a determination is whether there is a reasonable probability that the earning power of the road will be sufficient to pay prior claims of interest and principal and leave some surplus for the service of the stock. If it is established that there is no reasonable probability of such earning power,

then the inclusion of the stock would violate the full priority rule of *Northern Pacific Ry. Co.* v. *Boyd,* 228 U. S. 482—a rule of priority incorporated in § 77 (e) (1), as in § 77B and Ch. X (*Case* v. *Los Angeles Lumber Products Co., supra; Marine Harbor Properties* v. *Manufacturers Trust Co.,* 317 U. S. 78) through the phrase "fair and equitable." A valuation for reorganization purposes based on earning power requires of course an appraisal of many factors which cannot be reduced to a fixed formula. It entails a prediction of future events. Hence "an estimate, as distinguished from mathematical certitude, is all that can be made." *Consolidated Rock Products Co.* v. *Du Bois, supra,* p. 526. But recognizing the possible margin of error in any such prediction, we cannot say that the expert judgment of the Commission was erroneous when made or that the District Court was not justified in affirming the finding of "no value."

The question of the increase in earnings since the Commission approved the plan raises of course different issues. As we have indicated in the *Western Pacific* case, the power of the District Court to receive additional evidence may aid it in determining whether changed circumstances require that the plan be referred back to the Commission for reconsideration. The hearings before the Commission were closed in 1938 and its report rendered in 1940. The hearings before the District Court were held in September 1940. It had before it the trustees' annual reports for 1937, 1938 and 1939 and a statement of operating revenues and income available for fixed charges through the first half of 1940. Similar figures were before the Circuit Court of Appeals for most of 1941. The debtor and the preferred stockholders contend on the basis of those figures that the Commission's conclusion that there is no evidence that a "recovery of the earning power of 1928–29 is reasonably probable" has been disproved by subsequent events. They argue that while the net earnings for 1928,

1929 and 1930 were $30,671,000, $29,105,000 and $17,938,000 respectively, those for 1940 were $14,867,000 and for 1941 $28,939,000. And they point out that the net for 1940 was almost as great as, and the net for 1941 was much in excess of, the estimated $15,894,000 of net earnings for the future normal year to which the Commission referred. They also point to the fact that while that estimate indicated that 12½% of gross would be left for fixed charges, that percentage for 1940 was 13% and for 1941 20.6%.

We agree with the Circuit Court of Appeals that no sufficient showing of changed circumstances has been made which requires the District Court to return the plan to the Commission for reconsideration. Late in 1939 the Commission had occasion to say, "We know from past experience that the upswing in business which war brings is temporary and likely to be followed by an aftermath in which conditions may be worse than before." 53d Annual Report, p. 5. The record during the last World War is illuminating. It shows that the Milwaukee's net operating income rose to almost $31,000,000 in 1916, exceeded $21,500,000 in 1917, dropped to about $4,000,000 in 1918 and to about $2,000,000 in 1919 and showed a deficit of over $14,000,000 in 1920. See Chicago, M. & St. P. Reorganization, 131 I. C. C. 673, 715. As we have noted, the Commission conceived as its responsibility the devising of a plan which would serve "as a basis for the company's financial structure for the indefinite future." We cannot assume that the figures of war earnings could serve as a reliable criterion for that "indefinite future." As some of the bondholders point out, the bulge of war earnings *per se* is unreliable for use as a norm unless history is to be ignored; and numerous other considerations, present here as in former periods, make them suspect as a standard for any reasonably likely future normal year. Among these are the great increase in taxes and in certain costs of

operation and the decrease in water and truck competition. In addition to the increase in tax rates, of which we cannot be unmindful, there is the likely increase of the total tax burden occasioned by the conversion of debt into stock. It is estimated by certain bondholders that by reason of this fact a full dividend could not be paid on the new preferred stock and no dividend could be paid on the new common stock even on the basis of earnings as great as those for 1941. In view of these considerations, we cannot say that the junior interests have carried the burden which they properly have of showing that subsequent events make necessary a rejection of the Commission's plan.

But it is suggested that the vice of the Commission's plan is the formulation of a capital structure which as a result of conversion of debt into stock so increases the impact of mounting taxes on the company as to deprive junior interests of net earnings which would be available for distribution to them if the ratio of debt to stock were increased. Such a conversion of debt into stock is said to be entirely unnecessary to the formulation of a sound plan and results in unfairness to junior interests. The difficulty with that argument is that Congress has entrusted the Commission, not the courts, with the responsibility of formulating a plan of reorganization which "will be compatible with the public interest." § 77 (d). The nature of the capital structure, as well as the amount of the capitalization, is a component of "the public interest." For the "preservation of the transportation system and the stability of its credit essential to its preservation depend not alone upon the ability of individual carriers to meet their obligations, but upon the ability of all to attract the investment of funds in their securities." See *United States* v. *Chicago, M., St. P. & P. R. Co.*, 282 U. S. 311, 337 (dissenting opinion). Furthermore, Congress

has provided in § 77 (b) (4) that the fixed charges (including fixed interest on funded debt) provided in the plan shall be "in such an amount that, after due consideration of the probable prospective earnings of the property in light of its earnings experience and all other relevant facts, there shall be adequate coverage of such fixed charges by the probable earnings available for the payment thereof." The ratio of debt to stock, the amount of fixed as distinguished from contingent interest, the kind of capital structure which a particular company needs to survive the vicissitudes of the business cycle—all these have been reserved by Congress for the expert judgment and opinion of the Commission, which the courts must respect. Nor can we conclude that there is anything in § 77 which indicates that it may be used merely as a moratorium. Elimination of delay in railroad receivership and foreclosure proceedings was one of the purposes of the enactment of § 77. *Continental Bank* v. *Chicago, R. I. & P. Ry. Co.,* 294 U. S. 648, 685. Sec. 77 (g), giving the District Court power to dismiss the proceedings for "undue delay in a reasonably expeditious reorganization," was inserted in recognition of "the necessity of prompt action." (H. Rep. No. 1283, 74th Cong., 1st Sess., p. 3.) We cannot conclude that in this proceeding, which already has been pending seven years and which was before the Commission for over four years, the interests of junior claimants have been sacrificed for speed. The House Judiciary Committee only recently stated [9] that "where a railroad company is so burdened with a heavy capital structure that it is in need of thoroughgoing reorganization, it is not in the public interest, nor even, except temporarily, in the interest of the company itself, that such a reorganization

[9] Respecting the new Ch. XV of the Bankruptcy Act, c. 610, 56 Stat. 787, which provides for certain voluntary adjustments of obligations of railroads.

be postponed." H. Rep. No. 2177, 77th Cong., 2d Sess., p. 6. No case has been made out for further delay here.

Finally, it is argued on behalf of some of the stockholders that the effective date of a plan promulgated under § 77 must be the date of the filing of the petition, the theory being that § 77 does not permit the accrual of interest after that date. In *Consolidated Rock Products Co.* v. *Du Bois,* we held that, under § 77B, interest on secured claims accrued to the effective date of the plan was entitled to the same priority as the principal. See 312 U. S. p. 514, note 4, p. 527, and cases cited. The definition of the terms "creditors" and "claims" was substantially the same under § 77B (b) as it is under § 77. We see no reason why the same result should not obtain here.

Treatment of the Terre Haute Bonds. The treatment accorded these bonds is attacked by the Terre Haute and representatives of its bondholders as well as by certain groups of Milwaukee bondholders. The Terre Haute interests contend, in the first place, that the plan contains no findings necessary for determining how the sacrifices required of these bondholders shall be distributed *inter se.* It is pointed out that the modifications proposed by the Commission for these four classes of bondholders are to be made regardless of the lien, security, interest or maturity of each and the earning power of the respective underlying properties. Hence it is argued that this phase of the plan is not fair and equitable, since it does not even attempt to preserve the respective priorities of these bond issues. The short answer to that objection is that the Terre Haute properties have not been treated by the Commission or the District Court as a part of the properties of the debtor for reorganization purposes. Nor has any question been raised or argued here as to the power of the Commission or the District Court so to treat them. The Commission and the District Court considered the

problem solely as one of rejection or affirmance of a lease. The Terre Haute bondholders were in effect given the option to take the Terre Haute lines back or to agree to a reduced rental. If the Commission had authority to determine the question of rejection in the manner indicated and if it complied with the legal requirements for the exercise of that authority, the modifications which it proposed and which the District Court approved are valid. We think they are.

In 1928 the Commission reviewed the history of the acquisition of this property. 131 I. C. C. 653–660. It then said that the Terre Haute was "a distress property controlled by a committee of Chicago bankers who wanted to liquidate and who had written the securities off the books of their banks as losses" (pp. 657–658); that "the terms upon which the property was acquired were improvident and to that extent adversely affected the financial condition of the St. Paul" (p. 657); and that "the total financial burden as of June 30, 1925, which had fallen upon the income of the St. Paul as a result of this lease was nearly $11,000,000." p. 656. In its present report the Commission, after reviewing certain earnings data, concluded that "the earning power of the Terre Haute is sufficient to cover all interest requirements, but this earning power is largely dependent on a continuation of the Milwaukee's coal traffic, together with the commercial coal traffic that accompanies it, and would be greatly diminished if such traffic ceased." And it added, "The present arrangement is distinctly to the advantage of the Terre Haute." The Commission concluded, however, that a rejection of the lease would be to the "disadvantage" of both companies and that some means should be provided "for retaining the Terre Haute lines as a part of the system without unduly jeopardizing a successful reorganization of the Milwaukee." The Commission, on the other hand, felt that an affirmance would be inequitable from

the point of view of the Milwaukee bondholders. The present interest charges on the Terre Haute are about $1,023,000 a year. If those were assumed by the new company and fixed interest charges were kept at about $4,270,000 a year as provided in the plan, the amount of new first mortgage bonds which could be issued would have to be reduced by $10,500,000. Such a reduction, said the Commission, would mean a "substantial sacrifice" by Milwaukee bondholders which would be "entirely inequitable." In that connection, it also noted that if the $21,929,000 of Terre Haute bonds were assumed by the new company, they would constitute about 27% of the total amount of new fixed interest debt. This would mean that the allotment of fixed interest bonds to the General Mortgage bondholders "could not be more than double the amount of the existing Terre Haute bonds, whereas the mileage represented by the general mortgage is about 18 times that of the Terre Haute, and on the basis of the elements of value . . . for the lines covered by the general mortgage, about 17 times that of the Terre Haute properties." Those considerations of fairness constituted the primary reason which led the Commission to reject such an "inequitable" proposal. But there were other reasons too. The early maturities on the Terre Haute bonds, the substantial default of the debtor under its covenant in the lease to replace equipment, restrictions on the abandonment of property (all of which were covered by the proposed modifications) also played a part in the Commission's conclusion that the lease should not be assumed by the new company. The Commission said that its proposed modifications were "the best that we could devise in the public interest and as affording fair and equitable treatment to both the bondholders of the Terre Haute and those of the debtor." The District Court concurred with the Commission for substantially the same reasons. The Circuit Court of Appeals said it could not

approve that action without more specific findings. Just what findings it thought necessary we do not know. The Terre Haute interests suggest that the deficiency was in the lack of any finding that the lease was burdensome. And they add that only leases found to be burdensome may be rejected and that the evidence would not support any such finding if made.

The argument of the Terre Haute interests that *only* burdensome leases may be rejected is based on certain statements of ours that burdensome leases may be rejected (*Palmer* v. *Webster & Atlas National Bank,* 312 U. S. 156, 163; *Philadelphia Co.* v. *Dipple,* 312 U. S. 168, 174) and on cases like *American Brake Shoe & Foundry Co.* v. *New York Rys. Co.,* 278 F. 842, 844, which hold that an equity receiver may not reject a lease when it does not appear that "in carrying out its affirmative obligations the estate suffers an actual loss as distinguished from the obtaining of a more profitable rental." And an extended analysis of the operations under the lease is made to show that the lease is a valuable asset of the estate and that the debtor received a net financial benefit from it in recent years. We do not need to determine, however, what is the scope of the authority to reject leases under § 77, either by the trustees or pursuant to a plan of reorganization. For here we think that the proposed modifications of the lease contained in the plan were wholly justified. The Terre Haute bondholders are "creditors" of the debtor as defined in § 77 (b), for they are holders of "a claim under . . . an unexpired lease." Sec. 77 (b) (5) provides not only that the plan "may" contain provisions rejecting unexpired leases but also that it "may include any other appropriate provisions not inconsistent with this section." It is also stated in subsection (b) (1) that a plan "shall include provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured, either through

the issuance of new securities of any character or otherwise." In addition, § 77 (b) (4) provides that the plan "shall provide for fixed charges" including "rent for leased railroads" in such an amount "that . . . there shall be adequate coverage of such fixed charges by the probable earnings available for the payment thereof." And § 77 (e) requires the District Court to be satisfied, before approving the plan, that it is "fair and equitable" and "does not discriminate unfairly in favor of any class of creditors." These provisions taken together mean to us that the Commission (and the District Court) have the authority in approving a plan to condition acceptance of a lease on terms which are necessary or appropriate to keep the fixed charges within proper limits or to do equity between claims which arise under the lease and the other claims against the debtor. Like the question whether a lease is burdensome (see Meck & Masten, *Railroad Leases and Reorganization,* 49 Yale L. Journ. 626, 649), one phase of that problem is whether the lease is worth its annual charge. A disregard in that determination of the sacrifices which other creditors are making would be wholly incompatible with the standards which § 77 has prescribed for reorganization plans. At the same time, if the Commission deems it desirable to keep the leased line in the system, it must necessarily have rather broad discretion in providing modifications of the lease where, as here, the lessor is not being reorganized along with the debtor. For under that assumption the modification must be sufficiently attractive to insure acceptance by the lessor or its creditors. Thus, the question whether a lease should be rejected and, if not, on what terms it should be assumed is one of business judgment. See *Mercantile Trust Co.* v. *Farmers' Loan & Trust Co.,* 81 F. 254, 259; *Park* v. *New York, L. E. & W. R. Co.,* 57 F. 799, 802. Certainly there was ample evidence warranting the conclusion of the Commission and the District Court that affirmance of the

lease would be unjust from the viewpoint of other creditors. And we could not say that the Commission, exercising its expert judgment, and the District Court, affirming that judgment, were too generous in the offer which is made to the Terre Haute bondholders or that they should have rejected the lease. We are not warranted in upsetting those determinations on review except on a clear showing that the limits of discretion have been exceeded. We cannot say that here.

Finally, the Terre Haute interests object to the provisions of the plan which state that the Terre Haute lease shall be rejected as of the date the District Court determines that the Terre Haute bondholders have not consented to the making of a new lease at a reduced rental. They contend that the lessor's claim for damages for breach of the lease must be measured as of the date on which the proceeding was instituted. They further contend that, in the event of rejection of a lease, operation of the leased property subsequent to the commencement of the proceeding must be for the account of the lessor—the latter being liable for all losses and being entitled to any net earnings. On the first point they rely on § 77 (b), which provides that, in case an unexpired lease is rejected, "any person injured by such nonadoption or rejection shall for all purposes of this section be deemed to be a creditor of the debtor to the extent of the actual damage or injury determined in accordance with principles obtaining in equity proceedings." It is argued that, since this Court held that that provision places leases "upon the same basis as executory contracts" (*Connecticut Ry. Co.* v. *Palmer*, 305 U. S. 493, 502), the rule governing breaches of an executory contract (*Pennsylvania Steel Co.* v. *New York City Ry. Co.*, 198 F. 721, 744; *Samuels* v. *E. F. Drew & Co.*, 292 F. 734, 739) must be applied here. This Court stated in the *Palmer* case, however, that the provision in § 77 (b) which allows the lessor to prove his "actual dam-

age or injury determined in accordance with principles obtaining in equity proceedings" does not "refer to any rule for the measure of damages in equity receiverships." 305 U. S. p. 503. Furthermore, as we have noted, § 77 (b) provides not only that a plan may reject unexpired leases but also that it "may include any other appropriate provisions not inconsistent with this section." And § 77 (b) (1) says that a plan "shall include provisions modifying or altering the rights of creditors generally." For the reasons which we have already stated, these provisions give the Commission and the District Court power to adjust the claims under the lease so as to do equity between the various classes of creditors. Deferment of the date as of which the lease shall be rejected is an appropriate exercise of that power. During the § 77 proceedings the stipulated annual rental under the lease has been paid. In view of all the facts, no element of injustice to the lessor is apparent by reason of the deferment of the date as of which its damages, if any, will be measured.

For similar reasons we conclude that, in event of rejection of the lease, operation subsequent to the commencement of the proceeding and prior to the rejection need not be for the account of the lessor so as to entitle it to any net earnings. As we have noted, the stipulated annual rental has been paid during the § 77 proceedings. The court order authorizing the payment of interest (which is part of the rental) stated that it should not be construed "to preclude or conclude the Debtor in respect of its right of election to disaffirm or discontinue" the lease. And § 77 (b) provides that the adoption of an unexpired lease by the trustees "shall not preclude a rejection" of it in a plan of reorganization. Furthermore, § 77 (c) (6) provides:

"If a lease of a line of railroad is rejected, and if the lessee, with the approval of the judge, shall elect no longer to operate the leased line, it shall be the duty of the lessor

at the end of a period to be fixed by the judge to begin the operation of such line, unless the judge, upon the petition of the lessor, shall decree after hearing that it would be impracticable and contrary to the public interest for the lessor to operate the said line, in which event it shall be the duty of the lessee to continue operation on or for the account of the lessor until the abandonment of such line is authorized by the Commission in accordance with the provisions of section 1 of the Interstate Commerce Act as amended."

Sec. 77 (c) (6) contains no express provision that on rejection of a lease the operation of the property by the lessee shall be for the account of the lessor for the period prior to the rejection. But the Terre Haute interests seek to read into § 77 the doctrine of relation back so that in case of a rejection of the lease the lessee's operation during the entire period of bankruptcy is for the account of the lessor, the latter being responsible for all losses and entitled to all the net earnings. That was the general rule governing railroad leases in equity receivership proceedings (See Meck, *Railroad Leases and Reorganization,* 49 Yale L. Journ. 1401, 1405–1407), at least where the receivers of the lessee made no payments of rent during the term of their possession. *Pennsylvania Steel Co.* v. *New York City Ry. Co., supra,* 730–732; *American Brake Shoe & Foundry Co.* v. *New York Rys. Co.,* 282 F. 523. And see *United States Trust Co.* v. *Wabash Western Ry. Co.,* 150 U. S. 287. And there is some authority for the view that the same result follows even though unconditional payments of rent have been made in the interim, the theory being that the receiver must "be held to have occupied from the beginning the same position that he ultimately assumes." *Westinghouse Electric & Mfg. Co.* v. *Brooklyn Rapid Transit Co.,* 6 F. 2d 547, 549. But see *Second Avenue R. Co.* v. *Robinson,* 225 F. 734. Cf. *Sunflower Oil Co.* v. *Wilson,* 142 U. S. 313. But the rule was

not a hard and fast one. It permitted exceptions based on equitable considerations. *Westinghouse Electric & Mfg. Co.* v. *Brooklyn Rapid Transit Co., supra,* p. 551. So, although we assume *arguendo* that Congress incorporated the prior equity rule into § 77 (c) (6), which recognizes the necessity of keeping a railroad in operation until the public authority permits discontinuance (*Warren* v. *Palmer,* 310 U. S. 132), it does not necessarily follow that the lessor would be entitled to the net earnings accruing prior to the rejection, at least where the trustees have unconditionally paid the stipulated annual rental for that period. Cf. *Palmer* v. *Palmer,* 104 F. 2d 161. To be sure, we recognized in *Palmer* v. *Webster & Atlas National Bank, supra,* that the trustees of a lessee on their rejection of the lease operated the leased lines for the account of the lessor, the latter being liable for losses for the whole period. But we are here dealing with a rejection of a lease pursuant to a plan of reorganization. And the question raised relates to the fairness of that plan as between classes of creditors—one group being the Terre Haute bondholders, and the other the Milwaukee bondholders. In the event of a rejection of the lease, the Terre Haute interests are claiming that they are entitled not only to a return of the leased lines, to a claim against the estate for damages, and to the stipulated annual rental up to the date of the rejection, but also to any and all net income from the leased property in excess of that rent. Such a claim for net income, like a claim for rent, would be a charge against the estate for whose payment a plan of reorganization must provide. § 77 (e) (3). The amount of those charges, like other demands on the cash resources of the estate or the new company, have a decided bearing on the fairness and integrity of a plan of reorganization. The Commission and the District Court certainly have authority to determine whether the total amount which the lessor receives on rejection of the lease

is fair in comparison with the sacrifices which the other creditors make. The District Court agreed with the Commission that it would be inequitable to give the Terre Haute interests, in the event of a rejection, more than a return of the leased lines, an unsecured creditor's claim for damages, and the stipulated annual rental. We cannot say that that was not a fair equivalent of their claim. Nor can we say that their sacrifices, as compared with the sacrifices being made by the other Milwaukee creditors, are so great that they should receive an additional cash payment from the estate. Sec. 77 (c) (6) and the doctrine of relation back are not to be considered separate and apart from the other provisions of the Act. The end product of this reorganization system is supposed to be a fair plan. When a lease is rejected pursuant to a plan, § 77 (c) (6) may not be applied so as to give the lessor or its creditors a disproportionate claim against the estate.

General Mortgage Bonds. The objections of the corporate trustee and of a group of these bondholders are that the allocation of new securities under the plan violates their priority rights, that the findings of the Commission are inadequate to sustain that allocation of new securities, and that the additions and betterments fund impairs their priorities.

The Circuit Court of Appeals was of the view that the plan could not be approved because of the absence of certain findings which it thought were necessitated by *Consolidated Rock Products Co.* v. *Du Bois, supra.* It concluded that the findings must include specific values of liens to be surrendered and specific values of securities given in exchange. In its view, this defect in the Commission's reports permeated the whole plan except the finding of "no value" for the stock. As we have pointed out in the *Western Pacific* case, such a view misinterprets *Consolidated Rock Products Co.* v. *Du Bois.* In that case the District Court had found that the properties were

worth more than the amount of the debt, in spite of the fact that they had been operated at a loss for a period of more than eight years. And it admitted stockholders to participation in the plan in the face of that fact and also without compensating the bondholders for their accrued interest. Furthermore, the District Court in that case approved a distribution of new securities to bondholders under two different mortgages without attempting to ascertain what properties were covered by each. In addition, the plan as approved cancelled a claim against the holding corporation without making any finding as to its amount or validity. We held (1) that the "criterion of earning capacity is the essential one" in making a valuation for reorganization purposes (312 U. S. p. 526); (2) that some valuation of the assets of the holding company and of the claim against it must be made, so that there could be a determination as to whether it, as stockholder, was making a contribution to the new company for which it would receive new stock; (3) that at least an "approximate ascertainment" of the assets subject to the two mortgages must be made (312 U. S. p. 525), as a question of the fairness of the plan between the two classes of bondholders had been raised; and (4) that in applying the full priority rule of the *Boyd* case (228 U. S. 482) and the *Los Angeles Lumber Products* case (308 U. S. 106) full "compensatory provision must be made for the entire bundle of rights which the creditors surrender." 312 U. S. p. 528. And we added (p. 529), "Practical adjustments, rather than a rigid formula, are necessary. The method of effecting full compensation for senior claimants will vary from case to case." Applying these principles here, we are of the view that, except as hereinafter noted, the findings and conclusions of the Commission and the District Court were adequate and proper.

The objections of the General Mortgage bonds are that full compensation was not afforded them for the loss of

their first lien position, and that to sustain the allocation of new securities to them it must be determined that the new securities had in fact a value representing compensation for the priority of the old. We can put to one side at this point the treatment of the Terre Haute bonds at which the General Mortgage bonds direct some of their criticism. For the reasons which we have already stated, we cannot substitute our opinion for the business judgment of the Commission and say that the Terre Haute lease should have been rejected outright or that the Terre Haute interests would consent to a new lease on less favorable terms than are offered. Nor do we stop to analyze the facts warranting the preferred treatment accorded the amply secured claim of the Reconstruction Finance Corporation. For no argument is pressed here that the allocation of new First Mortgage bonds for the full amount of that claim was not warranted. Furthermore, we cannot agree with the suggestion that the General Mortgage bonds should have been granted a larger participation in new fixed interest securities. As we have noted, 25% of their claims is to be satisfied with the new First Mortgage bonds. We have already reviewed the reasons why the Commission felt that the fixed interest charges should not exceed about $4,270,000 a year. It should be noted at this point that the Commission stated that it saw "no means by which the exact present lien position of the general mortgage bonds or the 50-year bonds can be preserved except under a prohibitive mortgage structure." As we have stated, the determination of the kind of capital structure which a railroad emerging from reorganization should have is peculiarly a question for the expert judgment of the Commission. To give the General Mortgage bonds a larger percentage of new First Mortgage bonds would necessitate an increase in the total fixed interest charges of the new company. We would intrude on the Commission's function if we undertook to

direct that any such increase be made. The same reply may be given the contention that the Commission should not have created new system mortgages but should have left the 50-year bonds secured by a separate mortgage or should have created a separate corporation to operate the western lines which comprise the main security for the 50-year bonds. The Commission considered and rejected these proposals, saying that it was "of great importance that a completely unified system be created through the reorganization and that the capital structure be not complicated by numerous mortgages." Such a determination is peculiarly one for the Commission under § 77. So far as the law is concerned, there is no obstacle to the substitution of system mortgages for divisional ones. We so held in *Consolidated Rock Products Co.* v. *Du Bois, supra,* pp. 530–531, indicating that the requirements of feasibility and practicability may often necessitate such a course. The same principles are applicable here.

So the problem for us on this phase of the case is whether, within the framework of the capital structure which has been designed, the allocation of new securities to the General Mortgage bonds was permissible within the rule of the *Boyd* and the *Consolidated Rock Products* cases. On this record, that entails primarily a consideration of the treatment accorded the General Mortgage bonds, on the one hand, and the Milwaukee & Northern bonds and the 50-year bonds on the other.

As we have noted, the General Mortgage bonds are to receive 25% of their claims in new First Mortgage bonds, 35% in Series A and 20% in Series B, new General Mortgage bonds, and 20% in preferred stock. The same treatment is accorded the Milwaukee & Northern Consolidated Mortgage bonds. The Milwaukee & Northern First Mortgage bonds, however, are to receive 70% of their claims in new First Mortgage bonds and 30% in Series A new General Mortgage bonds. And the 50-year bonds

are to receive 15% of their claims in Series B, new General Mortgage bonds, 60% in new preferred stock, and 25% in common stock. If the criterion of earning power be given the weight which we think is necessary under this statutory system, the Milwaukee & Northern First Mortgage bonds are entitled to preferred treatment over the General Mortgage bonds and the Milwaukee & Northern Consolidated bonds. On the basis of system earnings for 1936, the Commission noted that income available for the Milwaukee & Northern First Mortgage bonds was about three times interest charges, and for the General Mortgage bonds about 1.16. In the case of the Milwaukee & Northern Consolidated Mortgage bonds, the interest for the same period was earned about 1.2 times. Regard for the earning power of those respective units of property led to the preferred treatment of the Milwaukee & Northern First Mortgage bonds and to the same offer being made to the General Mortgage bonds as was made to the Milwaukee & Northern Consolidated Mortgage bonds. But the attack of the General Mortgage bonds is directed, in the main, to the participation accorded the 50-year bonds and to the inadequacy as compared with them of the treatment given the General Mortgage bonds.

They point out that the Commission referred to the General Mortgage lines as "the heart of the system"; that the interest on these bonds has been earned, with the exception of a few years, since 1889; that the western lines securing the 50-year bonds are deficit lines. In that connection they refer to the Commission's statement that the losses by the western lines were $142,591 in 1930 and $1,540,808 in 1931, before payment of interest and that "on any reasonable basis of allocation between the lines west and the other parts of the system, the lines west cannot be expected to earn any sum for the payment of interest. In years when the system earnings approach $10,000,000,

some interest is apparently earned for the 50-year mortgage bonds under the present capital structure, but this reflects system operation and does not demonstrate any earning power for the western lines." But the problem for the Commission and the District Court was not as simple as the General Mortgage bondholders make it appear. The lien of the 50-year bonds embraces not only the western lines but also, subject to the First and Refunding Mortgage, the leasehold interest of the debtor in the Terre Haute and stocks and bonds of other companies, the most important of which are shares of Indiana Harbor Belt R. Co. and most of the Terre Haute stock. There was evidence that income from certain securities pledged under the First & Refunding Mortgage (largely the Indiana Harbor Belt stock) was $402,031 in 1936 and net income from the Terre Haute during that year was $875,327, after payment of all interest charges. Though the Commission recognized that the propriety of crediting the 50-year mortgage with income from the Terre Haute was doubtful because of the assumption that the First & Refunding Mortgage would be satisfied by other earnings, it gave some weight to those earnings in determining the participation to be accorded the 50-year bonds. Thus, it noted that one analysis in 1935 showed about $1,000,000 available for interest on the 50-year bonds, "on the basis of $10,263,185 of system earnings available for fixed charges, approximately $2,000,000 of net income from the Terre Haute, and a deficit of $500,000 on the lines west." The Commission also reviewed another analysis showing that the First & Refunding Mortgage lines contributed $6,249,099 of gross revenues and $3,300,400 of net revenues to the General Mortgage lines in 1936; and that the income for the 50-year mortgage lines (after payment of interest on the bonds of the Terre Haute, the Northern, the Gary, and the First & Refunding) was about $2,000,000, while the income of the General Mortgage lines avail-

able for interest was approximately $6,400,000, after interest on equipment certificates. While the Commission was critical of that analysis, it felt that that computation deserved "careful consideration," as the estimate of $2,000,000 was "roughly comparable" to the "other estimate of $1,000,000 in 1935, representing the earnings for the 50-year bonds, after payment of all interest on the general mortgage bonds." It noted that the analysis showing $2,000,000 available for the 50-year bonds also indicated that, on the basis of system earnings of about $12,300,000, all interest charges on the General Mortgage bonds, and only 38% of the interest on the 50-year bonds, were earned. The examiner had recommended that the 50-year bonds receive 10% of their claims in Series A, new General Mortgage bonds and 10% in Series B. The Commission did not consider that treatment "to be justified on any basis of earnings shown." It concluded that if the 50-year bonds were assigned a part of the new Series B bonds only, they would begin "to share earnings with the general mortgage bonds and Northern Consolidated bonds after $9,675,000 of prior charges." That treatment, said the Commission, "goes far toward resolving the doubts as to the accuracy or fairness of the allocation of earnings in favor of the 50-year bonds, without injustice to the general mortgage bonds."

The problem in such a case is not a simple one. The contribution which each division makes to a system is not a mere matter of arithmetical computation. It involves an appraisal of many factors and the exercise of an informed judgment. Furthermore, an attempt to put precise dollar values on separate divisions of one operating unit would be quite illusory. As the Commission recently stated, "The properties comprise one operating unit; a complete separation of values would necessarily have to be based on extensive assumptions of unprovable

validity; and any attempt at such a separation would in the end serve no purpose except to present an apparent certainty in the formulation of the plan which does not exist in fact." St. Louis Southwestern Ry. Co. Reorganization, 252 I. C. C. 325, 361. In the present case, the Commission and the District Court were satisfied that they had adequate data based on earning power to make a fair allocation of new securities between the General Mortgage bonds and the 50-year bonds. We cannot say that it was inadequate. Sec. 77 contains no formula for the making of such an allocation nor for the determination of the earning power of the entire system or parts thereof. The earnings periods to be chosen, the methods to be employed in allocating system earnings to the various divisions, are matters for the informed judgment of the Commission and the Court. Nor was there a failure here, as in the *Consolidated Rock Products* case, to ascertain what properties were subject to the respective divisional mortgages. With one minor exception, to be discussed later, that was done. So the Commission and the Court had before them data which we cannot say was inadequate to determine the allocation of new securities between these two classes of bondholders. Nor can we say that the Commission and the Court applied an incorrect rule of law in concluding that the plan was "fair and equitable" as between the General Mortgage bonds and the 50-year bonds. We are not dealing here merely with a first mortgage and a second mortgage on a single piece of property. For each of the two groups of bondholders has a first lien on a part of the Milwaukee properties.[10] In case of first and second liens on the same prop-

[10] The lien of the 50-year bonds is of course subject to the First & Refunding Mortgage bonds, all held by the Reconstruction Finance Corporation as security for its loan. But in view of the adequacy of that security, the Circuit Court of Appeals recognized that, as a practical matter, the 50-year bonds were to be considered as having a first lien on the western lines.

erty, senior lienors, of course, would be entitled to receive, in case the junior lienors participated in the plan, not only "a face amount of inferior securities equal to the face amount of their claims" but, in addition, "compensation for the senior rights" which they surrendered. *Consolidated Rock Products Co.* v. *Du Bois, supra,* p. 529. But where, as here, each group of bondholders is contributing to a new system mortgage separate properties from old divisional mortgages, it is necessary to fit each into the hierarchy of the new capital structure in such a way that each will retain in relation to the other the same position it formerly had in respect of assets and of earnings at various levels. If that is done, each has obtained new securities which are the equitable equivalent of its previous rights, and the full priority rule of the *Boyd* case, as applied to the rights of creditors *inter se,* is satisfied. That rule was applied here. And the determination by the Commission and the District Court that its requirements were satisfied is supported by evidence. Sixty per cent of the General Mortgage bonds receives priority, as respects assets and earnings, over the 50-year bonds, since the former receive 25% in new First Mortgage bonds and 35% in Series A, new General Mortgage bonds, while the 50-year bonds were allotted none of those new securities. Furthermore, the General Mortgage bonds received a larger share of Series B bonds (20% as against 15%), a smaller share of new preferred stock (20% as against 60%) and no common stock as compared with 25% by the 50-year bonds. For similar reasons, we cannot say that the treatment of the General Mortgage bonds as against the Milwaukee & Northern First Mortgage bonds and Consolidated Mortgage bonds was not fair and equitable. No fixed rule supplies the method for bringing two divisional mortgages into a new capital structure so that each will retain in relation to the other the same position it formerly had in respect of assets and of earnings at vari-

ous levels. The question in each case is one for the informed discretion of the Commission and the District Court. We cannot say that that discretion has been abused here.

We would have quite a different problem if the District Court had failed to perform the functions which § 77 (e) places upon it. But it cannot be said that there was any such failure here. The District Court satisfied itself that the principles of priority as applied to these facts were respected. See 36 F. Supp. pp. 202–203, 211–212. Since such a determination rests in the realm of judgment rather than mathematics, there is an area for disagreement. But we are not performing the functions of the District Court under § 77 (e). Our role on review is a limited one. It is not enough to reverse the District Court that we might have appraised the facts somewhat differently. If there is warrant for the action of the District Court, our task on review is at an end.

That leads to a question much discussed in this case, as in the *Western Pacific* case, as to the nature and extent of the findings necessary under § 77 in order to approve a plan as "fair and equitable." As we have said, the finding of the Commission, affirmed by the District Court, that the stock had "no value" was warranted. Furthermore, the Commission's determination of the permissible capitalization of the new company was sufficient as a finding of the maximum reorganization values which might be distributed among the various classes of security holders. But it has been argued here, as in the *Western Pacific* case, that a dollar valuation must be made of each old security and of each new security in order to give "full compensatory treatment" to senior claimants and to appropriate to the payment of their claims the "full value" of the property, in accord with the principles of *Consolidated Rock Products Co.* v. *Du Bois, supra,* p. 529. The rule in equity receivership cases that the creditors

were entitled to have the "value" (*Northern Pacific Ry. Co.* v. *Boyd, supra,* p. 508) or the "full value" (*Kansas City Terminal Ry. Co.* v. *Central Union Trust Co.,* 271 U. S. 445, 454) of the property first appropriated to the satisfaction of their claims never was thought to require such valuations. Nor does the *Consolidated Rock Products* case or § 77 require them. We indicated in the *Los Angeles Lumber Products* case (308 U. S. p. 130) that compromises, settlements, and concessions are a normal part of the reorganization process. And see *Marine Harbor Properties* v. *Manufacturers Trust Co., supra.* We stated in the *Consolidated Rock Products* case (312 U. S. p. 526) that a determination of earning power of an enterprise "requires a prediction as to what will occur in the future, an estimate, as distinguished from mathematical certitude." And in discussing the method by which creditors should receive "full compensatory treatment" for their rights, we emphasized, as already noted, that "Practical adjustments, rather than a rigid formula, are necessary." *Id.* p. 529. Certainly those standards do not suggest any mathematical formula. We recently stated in another connection that, whatever may be "the pretenses of exactitude" in determining a dollar valuation for a railroad property, "to claim for it 'scientific' validity, is to employ the term in its loosest sense." *Nashville, C. & St. L. Ry.* v. *Browning,* 310 U. S. 362, 370. That is equally true here. A requirement that dollar values be placed on what each security holder surrenders and on what he receives would create an illusion of certainty where none exists and would place an impracticable burden on the whole reorganization process. See Bourne, *Findings of "Value" in Railroad Reorganizations,* 51 Yale L. Journ. 1057. It is sufficient that each security holder in the order of his priority receives from that which is available for the satisfaction of his claim the equitable equivalent of the rights surrendered. That

requires a comparison of the new securities allotted to him with the old securities which he exchanges to determine whether the new are the equitable equivalent of the old. But that determination cannot be made by the use of any mathematical formula. Whether in a given case senior creditors have been made whole or received "full compensatory treatment" rests in the informed judgment of the Commission and the District Court on consideration of all relevant facts.

The General Mortgage bondholders attack the additions and betterments fund on the ground that it is unlawful and results in a dilution of their priority rights. They contend that § 77 (b) (4) [11] contemplates that the probable future earnings found to be available for fixed charges shall be used to pay those charges; that this provision of the plan reduces by $62,500,000 (the capitalized value of $2,500,000) the amount of new bonds available for the present underlying bonds; that additions and betterments are a capital charge and that the income of the road pledged to the underlying bonds cannot be diverted for that purpose at least without some compensating advantage given the underlying bonds; that the fund will enrich the junior interests at the expense of the bondholders; that the expenditures contemplated should be obtained from surplus earnings or from new capital raised under the open end First Mortgage.

The Commission, in determining that an additions and betterments fund should be set up, reviewed at some length the capital requirements of the system. It observed that, generally, "the expenditures for additions and

[11] Which provides that a plan of reorganization "shall provide for fixed charges (including fixed interest on funded debt, interest on unfunded debt, amortization of discount on funded debt, and rent for leased railroads) in such an amount that . . . there shall be adequate coverage of such fixed charges by the probable earnings available for the payment thereof."

betterments have varied in proportion to earnings available for interest. Ordinarily with a rising trend in traffic and revenues the carrier would need more or better facilities." Its conclusion was that "the increased income should properly provide, in part, for their cost." These amounts would supplement the "cash represented by charges to depreciation, retirements, and salvage." And the plan provides that if the new company establishes an "operating expense account for its roadway and structures," the additions and betterments fund shall be paid from the amount credited to such fund for the applicable income period to the extent that such amount is adequate therefor. Likewise, the additions and betterments fund is to be credited with the amount which the new company "shall charge to operating expenses in any year" for the "cost of any additions and betterments, properly chargeable to capital account under the rules now in effect." Since the Commission recently has required railroad companies generally to establish a depreciation reserve with respect to their roadway and structures,[12] the General Mortgage bonds concede that the alleged illegality of such a fund will be rendered largely academic. But in any event, we see no barrier to a determination by the Commission that expenditures which are incident to a normal and proper operation of the road are costs or charges which should be paid before net income is computed. Nor can we see any legal reason why, as the Commission has determined here, those charges should not be in part dependent on the level of earnings. The Circuit Court of Appeals thought that there must be findings which would support both the allowance and its amount. But as we have pointed out earlier, Congress has merely provided in § 77 (d) that the plan approved by the Commission must be one which "will in its opinion meet the requirements

[12] Order of June 8, 1942, effective January 1, 1943.

of subsections (b) and (e) of this section, and will be compatible with the public interest." And in its report the Commission is directed to "state fully the reasons for its conclusions." We do not see where the Commission failed to meet these requirements. The need for such a fund and its amount involve matters of policy. The determination that a particular fund should be constituted calls for the exercise of an expert, informed judgment. The Commission clearly has power to require that such a fund be provided for in a plan of reorganization under § 77, whether or not the payments to it are properly included within the term "fixed charges" as used in § 77 (b) (4). For such a fund, like the amount of capitalization and the nature of the capital structure, may be highly relevant to the financial integrity of the company which emerges from reorganization and to stability and efficiency of the transportation system.

There are, however, two objections made by the General Mortgage bonds which we think have merit. The first of these relates to the dispute as to the so-called "pieces of lines east." The General Mortgage bonds contend here, as they did before the Commission, that they have a first lien on those properties by reason of the after-acquired property clause in their mortgage. The Commission credited the 50-year bonds with the earnings from those properties, indicating, however, that the propriety of doing so was doubtful in absence of a judicial determination of the question. Some of the General Mortgage bonds objected to that allocation before the District Court. The District Court, however, did not undertake to resolve the dispute. These General Mortgage bondholders likewise raised the point before the Circuit Court of Appeals. But it was not considered there. The objection has been renewed here but has not been argued on the merits. We can hardly treat the matter as *de minimis,* as there is evidence that these properties had a

net income of $170,100 in 1936. Nor can we conclude that the objection has been waived or that the claim is frivolous. Here, as in the *Consolidated Rock Products* case, the "determination of what assets are subject to the payment of the respective claims" (312 U. S. p. 520) has a direct bearing on the fairness of the plan as between two groups of bondholders. The District Court should resolve the dispute.

The second of these objections is that the General Mortgage bonds are to receive under the plan only a face amount of inferior securities equal to the face amount of their claims. The objection would, of course, not be valid if claimants wholly junior to the General Mortgage bonds were not participating in the plan. But here the Adjustment bonds, junior to the General Mortgage bonds, receive a large amount of common stock under the plan for their claim upon the mortgaged assets.[13] The rule of the *Boyd* case "protects the rights of senior creditors against dilution either by junior creditors or by equity interests." *Marine Harbor Properties* v. *Manufacturers Trust Co., supra.* That view has not been contested here. Hence, as we indicated in the *Consolidated Rock Products* case, where junior interests participate in a plan and where the senior creditors are allotted 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." 312 U. S. 529. And we stated that whether they should "be made whole for the change in or loss of their seniority by an increased participation in assets, in earning or in control,

[13] This objection obviously would not run to a participation by junior creditors in unmortgaged assets—against which in this case 55,000 shares of common stock were reserved. Of those the Adjustment bonds were allotted 39,163 shares. But as we have noted, the Adjustment bonds were also allotted 1,749,492 shares of new common for their claim upon the mortgaged assets of the debtor.

or in any combination thereof, will be dependent on the facts and requirements of each case." *Id.* p. 529. We felt that that result was made necessary by the ruling in the *Boyd* case that, "If the value of the road justified the issuance of stock in exchange for old shares, the creditors were entitled to the benefit of that value, whether it was present or prospective, for dividends or only for purposes of control." 228 U. S. p. 508. We adhere to that view. Unless that principle is respected, there will be serious invasions of the rights of senior claimants to the benefit of junior interests. The property of one group will be subtly appropriated to pay the claims of another while lip service is rendered the principles of priority.

Some argument is advanced that under this plan the General Mortgage bondholders do receive as against the junior interests compensatory treatment which is adequate to make up for the seniority rights which they are to surrender. Part of that is said to be in the control which they obtain. It is pointed out that the plan provides for a five year voting trust in which the several groups of bondholders will be represented; that thereafter the plan protects their control by providing that the new preferred stock (all of which is to be issued to the Milwaukee & Northern Consolidated bonds, the Gary bonds, the General Mortgage bonds, and the 50-year bonds) will be entitled to cumulative voting to elect a majority of the board of directors during certain periods when full dividends on the preferred have not been paid; and that the exercise of the conversion rights of the Series B new General Mortgage bonds, allotted to these senior bondholders, would result in their acquisition of over 50% of both the preferred and common. It is also argued that compensatory treatment is to be found in the fact that the new General Mortgage bonds have sinking funds and are cumulative up to three years of interest, and that the new preferred stock is participating.

But neither the Commission nor the District Court considered the problem. As we have indicated, the question whether senior creditors have received "full compensatory treatment" rests in the informed judgment of the Commission and the court. A decision on that issue involves a consideration of the numerous investment features of the old and new securities and a financial analysis of many factors. Our task is ended if there is evidence to support that informed judgment. We are not equipped to exercise it in the first instance. Nor is it our function. Nor can we conclude that its omission in this instance was harmless. And minorities under § 77, like minorities under other reorganization sections of the Act (*Case* v. *Los Angeles Lumber Products Co., supra,* pp. 114–115, 128–129), cannot be deprived of the benefits of the statute by reason of a waiver, acquiescence or approval by the other members of the class. Certainly we cannot say that the inclusion in the new securities to be received by the General Mortgage bonds of features normally common to them are adequate compensation for the lost seniority. Our conclusion on the point is that, since junior interests are participating in the plan, the Commission and the District Court should determine what the General Mortgage bonds should receive in addition to a face amount of inferior securities equal to the face amount of their old ones, as equitable compensation, qualitative or quantitative, for the loss of their senior rights.

50-Year Bonds. The two points just discussed in relation to the General Mortgage bonds are equally applicable to the 50-year bonds. Final approval of the plan as it affects those two issues cannot be made until findings are made on those two matters.

The 50-year bonds raise other objections. We have already considered their major objections in other connections, and they need not be repeated. But a word should

be added in answer to their argument that the data before the Commission as to segregated earnings was too meager to warrant a permanent disruption of liens. They urge that the plan be remitted to the Commission so that the earning power of the various component parts or mortgage divisions of the road may be determined in light of earnings segregation studies, severance studies, and contributed traffic studies.[14] These are highly technical matters. See Meck & Masten, *Railroad Leases and Reorganization,* 49 Yale L. Journ. pp. 640–647. As stated above, we cannot say that the data as to earning power of the various divisions which was utilized by the Commission was inadequate. The earnings periods to be selected and the methods to be employed in allocating earnings among the various divisions are matters for the informed judgment of the Commission and the District Court. Whether earnings segregation, severance, or contributed traffic studies should be made is for the Commission initially to decide in light of the requirements of a particular case. We cannot say that those studies are so indispensable that they should be required here. Sec. 77 (c) (10) provides that the judge "may direct" the debtor or trustees "to keep such records and accounts, in addition to the accounts prescribed by the Commission," as will permit such a segregation and allocation of earnings and expenses. That does not indicate that Congress felt that the suggested studies were always necessary.

Gary First Mortgage Bonds; Adjustment Bonds. We have carefully considered the objections raised by these two groups. Their objections, for the most part, are of a

[14] Although the 50-year bonds and the debtor raised this point before the Commission as early as February, 1938, and the 50-year bonds raised it again when they filed their objections to the plan in the District Court, neither of them attempted to submit any such studies either in the hearings before the Commission or in the hearings before the District Court more than two years later.

kind which have been fully treated in other parts of this opinion and need not be elaborated. But one point raised by the Adjustment bonds need be mentioned. As we have noted, the interest on these bonds accrued to December 31, 1938 is over $79,000,000. The Commission ruled that, in view of the insufficiency of the mortgaged assets to meet the claims of the Adjustment bonds and the inadequacy of the free assets to satisfy the deficiency, with interest, and the unsecured claims, with interest, no allowance should be made in the plan for interest on these bonds subsequent to the date of the filing of the petition. For reasons we have already stated, the conclusion of the Commission that the mortgaged assets were insufficient to meet the bonded indebtedness was supported by evidence. Since the distribution provided for these bonds on the basis of their mortgage securities is less than the principal amount of their claim, the limitation of their right to share the unmortgaged assets ratably with the unsecured creditors on the basis of principal and interest prior to bankruptcy only is justified under the rule of *Ticonic National Bank* v. *Sprague,* 303 U. S. 406.

We have considered all other objections to the plan and find them without merit. But for the exceptions we have noted, we conclude that the District Court was justified in approving the plan and that the Circuit Court of Appeals was in error in reversing that judgment. Accordingly, we reverse in part and affirm in part the judgment of the Circuit Court of Appeals and direct that the cause be remanded to the District Court for proceedings in conformity with this opinion.

It is so ordered.

MR. JUSTICE JACKSON and MR. JUSTICE RUTLEDGE did not participate in the consideration or decision of these cases.

MR. JUSTICE ROBERTS:

This case presents two questions on which I feel compelled to express my views. I have set forth in *Ecker* v. *Western Pacific R. Corp., ante,* p. 448, what I consider the respective functions of the Interstate Commerce Commission and the district judge in respect of a plan of reorganization formulated under § 77. It follows from what I there said that I agree with the opinion of the Court except as herein noted.

The two matters as to which I disagree are the provisions of the plan respecting the lease of Chicago, Terre Haute & Southeastern Railway Company and the allocation of securities to the holders of General Mortgage bonds.

1. The statute deals with unexpired leases under which the debtor is lessee. It does not provide that the lessor may be brought into a reorganization proceeding with the debtor so that the properties of both debtor and lessor may be reorganized as a unit. On the contrary, all the relevant provisions contemplate the recognition of the lessor-lessee relation, and the dealing with the leased property in that light, and not as if it were part of the property of the lessee. The practice in equity receiverships prior to the adoption of § 77 permitted the affirmance or disaffirmance of unexpired leases. That practice is perpetuated in the reorganization statute. Prior to the formulation of a plan, the trustee appointed by the court may disaffirm the lease.[1] He may, on the other hand, adopt the lease.[2] But if he does so his adoption is subject to reversal by a provision in the plan providing for rejection.[3] The plan itself must, amongst other things,

[1] § 77 (c) (2); *Palmer* v. *Webster & Atlas National Bank,* 312 U. S. 156, 163.

[2] § 77 (b).

[3] *Id.*

provide for the rental payment under existing leases not rejected.[4] But the plan may provide for rejection and, in that case, the lessor is to be treated as a creditor with a claim for the amount of damage or injury done by rejection.[5] What is to be done with respect to the continued operation of a leased line upon the rejection of the lease is covered.[6]

It is evident that Congress concluded that the old and well-recognized principles applied in equity receivership should be substantially incorporated into § 77 so far as concerns unexpired leases. The draftsmen of the legislation did not provide for a case in which it would be to the interest of the reorganized corporation to retain the leased property under a new or amended lease stipulating for a reduced rental. But whether the omission to confer upon the Commission and the court the power to work out such a result arose from inadvertence or reasons of policy, or because of a belief that power was lacking, I need not speculate. Whatever the reason, it seems clear that such a case is not covered and that the only alternatives provided by the statute are disaffirmance or affirmance. In view of the provisions of subsection (b) as to what a plan shall or may include, I think it is inadmissible to find authority for what the Commission has done in this case in the concluding sentence of the first paragraph to the effect that the plan "may include any other appropriate provisions not inconsistent with this section." In view of the statutory provisions to which I have referred, the features of the plan respecting the Terre Haute lease are inconsistent with the section. Congress did not contemplate the treatment of a lessor as if the property it owns and leases to the debtor is part of the property to be re-

[4] *Id.*

[5] *Id.*

[6] § 77 (c) (6).

organized, nor did it intend to put the Commission in a position of bargaining with such a lessor for a new base.

The plan formulated by the Commission seems to me to be a straddle between these two alternatives. The holders of bonds secured by mortgages on the Terre Haute property are, in some aspects, treated as if they were mortgage creditors of the debtor. In other aspects, Terre Haute is treated as an arm's length creditor with whom a bargain must be struck. The vice of this seems apparent on this record. Whereas each class of mortgage creditors of the debtor is afforded a participation in the securities and probable earnings of the new company in purported compliance with the rule of the *Case* and *Rock Products* decisions, and whereas the Commission recognizes the difference in the nature of the lien and security of the three issues of mortgage bonds of Terre Haute, in the plan they are all treated alike and not accorded positions corresponding to their respective liens and priorities. The excuse for this is that the Commission is dealing with a lease and fixing a rental to be paid to an outside lessor. On the other hand, the concept of dealing with a lessor, as I read the record, moved the Commission to propose to the lessor what it thought would be an attractive offer in order to persuade the lessor to accept a new lease. In this aspect, the Commission, as I think, made the bondholders of Terre Haute, treated as a class, a proposition which gives them an inordinately superior position to that accorded the holders of General Mortgage bonds, and produces a serious discrimination against the latter.

I refer to these circumstances merely to reinforce what I have said above to the effect that it is evident Congress did not provide for any such treatment of the rights accruing under an unexpired lease. I am of opinion, therefore, that, as a matter of law, the plan adopted by the Commission does not conform to the standards set up by § 77, and particularly by subsection (b).

2. Upon the facts set forth in the Commission's report, I think it clear that the award of securities in the new corporation to the holders of General Mortgage bonds does not comply with the rule of absolute priority announced in the *Boyd* and *Rock Products* cases. If this is true, the plan violates subsection (e).

In conformity with what I have said in *Ecker* v. *Western Pacific R. Corp.*, I think the duty rested upon the district judge to sustain the objections of General Mortgage bondholders, because I cannot find in the facts stated by the Interstate Commerce Commission and those proved before the District Court any reasonable justification for the allocation made to them as against that made to the holders of bonds secured by the Milwaukee & Northern Consolidated Mortgage and the Fifty Year Mortgage, or for the treatment accorded them in comparison to that accorded Terre Haute's bondholders. The opinion of the Court treats this question as, in effect, lying within the sound discretion of the district judge and refuses to review his action on the ground that it is not evident he abused that discretion. I am of the view that, unless we are to recant what we have heretofore said, the rule of law as to the maintenance of the respective positions of lienors must be enforced. Of course, that rule must be applied in the light of the facts of each case, but I do not think the district judge may abdicate the duty of examining those facts and correcting what is shown to be a clear infraction of the rule. Neither the judge nor the Commission need essay to value the property under each mortgage, or the securities to be allocated to the mortgagees under it, in dollars and cents. Substantial equivalence satisfies the requirement of "fairness and equity" in its legal sense as used in this setting. The court should, of course, give weight to what the Commission has found,

and its reasons for its allocation, but I think that, if the district judge had, in this case, exercised the duty which lay upon him he would have held that there was no substantial foundation for the Commission's treatment of General Mortgage bondholders and would have been bound, therefore, to disapprove the plan. As he did not perform that duty, I think that, unless the right to come to this Court is vain, we have the duty to correct his action. I should, therefore, reverse the decree below.

EX PARTE REPUBLIC OF PERU.

ON MOTION FOR LEAVE TO FILE PETITION FOR A WRIT OF PROHIBITION AND/OR A WRIT OF MANDAMUS.

No. 13, original. Argued March 1, 1943.—Decided April 5, 1943.

1. This Court has power, under 28 U. S. C. §§ 342, 377, to issue a writ of prohibition or mandamus to restrain the district court from exercise of further jurisdiction *in rem*, in an admiralty suit, although the case be one in which direct appellate jurisdiction is vested in the circuit court of appeals, this Court having ultimate discretionary jurisdiction by certiorari; but such power will be exercised only where the question is of public importance or is of such nature that the exercise of such power is peculiarly appropriate. *Ex parte United States*, 287 U. S. 241. Pp. 582, 586.
2. A case of that character is presented by the claim of a friendly foreign state that its vessel, seized by the district court under a libel *in rem* in a private litigation, should be released as immune from suit, which claim of immunity had been recognized by the Department of State, whose action has been certified to the district court. P. 586.
3. In a suit *in rem* in admiralty by a private libelant for breach of a charter party, the district court acquired jurisdiction *in rem* by seizure and control of a vessel owned by the Republic of Peru. The Republic moved for release of the vessel upon the ground of sovereign immunity from suit and there was presented to the court by the Attorney General a certification showing that such immunity had been recognized and allowed by the State Department. *Held*

that it was the duty of the court to surrender the vessel and remit the libelant to the relief obtainable by diplomatic negotiations P. 587.

4. The Republic of Peru did not waive its claim of immunity by urging it both before the Department of State and the court or by reserving the right to interpose other defenses. P. 589.

Leave to file granted.

ON MOTION for leave to file a petition for a writ of prohibition and/or mandamus to prohibit the district court from further exercise of jurisdiction over a proceeding *in rem* in which a vessel was seized, and to direct the district judge to enter an order declaring the vessel immune.

Mr. Edgar R. Kraetzer, with whom *Mr. Monte M. Lemann* was on the brief, for petitioner.

Mr. Joseph M. Rault, with whom *Messrs. George H. Terriberry* and *Walter Carroll* were on the brief, for Galban Lobo Co., S. A., et al., respondents.

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

This is a motion for leave to file in this Court the petition of the Republic of Peru for a writ of prohibition or of mandamus. The petition asks this Court to prohibit respondent, a judge of the District Court for the Eastern District of Louisiana, and the other judges and officers of that court, from further exercise of jurisdiction over a proceeding *in rem,* pending in that court against petitioner's steamship *Ucayali,* and to direct the district judge to enter an order in the proceeding declaring the vessel immune from suit. The questions for decision here are whether this Court has jurisdiction to issue the writ, whether such jurisdiction should in our discretion be exercised in petitioner's behalf, and whether petitioner's appearance and defense of the suit in the district court was, as that court has ruled, a waiver of its claim that the vessel, being that of a friendly sovereign state, is im-

mune from suit brought by a private party in the court of the United States.

On March 30, 1942, Galban Lobo Co., S. A., a Cuban corporation, filed a libel in the district court against the *Ucayali* for its failure to carry a cargo of sugar from a Peruvian port to New York, as required by the terms of a charter party entered into by libelant with a Peruvian corporation acting as agent in behalf of the Peruvian Government. On April 9, 1942, the Republic of Peru, acting by the master of the vessel, intervened in the district court by filing a claim to the vessel, averring that the Republic of Peru was sole owner, and stating: "The filing of this claim is not a general appearance and is without prejudice to or waiver of all defenses and objections which may be available to respondent and claimant, particularly, but not exclusively, sovereign immunity."

On the same day, petitioner procured the release of the vessel by filing a surety release bond in the sum of $60,000, on which petitioner was principal. The bond, which contained a reservation identical with that appearing in petitioner's claim to the vessel, was conditioned upon payment of any amount awarded to libelant by the final decree in the cause. On April 11th petitioner proceeded in the cause to take the testimony of the master on the merits, and spread on the record a statement that the testimony was taken with like "full reservation and without waiver of all defenses and objections which may be available to respondent and claimant, particularly, but not exclusively, sovereign immunity." Petitioner also stated that "the appearance of counsel for the Government of Peru and the Steamship *Ucayali* is for the special purpose only of taking the testimony of the master under the reservation aforesaid."

On April 18th, and again on May 10th and on May 29th, petitioner moved for and obtained an order of the district court extending its time within which to answer

or otherwise plead to the libel. Each motion was made "with full reservation and without waiver of any defenses and objections which may be available to mover, particularly, but not exclusively, sovereign immunity."

In the meantime, petitioner, following the accepted course of procedure (see *Ex parte Muir,* 254 U. S. 522; *Compania Espanola* v. *The Navemar,* 303 U. S. 68), by appropriate representations, sought recognition by the State Department of petitioner's claim of immunity, and asked that the Department advise the Attorney General of the claim of immunity and that the Attorney General instruct the United States Attorney for the Eastern District of Louisiana to file in the district court the appropriate suggestion of immunity of the vessel from suit. These negotiations resulted in formal recognition by the State Department of the claim of immunity. This was communicated to the Attorney General by the Under Secretary's letter of May 5, 1942. The letter requested him to instruct the United States Attorney to present to the district court a copy of the Ambassador's formal claim of immunity filed with the State Department, and to say that "this Department accepts as true the statements of the Ambassador concerning the steamship *Ucayali,* and recognizes and allows the claim of immunity."

Pursuant to these instructions the United States Attorney, on June 29th, filed in the district court a formal statement advising the court of the proceedings and communications mentioned, suggesting to the court and praying "that the claim of immunity made on behalf of the said Peruvian Steamship *Ucayali* and recognized and allowed by the State Department be given full force and effect by this court"; and "that the said vessel proceeded against herein be declared immune from the jurisdiction and process of this court." On July 1st, petitioner moved for release of the vessel and that the suit be dismissed. The district court denied the motion on the ground that peti-

tioner had waived its immunity by applying for extensions of time within which to answer, and by taking the deposition of the master—steps which the district court thought constituted a general appearance despite petitioner's attempted reservation of its right to assert its immunity as a defense in the suit. 47 F. Supp. 203.

The first question for our consideration is that of our jurisdiction. Section 13 of the Judiciary Act of 1789, 1 Stat. 81, conferred upon this Court "power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction, and writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States." And § 14 provided that this Court and other federal courts "shall have power to issue writs of scire facias, habeas corpus, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." 1 Stat. 81. These provisions have in substance been carried over into §§ 234 and 262 of the Judicial Code (28 U. S. C. §§ 342, 377), and § 751 of the Revised Statutes (28 U. S. C. § 451).

The jurisdiction of this Court as defined in Article III, § 2, of the Constitution is either "original" or "appellate." Suits brought in the district courts of the United States, not of such character as to be within the original jurisdiction of this Court under the Constitution, are cognizable by it only in the exercise of its appellate jurisdiction. Hence, its statutory authority to issue writs of prohibition or mandamus to district courts can be constitutionally exercised only insofar as such writs are in aid of its appellate jurisdiction. *Marbury* v. *Madison,* 1 Cranch 137, 173–80; *Ex parte Siebold,* 100 U. S. 371, 374–75.

Under the statutory provisions, the jurisdiction of this Court to issue common-law writs in aid of its appellate

jurisdiction has been consistently sustained. The historic use of writs of prohibition and mandamus directed by an appellate to an inferior court has been to exert the revisory appellate power over the inferior court. The writs thus afford an expeditious and effective means of confining the inferior court to a lawful exercise of its prescribed jurisdiction, or of compelling it to exercise its authority when it is its duty to do so. Such has been the office of the writs when directed by this Court to district courts, both before the Judiciary Act of 1925, 43 Stat. 936,[1] and since.[2] In all these cases (cited in notes 1 and 2), the appellate, not the original, jurisdiction of this Court was invoked and exercised.[3]

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[1] E. g., *Ex parte State of New York, No. 1,* 256 U. S. 490; *The Western Maid,* 257 U. S. 419; *Ex parte Simons,* 247 U. S. 231; *Ex parte Peterson,* 253 U. S. 300, 305; *Ex parte Hudgings,* 249 U. S. 378; *Ex parte Uppercu,* 239 U. S. 435; *Matter of Heff,* 197 U. S. 488; *Ex parte Siebold,* 100 U. S. 371; *Ex parte Watkins,* 3 Pet. 193; *United States* v. *Peters,* 3 Dall. 121.

[2] *Ex parte United States,* 287 U. S. 241; *Maryland* v. *Soper (No. 1),* 270 U. S. 9, 27–28; *Maryland* v. *Soper (No. 2),* 270 U. S. 36; *Maryland* v. *Soper (No. 3),* 270 U. S. 44; *Colorado* v. *Symes,* 286 U. S. 510; *McCullough* v. *Cosgrave,* 309 U. S. 634; *Ex parte Kawato,* 317 U. S. 69; see *Los Angeles Brush Corp.* v. *James,* 272 U. S. 701.

[3] See particularly the discussion in *Maryland* v. *Soper (No. 1),* 270 U. S. 9, 28–30, and in *Ex parte United States,* 287 U. S. 241. Compare *Ex parte Siebold,* 100 U. S. 371.

Ex parte United States, supra, was not and could not have been a case of original jurisdiction. The Constitution confers original jurisdiction only in cases affecting ambassadors, other public ministers and consuls, and "those in which a State shall be Party" (Art. III, § 2, cl. 2). No state was made a party to *Ex parte United States.* The United States has never been held to be a "State" within this provision—and it obviously is not—nor has it any standing to bring an original action in this Court which does not otherwise come within one of the provisions of Article III, § 2, cl. 2. *United States* v. *Texas,* 143 U. S. 621, relied upon to sustain a different view, was within the original jurisdiction because the State of Texas was the party defendant. And

The common law writs, like equitable remedies, may be granted or withheld in the sound discretion of the Court, *Ex parte Skinner & Eddy Corp.*, 265 U. S. 86, 95–96; *Ex parte City of Monterey*, 269 U. S. 527; *Maryland* v. *Soper* (*No. 1*), 270 U. S. 9, 29; *United States* v. *Dern*, 289 U. S. 352, 359, and are usually denied where other adequate remedy is available. *Ex parte Baldwin*, 291 U. S. 610. And ever since the statute vested in the circuit courts of appeals appellate jurisdiction on direct appeal from the district courts, this Court, in the exercise of its discretion, has in appropriate circumstances declined to issue the writ to a district court, but without prejudice to an application to the circuit court of appeals (*Ex parte Apex Mfg. Co.*, 274 U. S. 725; *Ex parte Daugherty*, 282 U. S. 809; *Ex parte Krentler-Arnold Hinge Last Co.*, 286 U. S. 533), which likewise has power under § 262 of the Judicial Code to issue the writ. *McClellan* v. *Carland*, 217 U. S. 268; *Adams* v. *U. S. ex rel. McCann*, 317 U. S. 269.

After a full review of the traditional use of the common-law writs by this Court, and in issuing a writ of mandamus, in aid of its appellate jurisdiction, to compel a district judge to issue a bench warrant in conformity to statutory requirements, this Court declared in *Ex parte United States*, 287 U. S. 241, 248–49: "The rule deducible from the later decisions, and which we now affirm, is, that this Court has full power in its discretion to issue the writ of mandamus to a federal district court, although the case be one in respect of which direct appellate jurisdiction is

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until now it has never been suggested that necessity, however great, warrants the exercise by this Court of original jurisdiction which the Constitution has not conferred upon it. Moreover, even if Congress had withdrawn this Court's appellate jurisdiction by the 1925 Act, there would have been no necessity in *Ex parte United States* for inventing an original jurisdiction which the Constitution had withheld, since a writ of mandamus could have been applied for in the circuit court of appeals.

vested in the circuit court of appeals—this Court having ultimate discretionary jurisdiction by certiorari—but that such power will be exercised only where a question of public importance is involved, or where the question is of such a nature that it is peculiarly appropriate that such action by this Court should be taken. In other words, application for the writ ordinarily must be made to the intermediate appellate court, and made to this Court as the court of ultimate review only in such exceptional cases." [4]

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[4] The suggestion that the Judiciary Act of 1925 was intended to curtail the jurisdiction previously exercised by this Court in granting such writs to the district courts finds no support in the history or language of the Act. The Act was originally prepared by a committee of justices of this Court, by whom it was submitted to Congress for consideration. Four members of this Court gave testimony before Congressional committees in explanation of the purposes and meaning of the Act, and Chief Justice Taft submitted a detailed statement of the changes which the Act would effect. These disclose that the great purpose of the Act was to curtail the Court's obligatory jurisdiction by substituting, for the appeal as of right, discretionary review by certiorari in many classes of cases. In all the oral and written submissions by members of this Court, and in the reports of the committees of Congress which recommended adoption of the bill, there is not a single suggestion that the Act would withdraw or limit the Court's existing jurisdiction to direct the common-law writs to the district courts when, in the exercise of its discretion, it deemed such a remedy appropriate. See Résumé, together with Citations Affecting Sections of Senate Bill 3164, submitted by Chief Justice Taft, printed for use of Senate Committee on the Judiciary, 67th Cong., 2d Sess.; Hearing on S. 2060 and S. 2061, before a Subcommittee of the Senate Committee on the Judiciary, Feb. 2, 1924, 68th Cong., 1st Sess.; Hearing on H. R. 8206 before House Committee on the Judiciary, Dec. 18, 1924, 68th Cong., 2d Sess.; S. Rep. No. 362, 68th Cong., 1st Sess.; H. Rep. No. 1075, 68th Cong., 2d Sess. The changes in existing law proposed to be made by the Act were set forth with painstaking detail. It is hardly conceivable that the justices of this Court, fully familiar with its practice, would have left unexpressed an intention—had such intention really existed—to curtail drastically a jurisdiction which the Court had exercised under statutory

We conclude that we have jurisdiction to issue the writ as prayed. And we think that—unless the sovereign immunity has been waived—the case is one of such public importance and exceptional character as to call for the exercise of our discretion to issue the writ rather than to relegate the Republic of Peru to the circuit court of appeals, from which it might be necessary to bring the case to this Court again by certiorari. The case involves the

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authority from the beginning of its history. *Ex parte United States,* and most of the other cases cited in note 2, *supra,* were decided at a time when members of the Court's committee responsible for the 1925 Act were still members of the Court. The Court's unanimous concurrence in the existence of its jurisdiction in the cases subsequent to the 1925 Act establishes a practice (cf. *Stuart* v. *Laird,* 1 Cranch 299, 309) which would be beyond explanation if there had been any thought that any provision of the Act had placed such a restriction on the Court's jurisdiction to issue the writs.

Nor can it be said that this legislative history gives any support to the suggestion that the failure of the 1925 Act to cut off the jurisdiction of this Court to issue the common-law writs to district courts was inadverent, and that the Act should therefore be construed as though it had done what it failed to do. The jurisdiction of this Court to issue such writs, like its jurisdiction to grant certiorari, is discretionary. The definite aim of the 1925 Act was to enlarge, not to destroy, the Court's discretionary jurisdiction. That aim can hardly give rise to an inference of an unexpressed purpose to amend or repeal the statutes of the United States conferring jurisdiction on the Court to issue the writs, or an inference that such would have been the purpose had repeal been proposed. The exercise of that jurisdiction has placed no undue burden on this Court. It is significant that, since 1925, less than ten of the numerous applications to this Court for such writs have been granted. Only in rare instances has their denial been the occasion for an opinion dealing with questions of public importance. See, e. g., *Los Angeles Brush Corp.* v. *James,* 272 U. S. 701; *Ex parte Baldwin,* 291 U. S. 610; *Ex parte Colonna,* 314 U. S. 510; cf. *Mooney* v. *Holohan,* 294 U. S. 103. And whatever the scope of the jurisdiction of this Court, in no case does it decline to examine an application in order to determine whether it has jurisdiction.

dignity and rights of a friendly sovereign state, claims against which are normally presented and settled in the course of the conduct of foreign affairs by the President and by the Department of State. When the Secretary elects, as he may and as he appears to have done in this case, to settle claims against the vessel by diplomatic negotiations between the two countries rather than by continued litigation in the courts, it is of public importance that the action of the political arm of the Government taken within its appropriate sphere be promptly recognized, and that the delay and inconvenience of a prolonged litigation be avoided by prompt termination of the proceedings in the district court. If the Republic of Peru has not waived its immunity, we think that there are persuasive grounds for exercising our jurisdiction to issue the writ in this case and at this time without requiring petitioner to apply to the circuit court of appeals, and that those grounds are at least as strong and urgent as those found sufficient in *Ex parte United States,* in *Maryland* v. *Soper,* in *Colorado* v. *Symes,* and in *McCullough* v. *Cosgrave,* all *supra,* note 2. We accordingly pass to the question whether petitioner has waived his immunity.

This case presents no question of the jurisdiction of the district court over the person of a defendant. Such jurisdiction must be acquired either by the service of process or by the defendant's appearance or participation in the litigation. Here the district court acquired jurisdiction *in rem* by the seizure and control of the vessel, and the libelant's claim against the vessel constituted a case or controversy which the court had authority to decide. Indeed, for the purpose of determining whether petitioner was entitled to the claimed immunity, the district court, in the absence of recognition of the immunity by the Department of State, had authority to decide for itself whether all the requisites for such immunity existed—

whether the vessel when seized was petitioner's, and was of a character entitling it to the immunity. See *Ex parte Muir, supra; The Pesaro,* 255 U. S. 216; *Berizzi Bros. Co.* v. *The Pesaro,* 271 U. S. 562; *Compania Espanola* v. *The Navemar, supra.* Therefore the question which we must decide is not whether there was jurisdiction in the district court, acquired by the appearance of petitioner, but whether the jurisdiction which the court had already acquired by seizure of the vessel should have been relinquished in conformity to an overriding principle of substantive law.

That principle is that courts may not so exercise their jurisdiction, by the seizure and detention of the property of a friendly sovereign, as to embarrass the executive arm of the Government in conducting foreign relations. "In such cases the judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction." *United States* v. *Lee,* 106 U. S. 196, 209. More specifically, the judicial seizure of the vessel of a friendly foreign state is so serious a challenge to its dignity, and may so affect our friendly relations with it, that courts are required to accept and follow the executive determination that the vessel is immune. When such a seizure occurs the friendly foreign sovereign may present its claim of immunity by appearance in the suit and by way of defense to the libel. *Compania Espanola* v. *The Navemar, supra,* 74 and cases cited; *Ex parte Muir, supra.* But it may also present its claim to the Department of State, the political arm of the Government charged with the conduct of our foreign affairs. Upon recognition and allowance of the claim by the State Department and certification of its action presented to the court by the Attorney General, it is the court's duty to surrender the vessel and remit the libelant to the relief obtainable through diplomatic negotiations. *Compania Espanola* v. *The Navemar, supra,*

74; *The Exchange*, 7 Cranch 116. This practice is founded upon the policy, recognized both by the Department of State and the courts, that our national interest will be better served in such cases if the wrongs to suitors, involving our relations with a friendly foreign power, are righted through diplomatic negotiations rather than by the compulsions of judicial proceedings.

We cannot say that the Republic of Peru has waived its immunity. It has consistently declared its reliance on the immunity, both before the Department and in the district court. Neither method of asserting the immunity is incompatible with the other. Nor, in view of the purpose to be achieved by permitting the immunity to be asserted, are we able to perceive any ground for saying that the district court should disregard the claim of immunity, which a friendly sovereign is authorized to advance by way of defense in the pending suit, merely because the sovereign has seen fit to preserve its right to interpose other defenses. The evil consequences which might follow the seizure of the vessel are not any the less because the friendly state asserts other grounds for the vessel's release.

Here the State Department has not left the Republic of Peru to intervene in the litigation through its Ambassador as in the case of *Compania Espanola* v. *The Navemar*. The Department has allowed the claim of immunity and caused its action to be certified to the district court through the appropriate channels. The certification and the request that the vessel be declared immune must be accepted by the courts as a conclusive determination by the political arm of the Government that the continued retention of the vessel interferes with the proper conduct of our foreign relations. Upon the submission of this certification to the district court, it became the court's duty, in conformity to established principles, to release the vessel and to proceed no further in the cause. We

have no occasion to decide whether the court should surrender the vessel and dismiss the suit on certification of sovereign immunity by the Secretary, made after the friendly sovereign has once unqualifiedly assented to a judicial determination of the controversy.

The motion for leave to file is granted. We assume that, in view of this opinion, formal issuance of the writ will be unnecessary, and we direct that the writ issue only on further application by the petitioner.

MR. JUSTICE ROBERTS concurs in the result.

MR. JUSTICE FRANKFURTER, dissenting:

If due regard be had for its aims, the Judiciary Act of 1925, 43 Stat. 936, denies us, in my opinion, the power to review the action in this case of the District Court for the Eastern District of Louisiana, even though such review is cast in form of a writ of prohibition or of mandamus. But, even assuming we have discretionary power to issue such writs to a district court, we should in the circumstances of this case abstain from exercising that power, in view of the absence of any showing that relief equally prompt and effective and consonant with the national interest was not, and is not, available in the appropriate Circuit Court of Appeals.

The range of cases that may be brought here directly from the district courts and the rigor with which we limit our discretionary jurisdiction determine the capacity of this Court adequately to discharge its essential functions. I shall therefore briefly state the grounds for believing that this case is improperly here, that the rule should be discharged, and the motion for leave to file the petition be denied. I put to one side the relation of the Peruvian Ambassador to this litigation. This is not a proceeding falling under the rubric "Cases affecting Ambassadors" and thereby giving us original jurisdiction. My brethren

do not so treat it, and our common starting point is that in taking hold of this case the Court is exercising its appellate jurisdiction.

We are also agreed that this Court "can exercise no appellate jurisdiction, except in the cases, and in the manner and form, defined and prescribed by Congress." *American Construction Co.* v. *Jacksonville, T. & K. W. Ry. Co.*, 148 U. S. 372, 378. Had this case arisen under the Evarts Act (Act of March 3, 1891, 26 Stat. 826), appeal could have been taken from the district court, since its jurisdiction was in issue, directly to this Court without going to the Circuit Court of Appeals. See, *e. g.*, *Wilson* v. *Republic Iron Co.*, 257 U. S. 92. And since the case would have been within the immediate appellate jurisdiction of this Court, §§ 13 and 14 of the first Judiciary Act, 1 Stat. 73, 80–82 (now 28 U. S. C. §§ 342, 377, 451), would have authorized this Court to issue an appropriate writ to prevent frustration of its appellate power, see *Ex parte Crane*, 5 Pet. 190, or have enabled it to accelerate its own undoubted reviewing authority where, under very exceptional circumstances, actual and not undefined interests of justice so required. Compare *In re Chetwood*, 165 U. S. 443; *Whitney* v. *Dick*, 202 U. S. 132; *Adams* v. *U. S. ex rel. McCann*, 317 U. S. 269.

The power to issue these auxiliary writs is not a qualification or even a loose construction of the strict limits, defined by the Constitution and the Congress, within which this Court must move in reviewing decisions of lower courts. There have been occasional, but not many, deviations from the true doctrine in employing these auxiliary writs as incidental to the right granted by Congress to this Court to review litigation, in aid of which it may become necessary to issue a facilitating writ. The issuance of such a writ is, in effect, an anticipatory review of a case that can in due course come here directly. When the Act of 1891 established the intermediate courts of appeals and

gave to them a considerable part of the appellate jurisdiction formerly exercised by the Supreme Court, the philosophy and practice of federal appellate jurisdiction came under careful scrutiny. This Court uniformly and without dissent held that it was without power to issue a writ of mandamus in a case in which it did not otherwise have appellate jurisdiction. *In re Massachusetts,* 197 U. S. 482, and *In re Glaser,* 198 U. S. 171. In these cases, rules were discharged because, under the Circuit Courts of Appeals Act, appeals could not be brought directly to the Supreme Court but would have to go to the Circuit Court of Appeals, and only thereafter could they come here, if at all, through certiorari. But review could be brought directly to this Court of cases in which the jurisdiction of the district court was in issue, and therefore writs of "prohibition or mandamus or certiorari as ancillary thereto," *In re Massachusetts, supra,* at 488, were available. Cases which came here directly, prior to the Judiciary Act of February 13, 1925, 43 Stat. 936, to review the jurisdiction of the district courts, whether on appeal or through the informal procedure of auxiliary writs, are therefore not relevant precedents for the present case.

The Judiciary Act of 1925 was aimed to extend the Court's control over its business by curtailing its appellate jurisdiction drastically. Relief was given by Congress to enable this Court to discharge its indispensable functions of interpreting the Constitution and preserving uniformity of decision among the eleven intermediate courts of appeals. Periodically since the Civil War—to speak only of recent times—the prodigal scope of the appellate jurisdiction of this Court brought more cases here than even the most competent tribunal could wisely and promptly adjudicate. Arrears became inevitable until, after a long legislative travail, the establishment in 1891 of intermediate appellate tribunals freed this Court of a large volume of business. By 1916, Congress had

to erect a further dam against access to this Court of litigation that already had been through two lower courts and was not of a nature calling for the judgment of the Supreme Court. Act of September 6, 1916, 39 Stat. 726. But the increase of business—the inevitable aftermath of the Great War and of renewed legislative activity—soon caught up with the meager relief afforded by the Act of 1916. The old evils of an overburdened docket reappeared. Absorption of the appellate jurisdiction of the Supreme Court by cases that should have gone to, or been left with, the circuit courts of appeals resulted in unjustifiable subordination of the national interests in the special keeping of this Court. To be sure, the situation was not as bad as that which called the circuit courts of appeals into being. In the eighties, three to four years elapsed between the docketing and the hearing of a case. But it was bad enough. In 1922, Chief Justice Taft reported to Congress that it took from fifteen to eighteen months for a case to reach argument.

The needless clog on the Court's proper business came from two sources. More than a dozen classes of cases could have a second review in the Supreme Court, as a matter of right, after an unsuccessful appeal in the circuit courts of appeals. With a single exception, all adjudications by the circuit courts of appeals were by the Act of 1925 made reviewable only by the discretionary writ of certiorari. But no less prolific a source of mischief in the practical application of the appellate jurisdiction of the Supreme Court prior to the Act of 1925, was the right to bring cases directly to this Court from the district courts. According to the figures submitted to Congress in support of the need for the 1925 legislation, one-sixth of the total business of the Supreme Court came directly from the district courts. (Hearing before a Subcommittee of the Committee on the Judiciary, United States Sen-

ate, 68th Cong., 1st Sess., on S. 2060 and S. 2061, pp. 32–33, 44–45.) Most of these cases presented phases of the general question now before us, namely, the right of a district court to adjudicate. The obvious remedy for this unwarranted direct review of courts of first instance was to shut off direct access from the district courts to this Court. That is exactly what was proposed. In the language of the chief spokesman before the judiciary Committees, "Section 238 as amended and reenacted in the bill would permit cases falling within four particular classes, and those only, to come from the district courts directly to the Supreme Court. . . . Apart from cases within these four classes, the bill provides that the immediate review of all decisions in the district courts shall be in the circuit courts of appeals. We regard this as the better course and calculated to promote the public interest." *Ibid.*, 33–34. This conception of "the public interest" was translated into law, except that in one additional class of cases direct review was allowed from the district courts to this Court. Suffice it to say that the five excepted categories are not in serious derogation of the wise requirement that review of action by the district courts belongs to the circuit courts of appeals. All five either involve litigation before a district court composed of three judges, or ordinarily touch matters of national concern.

The present power of this Court to review directly decisions of district courts must be determined by the restrictions Congress imposed in the Act of 1925. The language of that section is significant:

"A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following Acts or parts of Acts, *and not otherwise*. . . ." (43 Stat. 936, 938—italics provided.)

This case does not fall even remotely within any of these five Acts.[1] We have thus been given no appellate jurisdiction over this controversy, but by resort to so-called ancillary writs we are exercising appellate jurisdiction here. On principle, it is still as true as it was held to be in *In re Massachusetts, supra,* and *In re Glaser, supra,* that "in cases over which we possess neither original nor appellate jurisdiction we cannot grant prohibition or mandamus . . . as ancillary thereto." 197 U. S. 482, 488. This

[1] "SEC. 238. A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following Acts or parts of Acts, and not otherwise:

(1) Section 2 of the Act of February 11, 1903, 'to expedite the hearing and determination' of certain suits brought by the United States under the antitrust or interstate commerce laws, and so forth.

(2) The Act of March 2, 1907, 'providing for writs of error in certain instances in criminal cases' where the decision of the district court is adverse to the United States.

(3) An Act restricting the issuance of interlocutory injunctions to suspend the enforcement of the statute of a State or of an order made by an administrative board or commission created by and acting under the statute of a State, approved March 4, 1913, which Act is hereby amended by adding at the end thereof, '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.'

(4) So much of 'An Act making appropriations to supply urgent deficiencies in appropriations for the fiscal year 1913, and for other purposes,' approved October 22, 1913, as relates to the review of interlocutory and final judgments and decrees in suits to enforce, suspend, or set aside orders of the Interstate Commerce Commission other than for the payment of money.

(5) Section 316 of 'An Act to regulate interstate and foreign commerce in livestock, livestock products, dairy products, poultry, poultry products, and eggs, and for other purposes' approved August 15, 1921." 43 Stat. 936, 938.

does not imply that by indirection the Act of 1925 repealed what were originally §§ 13 and 14 of the Judiciary Act of 1789, on which, in their present form in the United States Code (28 U. S. C. §§ 342, 377, 451), the Court relies. The new distribution of appellate jurisdiction between the Supreme Court and the circuit courts of appeals did not repeal these old provisions. It does, however, call for restriction of their application in harmony with this new distribution. Ancillary writs are still available both for the circuit courts of appeals and this Court when they may in fact be ancillary to a main suit. See *Ex parte Kawato,* 316 U. S. 650, 317 U. S. 69, 71 (leave to file petition for writ of mandamus granted after such leave was denied by the Circuit Court of Appeals); and *Adams* v. *U. S. ex rel. McCann,* 317 U. S. 269. But when we cannot have jurisdiction in a case on appeal, no proceeding can be ancillary to it.

I am not unmindful that the hearings on the Judiciary Act of 1925 before the Committees of Congress are completely silent regarding the appellate jurisdiction of this Court through use of ancillary writs. But it would not be the first time in the history of judiciary legislation that eminent jurisdictional authorities and expert draftsmen, preoccupied with major problems in a large scheme for relieving this Court of undue business, have been forgetful of minor aspects of jurisdiction. For instance, it took six years to deal with the implications overlooked by Senator Evarts in using the phrase "infamous crimes" in the Act of 1891. (See *In re Claasen,* 140 U. S. 200, and H. Rep. No. 666, 54th Cong., 1st Sess., the letter of Chief Justice Fuller to Senator Hoar in 23 Cong. Rec. 3285–86, Report of Attorney General Olney for 1893, xxv, and the Act of January 20, 1897, 29 Stat. 492.) Legislation by even the most competent hands, like other forms of composition, is subject to the frailties of the imagination. Concentration on the basic aims of a reform like the Act

of 1925 inevitably overlooks lacunae and ambiguities which the future reveals and which the future must correct. The Act of 1925, despite its deft authorship, soon revealed such ambiguities. See the series of cases collected in *Phillips* v. *United States,* 312 U. S. 246, 250–51. They were resolved by faithful enforcement of the central purpose of the Act of February 13, 1925, which was "to keep within narrow confines our appellate docket," 312 U. S. at 250. For more than half a century the desire of Congress to cut down the appellate jurisdiction of this Court has been given effect in a variety of situations even though Congress did not adequately express such purpose. See, for instance, *McLish* v. *Roff,* 141 U. S. 661; *Robinson* v. *Caldwell,* 165 U. S. 359; *American Sugar Refining Co.* v. *New Orleans,* 181 U. S. 277; *American Security Co.* v. *District of Columbia,* 224 U. S. 491; *Inter-Island Steam Navigation Co.* v. *Ward,* 242 U. S. 1.

Finally, it is urged that practice since the Judiciary Act of 1925 sanctions the present assumption of jurisdiction. Cases like *Ex parte Northern Pacific Ry. Co.,* 280 U. S. 142, ordering a district judge to summon three judges to hear a suit under § 266 of the Judicial Code (28 U. S. C. § 380), must be put to one side. This is one of the excepted classes under the Act of 1925 in which direct review lies from a district court to the Supreme Court, and it is therefore an orthodox utilization of an ancillary writ, within the rule of *In re Massachusetts, supra.* Of all the other cases in which, since the Act of 1925, a writ was authorized to be issued, none is comparable to the circumstances of the present case. In one, *Ex parte Kawato, supra,* the appellate jurisdiction of this Court was invoked only after appellate jurisdiction was denied by a circuit court of appeals. Another, *Ex parte United States,* 287 U. S. 241, while in form a review of action by a district court, was in fact an independent suit by the United States, because no appeal as such lay from the refusal of

the district judge in that case to issue a bench warrant in denial of his duty. If the suit was a justiciable controversy through use of the ancillary writ, it was equally justiciable if regarded as an original suit by the United States. While, to be sure, it was not formally such, and while an ordinary suit by the United States to enforce an obligation against one of its citizens properly cannot be brought within the original jurisdiction of this Court, *Ex parte United States, supra,* was quite different. There the United States sought enforcement of a public duty for which no redress could be had in any other court. Therefore, the considerations which led this Court in *United States* v. *Texas,* 143 U. S. 621, to allow the United States to initiate an original suit in this Court, although the merely literal language of the Constitution precluded it (as the dissent in that case insisted), might have been equally potent to allow assumption of such jurisdiction in the circumstances of *Ex parte United States.* But, in any event, merely because there is no other available judicial relief is no reason for taking appellate jurisdiction. For some situations the only appropriate remedy is corrective legislation. Of the same nature were four other cases, three suits by Maryland and one by Colorado. *Maryland* v. *Soper* (1), 270 U. S. 9; *Maryland* v. *Soper* (2), 270 U. S. 36; *Maryland* v. *Soper* (3), 270 U. S. 44; *Colorado* v. *Symes,* 286 U. S. 510. These cases were not ordinary claims by a state against one of its citizens for which the state courts are the appropriate tribunals, see *California* v. *Southern Pacific Co.,* 157 U. S. 229. They were in effect suits by states against federal functionaries in situations in which the citizenship of these functionaries was irrelevant to the controversy. And so the considerations that made the controversies by Maryland and Colorado justiciable through ancillary writs might have been equally relevant in establishing justiciability for original suits in this Court under Article III, § 2. It is not without sig-

nificance that the *Maryland* v. *Soper* cases and *Colorado* v. *Symes,* which the Court now regards as precedents for the ruling in *Ex parte United States,* were not even referred to in the opinion in the latter case.

If *Ex parte United States,* the *Maryland* v. *Soper* cases, and *Colorado* v. *Symes, supra,* are not to be supported on the basis of their peculiar circumstances which might have justified the Court in assuming jurisdiction, they should be candidly regarded as deviations from the narrow limits within which our appellate jurisdiction should move. They would then belong with the occasional lapses which occur when technical questions of jurisdiction are not properly presented to the Court and consciously met. That leaves two other cases, *Los Angeles Brush Corp.* v. *James,* 272 U. S. 701, and *McCullough* v. *Cosgrave,* 309 U. S. 634. In the *Los Angeles Brush* case, the Court explicitly refused to invoke authority to issue an ancilliary writ inasmuch as the appellate jurisdiction of the controversy belonged to the Circuit Court of Appeals and not to this Court. The case concerned "the enforcement of the Equity Rules," 272 U. S. at 706, and the power which this Court recognized in that case was part of the duty imposed upon the Court by Congress to formulate and put in force the Equity Rules. The *McCullough* case was equally restricted. It merely followed the *Los Angeles Brush* case in enforcing the Equity Rules.

To be sure, *Ex parte United States, supra,* stated that later cases had qualified *In re Massachusetts* and *In re Glaser, supra.* But the cases that were avouched (*McClellan* v. *Carland,* 217 U. S. 268; *Ex parte Abdu,* 247 U. S. 27) in no wise called into question *In re Massachusetts* and *In re Glaser,* and the actual decisions left them intact. The authority of *In re Massachusetts, supra,* and *In re Glaser, supra,* was unquestioned as late as 1923, in *Magnum Co.* v. *Coty,* 262 U. S. 159, after, that is, the cases referred to in *Ex parte United States, supra,* as having

limited *In re Massachusetts* and *In re Glaser*. The essence of the Act of 1925 was curtailment of our appellate jurisdiction as a measure necessary for the effective discharge of the Court's functions. It is hardly consonant with this restrictive purpose of the Act of 1925 to enlarge the opportunities to come to this Court beyond the limit recognized and enforced under the Act of 1891—that there can be no ancillary jurisdiction where the litigation on the merits could not directly come here for review. In only one of the cases since the Act of 1925 in which the ancillary writs were invoked in situations in which this Court did not have direct appellate jurisdiction, did counsel call to the attention of this Court the bearing of the Act of 1925 upon the power to issue ancillary writs and the relevance of cases prior to that Act, and in no case did this Court apparently address itself to the problem now canvassed. Authority exercised *sub silentio* does not establish jurisdiction. Throughout its history it has been the firm policy of this Court not to recognize the exercise of jurisdiction under such circumstances as precedents when the question is first sharply brought for decision. *United States* v. *More*, 3 Cranch 159, 172; *Snow* v. *United States*, 118 U. S. 346, 354–55; *Cross* v. *Burke*, 146 U. S. 82, 87; *Louisville Trust Co.* v. *Knott*, 191 U. S. 225, 236; *Arant* v. *Lane*, 245 U. S. 166, 170.

In deciding whether to give a latitudinarian or a restricted scope to the appellate jurisdiction of this Court, the important factor is the number of instances in which applications for the exercise of the Court's jurisdiction has been or may be made, not the number of instances in which the jurisdiction has been exercised. And so it tells little that less than ten applications for mandamus have been granted since the Act of 1925. What is far more important is that merely for the first seven Terms after that Act not less than seventy-two applications for such writs were made. Every application consumes time in consideration, whether eventually granted or denied.

Had the Court jurisdiction, this case would furnish no occasion for its exercise. On whatever technical basis of jurisdiction the availability of these writs may have been founded, their use has been reserved for very special circumstances. However varying the language of justification, these ancillary writs have been issued only to further some imperative claim of justice. In the present case, the upshot of these proceedings is to circumvent the intermediate appellate court as the natural and normal resort for relief from a claim of want of jurisdiction in the district court.

No palpable exigency either of national or international import is made manifest for seeking this extraordinary relief here. For all practical purposes, the litigation has ceased to concern a vessel belonging to a sister republic. While, to be sure, the legal issues turn on the claim of sovereign immunity by Peru in a vessel libeled in an American harbor, the ship has long since been released and the actual stake of the controversy is a bond. Thus the case for our intervention, to the disregard of the Circuit Court of Appeals, cannot be put higher than the propriety of vindicating the dignity of a friendly foreign state.

But surely this is to introduce the formal elegancies of diplomacy into the severe business of securing legal rights through the judicial machinery normally adapted for the purpose. After all, if the framers of the Constitution had deemed litigation in this Court alone to comport with appropriate regard for the dignity of a friendly foreign state, they would have given this Court original jurisdiction in such cases. If our nearest neighbors wished to litigate in this country, they could not bring suit in this Court. See *Monaco* v. *Mississippi*, 292 U. S. 313. It is not deemed incompatible with the dignity of the United States itself to begin suit in a district court, have the litigation proceed to the circuit court of appeals, and only

by our leave reach this Court. See, *e. g., United States* v. *California,* 297 U. S. 175. Litigation involving the interests of the United States in ships owned by it has twice recently gone through this normal process, and it will not be thought that the dignity of the United States was thereby compromised. Indeed, under the arrangements made by Congress in 1925, measures deemed indispensable for the conduct of the war could be nullified by district courts and could not come here for review until appeal was duly taken to the circuit courts of appeals. To be sure, Congress has wisely provided that once such an appeal is filed this Court in its discretion may bring the appeal here. See, *e. g., White* v. *Mechanics Securities Corp.,* 269 U. S. 283; *Norman* v. *B. & O. R. Co.,* 294 U. S. 240, 294–95; *Ex parte Quirin,* 317 U. S. 1, 19–20. To require a foreign state to seek relief in an orderly fashion through the circuit court of appeals can imply an indifference to the dignity of a sister nation only on the assumption that circuit courts of appeals are not courts of great authority. Our federal judicial system presupposes the contrary. Certainly this Court should in every possible way attribute to these courts a prestige which invites reliance for the burdens of appellate review except in those cases, relatively few, in which this Court is called upon to adjudicate constitutional issues or other questions of national importance.

To remit a controversy like this to the circuit court of appeals where it properly belongs is not to be indifferent to claims of importance but to be uncompromising in safeguarding the conditions which alone will enable this Court to discharge well the duties entrusted exclusively to us. The tremendous and delicate problems which call for the judgment of the nation's ultimate tribunal require the utmost conservation of time and energy even for the ablest judges. Listening to arguments and studying records and briefs constitute only a fraction of what goes into the

judicial process. For one thing, as the present law reports compared with those of even a generation ago bear ample testimony, the types of cases that now come before the Court to a considerable extent require study of materials outside the technical law books. But more important, the judgments of this Court are collective judgments. Such judgments presuppose ample time and freshness of mind for private study and reflection in preparation for discussions in Conference. Without adequate study there cannot be adequate reflection; without adequate reflection there cannot be adequate discussion; without adequate discussion there cannot be that mature and fruitful interchange of minds which is indispensable to wise decisions and luminous opinions.

It is therefore imperative that the docket of the Court be kept down, that no case be taken which does not rise to the significance of inescapability for the responsibility entrusted to this Court. Every case that is allowed to come here which, judged by these standards, may well be left either to the state courts or to the circuit courts of appeals, makes inroads upon thought and energy which properly belong to the limited number of cases which only this Court can adjudicate. Even a judge of such unique gifts and experience as Mr. Justice Holmes felt at the very height of his powers, as we now know, the whip of undue pressure in his work. One case is not just one case more, and does not stop with being just one more case. Chief Justice Taft was not the last judge who, as he said of himself, "having a kind heart, I am inclined to grant probably more [discretionary reviews] than is wise." (Hearing before the Committee on the Judiciary, House of Representatives, 68th Cong., 2d Sess., on H. R. 8206, p. 27.)

In a case like this, we should deny our power to exercise jurisdiction. But, in any event, we should refuse to exercise it. By such refusal we would discourage future

applications of a similar kind, and thereby enforce those rigorous standards in this Court's judicial administration which alone will give us the freshness and vigor of thought and spirit that are indispensable for wise decisions in the causes committed to us.

MR. JUSTICE REED is of the opinion that this Court has jurisdiction to grant the writ requested, *Ex parte United States,* 287 U. S. 241, but concurs in this dissent on the ground that application for the writ sought should have been made first to the Circuit Court of Appeals.

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

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

No. 22. Argued November 10, 12, 1942.—Decided April 5, 1943.

1. Where a corporation having but two classes of stock, voting common and non-voting common, distributes to all the shareholders of both classes, in proportion to their respective holdings, a dividend of non-voting common, the fair market value of which is its par value, and which is backed by earnings and profits available for distribution in excess of its total value, neither the voting rights of the voting common nor its right to share in dividends or in liquidation being altered by the distribution, so that the relations previously existing between all the shareholders, or between the particular shareholder and the corporation, are in no wise disturbed by the distribution, the dividend is not subject to income tax. Const., Amendment XVI; Revenue Act of 1936, § 115 (f) (1). P. 606.
2. Where the sole owner of the common stock of a corporation which had common stock only, received a dividend of non-voting preferred stock authorized by a charter amendment and the value of which

*Together with No. 66, *Strassburger* v. *Commissioner of Internal Revenue,* on writ of certiorari, 316 U. S. 656, to the Circuit Court of Appeals for the Second Circuit.

was exceeded by earnings of the corporation available for dividends without changing the shareholder's interest in the corporation or in its net value, the dividend is not taxable income. Const., Amendment XVI; Revenue Act of 1936, § 115 (f) (1). P. 606.

No. 22, 122 F. 2d 973, affirmed.

No. 66, 124 F. 2d 315, reversed.

REVIEW by certiorari, 316 U. S. 656, of two judgments, the one reversing a ruling which sustained a deficiency assessment of income, 42 B. T. A. 484, and the other affirming the like ruling in another case.

Mr. Leo Brady for petitioner in No. 66.

Mr. Arnold Raum, with whom *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key* and *Bernard Chertcoff* were on the brief, for the Commissioner of Internal Revenue.

Mr. Charles E. McCulloch for respondent in No. 22.

Messrs. Nathan Bilder, Walter J. Bilder, and *Erwin N. Griswold,* and *Mr. John E. Hughes* filed briefs as *amici curiae* in No. 66, urging reversal.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

Certiorari was granted because the decisions below in the two cases conflict. They arise under § 115 (f) (1) of the Revenue Act of 1936:[1]

"A distribution made by a corporation to its shareholders in its stock or in rights to acquire its stock shall not be treated as a dividend to the extent that it does not constitute income to the shareholder within the meaning of the Sixteenth Amendment to the Constitution."

[1] c. 690, 49 Stat. 1648, 1688.

No. 22

The respondent owned voting common stock in an Oregon corporation which paid a ten per cent stock dividend in shares of non-voting common stock. The company had outstanding but two classes of stock: voting common, of a par value of $397,471.25; and non-voting common, of a par value of $819,333.06. The dividend was of non-voting common of a par of $121,680.43 and was distributed to holders of the voting and non-voting common. The fair market value of the stock distributed as a dividend was its par value, and the earnings or profits available for distribution were in excess of its total value. Neither the voting rights of the voting common, nor its right to share in dividends and in liquidation, was altered by the distribution.

The respondent, who owned no non-voting common, received 200 shares of that class of stock. In his return for 1936, he did not report the dividend as income. The Commissioner determined a deficiency by including the value of the dividend as income, and the Board of Tax Appeals sustained him.[2] The Circuit Court of Appeals reversed, holding that the dividend was not constitutionally the subject of income tax if it was distributed to holders of both classes of outstanding stock in proportion to their respective holdings. It accordingly remanded the case to the Board to find the facts and to apply the rule announced.[3]

No. 66

Petitioner owned 200 shares of common,—the entire stock of a corporation. By charter amendment the creation of an issue of 500 shares of 7% Cumulative Non-

[2] 42 B. T. A. 484.

[3] 122 F. 2d 973.

Voting Preferred Stock, of $100 par value, was authorized. The directors voted a distribution to stockholders of $5,000 par of the preferred stock; and the petitioner, as sole stockholder, received fifty shares as a stock dividend. The earnings available for dividends were in excess of the value of this stock. Petitioner still holds the preferred stock and no dividends have been paid upon it. The petitioner failed to return the stock dividend as income, the respondent determined a deficiency, and the Board of Tax Appeals affirmed his action. The Circuit of Appeals affirmed the Board's decision.[4]

We think the judgment in No. 22 was right and that in No. 66 erroneous. The cases are ruled by *Helvering* v. *Griffiths, ante,* p. 371. While the petitioner in No. 66 received a dividend in preferred stock, the distribution brought about no change whatever in his interest in the corporation. Both before and after the event he owned exactly the same interest in the net value of the corporation as before. At both times he owned it all and retained all the incidents of ownership he had enjoyed before.

In No. 22, the respondent insists that the distribution of the dividend in nowise disturbed the relationship previously existing amongst all the stockholders, or that previously existing between the respondent and the corporation. The court below has held that, if this is true, the dividend did not constitute income.

We think *Koshland* v. *Helvering,* 298 U. S. 441, distinguishable. That was a case where there were both preferred and common stockholders, and where a dividend in common was paid on the preferred. We held, in the circumstances there disclosed, that the dividend was income, but we did not hold that any change whatsoever in the character of the shares issued as dividends resulted in

[4] 124 F. 2d 315.

the receipt of income. On the contrary, the decision was that, to render the dividend taxable as income, there must be a change brought about by the issue of shares as a dividend whereby the proportional interest of the stockholder after the distribution was essentially different from his former interest.

No. 22 affirmed.
No. 66 reversed.

MR. JUSTICE RUTLEDGE took no part in the consideration or decision of these cases.

MR. JUSTICE REED, MR. JUSTICE FRANKFURTER, and MR. JUSTICE JACKSON dissent from each judgment. They are of opinion that *Koshland* v. *Helvering*, 298 U. S. 441, requires contrary conclusions.

FIDELITY ASSURANCE ASSOCIATION ET AL. *v.* SIMS, AUDITOR OF THE STATE OF WEST VIRGINIA, ET AL.

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

No. 319. Argued February 9, 10, 1943.—Decided April 5, 1943.

1. In the light of the character and history of the business of the insolvent corporation in this case, *held* that its petition for reorganization under Chapter X of the Bankruptcy Act should have been dismissed as not filed in "good faith" within the meaning of § 146 (3), (4), since it was unreasonable to expect that the company could be reorganized as a going concern, and since the interests of creditors would be best subserved in prior proceedings pending in state courts. Pp. 618, 619.
2. Chapter X of the Bankruptcy Act may not be availed of merely for the purpose of liquidation. P. 621.

129 F. 2d 442, affirmed.

CERTIORARI, 317 U. S. 614, to review the reversal of an order of the District Court, 42 F. Supp. 973, approving a

plan of reorganization under Chapter X of the Bankruptcy Act.

Mr. Homer A. Holt, with whom *Messrs. James R. Fleming, John V. Ray,* and *T. C. Townsend* were on the brief, for petitioners.

Mr. John F. Davis, with whom *Solicitor General Fahy* and *Messrs. Richard S. Salant, Homer Kripke,* and *Justin N. Reinhardt* were on the brief, for the Securities & Exchange Commission; *Mr. H. Vernon Eney,* with whom *Mr. Guy B. Brown* was on the brief, for John B. Gontrum, Insurance Commissioner of Maryland; *Mr. Rickard H. Lauritzen,* Assistant Attorney General of Wisconsin, with whom *Messrs. James Ward Rector,* Deputy Attorney General, *Carl J. Stephens,* and *Ben C. Buckingham* were on the brief, for the Banking Commission of Wisconsin et al.; *Mr. Fyke Farmer,* with whom *Messrs. Nat Tipton,* Assistant Attorney General of Tennessee, *Weldon B. White,* and *Rudolph K. Schurr* were on the brief, for L. H. Brooks, Trustee, et al.; and *Mr. J. Campbell Palmer, III,* with whom *Mr. Ira J. Partlow* was on the brief, for Edgar B. Sims, Auditor of West Virginia, et al.,—respondents.

Mr. Harry L. Deibel filed a brief on behalf of Victor Salkeld et al., as *amici curiae,* urging reversal. A joint brief as *amici curiae* was filed on behalf of the States and state officials of Alabama, California, Delaware, Illinois, Indiana, Kansas, Kentucky, Louisiana, Nebraska, North Dakota, Ohio, Oregon, Texas, Utah, and Washington, and the state court receiver of Virginia, urging affirmance.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

This case presents important questions concerning the construction of Chapter X of the Bankruptcy Act.[1]

[1] Act of June 22, 1938, 52 Stat. 840, 883; 11 U. S. C. §§ 501–676, inclusive.

Many states of the Union are interested because of the asserted incidence of its provisions upon state laws and rights thereby created. A number of state officers are parties.

Fidelity Assurance Association, a West Virginia corporation, filed its petition for reorganization in the District Court for Southern West Virginia. The Judge made an order approving the petition as properly filed. He also entered orders enjoining state officials from dealing with property held by them.[2]

State banking and insurance commissioners and state court receivers answered, asserting that the debtor could not avail itself of the Act because it was an insurance company,[3] and that, in any event, the petition was not filed in good faith, as the phrase is defined in § 146 (3) (4) of Chapter X.[4] The Securities and Exchange Commission intervened at the request of the District Court. After trial of the issues, the court formally approved the petition and overruled the motions to rescind the decrees granting injunctions.[5] The Circuit Court of Appeals reversed.[6]

The debtor was organized April 11, 1911, under the name of Fidelity Investment and Loan Association. Its corporate purposes were enlarged in 1912 to include the soliciting and receiving of payments on annuity contracts. Thereby it became subject to the provisions of

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[2] An appeal was taken from the District Court's refusal to rescind the orders. The Circuit Court of Appeals refused to disturb them at that stage of the proceeding. *Sims* v. *Central Trust Co.*, 123 F. 2d 89.

[3] Act of July 1, 1898, c. 541, § 4, 30 Stat. 547, as amended, 11 U. S. C. § 22.

[4] 11 U. S. C. § 546.

[5] 42 F. Supp. 973.

[6] 129 F. 2d 442.

Art. 9 of Ch. 33 of the Code of West Virginia,[7] relating to the selling of annuity contracts and, as therein provided, to the supervision of the Auditor, as ex-officio Insurance Commissioner of the State.

From December 1912 to the close of 1940, the company's business was the selling of investment contracts and for this purpose it was licensed in many states. It altered its contracts from time to time, but in general they consisted of certificates evidencing the agreement of the purchaser to make specified periodic payments and the company's agreement that upon the expiration of a stipulated term it would return to him in instalments a sum designated as the face amount, or pay a lump sum less than the face amount.

During the six years preceding December 30, 1940, the debtor sold a contract having a collateral insurance feature provided by a blanket policy procured by Fidelity from Lincoln National Life Insurance Company. Approximately seventy-five per cent of the contracts issued after 1934 contained this feature.

It will be seen that the business was essentially the conduct of a compulsory savings plan. The interest paid a certificate holder was at a low rate and the penalty for failure to keep a certificate alive was heavy. The expense of selling the contracts was inordinately high and, in spite of a large volume of sales, the company was constantly falling behind and suffering serious losses.

The present Insurance Commissioner of West Virginia took office in 1933. It was his duty to require and approve the deposit with the State Treasurer of bonds and securities to be held in trust for the benefit of the company's West Virginia contract holders to an amount equal

[7] Michie's W. Va. Code 1937, p. 1204 ff. This Article was repealed by chapter 46, § 12, Acts of West Virginia, 1941, effective ninety days from March 8, 1941, but this fact is irrelevant to any issue in this case.

to the cash liability to them; to require a similar deposit in trust for the benefit of holders located in other states to the extent that the laws of such states did not provide for a deposit equal to, or greater than, that called for by the laws of West Virginia. Shortly after taking office, the Commissioner discovered that the company was insolvent. There is a long history of negotiations and requirements, extending almost to the time of filing the petition, in an effort to restore it to a solvent condition.

The company was at one time licensed in twenty-nine states, each of which had laws regulating its business. Fifteen required a deposit of approved investment obligations with some state official to secure payment of outstanding contracts held by residents; the remainder had no such requirement, but the contracts sold in these states were secured by the deposit made with West Virginia.[8] As of the date of the filing of the debtor's petition, the deposits made with various states, including West Virginia, amounted, according to the debtor's figures, to $20,056,680.27, against a net reserve liability of $24,221,651.36. In addition, the company had securities, not deposited anywhere, valued at $556,467.51, most of which were ineligible for deposit under the laws of any state; and $500,000 in cash.

Each of the series of contracts sold by Fidelity embodied provisions for the creation and maintenance of a reserve fund. All of the contracts provided that the reserve fund maintained by the company should be invested in approved securities and deposited in trust as required by the laws of West Virginia. Securities purchased with the moneys paid by the contract holders were deposited with the Treasurer of West Virginia and officials of other states in compliance with their respective laws, but no effective

[8] The security afforded by these laws was stressed by sales agents and was effective in the procurement of contracts.

effort was made to designate the source of the funds with which securities were purchased so as to identify the latter as belonging to the reserve of any series, nor did the state authorities make any such allocation. The securities on deposit with the states were at all times treated by the debtor, and state authorities, as securing all obligations to contract holders in the state where each deposit was made, and reports by the company to the states respecting total liabilities failed to show such liabilities by funds or series. There were certificate holders in all forty-eight states, the District of Columbia, and foreign countries.

December 14, 1938, the Securities and Exchange Commission sought an injunction in a federal court, alleging the company was engaged in acts and practices violative of the fraud provisions of § 17 (a) of the Securities Act of 1933.[9] This suit resulted in an injunction; and was followed by another for appointment of a receiver in a federal court in West Virginia, which was dismissed.[10]

Prior to 1938 the debtor had made efforts to obtain fresh capital to be used in reorganizing its business. After 1938 the effort was continuous, but no capital was forthcoming.

Despite enormous sales,[11] the company could not attain a solvent position. Moreover, the publicity ensuing the two suits resulted in the surrender of many contracts, the temporary suspension of the sale of new certificates, and a serious diminution of sales when activity was resumed.[12]

Pursuant to the Public Utility Holding Company Act of 1935,[13] the Securities and Exchange Commission con-

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[9] Act of May 27, 1933, c. 38, Tit. I, § 17, 48 Stat. 84, 15 U. S. C. § 77q.

[10] *McCammon* v. *Fidelity Investment Assn.*, 26 F. Supp. 117, affirmed *Hutchinson* v. *Fidelity Investment Assn.*, 106 F. 2d 431.

[11] The gross business written in 1938 was $52,000,000.

[12] Sales in 1940 were $12,000,000.

[13] Act of August 26, 1935, c. 687, Tit. I, § 30, 49 Stat. 837, 15 U. S. C. § 79z–4.

ducted an investigation and reported its findings respecting Fidelity's business and other matters to Congress on March 13, 1940. As a result, the Investment Company Act of August 22, 1940,[14] was adopted. Fidelity's officers and directors realized that the company could not meet the statutory requirements and survive. They therefore cast about for some other business to which the corporate resources might be devoted. They hit upon life insurance.

Accordingly, on December 31, 1940, the debtor amended its charter. The amendment changed its name to Fidelity Assurance Association, eliminated the existing corporate powers and purposes, and adopted as the corporate purpose "to issue insurance upon the lives of persons and every insurance appertaining thereto and connected therewith, and to grant, purchase, and dispose of annuities." In January 1941, by charter amendment, the authorized capital stock was altered in order to qualify the company to transact a life insurance business in West Virginia and elsewhere. The company also registered under § 8a of the Investment Company Act, *supra,* so that it might continue to service outstanding contracts. The Insurance Commissioner of West Virginia issued a license for the conduct of an insurance business, but with the understanding that no such business should be written until the company's affairs had been put into satisfactory order. Notwithstanding this arrangement, the company, by written negotiations, procured some 9,800 of its certificate holders to accept an amendment of their outstanding certificates providing an insurance obligation on the part of the company.

At the instance of the Insurance Commissioner, the Attorney General of West Virginia, on April 11, 1941, instituted proceedings for the appointment of a receiver in the

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[14] c. 686, 54 Stat. 789, 15 U. S. C. § 80a–1 *et seq.*

Circuit Court of Kanawha County. The company entered an appearance but interposed no answer or objection. The court appointed receivers who took over the cash and undeposited securities but did not essay to obtain possession of the assets on deposit with the Treasurer of West Virginia or with officials of other states. The authorities of the various states were notified of the pendency of this suit. Thereafter, proceedings were instituted or steps taken by state officers, pursuant to state law, for the liquidation of the company's obligations to local certificate holders in Wisconsin, Iowa, Ohio, Illinois, Tennessee, Missouri, Indiana, Kentucky, Maryland, and Pennsylvania.

The respondents, other than Securities and Exchange Commission, contended below, and urge here, that the petition should be dismissed, since (1) the debtor is an insurance company exempted from the provisions of the Bankruptcy Act, (2) the petition was not filed in good faith. The debtor, the trustee appointed under Chapter X, and the Commission, successfully opposed these contentions in the District Court. The Circuit Court of Appeals held with the respondents on both grounds. We find it unnecessary to consider or decide whether, at the date of filing, the debtor was an insurance company within the meaning of the Act, for we think the Circuit Court of Appeals was right in holding the petition not filed in good faith as the phrase is defined in § 146 (3) and (4).

Section 144 [15] requires that if the judge is not "satisfied" that the petition "has been filed in good faith" he shall dismiss it. The relevant portions of § 146 [16] are that "a petition shall be deemed not to be filed in good faith if . . . (3) it is unreasonable to expect that a plan of reorganization can be effected; or (4) a prior proceeding is

[15] 11 U. S. C. § 544.

[16] 11 U. S. C. § 546.

pending in any court and it appears that the interests of creditors and stockholders would be best subserved in such prior proceeding."

As the court below has said, in applying the statutory test the situation should be viewed realistically. If this be done, we think the rejection by the court below of the claim of the debtor and its trustee that it can be reorganized as a going concern must be affirmed. In appraising the soundness of this claim, certain facts additional to those already noticed must be kept in mind. On April 10, 1941, there were 87,999 contracts outstanding for a face amount of $181,948,026.70. At that time, liabilities exceeded assets, on the company's showing, by $2,500,000. The business written in 1940 had shrunk to 23% of that written in 1938. The company had been losing money at the rate of $250,000 per annum. Its sale of investment certificates had ceased December 30, 1940, and, even if it had been possible to resume this activity in compliance with the requirements of the Investment Company Act, the reëstablishment of the sales force would have cost $500,000.

In the light of all relevant facts, it seems clear that Fidelity cannot be reorganized for the purpose of conducting its old business of selling investment certificates. Conviction that this was so led its managers to attempt to alter its corporate purposes to those of a life insurance company. The District Judge said: "It is true that the broad picture developed by the testimony at the hearing does not present a very favorable view with respect to the rehabilitation and continued operation of the debtor as a face amount certificate company." And he added: "It is extremely doubtful whether, in view of unsettled economic conditions and the critical international situation, the Fidelity plan would any longer appeal to a large public; but it is not impossible; and it is not the duty of the court to decide for the public that investors will not or should not buy these contracts in the future."

There is no prospect that the debtor can be reorganized as an insurance company, and the District Judge did not find that it could.

The petitioners say: "Upon this record, can it be said that it is unreasonable to expect that some insurance or investment company can be found to take over or buy the assets of Fidelity under a contract for the benefit of the Fidelity contract holders, to issue them investment certificates or insurance policies, of one or more kinds of greater value than the dividends to such contract holders through the liquidation of Fidelity would buy?"

The court below properly concluded that "the possibility that thousands of contract holders could be persuaded to modify their contracts and scale down their claims [17] to enable the company to go on is so remote as to exist only in the imagination."

Petitioners and Securities and Exchange Commission urge, however, that Chapter X may be employed to accomplish a slow and orderly liquidation which they say is imperative in the interest of all creditors. The District Court so held.

It must be remembered that Fidelity is admittedly insolvent and no one suggests there is any equity in its stock; that there is one greatly preponderant class of creditors,—certificate holders—all having security for their claims on one or more deposits with state authorities, and all having unsecured claims against the unpledged assets of the debtor. The necessity for decision as to the relative rights of these classes in pledged assets may present difficult questions of distribution, but has little, if any, bearing upon the method of turning the debtor's assets into money.

The deposited securities are generally readily marketable at favorable prices. They are scattered through

[17] The claims average less than $273 each.

fifteen states, in hands of public officials whose duty it is to liquidate them on terms most favorable to those for whose protection they stand pledged. The suggestion that these quasi-trustees will force the securities on the market without regard to its ability to absorb them, to the destruction of their beneficiaries' security, is inadmissible, and, in addition, is contrary to what occurred after the institution of the West Virginia receivership. There is no foundation for the position that the so-called reorganization should take the form of the creation of a new corporation to which all these securities would be transferred for conversion into cash, particularly as the advocates of such a project admit that the application of the security afforded classes of certificate holders according to state law cannot be avoided in any distribution of assets.

It is urged that a plan of liquidation may constitute a reorganization under Chapter X, and decisions are cited to that point,[18] but an examination of them will demonstrate that in none save where the corporate purpose of the debtor was, in effect, holding and liquidating securities was the plan such as is proposed here. Under the facts of this case, the suggested plan is but an alternative for ordinary bankruptcy, without any readjustment of the rights of creditors and stockholders *inter se*, and this fact serves to distinguish the remaining cases on which reliance is placed.

We conclude that, in this aspect, good faith, in the statutory sense, is lacking, since no such reorganization as the statute was intended to accomplish is reasonably to be expected.

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[18] *In re Central Funding Corp.*, 75 F. 2d 256; *In re Mortgage Securities Corp.*, 75 F. 2d 261; *Continental Ins. Co.* v. *Louisiana Oil Rfg. Corp.*, 89 F. 2d 333; *R. L. Witters Associates* v. *Ebsary Gypsum Co.*, 93 F. 2d 746; *In re Porto Rican American Tobacco Co.*, 112 F. 2d 655.

In the second place, we hold that the interests of creditors would be best subserved in the pending prior proceedings in West Virginia and other states. The court below was of this opinion for these reasons: It appears unlikely that there will be any surplus after payment of local claimants in any state other than West Virginia; state law must govern the distribution of the respective deposits; creditors can as readily present claims against the surplus of the West Virginia deposit in the West Virginia court as in the federal court in this proceeding.

The Securities and Exchange Commission insists that the Chapter X proceeding is more advantageous as affording opportunity for impartial investigation of wrongdoing by company officers, and the solution of problems of marshalling and distribution. If, as the court below held, nothing is to be accomplished but the liquidation of Fidelity, it is difficult to see why that process and consequent distribution of the proceeds should be held up by the search for causes of action against officers and directors. Nor is any convincing showing made that such investigation cannot, or will not, be made and availed of by the state court receivers. Moreover, if Fidelity is not an insurance company, it could have been put into ordinary bankruptcy, orderly liquidation accomplished, and impartial investigation made by a trustee elected by the creditors.

There are no true problems of marshalling presented. Creditors in the various states will unquestionably go first against the local deposits. They may, or may not, be paid in full from those funds. They will have claims against the surplus of the West Virginia fund for any deficiency. On the other hand, a surplus in a state fund after satisfaction of local creditors, will be added to the surplus fund in West Virginia for the benefit of all having claims against it. Rights against local deposits will be adjudicated by the courts of the states, near the homes

of the beneficiaries and at a minimum of inconvenience, delay, and expense. The advantages of bringing all these funds to the District Court for administration in conformity to diverse state law, and compelling claimants to come there to assert their rights, are not apparent.

It is said, however, that Fidelity agreed to segregate the reserve fund of each series, and that the holders of certificates in any series are entitled to have the securities purchased for the reserve of that series traced and set apart for their benefit, and that this can be done only in the present proceeding by bringing all the funds under a single administration.

Without reciting the facts in detail, it is enough to say that, while the different reserve funds were separately set up on the books of the company, they were, for the greater part of the period in question, kept in a single bank account, and the securities purchased for the various reserve funds were not earmarked as such. Moreover, for the most part, securities deposited with state authorities were not, at the time of the deposit, designated as belonging to the reserve fund for any series of contracts. In some instances, designations of them were made subsequent to their deposit. In addition, it is to be noted that under the law of West Virginia, and that of other states having deposits, the securities deposited are made a common fund for the protection of all outstanding contracts, and the certificate holders were advised by the company in its literature that it proposed to deposit reserve fund securities in accordance with the law of the states. The situation discloses so many difficulties of law and fact as to render segregation for purposes of distribution of the avails of the securities improbable. And the smallness of the average amount due certificate holders indicates that the expense of the effort, if successful, would, in the end, prove more detrimental to a claimant than foregoing the trifling advantage of a reallocation of securities to the respective reserve funds.

It was suggested at the bar that, even if liquidation is all that can be hoped, this would be better managed by a single bankruptcy court than in several separate proceedings. The difficulty with the suggestion is that Congress did not intend resort to Chapter X to be had for the mere purpose of liquidation. The scheme of the chapter precludes any such conclusion. The mandate of § 144 is clear that unless the judge is satisfied the petition was filed in good faith he must dismiss it. Under the predecessor of Chapter X—§ 77B of the Bankruptcy Act—the district judge was given authority, by subsection (c) (8),[19] under certain circumstances, to "direct the estate to be liquidated, or direct the trustees to liquidate the estate . . ." In Chapter X, on the other hand, § 236 (2) [20] provides that if no plan is approved or accepted, or if it is not consummated, the judge may, after hearing all persons in interest, adjudge the debtor a bankrupt or dismiss the proceeding, as he may decide is in the interest of creditors and stockholders. Thus the statute does not contemplate a liquidation in a Chapter X proceeding but a liquidation in ordinary bankruptcy or a dismissal outright.

If the liquidation of Fidelity's affairs in bankruptcy had been proposed at the start, the petition in bankruptcy could not have been filed in the District Court for the Southern District of West Virginia, in which this proceeding is pending. A Chapter X proceeding may, under § 128,[21] be initiated either at the principal place of business of the corporation or where it has its principal assets. The present proceeding was initiated in the Southern District on the ground that the principal assets of the company are located at Charleston in that district, in the possession of the State Treasurer. Under § 2 of the Bank-

[19] 11 U. S. C. § 207 (c) (8).
[20] 11 U. S. C. § 636 (2).
[21] 11 U. S. C. § 528.

ruptcy Act,[22] an ordinary bankruptcy may be initiated only at the corporation's principal place of business, which is Wheeling, in the Northern District of West Virginia.

Congress did not intend a Chapter X case to be turned into a liquidation proceeding at the outset, but intended the litigation to become a straight bankruptcy only after the failure to consummate a plan, and meant to limit the parties to their remedy in ordinary bankruptcy in all other cases. It would, therefore, be a perversion of the Congressional intent to treat the present as a liquidation proceeding, since the rights of persons having liens or security pledged for their claims differ widely in the two sorts of bankruptcy.

The judgment is

Affirmed.

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

MYERS, TRUSTEE, *v.* MATLEY.

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

No. 540. Argued March 5, 1943.—Decided April 5, 1943.

1. Under § 70 (a) of the Bankruptcy Act, originally and as amended in 1938, a homestead is exempt in bankruptcy if, under the state law, it was exempt from levy and sale when the petition in bankruptcy was filed. P. 625.
2. *White* v. *Stump,* 266 U. S. 310, distinguished. P. 625.
3. Historically, and under the theory of the present Act, bankruptcy has the force and effect of the levy of an execution for the benefit of creditors to insure an equitable distribution amongst them of the bankrupt's assets. The trustee is vested not only with the title

[22] 11 U. S. C. § 11.

of the bankrupt but clothed with the right of an execution creditor with a levy on the property which passes into the trustee's custody. P. 627.

4. The law of Nevada entitles a debtor to his homestead exemption, if the selection of the property and filing for record of the declaration of intention occur at any time before actual judicial sale. P. 627.

130 F. 2d 775, affirmed.

CERTIORARI, 317 U. S. 621, to review the affirmance of a judgment of the District Court, 47 F. Supp. 558, sustaining a claim of homestead exemption and overruling the referee's denial of the claim.

Mr. T. L. Withers, with whom *Mr. Harlan L. Heward* was on the brief, for petitioner.

Mr. William M. Kearney submitted for respondent.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The petitioner's assertion that the court below misapplied § 70 (a) of the Bankruptcy Act, as amended,[1] in contravention of a decision of this court,[2] and contrary to the law of the State of Nevada, as well as a division of opinion of the judges in the court below, moved us to grant certiorari.

October 24, 1940, a petition in bankruptcy was filed against Marshall R. Matley, the respondent's husband. He appeared and consented to an adjudication, which was entered the same day. November 20, 1940, the respondent filed with the Recorder of Washoe County, Nevada, her declaration claiming as a homestead a tract of land in Reno, Nevada, listed in her husband's bankruptcy schedules. November 27, 1940, she filed in the

[1] Act of July 1, 1898, c. 541, § 70, 30 Stat. 565; Act of June 22, 1938, c. 575, § 1, 52 Stat. 879; 11 U. S. C. § 110.

[2] *White* v. *Stump,* 266 U. S. 310.

bankruptcy court a petition claiming the land as exempt. The referee denied her claim, the District Court reversed the referee, and the Circuit Court of Appeals affirmed its decision.[3] The real estate in question, acquired by the respondent and her husband while married, was community property, on which a residence was built and occupied by the couple as a home. While they were absent from it at times, they always considered it their home and intended to return to it. Although they were separated in 1940, the respondent was residing on the land when the petition in bankruptcy was filed. A divorce action was pending but was not concluded until May 1941, when the respondent was granted a divorce and the Reno residence was awarded her as her sole property.

The petitioner asserts that the property cannot be set apart to the respondent as exempt, since her homestead declaration was not filed, as required by state law, until after entry of the petition in bankruptcy.

Section 70 (a) originally provided that the trustee shall be vested, by operation of law, with the title of the bankrupt as of the date he was adjudged a bankrupt, "except in so far as it is to property which is exempt, . . ." The phraseology was altered by the amendment of 1938 to except "property which is held to be exempt, . . ." Section 6 of the Bankruptcy Act[4] declares that the provisions of the Act shall not affect the allowance to bankrupts of the exemptions "which are prescribed by the State laws in force at the time of the filing of the petition" in the state where the bankrupt has had his domicile. The trustee, as to all property in possession and under the control of the bankrupt at the date of bankruptcy, is deemed vested, as of that date, with all the rights and remedies of a creditor then holding a lien on the prop-

[3] 130 F. 2d 775.

[4] 30 Stat. 548, 11 U. S. C. § 24.

erty by legal or equitable proceedings, whether or not such a creditor actually exists.[5] An adjudication in bankruptcy is not the equivalent of a judicial sale, nor is the trustee given the rights of a purchaser at such a sale.

The question thus arises whether the respondent's right of homestead under Nevada law, secured by her filed declaration, prevails against the right and title of the trustee. The court below so held and we think its judgment was right.

1. We conclude that the new phraseology in the amendment of § 70 (a) does not alter the principles applicable to the exemption of homestead property in bankruptcy. On the face of the legislation, the intent of Congress was merely to clarify the meaning of the section. We are referred to no legislative history indicating that the alteration was intended to work a change of substance. Under the amendment, as under the original provision, a homestead is exempt if, under the state law, it would be held to be exempt.

2. *White* v. *Stump, supra,* involved a homestead exemption claimed pursuant to the law of Idaho, under which the declaration of homestead was required to be executed and acknowledged, like a conveyance of real property, and filed for record. The exemption arose when the declaration was filed and not before. Up to that time, the land remained subject to execution and attachment like any other land; and where a levy was effected while the land was in that condition, the subsequent making and filing of a declaration neither avoided the levy nor prevented a sale under it.[6] It appeared that no declaration was made and filed of record until a month after Stump's petition and adjudication in bankruptcy. The declaration was then made and filed by his wife for his and her

[5] § 70 (c); 52 Stat. 881; 11 U. S. C. § 110c.

[6] *White* v. *Stump, supra,* p. 311.

joint benefit. This court held that the Bankruptcy Act fixed the point of time which is to separate the old situation from the new in the bankrupt's affairs as the date when the petition is filed; that when the Act speaks of property which is exempt, and rights to exemption, it refers to that point of time—namely, the point as of which the general estate passes out of the bankrupt's control and with respect to which the status and rights of the bankrupt, the creditors, and the trustee in other particulars are fixed. The court said: "The exception, as its words and the context show, is not of property which would or might be exempt if some condition not performed were performed, but of property to which there is under the state law a present right of exemption—one which withdraws the property from levy and sale under judicial process." [7] Accordingly it was held that, as the claim of exemption was not perfected until after the petition was filed, it was ineffective as against the trustee, as it would have been against a creditor then having a levy on the property. If the law of Nevada respecting homestead exemptions were like that of Idaho, or operated in the same way, *White* v. *Stump* would be in point.

3. The Nevada Constitution, Art. 4, § 30, reads in part:

"A homestead, as provided by law, shall be exempt from forced sale under any process of law, and shall not be alienated without the joint consent of husband and wife, when that relation exists; . . . and laws shall be enacted providing for the recording of such homestead within the county in which the same shall be situated."

Section 3315 of the Compiled Laws of Nevada defines property which may be claimed as exempt as a homestead and permits selection by either the husband, the wife, or both, by a declaration of intention in writing to claim the same. After providing what the declaration shall con-

[7] *White* v. *Stump*, *supra*, p. 313.

tain and that it shall be signed, acknowledged, and recorded as conveyances of real estate are required to be acknowledged and recorded, the statute continues: ". . . from and after the filing for record of said declaration, the husband and wife shall be deemed to hold said homestead as joint tenants."

Section 8844 provides that "the following property is exempt from execution, . . . the homestead as provided for by law."

Historically, and under the theory of the present Act, bankruptcy has the force and effect of the levy of an execution for the benefit of creditors to insure an equitable distribution amongst them of the bankrupt's assets.[8] The trustee is vested not only with the title of the bankrupt but clothed with the right of an execution creditor with a levy on the property which passes into the trustee's custody.

Our question then is whether, under the constitution and statutes of Nevada, a declaration of homestead would be effective as against a creditor to prevent a judicial sale of the property if made and recorded after levy but before sale thereunder. If it would, it must be equally effective as against the trustee, whose rights rise no higher than those of the supposed creditor and attach at the date of the inception of bankruptcy.

Examination of the Nevada cases relied on by the court below satisfies us that the settled law of the State entitles the debtor to his homestead exemption if the selection and recording occurs at any time before actual sale under execution.[9] And indeed the petitioner so concedes in his brief, stating that he "admits that under the laws of Nevada as interpreted by the Nevada Supreme Court, a

[8] Remington, Bankruptcy, 4th Ed., pp. 4–6; *In re Youngstrom,* 153 F. 98, 103–4, and cases cited.

[9] *Hawthorne* v. *Smith,* 3 Nev. 182; *McGill* v. *Lewis,* 116 P. 2d 581.

declaration of homestead filed at any time prior to actual execution sale is sufficient to establish the homestead right."

In conformity to the principle announced in *White* v. *Stump*, that the bankrupt's right to a homestead exemption becomes fixed at the date of the filing of the petition in bankruptcy and cannot thereafter be enlarged or altered by anything the bankrupt may do, it remains true that, under the law of Nevada, the right to make and record the necessary declaration of homestead existed in the bankrupt at the date of filing the petition, as it would have existed in case a levy had been made upon the property. The assertion of that right before actual sale in accordance with state law did not change the relative status of the claimant and the trustee subsequent to the filing of the petition. The federal courts have generally so held and have distinguished *White* v. *Stump* where the state law was similar, in terms or in effect, to that of Nevada.[10]

The judgment is

Affirmed.

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[10] *In re Trammell*, 5 F. 2d 326; *Clark* v. *Nirenbaum*, 8 F. 2d 451; *McCrae* v. *Felder*, 12 F. 2d 554. Contra: *Georgouses* v. *Gillen*, 24 F. 2d 292.

CREEK NATION *v.* UNITED STATES.*

CERTIORARI TO THE COURT OF CLAIMS.

No. 321. Argued January 6, 7, 1943.—Decided April 5, 1943.

1. The provisions of treaties of 1866 with the Creek and Seminole Nations, whereby the United States guaranteed to them quiet possession of their country, can not be construed as obliging the United States to indemnify them for damages sustained through wrongful appropriations of tribal land in the guise of "station reservations," but for non-railroad purposes, by railroad companies whose lines were built and operated in the Indians' country by permission of the United States and under sanction of the treaties. P. 633.
2. Section 15 of the Act of February 28, 1902, provided that the Indian tribes through whose land railroads were to be built under the Act, should be compensated by the railroad companies for the land taken, and established a system of valuation under judicial supervision with a right of appellate review. These provisions prescribe an adequate method by which the tribes could protect their own interests, but contain no indication that the United States should pay for the lands taken. P. 636.
3. Read in view of its legislative history and its relation to other similar legislation, the Act of February 28, 1902 (§ 16), in providing that where a railroad is constructed under it in the Indian territory the railroad company shall pay to the Secretary of the Interior, for the benefit of the particular tribe or nation through whose lands it is constructed, "an annual charge of fifteen dollars per mile" did not make the Government an insurer of collection nor put upon the Secretary a mandatory duty to collect, nor does it import an obligation of the United States to the tribe for charges which railroad companies have failed to pay. P. 637.
4. The Act of April 26, 1906, § 11, providing that all revenues accruing to the Creek and Seminole tribes shall "be collected by an officer appointed by the Secretary of the Interior under rules and regulations to be prescribed by him" did not make the United States liable for rents and profits of tribal land allegedly taken and used for non-railroad purposes by railroad companies under color of

*Together with No. 322, *Seminole Nation* v. *United States*, also on writ of certiorari, 317 U. S. 614, to the Court of Claims.

authority to build and operate railroads in the Indians' country. P. 638.

5. As to trespasses which may have been committed by the railroads without compliance with the forms of the authorizing Acts, or as to holdings, once proper, which the railroads may have retained after the rights to them had expired, the Act of 1906 imposed no absolute duty on the Secretary to obtain compensation. P. 639.
6. The duty of the Secretary of the Interior under the Act of 1906 to collect revenues of the Creeks and Seminoles, and to bring suits for their use in the name of the United States for the collection of any moneys, or the recovery of any land claimed by them, was discretionary. P. 639.
7. The Creek and Seminole Tribes, not having been dissolved, had a legal right to bring actions for trespasses on their lands by railroad companies—a right which was not precluded by the fact that the United States also, as guardian, was empowered to sue. P. 640.

97 Ct. Cls. 591, 723, affirmed.

CERTIORARI, 317 U. S. 614, to review judgments sustaining demurrers to petitions setting up claims against the United States; and dismissing the petitions. See also 75 Ct. Cls. 873.

Mr. Paul M. Niebell, with whom *Messrs. C. Maurice Weidemeyer* and *W. W. Pryor* were on the brief, for petitioners.

Mr. Archibald Cox, with whom *Solicitor General Fahy, Assistant Attorney General Littell,* and *Messrs. Vernon L. Wilkinson* and *Dwight D. Doty* were on the brief, for the United States.

MR. JUSTICE BLACK delivered the opinion of the Court.

These actions were originally brought in 1926 under special jurisdictional acts of 1924, which gave the Court of Claims jurisdiction over claims under "any treaty or agreement between the United States" and these tribes.[1]

[1] 43 Stat. 133, 43 Stat. 139. See also the jurisdictional act of 1937, 50 Stat. 650.

The actions were based on a contention that the United States had breached its obligation as a guardian of its Indian wards in failing to collect the sums described below. The Court of Claims sustained a demurrer to the first complaint, on the ground that the special jurisdictional acts permitted actions brought on specific statutory or treaty pledges only, and not actions brought on a wardship theory. 75 Ct. Cls. 873. The petitioners subsequently amended their complaints to comply with the requirements of the jurisdictional acts, alleging that the United States in specific statutes and treaties guaranteed to repay the Indians for the losses claimed to have been suffered. The Court of Claims sustained a demurrer to the second amended complaint on the ground that it did not state a cause of action, 97 Ct. Cls. 591, and we granted certiorari because of the importance of the questions raised in the administration of Indian affairs. The cases present the question whether the United States has assumed treaty or statutory obligations which require it to indemnify the Creek and Seminole nations for injuries alleged to have been suffered by them as a result of the seizure and use of their land by private railroad companies.

By the treaties of 1866,[2] the Creeks and Seminoles granted a right of way to railroads which the United States might later authorize to construct and operate routes across their lands. They agreed to permit the railroads to buy strips up to three miles in width on each side of the track. In the succeeding thirty-six years, Congress, by a series of special acts, authorized the construction and operation of railroads,[3] and in 1902 it passed a

[2] 14 Stat. 755 (Seminole), 785 (Creeks). The treaties are sufficiently similar so that hereafter reference will be made to the Creek treaty only.

[3] The treaty was originally interpreted as permitting the construction of only two railroads through the Territory. Letter of the Secre-

general statute concerning future railroad construction in the Indian Territory.[4] The 1902 Act included a provision, § 16, that railroads should pay a fixed annual sum per mile to the Secretary of the Interior for the benefit of the tribes.

The Indians allege that the railroads have not complied with the terms of the treaties and statutes, in that they have taken and held certain station reservations unnecessary for railroad purposes for their own benefit, that they have received rents and profits from the use of these lands, and that they have failed to pay the annual mileage charge.[5] They ask that the government indemnify them for the value of the lands allegedly wrongfully taken, for rents and profits accruing to the railroads from their use of those lands, and for the mileage charge.

It must be emphasized that this action is brought, not against the railroads which have committed the asserted

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tary of the Interior to the President, May 21, 1870, approved by him May 23, 1870, referred to at 13 O. A. G. 285 (1870). In the 1880's, Congress began, in a series of special acts, to authorize construction of railroads through the Indian Territory on a theory of eminent domain. *Cherokee Nation* v. *Southern Kansas Ry. Co.*, 135 U. S. 641. See e. g. the Committee Report and discussion of the bill granting a right of way to the Gulf, Colorado & Santa Fe Railway, 15 Cong. Rec. 4711 *et seq.* (1884). Approximately one half of the railroads involved in the instant case appear to have been authorized by special acts and to have been constructed prior to the general act of 1902. For a general history of railroads in Oklahoma, see Bulletin No. 60, The Railway and Locomotive Historical Society, "The Railroads of Oklahoma," published through the Baker Library of the Harvard Business School (1943).

[4] An Act regulating general construction of railroads through Indian lands was first adopted in 1899, 30 Stat. 990. The 1902 Act was more particularly directed at construction through the territory of the Five Civilized Tribes, of which petitioners are two.

[5] Under an opinion of the Secretary of the Interior, the obligation to make this payment terminated upon the admission of Oklahoma as a state in 1907. 38 Decisions of Secretary of the Interior (Public Lands) 414.

misdeeds, but against the government for its failure to collect the sums claimed for the petitioners from the railroads. The question for decision here, therefore, is whether, assuming arguendo that the railroads are at fault, the government was obligated to compel restitution or to recover damages; and if the government failed to do these things, whether it had a duty to make the Indians whole. We are asked to find an agreement to indemnify the tribes for these losses in the Treaty of 1866, the Act of 1902, and an Act of 1906.

First. The Treaty of 1866. Article I of the Treaty provided:

"[The Creeks] also agree to remain at peace with all other Indian tribes; and, in return, *the United States guarantees them quiet possession of their country,* and protection against hostilities on the part of other tribes. In the event of hostilities, the United States agree that the tribe commencing and prosecuting the same, shall, as far as may be practicable, make just reparation therefor." (Emphasis added.)

The petitioners contend that the government failed to prevent the railroads from taking and holding station reservations later found to be unnecessary for railroad purposes, and that it thus became liable to the petitioners for breach of the guarantee of "quiet possession."

The Court of Claims concluded that the guarantee of quiet possession applied only to protection from hostilities by other tribes. Such a conclusion receives support from a consideration of the circumstances of the time, for inter-tribal warfare was a dominant danger. Some of the tribes had fought on each side in the Civil War, and strange new tribes were about to be settled on adjacent land. The turmoil of reconstruction called for military protection.

We conclude that, whether or not the guarantee is limited to military protection, this language did not obli-

gate the United States to compensate the tribes for encroachments by railroads acting under color of right. Keeping the peace and protecting the Indians was a difficult, and at times almost impossible, task,[6] and we cannot assume that the government meant to guarantee reparations for breach of quiet possession without a single explicit word in the Treaty to that effect. Where reparations were planned, clear language was used. Thus, in the section quoted above, hostile tribes, and not the government, were explicitly made liable for the tribe's depredations. There is no such provision putting a similar liability for losses of any sort on the United States.[7] A promise by the government to try to keep the peace is not equivalent to a promise to make payments if the peace is not kept; "and before any judgment should be rendered binding the United States it is familiar and settled law that the statute claimed to justify such judgment should be clear and not open to debate." *Leighton* v. *United States,* 161 U. S. 291, 296, 297.

This conclusion does not mean that the United States in signing the treaty made an empty promise. The government undertook to use its military power to protect the Indians against military aggression, and in addition it un-

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[6] "The treaties of 1866, and other treaties also, guarantee to the five civilized tribes the possession of their lands; but, without the moral and physical power which is represented by the Army of the United States, what are these treaties worth as a protection against the rapacious greed of the homeless people of the States who seek homesteads within the borders of the Indian Territory? If the protecting power of this Government were withdrawn for thirty days, where would the treaties be, and the laws of the Indians and the Indians themselves?" Report of the Commissioner of Indian Affairs in 1 Report, Secretary of the Interior (1886), 81.

[7] The only instance which has been called to our attention in which the United States specifically guaranteed to bring civil actions for the benefit of a tribe and insured payment for trespasses is the treaty of May 24, 1834, with the Chickasaws, 7 Stat. 450.

dertook through its administrative and legislative policy to aid the tribes to hold possession of their lands. In view of the pressures of the time, it appears to have treated its obligation with real care. The acts providing for the construction of the railroads, for example, provided for payment to the Indians for the land taken,[8] attempted to restrict the amount granted to that necessary,[9] and usually provided for reversion of title to the Indians upon discontinuance of the road.[10] In 1871, upon appeal of the tribes, the Secretary of the Interior refused to permit a road to enter the territory because of a claimed violation of the treaty.[11] The guarantee of quiet possession called for a

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[8] The Act of July 27, 1866, 14 Stat. 292, § 7, authorizing the construction of a railroad through the Indian country provided for a jury trial to determine the fair price. See, for example of the liberal construction given a similar provision in 23 Stat. 73, *Cherokee Nation* v. *Southern Kansas Ry. Co.*, 135 U. S. 641, 651–653. Another act passed in 1866, 14 Stat. 289, § 8, provided that the railroad should be constructed "with the consent of the Indians, and not otherwise."

[9] Note, for example, in the Congressional discussion of the bill authorizing construction of the Gulf, Colorado & Santa Fe Railway, an Oklahoma railroad not directly involved here, the debate over the amount of land necessary for sidings. 15 Cong. Rec. 4715–4718 (1884).

[10] The experience of one of the first of the two roads authorized under the treaty is revealing of the manner in which the use of the Indian lands was supervised: The Atlantic & Pacific Railroad was authorized to build a line by an 1866 Act, 14 Stat. 292. In 1871, after small parts of the line had been completed, it was ordered to cease work by the Secretary of the Interior and was not allowed to continue until it had posted a bond for the protection of Indian interests. See discussion in *Atlantic & Pacific R. Co.* v. *Mingus*, 165 U. S. 413, 417. Failure to complete the road resulted in an 1886 Act taking the lands previously granted back into the public domain, 24 Stat. 123, and the road was ultimately completed by the St. Louis & Oklahoma City Ry. Co. under an 1896 special act, 29 Stat. 69. Section 2 of that Act provides for reversion to the tribes of lands not used for railroad purposes.

[11] Letter, Secretary of the Interior, May 21, 1870, *supra*, note 3.

series of legislative, administrative, and military judgments, but was not a pledge of monetary reparation.

Second. The Act of February 28, 1902. The petitioners rest on §§ 15 and 16 of the Act of 1902. Section 15 provides that the tribes through whose land the roads were to be built should be compensated by the railroads for the land taken. The section established a system of valuation under judicial supervision and with a right of appellate review. These elaborate provisions provide an adequate method by which the tribes might protect their own interests, but contain no indication of any kind that the government should pay for the lands taken.[12]

Section 16 provides that "where a railroad is constructed under the provisions of this Act there shall be paid by the railroad company to the Secretary of the Interior, for the benefit of the particular tribe or nation through whose lands any such railroad may be constructed, an annual charge of fifteen dollars per mile. . . ." Petitioner contends that this direction to the Secretary to accept these payments made the government an insurer of their collection.

Variants of this statutory phrase were used generally in acts authorizing railroad construction after 1884. The Act of 1902, as has been noted, was the successor to the general railroad authorization act of 1899, which in 30 Stat. 990, § 5, required "such an annual charge as may be prescribed by the Secretary of the Interior, not less than fifteen dollars for each mile." Other acts of the period varied in that the Secretary was directed to apportion the sum collected among several tribes according to their interests.[13] Some of the earlier acts mentioned no specific sum, giving the Secretary complete discretion as to the

[12] Whether added obligations in connection with this section were assumed by the United States in the 1906 Act is considered below.

[13] See, e. g., the act authorizing construction of the Kansas & Arkansas Valley Railroad, 24 Stat. 73, § 5 (1886), or the act authoriz-

amount to be collected and the method of allocating it.[14] This device of assessment of an annual charge payable to the Secretary was also used in authorizing construction of telephone and telegraph lines across Indian lands, 25 U. S. C. § 319.

By the time of the adoption of the 1902 Act, the verbal formula used in § 16 was so familiar that it required no discussion in Congress. The clause seems first to have been used in an act of 1884, 23 Stat. 69, § 5, authorizing the Gulf, Colorado & Santa Fe Railway to cross the Indian territory. The $15.00 charge was considered a tax, approximately equal to the taxes charged by neighboring states.[15] No word was said indicating that the United States, acting as a voluntary tax collector for the tribes, meant to guarantee to the tribes that the taxpayers would make their payments when due.

Considering § 16 in its relation to the other statutes of the period, many of which through minor variations gave wide discretion to the Secretary of the Interior, we conclude that the words of this section were a direction to the Secretary to make the facilities of his office available for the payment of a form of tax. It provides that the railroads shall pay the tax to the Secretary, but puts no mandatory duty on the Secretary to do the work of collecting. We cannot suppose from any evidence before us either of legislative history or administrative practice that the United States repeatedly assumed obligations to in-

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ing construction of a branch of the St. Louis & San Francisco Railroad, 29 Stat. 80, § 5 (1896).

[14] The act authorizing construction of a railroad through the Papago (Arizona) reservation provided: "Such compensation as may be fixed by the Secretary of the Interior be paid to him by the said railroad company, to be expended by him for the benefit of the said Indians." 22 Stat. 299 (1882).

[15] See discussion in the House of Representatives, 15 Cong. Rec. 4723–4727. For an analysis of the nature of this tax see the Opinion of the Secretary of the Interior, *supra*, note 5.

demnify the Indian tribes for charges which railroad companies, telephone companies, and telegraph companies constructing lines across Indian lands may have failed to pay. Cf. *United States* v. *Algoma Lumber Co.*, 305 U. S. 415, 421.

Third. The Act of 1906. Congress at one time planned to terminate the existence of the Five Civilized Tribes in 1906, and the Act of 1906 was introduced into the House of Representatives with the object of preserving Indian interests after tribal dissolution. In the course of discussion, Congress determined to continue the tribal existence, and the Act was amended to that effect before passage. The petitioners' final reliance is on §§ 11 and 18 of this Act.

The relevant portion of § 11 of the Act is as follows:

"All revenues of whatever character accruing to the . . . Creek and Seminole tribes, whether before or after dissolution of the tribal governments, shall . . . be collected by an officer appointed by the Secretary of the Interior under rules and regulations to be prescribed by him."

The petitioner contends that under this section the government is liable for rents and profits on the station reservations allegedly wrongfully taken and wrongfully used by the railroads.

This language, like that of § 16 of the 1902 Act which it so closely resembles, does not make the government a guarantor that sums owing will be paid. The claim asserted is in essence one of damages for trespass, and assuming that the proceeds of a trespass action are to be considered "revenue," the Secretary was surely entitled to discretion as to which trespass actions he might consider worth bringing. In so far as the petitioner contends that the railroads wrongfully took lands under pretense of right in their original grants under the statutes, the administrative machinery provided by the acts gave the tribes adequate redress through the courts at the time the land

was taken.[16] As to trespasses which may have been committed by the railroads without compliance with the forms of the authorizing Acts, or as to holdings, once proper, which the railroads may have retained after the rights to them had expired, we find no absolute duty on the Secretary to obtain compensation.

That the Secretary's duty to collect revenues and institute actions under the Act was discretionary is made clear by § 18:

"The Secretary of the Interior is hereby authorized to bring suit in the name of the United States, for the use of the . . . Creek, or Seminole tribes, respectively . . . for the collection of any moneys or recovery of any land claimed by any of said tribes. . . ."

The petitioners contend that under this section the Secretary was obligated to bring suit for all damages suffered by the tribes for failure to pay sums owing under §§ 15 and 16 of the 1902 Act, for trespass and mileage taxes, for any breach of the treaty, and for rents and profits collected by the railroads. But the use of the word "authorized" in this context necessarily reserved to the Secretary the right to determine his own course of action. It must be remembered that the Secretary was traditionally given wide discretion in the handling of Indian affairs [17] and that discretion would seldom be more necessary than in determining when to institute legal proceedings. For example, a railroad might have become bankrupt or reorganized before a failure to make proper payments was discovered,[18] making recovery impossible; and

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[16] See for example § 15 of the 1902 Act.

[17] Cohen, Handbook of Federal Indian Law, "The Range of Administrative Powers," 100 *et seq.*

[18] The Oklahoma properties of the St. Louis & San Francisco Railway Co. were held by 25 different corporations between 1866 and 1916. The Atchison, Topeka & Santa Fe, not directly involved in this action, is the descendant of 64 railroads with Oklahoma holdings.

we can not suppose that the Secretary might not compromise difficult cases without bringing suit.

That the government did not mean to assume an insurer's responsibility for the payment of sums claimed by the Indians against the railroads is further shown by the fact that the Indians retained their own independent remedy for wrongs done them. The tribes have not yet been dissolved, and they have had, both as a general legal right [19] and by virtue of the very section of the 1906 Act under discussion here, the power to bring actions on their own behalf. That the United States also had a right to sue did not necessarily preclude the tribes from bringing their own actions.[20]

We are asked here to impose a liability on the government to these Indians for wrongs allegedly committed against the Indians by others. Appreciating the desire of Congress to recognize the "full obligation of this nation to protect the interests of a dependent people," *Tulee* v. *Washington,* 315 U. S. 681, 685, we are unable to find in the words of the treaties or statutes upon which this action rests any such prodigal assumption by the government of other people's liabilities as that for which the petitioners contend here.

Affirmed.

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

Approximately 150 railroads have existed in Oklahoma. See "The Railroads of Oklahoma," *supra,* note 3, pp. 28–77.

[19] *Cherokee Nation* v. *Southern Kansas Ry. Co.,* 135 U. S. 641; *Cherokee Nation* v. *Hitchcock,* 187 U. S. 294; *Lone Wolf* v. *Hitchcock,* 187 U. S. 553. Cf. *Lane* v. *Pueblo of Santa Rosa,* 249 U. S. 110, and *United States* v. *Candelaria,* 271 U. S. 432.

[20] Cf. *Heckman* v. *United States,* 224 U. S. 413, 446; *United States* v. *Osage County,* 251 U. S. 128; *Sunderland* v. *United States,* 266 U. S. 226.

MR. JUSTICE MURPHY, dissenting:

As a people our dealings with the Indian tribes have been too often marked by injustice, neglect, and even ruthless disregard of their interests and necessities. As a nation we have incurred moral and political responsibilities toward them and their descendants, which have been requited in some measure by treaties and statutes framed for the protection and advancement of their interests. Those enactments should always be read in the light of this high and noble purpose, in a manner that will give full scope and effect to the humane and liberal policy that has been adopted by the Congress to rectify past wrongs.[1]

Each railway company whose road was constructed under the Act of 1902 [2] was required by § 16 of that Act to pay to the Secretary of the Interior, for the benefit of the particular tribe through whose lands the road passed, an annual charge of fifteen dollars for each mile of road constructed. By the Act of 1906 it was provided that all revenues accruing to the Five Civilized Tribes "shall . . . be collected by an officer appointed by the Secretary of the Interior," and the Secretary was authorized to bring suit in the name of the United States for the use of any one of the five tribes to collect any moneys claimed by it.[3] For failure of the Secretary of the Interior to collect these mileage charges for the Creek and Seminole tribes, among other things, this action is brought under jurisdictional acts [4] which authorize the Court of Claims to hear and

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[1] *Choctaw Nation* v. *United States,* 119 U. S. 1, 27-28; *Seminole Nation* v. *United States,* 316 U. S. 286, 296-97.

[2] Act of February 28, 1902, 32 Stat. 43.

[3] §§ 11 and 18 of the Act of April 26, 1906, 34 Stat. 137, 141, 144.

[4] Act of May 20, 1924, 43 Stat. 133 (Seminole), and Act of May 24, 1924, 43 Stat. 139 (Creek).

determine all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and those tribes, or out of any act of Congress relating to Indian affairs.

We have held that the Government in its relations with the Indian tribes occupies the position of a fiduciary, that the relationship is similar to that of guardian and ward, and that the duties and responsibilities of the United States toward its wards require a generous interpretation.[5] If it is the duty of a guardian or trustee, as I conceive it to be, to exercise diligence to conserve and protect the interests of his trust, and collect moneys due to the estate of his ward, then such a duty may well have arisen under § 16 of the Act of 1902, a duty which, it is alleged, the Secretary of the Interior failed to discharge. In other words, if the railroads failed to pay to the Secretary the required annual charges for each mile of road constructed, it was the Secretary's duty to act to protect the Indian beneficiaries who should not be expected to assume the burden of acting on their own behalf, especially when the payments were to be made to the Secretary and not to them. Cf. *United States* v. *Creek Nation,* 295 U. S. 103, 110. To read the Act of 1902 otherwise is to take too restricted a view of the obligations of the United States toward a dependent people. But if there were any doubt, the duty of the Secretary of the Interior to collect the mileage charges was made plain and unmistakable by the Act of 1906, which required him to collect all revenues accruing to the tribes and specifically authorized him to bring suit on their behalf. The present claim to mileage charges undoubtedly is an equitable one arising out of those statutes and is therefore within the scope and purpose of the jurisdictional acts.

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[5] See Note 1, *ante.*

In my opinion the petitioners state a cause of action with respect to these mileage claims, and the judgment of the Court of Claims should accordingly be reversed.

MR. JUSTICE FRANKFURTER agrees with these views.

FRED FISHER MUSIC CO. ET AL. *v.* M. WITMARK & SONS.

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

No. 327. Argued January 14, 15, 1943.—Decided April 5, 1943.

Under the Copyright Act of 1909, as amended, an author's right to obtain a renewal and extension of his copyright is assignable by him by an agreement made before the expiration of the original copyright term. P. 656.

125 F. 2d 949, affirmed.

CERTIORARI, 317 U. S. 611, to review the affirmance of a decree of the District Court, 38 F. Supp. 72, granting an interlocutory injunction in a case of alleged copyright infringement.

Mr. John Schulman, with whom *Mr. Arthur Garfield Hays* was on the brief, for petitioners.

Mr. Robert W. Perkins, with whom *Mr. Stuart H. Aarons* was on the brief, for respondent.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This case presents a question never settled before, even though it concerns legislation having a history of more than two hundred years. The question itself can be stated very simply. Under § 23 of the Copyright Act of

1909, 35 Stat. 1075, as amended,[1] a copyright in a musical composition lasts for twenty-eight years from the date of its first publication, and the author can renew the copyright, if he is still living, for a further term of twenty-eight years by filing an application for renewal within a year before the expiration of the first twenty-eight year period. Section 42 of the Act provides that a copyright

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[1] The relevant provisions of the Copyright Act read as follows:

SEC. 23. That the copyright secured by this Act shall endure for twenty-eight years from the date of first publication, whether the copyrighted work bears the author's true name or is published anonymously or under an assumed name: *Provided,* That in the case of any posthumous work or of any periodical, cyclopedic, or other composite work upon which the copyright was originally secured by the proprietor thereof, or of any work copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author) or by an employer for whom such work is made for hire, the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright: *And provided further,* That in the case of any other copyrighted work, including a contribution by an individual author to a periodical or to a cyclopedic or other composite work, the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright: *And provided further,* That in default of the registration of such application for renewal and extension, the copyright in any work shall determine at the expiration of twenty-eight years from first publication.

SEC. 42. That copyright secured under this or previous Acts of the United States may be assigned, granted, or mortgaged by an instrument in writing signed by the proprietor of the copyright, or may be bequeathed by will.

"may be assigned . . . by an instrument in writing signed by the proprietor of the copyright . . ." Concededly, the author can assign the original copyright and, after he has secured it, the renewal copyright as well. The question is—does the Act prevent the author from assigning his interest in the renewal copyright before he has secured it?

This litigation arises from a controversy over the renewal rights in the popular song "When Irish Eyes Are Smiling." It was written in 1912 by Ernest R. Ball, Chauncey Olcott, and George Graff, Jr., each of whom was under contract to a firm of music publishers, M. Witmark & Sons. Pursuant to the contracts, Witmark on August 12, 1912, applied for and obtained the copyright in the song. On May 19, 1917, Graff and Witmark made a further agreement, under which, for the sum of $1,600, Graff assigned to Witmark "all rights, title and interest" in a number of songs, including "When Irish Eyes Are Smiling." The contract provided for the conveyance of "all copyrights and renewals of copyrights and the right to secure all copyrights and renewals of copyrights in the [songs], and any and all rights therein that I [Graff] or my heirs, executors, administrators or next of kin may at any time be entitled to." To that end, Witmark was given an irrevocable power of attorney to execute in Graff's name all documents "necessary to secure to [Witmark] the renewals and extensions of the copyrights in said compositions and all rights therein for the terms of such renewals and extensions." In addition, Graff agreed that, "upon the expiration of the first term of any copyright," he would execute and deliver to Witmark "all papers necessary in order to secure to it the renewals and extensions of all copyrights in said compositions and all rights therein for the terms of such renewals and extensions." This agreement was duly recorded in the Copyright Office.

On August 12, 1939, the first day of the twenty-eighth year of the copyright in "When Irish Eyes Are Smiling," Witmark applied for and registered the renewal copyright in Graff's name.[2] On the same day, exercising its power of attorney under the agreement of May 19, 1917, Witmark also assigned to itself Graff's interest in the renewal. Eleven days later, Graff himself applied for and registered the renewal copyright in his own name; and on October 24, 1939, he assigned his renewal interest to another music publishing firm, Fred Fisher Music Co., Inc. Both Graff and Fisher knew of the prior registration of the renewal by Witmark and of the latter's assignment to itself. Relying upon the validity of the assignment made to it on October 24, 1939, and without obtaining permission from Witmark, Fisher published and sold copies of "When Irish Eyes Are Smiling," representing to the trade that it owned the renewal rights in the song. Witmark thereupon brought this suit to enjoin these activities. The District Court granted a preliminary injunction *pendente lite* solely upon the ground that there was no statutory bar against an author's assignment of his interest in the renewal before it was secured. 38 F. Supp. 72. The court considered no evidence and made no findings upon the question whether equitable relief should be denied on other grounds, such as inadequacy of consideration and the like.[3] Upon appeal to the Circuit

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[2] Ball and Olcott were no longer living at the time, and under § 23 of the Act their interests in the renewal passed to their widows. Witmark is also the assignee of Mrs. Olcott's interest in the renewal copyright, and Mrs. Ball has assigned her interest to another music publisher. The validity of neither assignment is involved in this suit.

[3] In opposing the motion for a preliminary injunction, Graff submitted an affidavit stating he "was in desperate financial straits" when he entered into the agreement of May 19, 1917. The District Court made no findings upon and did not otherwise deal with the issue that this allegation may raise.

Court of Appeals for the Second Circuit under § 129 of the Judicial Code, 28 U. S. C. § 227, permitting appeals from interlocutory decrees, the order was affirmed. 125 F. 2d 949. The Circuit Court of Appeals limited itself, as did the parties before it, to the question of statutory construction, wholly apart from the particular circumstances of the case. The court expressly left open "other contentions which the parties may wish and be entitled to raise on the merits, including possibly claims of inadequacy of consideration." 125 F. 2d at 954. The petition for certiorari in this Court stated that the "sole question is whether . . . an agreement to assign his renewal, made by an author in advance of the twenty-eighth year of the original term of copyright, is valid and enforceable." Because of the obvious importance of this question of the proper construction of the Copyright Act, we brought the case here. 317 U. S. 611.

Plainly, there is only one question before us—does the Copyright Act nullify an agreement by an author, made during the original copyright term, to assign his renewal? The explicit words of the statute give the author an unqualified right to renew the copyright. No limitations are placed upon the assignability of his interest in the renewal. If we look only to what the Act says, there can be no doubt as to the answer. But each of the parties finds support for its conclusion in the historical background of copyright legislation, and to that we must turn to discover whether Congress meant more than it said.

Anglo-American copyright legislation begins in 1709 with the Statute of 8 Anne, c. 19. That act gave the author and his assigns the exclusive copyright for fourteen years from publication, and after the expiration of such term, if the author was still living, the copyright could be renewed for another fourteen years. The statute did not expressly provide that the author could assign his renewal interest during the original copyright term. But the

English courts held that the author's right of renewal, although contingent upon his surviving the original fourteen-year period, could be assigned, and that if he did survive the original term he was bound by the assignment. *Carnan* v. *Bowles,* 2 Bro. C. C. 80; *Rundell* v. *Murray,* Jac. 311; see Maugham, Law of Literary Property (1828) 73; Curtis on Copyright (1847) 235. Subsequent English legislation eliminated the problem by providing for one continuous term of copyright. In 1814 the statute was amended to provide that the author and his assigns should have the copyright for twenty-eight years, "and also, if the author shall be living at the end of that period, for the residue of his natural life." 54 Geo. III, c. 156. In 1842 the copyright term was extended to forty-two years or the life of the author and seven years, whichever should prove longer. 5 & 6 Vict., c. 45; see Macgillivray, Law of Copyright (1902) 56–57. The English law today, with minor qualifications not relevant here, gives the author and his assigns the exclusive copyright for the life of the author and fifty years after his death. Copyright Act of 1911, 1 & 2 Geo. V, c. 34; see Oldfield, Law of Copyright (1912) 60–66; Robertson, Law of Copyright (1912) 44–50; Copinger, Law of Copyright (7th ed. 1936) 78–86.

In this country, the copyright laws enacted by the original thirteen states prior to 1789 were based largely upon the Statute of Anne. In 1783 the Continental Congress passed a resolution calling upon the states to adopt copyright legislation for the protection of authors and publishers. The resolution recommended that copyright be given to authors and publishers "for a certain time, not less than fourteen years from the first publication; and to secure to the said authors, if they shall survive the term first mentioned, and to their executors, administrators and assigns, the copyright of such books for another term of time not less than fourteen years." Journals of

the Continental Congress, 1774–1789 (1922), vol. XXIV, pp. 326–27. When the resolution was adopted, laws governing copyrights were on the statute-books of at least three states, Connecticut, Massachusetts, and Maryland. The Connecticut and Maryland statutes substantially followed the Statute of Anne: in both states copyright was granted for a term of fourteen years, renewable for another term of the same length if the author survived the original term. Connecticut, Acts & Laws (Green, 1783) 617–19; Maryland, Laws (Green, 1783) c. 34. The Maryland statute employed the phraseology of the Statute of Anne, providing simply that the privilege of renewal belonged to the author. The Connecticut statute, however, explicitly incorporated the construction made by the English courts, and conferred the right of renewal upon the author and "his heirs and assigns." The Massachusetts statute created a single copyright term of twenty-one years. Massachusetts, Acts & Laws (Edes, 1783) 236.

In response to the resolution of the Congress, nine of the ten other states enacted copyright legislation. Only Delaware did not adopt a copyright statute. Five states accepted the recommendation of the Congress and followed the Statute of Anne: two copyright terms of fourteen years, the second term contingent upon the author's surviving the first. New Jersey, Acts of the General Assembly (Collins, 1783) c. 21; Pennsylvania, Laws (Bradford, 1784) c. 125; South Carolina, Acts, Ordinances and Resolves (Miller, 1784) 49–51; Candler, Colonial Records of Georgia (1911), vol. XIX, part 2, pp. 485–89; Laws of New York, 1786, c. 54. Four of these, like the earlier Connecticut statute, explicitly provided that the right of renewal could be exercised by the author's heirs and assigns, namely, New Jersey, Pennsylvania, Georgia, and New York. The four remaining states enacted statutes providing for single terms of varying lengths, ranging from fourteen to twenty-one years. New Hampshire,

Laws (Melcher, 1789) 161–62; Rhode Island, Acts and Resolves (Carter, 1783) 6–7; Virginia, Acts (Dunlap & Hayes, 1785) 8–9; North Carolina, Laws 1785, c. 24.

Exercising the power granted by Article 1, § 8 of the Constitution—"To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries"—the first Congress enacted a copyright statute, the Act of May 31, 1790, 1 Stat. 124. As might have been expected, this Act reflected its historical antecedents. The author was given the copyright for fourteen years and "if, at the expiration of the said term, the author or authors, or any of them, be living, and a citizen or citizens of these United States, or resident therein, the same exclusive right shall be continued to him or them, his or their executors, administrators or assigns, for the further term of fourteen years." 1 Stat. 124. In view of the language and history of this provision, there can be no doubt that if the present case had arisen under the Act of 1790, there would be no statutory restriction upon the assignability of the author's renewal interest. The petitioners contend, however, that such a limitation was introduced by subsequent legislation, particularly the Copyright Acts of 1831 and 1909.

The Act of February 3, 1831, 4 Stat. 436, amended the 1790 Act in two important respects: the original term was increased from fourteen to twenty-eight years, and the renewal term, although still only fourteen years long, could pass to the author's widow or children if he did not survive the original term. The renewal provision, like the Statute of Anne, did not refer to the author's "assigns." The purpose of these changes, as stated in the report of the Committee on the Judiciary of the House of Representatives was "chiefly to enlarge the period for the enjoyment of copy-right, and thereby to place authors in this country more nearly upon an equality with

authors in other countries. . . . In the United States, by the existing laws, a copy-right is secured to the author, in the first instance, for fourteen years; and if, at the end of that period, he be living, then for fourteen years more; but, if he be not then living, the copy-right is determined, although, by the very event of the death of the author, his family stand in more need of the only means of subsistence ordinarily left to them." Register of Debates, vol. 7, appendix CXIX.

Plainly, therefore, the Copyright Act of 1831 merely enlarged the benefits of the copyright; it extended the length of the original term and gave the author's widow and children that which theretofore they did not possess, namely, the right of renewal to which the author would have been entitled if he had survived the original term. The petitioners attach much significance to a sentence appearing in the report of the committee: "The question is, whether the author or the bookseller should receive the reward." *Ibid.* The meaning of this sentence, read in its context, is quite clear. By providing that, if the author should not survive the original term, his renewal interest should, instead of falling into the public domain, pass to his widow and children, Congress was of course preferring the author to the bookseller. But neither expressly nor impliedly did the Act of 1831 impose any restraints upon the right of the author himself to assign his contingent interest in the renewal. That the Act contained no such limitation was accepted without question both by the courts, see *Pierpont* v. *Fowle,* 19 Fed. Cas. 652 (C. C. Mass. 1846), and *Paige* v. *Banks,* 13 Wall. 608, with which compare *White-Smith Music Pub. Co.* v. *Goff,* 187 F. 247, 250–53, and by commentators, see Curtis on Copyright (1847) 235; 2 Morgan, Law of Literature (1875) 229–30; Spalding, Law of Copyright (1878) 111; Drone on Copyright (1879) 326–32; Bowker on Copyright (1886) 20, 34; 2 Kent's Commentaries (12th ed.

1873) 510; Solberg, Copyright Protection and Statutory Formalities (1904) 24. Representative Ellsworth,[4] who submitted the committee report on the bill that became the Copyright Act of 1831, himself stated unequivocally that an agreement to assign the renewal was binding upon the author. See Ellsworth, Copy-Right Manual (1862) 29.

We come, finally, to the Copyright Act of March 4, 1909, 35 Stat. 1075, which, except for some minor amendments not relevant here, is the statute in effect at the present time. In December, 1905, President Theodore Roosevelt urged the Congress to undertake a revision of the copyright laws. H. Doc. 1, 59th Cong., 1st Sess., p. LII. In response to this message the Librarian of Congress, under whose authority the Copyright Office functions, invited persons interested in copyright legislation to attend a conference for the purpose of devising a satisfactory measure. Several conferences were held in 1905 and 1906, resulting in a bill which was introduced in the House and Senate by the chairman of the Committee on Patents in each body. This bill (H. R. 19853 and S. 6330, 59th Cong., 1st Sess.) provided, in the case of books and musical compositions, for a single copyright term lasting for the life of the author and for fifty years thereafter. Joint hearings by the House and Senate Committees were held on this bill, but no action was taken by the Fifty-ninth Congress. At the next session of Congress, this and other bills to revise the copyright laws were again introduced. Extensive public hearings were held. The result of this elaborate legislative consideration of the problem of copyright was a bill (H. R. 28192; S. 9440) which became the Copyright Act of 1909. As stated in the report of the House committee, this bill "differs in many respects from

[4] William Wolcott Ellsworth, the son of Oliver Ellsworth, third Chief Justice of the United States. See Biographical Directory of the American Congress, 1774–1927 (1928) 943.

any of the bills previously introduced. Your committee believes that in all its essential features it fairly meets and solves the difficult problems with which the committee had to deal . . ." H. Rep. 2222, 60th Cong., 2d Sess., p. 4. Under the bill, copyright was given for twenty-eight years, with a renewal period of the same duration. The report of the House committee indicates the reasons for this provision. This section of the report, to which much importance has been attached by the judges of the court below and by the parties, must be read in the light of the specific problem with which the Congress was presented: should there be one long term, as was provided for in the bill resulting from the conferences held by the Librarian of Congress, or should there be two shorter terms? The House and Senate committees chose the latter alternative. They were aware that an assignment by the author of his "copyright" in general terms did not include conveyance of his renewal interest. See *Pierpont* v. *Fowle,* 19 Fed. Cas. 652 (C. C. Mass. 1846); 2 Morgan, Law of Literature (1875) 229–30; Macgillivray, Law of Copyright (1902) 267. During the hearings of the Joint Committee, Representative Currier the chairman of the House committee, referred to the difficulties encountered by Mark Twain:

"Mr. Clemens told me that he sold the copyright for Innocents Abroad for a very small sum, and he got very little out of the Innocents Abroad until the twenty-eight-year period expired, and then his contract did not cover the renewal period, and in the fourteen years of the renewal period he was able to get out of it all of the profits." (Hearings before the Committees on Patents of the Senate and House of Representatives on Pending Bills to Amend and Consolidate the Acts respecting Copyright, 60th Cong., 1st Sess., p. 20.)

By providing for two copyright terms, each of relatively short duration, Congress enabled the author to sell

his "copyright" without losing his renewal interest. If the author's copyright extended over a single, longer term, his sale of the "copyright" would terminate his entire interest. That this is the basic consideration of policy underlying the renewal provision of the Copyright Act of 1909 clearly appears from the report of the House committee which submitted the legislation (the Senate committee adopted the report of the House committee, see Sen. Rep. 1108, 60th Cong., 2d Sess.):

"Section 23 deals with the term of the copyright. Under existing law the copyright term is twenty-eight years, with the right of renewal by the author, or by the author's widow or children if he be dead, for a further term of fourteen years. The act of 1790 provided for an original term of fourteen years, with the right of renewal for fourteen years. The act of 1831 extended the term to its present length. It was urged before the committee that it would be better to have a single term without any right of renewal, and a term of life and fifty years was suggested. Your committee, after full consideration, decided that it was distinctly to the advantage of the author to preserve the renewal period. It not infrequently happens that the author sells his copyright outright to a publisher for a comparatively small sum. If the work proves to be a great success and lives beyond the term of twenty-eight years, your committee felt that it should be the exclusive right of the author to take the renewal term, and the law should be framed *as is the existing law* [italics ours], so that he could not be deprived of that right.

"The present term of twenty-eight years, with the right of renewal for fourteen years, in many cases is insufficient. The terms, taken together, ought to be long enough to give the author the exclusive right to his work for such a period that there would be no probability of its being taken away from him in his old age, when, perhaps, he

needs it the most. A very small percentage of the copyrights are ever renewed. All use of them ceases in most cases long before the expiration of twenty-eight years. In the comparatively few cases where the work survives the original term the author ought to be given an adequate renewal term. In the exceptional case of a brilliant work of literature, art, or musical composition it continues to have a value for a long period, but this value is dependent upon the merit of the composition. Just in proportion as the composition is meritorious and deserving will it continue to be profitable, provided the copyright is extended so long; and it is believed that in all such cases where the merit is very high this term is certainly not too long.

"Your committee do not favor and the bill does not provide for any extension of the original term of twenty-eight years, but it does provide for an extension of the renewal term from fourteen years to twenty-eight years; and it makes some change in existing law as to those who may apply for the renewal. Instead of confining the right of renewal to the author, if still living, or to the widow or children of the author, if he be dead, we provide that the author of such work, if still living, may apply for the renewal, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or, in the absence of a will, his next of kin. It was not the intention to permit the administrator to apply for the renewal, but to permit the author who had no wife or children to bequeath by will the right to apply for the renewal." (H. Rep. 2222, 60th Cong., 2d Sess., pp. 14–15.)

The report cannot be tortured, by reading it without regard to the circumstances in which it was written, into an expression of a legislative purpose to nullify agreements by authors to assign their renewal interests. If

Congress, speaking through its responsible members, had any intention of altering what theretofore had not been questioned, namely, that there were no statutory restraints upon the assignment by authors of their renewal rights, it is almost certain that such purpose would have been manifested. The legislative materials reveal no such intention.

We agree with the court below, therefore, that neither the language nor the history of the Copyright Act of 1909 lend support to the conclusion that the "existing law" prior to 1909, under which authors were free to assign their renewal interests if they were so disposed, was intended to be altered. We agree, also, that there are no compelling considerations of policy which could justify reading into the Act a construction so at variance with its history. The policy of the copyright law, we are told, is to protect the author—if need be, from himself—and a construction under which the author is powerless to assign his renewal interest furthers this policy. We are asked to recognize that authors are congenitally irresponsible, that frequently they are so sorely pressed for funds that they are willing to sell their work for a mere pittance, and therefore assignments made by them should not be upheld. It is important that we distinguish between two problems implied in these situations: whether, despite the contrary direction given to this legislation by the momentum of history, we are to impute to Congress the enactment of an absolute statutory bar against assignments of authors' renewal interests, and secondly, whether, although there be no such statutory bar, a particular assignment should be denied enforcement by the courts because it was made under oppressive circumstances. The first question alone is presented here, and we make no intimations upon the other. It is one thing to hold that the courts should not make themselves instruments of injustice by lending their aid to the enforce-

ment of an agreement where the author was under such coercion of circumstances that enforcement would be unconscionable. Cf. *Union Pacific R. Co.* v. *Public Service Comm'n,* 248 U. S. 67, 70; *Lonergan* v. *Buford,* 148 U. S. 581, 589–91; *Snyder* v. *Rosenbaum,* 215 U. S. 261, 265–66; *Post* v. *Jones,* 19 How. 150, 160; *The Elfrida,* 172 U. S. 186, 193–94. It is quite another matter to hold, as we are asked in this case, that regardless of the circumstances surrounding a particular assignment, no agreements by authors to assign their renewal interests are binding.

It is not for courts to judge whether the interests of authors clearly lie upon one side of this question rather than the other. If an author cannot make an effective assignment of his renewal, it may be worthless to him when he is most in need. Nobody would pay an author for something he cannot sell. We cannot draw a principle of law from the familiar stories of garret-poverty of some men of literary genius. Even if we could do so, we cannot say that such men would regard with favor a rule of law preventing them from realizing on their assets when they are most in need of funds. Nor can we be unmindful of the fact that authors have themselves devised means of safeguarding their interests. We do not have such assured knowledge about authorship, and particularly about song writing, or the psychology of gifted writers and composers, as to justify us as judges in importing into Congressional legislation a denial to authors of the freedom to dispose of their property possessed by others. While authors may have habits making for intermittent want, they may have no less a spirit of independence which would resent treatment of them as wards under guardianship of the law.

We conclude, therefore, that the Copyright Act of 1909 does not nullify agreements by authors to assign their renewal interests. We are fortified in this conclusion by

reference to the actual practices of authors and publishers with respect to assignments of renewals, as disclosed by the records of the Copyright Office. Since the enactment of the Copyright Act of 1870, 16 Stat. 198, 213, assignments of copyrights must be recorded in the office of the Register of Copyrights. The records of the Copyright Office, we are advised, show that during the period from July, 1870, to July, 1871, the first period in which assignments were recorded in the Office, 223 assignments were registered. Of these 14 were assignments of renewal interests. Similarly, during the first six months of 1909, immediately preceding the enactment of the Copyright Act of that year, 304 assignments were recorded, and of these 62 were assignments of renewal interests. In the six-month period following the enactment of the Copyright Act of 1909, there was no significant change: 404 assignments, of which 68 were transfers of renewals. And, to round out the picture, in the most recent complete volume of records (covering the period from January 27, 1943, to February 12, 1943), 135 assignments were recorded, and of these 29 were assignments of renewals. Many assignments have thus been entered into in good faith upon the assumption that they were valid and enforceable.

In addition to all other books and pamphlets relevant to our problem, we have consulted all of the twenty treatises on the American law of copyright available at the Library of Congress. Eight of these state, without qualification, that an author can effectively agree to assign his renewal interest before it has been secured;[5] two state

[5] Curtis on Copyright (1847) 235; Drone on Copyright (1879) 326–32; Howell, Copyright Law (1942) 108; 2 Morgan, Law of Literature (1875) 229–30; Spalding, Law of Copyright (1878) 111; Macgillivray, Law of Copyright (1902) 266–67; Wittenberg, Protection and Marketing of Literary Property (1937) 45; Ladas, International Protection of Literary and Artistic Property (1938) 772–73.

the rule with some reservations; [6] ten are either silent or ambiguous.[7] And the forms of assignment of copyright in treatises and standard form-books generally contain a provision designed to transfer the renewal interest.[8]

The available evidence indicates, therefore, that renewal interests of authors have been regarded as assignable both before and after the Copyright Act of 1909. To hold at this late date that, as a matter of law, such interests are not assignable would be to reject all relevant aids to construction.

Affirmed.

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

MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, and MR. JUSTICE MURPHY conclude that the analysis of the language and history of the copyright law in the dissenting opinion of Judge Frank in the court below, 125 F. 2d 949, 954, demonstrates a Congressional purpose to re-

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[6] DeWolf, Outline of Copyright Law (1925) 65–66; Weil, American Copyright Law (1917) 365–66.

[7] Amdur, Copyright Law and Practice (1936) 540–41; Frohlich and Schwartz, Law of Motion Pictures (1918) 548–49; Marchetti, Law of Stage, Screen, and Radio (1936) 67; Bowker, Copyright—Its History and Its Law (1912) 117, 438; Bump, Law of Patents, Trade-marks, Labels, and Copyrights (2d ed. 1884); Elfreth, Patents, Copyrights, and Trade-marks (1913); Graham, Patents, Trademarks and Copyrights (2d ed. 1921); Law, Copyright and Patent Laws of the United States, 1790–1870 (3d ed. 1870); Copinger, Law of Copyright (7th ed. 1936); Shafter, Musical Copyright (2d ed. 1939) 174.

[8] Wittenberg, Protection and Marketing of Literary Property (1937) 195, 261; Shafter, Musical Copyright (2d ed. 1939) 577; Gordon, Annotated Forms of Agreement (1932) 32; 6 Winslow, Forms of Pleading and Practice (3d ed. 1934) § 8267, pp. 501–02; Birdseye, Encyclopedia of General Business and Legal Forms (1924) 280–81; Amdur, Copyright Law and Practice (1936) 836; Church, Legal and Business Forms (2d ed. 1925) 344.

serve the renewal privilege for the personal benefit of authors and their families. They believe the judgment below should be reversed.

DE ZON *v.* AMERICAN PRESIDENT LINES, LTD.

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

No. 436. Argued February 4, 1943.—Decided April 5, 1943.

1. A seaman who, in the course of his employment, suffers physical injury due to the neglect or incompetence of the ship's doctor in treating his illness has a right of action against the shipowner under the Jones Act. P. 668.
2. To such an action it is no defense that the shipowner used due care in selecting the ship's doctor. P. 664.
3. In this case, involving the right of a seaman to recover for injury to and for the loss of an eye, alleged to have resulted from negligence of the ship's doctor in his diagnosis, or in his failure to send the seaman to a hospital at a port of call, there was not sufficient evidence of negligence to require submission to the jury. P. 671.

129 F. 2d 404, affirmed.

CERTIORARI, 317 U. S. 617, to review a judgment affirming a judgment on a directed verdict in an action for damages for personal injuries brought by a seaman against his employer, the above-named steamship company.

Mr. Herbert Resner for petitioner.

Mr. Edward F. Treadwell, with whom *Mr. Reginald S. Laughlin* was on the brief, for respondent.

MR. JUSTICE JACKSON delivered the opinion of the Court.

Petitioner, a seaman, brought an action at law under the Jones Act[1] against the respondent shipowner. He

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[1] 41 Stat. 1007, 46 U. S. C. § 688.

alleged that while in the service of its ship he suffered injuries which resulted in the loss of his right eye, because of the negligence of the ship's doctor in treating him and in failing to have him hospitalized ashore. The trial court directed a verdict against him. The Circuit Court of Appeals affirmed for the reason, among others, that the shipowner's duty to the seaman was only to use due care in selecting a competent physician and, that being done, was not responsible for his incompetence or negligence. 129 F. 2d 404. This holding raised an important question of federal law under the Jones Act not passed on heretofore by this Court. Accordingly we granted certiorari. 317 U. S. 617.

The petitioner signed articles as a marine fireman for a voyage, from San Francisco to the Orient and return, on the respondent's passenger ship *President Taft*. The voyage was of about sixty days' duration, ending at the home port on June 10, 1940. On June 3, while petitioner was painting the outside of a boiler, a chip of dry aluminum paint lodged in his right eye, followed probably by getting some of the liquid paint in as well. He went to his quarters and washed the eye with a wash in an eye cup. At this time he did not believe that anything was seriously amiss with his eye, and he returned to work. When he arose the next morning he was suffering considerably from his eye. He told the ship's doctor of this history, and the doctor examined his eye without the aid of any special equipment, washed it out with a boric solution, irrigated it with argyrol, and bandaged it. He told petitioner not to work, and the petitioner repaired to his quarters and stayed there until the ship came into Honolulu, about 4:00 in the afternoon. Then the ship's doctor gave him authority from the master to go ashore for examination at the outpatient department of the Marine Hospital in Honolulu. Petitioner found this closed, and went to Queens Hospital. There he was examined by

Doctor Yap, a physician of unspecified qualifications, who diagnosed the injury as "acute traumatic conjunctivitis" (injury to outer coating of eye resulting from a blow), washed out the eye with a boric acid wash, and applied yellow oxide and an eye pad. Doctor Yap told the petitioner that he could not do much for him, but advised petitioner to get off the ship and be hospitalized ashore. The petitioner returned to the ship, arriving at about 6:00 in the evening. The ship's doctor was ashore, and, since the petitioner did not feel well, the ship's medical orderly put him to bed. Forty minutes before sailing time, the ship's doctor returned. He saw petitioner at 11:30 and was informed of Doctor Yap's recommendation, then told the petitioner that: "Well, if you want to take a chance or a gamble on it you can go on to the States. It don't look so bad. It can be all right." The petitioner answered: "You are the boss; if you want to go, let's go."

The ship sailed at 12:00 midnight on June 4, with petitioner hospitalized aboard. The petitioner's injured right eye got steadily worse, and, in the ship's doctor's term, was in an "alarming" condition two or three days later. The ship's doctor sought the advice of another doctor, a passenger, who had resided in the Orient and was familiar with eye infections common there. He thought that none of these was present, but suggested that petitioner be given sulfapyridine, a drug used to combat eye infections; and this advice was followed. On arrival at San Francisco on June 10, the petitioner was taken to the Marine Hospital by ambulance.

On the evening of June 11, a consulting eye specialist was called in. In the belief that there was a foreign body in the eye he recommended an X-ray, which was made on the next day. Thereafter he reported that the anterior chamber of the eye was filled with dark hemorrhage material, and that in that chamber there was "fibrin . . . or scar of previous operation, most likely the former," with

the comment that "This is a peculiar looking eye which is difficult to fit in with the history of impact with paint scale or possible steel fragment. The hemorrhage suggests perforation with injury to iris or ciliary body. There is small likelihood of a contusion causing it." Petitioner's injury was finally diagnosed on June 15 as "Hemorrhage, anterior chamber, right eye, traumatic." The eye was removed on July 5. In the course of after-treatment there was entered in the hospital records, on September 10, the statement that: "At this time patient changes history of injury and also states he had a muscle operation on right eye in 1937. Injury now alleged to cause the disability was a scale of paint in the eye and it is the opinion of the surgeon in charge that this would give an intraocular hemorrhage such as was present in the right eye. Diagnosis changed September 10, 1940."

Doctor Faed, connected with the Marine Hospital in San Francisco, who had removed the eye, was called as petitioner's witness. He testified that whether an eye injury can be diagnosed as conjunctivitis, as the ship's doctor had diagnosed it, or as a hemorrhage, as was finally the diagnosis at the Marine Hospital, depends upon the doctor and the facilities at his command. He was asked on direct examination whether "if such treatment as was given in the Marine Hospital on June 10th and following had been afforded Mr. De Zon on June 3rd, 4th and following, . . . that might have saved his eye," and answered that "I am unable to give an opinion about that." Then, in response to a question whether, on the basis of the whole history of the case, including that developed at the Marine Hospital at San Francisco, it was his opinion that petitioner "should have been hospitalized on June 3rd and 4th, when this trouble to the eye first occurred," he answered that: "I believe he should have been hospitalized; it might have helped some." He did not wish, however, to "go on record" as saying that it would

have aided, and testified further on direct examination that, not being sure whether to hospitalize petitioner at the earlier date, he "would have given the advantage to the patient." Another and apparently equally well qualified eye specialist, offered as respondent's witness, testified, as did the ship's doctor, that the ship's doctor had given the standard treatment for conjunctivitis, and that additional treatment such as was given the petitioner at San Francisco would have had no beneficial effect, and might have had harmful effects, if given before the period of time which elapsed on the voyage to San Francisco. This specialist also testified, and without contradiction, that it was too much to expect of the ordinary general practitioner, such as the ship's doctor was, to be able to diagnose petitioner's case as a dangerous one.

The testimony of respondent is uncontradicted that the ship's doctor was a duly licensed physician in California, a general practitioner with some surgical experience, and was selected only after careful inquiry had satisfied the Chief Surgeon of the respondent that he was a competent man for the post. It is conceded that proper investigation was made, and it was learned that he was a man of good reputation and character.

Respondent's Chief Surgeon also testified that authority to decide whether a seaman should be treated, and the manner of treatment, was vested in the master, who had authority to disregard any recommendation in this regard that the ship's doctor might make. See also, R. S. § 4596, 46 U. S. C. § 701; R. S. § 4612, 46 U. S. C. § 713.

The Circuit Court of Appeals in considering this case held that the shipowner's duty ended with the exercise of reasonable care to secure a competent general practitioner, and since there could be no question that such care had been exercised, the shipowner could not be held liable in damages for harm that could have followed the negli-

gence of the ship's doctor. In our opinion this was error.

The Jones Act reads in pertinent part as follows: "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; . . ." Thus it makes applicable to seamen injured in the course of their employment the provisions of the Federal Employers' Liability Act, 45 U. S. C. §§ 51–60, which gives to railroad employees a right of recovery for injuries resulting from the negligence of their employer, its agents or employees. *Panama R. Co.* v. *Johnson,* 264 U. S. 375; *The Arizona* v. *Anelich,* 298 U. S. 110; *O'Donnell* v. *Great Lakes Dredge & Dock Co., ante,* p. 36.

Cortes v. *Baltimore Insular Line,* 287 U. S. 367, 377–378, explained the effect of the Jones Act as follows: "Congress did not mean that the standards of legal duty must be the same by land and sea. Congress meant no more than this, that the duty must be legal, i. e., imposed by law; that it shall have been imposed for the benefit of the seaman, and for the promotion of his health or safety; and that the negligent omission to fulfill it shall have resulted in damage to his person. When this concurrence of duty, of negligence and of personal injury is made out, the seaman's remedy is to be the same as if a like duty had been imposed by law upon carriers by rail." Recovery was accordingly allowed under the Jones Act for the negligence of the master in the discharge of the ancient duty to provide maintenance and cure for a seaman wounded in the service of the ship.

We are of opinion that the reasoning of the *Cortes* case is controlling, and that there is nothing in this case to shield the shipowner from liability for any negligence of the ship's doctor.

Immunity cannot be rested upon the ground that the medical service was the seaman's and the doctor's business, and the treatment not in pursuance of the doctor's duty to the ship or the ship's duty to the seaman.[2]

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[2] Liability to a passenger injured by the negligence of a ship's doctor has been denied on this ground. One of the leading cases on liability to passengers is *Laubheim* v. *DeK. N. S. Co.*, 107 N. Y. 228, 13 N. E. 781. It arose before, but was decided after, the enactment of the Act of Congress of August 2, 1882, 22 Stat. 186, 188, 46 U. S. C. § 155, imposing upon ships carrying certain types of passengers the obligation of providing a "competent" doctor for the benefit of the passengers. The plaintiff, a passenger, sued the shipowner for personal injuries resulting from alleged negligence of the ship's surgeon. Judge Francis M. Finch disposed of the case in a short opinion, in the apparent belief that the rule applied was not sufficiently in question to warrant discussion. He said: "If, by law or by choice, the defendant was bound to provide a surgeon for its ships, its duty to the passengers was to select a reasonably competent man for that office, and it is liable only for a neglect of that duty. (*Chapman* v. *Erie R. Co.*, 55 N. Y. 579; *McDonald* v. *Hospital*, 120 Mass. 432; *Secord* v. *St. Paul R. R. Co.*, 18 Fed. Rep. 221.) It is responsible solely for its own negligence and not for that of the surgeon employed." The *Chapman* case tested liability of a railroad by the "fellow servant" doctrine, which has been abolished by the Federal Employers' Liability Act and can therefore have no application in this case. *Jamison* v. *Encarnacion*, 281 U. S. 635. The *Secord* case gives only a charge to a jury in a case where the issue was liability of a railroad to a passenger for negligent treatment by a physician in its employ. The *McDonald* case held a hospital immune from liability for negligence of its house surgeon, on the ground that it was a charitable institution.

O'Brien v. *Cunard Steamship Co.*, 154 Mass. 272, 28 N. E. 266, arose under the Act of August 2, 1882, and was decided after the *Laubheim* case, upon which it relied. Judge Knowlton of the Massachusetts Supreme Judicial Court said: "Under this statute it is the duty of ship-owners to provide a competent surgeon, whom the passengers may employ if they choose, in the business of healing their wounds and curing their diseases. The law does not put the business of treating sick passengers into the charge of common carriers, and make them responsible for the proper management of it. The work

"The duty to provide proper medical treatment and attendance for seamen falling ill or suffering injury in the service of the ship has been imposed upon the shipowners by all maritime nations." *The Iroquois,* 194 U. S. 240, 241–242. When the seaman becomes committed to the service of the ship, the maritime law annexes a duty that no private agreement is competent to abrogate, and the ship is committed to the maintenance and cure of the seaman for illness or injury during the period of the voyage, and in some cases for a period thereafter.[3] This duty does not depend upon fault. It is no merely formal obligation and it admits of no merely perfunctory discharge. Its measure depends upon the circumstances of each

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which the physician or surgeon does in such cases is under the control of the passengers themselves. It is their business, not the business of the carrier. . . . The master or owners of the ship cannot interfere in the treatment of the medical officer when he attends a passenger. He is not their servant, engaged in their business and subject to their control as to his mode of treatment. They do their whole duty if they employ a duly qualified and competent surgeon and medical practitioner, and supply him with all necessary and proper instruments, medicines, and medical comforts, and have him in readiness for such passengers as choose to employ him. This is the whole requirement of the statute of the United States applicable to such cases. . . ." *Id.* at 275–276.

These statements of judges of great learning, for courts of last resort of states having much to do with maritime pursuits, had their influence upon the federal courts dealing with the same problem. *The Great Northern,* 251 F. 826; *The Korea Maru,* 254 F. 397, 399; *Branch* v. *Compagnie Generale Transatlantique,* 11 F. Supp. 832; cf. *The Napolitan Prince,* 134 F. 159.

[3] The duty is not to "cure" in a literal sense, but to provide care, including nursing and medical attention. *Calmar S. S. Corp.* v. *Taylor,* 303 U. S. 525, 528. It has not been restricted by the Shipowners' Liability Convention of 1936, 54 Stat. 1693, which provides in Article 12 that "Nothing in this Convention shall affect any law, award, custom or agreement between shipowners and seamen which ensures more favourable conditions than those provided by this Convention."

case—the seriousness of the injury or illness and the availability of aid. Although there may be no duty to the seaman to carry a physician, the circumstances may be such as to require reasonable measures to get him to one, as by turning back, putting in to the nearest port although not one of call, hailing a passing ship, or taking other measures of considerable cost in time and money. Failure to furnish such care, even at the cost of a week's delay, has been held by this Court to be a basis for damages. *The Iroquois, supra.*

To provide a ship's physician was therefore no mere act of charity.[4] The doctor in treating the seaman was engaged in the shipowner's business; it was the ship's duty that he was discharging in treating the injured eye. While, no doubt, the physician recognized at least an ethical obligation between himself and the patient, he was performing the service because the ship employed him to do so, not because the petitioner did. He was not an independent practitioner, called to treat one whose expenses the ship agreed to make good. We express no view as to the liability for malpractice by one not in the employ of the ship.[5] But in this case the physician was not in his own or the seaman's control; he was an employee and, as such, subject to the ship discipline and the master's orders.

Whatever, in the absence of the Jones Act, might have been the effect upon respondent's liability of the fact that petitioner and the ship doctor were both in its employ, that Act prevents this fact from conferring an immunity

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[4] We express no opinion upon whether charitable or gratuitous nature of medical attention should have exculpatory effect. Cf. *President and Directors of Georgetown College* v. *Hughes,* 130 F. 2d 810.

[5] Cf. *The Sarnia,* 147 F. 106; *The C. S. Holmes,* 209 F. 970; *Bonam* v. *Southern Menhaden Corp.,* 284 F. 360 (involving physicians other than ship's doctors).

upon the respondent. *Jamison* v. *Encarnacion,* 281 U. S. 635; *Cortes* v. *Baltimore Insular Line, supra.*

We hold, therefore, that the shipowner was liable in damages for harm suffered as the result of any negligence on the part of the ship's doctor.[6]

We come, then, to the question as to whether there was sufficient proof of negligence to require sending this case to the jury.

The short of the case is that the petitioner failed to disclose the past history of the eye to the ship's doctor, and the ship's doctor diagnosed the case as one of conjunctivitis and gave the petitioner what undisputed medical testimony says to be the standard treatment for that condition. Going ashore, the case was diagnosed similarly by a physician of unstated qualifications, who treated the eye in the same manner as the ship's doctor. Returning to the ship, the petitioner told the ship's doctor of the shore doctor's recommendation that he leave the ship and be hospitalized ashore. The ship's doctor acknowledges that he would have heeded such a recommendation had it been made, but asserts that it was not made. For purposes of testing the correctness of the direction of the verdict, we must assume that the ship's doctor was told of it. The concession of the ship's doctor that he would have heeded such a recommendation is not of itself evidence of negligence. There is not a word of evidence that

[6] *Johnson* v. *American Mail Line,* 1937 A. M. C. 1267 (Superior Court for King County, Washington), reached the opposite conclusion, relying upon cases cited in footnotes 2 and 5, *supra,* which we think are inapposite, for the reasons already stated. *Geistlinger* v. *International Mercantile Marine Co.,* 295 F. 176, also denied liability for the ship's doctor's negligent treatment of a seaman, but it did not find the Jones Act applicable, and did not consider what its effect might be if it should be found applicable. *Leone* v. *Booth S. S. Co.,* 232 N. Y. 183, 133 N. E. 439, also denied liability, but it was decided on facts antedating the Jones Act, and it too did not consider the effect of the Act.

the shore doctor was any better qualified to diagnose the eye than was the ship's doctor, and as a matter of fact his diagnosis of the case was the same as the ship's doctor's. That their prognoses were different does not establish either that the one was overly cautious or that the other was negligent in failing to take the same attitude as to the necessity of hospitalization ashore. Our own experience vividly demonstrates that careful and competent men frequently reach different conclusions despite the fullest and most careful examination of all available data, including the difference of opinion on the part of their associates. In the present case, neither doctor had the benefit of all the facts of the eye's history. The character of the petitioner's affliction was not ascertained until days after the petitioner reached San Francisco, and then only after an outside consultant was called in to advise the eye specialists in the Marine Hospital. True it is that one doctor said, partly on the basis of the facts disclosed long after petitioner's eye had been removed, that he would have recommended hospitalization at Honolulu, and that additional treatment at the time petitioner was en route to San Francisco might have had a beneficial effect; but even on the basis of the knowledge available at the trial he would not venture an opinion that treatment such as was given at San Francisco would have saved petitioner's eye if given before or at the time he reached Honolulu. Another, and apparently equally well qualified, eye specialist testified that nothing in addition to the standard course of treatment for conjunctivitis, which the ship's doctor gave, could have been done with safety until after the petitioner's arrival in San Francisco, and that any attempt to do more probably would have actually impaired petitioner's chances of saving his eye. He testified, and without contradiction, that it was too much to expect of the ordinary general practitioner, such as the ship's doctor was, to be able to diagnose petitioner's case as a dangerous one.

In these circumstances, it is said that the ship's doctor should have sent the petitioner ashore, despite the petitioner's desire to return to San Francisco with the boat; and although there is no evidence what the facilities were at Honolulu. Had he put petitioner ashore only to have him lose his eye, it is conceivable that he would have been charged with neglect in doing that.

If there was malpractice in this case, no evidence of it has been put into this record. The surgeon who removed the eye was called as a witness. He testified that the cause of the trouble was a hemorrhage. But no professional opinion was offered as to when the hemorrhage took place. We do not know whether the ship's surgeon is accused of malpractice for failure to cure a hemorrhage which had already occurred when he was first consulted or because of failure to anticipate it and prevent it. Moreover, there is no proof whatever that, if a hemorrhage within the eye once occurred to an extent not absorbed by the ordinary natural processes, it is curable at all. If this petitioner was destined to lose his eye at all odds, he hardly establishes a cause of action by saying it should have occurred at Honolulu instead of San Francisco. Hospitalization either on ship or on land is not in itself a cure. At San Francisco, specialists had no cure for the eye but to remove it, and we are not told that anything different could have been done at any earlier stage with any probability that it would bring about a different result.

The doctor apparently made a wrong diagnosis, but that does not prove that it was a negligent one. It seemed to be the obvious diagnosis from the history which the patient gave him, and that appears to have been incomplete and not unlikely to mislead.

The loss of the petitioner's eye is a serious handicap. But damages may be recovered under the Jones Act only for negligence. *Jamison* v. *Encarnacion, supra,* at 639.

Whether the legislative policy of compensating only on the basis of proven fault is wise is not for us to say, nor is it our function to circumvent it by reading into the law a theory, however disguised, that a physician who undertakes care guarantees cure, and that each unsuccessful effort of the physician may be visited with a successful malpractice suit.

Affirmed.

MR. JUSTICE RUTLEDGE did not participate in the consideration or decision of this case.

MR. JUSTICE BLACK, dissenting:

The issue in this case is: shall a jury or a court decide whether petitioner lost his eye through the respondent's negligence? I agree with the Court that the shipowner was liable for the negligence of its doctor, and I agree further that the Jones Act is not a workmen's compensation act and does not impose liability without fault; but I do not agree that a court may substitute its judgment on the facts for the decision of a jury when, as here, there is room for reasonable difference of opinion on the critical issue of the case. I think there was sufficient evidence to permit a jury to find negligence in the doctor's failure to leave the petitioner at Honolulu for hospital treatment.

The evidence showed that this seaman sustained an injury so serious that it resulted in the eventual removal of his eye. When a seaman is injured, the shipowner has an imperative obligation to come to his aid; [1] and the shipowner's responsibility is so heavy that he may be found negligent for failure to take his ship to the nearest port in order to provide adequate treatment.[2] There is a similar obligation to leave a seriously injured seaman in a

[1] *Harden* v. *Gordon*, 2 Mason 541; *Reed* v. *Canfield*, 1 Sumner 195.
[2] *The Iroquois*, 194 U. S. 240, 242.

port at which a vessel has arrived.[3] This duty of course exists where no adequate treatment can be given on the ship. Here the ship's doctor was not an eye specialist; the ship did not have aboard the medicines which competent physicians in San Francisco applied; and there was no X-ray although one was later found essential for diagnosing the ailment. It is not surprising that the ship should lack these facilities, for every merchant vessel cannot be a floating hospital; but it is for this very reason that a ship is required to furnish shore treatment for seriously injured seamen.

The United States Marine Hospital in Honolulu had all the facilities which the ship lacked. These hospitals are recognized government institutions and a seaman has no burden to prove that the equipment and treatment in the hospital would have been better than the equipment and treatment on the ship. Here, as in *Leone* v. *Booth Steamship Co.,* 232 N. Y. 183, 185, 133 N. E. 439, "It is to prefer shadow to substance to make the result of this action depend on affirmative proof of this matter."

What was the evidence on which the jury could have found that the seaman should have been left for treatment in this hospital? The petitioner's eye began to pain him as a result of an accident on June 3, 1940. By 7 o'clock the next morning, the eye was in such condition that he required medical treatment from the ship's doctor and was released from duty. At 5 o'clock that afternoon the vessel docked at Honolulu. The ship's doctor sent him to the Marine Hospital, which was closed at that hour, and he went to Queens Hospital which, according to the evidence, is an emergency institution connected with the Marine Hospital and which takes care of patients

[3] The United States guarantees the cost of maintenance and return to the United States of injured seamen discharged in foreign ports. 46 U. S. C. § 683.

temporarily. The doctor at Queens Hospital advised the petitioner that he should be released from his vessel and enter the hospital at once. This physician advised the seaman that he might lose his eye if he returned to the ship.

The petitioner returned to his vessel at 6 P. M. but was unable to see the ship's doctor until 11:30, approximately 30 minutes before the vessel sailed. He repeated to the ship's doctor the advice given him ashore. The seaman testified that the doctor told him that no danger would result from returning to San Francisco, and, since the doctor was his superior officer and an "accredited physician," he relied upon the doctor's advice although he was suffering intensely.

The petitioner's eye grew worse, treatment in the San Francisco Hospital failed to cure it, and it was removed. Two San Francisco specialists familiar with his case testified that they would have advised that he be left in Honolulu for hospital treatment. True, we have no testimony that the eye would have been saved by hospitalization at Honolulu, and whether it could have been will never be known; but it is clear that the petitioner would have received excellent treatment at an earlier date than he did. Adequate treatment, of course, is usually aimed at curing or alleviating the serious consequences of injuries and diseases, and timely treatment can prevent progressive physical deterioration. Someone must decide whether such happy results would have followed earlier hospitalization in the instant case.

Directing a verdict against the petitioner in this case is substituting judicial for jury judgment on factual questions which can as readily be decided by the layman as by the lawyer. When we consider the weight of the evidence and resolve doubtful questions such as these, we invade the historic jury function. "The right of jury trial in civil cases at common law is a basic and fundamen-

tal feature of our system of federal jurisprudence which is protected by the Seventh Amendment." *Jacob* v. *New York City,* 315 U. S. 752. This constitutional command should not be circumvented.

MR. JUSTICE DOUGLAS and MR. JUSTICE MURPHY join in this dissent.

ILLINOIS COMMERCE COMMISSION ET AL. *v.* THOMSON, TRUSTEE.

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

No. 178. Argued January 12, 1943.—Decided April 12, 1943.

1. The order of January 21, 1942, in a proceeding known as *Ex parte No. 148,* by which the Interstate Commerce Commission authorized the railroads, including the Chicago & North Western, to increase passenger fares by 10%, was not intended to apply to intrastate commutation fares on that railway in Illinois. P. 684.
2. An order of the Interstate Commerce Commission directing an increase of railroad fares should not be held to apply to intrastate fares in the presence of a serious doubt that it was so intended. P. 685.
3. In the absence of circumstances of peculiar urgency, a railroad, asserting that passenger fares fixed by state authority are confiscatory, should exhaust the administrative remedy afforded by the state law before seeking an injunction in a federal court. P. 686.

Reversed.

APPEAL from a decree of the District Court of three judges, awarding to the Trustee in reorganization of the Chicago & North Western Railway an injunction permanently restraining the Illinois Commerce Commission and state enforcement officials from taking any steps to prevent a 10% increase of intrastate commutation passenger fares on that railway.

Mr. William C. Wines, Assistant Attorney General of Illinois, with whom *Messrs. George F. Barrett,* Attorney

General, and *Albert E. Hallett*, Assistant Attorney General, were on the brief, for appellants.

Mr. Nye F. Morehouse, with whom *Messrs. William T. Faricy* and *P. F. Gault* were on the brief, for appellee.

Solicitor General Fahy and *Messrs. Robert L. Stern, Daniel W. Knowlton*, and *J. Stanley Payne* filed a brief on behalf of the Interstate Commerce Commission, as *amicus curiae*. *Messrs. William C. Chanler* and *Herman Horowitz* also filed a brief on behalf of New York City, as *amicus curiae*, urging reversal.

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

This case, which comes here by direct appeal under § 266 of the Judicial Code, 28 U. S. C. § 380, involves the meaning of an order of the Interstate Commerce Commission and its application to the Illinois intrastate commutation passenger fares of the Chicago & North Western Railway. By interlocutory and finally by permanent injunction, the district court below of three judges has enjoined appellants, the Illinois Commerce Commission and named law enforcement officers of the state, from taking any steps to prevent a 10% increase in such fares by appellee, trustee of the Chicago & North Western Railway Company in reorganization under § 77 of the Bankruptcy Act. The 10% increase, if effective, would bring the fares in some instances above the maximum of two cents per mile imposed by state statute. Illinois Revised Statutes, 1941, c. 114, §§ 154–56.

The bill of complaint alleges, and the district court found, substantially as follows: Until March 7, 1942, appellee and his predecessor in interest, the Chicago & North Western Railway Company, had collected commutation fares for the intrastate transportation of passengers in Illinois, as required by a report and order of the Interstate Commerce Commission entered October 6, 1925, in a pro-

ceeding under § 13 of the Interstate Commerce Act (now 49 U. S. C. § 13). The purpose and effect of that order was to require the Chicago & North Western to increase its intrastate commutation fares to substantially the same level as the fares then in force for interstate passenger traffic, which had previously been increased by order of the Commission, and thus to remove undue preference and prejudice and unjust discrimination against interstate commerce, as well as undue preference and advantage to persons traveling in intrastate commerce on the Illinois lines of the Chicago & North Western. The order was entered upon appropriate findings. Intrastate Rates Within Illinois, Docket No. 11703, 102 I. C. C. 479. It directed an increase of 20% over the then prevailing rates for the intrastate commutation fares involved in this case, but provided that this increase should be "subject to a maximum of 2 cents per mile," the Commission's opinion stating that this was "in deference to the state statute." (102 I. C. C. at 485.)

On February 28, 1936, the Interstate Commerce Commission, after a general and nationwide investigation of railroad passenger fares, entered an order by which it retained its continuing jurisdiction over the Illinois intrastate commutation passenger fares here in question, by specific reference to its previous order in Docket No. 11703, although the order did not require any modification of those fares. Passenger Fares and Surcharges, Docket No. 26550, 214 I. C. C. 174.

In December 1941, the Commission undertook a further nationwide investigation of both freight rates and passenger fares, to determine whether increases of 10%, as asked by the railroads, should be authorized in view of increased operating expenses and costs of materials and supplies. By order of January 21, 1942, in that proceeding, known as Ex parte No. 148, the Commission—upon findings that the increase was necessary for adequate and

efficient service during the war emergency—authorized the railroads, including the Chicago & North Western, to increase passenger fares by 10%. The order further directed that "all outstanding orders, as amended, of the Commission, authorizing or prescribing interstate and intrastate fares, or bases of fares be, and they are hereby, modified, effective concurrently with the establishment of the increased fares" approved by the order, but only to the extent necessary to permit the authorized increase to be added to "the interstate and intrastate fares approved or prescribed in, or maintained or held by virtue of, said outstanding orders"; that a copy of the order be filed "in the docket of each such proceeding, including those proceedings under § 13 of the Interstate Commerce Act enumerated in the order of February 28, 1936, in Docket No. 26550"; and "that all tariffs or supplements changing fares by authority of this order, which are maintained or held by authority of outstanding orders of the Commission, shall bear on their title pages specific reference to this order." In a report and order of March 2, 1942, in Ex parte No. 148, the Commission reaffirmed these findings, authorized certain increases in freight rates, and made further findings of fact in support of the increases. Increased Railway Rates, Fares, and Charges, 1942, 248 I. C. C. 545.

The district court held that the Commission's order of January 21, 1942, by its specific references to all outstanding orders previously issued in § 13 proceedings, which would include that of 1925 in Docket No. 11703, had been made applicable to the Illinois commutation passenger fares here in question.

Acting under the purported authority of these orders, appellee, about February 6, 1942, filed with the Illinois Commerce Commission, and with the Interstate Commerce Commission, tariff schedules referring to the latter's order of January 21, 1942, and increasing by 10%, effective

March 8, 1942, its previously existing Illinois intrastate passenger commutation fares. The fares proposed by these tariffs in some instances exceed the limit imposed by the Illinois two cent fare law. On February 18th the Illinois commission issued an order purporting to suspend these tariffs and the increased fares named in them until July 6, 1942, and ordered appellee not to file any new tariff or otherwise to change the previously existing fares during the period of suspension or any extension of it without the permission of the state commission. The order directed that a hearing be held by the state commission on the propriety of the proposed changes.

The district court held that the effect of the state commission's order was to prescribe for appellee the continuation of the intrastate passenger fares in force immediately before February 18, 1942, and to prohibit appellee from increasing or modifying those fares save as permitted by the state commission; that appellants have threatened and continue to threaten appellee with the prosecution of numerous proceedings in the state courts to impose upon appellee and his agents fines and penalties for failure to comply with the state commission's order; that unless appellants are enjoined from such threatened prosecutions and cumulative penalties, appellee will suffer irreparable injury.

From all this the district court concluded, as matters of law, that the Interstate Commerce Commission's order of January 21, 1942, is a valid order which modified the 1925 and 1936 orders taking jurisdiction over the intrastate commutation fares in question, and that the 1942 order, without more, authorized the increased fares prescribed in the tariffs filed by appellee. The court held that the Illinois commission's order of February 18, 1942, was invalid and without force with respect to these commutation fares because in conflict with the 1942 order of the Interstate Commerce Commission, and for the additional

reason that the old fares continued in effect by the state commission are confiscatory and in violation of the Due Process Clause of the Fourteenth Amendment. The court accordingly restrained appellants from enforcing the state commission's order, and from interfering with the collection of the commutation fares prescribed by appellee's proposed tariffs.

Appellants assail the judgment of the district court on the grounds that the purport and true meaning of the Interstate Commerce Commission's 1942 order was not to order into effect Illinois intrastate fares superseding those previously in force, but only to assent to increased rates when and if permitted by the state commission, which it has not done; that the Interstate Commerce Commission's order, if intended to compel increases in intrastate rates, is not supported by adequate findings (cf. *Florida* v. *United States,* 282 U. S. 194); and that, so far as the judgment below rests on the alleged confiscatory character of the preëxisting rates, the finding of confiscation is not supported by the record, and appellee has not pursued the administrative remedy available before the state commission, as is prerequisite to equitable relief.

The meaning and appropriate application of the Interstate Commerce Commission's order are undoubtedly obscure. We have heard exhaustive argument and examined elaborate briefs by the parties to this litigation and by the City of New York as amicus curiae, endeavoring to throw light on its true meaning. Like arguments have been made, in a cause pending in the New York state courts,[1] to determine the application of this order to intra-

[1] The Supreme Court of New York concluded that the Commission's order was not intended to direct a 10% increase in those intrastate rates. *Matter of Transit Commission* v. *Long Island R. Co.,* 178 Misc. 290, 33 N. Y. S. 2d 993. The Court, however, suggested that an application might be made to the Interstate Commerce Commission for a clarification of its order to remove any doubt. On such

state standard passenger fares of the Long Island Railroad.

As we were in doubt as to the intended scope of the Commission's order, and the Commission had not filed a brief or otherwise intervened in this litigation, we requested a brief on its behalf discussing the meaning and application of its order. In compliance with our request it has filed a brief, in which it takes the position that the 1942 order was not intended, and should not be construed, to direct a 10% increase in the Illinois intrastate commutation fares established in 1925. Although the brief is not wholly free from the obscurity surrounding the order itself, the Commission's ultimate position that the order is inapplicable to these particular commutation fares is one which, under all the circumstances of the case, we accept.

The doubt concerning the application of the 1942 order arises from uncertainty as to the extent to which its broad language is to be deemed restricted when read with the earlier orders of the Commission relating to intrastate rates, and in the light of the nature of the functions which the Commission is called on to perform in prescribing such rates. On its face, the order provides broadly that: "all outstanding orders, as amended, of the Commission, authorizing or prescribing interstate and intrastate fares . . . are hereby, modified, effective concurrently with the establishment of the increased fares herein approved, only to the extent necessary to permit the increase herein authorized to be added to the interstate and intrastate fares approved or prescribed in . . . said outstanding

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application the Commission refused to clarify the order, and on rehearing the court adhered to its original decision. I. C. C. Order, entered in Ex parte 148, April 6, 1942; 107 N. Y. L. Journal, p. 1958, May 8, 1942. The decision was affirmed by the Appellate Division, 265 App. Div. 847, 38 N. Y. S. 2d 361, and the case is now pending in the New York Court of Appeals.

orders." Whether this, without more, was intended or operates to direct a 10% increase of appellee's intrastate commutation fares in Illinois, so as to preserve the established relationship between them and interstate fares, rather than intended to permit appellee to obtain the 10% increase only with the assent of the state commission, is the question.

The position of the Interstate Commerce Commission is, in substance, that the order is not to be construed as prescribing Illinois intrastate commutation fares for the Chicago & North Western, because the order was unattended by the procedure which the Commission regards as the appropriate basis for such an order, and consequently that the Commission did not have in mind or intend that the order should have that effect.

It has long been established that the Interstate Commerce Commission, under § 13 (4) of the Act, has power to supersede an intrastate rate by prescribing in its stead a new rate which the Commission finds necessary to remove undue or unreasonable prejudice to interstate commerce resulting from the maintenance of the intrastate rate. It may rightly establish such a modification of the intrastate rate only upon notice to the intrastate carriers concerned, and hearings, followed by findings showing prejudice to interstate commerce. Upon such findings the statute makes it the duty of the Commission to prescribe the just and reasonable intrastate rate found necessary to remove the prejudice. *Wisconsin Railroad Comm'n* v. *C., B. & Q. R. Co.*, 257 U. S. 563; *Louisiana Public Service Comm'n* v. *Texas & New Orleans R. Co.*, 284 U. S. 125; *United States* v. *Louisiana*, 290 U. S. 70. And for purposes of this case we may assume, without deciding, that intrastate rates which have once been prescribed by § 13 orders may be modified by a blanket order raising or lowering the level of intrastate and interstate rates, even though the Commission makes no new findings

of discrimination but leaves that question subject to later inquiry upon applications filed in particular cases. Cf. *United States* v. *Louisiana, supra,* 73–79; *New England Divisions Case,* 261 U. S. 184, 196–201.

In 1920 the Interstate Commerce Commission authorized a general increase of 20% in interstate passenger fares, establishing a countrywide standard passenger fare of 3.6 cents a mile. Increased Rates, 1920, 58 I. C. C. 220 and 302. The Commission later instituted the § 13 proceeding which resulted in its 1925 order increasing by 20%, subject to a 2 cent per mile maximum, the Illinois intrastate commutation fares of the Chicago & North Western, in order to remove the prejudice of such fares to interstate commerce. Intrastate Rates Within Illinois, 102 I. C. C. 479. This was followed by the 1936 order directing a general reduction of interstate passenger fares. By this order the Commission, as a means of increasing passenger traffic, reduced maximum standard Pullman fares to three cents and coach fares to two cents a mile. And to prevent intrastate fares subject to the earlier § 13 orders from being higher than the new interstate maximum fares, the Commission ordered all outstanding § 13 orders to be modified to the extent necessary to permit the new fares to become effective. Passenger Fares and Surcharges, 214 I. C. C. 174. While this order affected many intrastate fares which had previously been subject to § 13 orders, it was without effect on Illinois commutation fares on the Chicago & North Western, which had been no greater than the maximum of two cents a mile. Thus the Illinois commutation fares involved in the present case, established in 1925, were not reduced between 1925 and 1942.

It is the position of the Commission that, since the 10% increase of 1942 if mandatory would raise these Illinois intrastate commutation fares (unlike the standard fares) above the level set by the § 13 order of 1925, and

as the Commission made no special findings justifying such an increase of the level of intrastate fares, the 1942 order is not to be understood to have the effect ascribed to it by the district court. The Commission points out that even if the need of equivalence of intrastate and interstate fares has not changed since 1925, the Commission is concerned not only with the necessity for maintaining the equivalence, but also with the particular point at which the fares should be brought together. The Commission intimates that its findings establishing the 1925 maximum level of intrastate fares would not be regarded by it as sufficient support for a still higher level in 1942. It urges that the absence of findings supporting a higher level therefore indicates that its 1942 order was not intended, without more, to increase by 10% the Illinois intrastate commutation fares.[2]

The Interstate Commerce Commission is without jurisdiction over intrastate rates except to protect and make effective some regulation of interstate commerce. In view of the Commission's construction of its order, and the grounds upon which it rests, we can only conclude that there is at least serious doubt whether the 1942 proceeding and the order which resulted from it were ever intended by the Commission to increase the intrastate rates in question. Since the Commission alone is authorized to wield the constitutional power to set aside state-established intrastate rates by prescribing intrastate rates itself, state power cannot rightly be deemed to be sup-

[2] The brief filed by the Commission in this Court to assist in discovering the intended meaning of the order in Ex parte No. 148, states that "the 1942 increase may well be mandatory" as to standard intrastate passenger fares covered by prior outstanding § 13 orders, as in the New York case discussed in note 1, *supra*. This is said to be because, in the 1936 proceeding, such fares were reduced, and because the 10% increase of 1942 would only raise them to a level well within the maximum prescribed for such fares in § 13 proceedings in 1920.

planted so long as the Commission's exercise of its authority is left in serious doubt. *Arkansas Railroad Comm'n* v. *Chicago, R. I. & P. R. Co.*, 274 U. S. 597, 603. And where the applicability of the order is as doubtful as it is in this case, we should not feel justified in disregarding the Commission's disclaimer in this Court of all intention to override Illinois state law by its 1942 order—especially in view of the fact that in the § 13 proceeding in 1925 the Commission had framed its order in deference to the two-cent fare law prevailing in Illinois.

It is regrettable that prolonged litigations should have resulted because of the absence from the Commission's order of a sentence more precisely defining its scope, or of a clarifying order which could have been entered at any stage of the pending litigations.

Since we accept the Commission's conclusion that the 1942 order is inapplicable, it is unnecessary for us to consider whether, as appellants contend, the order if applicable would be open to collateral attack in this proceeding for the insufficiency of the Commission's findings to support it, or whether that issue may be litigated only in a suit to set aside the order brought against the United States as prescribed by the Urgent Deficiencies Act. 38 Stat. 219, 28 U. S. C. § 46.

Only a word need be said of the district court's finding of confiscation. Appellants filed no answer to the bill of complaint and no evidence was taken in the cause. Judgment in favor of appellee was entered upon appellants' motion to strike the complaint and dismiss the cause, and upon the prayer of the bill for a permanent injunction. The only support for the finding of confiscation is in the general allegations of the complaint that the existing intrastate commutation fares complained of are confiscatory, and more particularly that these fares are not adequate to compensate for the cost of the particular service.

Apart from the insufficiency of such allegations, when not buttressed by convincing proof, to sustain an injunction setting aside rates as confiscatory, see *California Railroad Comm'n* v. *Pacific Gas Co.*, 302 U. S. 388, 401, it appears that when the present suit was brought the state commission had ordered a hearing before it concerning the propriety of appellee's proposed increase of the existing, allegedly confiscatory, fares. There is no contention and no finding that appellee's attack on the existing fares as confiscatory was not open for consideration before the commission. The equitable remedy sought by appellee in court should have been denied because of his failure first to pursue the administrative remedy thus afforded. *Gilchrist* v. *Interborough Co.*, 279 U. S. 159, 208–09; *Natural Gas Co.* v. *Slattery*, 302 U. S. 300, 310–11. There are no circumstances of peculiar urgency alleged, and no other ground is disclosed by the record which would warrant a federal equity court in dispensing with this salutary requirement.

Upon this record the district court should have declined to pass on the merits of the confiscation issue.

Reversed.

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

MR. JUSTICE ROBERTS:

I am of opinion that the judgment should be affirmed.

This case is important not so much because of the relative rights of the parties as of the principles announced by the court, which I think are likely to produce unfortunate results in later cases.

First. The meaning and scope of the Interstate Commerce Commission's order is, in my view, clear. It expressly included the earlier § 13 order affecting the intrastate rates of the Chicago and North Western which are

in question. I could understand the assertion that the order is obscure if its purported application were to intrastate rates not specifically mentioned in the order itself. But here the Commission seems *ex industria* to have referred to an earlier § 13 order so as to leave no doubt of its purpose.

Second. Even if the order were obscure, any party in interest could have obtained a clarification by application to the Commission. It is somewhat difficult to understand why the Commission, in response to an informal application, refused to vouchsafe any clarification of the order in the case of New York intrastate rates.

Third. It seems to me inadmissible to permit the Commission, in a litigation such as the present, to suggest that its order was not intended to cover the intrastate rates in question because, forsooth, the order is not supported by requisite findings. I fail to see the fairness or equity of permitting parties to struggle for months or years over the meaning or scope of an order which happens to be involved in a collateral proceeding and then permit the Commission to appear in the litigation and attempt to explain why its order does or does not cover the situation disclosed.

Fourth. I also think it inadmissible to litigate, in a collateral proceeding such as this, the question of the adequacy of the support of the Commission's order in the record made before the Commission. Congress has provided a method whereby orders not entered in accordance with the provisions of the Interstate Commerce Act may be set aside or enjoined by a petition to a District Court of the United States. This method of attack is available to any party in interest or any intervenor before the Commission. It is wrong, in my judgment, to permit a state commission, or any other party, to forego the method prescribed by the Urgent Deficiencies Act for enjoining or setting aside a Commission order on such ground as

is here asserted, and to act in the teeth of the order, reserving an attack on the findings, or lack of findings, to support the order until its regulations are challenged in an independent proceeding. In such a proceeding as this, I think the order should be treated as binding until modified or set aside in the manner provided by federal law.

NEW YORK EX REL. WHITMAN *v.* WILSON, WARDEN.

CERTIORARI TO THE SUPREME COURT OF NEW YORK.

No. 72. Argued February 1, 1943.—Decided April 12, 1943.

Since the present proceeding must be dismissed if habeas corpus is not an appropriate remedy under the state law, and since this Court is unable to determine that question with finality, or to resolve the contentions with respect to it, in advance of a controlling decision by the state courts, the judgment appealed from is vacated and the cause is remanded to the state court for further proceedings. P. 690.

263 App. Div. 908, 924, 32 N. Y. S. 2d 29, 1023, vacated.

CERTIORARI, 317 U. S. 615, to review a judgment affirming the dismissal of a writ of habeas corpus. Leave to appeal to the highest court of the State was denied, 263 App. Div. 924; 287 N. Y. 856; and an appeal taken as of right was dismissed, 290 N. Y. 670.

Mr. Charles E. Hughes, Jr., with whom *Mr. Curtiss E. Frank* was on the brief, for petitioner.

Mr. Bernard L. Alderman, with whom *Messrs. Nathaniel L. Goldstein*, Attorney General of New York, *Orrin G. Judd*, Solicitor General, and *Wendell P. Brown*, Assistant Attorney General, were on the brief, for respondent.

PER CURIAM.

Petitioner began this proceeding by an application for a writ of habeas corpus in the Supreme Court of the State

of New York, Washington County. He alleged that his conviction had been procured through the use of perjured testimony knowingly used by the prosecution, and that under *Mooney* v. *Holohan,* 294 U. S. 103, his commitment was in deprivation of his constitutional rights under the Due Process Clause of the Fourteenth Amendment. The writ of habeas corpus was dismissed by the Supreme Court; its order was affirmed by the Appellate Division, 263 App. Div. 908, 32 N. Y. S. 2d 29; leave to appeal to the Court of Appeals was denied by both the Appellate Division and the Court of Appeals. 263 App. Div. 924, 32 N. Y. S. 2d 1023; 287 N. Y. 856, 40 N. E. 2d 649. We granted certiorari, 317 U. S. 615, and, because petitioner was a poor person without counsel of his own selection, we appointed counsel to represent him. Since the argument in this Court, the Court of Appeals has entered a further order dismissing petitioner's attempted appeal to that court as of right, stating that "the case is one where appellant is not entitled to a writ of habeas corpus under Section 1231" of the New York Civil Practice Act. 290 N. Y. 670.

In his brief and argument in this Court, the Attorney General of the State of New York, on respondent's behalf, took the position that New York law makes the writ of habeas corpus available to test the constitutional validity, under the Due Process Clause, of petitioner's detention. In support of this contention, the Attorney General relied upon a number of cases in the New York courts, which appear to sustain his position. *People ex rel. Moore* v. *Hunt,* 258 App. Div. 24, 16 N. Y. S. 2d 19; *People ex rel. Harrison* v. *Wilson,* 176 Misc. 1042, 29 N. Y. S. 2d 809; *People ex rel. Kruger* v. *Hunt,* 257 App. Div. 917, 12 N. Y. S. 2d 167; *People ex rel. Kennedy* v. *Hunt,* 257 App. Div. 1039, 13 N. Y. S. 2d 797.

After the oral argument in this Court, the Court of Appeals on March 4, 1943, decided the case of *Lyons* v. *Gold-*

stein, 290 N. Y. 19. It there held that, despite the lapse of time, a state court in which a judgment of conviction has been entered retains jurisdiction, analogous to the common law jurisdiction upon writ of error coram nobis, to set aside the conviction on a showing that a plea of guilty had been obtained by fraud and misrepresentation on the part of a prosecuting official. The opinion rests in part on the requirement of the Due Process Clause that a prisoner be granted a hearing on the merits of such a contention; it cites *Mooney* v. *Holohan, supra,* and also *Walker* v. *Johnston,* 312 U. S. 275, and *Waley* v. *Johnston,* 316 U. S. 101, 104–05, in which this Court sustained the use in the federal courts of habeas corpus to that end. The opinion does not expressly consider or otherwise allude to the question whether, under New York practice, habeas corpus may be used as either an alternative or a cumulative remedy in such a case.

In his latest submission to us, the Attorney General now contends that, in the light of the decision in *Lyons* v. *Goldstein, supra,* the remedy by a proceeding coram nobis in the court where the judgment of conviction was entered (here the Court of General Sessions, New York County) is exclusive; and that habeas corpus accordingly is not available to petitioner in the state courts, even if on the merits petitioner has set forth a prima facie case. Petitioner takes the contrary position.

If habeas corpus is not an appropriate remedy under the state law, the present proceeding must be dismissed. But we are unable to decide this question with finality, or to resolve the contentions with respect to it, in advance of a controlling decision of the New York courts. In view of the changed situation resulting from the decision in *Lyons* v. *Goldstein* after we granted certiorari, we think it appropriate to vacate the judgment and to remand the cause to the state court for its determination in the light of that decision, and for such further or other proceedings as may

be deemed advisable. *Patterson* v. *Alabama,* 294 U. S. 600, 607; *Missouri ex rel. Wabash Ry. Co.* v. *Public Service Comm'n,* 273 U. S. 126, 131; *State Tax Comm'n* v. *Van Cott,* 306 U. S. 511, 515–16; *Villa* v. *Van Schaick,* 299 U. S. 152.

So ordered.

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

MR. JUSTICE FRANKFURTER:

Petitioner's claim is that the State of New York has denied him the right which, according to our decision in *Mooney* v. *Holohan,* 294 U. S. 103, is his under the Constitution of the United States. As in the *Mooney* case, "Petitioner urges that the 'knowing use' by the State of perjured testimony to obtain the conviction and the deliberate suppression of evidence to impeach that testimony constituted a denial of due process of law. Petitioner further contends that the State deprives him of his liberty without due process of law by its failure, in the circumstances set forth, to provide any corrective judicial process by which a conviction so obtained may be set aside." 294 U. S. at 110.

Unless I misapprehend the controlling decisions of the New York Court of Appeals and the authoritative commentary thereon by the Chief Judge of that Court, in a submission before us, New York recognizes the right which petitioner seeks to vindicate here by providing a procedure for asserting it different from that which petitioner has pursued. Petitioner has sought to prove his claim in the New York courts through the writ of habeas corpus. But § 1231 of the New York Civil Practice Act, providing that "a person is not entitled to" habeas corpus "where he has been committed or is detained by virtue of the final judgment or decree of a competent tribunal of civil or criminal jurisdiction," does not allow the use of

the writ to raise such a claim. That writ in New York merely tests the legality of a detention according to the face of the record. As, for instance, where one under sentence is transferred from a reformatory to a state prison and there detained under a void order, *People ex rel. Saia* v. *Martin,* 289 N. Y. 471, 46 N. E. 2d 890, or where a relator is held in custody under the provisions of a statute claimed to be unconstitutional. See *People ex rel. Bryant* v. *Zimmerman,* 241 N. Y. 405, 150 N. E. 497; 278 U. S. 63. New York recognizes the constitutional duty to provide a remedy for such a claim as arises under the doctrine of *Mooney* v. *Holohan, supra.* But New York's remedy for testing such a claim is not by habeas corpus but by appropriate motion before the court in which the sentence of conviction was rendered. *Lyons* v. *Goldstein,* 290 N. Y. 19, 25, 47 N. E. 2d 425.

Since the argument in this case, the New York Court of Appeals formally dismissed petitioner's appeal to that court from the order of the Appellate Division denying him habeas corpus, on the ground that "the case is one where appellant is not entitled to a writ of habeas corpus under Section 1231 of the Civil Practice Act." But inasmuch as "the constitutional questions which appellant asked the court to review are substantial," to use the language of Chief Judge Lehman, he could, under New York practice, have gone to the Court of Appeals as of right if habeas corpus were the proper remedy. The merits of petitioner's constitutional claim have therefore never been passed on by, because never presented in an appropriate proceeding to, the highest available New York court. Consequently, it cannot be entertained here. Since petitioner has misconceived the mode by which his constitutional claim may properly be brought before the New York courts, this petition should be dismissed.

MR. JUSTICE ROBERTS and MR. JUSTICE REED join in this opinion.

HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* CHICAGO STOCK YARDS CO.

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

No. 488. Argued March 9, 10, 1943.—Decided April 12, 1943.

The conclusion of the Board of Tax Appeals that the taxpayer corporation was "availed of" for the purpose of preventing the imposition of surtax upon its stockholders, through the medium of accumulation of its profits—within the meaning of § 104 of the Revenue Acts of 1928 and 1932, imposing in such case a 50% additional tax—was supported by substantial evidence, and should not have been disturbed on appeal. P. 702.

129 F. 2d 937, reversed.

CERTIORARI, 317 U. S. 619, to review the reversal of a decision of the Board of Tax Appeals, 41 B. T. A. 590, sustaining the determination of a deficiency in income tax.

Assistant Attorney General Samuel O. Clark, Jr., with whom *Solicitor General Fahy* and *Messrs. Sewall Key, Arnold Raum, Alvin J. Rockwell,* and *Carlton Fox* were on the brief, for petitioner.

Mr. George Wharton Pepper, with whom *Messrs. L. E. Green, Frederick H. Spotts,* and *Erwin N. Griswold* were on the brief, for respondent.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The Board of Tax Appeals sustained the petitioner's determination of deficiencies in the respondent's income tax for 1930, 1932, and 1933.[1] The Circuit Court of Appeals reversed the Board's decision.[2] We granted certio-

[1] 41 B. T. A. 590.

[2] 129 F. 2d 937.

rari because of the importance of the questions involved.

The challenged assessment was of the fifty per cent additional tax imposed by § 104 of the Revenue Acts of 1928 and 1932.[3] The section, which is substantially the same in both statutes, provides, in subsection (a), that if any corporation is formed or availed of for the purpose of preventing the imposition of surtax upon its shareholders through the medium of permitting its gains and profits to accumulate instead of being divided or distributed, the additional tax shall be imposed. That the corporation "is a mere holding or investment company," or that the gains or profits are "permitted to accumulate beyond the reasonable needs of the business," is declared, by subsection (b), prima facie evidence of a purpose to avoid the surtax.

The Union Stock Yards & Transit Company of Chicago, hereinafter called Transit Company, was incorporated in 1865 to operate stock yards in Chicago. Its business was profitable. Frederick H. Prince became a stockholder. In 1890, packers, who were the company's principal source of business, threatened to remove their plants from Chicago unless they were given a share in its profits. Due to limitations in its charter, the corporation could not raise funds necessary to buy off the packers. Mr. Prince and other stockholders met the situation by organizing a holding company under the law of New Jersey, the Chicago Junction Railways & Union Stock Yards Company, hereinafter called the New Jersey Company, which acquired all of the capital stock of the Transit Company. The capital structure at organization was 65,000 shares each of preferred and common, all of $100 par. Collateral trust bonds, secured by Transit Company stock, were issued, of which $14,000,000 were ultimately out-

[3] 45 Stat. 814–15, 47 Stat. 195.

standing. The charter was to expire in 1940. The New Jersey Company came to own all of the stock of the Transit Company, of a railway company, a railroad company, and all beneficial interest in a real estate trust, which themselves, or through subsidiaries, pursued activities collateral to the stock-yards business. By payments in cash and its own bonds, it procured from the packers an agreement to maintain the stock yards at their then location for fifteen years.

When this agreement was about to expire, the packers presented fresh demands and Mr. Prince was compelled to devise some method of satisfying them. He decided that, if he could obtain the coöperation of the largest, he need not trouble about the others. To attain this end, he organized, in 1911, the respondent, a Maine corporation. He formed a committee which made a proposal to the New Jersey Company's common stockholders that the respondent would purchase their stock by giving them $200 par of its 5% bonds for each share of common stock, or, in the alternative, would stamp the stock with the company's agreement to guarantee a 9% dividend upon it; this in consideration that the respondent should be entitled to all of the New Jersey Company's earnings over and above its expenses, interest charges, and the guaranteed dividend on the common. Thus it was intended to draw into the taxpayer's treasury the excess of the New Jersey Company's earnings. Armour & Co. was given 20% of the respondent's stock, Prince retaining 80% of it. In this way, Armour was to share in the earnings of the stock yards.

By a decree in a suit under the Sherman Act, Armour was ordered to part with all interest in the stock yards. In consequence, Mr. Prince purchased the Armour-held stock for $1,000,000, which sum was loaned to him by the respondent. Thus, Prince became the taxpayer's only stockholder; and it is conceded that he retained owner-

ship or voting power which gave him sole control of the company to the close of 1933.[4]

By August 1914 the respondent had acquired, in exchange for its bonds, 31,075 common shares of the New Jersey Company, and 33,922 shares had been stamped with its guarantee. In 1919 it acquired the three remaining shares. In the period from 1915 to 1933, it organized two small wholly-owned subsidiaries to transact business connected with the stock-yards enterprise; and also organized, and held four-fifths of the capital stock of, a national bank intended to serve the stock-yard district.

The respondent in addition to the New Jersey Company common stock acquired by exchange of its own bonds therefor, bought such stock for cash. By December 31, 1929, it had acquired 58,742 of the 65,000 shares outstanding.

As the charter of the New Jersey Company was to expire in 1940, Mr. Prince, at some date not clearly fixed by the testimony, formed the plan of accumulating cash in the respondent's treasury sufficient to pay the debts of the New Jersey Company and liquidate it by that time. To do this, it would be necessary to redeem the outstanding preferred stock at par, pay off the $14,000,000 mortgage and over $6,000,000 of fixed obligations of subsidiaries which had been guaranteed by the New Jersey Company. It would also be necessary to purchase 6,258 shares of New Jersey common not then owned. Thus, as of December 31, 1929, the plan involved the expenditure of about $28,000,000 by 1940. If it could be consummated, the taxpayer would then own the entire stock-yards enterprise clear of debt, other than its own bonds then outstanding in the amount of $3,227,000 due in 1961. That enterprise, treated as a whole, then had cash and liquid

[4] He placed some of the stock in trust, retaining voting control.

assets amounting to $21,705,185,[5] and fixed and other assets of a book value of $40,000,000. The bulk of the liquid assets had been drawn up into the respondent's treasury by virtue of the agreement with the New Jersey Company's stockholders.

The respondent's assets December 31, 1929, exceeded its liabilities, including its capital stock, by $19,622,355. From that date to the close of 1933 its earnings were $10,243,373, of which $1,600,000 was paid out in dividends, and $8,643,373 was added to earned surplus.[6]

These are the salient facts. They are stated in greater detail by the Board and by the court below.

The Board reached these conclusions: That the respondent was a mere holding or investment company as defined by § 104, and had not overcome the consequent presumption that its surplus had been accumulated for the purpose of avoiding surtax upon the earnings of Mr. Prince, as sole stockholder; that, although it was more than a mere holding or investment company, its profits had been permitted to accumulate beyond the reasonable needs of the business, and the evidence did not overcome the prima facies which § 104 (b) attributes to this fact; and that, without the benefit of the presumptions created by § 104 (b), the proofs require the conclusion that the respondent had been availed of for the purpose of accumu-

[5] Including some $2,000,000 of impounded charges not released to Transit Company until 1932 and a working fund claimed by respondent to require $5,000,000.

[6] This item included additional cash on hand of $2,755,931 ($1,800,000 of which was a subordinated deposit in a stock-yards bank), loans to subsidiaries and to Mr. Prince, purchases of common and preferred stock of the New Jersey Company and of respondent's own bonds, and other investments, and an investment of $3,573,218 in securities of stock-yards banks which needed financial support. Similar subordinations of deposits and bank investments were made by subsidiaries.

lating profits beyond its needs for the purpose of avoiding surtax upon its stockholder.

The Circuit Court of Appeals held that, viewing the facts most favorably to the Government, the respondent was not a mere holding or investment company within the meaning of the statute; that, in concluding the company had accumulated profits beyond its reasonable needs, the Board had employed a wrong yardstick in that it had failed to give weight to the controlling purpose of the accumulation, namely, the long range plan to liquidate the New Jersey Company and consolidate all the assets, free of debt, in the respondent; and, finally, that, in purporting to reach its final conclusion without reference to the statutory presumptions, it had allowed them to affect its judgment. Accordingly the court reversed and directed the Board to retry the case in conformity to the court's opinion.

The petitioner urges acceptance of the Board's first conclusion that the respondent was a mere holding or investment company. He says that the taxpayer was nothing but a pocketbook for Mr. Prince, who, as an individual, managed and controlled the entire enterprise and used the taxpayer merely as a repository of surplus earnings which were intended ultimately to be used for his benefit. We find it unnecessary to consider this contention, since we think the Board's decision may be supported apart from any presumption arising under the terms of the Act.

The respondent was not formed for the purpose of avoiding surtax on its stockholders. No such exaction existed in 1911. Until some effort was made by legislation to reach and tax accumulated and undistributed surplus, the taxpayer's dividend policy was immaterial. Accumulation of profits in its treasury was of no tax significance and, so far as appears, it was otherwise a matter of indifference, legally speaking, whether surplus moneys were allowed to remain in the treasury or were paid in dividends.

The series of acts which sought to discourage such accumulations had its origin in 1913 with the imposition of an additional tax on the shareholder rather than on the corporation.[7] The additional tax was laid on the corporation by the Revenue Act of 1921 and this method was retained in subsequent acts to and including that of 1932.[8] As the theory of the revenue acts has been to tax corporate profits to the corporation, and their receipt only when distributed to the stockholders, the purpose of the legislation is to compel the company to distribute any profits not needed for the conduct of its business so that, when so distributed, individual stockholders will become liable not only for normal but for surtax on the dividends received.

A corporate practice adopted for mere convenience or other reasons, and without tax significance when adopted, may have been continued with the additional motive of avoiding surtax on the stockholders. The Board's conclusion may justifiably have been reached in the view that, whatever the motive when the practice of accumulation was adopted, the purpose of avoiding surtax induced, or aided in inducing, the continuance of the practice.

The Board, the court below, and the parties in brief and argument have discussed many facts thought to be relevant to the purpose of the accumulation of surplus by the respondent. The interrelation of the taxpayer and the other corporations involved in the enterprise, the expiration of the New Jersey Company's charter, the policy or obligation of the taxpayer to provide for the payment

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[7] Act of Oct. 3, 1913, ch. 16, 38 Stat. 114, 166–167; Revenue Act of 1918, ch. 18, 40 Stat. 1057, 1072.

[8] Revenue Act of 1921, ch. 136, 42 Stat. 227, 247–248; Revenue Act of 1924, ch. 234, 43 Stat. 253, 277; Revenue Act of 1928, ch. 852, 45 Stat. 791, 814–15; Revenue Act of 1932, ch. 209, 47 Stat. 169, 195. In later revenue acts, a different method of accomplishing the purpose has been adopted.

of the debts of the New Jersey Company and its subsidiaries, the relation of Mr. Prince as officer and active manager of underlying corporations, the financial transactions between him and the respondent, are discussed and arguments pro and con are based thereon in an effort to prove or to disprove the character of the respondent, the necessities of its business, and the nature of the relationship between it and Mr. Prince.

If we eliminate these matters from consideration and treat the respondent as a controller, manager, and, to a large extent, the proprietor of the entire enterprise, we think the Board's conclusion of fact has support in the evidence and must be accepted.

The respondent launched its corporate activities with partners and co-investors in the stock-yards enterprise. The New Jersey Company, which then embraced the entire business, had a capital investment represented by stock and bonds of not less than $27,000,000. In 1911, when the respondent was organized, the enterprise had a net worth of at least $16,000,000.[9] The respondent, with a paid-in cash capital of $1,000,000, purchased [10] the right to receive the net earnings of the enterprise after the payment of the New Jersey Company's fixed charges, operating expenses, and the guaranteed dividends on its stock. The respondent's goal was the acquisition, by the year 1940, of the interest of all others having any capital share in the enterprise, and the method pursued was to accumulate current earnings [11] so that, by 1940, they would be

[9] The net worth was probably some $3,000,000 in excess of the amount named if the actual net worth of subsidiaries is taken into account.

[10] When the plan and agreement with respect to New Jersey Company's common stock was in shape to be consummated, the respondent purchased the plan and the rights arising under it for $1,000,000 (its cash capital), and $7,000,000 par value of its own stock arising out of an increase of its authorized stock from $1,000,000 to $8,000,000.

[11] The respondent has paid substantial annual dividends, the highest being at the rate of $400,000 per year during the taxable years in ques-

available for such capital investment. This investment would, of course, redound to the benefit of the holder or holders of the respondent's stock. The situation disclosed is, in legal effect, similar to that presented in *Helvering* v. *National Grocery Co.*, 304 U. S. 282. There the surplus earnings were invested in securities unrelated to the business in hand and were, and would remain, available for whatever purposes Kohl, the sole stockholder, determined. Here the accumulated earnings became available to the investment purpose and program of Mr. Prince, the sole stockholder of the taxpayer, or for other purposes as he might determine. By the use of the taxpayer's corporate personality, Mr. Prince could plow the earnings of the enterprise into a capital investment which would convert, by 1940, an original capital venture of $1,000,000 into free assets of a value in excess of $60,000,000. And this without the payment of taxes[12] or surtaxes on the bulk of the earnings. Although Mr. Prince denied any purpose to avoid surtaxes, the Board, as in the *National Grocery* case, was free to conclude, upon all the evidence, that such was the purpose.

The respondent's position is that, as the New Jersey Company's charter was to expire in 1940, and as respondent was under what it deemed a moral and, indeed, a legal obligation to pay off the mortgage debts of the New Jersey Company and its subsidiaries and to redeem its outstanding stock, the accumulation of earnings was necessary to the preservation of its business. There are two sufficient answers. Mr. Prince, the sole stockholder, if in receipt of the respondent's earnings, could equally well have done

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tion; and Mr. Prince has also received substantial salaries from the respondent and other corporations which were conducting activities of the enterprise.

[12] Most of respondent's income consisted of dividends received from domestic corporations, which were deductible from its gross income for tax purposes.

what the respondent proposed to do, that is, turn accumulated earnings into invested capital. And the evidence shows that the New Jersey Company's charter could have been renewed in 1940. Continuance or refinancing of such an enterprise on the face of things would have been practicable.

We cannot say that the Board's conclusion that respondent was availed of for the purpose of preventing the imposition of surtax upon its stockholders, through the medium of accumulation of its profits, is without substantial support.

The judgment is

Reversed.

UNITED STATES *v.* LEPOWITCH ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION.

No. 629. Argued April 8, 1943.—Decided April 19, 1943.

1. It is a violation of 18 U. S. C. § 76 to impersonate and act as a federal officer, with intent to obtain from a person information concerning the whereabouts of another, although the information may be valueless to the person from whom it is sought. P. 704.
2. The words "intent to defraud," as used in 18 U. S. C. § 76, are applicable where the defendants, by artifice and deceit, have sought to cause the deceived person to follow some course he would not have pursued but for the deceitful conduct. P. 704.

48 F. Supp. 846, reversed.

APPEAL under the Criminal Appeals Act from a judgment sustaining a demurrer to an indictment for violation of 18 U. S. C. § 76.

Mr. Archibald Cox argued the cause, and *Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. George F. Kneip* were on the brief, for the United States.

Mr. Henry S. Janon for appellees.

MR. JUSTICE BLACK delivered the opinion of the Court.

The defendants are charged with impersonating Federal Bureau of Investigation officers and by that means attempting to elicit information from one person concerning the whereabouts of another. They were indicted under 18 U. S. C. § 76, the first branch of which includes two elements: impersonation of an officer of the government and acting as such with intent to defraud either the United States or any person.[1] The District Judge sustained a demurrer to the indictment, holding that the conduct of the defendants, "while highly reprehensible, does not come within the terms of the statute." [2] He apparently concluded that the count of the indictment under consideration did not, within the meaning of the statute, make sufficient allegations either of impersonation or of acting with intent to defraud. Since the decision below was based on a construction of the statute, the case was properly brought here by the government under the

[1] "Falsely pretending to be United States officer.—Whoever with intent to defraud either the United States or any person, shall falsely assume or pretend to be an officer or employee acting under the authority of the United States, or any department, or any officer of the Government thereof, or under the authority of any corporation owned or controlled by the United States, and shall take upon himself to act as such, or shall in such pretended character demand or obtain from any person or from the United States, or any department, or any officer of the Government thereof, or any corporation owned or controlled by the United States, any money, paper, document, or other valuable thing, shall be fined not more than $1,000 or imprisoned not more than three years, or both."

[2] The indictment contained two counts. The second, based on the same acts of the appellees, was rested on the second branch of the statute and the information sought was said to be the "valuable thing" required by the Act. While insisting here that the second count was not subject to the demurrer, the government does not ask for review of the ruling with reference to it.

Criminal Appeals Act, 18 U. S. C. § 682, and 28 U. S. C. § 345.

Government officials are impersonated by any persons who "assume to act in the pretended character." *United States* v. *Barnow,* 239 U. S. 74, 77. The most general allegation of impersonation of a government official, therefore, sufficiently charges this element of the offense. The validity of this portion of the indictment was not contested here.

We hold that the words "intent to defraud," in the context of this statute, do not require more than that the defendants have, by artifice and deceit, sought to cause the deceived person to follow some course he would not have pursued but for the deceitful conduct.[3] If the statutory language alone had been used, the indictment would have been proof against demurrer under *Lamar* v. *United States,* 241 U. S. 103, 116; *Pierce* v. *United States,* 314 U. S. 306, 307; and this indictment has merely been made more elaborate than that in the *Lamar* case by the addition of a description of the nature of the alleged fraud. In any case, this branch of the statute covers the acquisition of information by impersonation although the information may be wholly valueless to its giver. This result is required by *United States* v. *Barnow, supra,* 80, in which we held that the purpose of the statute was "to maintain the general good repute and dignity of the [government] service itself," and cited with approval cases which, interpreting an analogous statute, said: "it is not essential to charge or prove an actual financial or property loss to make a case under the statute." *Haas* v. *Henkel,* 216 U. S. 462, 480; *United States* v. *Plyler,* 222 U. S. 15.

The first clause of this statute, the only one under consideration here, defines one offense; the second clause de-

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[3] For a more limited construction of similar words in a different statutory context, see *United States* v. *Cohn,* 270 U. S. 339.

fines another. While more than mere deceitful attempt to affect the course of action of another is required under the second clause of the statute, which speaks of an intent to obtain a "valuable thing," the very absence of these words of limitation in the first portion of the act persuades us that, under it, a person may be defrauded although he parts with something of no measurable value at all.

Reversed.

MR. JUSTICE RUTLEDGE concurs in the result.

MR. JUSTICE ROBERTS believes that the judgment should be affirmed.

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

BOARD OF COUNTY COMMISSIONERS ET AL. *v.* SEBER ET AL.

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

No. 556. Argued March 3, 4, 1943.—Decided April 19, 1943.

1. Lands theretofore purchased with restricted funds derived from an oil and gas lease of restricted allotted lands of a Creek Indian, *held,* under the Act of June 20, 1936, immune from tax by Oklahoma for the year 1937, where, on the assessment date, the Indian owned a life estate in such lands subject to restrictions against alienation except with the approval of the Secretary of the Interior. P. 709.
   (a) The tax immunity granted by the Act of June 20, 1936, was not limited to lands purchased for landless Indians. P. 710.
   (b) An Indian has "title" within the meaning of the Act if his interest in the property is such that, but for the Act, he would be subjected to the tax. P. 711.
2. Lands theretofore purchased with restricted funds derived from an oil and gas lease of restricted allotted lands of a Creek Indian, and which have been conveyed to Creek Indian grantees, subject

to valid restrictions against alienation except with the approval of the Secretary of the Interior, *held,* under the Act of May 19, 1937, immune from tax by Oklahoma, where, prior to the assessment date, the lands have been properly designated by such grantees as homestead lands. P. 712.

(a) The tax immunity granted by the Act of May 19, 1937, does not extend only to lands purchased for landless Indians. P. 712.

(b) The tax exemption granted by the 1937 Act is not personal to the Indian whose restricted funds were used to purchase the land; nor does it extend to the land in the hands of the Creek Indian grantees only until 1956. P. 712.

(c) It is immaterial that the Creek Indian grantees in this case are citizens of the United States. P. 718.

3. The Act of June 20, 1936, and the Act of May 19, 1937, as here applied, are constitutional. P. 715.
4. The grant of citizenship is not inconsistent with the status of Indians as wards whose property is subject to the plenary control of the federal government. P. 718.
5. Creek Indians of the half blood or more, though they be unenrolled, are tribal Indians subject to federal control. P. 718.

130 F. 2d 663, affirmed.

CERTIORARI, 317 U. S. 622, to review the affirmance in part of a judgment, 38 F. Supp. 731, allowing recovery of taxes paid upon lands claimed to be tax exempt under federal statutes.

Messrs. Mac Q. Williamson, Attorney General of Oklahoma, and *Houston E. Hill,* Assistant Attorney General, with whom *Mr. Norman J. Futor,* Assistant Attorney General, was on the brief, for petitioners.

Mr. George H. Jennings, with whom *Mr. Leonard O. Lytle* was on the brief, for respondents.

By special leave of Court, *Mr. Warner W. Gardner,* with whom *Solicitor General Fahy, Assistant Attorney General Littell,* and *Messrs. Norman MacDonald* and *Archibald Cox* were on the brief, for the United States, as *amicus curiae,* urging affirmance.

MR. JUSTICE MURPHY delivered the opinion of the Court.

This petition for certiorari presents the questions whether certain lands held by respondent Indians, subject to restrictions against alienation and encumbrance without the approval of the Secretary of the Interior, were exempt from Oklahoma real estate taxes for the year 1937 by virtue of the Act of June 20, 1936, 49 Stat. 1542; [1] whether a portion of those lands were exempt for subsequent years by virtue of the Act of 1936 as amended by the Act of May 19, 1937, 50 Stat. 188; [2] and whether the Acts of 1936 and 1937, so applied, are constitutional.

The facts are agreed. Prior to 1931, the Secretary of the Interior purchased three tracts of land, two rural and one urban, in Creek County, Oklahoma, for Wosey John Deere, an enrolled, full-blood member of the Creek Tribe of Indians. The purchase price was paid out of restricted royalties from an oil and gas lease of her restricted allot-

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[1] Section 2 of this Act provides:

"All lands the title to which is now held by an Indian subject to restrictions against alienation or encumbrance except with the consent or approval of the Secretary of the Interior, heretofore purchased out of trust or restricted funds of said Indian, are hereby declared to be instrumentalities of the Federal Government and shall be nontaxable until otherwise directed by Congress."

[2] The 1937 Act amended § 2 of the 1936 Act to read as follows:

"All homesteads, heretofore purchased out of the trust or restricted funds of individual Indians, are hereby declared to be instrumentalities of the Federal Government and shall be nontaxable until otherwise directed by Congress: *Provided,* That the title to such homesteads shall be held subject to restrictions against alienation or encumbrance except with the approval of the Secretary of the Interior: *And provided further,* That the Indian owner or owners shall select, with the approval of the Secretary of the Interior, either the agricultural and grazing lands, not exceeding a total of one hundred and sixty acres, or the village, town or city property, not exceeding in cost $5,000, to be designated as a homestead."

ted land. She was given title subject to a condition against alienation or encumbrance without approval of the Secretary prior to April 26, 1931.[3] Before that date, with the approval of the Secretary, she reserved a life estate and conveyed the fee to her children, full-blood but un-enrolled Creeks and respondents here, subject to a like condition against alienation or encumbrance without the approval of the Secretary with the exception that the restriction had no definite time limitation. On December 10, 1937, Wosey John Deere conveyed her life estate to respondents so that they became full owners subject to a restriction against alienation or encumbrance without the approval of the Secretary. Both conveyances were in consideration of love and affection. Thereafter, on December 16, 1937, respondents designated the two rural tracts, totalling eighty-seven and one-half acres, as a tax exempt homestead under the provisions of the Act of May 19, 1937, and the Secretary approved this designation on March 24, 1938.

Before the Act of June 20, 1936, the lands were subject to Oklahoma real estate taxes.[4] Thereafter all three tracts were continued on the tax rolls of Creek County, and respondents, to avoid the accumulation of penalties and interest and a sale of the lands for taxes, paid the

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[3] In *Sunderland* v. *United States*, 266 U. S. 226, it was held that the Secretary of the Interior had power to impose such a restriction against alienation or encumbrance with respect to lands purchased for Indians of the Five Civilized Tribes (of which the Creeks are one) with the proceeds from sales of their restricted allotted lands. We think it clear that he also has authority to impose such restrictions upon lands purchased with restricted funds from leases of restricted allotted lands (see *Shaw* v. *Gibson-Zahniser Oil Corp.*, 276 U. S. 575, and *United States* v. *Brown*, 8 F. 2d 564 at 568), and to make those restrictions run with the lands in the hands of Indian grantees. Cf. *Drummond* v. *United States*, 34 F. 2d 755, 758–59; *United States* v. *Goldfeder*, 112 F. 2d 615.

[4] See *Shaw* v. *Gibson-Zahniser Oil Corp.*, 276 U. S. 575.

taxes for the years 1936, 1937, 1938, and part of 1939. On July 26, 1940, they filed this action in federal district court for the recovery of the 1936 and 1937 taxes paid on all three tracts, for the recovery of the 1938 and 1939 taxes paid on the two rural tracts designated as homestead lands, and for a declaration that the homestead lands were tax exempt. The district court gave judgment as prayed. 38 F. Supp. 731. The Circuit Court of Appeals affirmed for the most part but reversed with respect to the 1936 taxes on the ground that liability for them became fixed on the assessment date, January 1, 1936, before the enactment of the Act of June 20, 1936. Interest on the taxes paid was also disallowed. 130 F. 2d 663. The importance of the case in the administration of Indian affairs and its impact upon state finances caused us to grant the County's petition for certiorari. Respondents have not cross-petitioned for review of the adverse decision on the 1936 taxes and the allowance of interest, so it is unnecessary to consider those questions.

We hold that the 1936 Act extended tax immunity to all three tracts for the year 1937, that thereafter the 1937 Act exempted the designated homestead lands, and that both Acts, so applied, are constitutional.

Section 2 of the 1936 Act conditions tax immunity upon two requirements: (1) "title" to the lands must be "held by an Indian subject to restrictions against alienation or encumbrance except with the consent or approval of the Secretary of the Interior"; and, (2) the lands must have been "heretofore purchased out of trust or restricted funds of said Indian." Both requirements are met here with respect to all three tracts. These lands were purchased from the restricted royalties received from an oil and gas lease of the restricted allotted lands of Wosey John Deere, and, on the assessment day, January 1, 1937,[5] she held

[5] Under Oklahoma law, the taxable status of property in Oklahoma is fixed as of the assessment date, January 1, in each year, although

title to a freehold life estate in all the parcels, subject to restrictions against alienation and encumbrance which were validly imposed by the Secretary of the Interior.[6]

Petitioners advance two arguments against the applicability of the 1936 Act. First, they contend, from remarks made by the sponsor of the 1936 Act in the Senate,[7] that the Act applied only to lands purchased for landless Indians, and thus did not extend to lands purchased from the restricted funds of Wosey John Deere, who held allotted land. We do not read those remarks as limiting the scope of the 1936 Act to landless Indians; they do not deal in terms of exclusiveness. But if they are to be interpreted as petitioners contend, we do not accept them as definitive, because they are opposed to the clear words of the Act, the reasons for its enactment,[8] its contemporary

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taxes are levied as of July 1. See *Board of Commissioners* v. *Central Baptist Church*, 136 Okla. 99, 276 P. 726; *In re Sinclair Prairie Oil Co*, 175 Okla. 289, 53 P. 2d 221; *In re Champlin Refining Co.*, 186 Okla. 625, 99 P. 2d 880. For the purposes of this case, we assume without deciding that the status of the property on the assessment date is determinative.

[6] See Note 3, *ante*.

[7] Senator Thomas said in part: "Formerly the Congress authorized the Secretary of the Interior to buy land for landless Indians. The Secretary proceeded to buy the lands and assigned the Indians to reside upon such lands. The recommendation or assertion was made to the Indians that the land would be theirs and they would have no taxes to pay. . . . In some cases tax warrants have been issued and the Indians have been threatened with dispossession. The Department believes that, in order to keep faith with the Indians, the tax warrants and tax assessments should be paid and the title to the lands cleared. The bill authorizes the appropriation of money for that purpose.

"Section 2 provides that the lands so secured shall hereafter be nontaxable." 80 Cong. Rec. 9159.

[8] The Meriam Report to the Secretary of the Interior on the Problem of Indian Administration (Brookings Institute, 1928), pp. 795–98, pointed out that allotments were often unsuitable for homes, that other lands had to be purchased, and that while restricted allotted lands and the trust proceeds thereof had been held immune from state taxation,

administrative interpretation,[9] and its subsequent Congressional history.[10] Secondly, petitioners assert that the exemption of the 1936 Act was personal and extended only to lands the title to which was held by the Indian whose restricted funds were used to purchase the lands. This position finds some support in the language of the Act, referring to "lands the title to which is held by an Indian . . ., purchased out of trust or restricted funds of said Indian," but it is unnecessary to determine whether the purpose of Congress was such that the Act should be more broadly construed than its technical terms might indicate. For, even assuming *arguendo* that petitioners are correct in saying that the 1936 Act afforded only a personal exemption, Wosey John Deere, whose restricted funds purchased the three tracts, held a restricted life estate in each tract on January 1, 1937, the assessment date. As the life

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the tax status of property purchased with trust funds from sale or lease of allotted lands was in doubt. Legislation conferring tax exemption was recommended to protect the Indians against inability to pay or their insufficient sense of public responsibility, and to keep faith since officials of the federal government had expressly or impliedly represented that lands so purchased were tax exempt. The House and Senate reports show that this was the problem at which the 1936 Act was aimed. H. Rep. 2398, S. Rep. 2168, 74th Cong., 2d Sess. See also Cohen, Handbook of Federal Indian Law (1942), pp. 260-61.

[9] The Acting Attorney General and the Solicitor of the Department of the Interior both ruled that the 1936 Act applied to lands purchased from the restricted funds of individual Osage Indians who were not landless. 38 Op. A. G. 577; 56 I. D. 48.

[10] In reporting a bill to repeal the broad provision of § 2 of the 1936 Act, the House Committee on Indian Affairs said: "It will be observed from the language of section 2, . . . that it applies to *all* lands purchased by restricted Indian funds, and the Attorney General so held." H. Rep. 562, 75th Cong., 1st Sess. (emphasis supplied). The Senate substituted for the repealer an amendment limiting § 2 to homestead lands, which became the 1937 Act, but the Senate committee report also makes it clear that the 1936 Act covered all restricted Indian lands purchased out of restricted funds. S. Rep. 332, 75th Cong., 1st Sess.

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tenant, she was obligated to pay the taxes under Oklahoma law. 60 Okla Stat. Ann. § 69; *Helm* v. *Belvin,* 107 Okla. 214, 232 P. 382; *Riley* v. *Collier,* 111 Okla. 130, 238 P. 491; *Waldon* v. *Baker,* 184 Okla. 492, 495, 88 P. 2d 352. Since the 1936 Act was concerned with a tax exemption, the proper test of whether an Indian purchaser had "title," within the meaning of the Act, must be whether he had retained such a property interest that, but for the Act, he would be subjected to the tax. Here Wosey John Deere retained such a title, and the three tracts were clearly within the 1936 Act, even accepting petitioners' construction.

Likewise, the two rural parcels comply with the description contained in the 1937 Act, which provides in part: "All homesteads, heretofore purchased out of the trust or restricted funds of individual Indians, . . . shall be nontaxable until otherwise directed by Congress: *Provided,* That the title to such homesteads shall be held subject to restrictions . . ." Those parcels were purchased from the restricted funds of an individual Indian, Wosey John Deere; respondents hold them subject to valid restrictions;[11] and they were properly designated by respondents as homestead lands on December 16, 1937, prior to the 1938 assessment date.[12] In view of the legislative history of the 1937 Act, summarized in Note 10, *supra,* petitioners' argument that the 1937 Act applies only to lands purchased for landless Indians must be rejected.

It has been suggested that the tax exemption granted by the 1937 Act is personal to the Indian whose restricted funds were used to purchase the land, or else that it extends to the land in the hands of restricted Creek Indian grantees only until 1956, consonantly with the statutes

[11] See Note 3, *ante.*

[12] The Secretary did not approve the designation until March 24, 1938, but we think this approval related back to the date of designation.

governing the tax status of restricted allotted lands of the Creeks.[13] The Act does not say, however, and there is not a word to suggest that upon transfer of the lands to Indian heirs or grantees, subject to restrictions, the exemption is either to terminate or else extend only until 1956. If Congress had intended either result, it could easily have expressed those purposes. It did neither, but provided instead that the lands while restricted were to remain nontaxable until it directed otherwise. In the absence of explicit Congressional direction, we do not think we should hold the exemption personal or attempt to derive an applicable principle from the complicated and admittedly ambiguous statutes governing the tax status of restricted allotted Creek lands. Respondents received the land, which they have designated as a homestead, subject to restrictions of indefinite duration which the Secretary of the Interior had authority to impose.[14] It seems only fair, as the clear words of the 1937 Act provide, that the tax exemption should follow the restrictions and continue so long as they do, unless Congress meanwhile provides to the contrary. Even if the 1937 Act were ambiguous, we think this interpretation should be taken. Cf. *United States* v. *Reily,* 290 U. S. 33, 39.

It is argued, however, that the 1936 Act created only a personal exemption, and the 1937 Act gave no more because it was an amendment to the 1936 Act intended solely to limit the unnecessarily broad exemption of that Act. It is true that this was the avowed purpose of the 1937 Act,[15] but it does not follow that the 1937 Act grants

[13] See Act of June 30, 1902, 32 Stat. 500, 503; Act of April 26, 1906, § 19, 34 Stat. 137, 144; Act of May 27, 1908, §§ 4, 9, 35 Stat. 312, 313, 315; Act of April 12, 1926, 44 Stat. 239; Act of May 10, 1928, 45 Stat. 495; Act of May 24, 1928, 45 Stat. 733; Act of March 2, 1931, 46 Stat. 1471; Act of June 30, 1932, 47 Stat. 474; Act of January 27, 1933, 47 Stat. 777.

[14] See Note 3, *ante.*

[15] See H. Rep. 562, S. Rep. 332, 75th Cong., 1st Sess.

but a personal exemption or else allows the exemption only until 1956. While the question need not be decided, it is appropriate to notice that the purpose of the 1936 Act makes it at least doubtful whether that Act afforded only a personal exemption. Assuming, however, that it did, there is nothing to indicate that the 1937 Act, contrary to its terms, incorporated the same limitation. The applicable committee report sheds no light one way or another.[16] There is no inconsistency between the object of the 1937 Act to limit the sweeping exemption of all lands, granted by the 1936 Act, to homestead lands, and a purpose to enlarge the exemption accorded to the relatively small amount of homestead lands so that it would apply to restricted homesteads passing to Indian heirs or grantees. The fact that extensive changes in language were made in the 1937 Act is persuasive, moreover, that a change in sense from the presumed personal exemption of the 1936 Act was intended. If the only object of the 1937 Act was to limit the application of the 1936 Act (with its assumed personal exemption) to homesteads, that purpose could have been accomplished simply by substituting the word "homesteads" for the word "lands." We cannot accept the view that the substantial changes in language were only matters of style. Furthermore, it has not been suggested that respondents, as takers from the original purchaser, were incompetent to designate the lands as a homestead under the 1937 Act. If they could do that, as we and apparently the Secretary of the Interior think they could,[17] it would seem to follow that, having properly designated their homestead under the Act, they are entitled to the tax exemption afforded restricted homesteads by the Act until Congress otherwise directs.

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[16] S. Rep. 332, 75th Cong., 1st Sess.

[17] The Secretary approved respondents' designation. See Note 12, *ante*.

The Acts of 1936 and 1937 are constitutional. From almost the beginning, the existence of federal power to regulate and protect the Indians and their property against interference even by a state has been recognized. Cf. *Worcester* v. *Georgia,* 6 Pet. 515. This power is not expressly granted in so many words by the Constitution, except with respect to regulating commerce with the Indian tribes, but its existence cannot be doubted. In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people, needing protection against the selfishness of others and their own improvidence. Of necessity, the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation and to prepare the Indians to take their place as independent, qualified members of the modern body politic. This was classically summarized in *United States* v. *Kagama,* 118 U. S. 375, 384–85:

"From their [the Indians'] very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen.

. . . . . .

"The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, . . . It must exist in that government, because it never has existed anywhere else, because the theater of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes."

After 1871, Congress turned from regulating Indian affairs by treaties to regulation by agreement and legislation. The plenary character of this legislative power over various phases of Indian affairs has been recognized on many occasions.[18] One aspect of this legislative program commenced with the General Allotment Act of 1887, 24 Stat. 388, followed by various other allotment acts dealing with specific tribes,[19] whereby Congress embarked upon a policy of assimilating the Indians through dissolution of tribal governments and the compulsory individualization of Indian land.[20] To lessen the difficulty of the period of transition and to protect the allottees' interest in their lands, Congress, by the device of the trust patent or a restricted fee, denied them the power to alienate or encumber their lands for fixed periods of time, subject to extension—denials which were sustained as proper exercises of Congressional power. *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 310–17; *Brader* v. *James*, 246

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[18] See *United States* v. *Kagama, supra; Choctaw Nation* v. *United States*, 119 U. S. 1, 27; *Stephens* v. *Cherokee Nation*, 174 U. S. 445, 486; *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 566–68; *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 310–17; *United States* v. *Sandoval*, 231 U. S. 28, 45–47; *Brader* v. *James*, 246 U. S. 88, 96; *Sunderland* v. *United States*, 266 U. S. 226, 233–34; *United States* v. *Ramsey*, 271 U. S. 467, 469, 471; *United States* v. *McGowan*, 302 U. S. 535, 538–39; *Board of Comm'rs* v. *United States*, 308 U. S. 343, 349.

[19] Wosey John Deere received her allotment under an agreement negotiated with the Creeks by the Dawes Commission and incorporated into the Act of March 1, 1901, 31 Stat. 861, as amended by the supplemental agreement of June 30, 1902, 32 Stat. 500. See also § 19 of the Act of April 26, 1906, 34 Stat. 137, 144; Act of May 27, 1908, 35 Stat. 312; and Act of May 10, 1928, 45 Stat. 495.

[20] Allotments in severalty were halted by the Wheeler-Howard Act of June 18, 1934, 48 Stat. 984, and by the Oklahoma Welfare Act of June 26, 1936, 49 Stat. 1967. These and other recent statutes reflect a change in policy, the theory of which is that Indians can better meet the problems of modern life through corporate, group, or tribal action, rather than as assimilated individuals.

U. S. 88, 96; *Sunderland* v. *United States,* 266 U. S. 226, 233–34. The obligation and the power of the United States to protect and preserve those restricted allotted lands for the Indian owners has been recognized, *Heckman* v. *United States,* 224 U. S. 413, and they were held immune from state taxation as instrumentalities by which the United States provided for the welfare and education of its Indian wards. *Rickert* v. *United States,* 188 U. S. 432.[21] It has also been held by the lower federal courts that proceeds from the sale or lease of restricted allotted lands are immune from state taxation. See *United States* v. *Thurston County,* 143 F. 287; *National Bank of Commerce* v. *Anderson,* 147 F. 87. When this Court came to consider the tax status of lands of the character here involved, that is, lands purchased for an Indian from the trust or restricted proceeds of his restricted allotted land, it said that, "In a broad sense all lands which the Indians are permitted to purchase out of the taxable lands of the state in this process of their emancipation and assumption of the responsibility of citizenship, whether restricted or not, may be said to be instrumentalities in that process." Lands so purchased, however, were held to fall within that class of "instrumentalities which, though Congress may protect them from state taxation, will nevertheless be subject to that taxation unless Congress speaks." *Shaw* v. *Gibson-Zahniser Oil Corp.,* 276 U. S. 575, 580–81.

As a result of the *Shaw* decision, Congress spoke in the Act of 1936 and the amendment of 1937, which were intended to protect the Indians in their land purchases from restricted funds and to keep faith with them because of the implied or express representations that those lands

[21] The land involved in the *Rickert* case was a trust allotment, rather than a restricted fee. The power of Congress over both types of allotments, however, is the same. See *United States* v. *Ramsey,* 271 U. S. 467, 471.

were tax exempt.[22] The clear implication of the *Shaw* case is that those Acts are valid exercises of Congressional power, and we so hold. They are appropriate means by which the federal government protects its guardianship and prevents the impairment of a considered program undertaken in discharge of the obligations of that guardianship. The fact that the Acts withdraw lands from the tax rolls and may possibly embarrass the finances of a state or one of its subdivisions is for the consideration of Congress, not the courts. Cf. *Federal Land Bank* v. *Bismarck Co.*, 314 U. S. 95, 104. Also, it is immaterial that respondents are citizens, because it is settled that the grant of citizenship to the Indians is not inconsistent with their status as wards whose property is subject to the plenary control of the federal government. See *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 312–17; *Brader* v. *James*, 246 U. S. 88, 96. It rests with Congress to determine when the guardianship relation shall cease. *Tiger's* case, *supra; United States* v. *Ramsey*, 271 U. S. 467, 469; *United States* v. *McGowan*, 302 U. S. 535, 538. Thus far, Congress has not terminated that relation with respect to the Creek Nation and its members. That Nation still exists,[23] and has recently been authorized to resume some of its former powers. Act of June 26, 1936, 49 Stat. 1967. And although the Creek tribal rolls were closed on March 4, 1906,[24] Congress has recognized that un-enrolled Creeks of the half blood or more are tribal

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[22] See H. Rep. 2398, S. Rep. 2168, 74th Cong., 2d Sess. See also the Meriam Report to the Secretary of the Interior on the Problem of Indian Administration (Brookings Institute, 1928), pp. 795–98.

[23] The Act of March 1, 1901, 31 Stat. 861, and the supplemental agreement of June 30, 1902, 32 Stat. 500, provided for the dissolution of the Creek Tribe on March 4, 1906, but this provision was revoked by the joint resolution of March 2, 1906, 34 Stat. 822, and § 28 of the Act of April 26, 1906, 34 Stat. 137, 148.

[24] Section 2 of the Act of April 26, 1906, 34 Stat. 137.

Indians subject to federal control.[25] Respondents fall in this class.

We have considered the other contentions raised by petitioners and find them without merit. The judgment below is correct in the matters appealed from and is therefore

Affirmed.

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

MR. JUSTICE RUTLEDGE:

I concur in the result and also in the opinion except as it relates to the taxes for 1938 and thereafter, levied and collected under the 1937 Act. I agree that the exemption extended for these years to Wosey John Deere's grantees, but for different reasons and with the limitation, which I think should be stated, that under presently effective legislation the exemption extends only to 1956.

As I understand the ruling, the opinion grounds the exemption for grantees squarely on the 1937 Act, without reference to whether they were also exempt under the 1936 Act, a question not decided. With that I cannot agree. The later statute amended the earlier one. Both its terms and its legislative history [1] show it had only one purpose. That was to cut down the amount of land exempted. "All homesteads" took the place of "all lands." There were other changes in language, but they were matters of style, not of substance. There is not a word in the Act of 1937 itself, or in the Committee reports to Congress, to show that any other change was in mind. I find,

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[25] See Act of January 27, 1933, 47 Stat. 777; Act of Feb. 11, 1936, 49 Stat. 1135; Act of June 26, 1936, 49 Stat. 1967; Act of December 24, 1942, c. 813, 56 Stat. 1080.

[1] See H. R. Rep. No. 562, 75th Cong., 1st Sess.; S. Rep. No. 332, 75th Cong., 1st Sess.

therefore, no evidence of purpose to enlarge the protected class at the same time the amount of land exempted was being reduced. Nor is mere absence of language expressly limiting the exemption to a class defined in the Act a sufficient basis for implying an intent to enlarge the protected class. Nullifying the power of a state to tax land within its borders held by or for private individuals is too important and delicate a matter to hang on such an implication. In my opinion, therefore, the sole purpose and effect of the 1937 Act was to reduce the quantity of land for which exemption could be claimed. Consequently, if grantees were within the benefit, it was because they were so by virtue of the 1936 Act.

A literal reading of that Act possibly would lead to the conclusion that grantees were excluded and the protection was personal to the Indian with whose funds the lands were purchased. But the language is not absolutely conclusive to this effect, and, in my opinion, the legislative history [2] shows that the purpose again was not to enlarge or restrict the classes to which the benefit applied, but rather was to bring within the scope of preëxisting exemptions lands not covered by them. Any other view would create as to the lands covered by the 1936 Act, which were acquired with restricted funds, a different and a preferred exemption as compared with that applicable to originally allotted lands, from the sale of which in large part the funds were derived. No intent can be imputed to Congress to give the substituted lands preferential treatment as compared with original allotments. The language does not require this, and nothing in the legislative history gives a basis for believing it was intended. There is no sufficient reason in either for thinking that Congress

[2] See H. R. Rep. No. 2398, 74th Cong., 2d Sess.; S. Rep. No. 2168, 74th Cong., 2d Sess. See also 80 Cong. Rec. 9159 and Meriam Report to the Secretary of the Interior on the Problem of Indian Administration (Brookings Institute, 1928) 795–8.

intended to create new classes of beneficiaries or new kinds of exemptions, whether in duration or otherwise. There was a preëxisting and defined general policy in both respects, no problem of either sort was presented by the situation the Act was intended to cure, and the sole purpose, in my opinion, was to make sure the preëxisting exemptions would extend to the lands specified in the Act. Accordingly, whether grantees were exempted and, if so, for how long is to be determined not by implication or construction from the terms of the 1936 Act alone, but by reference to the law as it existed in respect of grantees of original allottees prior to 1936.

There is no need to go back of 1928, except to say that, for our purposes, the effect of prior legislation was that grantees of original allottees were not within the existing tax exemptions,[3] which were, for the most part, to expire at the latest in 1931.[4] In some instances, restrictions extended to lands held by heirs of allottees, but for the limited period.[5] In 1928, Congress extended existing restrictions on some lands—both allotted and inherited—to 1956, but at the same time removed existing restrictions on others. 45 Stat. 495. The existing tax exemption was cut down in scope to one hundred sixty acres of each Indian's holding, but was also extended more clearly to cover the land in the hands of "any full blood Indian heir or devisee," though not beyond 1956. 45 Stat. 495, as amended by 45 Stat. 733–4.

In 1933, probably by reason of the discovery of oil on Indian lands, consequent sale or lease of original allotments under the direction of the Secretary of the Interior,

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[3] *Cf.* Act of June 30, 1902, c. 1323, § 16, 32 Stat. 500, 503; Act of April 26, 1906, c. 1876, § 19, 34 Stat. 137, 144; Act of May 27, 1908, c. 199, §§ 4, 9, 35 Stat. 312, 313, 315; Act of April 12, 1926, c. 115, 44 Stat. 239.

[4] 34 Stat. 144; 35 Stat. 315; 44 Stat. 239.

[5] See 35 Stat. 315; 44 Stat. 239.

and numerous suits by Indians claiming the proceeds free from his restrictive power, Congress enacted another statute, 47 Stat. 777, which made all Indian funds then in or later coming to the Secretary's hands restricted. It contained the following proviso, which is the last word, for our purposes, on exemption of Five Civilized Tribe Indian lands prior to 1936:

"*Provided,* That where the entire interest in any tract of restricted and tax-exempt land belonging to members of the Five Civilized Tribes is acquired by inheritance, devise, gift, or purchase, with restricted funds, by or for restricted Indians, such land shall remain restricted and tax-exempt during the life of and as long as held by such restricted Indians, but not longer than April 26, 1956. . . . *Provided further,* That such restricted and tax-exempt land held by anyone, acquired as herein provided, shall not exceed one hundred and sixty acres."

In a number of respects, the meaning of the provision is unclear. But, without attempt to clarify them, the general purpose seems to have been to exempt lands belonging to members of the Five Civilized Tribes during their lives, but not beyond 1956 and not exceeding 160 acres, if "acquired by inheritance, devise, gift, or purchase, with restricted funds, by or for such restricted Indians." The proviso is awkwardly drawn, and some of the language could be taken to limit the exemption to the Indian with whose restricted funds the lands are acquired. But other language contradicts this and the legislative history shows it was contemplated the exemption would extend to heirs, devisees, donees and purchasers with restricted funds.[6] In short, as to the lands covered, Indian heirs, devisees, donees and grantees were within the protection. That the proviso covers directly the lands in question in the hands

[6] See H. R. Rep. No. 1015, 72d Cong., 1st Sess.; S. Rep. No. 873, 77th Cong., 1st Sess.; see also 75 Cong. Rec. 8163, 8170.

of Wosey John Deere's grantees may be doubted.[7] But, whether or not the statute applies specifically to this case, it shows the latest phase of Congressional policy, prior to 1936, as to the kind of exemption given to members of the Creek Nation and the persons entitled to its benefit.

In this background, the 1936 Act was adopted. In my opinion, it incorporated the previously existing exemption, as it related to duration and grantees, but extended it to "all lands" rather than merely the homestead. The 1937 Act returned to the homestead limit, but without change in other respects. In my view, therefore, and for these reasons, the grantees of Wosey John Deere were entitled to the benefit of the exemption, but, unless it is extended further by Congress, only to 1956.

MR. JUSTICE ROBERTS joins in this opinion.

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[7] They are homestead lands. They were bought with her restricted funds. She, if anyone, was a "restricted Indian," though that term is new in this Act and unclear. She acquired the lands by purchase. Her children took them by deed, whether by gift or by "purchase" is not material. They, too, were "restricted Indians," if she was. At any rate, they were full blood. All these things would fit the statute to the present case. On the other hand, the tax exemption in the proviso apparently extends only to newly acquired lands which prior to their acquisition were tax exempt and restricted. See 75 Cong. Rec. 8170. Nothing in the record indicates that the lands here involved were either tax exempt or restricted when Wosey John Deere purchased them. However, the precise significance of the apparent requirement that the lands shall have been tax exempt before they were acquired is obscured by the context of the proviso in a statute addressed primarily to the problem of restricting funds (in the hands of the Secretary) obtained largely from the sale of interests in restricted lands.

AGUILAR *v.* STANDARD OIL CO. OF NEW JERSEY.*

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

No. 454. Argued March 2, 3, 1943.—Decided April 19, 1943.

1. A shipowner's liability for maintenance and cure extends to a seaman who, departing on or returning from shore leave (though without any duty to perform for the ship while on leave), is injured while proceeding, without misconduct, across a dock or other property which was the only available route between the vessel and the public streets. P. 736.
2. Liability in such case does not depend upon whether the shipowner was negligent. P. 736.

No. 454, 130 F. 2d 154, reversed.
No. 582, 130 F. 2d 797, affirmed.

CERTIORARI, 317 U. S. 621, 622, to review, in No. 582, the reversal of a judgment dismissing the complaint, and, in No. 454, the affirmance of a judgment dismissing the complaint, in suits by seamen for maintenance and cure.

Mr. George J. Engelman for petitioner in No. 454; and *Mr. Joseph W. Henderson,* with whom *Mr. George M. Brodhead, Jr.* was on the brief, for petitioner in No. 582.

Mr. Walter X. Connor, with whom *Mr. Vernon S. Jones* was on the brief, for respondent in No. 454; and *Mr. Abraham E. Freedman,* with whom *Messrs. Paul M. Goldstein* and *Charles Lakatos* were on the brief, for respondent in No. 582.

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*Together with No. 582, *Waterman Steamship Corp.* v. *Jones,* on writ of certiorari, 317 U. S. 621, to the Circuit Court of Appeals for the Third Circuit.

MR. JUSTICE RUTLEDGE delivered the opinion of the Court.

The question presented by these cases is whether a shipowner is liable for wages and maintenance and cure to a seaman who, having left his vessel on authorized shore leave, is injured while traversing the only available route between the moored ship and a public street. The injury in No. 582 occurred while the seaman was departing for his leave. That in No. 454 occurred while he was returning.

The complaint in No. 582 discloses that the plaintiff, respondent here, was a messman on the Steamship Beauregard, owned by defendant. On January 16, 1941, the vessel, which apparently was engaged in the coastwise trade between New Orleans and East Coast and Gulf ports, was moored to Pier C, Port Richmond, Philadelphia. At about 6 p. m. plaintiff left the ship on shore leave. As he was proceeding through the pier toward the street, all the lights were extinguished. In the ensuing darkness, he fell into an open ditch at a railroad siding. This caused injuries which required treatment and prevented him from resuming his usual duties. This action followed, for maintenance and cure and wages. On defendant's motion, the District Court dismissed the complaint. The ground assigned was that, at the time of his injury, plaintiff was not ashore on the ship's business. The Third Circuit Court of Appeals reversed and remanded (130 F. 2d 797), holding that, on the facts stated in the complaint, defendant was liable for maintenance and cure and wages.

The stipulation of facts in No. 454 discloses that on April 18, 1938, the defendant's vessel, the Steamship E. M. Clark, was lying docked at the premises of the Mexican Petroleum Company, in Carteret, New Jersey, which defendant neither owned, operated, nor controlled. Petitioner, a member of the crew, obtained permission from

the master and went ashore on his own personal business. In order to reach the vessel on returning from shore leave, he had to pass through the premises of the Mexican Petroleum Company. After he had gone through the entrance gate and while he was walking on the roadway of those premises about a half mile from the ship, he was struck and injured by a motor vehicle which was neither owned, operated, nor controlled by the defendant. Petitioner brought this action to recover $10,000, the expense of his maintenance and cure for the injuries so incurred. The District Court dismissed the complaint, and on appeal the Second Circuit Court of Appeals affirmed. 130 F. 2d 154. Both courts acted on the ground that in going ashore on personal business the plaintiff left the service of the ship and therefore no liability for maintenance and cure attached.

The cases were brought here to resolve the conflict thus presented on an important question of maritime law.

All admit the shipowner is liable if the injury occurs while the seaman is "in the service of the ship," and the issue is cast in these ambiguous terms, the parties giving different meanings to the ancient phrase.

The claimants say it includes the whole period of service covered by the seaman's articles; and, if he is injured during this time, the right is made out, unless it is shown by way of defense he has forfeited it by misconduct causing the injury. Since the injuries here took place during the period and there was admittedly no misconduct, it is said the claims are established. Corollaries of this view are that recovery is not conditioned on showing the injury was received while the seaman was at work or doing some errand for the employer, and that going ashore with leave, or returning from it, is part of being "in the service of the ship," whether or not it was to perform such an errand.

The shipowners regard the phrase more narrowly. In their view, it requires the seaman to be injured, if ashore,

while he is "on duty" or at work, doing some task connected with the vessel's business. Going ashore simply for diversion and relief from its routine and discipline, or for any matter personal to the seaman, takes him out of the service of the ship; and the departure is made the moment he steps off deck and onto the dock or pier, perhaps as he descends the gangplank or ladder. Cf. *The President Coolidge,* 23 F. Supp. 575 (D. C.). Likewise, return is not made until he is on board again. Cf. *Lilly* v. *United States Lines Co.,* 42 F. Supp. 214 (D. C.). In this view, it is of no moment whether the injury results from the seaman's fault or misconduct or from causes entirely beyond his control.

It will aid in determining the scope of the liability to consider its origin and nature.

From the earliest times, maritime nations have recognized that unique hazards, emphasized by unusual tenure and control, attend the work of seamen. The physical risks created by natural elements, and the limitations of human adaptability to work at sea, enlarge the narrower and more strictly occupational hazards of sailing and operating vessels. And the restrictions which accompany living aboard ship for long periods at a time combine with the constant shuttling between unfamiliar ports to deprive the seaman of the comforts and opportunities for leisure, essential for living and working,[1] that accompany most land occupations. Furthermore, the seaman's unusual subjection to authority adds the weight of what would be involuntary servitude for others to these extraordinary hazards and limitations of ship life.

Accordingly, with the combined object of encouraging marine commerce and assuring the well-being of seamen, maritime nations uniformly have imposed broad responsibilities for their health and safety upon the owners of

[1] *Cf.* Holmes, J., dissenting in *Tyson & Brother* v. *Banton,* 273 U. S. 418, 447.

ships.[2] In this country these notions were reflected early, and have since been expanded, in legislation designed to secure the comfort and health of seamen aboard ship,[3] hos-

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[2] As Mr. Justice Story, then on circuit, observed in *Harden* v. *Gordon*, 2 Mason 541, 11 Fed. Cas. No. 6047 (C. C.), at 483, "Seamen are by the peculiarity of their lives liable to sudden sickness from change of climate, exposure to perils, and exhausting labour. They are generally poor and friendless, and acquire habits of gross indulgence, carelessness, and improvidence. If some provision be not made for them in sickness at the expense of the ship, they must often in foreign ports suffer the accumulated evils of disease, and poverty, and sometimes perish from the want of suitable nourishment. . . . If these expenses are a charge upon the ship, the interest of the owner will be immediately connected with that of the seamen. The master will watch over their health with vigilance and fidelity. He will take the best methods, as well to prevent diseases, as to ensure a speedy recovery from them. He will never be tempted to abandon the sick to their forlorn fate; but his duty, combining with the interest of his owner, will lead him to succor their distress, and shed a cheering kindness over the anxious hours of suffering and despondency. Beyond this, is the great public policy of preserving this important class of citizens for the commercial service and maritime defence of the nation. Every act of legislation which secures their healths, increases their comforts, and administers to their infirmities, binds them more strongly to their country; and the parental law, which relieves them in sickness by fastening their interests to the ship, is as wise in policy, as it is just in obligation. Even the merchant himself derives an ultimate benefit from what may seem at first an onerous charge. It encourages seamen to engage in perilous voyages with more promptitude, and at lower wages. It diminishes the temptation to plunderage upon the approach of sickness; and urges the seamen to encounter hazards in the ship's service, from which they might otherwise be disposed to withdraw."

[3] *E. g.*, Act of July 20, 1790, c. 29, § 8, 1 Stat. 134; Act of June 7, 1872, c. 322, § 41, 17 Stat. 270; 46 U. S. C. §§ 666, 667, requiring that ships carry a minimum supply of medicines and antiscorbutics. Act of July 20, 1790, c. 29, § 9, 1 Stat. 135; Act of June 7, 1872, c. 322, § 36, 17 Stat. 269; Act of Dec. 21, 1898, c. 28, § 12, 30 Stat. 758; R. S. 4565; 46 U. S. C. §§ 661, 662, requiring that ships carry sufficient and adequate stores and water for the crew. See also 17 Stat. 277, 46 U. S. C. § 713. Act of June 7, 1872, c. 322, § 42, 17 Stat. 270,

pitalization at home [4] and care abroad.[5] The statutes are uniform in evincing solicitude that the seaman shall have at hand the barest essentials for existence. They do this in two ways. One is by recognizing the shipowner's duty to supply them, the other by providing for care at public expense. The former do not create the duty. That existed long before the statutes were adopted. They merely recognize the preëxisting obligation and put specific legal sanctions, generally criminal, behind it. Compare *Harden* v. *Gordon,* 2 Mason 541, 11 Fed. Cas. No. 6047 (C. C.); *The George,* 1 Sumn. 151, 10 Fed. Cas. No. 5329 (C. C.); *The Forest,* 1 Ware 429, 9 Fed. Cas. No. 4936 (D. C.). The provisions for public assistance were not intended to relieve the shipowner of his duty. On the contrary, their purpose was to make sure the seaman would have care, if the employer should fail to give it and in the rarer cases to which his obligation does not extend. The legislation therefore gives no ground for making inferences adverse to the seaman or restrictive of his rights. Cf. *Reed* v. *Canfield,* 1 Sumn. 195, 20 Fed. Cas. No. 11,641 (C. C.). Rather it furnishes the strongest basis for regarding them broadly, when an issue concerning their scope arises, and particularly when it relates to the general character of relief the legislation was intended to secure.

R. S. 4572; Act of June 26, 1884, c. 121, § 11, 23 Stat. 56; Act of Dec. 21, 1898, c. 28, § 15, 30 Stat. 759; 46 U. S. C. §§ 669, 670, providing that certain basic clothes and heating facilities be furnished by the shipowner; 46 U. S. C. §§ 672–672 (c), 673, prescribing qualifications and quotas for crews, and watch divisions.

[4] Act of July 16, 1798, c. 77, 1 Stat. 605; Act of March 2, 1799, c. 36, 1 Stat. 729; 2 Stat. 192; R. S. 4808–13; 24 U. S. C. §§ 1, 6, 8, 11, 193.

[5] Act of Feb. 28, 1803, c. 9, § 4, 2 Stat. 204; 2 Stat. 651; R. S. 4577; 46 U. S. C. § 678, requiring consuls in the case of sick and destitute seamen abroad to provide for their subsistence and return passage to the United States.

Among the most pervasive incidents of the responsibility anciently imposed upon a shipowner for the health and security of sailors was liability for the maintenance and cure of seamen becoming ill or injured during the period of their service.[6] In the United States this obligation has been recognized consistently as an implied provision in contracts of marine employment.[7] Created thus with the contract of employment, the liability, unlike that for indemnity or that later created by the Jones Act,[8] in no sense is predicated on the fault or negligence of the shipowner. Whether by traditional standards he is or is not responsible for the injury or sickness, he is liable for the expense of curing it as an incident of the marine employer-employee relationship.[9] So broad is the shipowner's obliga-

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[6] See, *e. g.*, Laws of Oleron, Articles VI, VII; Laws of Wisbuy, Articles XVIII, XIX; Laws of the Hanse Towns, Articles XXXIX, XLV; Marine Ordinances of Louis XIV, of Marine Contracts, Title Fourth, Articles XI, XII, compiled in 30 Fed. Cas. 1171–1216; *cf. Harden* v. *Gordon, supra.*

The Laws of Oleron are typical of the provision for injuries: "If any of the mariners hired by the master of any vessel, go out of the ship without his leave, and get themselves drunk, and thereby there happens contempt to their master, debates, or fighting and quarrelling among themselves, whereby some happen to be wounded: in this case the master shall not be obliged to get them cured, or in any thing to provide for them, but may turn them and their accomplices out of the ship; . . . but if by the master's orders and commands any of the ship's company be in the service of the ship, and thereby happen to be wounded or otherwise hurt, in that case they shall be cured and provided for at the costs and charges of the said ship." Article VI.

[7] *Harden* v. *Gordon,* 2 Mason 541, 11 Fed. Cas. No. 6047 (C. C.); *The Atlantic,* Abb. Adm. 451, 2 Fed. Cas. 620 (D. C.); *Cortes* v. *Baltimore Insular Line,* 287 U. S. 367, 371.

[8] *Cf. The Osceola,* 189 U. S. 158; *Pacific S. S. Co.* v. *Peterson,* 278 U. S. 130; *O'Donnell* v. *Great Lakes Dredging Co., ante,* p. 36; *Brown* v. *The Bradish Johnson,* 1 Woods 301, 4 Fed. Cas. No. 1992 (C. C.); *The A. Heaton,* 43 F. 592 (C. C.); *The Mars,* 149 F. 729 (C. C. A.).

[9] *The City of Alexandria,* 17 F. 390 (D. C.); *The A. Heaton,* 43 F. 592 (C. C.); *The Wensleydale,* 41 F. 829 (D. C.); *Sorenson* v. *Alaska*

tion, that negligence or acts short of culpable misconduct on the seaman's part will not relieve him of the responsibility. *Peterson* v. *The Chandos,* 4 F. 645 (D. C.); see also *The J. F. Card,* 43 F. 92 (D. C.); *The Ben Flint,* 1 Abb. (U. S.) 126, 3 Fed. Cas. No. 1299 (D. C.). Conceptions of contributory negligence, the fellow-servant doctrine, and assumption of risk have no place in the liability or defense against it. Only some wilful misbehavior or deliberate act of indiscretion suffices to deprive the seaman of his protection. *The Ben Flint, supra.* The traditional instances are venereal disease [10] and injuries received as a result of intoxication,[11] though on occasion the latter has been qualified in recognition of a classic predisposition of sailors ashore.[12] Other recent cases, however, disclose a tendency to expand these traditional exceptions.[13]

Consistently with the basic premises of the liability, it was early suggested that the risks which it covered were not only those arising in the actual performance of the seaman's duties. *Reed* v. *Canfield,* 1 Sumn. 195, 20 Fed. Cas. No. 11,641 (C. C.); *Ringgold* v. *Crocker,* Abb. Adm. 344, 20 Fed. Cas. No. 11,843 (D. C.). Unlike men employed in service on land, the seaman, when he finishes his day's work, is neither relieved of obligations to his em-

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S. S. Co., 247 F. 294 (C. C. A.); *Peterson* v. *The Chandos,* 4 F. 645 (D. C.); *cf. Seely* v. *City of New York,* 24 F. 2d 412 (C. C. A.); *cf. Reed* v. *Canfield,* 1 Sumn. 195, 20 Fed. Cas. No. 11,641 (C. C.).

[10] *Pierce* v. *Patton,* Gilp. 435, 19 Fed. Cas. No. 11,145 (D. C.); *The Alector,* 263 F. 1007 (D. C.); *Chandler* v. *The Annie Buckman,* 21 Betts 112, 5 Fed. Cas. No. 2591a (D. C.); *Zambrano* v. *Moore-McCormack Lines,* 131 F. 2d 537 (C. C. A.); *Wytheville,* 1936 A. M. C. 1281 (D. C.)

[11] *Barlow* v. *Pan Atlantic S. S. Corp.,* 101 F. 2d 697 (C. C. A.); *The Berwindglen,* 88 F. 2d 125 (C. C. A.); *Lortie* v. *American-Hawaiian S. S. Co.,* 78 F. 2d 819 (C. C. A.); *Oliver* v. *Calmar S. S. Co.,* 33 F. Supp. 356 (D. C.).

[12] *The Quaker City,* 1 F. Supp. 840 (D. C.).

[13] *Cf.* text and note 15 *infra.*

ployer nor wholly free to dispose of his leisure as he sees fit. Of necessity, during the voyage he must eat, drink, lodge and divert himself within the confines of the ship. In short, during the period of his tenure the vessel is not merely his place of employment; it is the framework of his existence. For that reason, among others, his employer's responsibility for maintenance and cure extends beyond injuries sustained because of, or while engaged in, activities required by his employment. In this respect it is a broader liability than that imposed by modern workmen's compensation statutes.[14] Appropriately it covers all injuries and ailments incurred without misconduct on the seaman's part amounting to ground for forfeiture, at least while he is on the ship, "subject to the call of duty as a seaman, and earning wages as such." *The Bouker No. 2,* 241 F. 831, 833 (C. C. A.), certiorari denied, 245 U. S. 647; *Calmar S. S. Co.* v. *Taylor,* 303 U. S. 525, 527–8; *Holm* v. *Cities Service Transportation Co.,* 60 F. 2d 721 (C. C. A.); *Highland* v. *The Harriet C. Kerlin,* 41 F. 222 (C. C.); *The Quaker City,* 1 F. Supp. 840 (D. C.); compare *Neilson* v. *The Laura,* 2 Sawy. 242, 17 Fed. Cas. No. 10,092 (D. C.); *Callon* v. *Williams,* 2 Lowell 1, 4 Fed. Cas. No. 2324 (D. C.).[15]

When the seaman's duties carry him ashore, the shipowner's obligation is neither terminated nor narrowed.[16]

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[14] *Compare Yukes* v. *Globe S. S. Corp.,* 107 F. 2d 888 (C. C. A.); but *cf. States S. S. Co.* v. *Berglann,* 41 F. 2d 456 (C. C. A.), certiorari denied, 282 U. S. 868; *Holm* v. *Cities Service Transportation Co.,* 60 F. 2d 721 (C. C. A.).

[15] The recent tendency to confine the scope of the obligation to those shipboard injuries which are caused by the requirements of the seaman's duties (*Meyer* v. *Dollar S. S. Lines,* 49 F. 2d 1002 (C. C. A.); *cf. Brock* v. *Standard Oil Co.,* 33 F. Supp. 353 (D. C.)) is consonant neither with the liberality which courts of admiralty traditionally have displayed toward seamen, who are their wards, nor with the dictates of sound maritime policy. *Calmar S. S. Co.* v. *Taylor, supra,* at 529.

[16] See, *e. g.,* Laws of Oleron, Art. VI, VII; Laws of Wisbuy, Art. XVIII, XIX; Laws of Hanse Towns, Art. XXXIX, XLV; see also *The*

When he leaves the ship contrary to orders, however, the owner's duty is ended.[17] Between these extremes are the instant cases, raising for the first time here the question of the existence and scope of the shipowner's duty when the seaman is injured while on shore leave but without specific chore for the ship. Liability in that circumstance was obscured in the first maritime codes,[18] and although early suggested has been recognized only implicitly in lower federal courts.[19] Very recently it has been explicitly denied in several district courts.[20]

We think that the principles governing shipboard injuries apply to the facts presented by these cases. To relieve the shipowner of his obligation in the case of injuries incurred on shore leave would cast upon the seaman hazards encountered only by reason of the voyage. The assumption is hardly sound that the normal uses and purposes of shore leave are "exclusively personal" and have no relation to the vessel's business. Men cannot live for long cooped up aboard ship, without substantial impairment of their efficiency, if not also serious danger to discipline. Relaxation beyond the confines of the ship is

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Montezuma, 19 F. 2d 355 (C. C. A.); *Gomes* v. *Pereira,* 42 F. Supp. 328 (D. C.).

[17] Sound reasons of discipline long have impelled this rule. *Cf., e. g.,* Laws of Oleron, Art. VII; Marine Ordinances of Louis XIV, *supra;* Laws of Wisbuy, *supra;* and compare *Pierce* v. *Patton, supra,* note 10.

[18] Thus, while the Laws of Oleron and the Marine Ordinances of Louis XIV, *supra,* relieve from liability for injuries incurred while on shore without leave, they say nothing on the question here involved. Similarly, the Laws of Wisbuy, *supra,* are ambiguous on this point. The Laws of the Hanse Towns suggest that any injuries received otherwise than in the ship's service are not within the right to maintenance and cure.

[19] *E. g., Reed* v. *Canfield, supra,* note 9; *The Berwindglen, supra,* note 11; *cf. The J. M. Danziger,* 1938 A. M. C. 685 (D. C.).

[20] *Smith* v. *American South African Line,* 37 F. Supp. 262 (D. C.); *Wahlgren* v. *Standard Oil Co.,* 42 F. Supp. 992 (D. C.); *Collins* v. *Dollar Steamship Lines,* 23 F. Supp. 395 (D. C.).

necessary if the work is to go on, more so that it may move smoothly. No master would take a crew to sea if he could not grant shore leave, and no crew would be taken if it could never obtain it. Even more for the seaman than for the landsman, therefore, "the superfluous is the necessary . . . to make life livable" [21] and to get work done. In short, shore leave is an elemental necessity in the sailing of ships, a part of the business as old as the art, not merely a personal diversion.

The voyage creates not only the need for relaxation ashore, but the necessity that it be satisfied in distant and unfamiliar ports. If, in those surroundings, the seaman, without disqualifying misconduct, contracts disease or incurs injury, it is because of the voyage, the shipowner's business. That business has separated him from his usual places of association. By adding this separation to the restrictions of living as well as working aboard, it forges dual and unique compulsions for seeking relief wherever it may be found. In sum, it is the ship's business which subjects the seaman to the risks attending hours of relaxation in strange surroundings. Accordingly, it is but reasonable that the business extend the same protections against injury from them as it gives for other risks of the employment.

It was from considerations of exactly this character that the liability for maintenance and cure arose. From them, likewise, its legal incidents were derived. The shipowner owes the protection regardless of whether he is at fault; the seaman's fault, unless gross, cannot defeat it; unlike the statutory liability of employers on land, it is not limited to strictly occupational hazards or to injuries which have an immediate causal connection with an act of labor. An obligation which thus originated and was shaped in response to the needs of seamen for protection from the

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[21] Holmes, J., dissenting in *Tyson & Brother* v. *Banton*, 273 U. S. 418, 447.

hazards and peculiarities of marine employment should not be narrowed to exclude from its scope characteristic and essential elements of that work. And, indeed, no decision has been found which so narrows the shipowner's parallel obligation in the case of sickness or disease. Rather, the implications of existing authority point the other way. Cf. *The Bouker No. 2, supra.*[22] The considerations, including those of public interest adverted to by Mr. Justice Story, which support the liability for illness,[23] or for injuries received aboard ship, likewise sustain it for injuries incurred on shore leave, as were those now in issue. To exclude such injuries from the scope of the liability would ignore its origins and purposes.

There is strong ground, therefore, for regarding the right to maintenance and cure as covering injuries received without misconduct while on shore leave. Certainly the nature and foundations of the liability require that it be not narrowly confined or whittled down by restrictive and artificial distinctions defeating its broad and beneficial purposes. If leeway is to be given in either direction, all the considerations which brought the liability into being dictate it should be in the sailor's behalf. In this view,

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[22] See also *Holmes* v. *Hutchinson,* Gilp. 447, 12 Fed. Cas. No. 6639 (D. C.); *The Forest,* 1 Ware 429, 9 Fed. Cas. No. 4936 (D. C.); *The Nimrod,* 1 Ware 1, 18 Fed. Cas. No. 10,267 (D. C.); and see cases cited *supra,* note 10.

[23] At the argument, it was suggested that a reason which might sustain the imposition of liability for sickness innocently contracted on shore leave, but not for injuries so incurred, would be the difficulty of proving origin ashore. The difficulty undoubtedly would exist in some cases, but hardly in all. No authority has been found which suggests this explanation. Rather, cases of illness, which are within the reason and policy of the liability, are indistinguishable from cases of injury received without misconduct. The risk of incidence is not less in the one case than in the other. The afflicted seaman is made as helpless and dependent by injury as by illness. His resources for meeting the catastrophe and his employer's burden are not greater because he is hurt rather than ill.

the nature and purposes of the liability do not permit distinctions which allow recovery when the seaman becomes ill or is injured while idle aboard, cf. *Calmar S. S. Co.* v. *Taylor,* 303 U. S. 525; *The Bouker No. 2,* 241 F. 831 (C. C. A.); *Holm* v. *Cities Service Transportation Co.,* 60 F. 2d 721 (C. C. A.); *The Quaker City,* 1 F. Supp. 840 (D. C.), or when doing some minor errand for the ship ashore, *Gomes* v. *Pereira,* 42 F. Supp. 328 (D. C.), but deny it when he falls from the ladder or gangplank as he leaves the vessel on shore leave, cf. *The President Coolidge,* 23 F. Supp. 575 (D. C.), or is returning from it, *Lilly* v. *United States Lines Co.,* 42 F. Supp. 214 (D. C.). Such refinements cut the heart from a protection to which they are wholly foreign in aim and effect. The sailor departing for or returning from shore leave is, sensibly, no more beyond the broad protection of his right to maintenance and cure than is the seaman quitting the ship on being discharged or boarding it on first reporting for duty. Cf. *The Michael Tracy,* 295 F. 680 (C. C. A.); *The Scotland,* 42 F. 925 (D. C.).

Plaintiffs here were injured while traversing an area between their moored ships and the public streets by an appropriate route. It is true that in No. 454 the area consisted of the extensive premises of the Mexican Petroleum Company, at whose dock the ship was moored. And it is said the shipowner should not be liable because he had no control over the premises. But it was the shipowner's business which required the use of those facilities. And his obligation to care for the seaman's injuries is, as has been shown, in no sense a function of his negligence or fault. While his ability to control conditions aboard ship may be to some extent an element in creating his responsibility, it is only one of many, is not definitive, and by no means determines the occasions on which his obligation arises. Consequently, the fact that the shipowner might not be liable to the seaman in damages for the

dock-owner's negligence, cf. *Todahl* v. *Sudden & Christenson,* 5 F. 2d 462 (C. C. A.), does not relieve him of his duty of maintenance and cure. We can see no significant difference, therefore, between imposing the liability for injuries received in boarding or quitting the ship and enforcing it for injuries incurred on the dock or other premises which must be traversed in going from the vessel to the public streets or returning to it from them. That much, at least, is within the liability. How far it extends beyond that point we need not now determine. And, in view of the ground on which we rest the decision, it is not necessary to consider the effects of the Shipowners' Liability Convention of 1936,[24] other than to state that it in no way alters the conclusion here reached.

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[24] By presidential proclamation the Convention became effective for the United States and its citizens on October 29, 1939 (54 Stat. 1693). Article 2 provides:

"1. The shipowner shall be liable in respect of—

(a) sickness and injury occurring between the date specified in the articles of agreement for reporting for duty and the termination of the engagement;

(b) death resulting from such sickness or injury.

"2. Provided that national laws or regulations may make exceptions in respect of:

(a) injury incurred otherwise than in the service of the ship;

(b) injury or sickness due to the wilful act, default or misbehaviour of the sick, injured or deceased person;

(c) sickness or infirmity intentionally concealed when the engagement is entered into.

"3. National laws or regulations may provide that the shipowner shall not be liable in respect of sickness, or death directly attributable to sickness, if at the time of the engagement the person employed refused to be medically examined."

Relevant material on the scope and effect of the Convention may be found in H. R. Rep. No. 1328, 76th Cong., 1st Sess., containing the interpretation by the Secretary of State; Record of Proceedings, International Labor Conference, 21st and 22d Sessions, Geneva, 1936, 249–51; International Labor Conference, Geneva, 1929, The Protec-

The judgment in No. 582 is affirmed; that in No. 454 is reversed and remanded to the District Court for further proceedings not inconsistent with this opinion.

No. 582 affirmed.
No. 454 reversed.

MR. JUSTICE ROBERTS did not participate in the consideration or decision of this case.

The CHIEF JUSTICE thinks that the judgment in No. 454, *Aguilar* v. *Standard Oil Co.*, should be affirmed for the reasons stated in the opinion of the Circuit Court of Appeals below, 130 F. 2d 154. In No. 582, *Waterman Steamship Corp.* v. *Jones*, he concurs in the result on the ground that the recovery was authorized by the Shipowners' Liability Convention, 54 Stat. 1695, which became effective before the date of respondent's injury. He is of opinion that Article 2, Clause 1 of the treaty authorizing the recovery is self-executing, and that the exceptions permitted by Clause 2 are not operative in the absence of Congressional legislation giving them effect. (See letter of Secretary of State to the President, dated June 12, 1939, quoted in H. R. Rep. No. 1328, 76th Cong., 1st Sess., pp. 5–7.)

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tion of Seamen in Case of Sickness, 1st Discussion, 28–46; International Labor Conference, Geneva, 1931, The Protection of Seamen in Case of Sickness, 2d Discussion, 29–43, 161–2. See also H. R. 6881, 76th Cong., 1st Sess.; 84 Cong. Rec. 10540; Hearings before Committee on Merchant Marine and Fisheries, House of Representatives, on H. R. 6881, 76th Cong., 1st Sess., *passim;* Hearings before Senate Committee on Commerce on H. R. 6881, 76th Cong., 3d Sess., *passim.*

DECISIONS PER CURIAM, ETC., FROM JANUARY 19, 1943, THROUGH APRIL 19, 1943.*

No. 631. UNITED STATES *v.* NICKERSON. Appeal from the District Court of the United States for the District of New Jersey. February 1, 1943. *Per Curiam:* The judgment is affirmed on the authority of *Jerome* v. *United States, ante,* p. 101. *Solicitor General Fahy* for the United States.

No. 238. MARTIN *v.* CITY OF STRUTHERS. February 1, 1943. Upon reconsideration the judgment entered herein October 12, 1942, 317 U. S. 589, is vacated, the mandate is recalled, and probable jurisdiction is noted.

No. 358. HOOPESTON CANNING CO. ET AL. *v.* PINK, SUPERINTENDENT OF INSURANCE, ET AL. This case reported under the title *Hoopeston Canning Co. et al.* v. *Cullen, Superintendent of Insurance, et al., ante,* p. 313.

No. 77. DUNN ET AL. *v.* OHIO. Appeal from the Supreme Court of Ohio. Argued January 7, 1943. Decided February 8, 1943. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. *Nebbia* v. *New York,* 291 U. S. 502; *Olsen* v. *Nebraska,* 313 U. S. 236; *Federal Power Comm'n* v. *Pipeline Co.,* 315 U. S. 575, 582–83; *Sproles* v. *Binford,* 286 U. S. 374. *Mr. James H. Nacey,* with whom *Mr. Meyer A. Cook* was on the

*MR. JUSTICE MURPHY took no part in the consideration or decision of orders announced on April 12, 1943.

For decisions on applications for certiorari, see *post,* pp. 747, 755; for rehearing, *post,* pp. 796, 797. For cases disposed of without consideration by the Court, *post,* p. 795.

brief, for appellants. *Mr. Kenneth L. Sater,* with whom *Messrs. Thomas J. Herbert,* Attorney General of Ohio, and *Frank T. Cullitan* were on the brief, for appellee. Reported below: 139 Ohio St. 621, 41 N. E. 2d 577.

No. 396. PEDERSEN *v.* J. F. FITZGERALD CONSTRUCTION Co. On petition for writ of certiorari to the Supreme Court of New York. February 8, 1943. *Per Curiam:* Petition for writ of certiorari granted. Judgment reversed on the authority of *Overstreet* v. *North Shore Corporation, ante,* p. 125. MR. JUSTICE MURPHY took no part in the consideration or decision of this case. *Mr. Daniel H. Prior* for petitioner. *Messrs. Henry E. Foley* and *Charles E. Nichols* for respondent. Reported below: 288 N. Y. 687, 43 N. E. 2d 83.

No. —, original. EX PARTE WILLIAM W. BOEHMAN. February 8, 1943. The motion for leave to file petition for writ of mandamus is denied.

No. 554. NATIONAL BROADCASTING Co., INC., ET AL. *v.* UNITED STATES ET AL. Appeal from the District Court of the United States for the Southern District of New York. February 12, 1943. Appeal dismissed as to appellant, Woodmen of the World Life Insurance Society, on motion of counsel for said appellant. *Mr. David M. Wood* for the Woodmen of the World Life Insurance Society, appellant. Reported below: 47 F. Supp. 940.

No. 669. ALLIED MILLS, INC. *v.* DEPARTMENT OF TREASURY OF INDIANA ET AL. Appeal from the Supreme Court of Indiana. February 15, 1943. *Per Curiam:* The judgment is affirmed. *McGoldrick* v. *Felt & Tarrant Co.,*

309 U. S. 70; *Felt & Tarrant Co.* v. *Gallagher*, 306 U. S. 62. *Mr. Frank T. Miller* for appellant. *Mr. Joseph W. Hutchinson* for appellees. Reported below: 220 Ind. 340, 42 N. E. 2d 34.

No. 670. UNITED STATES *v.* AMERICAN FEDERATION OF MUSICIANS ET AL. Appeal from the District Court of the United States for the Northern District of Illinois. February 15, 1943. *Per Curiam:* The judgment is affirmed. Act of March 23, 1932, 47 Stat. 70, 29 U. S. C. §§ 101–115; *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U. S. 552; *Milk Wagon Drivers' Union* v. *Lake Valley Co.*, 311 U. S. 91. *Assistant Attorney General Arnold* for the United States. *Mr. Joseph A. Padway* for appellees. Reported below: 47 F. Supp. 304.

No. —. EX PARTE JAMES B. GOODRICH. February 15, 1943. Application denied.

No. —, original. EX PARTE FRANK SMITH;

No. —, original. EX PARTE DEWEY WALLACE MCMURTREY; and

No. —, original. EX PARTE HUGH A. BOWEN. February 15, 1943. The motions for leave to file petitions for writs of habeas corpus are denied.

No. —, original. EX PARTE ROBERT L. PEYTON. March 1, 1943. The motion for leave to file petition for writ of mandamus is denied.

No. —, original. EX PARTE E. C. LILLY;

No. —, original. EX PARTE JOHN RUSSELL MILLER; and

No. —, original. Ex parte James Raymond Buchanan. March 1, 1943. The motions for leave to file petitions for writs of habeas corpus are denied.

No. —, original. Ex parte Robert Spies. March 8, 1943. The motion for leave to file petition for writ of habeas corpus is denied.

No. —, original. Ex parte Margaret E. Waley. March 8, 1943. The motion for leave to file petition for writ of habeas corpus is denied without prejudice to an application to the District Court.

No. —. Ex parte Ross Cummings Patton. March 8, 1943. Application for stay denied.

No. 396. Pedersen *v.* J. F. Fitzgerald Construction Co. March 8, 1943. The judgment entered in this case on February 8, 1943, *ante,* p. 740, is amended by adding the following: "and without prejudice to a determination of the nature of the employment of any members of the class on whose behalf this suit has been brought." The petition for rehearing is denied. Mr. Justice Murphy and Mr. Justice Rutledge took no part in the consideration or decision of this application.

No. 704. Redus *v.* Alabama. March 11, 1943. The application for a stay of execution, referred to the Court by Mr. Justice Black, is granted and an order is entered staying execution to and including April 5, next.

No. 554. NATIONAL BROADCASTING CO., INC. ET AL. *v.* UNITED STATES ET AL.; and

No. 555. COLUMBIA BROADCASTING SYSTEM, INC. *v.* UNITED STATES ET AL. March 12, 1943. The motion for a temporary restraining order in each case is granted, and the stay entered by the District Court is continued until 10 days after the filing in the District Court of this Court's mandates upon decision of the appeals. See 319 U. S. 190.

No. —. UNITED STATES EX REL. PURCELL *v.* STATE OF NEW YORK ET AL. March 15, 1943. Application denied.

No. —, original. EX PARTE DAISY D. WILSON. March 15, 1943. Applications denied.

No. —, original. EX PARTE CHARLES H. COCHRAN. March 15, 1943. Application denied.

No. —, original. EX PARTE MARTIN M. GOLDMAN ET AL. March 15, 1943. The motion for leave to file petition for writ of mandamus is denied.

No. —, original. EX PARTE SAM MINER;

No. —, original. EX PARTE JOE SOWDER; and

No. —, original. EX PARTE JOSEPH GRECO. March 15, 1943. The motions for leave to file petitions for writs of habeas corpus are denied.

No. 12, original. UNITED STATES *v.* LOUISIANA ET AL. March 15, 1943. Streeter B. Flynn, Esq., of Oklahoma

City, Oklahoma, appointed a Commissioner in this cause, for the purpose of perpetuating testimony.

No. 490. CLEARFIELD TRUST CO. ET AL. *v.* UNITED STATES. March 15, 1943. Ordered that the opinion in this case dated March 1, 1943, be amended by striking the sentence beginning on the 5th line from the bottom of page 3, which reads: "Its facts are practically on all fours with those of the present case."

Opinion reported as amended, *ante*, p. 363.

No. 630. GOLDSMITH *v.* SANFORD, WARDEN. March 15, 1943. Application denied. MR. JUSTICE MURPHY and MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application. *H. Ely Goldsmith, pro se. Solicitor General Fahy, Assistant Attorney General Berge,* and *Messrs. Oscar A. Provost* and *W. Marvin Smith* and *Miss Melva M. Graney* for respondent.

No. 288. AGRICULTURAL PRORATE COMMISSION OF CALIFORNIA ET AL. *v.* MUTUAL ORANGE DISTRIBUTORS ET AL. Appeal from the District Court of the United States for the Southern District of California. April 5, 1943. *Per Curiam:* The motion to vacate the judgment is granted. The judgment of the District Court is vacated, without costs to either party in this Court, and the cause is remanded to the District Court with directions to dismiss the bill of complaint as moot. *United States* v. *Hamburg-American Co.*, 239 U. S. 466, 477–8; *Brownlow* v. *Schwartz*, 261 U. S. 216; *Paramount Pictures* v. *Langer*, 306 U. S. 619; *Retail Food Clerks & Managers Union* v. *Union*

Premier Food Stores, 308 U. S. 526. *Messrs. Earl Warren*, Attorney General of California, and *Walter L. Bowers*, Deputy Attorney General, for appellants. *Mr. Guy Richards Crump* for appellees. Reported below: 35 F. Supp. 108.

No. —, original. EX PARTE FOREST G. WOOD. April 5, 1943. The motion for leave to file petition for writ of habeas corpus is denied without prejudice for the reasons stated in *Ex parte Elmer Davis, ante*, p. 412.

No. —, original. EX PARTE EDWARD J. BORAH;

No. —, original. EX PARTE CLARENCE M. HOLMES; and

No. —, original. EX PARTE CHARLES JENNINGS. April 5, 1943. The motions for leave to file petitions for writs of habeas corpus are denied.

No. —. EX PARTE FRANK KUCZYNSKI. April 5, 1943. Application denied.

No. 844. PEARSON *v.* CALIFORNIA ET AL. Appeal from the Supreme Court of California. April 12, 1943. *Per Curiam:* The appeal is dismissed for the want of a properly presented substantial federal question. *Clarence Pearson, pro se.*

No. —, original. EX PARTE RAYMOND BARTON;

No. —, original. EX PARTE CHESTEEN MCCONNELL; and

No. —, original. EX PARTE FRANK CONTARDI. April 12, 1943. The motions for leave to file petitions for writs of habeas corpus are denied.

No. —, original. Ex parte Henry Hawk. April 12, 1943. The motion for leave to file petition for writ of habeas corpus is denied without prejudice to an application to the District Court.

No. —, original. Ex parte Dewey Wallace McMurtrey. April 12, 1943. The motion for leave to file petition for writ of certiorari is denied.

No. 792. Stephan *v.* United States. April 14, 1943. The motion for a stay of execution is granted and it is ordered that execution of the sentence of death in this case be stayed until further order of this Court.

No. 720. Bayuk Cigars, Inc. *v.* Pennsylvania. Appeal from the Supreme Court of Pennsylvania. April 19, 1943. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. (1) *Butler Bros.* v. *McColgan,* 315 U. S. 501, and cases cited; *Wisconsin* v. *J. C. Penney Co.,* 311 U. S. 435, 441; *Department of Treasury* v. *Wood Preserving Corp.,* 313 U. S. 62, 66–67; *Wheeling Steel Corp.* v. *Fox,* 298 U. S. 193; (2) *Madden* v. *Kentucky,* 309 U. S. 83, 87–90. *Mr. Jerome J. Rothschild* for appellant. *Mr. Frank A. Sinon* for appellee. Reported below: 345 Pa. 348, 28 A. 2d 134.

No. 876. Jewel Incandescent Lamp Co., Inc. *v.* General Electric Co. et al. Appeal from the District Court of the United States for the District of New Jersey. April 19, 1943. *Per Curiam:* The appeal is dismissed on the authority of *Ex parte Cutting,* 94 U. S. 14; *Credits Commutation Co.* v. *United States,* 177 U. S. 311, and *United States* v. *California Coöperative Canneries,* 279

U. S. 553, 556. *Mr. Samuel E. Darby, Jr.* for appellant. *Mr. Alexander C. Neave* for appellees. Reported below: 47 F. Supp. 818.

No. —, original. Ex parte Emmet H. Bozel;
No. —, original. Ex parte Elmer Davis;
No. —, original. Ex parte Charles Erickson; and
No. —, original. Ex parte Frank Roberson. April 19, 1943. The motions for leave to file petitions for writs of habeas corpus are denied.

No. —, original. Ex parte Thomas B. Mulrennan. April 19, 1943. The motion for leave to file petition for writ of habeas corpus is denied without prejudice to an application to the District Court.

No. —. Daniels *v.* Alabama; and
No. —. Robinson *v.* Alabama. April 19, 1943. The applications for stay of execution are granted and it is ordered that execution of the sentence of death in each of these cases be stayed until further order of this Court.

DECISIONS GRANTING CERTIORARI, FROM JANUARY 19, 1943, THROUGH APRIL 19, 1943.

No. 396. Pedersen *v.* J. F. Fitzgerald Construction Co. See *ante*, p. 740.

No. 584. Roche, U. S. District Judge, et al. *v.* Evaporated Milk Association et al. February 8, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Solicitor General Fahy* for petitioners. *Messrs. Marshall P. Madison,*

Francis R. Kirkham, Herbert W. Clark, Arthur B. Dunne, U. S. Webb, Maurice E. Harrison, Willis I. Morrison, Joseph A. Murphy, and *Nat Brown* for respondents. Reported below: 130 F. 2d 843.

Nos. 623, 624, and 625. OKLAHOMA TAX COMMISSION *v.* UNITED STATES. February 15, 1943. Petition for writs of certiorari to the Circuit Court of Appeals for the Tenth Circuit granted. *Messrs. W. A. Barnett, C. W. King,* and *A. L. Herr* for petitioner. *Solicitor General Fahy, Assistant Attorney General Littell,* and *Mr. Norman MacDonald* for the United States. Reported below: 131 F. 2d 635.

No. 636. UNITED STATES *v.* DELIA. February 15, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Solicitor General Fahy* for the United States. *Messrs. Morton A. Eden* and *Jack N. Tucker* for respondent. Reported below: 131 F. 2d 614.

No. 480. MURDOCK *v.* PENNSYLVANIA (CITY OF JEANNETTE);

No. 481. PERISICH *v.* PENNSYLVANIA (CITY OF JEANNETTE);

No. 482. MOWDER *v.* PENNSYLVANIA (CITY OF JEANNETTE);

No. 483. SEDERS *v.* PENNSYLVANIA (CITY OF JEANNETTE);

No. 484. LAMBORN *v.* PENNSYLVANIA (CITY OF JEANNETTE);

No. 485. MALTEZOS *v.* PENNSYLVANIA (CITY OF JEANNETTE);

No. 486. ANASTASIA TZANES *v.* PENNSYLVANIA (CITY OF JEANNETTE); and

No. 487. ELLAINE TZANES *v.* PENNSYLVANIA (CITY OF JEANNETTE). February 15, 1943. Petition for writs of certiorari to the Superior Court of Pennsylvania granted. *Mr. Hayden C. Covington* for petitioners. *Mr. Fred B. Trescher* for respondent. Reported below: 149 Pa. Super. 175, 27 A. 2d 666.

No. 450. DOUGLAS ET AL. *v.* CITY OF JEANNETTE (PENNSYLVANIA) ET AL. February 15, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Mr. Hayden C. Covington* for petitioners. *Mr. Fred B. Trescher* for respondents. Reported below: 130 F. 2d 652.

No. 589. BOWLES *v.* UNITED STATES. March 1, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Mr. Osmond K. Fraenkel* for petitioner. *Solicitor General Fahy, Assistant Attorney General Berge,* and *Messrs. Oscar A. Provost, Andrew F. Oehmann,* and *W. Marvin Smith* for the United States. Reported below: 131 F. 2d 818.

No. 593. DIRECT SALES CO. *v.* UNITED STATES. March 1, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. *Messrs. Edwin J. Culligan* and *William B. Mahoney* for petitioner. *Solicitor General Fahy, Assistant Attorney General Berge,* and *Messrs. Robert S. Erdahl* and *W. Marvin Smith* for the United States. Reported below: 131 F. 2d 835.

No. 675. DETROIT EDISON CO. *v.* COMMISSIONER OF INTERNAL REVENUE. March 1, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth

Circuit granted. The CHIEF JUSTICE took no part in the consideration or decision of this application. *Messrs. Edward H. Green, Norris Darrell,* and *Oscar C. Hull* for petitioner. *Solicitor General Fahy* for respondent. Reported below: 131 F. 2d 619.

No. 721. NORTH AMERICAN COMPANY *v.* SECURITIES & EXCHANGE COMMISSION. March 1, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. The CHIEF JUSTICE took no part in the consideration or decision of this application. *Mr. Charles E. Hughes, Jr.* for petitioner. *Solicitor General Fahy* and *Mr. John F. Davis* for respondent. Reported below: 133 F. 2d 148.

No. 725. RICHARDSON *v.* JAMES GIBBONS CO. March 1, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. *Mr. George A. Mahone* for petitioner. *Messrs. O. Bowie Duckett* and *Edward E. Hargest, Jr.* for respondent. Reported below: 132 F. 2d 627.

No. 696. ALTVATER ET AL. *v.* FREEMAN ET AL. March 8, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Messrs. Lawrence C. Kingsland* and *Edmund C. Rogers* for petitioners. *Mr. Marston Allen* for respondents. Reported below: 130 F. 2d 763.

No. 698. BOONE *v.* LIGHTNER ET AL. March 8, 1943. Petition for writ of certiorari to the Supreme Court of North Carolina granted. *Messrs. Milton I. Baldinger, Stuart H. Robeson, Roy L. Deal, J. G. Moser,* and *I. Irving*

Bolotin for petitioner. *Mr. M. R. McCown* for respondents. Reported below: 222 N. C. 205, 22 S. E. 2d 426.

No. 687. ST. PIERRE *v.* UNITED STATES. March 8, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. Edward V. Broderick, S. Bertram Friedman,* and *Joseph H. Broderick* for petitioner. *Solicitor General Fahy* for the United States. *Mr. Osmond K. Fraenkel* filed a brief on behalf of the American Civil Liberties Union, as *amicus curiae,* in support of the petition. Reported below: 132 F. 2d 837.

No. 552. INTERSTATE TRANSIT LINES *v.* COMMISSIONER OF INTERNAL REVENUE. March 8, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Messrs. Joseph F. Mann* and *Nelson Trottman* for petitioner. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Joseph M. Jones* for respondent. Reported below: 130 F. 2d 136.

No. 660. MOLINE PROPERTIES, INC. *v.* COMMISSIONER OF INTERNAL REVENUE. March 8, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Messrs. Bart A. Riley* and *Thomas H. Anderson* for petitioner. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *J. Louis Monarch* for respondent. Reported below: 131 F. 2d 388.

No. 640. BAILEY, ADMINISTRATRIX, *v.* CENTRAL VERMONT RAILWAY, INC. March 8, 1943. Petition for writ

of certiorari to the Supreme Court of Vermont granted. *Mr. Joseph A. McNamara* for petitioner. *Mr. Horace H. Powers* for respondent. Reported below: 113 Vt. 8, 28 A. 2d 639.

No. 684. COUNTY OF MAHNOMEN *v.* UNITED STATES. March 15, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Messrs. J. A. A. Burnquist,* Attorney General of Minnesota, and *Geo. B. Sjoselius,* Assistant Attorney General, for petitioner. *Solicitor General Fahy, Assistant Attorney General Littell,* and *Mr. Vernon L. Wilkinson* for the United States. Reported below: 131 F. 2d 936.

No. 707. FREEMAN *v.* BEE MACHINE CO., INC. March 15, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Messrs. Marston Allen* and *Nathan Heard* for petitioner. *Messrs. George P. Dike* and *Cedric W. Porter* for respondent. Reported below: 131 F. 2d 190.

No. 709. VIRGINIA ELECTRIC & POWER CO. *v.* NATIONAL LABOR RELATIONS BOARD. March 15, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. *Messrs. T. Justin Moore* and *George D. Gibson* for petitioner. *Solicitor General Fahy* and *Mr. Robert B. Watts* for respondent. Reported below: 132 F. 2d 390.

No. 606. BUCHALTER *v.* NEW YORK;
No. 610. WEISS *v.* NEW YORK; and
No. 619. CAPONE *v.* NEW YORK. See *post,* p. 797.

No. 717. UNITED STATES *v.* DOTTERWEICH. April 5, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Solicitor General Fahy* for the United States. *Mr. Francis E. Bagot* for respondent. Reported below: 131 F. 2d 500.

No. 756. ROBERTS *v.* UNITED STATES. April 5, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Messrs. Benton Littleton Britnell* and *Newton Benjamin Powell* for petitioner. *Solicitor General Fahy, Assistant Attorney General Berge,* and *Messrs. Oscar A. Provost* and *W. Marvin Smith* and *Miss Melva M. Graney* for the United States. Reported below: 131 F. 2d 392.

No. 794. GREEN, DOING BUSINESS AS GREEN VACUUM CLEANER CO., *v.* ELECTRIC VACUUM CLEANER CO., INC. April 5, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Messrs. Merritt A. Vickery* and *Earl William Aurelius* for petitioner. *Messrs. John F. Oberlin* and *L. C. Spieth* for respondent. Reported below: 132 F. 2d 312.

No. 750. CARTER *v.* KUBLER. April 5, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted limited to the first question presented by the petition. *Mr. Elmer McClain* for petitioner. *George A. Kubler, pro se.* Reported below: 131 F. 2d 222.

No. 708. HILL, ADMINISTRATOR, *v.* HAWES, TRUSTEE, ET AL. April 5, 1943. Petition for writ of certiorari to the United States Court of Appeals for the District of

Columbia granted. *Messrs. Henry Lincoln Johnson* and *Thurman L. Dodson* for petitioner. *Mr. John B. Gunion* for respondents. Reported below: 132 F. 2d 569.

No. 766. VIRGINIAN HOTEL CORP. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. April 5, 1943. Petion for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. *Messrs. S. V. Kemp* and *F. G. Davidson, Jr.* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key, J. Louis Monarch,* and *L. W. Post* for respondent. *Mr. W. A. Sutherland* filed a brief, as *amicus curiae,* in support of the petition. Reported below: 132 F. 2d 909.

No. 849. GREAT LAKES DREDGE & DOCK CO. ET AL. *v.* HUFFMAN, ADMINISTRATOR. April 5, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Messrs. R. Emmett Kerrigan* and *James J. Morrison* for petitioners. *Mr. Eugene Stanley* for respondent. Reported below: 134 F. 2d 213.

No. 787. MCLEOD *v.* THRELKELD ET AL., DOING BUSINESS AS THRELKELD COMMISSARY CO. April 5, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Mr. Harry Dow* for petitioner. *Mr. John P. Bullington* for respondents. Reported below: 131 F. 2d 880.

No. 762. BARTCHY *v.* UNITED STATES. April 12, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Mr. Bernard A.*

Golding for petitioner. *Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. Robert S. Erdahl* for the United States. Reported below: 132 F. 2d 348.

No. 848. BROTHERHOOD OF RAILROAD TRAINMEN ET AL. *v.* TOLEDO, PEORIA & WESTERN RAILROAD. April 19, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Mr. John E. Cassidy* for petitioners. *Messrs. John M. Elliott* and *Clarence W. Heyl* for respondent. Reported below: 132 F. 2d 265.

No. 815. SECURITIES & EXCHANGE COMMISSION *v.* C. M. JOINER LEASING CORP. ET AL. April 19, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Solicitor General Fahy* and *Mr. John F. Davis* for petitioner. *Mr. David A. Frank* for respondents. Reported below: 133 F. 2d 241.

No. 749. BELL *v.* PREFERRED LIFE ASSURANCE SOCIETY ET AL. April 19, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Mr. Warren E. Miller* for petitioner. *Mr. Richard T. Rives* for respondents. Reported below: 131 F. 2d 516.

DECISIONS DENYING CERTIORARI, FROM JANUARY 19, 1943, THROUGH APRIL 19, 1943.

No. 577. THOMSON, TRUSTEE, *v.* INDUSTRIAL COMMISSION OF ILLINOIS (HERMAN E. STOLL). February 1, 1943. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Messrs. William T. Faricy* and *Weldon A. Dayton* for petitioner. *Messrs. Marshall Solberg*

and *Gerald T. Wiley* for respondent. Reported below: 380 Ill. 386, 44 N. E. 2d 19.

No. 578. HELMS BAKERIES *v.* STATE BOARD OF EQUALIZATION ET AL. February 1, 1943. Petition for writ of certiorari to the District Court of Appeal, 1st Appellate District, of California, denied. *Mr. David R. Faries* for petitioner. *Messrs. H. H. Linney,* Assistant Attorney General of California, and *Adrian A. Kragen,* Deputy Attorney General, for respondents. Reported below: 53 Cal. App. 2d 417, 128 P. 2d 167.

No. 586. CUSHMAN MOTOR WORKS *v.* COMMISSIONER OF INTERNAL REVENUE. February 1, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Thomas S. Allen* for petitioner. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key, Samuel H. Levy,* and *Joseph M. Jones* for respondent. Reported below: 130 F. 2d 977.

No. 596. GALBAN LOBO CO. *v.* HENDERSON. February 1, 1943. Petition for writ of certiorari to the United States Emergency Court of Appeals denied. *Mr. Donald Marks* for petitioner. *Solicitor General Fahy* for respondent. Reported below: 132 F. 2d 150.

No. 599. FAIRCLAW *v.* FORREST. February 1, 1943. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. Geo. E. C. Hayes* for petitioner. *Mr. Richard E. Shands* for respondent. Reported below: 130 F. 2d 829.

No. 604. SQUIRE, SUPERINTENDENT OF BANKS, *v.* MERRIAM. February 1, 1943. Petition for writ of certiorari to the Supreme Court of California denied. *Messrs. Thomas J. Herbert,* Attorney General of Ohio, and *William C. Mathes* for petitioner. *Mr. Louis E. Hart* for respondent. Reported below: 21 Cal. 2d 889, 129 P. 2d 698.

No. 418. WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, U. S. DEPARTMENT OF LABOR, *v.* GOLDBLATT BROTHERS, INC. February 1, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Solicitor General Fahy* and *Mr. Irving J. Levy* for petitioner. *Messrs. Abram N. Pritzker* and *Stanford Clinton* for respondent. *Mr. Charles B. Rugg* filed a brief on behalf of the American Retail Federation, as *amicus curiae,* urging denial of the petition. Reported below: 128 F. 2d 778.

No. 602. CARON CORPORATION *v.* R. K. O. RADIO PICTURES, INC. February 1, 1943. Petition for writ of certiorari to the Supreme Court of New York denied. *Messrs. Joseph H. Choate, Jr., William Byrd,* and *Maurice Léon* for petitioner. *Mr. Bruce Bromley* for respondent. Reported below: 264 App. Div. 852, 36 N. Y. S. 2d 188.

No. 603. OHIO EX REL. SQUIRE, SUPERINTENDENT OF BANKS, *v.* PORTER. February 1, 1943. Petition for writ of certiorari to the Supreme Court of California denied. *Messrs. Thomas J. Herbert,* Attorney General of Ohio, and *William C. Mathes* for petitioner. *Mr. Edwin A. Meserve* for respondent. Reported below: 21 Cal. 2d 45, 129 P. 2d 691.

No. 605. GUTH *v.* GROVES ET AL. February 1, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Sidney A. Syme, Thomas H. Matters, Jr.,* and *Donald Horne* for petitioner. *Mr. Albert R. Connelly* for respondents. Reported below: 129 F. 2d 325.

No. 612 SCHLUMBERGER WELL SURVEYING CORP. *v.* HALLIBURTON OIL WELL CEMENTING CO. February 1, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. William D. Mitchell, Worthington Campbell,* and *Brady Cole* for petitioner. *Messrs. Frederick S. Lyon, Leonard S. Lyon,* and *Ben F. Saye* for respondent. Reported below: 130 F. 2d 589.

No. 618. ARKANSAS FUEL OIL CO. *v.* MAGRATH OIL CO. February 1, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. John A. Chambliss, Jr.* for petitioner. *Mr. Fred M. Williams* for respondent. Reported below: 131 F. 2d 318.

No. 638. NULSEN, EXECUTOR, *v.* NATIONAL LEAD CO. February 1, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Richard S. Bull* for petitioner. *Mr. Thomas Bond* for respondent. Reported below: 131 F. 2d 51.

No. 652. HALFERTY ET AL., DOING BUSINESS AS HALFERTY BROTHERS, ET AL. *v.* HAWKEYE CASUALTY CO. February 1, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr.*

Pross T. Cross for petitioners. *Mr. K. B. Randolph* for respondent. Reported below: 131 F. 2d 194.

No. 579. PACIFIC GAS & ELECTRIC CO. *v.* SACRAMENTO MUNICIPAL UTILITY DISTRICT. February 1, 1943. Petition for writ of certiorari to the Supreme Court of California denied. MR. JUSTICE ROBERTS took no part in the consideration or decision of this application. *Messrs. Thomas J. Straub* and *John Clarence Wood* for petitioner. *Mr. Stephen W. Downey* for respondent. Reported below: 20 Cal. 2d 684, 128 P. 2d 529.

No. 548. REECE ET AL. *v.* UNITED STATES. February 1, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. James F. Kemp* for petitioners. *Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. Robert S. Erdahl* for the United States. Reported below: 131 F. 2d 186.

No. 587. VILES *v.* PRUDENTIAL INSURANCE CO. February 1, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Edmond L. Viles, pro se. Mr. Horace Phelps* for respondent. Reported below: 130 F. 2d 944.

No. 611. COATES *v.* LAWRENCE, SUPERINTENDENT AND WARDEN. February 1, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Paul Crutchfield* for petitioner. *Mr. Ellis Arnall* for respondent. Reported below: 131 F. 2d 110.

No. 594. LUNDON *v.* CHAPMAN, KEEPER OF THE FLORIDA STATE PENITENTIARY. February 1, 1943. Petition

for writ of certiorari to the Supreme Court of Florida denied. *Mr. S. D. McGill* for petitioner. *Messrs. J. Tom Watson,* Attorney General of Florida, and *Woodrow M. Melvin,* Assistant Attorney General, for respondent. Reported below: 151 Fla. 336, 9 So. 2d 723.

No. 620. STEWART *v.* ST. SURE, U. S. DISTRICT JUDGE. February 1, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *J. L. Stewart, pro se. Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. Oscar A. Provost* and *Miss Melva M. Graney* for respondent. Reported below: 131 F. 2d 862.

No. 609. BOSTON ELEVATED RAILWAY CO. *v.* COMMISSIONER OF INTERNAL REVENUE. February 8, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. MR. JUSTICE MURPHY took no part in the consideration or decision of this application. *Messrs. Charles W. Mulcahy, Robert N. Miller,* and *John H. Moran* for petitioner. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key, Joseph M. Jones,* and *Archibald Cox* for respondent. Reported below: 131 F. 2d 161.

No. 613. LOUISVILLE & NASHVILLE RAILROAD CO. *v.* UNDERWOOD, ADMINISTRATRIX. February 8, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. MR. JUSTICE MURPHY took no part in the consideration or decision of this application. *Mr. White E. Gibson* for petitioner. *Mr. Louis E. Miller* for respondent. Reported below: 131 F. 2d 306.

No. 616. LOUISVILLE GAS & ELECTRIC CO. *v.* FEDERAL POWER COMMISSION. February 8, 1943. 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 or decision of this application. *Messrs. Charles W. Milner, A. Louis Flynn,* and *Helmer Hansen* for petitioner. *Solicitor General Fahy, Assistant Attorney General Shea,* and *Messrs. Charles V. Shannon* and *Howard E. Wahrenbrock* for respondent. Reported below: 129 F. 2d 126.

No. 617. JAYNE ET AL. *v.* NATIONAL LIFE INSURANCE CO. February 8, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. MR. JUSTICE MURPHY took no part in the consideration or decision of this application. *Mr. John H. Cantrell* for petitioners. Reported below: 132 F. 2d 358.

No. 621. BAYSIDE BUS CORP. *v.* UNITED STATES. February 8, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. MR. JUSTICE MURPHY took no part in the consideration or decision of this application. *Mr. Emanuel Harris* for petitioner. *Solicitor General Fahy* and *Assistant Attorney General Shea* for the United States. Reported below: 131 F. 2d 825.

No. 627. GUTTMANN ET AL. *v.* PITTSBURGH TERMINAL COAL CORP. ET AL. February 8, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. MR. JUSTICE MURPHY took no part in the consideration or decision of this application. *Mr. Harry Hoffman* for petitioners. *Mr. William H. Eckert* for the Union Trust Co., and *Mr. H. Eastman Hackney*

for the Pittsburgh & West Virginia Railway Co., respondents. Reported below: 130 F. 2d 872.

No. 635. Moore-McCormack Lines, Inc. *v.* Foster. February 8, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. Mr. Justice Murphy took no part in the consideration or decision of this application. *Messrs. Corydon B. Dunham* and *Irving L. Evans* for petitioner. *Mr. Sydney R. Snitken* for respondent. Reported below: 131 F. 2d 907.

No. 639. Price Brothers Co. *v.* Smith. February 8, 1943. 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 or decision of this application. *Mr. Andrew M. Henderson* for petitioner. *Mr. John Ruffalo* for respondent. Reported below: 131 F. 2d 750.

No. 630. Goldsmith *v.* Sanford, Warden. February 8, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. Mr. Justice Murphy took no part in the consideration or decision of this application. *H. Ely Goldsmith, pro se. Solicitor General Fahy, Assistant Attorney General Berge,* and *Messrs. Oscar A. Provost* and *W. Marvin Smith* and *Miss Melva M. Graney* for respondent. Reported below: 132 F. 2d 126.

No. 595. Kelley-Koett Manufacturing Co. *v.* McEuen. February 15, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Dean S. Edmonds* for petitioner. *Mr. Ar-*

lon V. Cushman for respondent. Reported below: 130 F. 2d 488.

No. 607. BORDER LINE TRANSPORTATION CO. *v.* HAAS, COLLECTOR OF CUSTOMS. February 15, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. George R. Tuttle* for petitioner. *Solicitor General Fahy, Assistant Attorney General Shea,* and *Mr. Robert L. Stern* for respondent. Reported below: 128 F. 2d 192.

No. 622. GERITY-WHITAKER CO. ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. February 15, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Milo J. Warner* and *Elmer A. Smith* for petitioners. *Solicitor General Fahy* and *Messrs. Robert B. Watts* and *Ernest A. Gross* and *Misses Ruth Weyand* and *Fannie M. Boyls* for respondent.

No. 633. PICKERING LUMBER CO. *v.* WHITESIDE ET AL. February 15, 1943. Petition for writ of certiorari to the District Court of Appeal, 3d Appellate District, of California, denied. *Messrs. Paul Barnett* and *Henry N. Ess* for petitioner. *Mr. Francis H. De Groat* for respondents. Reported below: 54 Cal. App. 2d 200, 128 P. 2d 899.

No. 641. TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS *v.* PASHEA. February 15, 1943. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Messrs. Louis A. McKeown* and *Arnot L. Sheppard* for petitioner. *Messrs. James T. Blair* and *Harvey B. Cox* for respondent. Reported below: 350 Mo. 132, 165 S. W. 2d 691.

No. 645. PELLEY *v.* UNITED STATES;

No. 646. BROWN *v.* UNITED STATES; and

No. 647. FELLOWSHIP PRESS, INC. *v.* UNITED STATES. February 15, 1943. Petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Oscar F. Smith* and *Floyd G. Christian* for petitioners. *Solicitor General Fahy, Assistant Attorney General Berge,* and *Messrs. Arnold Raum, Oscar A. Provost,* and *John Ford Baecher* for the United States. Reported below: 132 F. 2d 170.

No. 648. EARP *v.* JONES, COLLECTOR OF INTERNAL REVENUE. February 15, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. R. M. Rainey* and *Streeter B. Flynn* for petitioner. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key, Arnold Raum, J. Louis Monarch,* and *Earl C. Crouter* for respondent. Reported below: 131 F. 2d 292.

No. 649. MASHUNKASHEY, NOW BRADSHAW, *v.* UNITED STATES ET AL. February 15, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Neal E. McNeill* and *Stephen R. Lewis* for petitioner. *Solicitor General Fahy, Assistant Attorney General Littell,* and *Mr. Vernon L. Wilkinson* for the United States, and *Mr. Ralph A. Barney* for A. G. Williams et al., respondents. Reported below: 131 F. 2d 288.

No. 650. GULF REFINING CO. *v.* FETSCHAN ET AL. February 15, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Joseph S. Graydon* and *John Spalding Flannery*

for petitioner. *Mr. George Luedeke* for respondents. Reported below: 130 F. 2d 129.

No. 654. McHie et al. *v.* Fifth Avenue Bank, Executor. February 15, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Walter Myers* and *Jay E. Darlington* for petitioners. *Mr. Norman H. Nachman* for respondent. Reported below: 130 F. 2d 993.

No. 657. Bellow et al. *v.* Park Sherman Co., Inc. February 15, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Albert G. McCaleb* for petitioners. *Mr. Ralph M. Snyder* for respondent. Reported below: 131 F. 2d 599.

No. 634. Garrow et al. *v.* United States. February 15, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. J. Gaillard Hamilton* for petitioners. *Solicitor General Fahy, Assistant Attorney General Littell,* and *Messrs. Vernon L. Wilkinson* and *Roger P. Marquis* for the United States. Reported below: 131 F. 2d 724.

No. 632. McDermott *v.* United States. February 15, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. Mr. Justice Douglas took no part in the consideration or decision of this application. *Messrs. Eben Lesh* and *Julius C. Travis* for petitioner. *Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. Robert S. Erdahl* for the United States. Reported below: 131 F. 2d 313.

No. 642. THOMAS *v.* UNITED STATES; and

No. 643. THOMAS *v.* ROSSETTER ET AL. February 15, 1943. Petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Lloyd C. Whitman* for petitioner. *Mr. Isaac E. Ferguson* for respondents in No. 643. *Mr. Charles Liebman* filed a brief on behalf of the Chicago Civil Liberties Committee, as *amicus curiae,* in support of the petition. Reported below: 131 F. 2d 120.

No. 606. BUCHALTER *v.* NEW YORK. On petition for writ of certiorari to the County Court of Kings County, New York;

No. 610. WEISS *v.* NEW YORK. On petition for writ of certiorari to the Court of Appeals of New York; and

No. 619. CAPONE *v.* NEW YORK. On petition for writ of certiorari to the County Court of Kings County, New York. February 15, 1943. Petitions for writs of certiorari denied. The stay orders heretofore entered are vacated. MR. JUSTICE MURPHY and MR. JUSTICE JACKSON took no part in the consideration or decision of these applications. *Messrs. I. Maurice Wormser, J. Bertram Wegman,* and *Jesse Climenko* for petitioner in No. 606. *Messrs. Arthur Garfield Hays, Alfred J. Talley, John Schulman,* and *Gerald Weatherly* for petitioner in No. 610. *Messrs. Sydney Rosenthal* and *Benj. J. Jacobson* for petitioner in No. 619. *Messrs. Thomas Cradock Hughes, Henry J. Walsh,* and *Solomon A. Klein* for respondent. Reported below: 289 N. Y. 244, 45 N. E. 2d 425. See *post,* p. 797.

No. 459. BUIE *v.* UNITED STATES. February 15, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Vivian Wycliff Buie, pro se. Solicitor General Fahy, Assistant Attorney*

General Berge, and *Mr. Oscar A. Provost* and *Miss Melva M. Graney* for the United States. Reported below: 127 F. 2d 367.

No. 653. COLLINS *v.* WAYLAND ET AL. March 1, 1943. Petition for writ of certiorari to the Supreme Court of Arizona denied. *Mr. Thomas A. Flynn* for petitioner. *Mr. Charles L. Strouss* for respondents. Reported below: 59 Ariz. 340, 127 P. 2d 716.

No. 655. FOSTER ET AL. *v.* UNITED STATES; and

No. 656. BUESCHER ET AL. *v.* UNITED STATES. March 1, 1943. Petition for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. J. C. Pryor* for petitioners. *Solicitor General Fahy, Assistant Attorney General Littell*, and *Mr. Vernon L. Wilkinson* for the United States. Reported below: 131 F. 2d 3.

No. 658. BROWN *v.* COMMISSIONER OF INTERNAL REVENUE. March 1, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. S. Leo Ruslander* and *Samuel Kaufman* for petitioner. *Solicitor General Fahy, Assistant Attorney General Clark*, and *Messrs. Sewall Key, J. Louis Monarch*, and *Archibald Cox* for respondent. Reported below: 131 F. 2d 640.

No. 667. AMERICAN UNITED LIFE INSURANCE CO. ET AL. *v.* FISCHER, COMMISSIONER OF INSURANCE, RECEIVER. March 1, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Edmund C. Shields, Clayton F. Jennings, Robert A. Adams, B. E. Godfrey*, and *John M. Scott, Jr.* for pe-

titioners. *Mr. Willis J. O'Brien* for respondent. Reported below: 130 F. 2d 643.

No. 668. DE JONG *v.* TIETSORT. March 1, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. John James Ziska* for petitioner. *Mr. John J. Yowell* for respondent. Reported below: 131 F. 2d 448.

No. 672. REED ET AL. *v.* CHICAGO, NORTH SHORE & MILWAUKEE RAILROAD CO. March 1, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Vincent D. Wyman* for petitioners. *Mr. Addison L. Gardner* for respondent. Reported below: 131 F. 2d 458.

No. 674. HUMES *v.* HUDSPETH ET AL. March 1, 1943. Petition for writ of certiorari to the Supreme Court of Kansas denied. *Arthur S. Humes, pro se.*

No. 597. MCSPARRAN *v.* CITY OF PORTLAND. March 1, 1943. Petition for writ of certiorari to the Supreme Court of Oregon denied. *Mr. Hayden C. Covington* for petitioner. *Mr. Lyman E. Latourette* for respondent. Reported below: 169 Ore. 377, 129 P. 2d 65.

No. 615. KEEFE ET AL. *v.* UNITED STATES. March 1, 1943. Petition for writ of certiorari to the Court of Claims denied. *Mr. Ira Lloyd Letts* for petitioners. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Arnold Raum* and *Mrs. Eliz-*

abeth B. Davis for the United States. Reported below: 97 Ct. Cls. 576, 46 F. Supp. 1016.

Nos. 662 and 663. DEMPSEY, ADMINISTRATOR, *v.* GUARANTY TRUST CO. March 1, 1943. Petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Lewis E. Pennish* for petitioner. *Messrs. James P. Dillie* and *Otis T. Bradley* for respondent. Reported below: 131 F. 2d 103.

No. 665. METCALF, TRUSTEE IN BANKRUPTCY, *v.* UNITED STATES. March 1, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Norman A. Bailie* and *Richard A. Turner* for petitioner. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *J. Louis Monarch* for the United States. Reported below: 131 F. 2d 677.

No. 666. PAVLIS ET AL. *v.* JACKSON. March 1, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Fred T. Saussy* and *J. C. Davant* for petitioners. Reported below: 131 F. 2d 362.

No. 671. TOWN OF BELLEAIR *v.* GROVES ET AL. March 1, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. O. K. Reaves* for petitioner. *Messrs. Robert J. Pleus, Giles J. Patterson,* and *Stuart B. Warren* for respondents. Reported below: 132 F. 2d 542.

Nos. 677, 678, 679, and 680. HARBORSIDE WAREHOUSE CO., INC. *v.* JERSEY CITY ET AL. March 1, 1943. Petition

for writs of certiorari to the Court of Errors and Appeals of New Jersey denied. *Mr. John A. Hartpence* for petitioner. *Mr. Charles A. Rooney* for respondents. Reported below: 129 N. J. L. 62, 28 A. 2d 91.

No. 673. BOUCHER ET AL. *v.* SOLA ET AL. March 1, 1943. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application. *Messrs. Herbert S. Ward* and *Scott D. Kellogg* for petitioners. *Messrs. J. Bernhard Thiess* and *Leslie W. Fricke* for respondents. Reported below: 131 F. 2d 225.

No. 644. HITT, TRADING AS CONGRESSIONAL GARAGE, ET AL. *v.* CARDILLO, DEPUTY COMMISSIONER, ET AL. March 1, 1943. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application. *Messrs. Chas. S. Baker, Warren E. Magee,* and *Benj. L. Tepper* for petitioners. *Solicitor General Fahy, Assistant Attorney General Shea,* and *Messrs. Robert L. Stern* and *Christopher B. Garnett* for respondents. Reported below: 131 F. 2d 233.

No. 691. HAMMOND *v.* HAMMOND. March 1, 1943. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application. *Messrs. Wilber Stammler, George W. Dalzell,* and *Daniel G. Albert* for petitioner. *Messrs. Manuel J. Davis* and *Richard W. Galiher* for respondent. Reported below: 131 F. 2d 351.

No. 614. AVIATION CORPORATION *v.* UNITED STATES. March 1, 1943. Petition for writ of certiorari to the Court of Claims denied. MR. JUSTICE BLACK and MR. JUSTICE JACKSON took no part in the consideration or decision of this application. *Messrs. Basil O'Connor* and *John E. Hughes* for petitioner. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Arnold Raum* and *Mrs. Elizabeth B. Davis* for the United States. Reported below: 97 Ct. Cls. 550, 46 F. Supp. 491.

No. 716. BOMER *v.* TENNESSEE. March 1, 1943. The petition for writ of certiorari to the Court of Appeals of Tennessee is denied for the reason that application therefor was not made within the time provided by law. § 8 (a), Act of February 13, 1925 (43 Stat. 936, 940), 28 U. S. C. § 350. *J. O. Bomer, Jr., pro se. Mr. Marion G. Evans* for respondent. Reported below: 162 S. W. 2d 515.

No. 517. AJELLO *v.* PAN AMERICAN AIRWAYS CORP. ET AL. March 1, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Gaetano Ajello, pro se. Messrs. Drury W. Cooper, C. Blake Townsend, Worthington Campbell,* and *R. Welton Whann* for respondents. Reported below: 128 F. 2d 196.

No. 664. NIX *v.* UNITED STATES. March 1, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Eustis Myers* for petitioner. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Archibald Cox* for the United States. Reported below: 131 F. 2d 857.

No. 689. KING *v.* SUPREME COURT OF SOUTH DAKOTA. March 1, 1943. Petition for writ of certiorari to the Supreme Court of South Dakota denied. *J. B. King, pro se.*

No. 676. FRANK *v.* HENDERSON, PRICE ADMINISTRATOR. March 8, 1943. Petition for writ of certiorari to the United States Emergency Court of Appeals denied. *Mr. Herbert M. Karp* for petitioner. *Solicitor General Fahy* for respondent. Reported below: 133 F. 2d 207.

No. 681. ACME-EVANS COMPANY *v.* NATIONAL LABOR RELATIONS BOARD. March 8, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Kurt F. Pantzer* and *Charles M. Wells* for petitioner. *Solicitor General Fahy* and *Messrs. Archibald Cox, Robert B. Watts,* and *Ernest A. Gross,* and *Misses Ruth Weyand* and *Fannie M. Boyls* for respondent. Reported below: 130 F. 2d 477.

No. 682. TUFFANELLI *v.* UNITED STATES. March 8, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. George F. Callaghan* for petitioner. *Solicitor General Fahy, Assistant Attorney General Berge,* and *Messrs. Robert S. Erdahl* and *Archibald Cox* for the United States. Reported below: 131 F. 2d 890.

No. 683. SONDOCK ET AL. *v.* WALLING, ADMINISTRATOR. March 8, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Brady Cole* for petitioners. *Solicitor General Fahy* and *Messrs. Irving J. Levy* and *Morton Liftin* and *Miss Bessie Margolin* for respondent. Reported below: 132 F. 2d 77.

No. 686. THOMPSON, TRUSTEE, *v.* MCPHERSON, ADMINISTRATRIX. March 8, 1943. Petition for writ of certiorari to the Springfield Court of Appeals of Missouri denied. *Messrs. Thomas J. Cole* and *DeWitt C. Chastain* for petitioner. *Mr. Wendell W. McCanles* for respondent. Reported below: 164 S. W. 2d 80.

No. 692. BAND-IT COMPANY ET AL. *v.* MCANENY. March 8, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Carle Whitehead* and *Albert L. Vogl* for petitioners. Reported below: 131 F. 2d 766.

No. 693. L. & C. MAYERS CO., INC. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. March 8, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Andrew B. Trudgian* for petitioner. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Samuel H. Levy* and *Mrs. Maryhelen Wigle* for respondent. Reported below: 131 F. 2d 309.

No. 694. BURRUS MILL & ELEVATOR CO. *v.* CHICAGO, ROCK ISLAND & PACIFIC RAILWAY CO. ET AL. March 8, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. H. D. Driscoll* and *H. Russell Bishop* for petitioner. *Messrs. W. R. Bleakmore* and *A. B. Enoch* for respondents. Reported below: 131 F. 2d 532.

No. 700. AMERICAN AUTOMOBILE INSURANCE CO. *v.* EMPLOYERS MUTUAL CASUALTY CO. March 8, 1943. Petition for writ of certiorari to the Circuit Court of Appeals

for the Tenth Circuit denied. *Mr. Austin M. Cowan* for petitioner. *Mr. Robert C. Foulston* for respondent. Reported below: 131 F. 2d 802.

No. 703. HILL *v.* SANFORD, WARDEN. March 8, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Lawrence S. Camp* for petitioner. *Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. Oscar A. Provost* for respondent. Reported below: 131 F. 2d 417.

No. 704. REDUS *v.* ALABAMA. March 9, 1943. Petition for writ of certiorari to the Supreme Court of Alabama denied. The application for stay is denied. *Mr. Walter S. Smith* for petitioner. *Mr. William N. McQueen,* Attorney General of Alabama, for respondent. Reported below: 9 So. 2d 914.

No. 695. UNITED STATES *v.* FIRST NATIONAL BANK. March 15, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Solicitor General Fahy* for the United States. *Mr. Pearce C. Rodey* for respondent. Reported below: 131 F. 2d 985.

No. 699. PEOPLES PACKING CO., INC. *v.* WALLING, ADMINISTRATOR OF THE WAGE & HOUR DIVISION, U. S. DEPARTMENT OF LABOR. March 15, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. James S. Twyford* for petitioner. *Solicitor General Fahy* and *Mr. Irving J. Levy* for respondent. Reported below: 132 F. 2d 236.

No. 702. AINTREE CORPORATION *v.* NATIONAL LABOR RELATIONS BOARD. March 15, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh

Circuit denied. *Mr. Hyman G. Stein* for petitioner. *Solicitor General Fahy* and *Messrs. Robert L. Stern, Robert B. Watts, Ernest A. Gross,* and *Owsley Vose,* and *Miss Ruth Weyand* for respondent. Reported below: 132 F. 2d 469.

No. 706. QUALITY & SERVICE LAUNDRY, INC. *v.* NATIONAL LABOR RELATIONS BOARD. March 15, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Louis A. Spiess* for petitioner. *Solicitor General Fahy* and *Messrs. Valentine Brookes, Robert B. Watts,* and *Ernest A. Gross,* and *Misses Ruth Weyand* and *Fannie M. Boyls* for respondent. Reported below: 131 F. 2d 182.

Nos. 714 and 715. PUERTO RICO *v.* UNITED STATES ET AL. March 15, 1943. Petition for writs of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. William Cattron Rigby* for petitioner. *Solicitor General Fahy* and *Assistant Attorney General Littell* for respondents. Reported below: 131 F. 2d 151.

No. 719. MURRAY, AGENT, *v.* NOBLESVILLE MILLING CO. March 15, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Francis E. Thomason* for petitioner. *Messrs. Harvey J. Elam* and *Howard S. Young* for respondent. Reported below: 131 F. 2d 470.

No. 39. CHICAGO, TERRE HAUTE & SOUTHEASTERN RAILWAY CO. ET AL. *v.* GROUP OF INSTITUTIONAL INVESTORS ET AL.;

No. 47. CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD CO. *v.* GROUP OF INSTITUTIONAL INVESTORS ET AL.;

No. 51. TRUSTEES OF PRINCETON UNIVERSITY ET AL. *v.* GROUP OF INSTITUTIONAL INVESTORS ET AL.;

No. 52. GUARANTY TRUST CO. ET AL. *v.* GROUP OF INSTITUTIONAL INVESTORS ET AL.;

No. 53. GLINES ET AL. *v.* GROUP OF INSTITUTIONAL INVESTORS ET AL.;

No. 54. ORTON ET AL. *v.* GROUP OF INSTITUTIONAL INVESTORS ET AL.; and

No. 55. UNITED STATES TRUST CO., TRUSTEE, *v.* GROUP OF INSTITUTIONAL INVESTORS ET AL. March 15, 1943. Petitions for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of these applications. *Messrs. W. F. Peter, Reese D. Alsop, Ernest S. Ballard, William A. McSwain, Frederic Burnham, Frederick Secord, Charles Myers,* and *Edwin H. Cassels* for petitioners in No. 39; *Mr. Frank C. Nicodemus, Jr.* for petitioner in No. 47; *Mr. Frederick J. Moses* for petitioners in No. 51; *Messrs. Edwin S. S. Sunderland, Thomas O'G. FitzGibbon, Henry F. Tenney,* and *William V. Hodges* for petitioners in Nos. 52 and 53; *Messrs. Edward R. Johnston* and *Albert K. Orschel* for petitioners in No. 54; and *Messrs. George L. Shearer* and *McCready Sykes* for petitioner in No. 55. *Messrs. Kenneth F. Burgess, Douglas F. Smith,* and *Fred N. Oliver* for respondents. Reported below: 36 F. Supp. 193.

No. 661. EWING *v.* UNITED STATES. March 15, 1943. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application. *Mr. James J. Laughlin* for petitioner. *Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. Oscar A. Provost* for the United States. Reported below: 135 F. 2d 633.

No. 690. HAMMOND *v.* HULL ET AL. March 15, 1943. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application. *Messrs. George W. Dalzell, Daniel G. Albert,* and *Wilber Stammler* for petitioner. *Solicitor General Fahy, Assistant Attorney General Shea,* and *Mr. Archibald Cox* for respondents. Reported below: 131 F. 2d 23.

No. 685. GRAHAM *v.* WARDEN, U. S. PENITENTIARY, MCNEIL ISLAND, WASHINGTON. March 15, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Jack Graham, pro se. Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. Oscar A. Provost* for respondent. Reported below: 132 F. 2d 681.

No. 701. LYNCH *v.* UNITED STATES. March 15, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Joseph P. Lynch, pro se. Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. Robert S. Erdahl* for the United States. Reported below: 132 F. 2d 111.

No. 784. GOODALE *v.* CAMPBELL ET AL. March 15, 1943. Petition for writ of certiorari to the Supreme Court of Michigan denied. *Hazel Frances Goodale, pro se.*

No. 688. MEAD *v.* COMMISSIONER OF INTERNAL REVENUE. April 5, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Walter J. Knabe* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark,*

Jr., and *Mr. Sewall Key* and *Miss Helen R. Carloss* for respondent. Reported below: 131 F. 2d 323.

No. 724. CENTRAL WEST COAL CO. *v.* COMMISSIONER OF INTERNAL REVENUE. April 5, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. B. F. Saltzstein* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.*, and *Messrs. Sewall Key* and *L. W. Post* for respondent. Reported below: 132 F. 2d 190.

No. 743. READING COMPANY *v.* COMMISSIONER OF INTERNAL REVENUE. April 5, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. John E. McClure, O. H. Chmillon,* and *David W. Richmond* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.*, and *Mr. Sewall Key* and *Miss Helen R. Carloss* for respondent. Reported below: 132 F. 2d 306.

No. 748. GITHENS *v.* ESTATE OF ZOELL. April 5, 1943. Petition for writ of certiorari to the Supreme Court of Pennsylvania denied. *Messrs. D. Arthur Magaziner* and *Eugene B. Strassburger* for petitioner. *Mr. Henry H. Hanna* for respondent. Reported below: 345 Pa. 413, 29 A. 2d 31.

No. 718. ILLINOIS EX REL. HIGHLAND PARK *v.* MCKIBBIN, DIRECTOR OF FINANCE. April 5, 1943. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Mr. Benjamin F. J. Odell* for petitioner. *Messrs. George F. Barrett,* Attorney General of Illinois, and *William C. Wines,* Assistant Attorney General, for respondent. Reported below: 380 Ill. 447, 44 N. E. 2d 449.

No. 744. STEWART *v.* UNITED STATES. April 5, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Jack Crenshaw* for petitioner. *Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. Robert S. Erdahl* for the United States. Reported below: 131 F. 2d 624.

No. 747. WASHINGTON, MARLBORO & ANNAPOLIS MOTOR LINES, INC. *v.* HENDERSON, PRICE ADMINISTRATOR. April 5, 1943. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. James P. Donovan* for petitioner. *Solicitor General Fahy* and *Mr. Valentine Brookes* for respondent. Reported below: 132 F. 2d 729.

No. 755. CRIDLEBAUGH, TRADING AS MARVEL COMPANY, *v.* RUDOLPH, TRADING AS RUDOLPH POULTRY EQUIPMENT CO. April 5, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Jas. M. Naylor, Theodore H. Lassagne,* and *George C. Baldt* for petitioner. *Mr. Wm. S. Hodges* for respondent. Reported below: 131 F. 2d 795.

No. 807. MACBRYDE, ADMINISTRATOR, ET AL. *v.* PARKER, EXECUTRIX, ET AL.; and

No. 808. MACBRYDE, ADMINISTRATOR, ET AL. *v.* DAVIDGE, TRUSTEE, ET AL. April 5, 1943. Petition for writs of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. James Morfit Mullen* for petitioners. *Messrs. Eben J. D. Cross* and *Edwin F. A. Morgan* for respondents. Reported below: 132 F. 2d 932.

No. 770. COOPERATIVE TRANSIT CO. *v.* WEST PENN ELECTRIC CO. ET AL. April 5, 1943. Petition for writ of

certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Jay T. McCamic* for petitioner. *Mr. Edward O. Tabor* for respondents. Reported below: 132 F. 2d 720.

No. 773. CERAMI *v.* HAAS. April 5, 1943. Petition for writ of certiorari to the Supreme Court of Louisiana denied. *Mr. George Seth Guion* for petitioner. *Wm. D. Haas, Jr., pro se.* Reported below: 201 La. 612, 10 So. 2d 61.

No. 775. GENERAL SHALE PRODUCTS CORP. *v.* STRUCK CONSTRUCTION CO. ET AL. April 5, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Haveth E. Mau* and *Robert Houston French* for petitioner. *Messrs. William W. Crawford* and *William Furlong* for respondents. Reported below: 132 F. 2d 425.

No. 782. COLONIAL MILLING CO. *v.* COMMISSIONER OF INTERNAL REVENUE. April 5, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Cecil Sims* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key* and *Joseph M. Jones* for respondent. Reported below: 132 F. 2d 505.

No. 785. LEVY *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. April 5, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Andrew B. Trudgian* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key, J. Louis Monarch,* and *Newton K. Fox* for respondent. Reported below: 131 F. 2d 544.

No. 789. MITSUBISHI SHOJI KAISHA, LTD. ET AL. *v.* SOCIETE PURFINA MARITIME. April 5, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. MR. JUSTICE MURPHY and MR. JUSTICE JACKSON took no part in the consideration or decision of this application. *Messrs. John W. Crandall, Geo. Whitefield Betts, Jr., Arch E. Ekdale,* and *Martin J. Weil* for petitioners. *Messrs. T. Catesby Jones* and *Farnham P. Griffiths* for respondent. Reported below: 133 F. 2d 552.

No. 792. STEPHAN *v.* UNITED STATES. April 5, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. MR. JUSTICE MURPHY and MR. JUSTICE JACKSON took no part in the consideration or decision of this application. *Mr. Nicholas Salowich* for petitioner. *Solicitor General Fahy, Assistant Attorney General Berge,* and *Messrs. Arnold Raum* and *Oscar A. Provost* for the United States. Reported below: 133 F. 2d 87.

No. 793. CITY OF NEW YORK *v.* UNITED STATES. April 5, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. MR. JUSTICE MURPHY and MR. JUSTICE JACKSON took no part in the consideration or decision of this application. *Mr. Thomas D. Thacher* for petitioner. *Solicitor General Fahy, Assistant Attorney General Shea,* and *Messrs. Sidney J. Kaplan, Paul A. Sweeney,* and *Robert L. Stern* for the United States. Reported below: 131 F. 2d 909.

No. 798. INDIANAPOLIS *v.* WHEELER, ACTING DIRECTOR BITUMINOUS COAL DIVISION OF THE DEPARTMENT OF THE INTERIOR, ET AL. April 5, 1943. Petition for writ of cer-

tiorari to the Circuit Court of Appeals for the Seventh Circuit denied. MR. JUSTICE MURPHY and MR. JUSTICE JACKSON took no part in the consideration or decision of this application. *Messrs. William H. Thompson, Perry E. O'Neal, Patrick J. Smith,* and *Sidney S. Miller* for petitioner. *Solicitor General Fahy* and *Messrs. Robert L. Stern, Warner W. Gardner, Arnold Levy,* and *Jesse B. Messitte* for Dan H. Wheeler, and *Messrs. Burr Tracy Ansell* and *Roger Robb* for the Bituminous Coal Producers Board, District No. 8, respondents. Reported below: 132 F. 2d 879.

No. 820. HYER ET AL. *v.* ROTH ET AL. April 5, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. MR. JUSTICE MURPHY and MR. JUSTICE JACKSON took no part in the consideration or decision of this application. *Mr. Charles P. Dickinson* for petitioners. *Messrs. H. N. Roth, Clark W. Jennings,* and *Lloyd B. Kanter* for respondents. Reported below: 133 F. 2d 5.

No. 751. MILLER *v.* WISCONSIN DEPARTMENT OF TAXATION ET AL. April 5, 1943. Petition for writ of certiorari to the Supreme Court of Wisconsin denied. *Mr. A. W. Schutz* for petitioner. *Mr. Harold H. Persons* for respondents. Reported below: 241 Wis. 145, 5 N. W. 2d 749.

No. 763. DIXIE ROSE NURSERY *v.* COE, COMMISSIONER OF PATENTS. April 5, 1943. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application. *Messrs. Harry C. Robb, John F. Robb,* and *Harry C. Robb, Jr.* for petitioner. *Solicitor General Fahy* and *Assistant*

Attorney General Shea for respondent. Reported below: 131 F. 2d 446.

No. 767. REGINELLI *v.* UNITED STATES. April 5, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. MR. JUSTICE MURPHY is of opinion that certiorari should be granted. *Mr. William A. Gray* for petitioner. *Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. Oscar A. Provost* for the United States. Reported below: 133 F. 2d 595.

No. 651. MCCREA *v.* MICHIGAN;
No. 738. WILCOX *v.* MICHIGAN;
No. 739. WAY *v.* MICHIGAN;
No. 740. LANDSBERG *v.* MICHIGAN;
No. 741. ELLIOTT *v.* MICHIGAN;
No. 742. STAMBAUGH *v.* MICHIGAN; and
No. 771. MALONE *v.* MICHIGAN. April 5, 1943. Petitions for writs of certiorari to the Supreme Court of Michigan denied. The stay orders heretofore entered are vacated. MR. JUSTICE MURPHY took no part in the consideration or decision of these applications. *Messrs. William E. Leahy* and *Nicholas J. Chase* for petitioners in Nos. 651 and 771; and *Mr. John A. Bresnahan* for petitioners in Nos. 738, 739, 740, 741, and 742. *Messrs. Herbert J. Rushton,* Attorney General of Michigan, and *Daniel J. O'Hara,* Assistant Attorney General, for respondent. Reported below: 303 Mich. 213, 287, 297, 300, 303; 6 N. W. 2d 489, 518, 521, 522, 523.

No. 746. MARKHAM *v.* ILLINOIS EX REL. CROMER ET AL. April 5, 1943. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Messrs. Henry I. Green* and *Charles J. Monahan* for petitioner. Reported below: 381 Ill. 337, 45 N. E. 2d 617.

No. 712. NICHOLS ET AL. *v.* KUBINA. April 5, 1943. Petition for writ of certiorari to the Supreme Court of Wisconsin denied. *Raymond W. Nichols, pro se.* Reported below: 241 Wis. 644, 6 N. W. 2d 657.

No. 745. MOORE *v.* UNITED STATES. April 5, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. J. Frank Kemp* and *James F. Kemp* for petitioner. *Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. Oscar A. Provost* for the United States. Reported below: 132 F. 2d 47.

No. 754. REECE *v.* EBERSBACH ET AL. April 5, 1943. Petition for writ of certiorari to the Supreme Court of Florida denied. *Mr. Walter Warren* for petitioner. Reported below: 9 So. 2d 805.

No. 764. JONES *v.* BIDDLE, ATTORNEY GENERAL. April 5, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Joseph E. Jones, pro se. Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. Oscar A. Provost* for respondent. Reported below: 131 F. 2d 853.

No. 768. DODD *v.* KANSAS. April 5, 1943. Petition for writ of certiorari to the Supreme Court of Kansas denied. MR. JUSTICE MURPHY and MR. JUSTICE JACKSON took no part in the consideration or decision of this application. *Jack Clarence Dodd, pro se.* Reported below: 156 Kan. 52, 131 P. 2d 725.

No. 777. REPUBLIC INSURANCE CO. *v.* BUTTS. April 12, 1943. Petition for writ of certiorari to the Circuit Court

of Appeals for the Fifth Circuit denied. *Mr. J. L. Shook* for petitioner. Reported below: 131 F. 2d 768.

No. 790. CABALIK *v.* BELL, RECEIVER. April 12, 1943. Petition for writ of certiorari to the Supreme Court of Pennsylvania denied. *Messrs. Alexander J. Barron* and *George F. Taylor* for petitioner. *Mr. Orville Brown* for respondent. Reported below: 346 Pa. 115, 29 A. 2d 678.

No. 791. OSBORNE *v.* HASTINGS, SHERIFF. April 12, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Dean S. Face* for petitioner. *Messrs. John M. Dunham* and *Laurent K. Varnum* for respondent. Reported below: 131 F. 2d 396.

No. 797. MASON *v.* PALO VERDE IRRIGATION DISTRICT. April 12, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. W. Coburn Cook* for petitioner. *Messrs. Arvin B. Shaw, Jr.* and *Wm. L. Murphey* for respondent. Reported below: 132 F. 2d 714.

No. 800. ROMERO *v.* SQUIRE, WARDEN. April 12, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Pedro P. Semsem* for petitioner. *Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. Robert S. Erdahl* and *Miss Beatrice Rosenberg* for respondent. Reported below: 133 F. 2d 528.

No. 811. SANDLIN *v.* GRAGG. April 12, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. B. B. Blakeney* for pe-

titioner. *Messrs. Joseph C. Stone* and *Charles A. Moon* for respondent. Reported below: 133 F. 2d 114.

No. 814. SAMPSELL, TRUSTEE IN BANKRUPTCY, ET AL. *v.* TOM. April 12, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Thomas S. Tobin* for petitioners. *Mr. Reuben G. Hunt* for respondent. Reported below: 131 F. 2d 779.

No. 821. SIBLEY SYNDICATE *v.* COMMISSIONER OF INTERNAL REVENUE. April 12, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Harry Allen, Harry B. Sutter,* and *Samuel H. Horne* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key, Joseph M. Jones,* and *Valentine Brookes* for respondent. Reported below: 131 F. 2d 224.

No. 858. RUTIGLIANO *v.* NEW YORK. April 12, 1943. Petition for writ of certiorari to the Court of General Sessions of the County of New York, New York, denied. *Nicholas Rutigliano, pro se.*

No. 765. HOPKINS, U. S. DISTRICT JUDGE, *v.* UNITED STATES. April 12, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Austin M. Cowan, T. M. Lillard,* and *Fred Robertson* for petitioner. *Solicitor General Fahy, Assistant Attorney General Littell,* and *Mr. Vernon L. Wilkinson* for the United States. Reported below: 133 F. 2d 311.

No. 772. NEW YORK TRUST CO., TRUSTEE, ET AL. *v.* SECURITIES & EXCHANGE COMMISSION ET AL. April 12, 1943. Petition for writ of certiorari to the Circuit Court of

Appeals for the Second Circuit denied. *Mr. Irwin L. Tappen* for petitioners. *Solicitor General Fahy* and *Mr. John F. Davis* for the Securities & Exchange Comm'n, and *Mr. Donald R. Richberg* for the United Light & Power Co., respondents. Reported below: 131 F. 2d 274.

No. 829. ESTATE OF HAGUE ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. April 12, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Fred R. Angevine* and *Aaron H. Marx* for petitioners. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key* and *Warren F. Wattles* for respondent. Reported below: 132 F. 2d 775.

No. 711. CREEK NATION *v.* UNITED STATES. April 12, 1943. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Paul M. Niebell* and *C. Maurice Weidemeyer* for petitioner. *Solicitor General Fahy, Assistant Attorney General Littell,* and *Messrs. Vernon L. Wilkinson* and *Dwight D. Doty* for the United States. Reported below: 97 Ct. Cls. 602.

No. 774. COUNTY OF ALLEGHENY *v.* MARYLAND CASUALTY CO. April 12, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. MR. JUSTICE JACKSON took no part in the consideration or decision of this application. *Messrs. Edward G. Bothwell* and *Walter P. Smart* for petitioner. *Messrs. Duane R. Dills* and *George W. Dexter* for respondent. Reported below: 132 F. 2d 894.

No. 802. SHIMA *v.* BROWN. April 12, 1943. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. MR. JUSTICE

RUTLEDGE took no part in the consideration or decision of this application. *Messrs. John Wattawa* and *V. O. Hill* for petitioner. *Mr. Richard E. Wellford* for respondent. Reported below: 133 F. 2d 48.

No. 805. WOOD ET AL. *v.* TAWES, COMPTROLLER, ET AL. April 12, 1943. Petition for writ of certiorari to the Court of Appeals of Maryland denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Messrs. A. F. Prescott, Jr., Jo. V. Morgan,* and *Clarence E. Dawson* for petitioners. *Mr. William C. Walsh,* Attorney General of Maryland, for respondents. Reported below: 181 Md. 155, 28 A. 2d 850.

No. 817. W. C. & A. N. MILLER DEVELOPMENT CO. *v.* EMIG PROPERTIES CORP. April 12, 1943. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application. *Mr. George C. Gertman* for petitioner. *Mr. Byron G. Carson* for respondent. Reported below: 134 F. 2d 36.

No. 795. CREBS *v.* AMRINE, WARDEN. April 12, 1943. Petition for writ of certiorari to the Supreme Court of Kansas denied. *Cecil C. Crebs, pro se.* Reported below: 153 Kan. 736, 113 P. 2d 1084.

No. 825. CARPENTER *v.* ERIE RAILROAD CO. April 12, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Laurie J. Carpenter, pro se.* Reported below: 132 F. 2d 362.

No. 737. LUKENS *v.* OHIO. April 12, 1943. Petition for writ of certiorari to the Court of Appeals of Ohio denied. *Mr. E. Guy Hammond* for petitioner. Reported below: 140 Ohio St. 354, 44 N. E. 2d 355.

No. 769. SIOUX TRIBE OF INDIANS *v.* UNITED STATES. April 19, 1943. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Ralph H. Case, James S. Y. Ivins,* and *Richard B. Barker* for petitioner. *Solicitor General Fahy, Assistant Attorney General Littell,* and *Messrs. Vernon L. Wilkinson* and *Roger P. Marquis* for the United States. Reported below: 97 Ct. Cls. 613.

No. 776. CLARKE *v.* UNITED STATES. April 19, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. John F. Garvin* for petitioner. *Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. Robert S. Erdahl* for the United States. Reported below: 132 F. 2d 538.

No. 779. CURTIS *v.* UTAH FUEL CO. ET AL. April 19, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Nicholas J. Curtis, pro se. Messrs. H. Brua Campbell* and *Grover A. Giles* for respondents. Reported below: 132 F. 2d 321.

No. 803. SCOTT REALTY COMPANY *v.* LA SALLE & KOCH CO. April 19, 1943. Petition for writ of certiorari to the Supreme Court of Ohio denied. *Messrs. Harold W. Fraser* and *Erwin R. Effler* for petitioner. *Messrs. E. J. Marshall* and *Seth W. Richardson* for respondent. Reported below: 140 Ohio St. 552, 45 N. E. 2d 604.

No. 804. MOORE *v.* MAVERICK COUNTY WATER CONTROL & IMPROVEMENT DISTRICT No. 1. April 19, 1943. Petition for writ of certiorari to the Court of Civil Appeals, 4th Supreme Judicial District, of Texas, denied. *Mr. James B. Lewright* for petitioner. *Mr. W. L. Matthews* for respondent. Reported below: 162 S. W. 2d 1009.

No. 806. ROSENHAN *v.* UNITED STATES. April 19, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Grover A. Giles* for petitioner. *Solicitor General Fahy, Assistant Attorney General Shea,* and *Mr. Paul A. Sweeney* for the United States. Reported below: 131 F. 2d 932.

No. 809. ANDERSON *v.* UNITED STATES; and

No. 810. ANDERSON ET UX. *v.* UNITED STATES. April 19, 1943. Petitions for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. Mr. *M. W. Egerton* for petitioners. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key* and *J. Louis Monarch* for the United States. Reported below: 132 F. 2d 98.

No. 812. JOHNSON ET AL. *v.* DALLAS DOWNTOWN DEVELOPMENT CO. April 19, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. William Andress, Jr.* for petitioners. Reported below: 132 F. 2d 287.

No. 818. GRAF ET AL. *v.* NEWARK. April 19, 1943. Petition for writ of certiorari to the Court of Errors and Appeals of New Jersey denied. *Mr. Oliver C. Carpenter* for petitioners. *Mr. Raymond Schroeder* for respondent. Reported below: 129 N. J. L. 96, 28 A. 2d 118.

No. 819. FRANKLINVILLE REALTY CO. *v.* ARNOLD CONSTRUCTION CO. April 19, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. T. J. Blackwell* for petitioner. *Messrs. Bert Winters* and *Paul W. Potter* for respondent. Reported below: 132 F. 2d 828.

No. 832. IN THE MATTER OF JAMES AUSTIN ELLISON. April 19, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. William A. Gray* for petitioner. *Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. Oscar A. Provost* for the United States. Reported below: 133 F. 2d 903.

No. 835. UNITED SHIPYARDS, INC. *v.* HOEY, EXECUTRIX. April 19, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. John F. Condon, Jr.* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key, J. Louis Monarch,* and *Joseph M. Jones* for respondent. Reported below: 131 F. 2d 525.

No. 838. BLOUNT ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. April 19, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Louis H. Breuer* for petitioners. *Solicitor General Fahy* and *Messrs. Robert B. Watts* and *Ernest A. Gross* and *Miss Ruth Weyand* for respondent. Reported below: 131 F. 2d 585.

No. 758. BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION *v.* NATIONAL LABOR RELATIONS BOARD.

April 19, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Herbert W. Erskine, Edmund Nelson, G. D. Schilling,* and *Louis Ferrari* for petitioner. *Solicitor General Fahy* and *Messrs. Robert L. Stern, Robert B. Watts,* and *Ernest A. Gross,* and *Miss Ruth Weyand* for respondent. Reported below: 130 F. 2d 624.

No. 759. BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION *v.* NATIONAL LABOR RELATIONS BOARD. April 19, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Herbert W. Erskine, Edmund Nelson, G. D. Schilling, and Louis Ferrari* for petitioner. *Solicitor General Fahy* and *Messrs. Robert L. Stern, Robert B. Watts,* and *Ernest A. Gross,* and *Miss Ruth Weyand* for respondent. Reported below: 130 F. 2d 624.

No. 163. TORNELLO *v.* HUDSPETH, WARDEN. April 19, 1943. The petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit is denied on the ground that the case is moot, it appearing that petitioner has been pardoned by the President and that he is no longer in respondent's custody. *Weber* v. *Squier,* 315 U. S. 810. *William Humbert Tornello, pro se. Assistant Solicitor General Cox, Assistant Attorney General Berge,* and *Messrs. Robert S. Erdahl* and *W. Marvin Smith* for respondent. Reported below: 128 F. 2d 172.

No. 830. BRADY, ADMINISTRATRIX, *v.* SOUTHERN RAILWAY CO. April 19, 1943. Petition for writ of certiorari to the Supreme Court of North Carolina denied on the ground that it does not appear from the record or from

the papers submitted that the judgment is final. MR. JUSTICE BLACK is of opinion that the judgment is final. *Messrs. Julius C. Smith, Welch Jordan,* and *D. E. Hudgins* for petitioner. *Messrs. Russell M. Robinson* and *S. R. Prince* for respondent. Reported below: 222 N. C. 367, 23 S. E. 2d 334.

No. 799. PHILADELPHIA INQUIRER CO. *v.* COE, COMMISSIONER OF PATENTS. April 19, 1943. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application. *Mr. Frank E. Scrivener* for petitioner. *Solicitor General Fahy, Assistant Attorney General Shea,* and *Messrs. Valentine Brookes* and *Leon Frechtel* for respondent. Reported below: 133 F. 2d 385.

Nos. 34, 35, and 36. CHICAGO & NORTH WESTERN RAILWAY CO. *v.* MUTUAL SAVINGS BANK GROUP COMMITTEE ET AL.;

Nos. 37 and 38. LOUIS SUSMAN ET AL., CONVERTIBLE BOND OWNERS, *v.* MUTUAL SAVINGS BANK GROUP COMMITTEE ET AL.;

Nos. 56 and 57. CITY BANK FARMERS TRUST CO., TRUSTEE, *v.* LIFE INSURANCE GROUP COMMITTEE ET AL.;

Nos. 62, 63, and 64. IRVING TRUST CO., SUCCESSOR TRUSTEE, *v.* MUTUAL SAVINGS BANK GROUP COMMITTEE ET AL.;

Nos. 68 and 69. PROTECTIVE COMMITTEE FOR HOLDERS OF COMMON STOCK *v.* MUTUAL SAVINGS BANK GROUP COMMITTEE ET AL.; and

Nos. 83 and 84. PROTECTIVE COMMITTEE FOR HOLDERS OF PREFERRED STOCK ET AL. *v.* MUTUAL SAVINGS BANK GROUP COMMITTEE ET AL. April 19, 1943. Petitions for

writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of these applications. *Mrs. Helen W. Munsert* and *Mr. Luther M. Walter* for the Chicago & North Western Railway Co.; *Mr. Meyer Abrams* for Louis Susman et al.; *Messrs. John B. Marsh* and *Edward E. Watts, Jr.*, for the City Bank Farmers Trust Co., Trustee; *Messrs. Harold C. McCollom* and *Orrin G. Judd* for the Irving Trust Co., Successor Trustee; *Mr. Harry N. Wyatt* for the Protective Committee for Holders of Common Stock; and *Messrs. John M. MacGregor* and *Harry I. Allen* for the Protective Committee for Holders of Preferred Stock, et al.,—petitioners. *Solicitor General Fahy* and *Messrs. James L. Homire* and *Emmet McCaffery* for the Reconstruction Finance Corporation; *Messrs. Kenneth F. Burgess, Douglas F. Smith, Fred N. Oliver,* and *Willard P. Scott* for Mutual Savings Bank Group et al.; *Messrs. William A. W. Stewart* and *William B. Hale* for the United States Trust Co., Trustee; *Messrs. Edward K. Hanlon* and *Ernest S. Ballard* for the New York Trust Co., Trustee; *Mr. Leonard D. Adkins* for George W. Bovenizer et al.; *Messrs. Edwin S. S. Sunderland, Thomas O'G. FitzGibbon,* and *Henry F. Tenney* for the Guaranty Trust Co., Trustee; and *Mr. Alfred H. Phillips* for the Chemical Bank & Trust Co., Successor Trustee,— respondents. Reported below: 126 F. 2d 351.

No. 354. AKRON, CANTON & YOUNGSTOWN RAILWAY CO. *v.* HAGENBUCH ET AL., TRUSTEES, ET AL.; and

No. 355. CHAMBERLAIN ET AL. *v.* HAGENBUCH ET AL., TRUSTEES, ET AL. April 19, 1943. Petition for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application. *Mr. Paul D. Miller* for petitioners. *Mr. Andrew P. Martin* for

George E. Hagenbuch et al., Trustees, et al.; *Mr. Shelton Pitney* for the Bondholders' Protective Committee for the Northern Ohio Ry. Co. First Mortgage Bonds; and *Mr. George C. Sharp* for the Bondholders' Committee for the Akron, C. & Y. Ry. Co. General and Refunding Mortgage Bonds,—respondents. Reported below: 128 F. 2d 932.

No. 757. FITZGERALD *v.* KANSAS ET AL. April 19, 1943. Petition for writ of certiorari to the Supreme Court of Kansas denied. *Edward R. Fitzgerald, pro se.*

No. 801. CORKUM *v.* NEW YORK. April 19, 1943. Petition for writ of certiorari to the Supreme Court of New York denied. *Arthur Corkum, pro se.* Reported below: 264 App. Div. 745, 35 N. Y. S. 2d 279.

No. 822. TROTT *v.* McDONOUGH MOTOR EXPRESS CO., INC. ET AL. April 19, 1943. Petition for writ of certiorari to the Supreme Court of Mississippi denied. *Mr. Horace C. Wilkinson* for petitioner. *Mr. George Butler* for respondents. Reported below: 10 So. 2d 450.

No. 915. ERICKSON *v.* MAYO, STATE PRISON CUSTODIAN. April 19, 1943. Petition for writ of certiorari to the Supreme Court of Florida denied. *Charles Erickson, pro se.*

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No. 514. UNITED STATES *v.* FRENCH BAUER, INC. ET AL. Appeal from the District Court of the United States for the Southern District of Ohio. February 1, 1943.

Dismissed on motion of counsel for appellant. *Solicitor General Fahy* for the United States. *Mr. Robert S. Marx* for the Kroger Grocery & Baking Co. et al., and *Mr. Robert N. Gorman* for the Mutual Bottle Exchange et al., appellees. Reported below: 48 F. Supp. 260.

No. 697. JACKSON ET AL. *v.* GULF REFINING CO. ET AL. On petition for writ of certiorari to the Supreme Court of Louisiana. March 8, 1943. Dismissed on motion of counsel for the petitioners. *Mr. Aubrey M. Pyburn* for petitioners. Reported below: 201 La. 721, 10 So. 2d 593.

No. 705. SAUNDERS *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. On petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit. March 15, 1943. Dismissed on motion of counsel for petitioner. *Mr. W. H. Harris* for petitioner. Reported below: 131 F. 2d 571.

No. 626. UNITED STATES *v.* RADIO CORPORATION OF AMERICA ET AL. Appeal from the District Court of the United States for the District of Delaware. April 5, 1943. Dismissed on motion of counsel for the appellant. *Solicitor General Fahy* for the United States. *Messrs. John T. Cahill* and *Frederick H. Wood* for appellees. Reported below: 46 F. Supp. 654.

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No. 314, October Term, 1941. BOWDEN ET AL. *v.* FORT SMITH; and

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No. 606. BUCHALTER *v.* NEW YORK;

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No. —, original. EX PARTE ELLERT L. MCGRATH. February 1, 1943. 317 U. S. 605.

No. 441. BECK *v.* NEW YORK. February 1, 1943. 317 U. S. 696.

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No. 517. AJELLO *v.* PAN AMERICAN AIRWAYS CORP. ET AL.;

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No. 566. LAFUENTE *v.* COUNTY OF LOS ANGELES. April 5, 1943. The third petition for rehearing is denied. MR. JUSTICE MURPHY, MR. JUSTICE JACKSON, and MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application.

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No. 903, October Term, 1941. PEYTON *v.* RAILWAY EXPRESS AGENCY, INC. ET AL. April 12, 1943. Fourth petition for rehearing denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application.

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AMENDMENT OF RULES OF THIS COURT.

ORDER.

It is ordered that paragraph 7 of Rule 32 of the Rules of this Court be amended so as to read as follows:

"7. In pursuance of the Act of March 3, 1883, authorizing and empowering this court to prepare a table of fees to be charged by the clerk of this court the following table is adopted:

"For docketing a case and filing and indorsing the transcript of the record, twenty-five dollars.

"For entering an appearance, twenty-five cents.

"For entering a continuance, twenty-five cents.

"For filing a motion, order, or other paper, twenty-five cents.

"For entering any rule or for making or copying any record or other paper, twenty cents per folio of each one hundred words.

"For transferring each case to a subsequent docket and indexing the same, one dollar.

"For entering a judgment or decree, one dollar.

"For every search of the records of the court, one dollar.

"For a certificate and seal, two dollars.

"For receiving, keeping, and paying money in pursuance of any statute or order of court, two percent on the amount so received, kept, and paid.

"For an admission to the bar and certificate under seal, including filing of preliminary certificate and statements, twenty-five dollars.

"For preparing the record or a transcript thereof for the printer, in all cases, including records presented with petitions for certiorari, indexing the same, supervising the printing and distributing the printed copies to the justices, the reporter, the law library, and the parties or

their counsel, fifteen cents per folio of each one hundred words; but where the necessary printed copies of the record as printed for use of the court below are furnished, charges under this item will be limited to any additions printed here under the clerk's supervision.

"For making a manuscript copy of the record, when required under Rule 13, fifteen cents per folio of each one hundred words, but nothing in addition for supervising the printing.

"For preparing, on filing, for the printer, petitions for writs of certiorari, briefs, jurisdictional statements or motions when required by the Rules, or at the request of counsel when, in the opinion of the clerk, circumstances require, indexing the same, changing record references to conform to the pagination of the printed record, and supervising the printing, five dollars for each such petition, brief, jurisdictional statement or motion. Neither the expense of printing nor the clerk's supervising fee shall be allowed as costs in the case.

"For a mandate or other process, ten dollars.

"For an order on petition for writ of certiorari, five dollars.

"For filing briefs, ten dollars for each party appearing.

"For every printed copy of any opinion of the court or any justice thereof, certified under seal, two dollars."

IT IS FURTHER ORDERED that this order shall apply to all cases docketed on or after February 15, 1943, and to all admissions to the bar on or after March 2, 1943.

FEBRUARY 11, 1943.

AMENDMENT OF CRIMINAL RULES.

ORDER.

It is ordered that Rule XI of the Rules of Practice and Procedure in Criminal Cases be, and the same is hereby, amended to read as follows:

"XI. Writs of certiorari. Petition to the Supreme Court of the United States for writ of certiorari to review a judgment of the appellate court shall be made within thirty (30) days after the entry of the judgment of that court, except that in cases in which the judgment of conviction has been entered in a District Court of Alaska, Hawaii, Puerto Rico, Canal Zone, or Virgin Islands, the petition shall also be deemed in time if the container in which it is mailed, addressed to the Supreme Court of the United States is postmarked within the thirty (30) days provided by this Rule. Such petition shall be made as prescribed in Rules 38 and 39 of the Rules of the Supreme Court of the United States."

FEBRUARY 15, 1943.

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