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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1942

AND

OCTOBER TERM, 1943

FROM JUNE 15 TO AND INCLUDING JUNE 21, 1943 (END OF 1942 TERM); AND FROM OCTOBER 4, 1943 THROUGH JANUARY 10, 1944

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ERRATA.

300 U. S. 498, n. 6, citation of *Gunning* v. *Cooley* should be 281 U. S.
302 U. S. 704, No. 162, citation should be 67 N. D. 341, 272 N. W. 286.
317 U. S. 627, No. 165, citation should be 122 F. 2d 213.

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.

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.

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.)

TABLE OF CASES REPORTED

552826—44——2

552826—44——3

TABLE OF CASES

Cited in Opinions

TABLE OF STATUTES

Cited in Opinions

(A) STATUTES OF THE UNITED STATES.

552826—44——5

(B) STATUTES OF THE STATES AND TERRITORIES.

(C) PROCLAMATIONS.

(D) FOREIGN STATUTES.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1942.

MARCONI WIRELESS TELEGRAPH COMPANY OF AMERICA *v.* UNITED STATES.*

CERTIORARI TO THE COURT OF CLAIMS.

No. 369. Argued April 9, 12, 1943.—Decided June 21, 1943.

1. The broad claims of the Marconi Patent No. 763,772, for improvements in apparatus for wireless telegraphy—briefly, for a structure and arrangement of four high-frequency circuits with means of independently adjusting each so that all four may be brought into electrical resonance with one another—*held* invalid because anticipated. P. 38.

   Marconi showed no invention over Stone (Patent No. 714,756) by making the tuning of his antenna circuit adjustable, or by using Lodge's (Patent No. 609,154) variable inductance for that purpose. Whether Stone's patent involved invention is not here determined.
2. Merely making a known element of a known combination adjustable by a means of adjustment known to the art, when no new or unexpected result is obtained, is not invention. P. 32.
3. As between two inventors, priority of invention will be awarded to the one who by satisfying proof can show that he first conceived of the invention. P. 34.
4. Commercial success achieved by the later inventor and patentee cannot save his patent from the defense of anticipation by a prior inventor. P. 35.

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*Together with No. 373, *United States* v. *Marconi Wireless Telegraph Company of America*, also on writ of certiorari, 317 U. S. 620, to the Court of Claims.

5. In the exercise of its appellate power, this Court may consider any evidence of record which, whether or not called to the attention of the court below, is relevant to and may affect the correctness of its decision sustaining or denying any contention which a party has made before it. P. 44.
6. Although the interlocutory decision of the Court of Claims in this case that Claim 16 of Marconi Patent No. 763,772 was valid and infringed was appealable, the decision was not final until the conclusion of the accounting; hence, the court did not lack power at any time prior to entry of its final judgment at the close of the accounting to reconsider any portion of its decision and reopen any part of the case, and it was free in its discretion to grant a reargument based either on all the evidence then of record or only the evidence before the court when it rendered its interlocutory decision, or to reopen the case for further evidence. P. 47.
7. The judgment of the Court of Claims holding valid and infringed Claim 16 of Marconi Patent No. 763,772 is vacated and remanded in order that that court may determine whether to reconsider its decision in the light of the Government's present contention that Claim 16, as construed by the Court of Claims, was anticipated by the patents to Pupin, No. 640,516, and Fessenden, No. 706,735. P. 48.
8. A defendant in a patent infringement suit who has added non-infringing and valuable improvements which contributed to the making of the profits is not liable for benefits resulting from such improvements. P. 50.
9. Disclosure by publication more than two years before application for a patent bars any claim for a patent for an invention embodying the published disclosure. P. 57.
10. Invalidity in part of a patent defeats the entire patent unless the invalid portion was claimed through inadvertence, accident, or mistake, and without any fraudulent or deceptive intention, and is disclaimed without unreasonable neglect or delay. P. 57.
11. Fleming Patent No. 803,864 *held* invalid by reason of an improper disclaimer. P. 58.

    The specifications plainly contemplated the use of the claimed device with low as well as high frequency currents, and the patent was invalid for want of invention so far as applicable to use with low frequency currents; the claim was not inadvertent, and the delay of ten years in making the disclaimer was unreasonable.
12. That the patentee's claim for more than he had invented was not inadvertant, and that his delay in making disclaimer was unreasonable, were questions of fact; but, since the Court of Claims in

its opinion in this case plainly states its conclusions as to them, and those conclusions are supported by substantial evidence, its omission to make formal findings of fact is immaterial. P. 58.

13. The disclaimer statutes are applicable to one who acquires a patent under an assignment of the application. P. 59.

99 Ct. Cls. 1, affirmed in part.

WRITS of certiorari, 317 U. S. 620, on cross-petitions to review a judgment in a suit against the United States to recover damages for infringement of patents. See 81 Ct. Cls. 741.

Mr. Stephen H. Philbin, with whom *Messrs. Abel E. Blackmar, Jr.* and *Richard A. Ford* were on the brief, for the Marconi Company.

Assistant Attorney General Shea, with whom *Solicitor General Fahy and Messrs. Clifton V. Edwards, J. F. Mothershead, Joseph Y. Houghton* and *Richard S. Salant* were on the brief, for the United States.

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

The Marconi Company brought this suit in the Court of Claims pursuant to 35 U. S. C. § 68, to recover damages for infringement of four United States patents. Two, No. 763,772, and reissue No. 11,913, were issued to Marconi, a third, No. 609,154, to Lodge, and a fourth, No. 803,684, to Fleming. The court held that the Marconi reissue patent was not infringed. It held also that the claims in suit, other than Claim 16, of the Marconi patent No. 763,772, are invalid; and that Claim 16 of the patent is valid and was infringed. It gave judgment for petitioner on this claim in the sum of $42,984.93 with interest. It held that the Lodge patent was valid and infringed, and that the Fleming patent was not infringed and was rendered void by an improper disclaimer. The case comes here on certiorari, 317 U. S. 620, 28 U. S. C. § 288

(b), on petition of the Marconi Company in No. 369, to review the judgment of the Court of Claims holding invalid the claims in suit, other than Claim 16, of the Marconi patent, and holding the Fleming patent invalid and not infringed, and on petition of the Government in No. 373, to review the decision allowing recovery for infringement of Claim 16 of the Marconi patent. No review was sought by either party of so much of the court's judgment as sustained the Lodge patent and held the first Marconi reissue patent not infringed.

Marconi Patent No. 763,772.

This patent, granted June 28, 1904, on an application filed November 10, 1900, and assigned to the Marconi Company on March 6, 1905,[1] is for improvements in apparatus for wireless telegraphy by means of Hertzian oscillations or electrical waves. In wireless telegraphy, signals given by means of controlled electrical pulsations are transmitted through the ether by means of the so-called Hertzian or radio waves. Hertzian waves are electrical oscillations which travel with the speed of light and have varying wave lengths and consequent frequencies intermediate between the frequency ranges of light and sound waves. The transmitting apparatus used for sending the signals is capable, when actuated by a telegraph key or other signalling device, of producing, for short periods of variable lengths, electrical oscillations of radio frequency (over 10,000 cycles per second) in an antenna or open circuit from which the oscillations are radiated to a distant receiving apparatus. The receiver has an open antenna circuit which is electrically responsive

[1] On November 20, 1919, the Marconi Company assigned to the Radio Corporation of America all of its assets, including the patents here in suit, but reserved, and agreed to prosecute, the present claims against the United States, on which it had instituted suit on July 29, 1916.

to the transmitted waves and is capable of using those responses to actuate by means of a relay or amplifier any convenient form of signalling apparatus for making audible an electrically transmitted signal, such as a telegraph sounder or a loud speaker. In brief, signals at the transmitter are utilized to control high frequency electrical oscillations which are radiated by an antenna through the ether to the distant receiver and there produce an audible or visible signal.

All of these were familiar devices at the time of Marconi's application for the patent now in suit. By that time radio had passed from the theoretical to the practical and commercially successful. Four years before, Marconi had applied for his original and basic patent, which was granted as No. 586,193, July 13, 1897 and reissued June 4, 1901 as reissue No. 11,913. He applied for his corresponding British patent, No. 12039 of 1896, on June 2, 1896. Marconi's original patent showed a two-circuit system, in which the high frequency oscillations originated in the transmitter antenna circuit and the detecting device was connected directly in the receiver antenna circuit. Between 1896 and 1900 he demonstrated on numerous occasions the practical success of his apparatus, attaining successful transmission at distances of 70 and 80 miles. During those years he applied for a large number of patents in this and other countries for improvements on his system of radio communication.[2]

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[2] See *Marconi Wireless Tel. Co.* v. *National Electric Signalling Co.*, 213 F. 815, 825, 829–31; Encyclopedia Britannica (14th Ed.) vol. 14, p. 869; Dunlap, Marconi, The Man and His Wireless; Jacot and Collier, Marconi—Master of Space; Vyvyan, Wireless Over Thirty Years; Fleming, Electric Wave Telegraphy, 426–443.

Marconi was granted eight other United States patents for wireless apparatus on applications filed between the filing dates of Nos. 586,193 and 763,772. They are Nos. 624,516, 627,650, 647,007, 647,008, 647,009, 650,109, 650,110, 668,315.

The particular advance said to have been achieved by the Marconi patent with which we are here concerned was the use of two high frequency circuits in the transmitter and two in the receiver, all four so adjusted as to be resonant to the same frequency or multiples of it. The circuits are so constructed that the electrical impulses in the antenna circuit of the transmitter vibrate longer with the application to the transmitter of a given amount of electrical energy than had been the case in the previous structures known to the art, and the selectivity and sensitivity of the receiver is likewise enhanced. Thus increased efficiency in the transmission and reception of signals is obtained. The specifications of the Marconi patent state that its object is "to increase the efficiency of the system and to provide new and simple means whereby oscillations of electrical waves from a transmitting station may be localized when desired at any one selected receiving station or stations out of a group of several receiving-stations."

The specifications describe an arrangement of four high frequency circuits tuned to one another—two at the sending station associated with a source of low frequency oscillations, and two at the receiving station associated with a relay or amplifier operating a signalling device. At the sending station there is an open antenna circuit which is "a good radiator," connected with the secondary coil of a transformer, and through it inductively coupled with a closed circuit, which is connected with the primary coil of the transformer, this closed circuit being a "persistent oscillator." At the receiving station there is an open antenna circuit constituting a "good absorber" inductively coupled with a closed circuit capable of accumulating the received oscillations.

The patent, in describing the arrangement of the apparatus so as to secure the desired resonance or tuning, specifies: "The capacity and self-induction of the four

circuits—i. e., the primary and secondary circuits at the transmitting-station and the primary and secondary circuits at any one of the receiving-stations in a communicating system are each and all to be so independently adjusted as to make the product of the self-induction multiplied by the capacity the same in each case or multiples of each other—that is to say, the electrical time periods of the four circuits are to be the same or octaves of each other." [3] And again, "In employing this invention to localize the transmission of intelligence at one of several receiving-stations the time period of the circuits at each of the receiving-stations is so arranged as to be different from those of the other stations. If the time periods of the circuits of the transmitting-station are varied until they are in resonance with those of one of the receiving-stations, that one alone of all the receiving-stations will respond, provided that the distance between the transmitting and receiving stations is not too small."

The drawings and specifications show a closed circuit at the transmitting station connected with the primary

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[3] Capacity is the property of an electrical circuit which enables it to receive and store an electrical charge when a voltage is applied to it, and to release that charge as the applied voltage is withdrawn, thereby causing a current to flow in the circuit. Although any conductor of electricity has capacity to some degree, that property is substantially enhanced in a circuit by the use of a condenser, consisting of two or more metal plates separated by a non-conductor, such that when a voltage is applied to the circuit one plate will become positively and the other negatively charged.

Self-inductance is the property of a circuit by which, when the amount or direction of the current passing through it is changed, the magnetic stresses created induce a voltage opposed to the change. Although any conductor has self-inductance to some degree, that property is most marked in a coil.

See generally Albert, Electrical Fundamentals of Communication, Chs. V, VI, VII, and IX; Terman, Radio Engineering, Chs. II and III; Morecroft, Principles of Radio Communication, Chs. I, II, III; Lauer and Brown, Radio Engineering Principles, Chs. I and II.

of an induction coil, and embracing a source of electrical current and a circuit-closing key or other signalling device. The secondary of the induction coil is connected in a circuit which includes a spark gap or other producer of high frequency oscillations and, in a shunt around the spark gap, the primary coil of an oscillation transformer and a condenser, preferably so arranged that its capacity can readily be varied. This shunt circuit constitutes one of the two tuned circuits of the transmitter, and is often referred to as the closed or charging circuit. The secondary coil of the transformer is connected in the open or antenna circuit, one end of which is connected with the earth, the other to a vertical wire antenna or an elevated plate. This antenna circuit also includes an induction coil, preferably one whose inductance is readily variable, located between the antenna or plate and the transformer.

The receiver consists of a similar antenna circuit connected with the primary coil of a transformer, and having a variable induction coil located between the antenna or plate and the transformer. A shunt circuit bridging the transformer and containing a condenser which is preferably adjustable may also be added. The secondary coil of the transformer is connected through one or more interposed inductance coils, "preferably of variable inductance," with the terminals of a coherer [4] or other suitable detector of electrical oscillations. The closed receiver circuit also contained one or more condensers.

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[4] A coherer was a device disclosed by Branly as early as 1891. It was used by Lodge in experiments described in the London Electrician for June 15, 1894, p. 189, and was in common use thereafter as a detector of radio waves until replaced by the crystal and the cathode-anode tube. The most common form consisted of a tube containing metal filings which, in their normal state, were a non-conductor. When placed in a circuit through which high frequency oscillations passed, the filings aligned themselves in a continuous stream through which the low frequency electrical current operating a key or other

The devices and arrangements specified are suitable for effecting the electrical transmission of signals in the manner already indicated. By the maintenance of the same high frequency throughout the four-circuit system the cumulative resonance is attained which gives the desired increased efficiency in transmission and increased selectivity at the receiving station.

The patent describes the operation of the four circuits as follows, beginning with the transmitter:

"In operation the signalling-key *b* is pressed, and this closes the primary of the induction-coil. Current then rushes through the transformer-circuit and the condenser *e* is charged and subsequently discharges through the spark-gap. If the capacity, the inductance, and the resistance of the circuit are of suitable values, the discharge is oscillatory, with the result that alternating currents of high frequency pass through the primary of the transformer and induce similar oscillations in the secondary, these oscillations being rapidly radiated in the form of electric waves by the elevated conductor [antenna].

"For the best results and in order to effect the selection of the station or stations whereat the transmitted oscillations are to be localized I include in the open secondary circuit of the transformer, and preferably between the radiator *f* and the secondary coil *d'*, an inductance-coil *g*, Fig. 1, having numerous coils, and the connection is such that a greater or less number of turns of the coil can be put in use, the proper number being ascertained by experiment."

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signalling device could pass. By means of a device which tapped the sides of the tube, the stream of filings was broken when the high-frequency oscillations ceased. Thus the coherer was a sensitive device by which weak, high-frequency signals could be made to actuate a low-frequency current of sufficient power to operate a telegraphic key or other device producing a visible or audible signal.

The invention thus described may summarily be stated to be a structure and arrangement of four high frequency circuits, with means of independently adjusting each so that all four may be brought into electrical resonance with one another. This is the broad invention covered by Claim 20. Combinations covering so much of the invention as is embodied in the transmitter and the receiver respectively are separately claimed.[5]

Long before Marconi's application for this patent the scientific principles of which he made use were well understood and the particular appliances constituting elements in the apparatus combination which he claimed were well known. About seventy years ago Clerk Maxwell described the scientific theory of wireless communication through the transmission of electrical energy by ether waves.[6] Between 1878 and 1890 Hertz devised apparatus for achieving that result which was described by de Tunzelmann in a series of articles published in the London

[5] Of the claims in suit in No. 369, Claims 10 and 20 cover the four-circuit system, while Claims 1, 3, 6, 8, 11 and 12 cover the two transmitter circuits and Claims 2, 13, 14, 17, 18 and 19 cover the two receiver circuits. Claim 10 merely provides that the four circuits be in resonance with each other and hence does not prescribe means of adjusting the tuning. Claim 11 likewise prescribes no means of adjustment. The other claims provide means of adjustment, either a "variable inductance" (Claims 1, 2, 3, 8, 12, 13, 18, and 19) or more generally "means" for adjusting the period of the circuits (Claims 3, 6, 14 and 17). Some of the claims merely provide means of adjusting the tuning of the antenna circuit (Claims 1, 2, 8, 12, and 13) and hence do not require that the closed circuits be tuned. Others either specifically prescribe the adjustable tuning of both circuits at transmitter (Claims 3, 6) or receiver (Claims 18 and 19) or both (Claim 20) or else prescribe "means for adjusting the two transformer-circuits in electrical resonance with each other, substantially as described" (Claims 14 and 17).

[6] A Dynamical Theory of the Electromagnetic Field (1864), 155 Philosophical Transactions of the Royal Society 459; 1 Scientific Papers of James Clerk Maxwell 526.

Electrician in 1888. One, of September 21, 1888, showed a transmitter comprising a closed circuit inductively coupled with an open circuit. The closed circuit included a switch or circuit breaker capable of use for sending signals, and an automatic circuit breaker capable, when the switch was closed, of setting up an intermittent current in the closed circuit which in turn induced through a transformer an intermittent current of higher voltage in the open circuit. The open circuit included a spark gap across which a succession of sparks were caused to leap whenever the signal switch was closed, each spark producing a series of high frequency oscillations in the open circuit.

By connecting the spark gap to large area plates in the open circuit Hertz increased the capacity and thus not only increased the force of the sparks but also changed one of the two factors determining the frequency of the oscillations in the circuit, and hence the wave length of the oscillations transmitted. Hertz's receiver was shown as a rectangle of wire connected to the knobs of a spark gap, both the wire and the spark gap being of specified lengths of such relationship as to render the circuit resonant to the wave lengths in the transmitter. At times Hertz attached to the rectangle additional vertical wires which provided additional capacity, and whose length could readily be varied so as to vary the wave lengths to which the receiver was responsive, thus providing a "method of adjusting the capacity" of the receiver.[7] Thus Hertz at the outset of radio communication recognized the importance of resonance and provided means for securing it by tuning both his transmitting and re-

[7] See the London Electrician for September 21, 1888, p. 628.

Ebert, in the London Electrician for July 6, 1894, p. 333, likewise pointed out that Hertz's receivers are "so arranged that they show the maximum resonant effect with a given exciter; they are 'electrically tuned.'"

ceiving circuits to the same frequency, by adjusting the capacity of each.[8]

Lodge, writing in the London Electrician in 1894, elaborated further on the discoveries of Hertz and on his own experiments along the same lines. In one article, of June 8, 1894, he discussed phenomena of resonance and made an observation which underlies several of the disclosures in Marconi's patent. Lodge pointed out that some circuits were by their nature persistent vibrators, i. e., were able to sustain for a long period oscillations set up in them, while others were so constructed that their oscillations were rapidly damped. He said that a receiver so constructed as to be rapidly damped would respond to waves of almost any frequency, while one that was a persistent vibrator would respond only to waves of its own natural periodicity. Lodge pointed out further that Hertz's transmitter "radiates very powerfully" but that "In consequence of its radiation of energy, its vibrations are rapidly damped, and it only gives some three or four good strong swings. Hence it follows that it has a wide range of excitation, *i. e.*, it can excite sparks in conductors barely at all in tune with it." On the other hand Hertz's receiver was "not a good absorber but a persistent vibrator, well adapted for picking up disturbances of precise

[8] De Tunzelmann shows that Hertz clearly understood the principles of electrical resonance. Some of his early experiments were designed to determine whether principles of resonance were applicable to high frequency electrical circuits. From them Hertz concluded that "an oscillatory current of definite period would, other conditions being the same, exert a much greater inductive effect upon one of equal period than upon one differing even slightly from it." *Id.* p. 626. Hertz knew that the frequency to which a circuit was resonant was a function of the square root of the product of the self-inductance and capacity in the circuit and by a formula similar to that now used he calculated the approximate frequency of the oscillations produced by his transmitter. *Id.*, September 28, 1888, 664–5.

and measurable wave-length." Lodge concluded that "The two conditions, conspicuous energy of radiation and persistent vibration electrically produced, are at present incompatible." (pp. 154–5.)

In 1892, Crookes published an article in the Fortnightly Review in which he definitely suggested the use of Hertzian waves for wireless telegraphy and pointed out that the method of achieving that result was to be found in the use and improvement of then known means of generating electrical waves of any desired wave length, to be transmitted through the ether to a receiver, both sending and receiving instruments being attuned to a definite wave length.[9] A year later Tesla, who was then preoccupied with the wireless transmission of power for use in lighting or for the operation of dynamos, proposed, in a lecture before the Franklin Institute in Philadelphia, the use of adjustable high frequency oscillations for wireless transmission of signals.[10]

Marconi's original patent No. 586,193, which was granted July 13, 1897, and became reissue No. 11,913, disclosed a two-circuit system for the transmission and reception of Hertzian waves. The transmitter comprised an antenna circuit connected at one end to an aerial plate and at the other to the ground, and containing a spark gap. To the knobs of the spark gap was connected a transformer whose secondary was connected with a source of current and a signalling key. The low frequency current thereby induced in the antenna circuit was caused to discharge through the spark gap, producing the high frequency oscillations which were radiated by the antenna. The receiver similiarly contained an antenna circuit between an elevated plate and the ground, in which

[9] Fortnightly Review, No. 101, February, 1892, 173, 174–5.

[10] Martin, Inventions, Researches and Writings of Nikola Tesla, pp. 346–8.

a coherer was directly connected. Marconi claimed the construction of transmitter and receiver so as to be resonant to the same frequency, and described means of doing so by careful determination of the size of the aerial plates.

The Tesla patent No. 645,576, applied for September 2, 1897 and allowed March 20, 1900, disclosed a four-circuit system, having two circuits each at transmitter and receiver, and recommended that all four circuits be tuned to the same frequency. Tesla's apparatus was devised primarily for the transmission of energy to any form of energy-consuming device by using the rarified atmosphere at high elevations as a conductor when subjected to the electrical pressure of a very high voltage. But he also recognized that his apparatus could, without change, be used for wireless communication, which is dependent upon the transmission of electrical energy. His specifications declare: "The apparatus which I have shown will obviously have many other valuable uses— as, for instance, when it is desired to transmit intelligible messages to great distances . . ." [11]

Tesla's specifications disclosed an arrangement of four circuits, an open antenna circuit coupled, through a transformer, to a closed charging circuit at the transmitter, and an open antenna circuit at the receiver similarly coupled to a closed detector circuit. His patent also in-

[11] Tesla's specifications state that the current should preferably be "of very considerable frequency." In describing apparatus used experimentally by him, the specifications state that the oscillations are generated in the charging circuit by the periodic discharge of a condenser by means of "a mechanically operated break," a means whose effects are similar to those of the spark gap generally used at this period in the radio art. He further states that the inductance of the charging circuit is so calculated that the "primary circuit vibrates generally according to adjustment, from two hundred and thirty thousand to two hundred and fifty thousand times per second." The

structed those skilled in the art that the open and closed circuits in the transmitting system and in the receiving system should be in electrical resonance with each other. His specifications state that the "primary and secondary circuits in the transmitting apparatus" are "carefully synchronized." They describe the method of achieving this by adjusting the length of wire in the secondary winding of the oscillation transformer in the transmitter, and similarly in the receiver, so that "the points of highest potential are made to coincide with the elevated terminals" of the antenna, i. e., so that the antenna circuit will be resonant to the frequency developed in the charging circuit of the transmitter. The specifications further state that "the results were particularly satisfactory when the primary coil or system A′ with its secondary C′ [of the receiver] was carefully adjusted, so as to vibrate in synchronism with the transmitting coil or system AC."

Tesla thus anticipated the following features of the Marconi patent: A charging circuit in the transmitter for causing oscillations of the desired frequency, coupled, through a transformer, with the open antenna circuit, and the synchronization of the two circuits by the proper disposition of the inductance in either the closed or the antenna circuit or both. By this and the added disclosure of the two-circuit arrangement in the receiver with similar adjustment, he anticipated the four-circuit tuned

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range of radio frequencies in use in 1917 was said by a witness for the plaintiff to extend from 30,000 to 1,500,000 cycles per second. The range of frequencies allocated for radio use by the International Telecommunication Convention, proclaimed June 27, 1934, 49 Stat. 2391, 2459, is from 10 to 60,000 kilocycles (10,000 to 60,000,000 cycles) per second, and the spectrum of waves over which the Federal Communications Commission currently exercises jurisdiction extends from 10 to 500,000 kilocycles. Code of Federal Regulations, Title 47, Ch. I, § 2.71. Thus Tesla's apparatus was intended to operate at radio frequencies.

552826—44——6

combination of Marconi. A feature of the Marconi combination not shown by Tesla was the use of a variable inductance as a means of adjusting the tuning of the antenna circuit of transmitter and receiver. This was developed by Lodge after Tesla's patent but before the Marconi patent in suit.

In patent No. 609,154, applied for February 1, 1898 and allowed August 16, 1898, before Marconi's application, Lodge disclosed an adjustable induction coil in the open or antenna circuit in a wireless transmitter or receiver or both to enable transmitter and receiver to be tuned together. His patent provided for the use, in the open circuits of a transmitter and a receiver of Hertzian waves, of a self-induction coil between a pair of capacity areas which he stated might be antenna and earth. His specifications state that a coil located as described could be made adjustable at will so as to vary the value of its self-inductance; that the adjustment, to secure the "desired frequency of vibration or syntony with a particular distant station," may be attained either "by replacing one coil by another" or by the use of a coil constructed with a movable switch so related to the coil as to short circuit, when closed, any desired number of turns of the wire, "so that the whole or any smaller portion of the inductance available may be used in accordance with the correspondingly-attuned receiver at the particular station to which it is desired to signal." Thus Lodge adjusted his tuning by varying the self-inductance of the antenna circuits, for, as he explained, the adjustment of wave lengths, and hence of frequency in the circuits, could be made by varying either or both the inductance and capacity, which are the factors controlling wave length and hence frequency in the antenna circuits.

Lodge thus broadly claimed the tuning, by means of a variable inductance, of the antenna circuits in a system of radio communication. His specifications disclose what is substantially a two-circuit system, with one high fre-

quency circuit at the transmitter and one at the receiver. He also showed a two-circuit receiver with a tuned antenna circuit, his detector circuit at the receiver being connected with the terminals of a secondary coil wound around the variable inductance coil in the antenna circuit and thus inductively coupled through a transformer with the antenna circuit.[12] Lodge thus supplied the means of varying inductance and hence tuning which was lacking in the Tesla patent. He also showed a receiver which completely anticipated those of the Marconi receiver claims which prescribe adjustable means of tuning only in the antenna circuit (Claims 2, 13 and 18) and partially anticipated the other receiver claims.

The Stone patent No. 714,756, applied for February 8, 1900, nine months before Marconi's application, and allowed December 2, 1902, a year and a half before the grant of Marconi's patent, showed a four-circuit wireless telegraph apparatus substantially like that later specified and patented by Marconi. It described adjustable tuning, by means of a variable inductance, of the closed circuits of both transmitter and receiver. It also recommended that the two antenna circuits be so constructed as to be resonant to the same frequencies as the closed circuits. This recommendation was added by amendment to the specifications made after Marconi had filed his application, and the principal question is whether the amendments were in point of substance a departure from Stone's invention as disclosed by his application.

Stone's application shows an intimate understanding of the mathematical and physical principles underlying radio communication and electrical circuits in general.

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[12] Marconi's patent No. 627,650, of June 27, 1899, similarly showed a two-circuit receiving system, in which the coherer was placed in a closed circuit which was inductively coupled with a tuned antenna circuit. The Court of Claims found, however, that this patent did not clearly disclose the desirability of tuning both circuits.

It contains a critical analysis of the state of the art of radio transmission and reception. He said that as yet it had not been found possible so to tune stations using a vertical antenna as to make possible selective reception by a particular station to the exclusion of others. His effort, accordingly, was to transmit a "simple harmonic wave" of well defined periodicity to a receiver which would be selectively responsive to the particular frequency transmitted, and thereby to achieve greater precision of tuning and a higher degree of selectivity.

Stone discusses in some detail the difference between "natural" and "forced" oscillations. He says "If the electrical equilibrium of a conductor be abruptly disturbed and the conductor thereafter be left to itself, electric currents will flow in the conductor, which tend to ultimately restore the condition of electrical equilibrium." He points out that a closed circuit containing a condenser and a coil is "capable of oscillatory restoration of equilibrium upon the sudden discharge of the condenser" and that "the electrical oscillations which it supports when its equilibrium is abruptly disturbed and it is then left to itself are known as the *natural vibrations* or oscillations of the system."

In addition to its ability to originate "natural vibrations" when its electrical equilibrium is disturbed, Stone says that an electrical circuit is also "capable of supporting what are termed *forced vibrations*" when electrical oscillations elsewhere created are impressed upon it. In contrast to the "natural" vibrations of a circuit, whose frequency depends upon "the relation between the electromagnetic constants [capacity and self-inductance] of the circuit," the frequency of the "forced" vibrations is "independent of the constants of the circuit" on which they are impressed and "depends only upon the period [frequency] of the impressed force." In other words, Stone found that it was possible not only to originate high-

frequency oscillations in a circuit, and to determine their frequency by proper distribution of capacity and self-inductance in the circuit, but also to transfer those oscillations to another circuit and retain their original frequency.

Stone points out that in the existing systems of radio transmission the electric oscillations are "naturally" developed in the antenna circuit by the sudden discharge of accumulated electrical force through a spark gap in that circuit. Such oscillations are "necessarily of a complex character and consist of a great variety of superimposed simple harmonic vibrations of different frequencies." "Similarly the vertical conductor at the receiving station is capable of receiving and responding to vibrations of a great variety of frequencies so that the electro-magnetic waves which emanate from one vertical conductor used as a transmitter are capable of exciting vibrations in any other vertical wire as a receiver . . . and the messages from the transmitting station will not be selectively received by the particular receiving station with which it is desirous to communicate, and will interfere with the operation of other receiving stations within its sphere of influence."

In contrast to the two-circuit system whose inadequacies he had thus described, Stone's drawings and specifications disclose a four-circuit system for transmitting and receiving radio waves which was very similar to that later disclosed by Marconi. The transmitter included a source of low frequency oscillating current and a telegraph or signalling key connected in a circuit which was inductively coupled with another closed circuit. This included an induction coil, a condenser, and a spark gap capable of generating high frequency oscillations. It in turn was inductively coupled through a transformer with an open antenna circuit connected to an aerial capacity at one end and the earth at the other. The receiver included a sim-

ilar antenna circuit, inductively coupled with a closed oscillating circuit containing an induction coil, a condenser, and a coherer or other detector of radio waves.

Stone thus recognized, although he used different terminology, the fact, previously observed by Lodge, that an open antenna circuit, so constructed as to be an efficient radiator, was not an oscillator capable of producing natural waves of a single well-defined periodicity, and consequently had a wide range of excitation. He adopted the same remedy for this defect as Marconi later did, namely to produce the oscillations in a closed circuit capable of generating persistent vibrations of well-defined periodicity, and then induce those oscillations in an open antenna circuit capable of radiating them efficiently to a distant resonant receiver. He states that the vibrations in his closed circuit "begin with a maximum of amplitude and gradually die away," a good description of the results obtainable by a "persistent oscillator." [13] Similarly in his receiver Stone recognized that an open antenna circuit (Lodge's "good absorber") was not a highly sensitive responder to waves of a particular frequency, and accordingly he sought to augment the selectivity of tuning at the receiver by interposing between the antenna circuit and the responding device a closed circuit which would be a more persistent vibrator and hence render the receiv-

[13] That the closed circuit was intended to be a "persistent oscillator" is also brought out by Stone's emphasis on "loose coupling." Stone's application explained in detail the fact that when two circuits are inductively coupled together there normally result "two degrees of freedom," that is to say, the superposition of two frequencies in the same circuit because of the effect on each of the magnetic lines of force set up by the other. He discussed in detail methods of eliminating this superposition, which interfered with accurate selectivity of tuning, by so constructing his circuits as to be "loosely coupled." This he achieved by including in the closed circuits a large inductance coil, which had the effect of "swamping" the undesirable effect of

ing apparatus more selectively responsive to waves of a particular frequency. In so doing, however, as will presently appear, he did not disregard the favorable effect on selectivity of tuning afforded by making the antenna circuits resonant to the transmitted frequency.

Stone's application recommends that the inductance coils in the closed circuits at transmitter and receiver "be made adjustable and serve as a means whereby the operators may adjust the apparatus to the particular frequency which it is intended to employ." He thus disclosed a means of adjusting the tuning of the closed circuits by variable inductance. His original application nowhere states in so many words that the antenna circuits should be tuned, nor do its specifications or drawings explicitly disclose any means for adjusting the tuning of those circuits. But there is nothing in them to suggest that Stone did not intend to have the antenna circuits tuned, and we think that the principles which he recognized in his application, the purpose which he sought to achieve, and certain passages in his specifications, show that he recognized, as they plainly suggest to those skilled in the art, the desirability of tuning the antenna circuits as well. The disclosures of his application were thus an adequate basis for the specific recommendation, later added by amendment, as to the desirability of constructing the

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the lines of force set up in the primary of the transformer by the current induced in the secondary. Since the turns of wire in the primary of the transformer constituted a relatively small part of the total inductance in the closed circuit the effect of those turns on the frequency of the circuit was minimized.

But the testimony at the trial was in substantial agreement that the looser the coupling the slower is the transfer of energy from the closed charging circuit to the open antenna circuit. Hence the use of loose coupling presupposes a charging circuit that will store its energy for a considerable period, i. e., that will maintain persistent oscillations.

antenna circuits so as to be resonant to the frequency produced in the charging circuit of the transmitter.

The major purpose of Stone's system was the achievement of greater selectivity of tuning. His objective was to transmit waves "of but a single frequency" and to receive them at a station which "shall be operated only by electric waves of a single frequency and no others." He states:

"By my invention the vertical conductor of the transmitting station is made the source of electro-magnetic waves of but a single periodicity, and the translating apparatus at the receiving station is caused to be selectively responsive to waves of but a single periodicity so that the transmitting apparatus corresponds to a tuning fork sending but a single simple musical tone, and the receiving apparatus corresponds to an acoustic resonator capable of absorbing the energy of that single, simple musical tone only."

He says that "when the apparatus at a particular [receiving] station" is properly tuned to a particular transmitting station the receiver will selectively receive messages from it. He adds:

"Moreover, by my invention the operator at the transmitting or receiving station may at will adjust the apparatus at his command in such a way as to place himself in communication with any one of a number of stations . . . by bringing his apparatus into resonance with the periodicity employed."

And with respect to the transmitter he says, "It is to be understood that any suitable device may be employed to develop the simple harmonic force impressed upon the vertical wire [antenna]. It is sufficient to develop in the vertical wire practically simple harmonic vibrations of a fixed and high frequency."

These statements sufficiently indicate Stone's broad purpose of providing a high degree of tuning at sending and receiving stations. In seeking to achieve that end he not unnaturally placed emphasis on the tuning of the closed circuits, the association of which with the antenna circuits was an important improvement which he was the first to make. But he also made it plain that it was the sending and receiving "apparatus" which he wished to tune, so that the sending "apparatus" "would correspond to a tuning fork" and the receiving "apparatus" to "an acoustic resonator" capable of absorbing the energy of the "single, simple musical tone" transmitted. And this he sought to achieve by "any suitable device."

Stone thus emphasized the desirability of making the entire transmitting and receiving "apparatus" resonant to a particular frequency. As none of the circuits are resonant to a desired frequency unless they are tuned to that frequency, this reference to the transmitting and receiving apparatus as being brought into resonance with each other cannot fairly be said to mean that only some of the circuits at the transmitter and receiver were to be tuned. To say that by this reference to the tuning of sending and receiving apparatus he meant to confine his invention to the tuning of some only of the circuits in that apparatus is to read into his specifications a restriction which is plainly not there and which contradicts everything they say about the desirability of resonance of the apparatus. It is to read the specifications, which taken in their entirety are merely descriptive or illustrative of his invention, compare *Continental Paper Bag Co.* v. *Eastern Paper Bag Co.*, 210 U. S. 405, 418, 419–20, as though they were claims whose function is to exclude from the patent all that is not specifically claimed. *Mahn* v. *Harwood,* 112 U. S. 354, 361; *McClain* v. *Ortmayer,* 141 U. S. 419, 423–5; *Milcor Steel Co.* v. *Fuller Co.*, 316 U. S. 143, 146.

Stone had pointed out that the tuning of the antenna circuits shown in the prior art did not of itself afford sufficient selectivity. It was for that reason that he used the tuned closed circuit in association with the antenna circuit. But in the face of his emphasis on the desirability of tuning the transmitting and receiving apparatus, we cannot impute to him an intention to exclude from his apparatus the well known use of tuning in the antenna circuits as an aid to the selectivity which it was his purpose to achieve. The inference to be drawn is rather that he intended the tuned closed circuits which he proposed to add to the then known systems of radio communication, to be used in association with any existing type of vertical wire antenna circuit, including one so constructed as to be either resonant to a particular frequency, or adjustably resonant to any desired frequency, both of which involved tuning.

Stone's full appreciation of the value of making all of his circuits resonant to the same frequency is shown by his suggestion to insert, between the closed and antenna circuits at the transmitter and receiver, one or more additional closed circuits, so constructed as to be highly resonant to the particular frequency employed. He says that the purpose of such an intermediate circuit is "to weed out and thereby screen" the antenna circuit at the transmitter and the detecting device at the receiver from any harmonics or other impurities in the wave structure.

He states: "This screening action of an interposed resonant circuit is due to the well known property of such circuits by which a resonant circuit favors the development in it of simple harmonic currents of the period to which it is attuned and strongly opposes the development in it of simple harmonic currents of other periodicities." His original application thus disclosed the advantage, where vibrations created in one circuit are to be impressed on another, of making the latter circuit resonant to the same frequency as the former, in view of the "well

known property" of a resonant circuit to favor the "development" in it of forced vibrations of the same frequency as its natural periodicity.

Stone's application shows that these principles of resonant circuits were no less applicable to the antenna circuit, and suggests the use of "any suitable device" to "develop" in the antenna circuit the "simple harmonic force impressed" upon it. It was then well known in the art that every electrical circuit is to some degree resonant to a particular frequency to which it responds more readily and powerfully than to others. Although the degree of resonance attained by a vertical wire is small, its natural resonance is no different in kind from that of a closed circuit such as Stone's screening circuit. Stone recognized this in his application. In describing the complex natural vibrations set up by a sudden discharge in an antenna circuit, such as that commonly used at the time of his application, Stone said that "the vibrations consist of a simple harmonic vibration of lower period than all the others, known as the fundamental with a great variety of superimposed simple harmonics of higher periodicity superimposed thereon." And he says that the oscillations developed in the charging circuit of his system "induce corresponding oscillations in the vertical wire," which are "virtually" forced vibrations, and "practically independent, as regards their frequency, of the constants of the second circuit in which they are induced"—a plain recognition that the antenna circuit has electro-magnetic constants which affect its natural periodicity, and that that natural periodicity does have some effect on the frequency of the vibrations impressed upon the antenna circuit.[14]

[14] Stone's recognition of the similarity between his antenna circuit and his screening circuit is further shown by his direction that the coupling between the screening circuit and the charging circuit, like that between the antenna and charging circuits where no screening circuit is used, be loose. See note 12, *supra*.

Thus Stone did not, as the Marconi Company suggests, say that the antenna circuit had no natural periodicity. He recognized that its natural periodicity was less strongly marked than that of his closed circuit, and hence that the wave structure could be greatly improved by creating the oscillations in a closed circuit such as he described. But he also plainly recognized that the antenna circuit, like his screening circuit, was a circuit having a natural period of vibration which would therefore be more responsive to impressed oscillations of that same periodicity. Since he had previously said that "any suitable device may be employed to develop the simple harmonic force impressed upon the vertical wire," we think that Stone's specifications plainly suggested to those skilled in the art that they avail themselves of this means of developing in the antenna this simple harmonic force, and that they tune the antenna circuit in order to improve the strength and quality of the "forced" vibrations impressed upon it.

The Marconi Company argues that Stone's theory of "forced" oscillations presupposes that the open transmitter circuit be untuned. It is true that Stone said that such "forced" oscillations have a period of vibration which is "independent of the electrical constants of the circuit" on which they are impressed. But the fact that the "forced" vibration will retain its natural period whatever the frequency of the antenna circuit may be, does not preclude, as Stone showed, the tuning of that circuit so as to achieve maximum responsiveness to the vibrations impressed upon it. Stone's specifications indicate that he used the term "forced" merely as meaning that the vibrations are developed in another circuit and then transferred to the antenna circuit by inductive coupling, as distinguished from "natural" vibrations which originate in the antenna or radiating circuit—in short that "forced" is merely used as a synonym for "in-

duced." Thus he states in describing the operation of his transmitter, "The high frequency current . . . passing through the primary I_1 [of the antenna transformer] induces a corresponding high-frequency electromotive force and current in the secondary I_2 and forced electric vibrations result in the vertical conductor *v* . . ." [15]

Hence there is ample support for the finding of the court below that

"By free oscillations is meant that their frequency was determined by the constants of the circuit in which they were generated. The Stone application as filed impressed these oscillations upon the open circuit, and therefore used 'forced' oscillations in the open circuit of the transmitter, that is, the frequency of the oscillations in the open circuit was determined by the frequency of the oscillations in the closed circuit.

"The effect of forcing vibrations upon a tuned and untuned circuit may be likened unto the effect of a tuning fork upon a stretched cord in a viscous medium. When the cord is vibrated by the tuning fork it has the same period as does the fork regardless of whether such period be that of the natural period of the cord, but when the fork vibrations are in tune with the natural period or

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[15] Stone's language here makes it plain that throughout his allusions to a frequency developed in one circuit as being "impressed" or "forced" on another circuit when the two circuits are coupled through a transformer, are used figuratively or metaphorically only as synonymous with "induced." Scientifically the oscillations in the charging circuit are not impressed or forced on the other. The stress in the magnetic field of the first circuit sets up or induces corresponding stresses in the magnetic field of the other circuit. The resulting frequency in the second circuit is affected both by the frequency of the oscillations in the charging circuit and the inductance and capacity in the second circuit. The result may be the superposition of two frequencies in the second circuit. This may be avoided and a single frequency developed, as Stone showed, by tuning the second circuit so as to be resonant to the frequencies created in the first.

fundamental of the cord, then the amplitude of vibrations in the cord is a maximum."

Thus Stone's application, prior to Marconi, showed a four-circuit system, in which the oscillations were produced in a closed charging circuit and impressed on an open antenna circuit in the transmitter, and were similarly received in an open antenna circuit and by it induced in a closed circuit containing a detector. He showed the effect of resonance on the circuits resulting from their tuning to a desired frequency, and emphasized the importance of making the transmitting and receiving apparatus resonant to that frequency.

Stone's patent,[16] granted a year and a half before Marconi—although after Marconi's application was filed—makes explicit, as the patent law permits, what was implicit in Stone's application. By amendments to his specifications made April 8, 1902, he recommended that the frequency impressed upon the vertical conductor at the transmitter "may or may not be the same as the natural period or fundamental of such conductor" and that the antenna circuit at the transmitter "may with advantage be so constructed as to be highly resonant to a particular frequency and the harmonic vibrations impressed thereon may with advantage be of that frequency." Since Stone used a variable inductance to alter at will the frequency of the charging circuit, this direction plainly indicated that the frequency of the antenna circuit might also be variable, and suggested the inclusion of the well-known Lodge variable inductance in the construction of the antenna circuit to achieve that result. And since Stone had specified that "by my invention" the operator at the receiving station is able to "adjust" the receiving

[16] At the insistence of the Patent Office Stone divided his original application, and was granted two patents, No. 714,756 for a method and No. 714,831 for apparatus. The former is the one particularly relied on here.

apparatus so as to place it in resonance with any particular transmitting station, his patent equally plainly suggested the use of the Lodge variable inductance as a means of adjusting the tuning of the receiving antenna.

Stone's 1902 amendments also suggested that an "elevated conductor that is aperiodic may be employed"—i. e., one having very weak natural periodicity and consequently "adapted to receive or transmit all frequencies." But this suggestion was accompanied by the alternative recommendation in the 1902 amendments that the antenna circuits at transmitter and receiver "may with advantage be made resonant to a particular frequency," i. e., be periodic. No inference can be drawn from this that only an aperiodic antenna was contemplated either by the application or the amendments. The application was sufficiently broad to cover both types, since both were suitable means of achieving under different conditions the results which the application described and sought to attain. The amendments thus merely clarified and explained in fuller detail two alternative means which could be employed in the invention described in the original application, one of those means being the construction of the antenna so as to be highly resonant, i. e., tuned, to a particular frequency.[17]

The only respects in which it is seriously contended that Marconi disclosed invention over Stone are that Marconi explicitly claimed four-circuit tuning before

[17] This is borne out by the subsequent letter from Stone to the Commissioner of Patents dated June 7, 1902. Stone there refers to a letter by the Patent Office saying that the statement that a simple harmonic wave developed in the closed circuit "can be transferred to the elevated conductor and from the latter to the ether without change of form" is "an argument the soundness of which the Office has no means of testing." Stone replied with arguments to show that the vibrations radiated by the antenna circuit would be sufficiently pure for practical purposes either if the antenna circuit were

Stone had made it explicit by his 1902 amendment, and that Marconi disclosed means of adjusting the tuning of each of his four circuits whereas Stone had explicitly shown adjustable tuning only in the two closed circuits. But we think that neither Marconi's tuning of the two antenna circuits nor his use of the Lodge variable inductance to that end involved any invention over Stone. Two questions are involved, first, whether there was any invention over Stone in tuning the antenna circuits, and, second, whether there was any invention in the use of the Lodge variable inductance or any other known means of adjustment in order to make the tuning of the antenna circuits adjustable.

For reasons already indicated we think it clear that Stone showed tuning of the antenna circuits before Marconi, and if this involved invention Stone was the first inventor. Stone's application emphasized the desirability of tuning, and disclosed means of adjusting the tuning of the closed circuits. His very explicit recognition of the increased selectivity attained by inductive coupling of several resonant circuits plainly suggested to those skilled in the art that the antenna circuit could with advantage be a resonant circuit, that is to say a tuned circuit, and hence that it was one of the circuits to be tuned. He stressed the importance of tuning "by any suitable device" the "apparatus" at transmitter and receiver, which included at both an antenna circuit.

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aperiodic, or if it had a fundamental which was of the same frequency as that of the forced vibrations impressed upon it, although they would not be pure if the antenna circuit had a marked natural periodicity and was untuned. This letter, while somewhat later in date than the amendments, reinforces the conclusion that the purpose of those amendments was to explain more fully the details of theory and practice necessary to the success of the idea underlying Stone's original invention.

Tuning of the antenna circuit was nothing new; Lodge had not only taught that the antenna circuits at transmitter and receiver should be tuned to each other but had shown a means of adjusting the tuning which was the precise means adopted by Marconi, and which Stone had, prior to Marconi, used to tune his closed circuit—the variable inductance. Tesla, too, had shown the tuning of the antenna circuit at the transmitter to the frequency developed by the charging circuit, and the tuning of both circuits at the receiver to the frequency thus transmitted. Thus Marconi's improvement in tuning the antenna circuits is one the principles of which were well understood and stated by Stone himself before Marconi, and the mechanism for achieving which had previously been disclosed by Lodge and Stone.[18]

Since no invention over Stone was involved in tuning the antenna circuits, neither Marconi nor Stone made an invention by providing adjustable tuning of any of the circuits or by employing Lodge's variable inductance as a means of adjusting the tuning of the resonant four-circuit arrangement earlier disclosed by Stone's application and patented by him. No invention was involved in employing the Lodge variable inductance for tuning

[18] It is not without significance that Marconi's application was at one time rejected by the Patent Office because anticipated by Stone, and was ultimately allowed, on renewal of his application, on the sole ground that Marconi showed the use of a variable inductance as a means of tuning the antenna circuits, whereas Stone, in the opinion of the Examiner, tuned his antenna circuits by adjusting the length of the aerial conductor. All of Marconi's claims which included that element were allowed, and the Examiner stated that the remaining claims would be allowed if amended to include a variable inductance. Apparently through oversight, Claims 10 and 11, which failed to include that element, were included in the patent as granted. In allowing these claims the Examiner made no reference to Lodge's prior disclosure of a variable inductance in the antenna circuit.

either the closed or the open circuits in lieu of other structural modes of adjustment for that purpose. The variable inductance imparted no new function to the circuit; and merely making a known element of a known combination adjustable by a means of adjustment known to the art, when no new or unexpected result is obtained, is not invention. *Peters* v. *Hanson,* 129 U. S. 541, 550–51, 553; *Electric Cable Co.* v. *Edison Co.,* 292 U. S. 69, 79, 80, and cases cited; *Smyth Mfg. Co.* v. *Sheridan,* 149 F. 208, 211; cf. *Bassick Mfg. Co.* v. *Hollingshead Co.,* 298 U. S. 415, 424–5 and cases cited.

Stone's conception of his invention as disclosed by his patent antedated his application. It is carried back to June 30, 1899, seven months before his application, when, in a letter to Baker, he described in text and drawings his four-circuit system for wireless telegraphy in substantially the same form as that disclosed by the application. His letter is explicit in recommending the tuning of the antenna circuits. In part he wrote as follows:

"Instead of utilizing the vertical wire [antenna] itself at the transmitting station as the oscillator, I propose to impress upon this vertical wire, oscillations from an oscillator, which oscillations shall be of a frequency corresponding to the fundamental of the wire. Similarly at the receiving station, I shall draw from the vertical wire, only that component of the complex wave which is of lowest frequency.

"If now the fundamental of the wire at the receiving station be the same as that of the wire at the transmitting station, then the receiving station may receive signals from the transmitting station, but if it be different from that of the transmitting station, it may not receive those signals.

. . . . .

"The tuning of these circuits one to another and all to the same frequency will probably be best accomplished

empirically, though the best general proportions may be determined mathematically."

On July 18, 1899, Stone again wrote to Baker, mathematically demonstrating how to achieve the single frequency by means of forced vibrations. He expressed as a trigonometric function the form taken by the forced wave "if the period of the impressed force be the same as that of the fundamental of the vertical wire." He also pointed out that the transmitting circuit which he had disclosed in his earlier letter to Baker, "is practically the same as that employed by Tesla," except that Stone added an inductance coil in the closed circuit "to give additional means of tuning" and to "swamp" the reactions from the coil of the oscillation transformer and thus loosen the coupling between the open and closed circuit of the transmitter.[19] His recognition of the effect upon the current in the antenna if it is of the same period as the charging circuit; his statement that his transmitting system was the same as that employed by Tesla; his recognition that the fundamental of the receiver should be the same as that of the transmitter antenna when used for the transmission of a single frequency, and finally his statement that all four circuits are to be tuned, "one to another and all to the same frequency," all indicate his understanding of the principles of resonance and of the significance of tuning the antenna circuits.

Stone disclosed his invention to others, and in January, 1900, described it to his class at the Massachusetts Institute of Technology. Before 1900 he was diligent in obtaining capital to promote his invention. Early in 1901 a syndicate was organized to finance laboratory experiments. The Stone Telegraph & Telephone Co. was organized in December, 1901. It constructed several experimental stations in 1902 and 1903; beginning in 1904

[19] See footnote 13, *supra*.

or 1905 it built wireless stations and sold apparatus, equipped a Navy collier and some battleships, and it applied for a large number of patents. The apparatus used in the stations is described by Stone's testimony in this suit as having resonant open and closed circuits loosely coupled inductively to each other, at both the transmitter and receiver, and all tuned to the same wave length, as described in his letters to Baker and his patent.

We think that Stone's original application sufficiently disclosed the desirability that the antenna circuits in transmitter and receiver be resonant to the same frequency as the closed circuits, as he expressly recommended in his patent. But in any event it is plain that no departure from or improper addition to the specifications was involved in the 1902 amendments, which merely made explicit what was already implicit. *Hobbs* v. *Beach,* 180 U. S. 383, 395–7. We would ordinarily be slow to recognize amendments made after the filing of Marconi's application and disclosing features shown in that application. Cf. *Schriber-Schroth Co.* v. *Cleveland Trust Co.,* 305 U. S. 47, 57; *Powers-Kennedy Corporation* v. *Concrete Co.,* 282 U. S. 175, 185–6; *Mackay Radio Co.* v. *Radio Corporation,* 306 U. S. 86. But here Stone's letters to Baker, whose authenticity has not been questioned in this case, afford convincing proof that Stone had conceived of the idea of tuning all four circuits prior to the date of Marconi's invention. Cf. *Bickell* v. *Smith-Hambury-Scott Welding Co.,* 53 F. 2d 356, 358.

It is well established that as between two inventors priority of invention will be awarded to the one who by satisfying proof can show that he first conceived of the invention. *Philadelphia & Trenton R. Co.* v. *Stimpson,* 14 Pet. 448, 462; *Loom Co.* v. *Higgins,* 105 U. S. 580, 593; *Radio Corporation* v. *Radio Laboratories,* 293 U. S. 1, 11–13; *Christie* v. *Seybold,* 55 F. 69, 76; *Automatic Weighing Mach. Co.* v. *Pneumatic Scale Corp.,* 158 F. 415, 417–

22; *Harper* v. *Zimmermann,* 41 F. 2d 261, 265; *Sachs* v. *Hartford Electric Supply Co.,* 47 F. 2d 743, 748.

Commercial success achieved by the later inventor and patentee cannot save his patent from the defense of anticipation by a prior inventor.[20] Compare *Smith* v. *Hall,* 301 U. S. 216 with *Smith* v. *Snow,* 294 U. S. 1. To obtain the benefit of his prior conception, the inventor must not abandon his invention, *Gayler* v. *Wilder,* 10 How. 477, 481, but must proceed with diligence to reduce it to practice. We think Stone has shown the necessary diligence. Compare *Radio Corporation* v. *Radio Laboratories, supra,* 13, 14. The delay until 1902 in including in his patent specifications the sentences already referred to, which explicitly provide for tuning of the antenna circuits, does not in the circumstances of this case show any abandonment of that

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[20] Even if the lack of invention in Marconi's improvement over Stone—making adjustable the tuning of the antenna circuits which Stone had said should be tuned—could be said to be in sufficient doubt so that commercial success could aid in resolving the doubt, *Thropp's Sons Co.* v. *Seiberling,* 264 U. S. 320, 330; *DeForest Radio Co.* v. *General Electric Co.,* 283 U. S. 664, 685; *Altoona Theatres* v. *Tri-Ergon Corp.,* 294 U. S. 477, 488, it has not been established that the alleged improvement contributed in any material degree to that success. Compare *Altoona Theatres* v. *Tri-Ergon Corp., supra.* Marconi's specifications disclose a large number of details of construction, none of which is claimed as invention in this patent, in which his apparatus differed from, and may have been greatly superior to, Stone's. Many of these formed the subject of prior patents. After his application for his patent, as well as before, Marconi made or adopted a great number of improvements in his system of wireless telegraphy. Two of his engineers have written that a major factor in his successful transmission across the Atlantic in December, 1901, was the use of much greater power and higher antennae than had previously been attempted, an improvement in no way suggested by the patent here in suit. Fleming, Electric Wave Telegraphy, 449–53; Vyvyan, Wireless Over Thirty Years, 22–33. Indeed both are agreed that in the actual transmission across the Atlantic tuning played no part; the receiver antenna consisted of a wire suspended by a kite which rose

feature of Stone's invention since, as we have seen, the idea of such tuning was at least implicit in his original application, and the 1902 amendments merely clarified that application's effect and purport.

Marconi's patent No. 763,772 was sustained by a United States District Court in *Marconi Wireless Telegraph Co.* v. *National Signalling Co.*, 213 F. 815, and his invention as specified in his corresponding British patent No. 7777 of 1900, was upheld in *Marconi* v. *British Radio & Telegraph Co.*, 27 T. L. R. 274, 28 R. P. C. 18. The French court likewise sustained his French patent, Civil Tribunal of the Seine, Dec. 24, 1912. None of these courts considered the Stone patent or his letters. All rest their findings of invention on Marconi's disclosure of a four-circuit system and on his tuning of the four circuits, in the

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and fell with the wind, varying the capacity so much as to make tuning impossible. *Ibid.*

By 1913, when he testified in the National Electric Signalling Co. case, that "due to the utilization of the invention" of this patent he had successfully transmitted messages 6,600 miles, he had, after almost continuous experimentation, further increased the power used, developed new apparatus capable of use with heavy power, enlarged his antennae and adopted the use of horizontal, "directional" antennae, and made use of improved types of spark gaps and detecting apparatus, including the Fleming cathode-anode tube, the crystal detector, and sound recording of the signals—to mention but a few of the improvements made. He had also discovered that much greater distances could be attained at night. See Vyvyan, *supra*, 34–47, 55–60. The success attained by the apparatus developed by Marconi and his fellow engineers by continuous experimentation over a period of years—however relevant it might be in resolving doubts whether the basic four-circuit, tuned system disclosed by Marconi, and before him by Stone, involved invention—cannot, without further proof, be attributed in significant degree to any particular one of the many improvements made by Marconi over Stone during a period of years. The fact that Marconi's apparatus as a whole was successful does not entitle him to receive a patent for every feature of its structure.

sense of rendering them resonant to the same frequency, in both of which respects Stone anticipated Marconi, as we have seen. None of these opinions suggests that if the courts had known of Stone's anticipation, they would have held that Marconi showed invention over Stone by making the tuning of his antenna circuit adjustable, or by using Lodge's variable inductance for that purpose. In *Marconi Wireless Telegraph Co.* v. *Kilbourne & Clark Mfg. Co.*, 239 F. 328, affirmed 265 F. 644, the district court held that the accused device did not infringe. While it entered formal findings of validity which the Circuit Court of Appeals approved, neither court's opinion discussed the question of validity and that question was not argued in the Circuit Court of Appeals.[21]

Marconi's reputation as the man who first achieved successful radio transmission rests on his original patent, which became reissue No. 11,913, and which is not here

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[21] A preliminary injunction restraining infringement was entered in *Marconi Wireless Tel. Co.* v. *DeForest Co.*, 225 F. 65, affirmed, 225 F. 373, both courts, without independent discussion of the validity of the patent, determining that the decision in the *National Signalling Co.* case justified the grant of preliminary relief. A preliminary injunction was also granted in *Marconi Wireless Tel. Co.* v. *Atlantic Communications Co.*, an action brought in the Eastern District of New York.

Stone's letters were introduced in evidence in the *Atlantic Communications Company* case and the *Kilbourne & Clark* case. His deposition in the latter case, taken February 28 and 29, 1916, was incorporated in the record in this case. He there testified that he had refrained from producing proofs of the priority of his invention when called upon to testify in prior litigation in 1911 and 1914 because he wished the priority of his invention to be established by the owners of the patent—the Stone Telegraph Co. and its bondholders—in order to be sure that a bona fide defense would be made. He said that by May 1915, when he testified in the *Atlantic Communications Co.* case, he had concluded that the owners of the patent were not in a financial position to litigate, and that the Atlantic Co. "would make a bona fide Stone defense."

in question. That reputation, however well-deserved, does not entitle him to a patent for every later improvement which he claims in the radio field. Patent cases, like others, must be decided not by weighing the reputations of the litigants, but by careful study of the merits of their respective contentions and proofs. As the result of such a study we are forced to conclude, without undertaking to determine whether Stone's patent involved invention, that the Court of Claims was right in deciding that Stone anticipated Marconi, and that Marconi's patent did not disclose invention over Stone. Hence the judgment below holding invalid the broad claims of the Marconi patent must be affirmed. In view of our interpretation of the Stone application and patent we need not consider the correctness of the court's conclusion that even if Stone's disclosures should be read as failing to direct that the antenna circuits be made resonant to a particular frequency, Marconi's patent involved no invention over Lodge, Tesla, and Stone.

Claim 16 of Marconi patent No. 763,772.

The Government asks us to review so much of the decision of the Court of Claims as held valid and infringed Claim 16 of Marconi's patent No. 763,772. That claim is for an antenna circuit at the receiver connected at one end to "an oscillation-receiving conductor" and at the other to a capacity (which could be the earth), containing the primary winding of a transformer, "means for adjusting the two transformer-circuits in electrical resonance with each other," and "an adjustable condenser in a shunt connected with the open circuit, and around said transformer-coil." Marconi thus discloses and claims the addition to the receiver antenna of an adjustable condenser connected in a shunt around the primary of the transformer. The specifications describe the condenser as "preferably one provided with two telescoping metallic tubes separated by a dielectric and arranged to readily

vary the capacity by being slid upon each other." Marconi, however, makes no claim for the particular construction of the condenser.

Although the claim broadly provides for "means of adjusting the two transformer-circuits in electrical resonance," Marconi's drawings disclose the use of a variable inductance connected between the aerial conductor and the transformer-coil in such a manner that the variable inductance is not included in that part of the antenna circuit which is bridged by the condenser. The condenser is thus arranged in parallel with the transformer coil and in series with the variable inductance. In his specifications Marconi enumerates a number of preferred adjustments for tuning the transmitting and receiving stations, showing the precise equipment to be used to achieve tuning to the desired wave-length. The two tunings which show the use of the adjustable condenser in the receiver antenna also make use of the variable inductance. And his specifications state: "In a shunt around said primary j^1 [the primary of the transformer] I usually place a condenser h . . . An inductance coil g^1 of variable inductance is interposed in the primary circuit of the transformer, being preferably located between the cylinder f^1 [the aerial capacity] and the coil j^1."

In this respect the devices which the court below found to infringe Claim 16 exhibit somewhat different arrangements. Apparatus manufactured by the Kilbourne and Clark Company, and used by the Government, had a receiver antenna circuit containing a variable inductance in addition to the transformer coil, and having an adjustable condenser so constructed that it could be connected either in series with the two inductances, or in a shunt bridging both of them. Apparatus manufactured by the Telefunken Company showed a similar antenna circuit having no variable inductance, but having an adjustable condenser so arranged that it could be connected either in

series with the transformer coil, or in parallel with it by placing the condenser in a shunt circuit which would thus bridge all the inductance in the antenna circuit.

The Marconi patent does not disclose the function which is served by the adjustable condenser disclosed by Claim 16, except in so far as Marconi in his specifications, in describing the means of tuning the receiver circuits to a particular desired frequency, prescribes specific values for both the variable inductance and the adjustable condenser in the receiver antenna circuit. The Court of Claims found that this indicated "that the purpose of the condenser connected in shunt with the primary winding of the transformer of the receiver, is to enable the electrical periodicity or tuning of the open circuit of the receiver to be altered."

The court thus based its holding that Claim 16 disclosed patentable invention on its finding that Marconi, by the use of an adjustable condenser in the antenna circuit, disclosed a new and useful method of tuning that circuit. The Government contends that the arrangement of the antenna circuit disclosed by Marconi's specifications—with the condenser shunted around the transformer coil but not around the variable inductance—is such that the condenser cannot increase the wave-length over what it would be without such a condenser, and that it can decrease that wave-length only when adjusted to have a very small capacity. The Government contends therefore that its principal function is not that of tuning but of providing "loose coupling." [22] The Government does not deny that this precise arrangement is novel and useful, but it contends that its devices do not infringe that

[22] See note 13, *supra*. Most of the current in the antenna circuit is said to pass through the condenser shunt and not through the transformer coil, thus minimizing the effect upon the frequency of vibrations in the antenna circuit of the magnetic stresses set up in the primary of the transformer by the current induced in the secondary.

precise arrangement, and that Claim 16, if more broadly construed so as to cover its apparatus, is invalid because anticipated by the prior art, particularly the patents of Pupin and Fessenden.

As we have seen from our discussion of the other claims of the Marconi patent, the idea of tuning the antenna circuits involved no patentable invention. It was well known that tuning was achieved by the proper adjustment of either the inductance or the capacity in a circuit, or both. Lodge and Stone had achieved tuning by the use of an adjustable induction coil, so arranged that its effective inductance could readily be varied.

But capacity was no less important in tuning. De Tunzelmann's descriptions of Hertz's experiments show that Hertz, in order to make his receiving apparatus resonant to the particular frequency radiated by the transmitter, carefully determined the capacity of both, and indeed disclosed a means of adjusting the capacity of the receiver by attaching to it wires whose length could readily be varied. Marconi in his prior patent No. 586,193, granted July 13, 1897, which became reissue No. 11,913, had disclosed a two-circuit system for the transmission of radio waves in which both transmitter and receiver had large metal plates serving as capacity areas. His specifications describe the construction of transmitting and receiving stations so as to be resonant to the same frequency by calculation of the length of these metal plates, thereby determining the capacity of the antenna circuits of transmitter and receiver respectively. He states that the plates are "preferably of such a length as to be electrically tuned with the electric oscillations transmitted," and describes means of achieving this result so as to determine "the length most appropriate to the length of wave emitted by the oscillator." Claim 24 of his patent claims "the combination of a transmitter capable of producing electrical oscillations or rays of definite character at the

will of the operator, and a receiver located at a distance and having a conductor tuned to respond to such oscillations . . ." The only means of achieving this tuning disclosed by the specifications is the determination of the capacity of the antenna of transmitter and receiver in the manner described.

Moreover the use of an adjustable condenser as a means of tuning was known to the prior art. Pupin in patent No. 640,516, applied for May 28, 1895, and granted January 2, 1900, before Marconi, disclosed the use of an adjustable condenser as a means of tuning a receiving circuit in a system of wired telegraphy. Pupin's patent was designed to permit the simultaneous transmission over a wire of several messages at different frequencies, and the selective reception at a given receiving station of the particular message desired, by tuning the receiving circuit to the frequency at which that message was transmitted. His specifications and drawings disclose at the receiver a telegraph key or other suitable detecting instrument located in a shunt from the wire along which the messages were passed. The shunt circuit included a condenser "of adjustable capacity," an adjustable induction coil, and a detecting instrument. His specifications state that "the capacity of the condenser H and the self-induction of the [induction] coil I being such that the natural period or frequency of the shunt or resonance circuit HI is the same as the period of one of the electromotive forces which produce the current coming over the line . . . this circuit HI will be in resonance with the current and therefore will act selectively with respect to it." He disclosed an alternative system in which a similar shunt circuit containing a condenser, already described as of adjustable capacity, and the primary of a transformer, was inductively coupled with another circuit containing the secondary of the transformer, an induction coil, an adjustable condenser, and a receiving device. He thus in effect dis-

closed an open receiving circuit with earth connection including the primary of an oscillation transformer—the secondary of which is connected in a circuit with a telegraph key or other suitable detecting instrument—and an adjustable condenser in a shunt bridging the primary of the transformer and thus connected in parallel with it.

Thus Pupin showed the use of an adjustable condenser as a means of tuning an electrical circuit so as to be selectively receptive to impulses of a particular frequency. It is true that his patent related not to the radio art but to the art of wired telegraphy, an art which employed much lower frequencies. But so far as we are informed the principles of resonance, and the methods of achieving it, applicable to the low frequencies used by Pupin are the same as those applicable to high frequency radio transmission and reception.

Fessenden, in patent No. 706,735, applied for Dec. 15, 1899, before Marconi, and granted Aug. 12, 1902, disclosed, in the antenna circuit of a radio receiver, a condenser in a shunt around a coil. The coil was used in effect as a transformer; by the magnetic lines of force set up when a current passed through it an indicator was caused to move, thereby either closing an electrical connection or giving a visible signal. Fessenden's specifications do not clearly disclose the purpose of his condenser, but they specify that it must be "of the proper size." He also discloses a condenser in a shunt circuit around the terminals of a spark gap in the antenna circuit of the transmitter, and his specifications prescribe that "This shunt-circuit must be tuned to the receiving-conductor; otherwise the oscillations produced by it will have no action upon the wave-responsive device at the receiving-station."

We have referred to the Pupin and Fessenden patents, not for the purpose of determining whether they anticipate Claim 16 of Marconi, as the Government insists, but to indicate the importance of considering them in that

aspect, together with the relevant testimony, which the court below did not do. In the present state of the record we do not undertake to determine whether and to what extent these disclosures either anticipate Claim 16 of the Marconi patent or require that claim to be so narrowly construed that defendants' accused devices or some of them do not infringe Marconi.

Although the Pupin and Fessenden patents were in the record before the Court of Claims when it entered its decision finding Claim 16 valid and infringed, they were not referred to in connection with Claim 16 either in the court's opinion or in its findings, evidently because not urged upon that court by the Government as anticipating Claim 16. But this Court, in the exercise of its appellate power, is not precluded from looking at any evidence of record which, whether or not called to the attention of the court below, is relevant to and may affect the correctness of its decision sustaining or denying any contention which a party has made before it. *Muncie Gear Co.* v. *Outboard Motor Co.*, 315 U. S. 759, 766–8; Act of May 22, 1939, 28 U. S. C. § 288; cf. *Hormel* v. *Helvering*, 312 U. S. 552, 556.

In order to determine whether this Court should consider the evidence which the Government now presses upon it, and should on the basis of that evidence either decide for itself whether Claim 16 is valid and infringed or remand that question to the Court of Claims for further consideration, it is necessary to set out in some detail the relevant proceedings below. The case was referred to a special commissioner for the taking of testimony under a stipulation that the issue of reasonable compensation for damages and profits be postponed until the determination of the issues of validity and infringement. On June 26, 1933, the Commissioner filed a report in which he made the following findings with regard to Claim 16, which the Court of Claims later adopted in substance:

"LXII. Claim 16 of Marconi #763772 is directed to subject matter which is new and useful . . .

"LXV. The receiving apparatus of the Kilbourne & Clark Company, shown in exhibit 95, and the receiver made by the Telefunken company, illustrated in exhibit 79, each has apparatus coming within the terminology of claim 16."

Both parties filed exceptions to the Commissioner's report. The Marconi Company excepted to part of finding LXII, and took several exceptions which were formally addressed to finding LXV. The Government, in a memorandum, opposed the suggested amendments to these findings. But the Government filed no exceptions to these two findings, nor did it, in its extensive brief before the Court of Claims, make any contention that Claim 16 either is invalid or was not infringed.

After the court had rendered its interlocutory decision holding Claim 16 valid and infringed, the case was sent back to the Commissioner to take evidence on the accounting. Much evidence was taken bearing on the function served by the condenser in the arrangement described in Claim 16 and in the Government's receivers, and in that connection the Pupin and Fessenden patents were again introduced in evidence by the Government. When the Pupin patent was offered the Commissioner stated: "Obviously, as I understand the offer of this patent of Pupin, it does not in any way attack the validity of Claim 16 of the Marconi patent in suit. As you state Mr. Blackmar, that has been decided by the Court, and I do not recall just now what procedure was followed after the decision and prior to this accounting proceeding; but the defendant had at that time opportunity for a motion for a new trial and presentation of newly-discovered evidence and all those matters." Accordingly, the Commissioner stated that he received the patent in evidence "for the sole purpose of aiding the witness and the Commissioner and the

Court in an understanding of how the condenser in the Marconi patent operates." And in offering the Fessenden patent counsel for the Government similarly stated that it was offered "not to show invalidity but as showing justification for the defendant's use."

In its exceptions to the Commissioner's report on the accounting the Government asked the Court of Claims to make certain specific findings as to the mode of operation of the arrangements disclosed in the Pupin and Fessenden patents, and also to find that

"The mode of connecting the primary condenser in parallel with the antenna-to-earth capacity used by the defendant followed the disclosure of Pupin 640,516 and the Fessenden patent 706,735 . . . and hence does not infringe the Marconi claim 16 which is based upon a different arrangement, operating in a different manner to obtain a different result."

The Government contended that there was no finding of fact that Claim 16 had been infringed, and that the court, in the course of the accounting proceeding had by an order of October 22, 1937, reopened the entire subject of infringement. We agree with the court that the Commissioner's finding LXV, which the court adopted as finding LXIII, was a finding of infringement, and we see no reason to question the court's conclusion that its order had not reopened the subject of infringement.

In view, however, of the Government's apparent misunderstanding of the scope of the issues left open on the accounting we think that its request for a finding of noninfringement specifically addressed to the Pupin and Fessenden patents was a sufficient request to the court to reconsider its previous decision of infringement. And while most of the argument on the Government's exceptions to the Commissioner's report was based on evidence taken upon the accounting, the Government's briefs suf-

ficiently disclosed to the court that the Pupin and Fessenden patents, at least, had been in the record prior to the interlocutory decision.

The court, in rejecting the Government's request for a finding of non-infringement, stated: "The question of infringement of Marconi Claim 16 . . . is not before us in the present accounting." "The sole purpose and function of an accounting in a patent infringement case is to ascertain the amount of compensation due, and no other issue can be brought into the accounting to change or alter the court's prior decision." We cannot say with certainty whether in rejecting the Government's request the court thought that it lacked power to reconsider its prior decision, or whether it held merely that in the exercise of its discretion it should not do so. Nor does it appear that, assuming it considered the question to be one of discretion, it recognized that in part at least the Government's request was based on evidence, having an important bearing on the validity and construction of Claim 16, which had been before the court but had not been considered by it when it held Claim 16 valid and infringed.

Although the interlocutory decision of the Court of Claims on the question of validity and infringement was appealable, *United States* v. *Esnault-Pelterie,* 299 U. S. 201, 303 U. S. 26; 28 U. S. C. § 288 (b), as are interlocutory orders of district courts in suits to enjoin infringment, 28 U. S. C. § 227 (a); *Simmons Co.* v. *Grier Bros. Co.,* 258 U. S. 82, 89, the decision was not final until the conclusion of the accounting. *Barnard* v. *Gibson,* 7 How. 649; *Humiston* v. *Stainthorp,* 2 Wall. 106; *Simmons Co.* v. *Grier Bros. Co., supra,* 89. Hence the court did not lack power at any time prior to entry of its final judgment at the close of the accounting to reconsider any portion of its decision and reopen any part of the case. *Perkins* v. *Fourniquet,* 6 How. 206, 208; *McGourkey* v. *Toledo & Ohio Central Ry. Co.,* 146 U. S. 536, 544; *Simmons Co.*

v. *Grier Bros. Co., supra,* 90–91. It was free in its discretion to grant a reargument based either on all the evidence then of record or only the evidence before the court when it rendered its interlocutory decision, or to reopen the case for further evidence.

Whether it should have taken any of these courses was a matter primarily for its discretion, to be exercised in the light of various considerations which this Court cannot properly appraise without more intimate knowledge than it has of the proceedings in a long and complex trial. Among those considerations are the questions whether, as appears to be the case from such portions of the record as have been filed in this Court or cited to us by counsel, the Government failed to make any contention as to the validity or construction of Claim 16 in the proceedings leading to the interlocutory decision; whether the showing of non-infringement which it now makes is sufficiently strong, and the public interest that an invalid patent be not sustained is sufficiently great, to justify reconsidering the decision as to Claim 16 despite the failure of Government counsel to press its contention at the proper time; whether adequate consideration of the question of non-infringement can be had on the existing record, or whether additional testimony should be received; and whether, balancing the strength or weakness of the Government's present showing of non-infringement against the undesirability of further prolonging this already extended litigation, the case is one which justifies reconsideration.

These are all matters requiring careful consideration by the trial court. In order that the case may receive that consideration, we vacate the judgment as to Claim 16 and remand the cause to the Court of Claims for further proceedings in conformity to this opinion.

If on the remand the court should either decline to reconsider its decision of infringement, or should upon reconsideration adhere to that decision, it should pass upon

the contention of the Government, urged here and below, as to the measure of damages, with respect to which the court made no findings. The Government's contention is that the variable capacity shunt of the accused devices bridged all the inductance in the receiving antenna circuit, and that even though those devices infringed they nevertheless embody an improvement over Marconi's Claim 16, in which only the transformer coil was bridged. In computing the damages the court measured them by 65% of the cost to the Government of the induction coils which would be required to replace in the accused devices the adjustable condensers as a means of tuning, taking into account the greater convenience and efficiency of condenser tuning. The allowance of only 65% was on the theory that if the parties had negotiated for the use of the invention the price would have been less than the cost to the Government of the available alternative means of tuning.

In computing the damages the court apparently did not take into account or attempt to appraise any contribution which may have been made by the improvement over Marconi which the Government asserts was included in the accused devices. The court found that where the condenser is connected in series with the inductance coils in the antenna it "can be used to shorten the natural resonant wave length of the antenna circuit but cannot lengthen it beyond what would be the resonant wave length if the condenser were not present." On the other hand, it found that when the condenser is connected in parallel it enables the periodicity of the antenna to be lowered, permitting the reception of longer wave-lengths.

The computation of damages was based on the premise that the advantage to the Government resulting from the infringement was derived from the ability which the accused devices had thus acquired to receive longer wave-lengths. But there was substantial testimony that the ar-

rangement disclosed by Marconi's specifications was in effect a connection in series which did not make possible reception of longer wave-lengths, as did the arrangement in the accused devices. And the court nowhere found that the arrangement covered by Marconi's Claim 16 did make possible such reception. The appropriate effect to be given to this testimony is important in the light of the recognized doctrine that if a defendant has added "non-infringing and valuable improvements which had contributed to the making of the profits," it is not liable for benefits resulting from such improvements. *Westinghouse Electric Co.* v. *Wagner Mfg. Co.*, 225 U. S. 604, 614–15, 616–17; *Sheldon* v. *Metro-Goldwyn Corp.*, 309 U. S. 390, 402–406, and cases cited. Finding LXIII that the Government was using "apparatus coming within the terminology of Claim 16," and Finding 23 on the accounting that the accused devices "infringe Claim 16 of the Marconi patent," give no aid in solving this problem for they are not addressed to the question whether, assuming infringement, the Government has made improvements which of themselves are non-infringing. That can only be afforded by findings which appraise the evidence, establish the scope of Marconi's claim and the nature and extent of the difference in function, if any, between the device claimed by Marconi and those used by the Government, and determine whether any differences shown to exist constitute a "non-infringing improvement" for which Marconi deserves no credit.

The judgment as to Claim 16 will be vacated and the cause remanded for further proceedings.

The Fleming Patent No. 803,684.

The Fleming patent, entitled: "Instrument for Converting Alternating Electric Currents into Continuous Currents" was applied for April 19, 1905, and granted on November 7, 1905 to the Marconi Company, as assignee

of Fleming. Its specifications state that "this invention relates to certain new and useful devices for converting alternating electric currents, and especially high-frequency alternating electric currents or electric oscillations, into continuous electric currents for the purpose of making them detectable by and measurable with ordinary direct-current instruments, such as a 'mirror-galvanometer' of the usual type or any ordinary direct-current ammeter." Fleming's drawings and specifications show a combination apparatus by which alternating current impulses received through an antenna circuit containing the primary of a transformer are induced in the secondary of the transformer. To one end of the secondary coil is connected a carbon filament like that of an incandescent electric lamp, which is heated by a battery. Surrounding, but not touching the filament, is a cylinder of aluminum open at the top and bottom, which is connected with the other end of the secondary. The cylinder and filament are enclosed in an evacuated vessel such as an ordinary electric lamp bulb. An indicating instrument or galvanometer is so located in this circuit as to respond to the flow of current in it. The specifications explain the operation of this device:

"This arrangement described above operates as an electric valve and permits negative electricity to flow from the hot carbon *b* to the metal cylinder *c*, but not in the reverse direction, so that the alternations induced in the coil *k* by the Hertzian waves received by the aerial wire *n* are rectified or transformed into a more or less continuous current capable of actuating the galvanometer *l* by which the signals can be read."

The specifications further state:

". . . the aerial wire *n* may be replaced by any circuit in which there is an alternating electromotive force, whether of low frequency or of high frequency . . ."

"Hence the device may be used for rectifying either high-frequency or low-frequency alternating currents of electrical oscillations . . ."

Only Claims 1 and 37 of the patent are in suit. They read as follows:

"1. The combination of a vacuous vessel, two conductors adjacent to but not touching each other in the vessel, means for heating one of the conductors, and a circuit outside the vessel connecting the two conductors.

"37. At a receiving-station in a system of wireless telegraphy employing electrical oscillations of high frequency a detector comprising a vacuous vessel, two conductors adjacent to but not touching each other in the vessel, means for heating one of the conductors, a circuit outside of the vessel connecting the two conductors, means for detecting a continuous current in the circuit, and means for impressing upon the circuit the received oscillations."

The current applied to the filament or cathode by the battery sets up a flow of electrons (negative electric charges) from the heated cathode, which are attracted to the cold plate or anode when the latter is positively charged. When an alternating current is set up in the circuit containing the cathode, anode, and secondary of the transformer, the electronic discharge from the cathode closes the circuit and permits a continuous flow of electricity through it when the phase of the current is such that the anode is positively charged, while preventing any flow of current through the tube when the anode is negatively charged. The alternating current is thus rectified so as to produce a current flowing only in one direction. See *DeForest Radio Co.* v. *General Electric Co.*, 283 U. S. 664; *Radio Corporation* v. *Radio Laboratories*, 293 U. S. 1; *Detrola Radio Corp.* v. *Hazeltine Corporation*, 313 U. S. 259.

Claims 1 and 37 of the Fleming patent are identical in their structural elements. Both claim the vacuum tube,

and the two electrodes connected by a circuit outside the tube, one element being heated. The claims differ only in that Claim 37 includes "means for detecting" the continuous or direct current in the anode-cathode circuit, and "means for impressing upon the circuit the received oscillations" from the transformer coil of the antenna circuit.

In the patent as originally issued there had been another difference between the two claims. Claim 37 describes the tube as being used "in a system of wireless telegraphy employing electrical oscillations of high frequency." No such limitation was placed on Claim 1 as originally claimed, and the specifications already quoted plainly contemplated the use of the claimed device with low as well as high frequency currents. This distinction was eliminated by a disclaimer filed by the Marconi Company November 17, 1915, restricting the combination of the elements of Claim 1 to a use "in connection with high frequency alternating electric currents or electric oscillations of the order employed in Hertzian wave transmission," and deleting certain references to low frequencies in the specifications. The result of the disclaimer was to limit both claims to the use of the patented device for rectifying high frequency alternating waves or currents such as were employed in wireless telegraphy.

The earliest date asserted for Fleming's invention, as limited by the disclaimer, is November 16, 1904. Twenty years before, on October 21, 1884, Edison had secured United States Patent No. 307,031. In his specifications he stated:

"I have discovered that if a conducting substance is interposed anywhere in the vacuous space within the globe of an incandescent electric lamp, and said conducting substance is connected outside of the lamp with one terminal, preferably the positive one, of the incandescent conductor, a portion of the current will, when the lamp is in opera-

tion, pass through the shunt-circuit thus formed, which shunt includes a portion of the vacuous space within the lamp. This current I have found to be proportional to the degree of incandescence of the conductor or candle-power of the lamp."

Edison proposed to use this discovery as a means of "indicating, variations in the electro-motive force in an electric circuit," by connecting a lamp thus equipped at a point where the current was to be measured. The drawings of his patent show an electric circuit, including a filament (cathode) and a plate (anode) both "in the vacuous space within the globe"—an electric light bulb. The shunt-circuit extends from the plate through a galvanometer to the filament. His specifications disclose that the vacuous space within the globe is a conductor of current between the plate anode and the filament; that the strength of the current in the filament-to-plate circuit through the vacuum depends upon the degree of incandescence at the filament; and that the plate anode is preferably connected to the positive side of the current supply. The claims of the patent are for the combination of the filament, plate and interconnecting circuit, including the galvanometer. Claim 5, a typical claim, reads as follows:

"The combination, with an incandescent electric lamp, of a circuit having one terminal in the vacuous space within the globe of said lamp, and the other connected with one side of the lamp-circuit, and electrically controlled or operated apparatus in said circuit, substantially as set forth."

The structure disclosed in Fleming's Claims 1 and 37 thus differed in no material respect from that disclosed by Edison. Since Fleming's original Claim 1 is merely for the structure, it reads directly on Edison's Claim 5 and could not be taken as invention over it.

Fleming used this structure for a different purpose than Edison. Edison disclosed that his device operated to pass a current across the vacuous space within the tube between filament and plate. He used this current as a means of measuring the current passing through the filament circuit. Fleming, in his specifications, disclosed the use of his tube as a rectifier of alternating currents, and in Claim 37 he claimed the use of that apparatus as a means of rectifying alternating currents of radio frequency. But in this use of the tube to convert alternating into direct currents there was no novelty for it had been disclosed by others and by Fleming himself long before Fleming's invention date.

On January 9, 1890, ten years before Fleming filed his application, he stated in a paper read before the Royal Society of London:

"It has been known for some time that if a platinum plate or wire is sealed through the glass bulb of an ordinary carbon filament incandescent lamp, this metallic plate being quite out of contact with the carbon conductor, a sensitive galvanometer connected between this insulated metal plate enclosed in the vacuum and the external *positive* electrode of the lamp indicates a current of some milliampères passing through it when the lamp is set in action, but the same instrument when connected between the *negative* electrode of the lamp and the insulated metal plate indicates no sensible current. This phenomenon in carbon incandescence lamps was first observed by Mr. Edison, in 1884, and further examined by Mr. W. H. Preece, in 1885." Proceedings of the Royal Society of London, vol. 47, pp. 118–9.

Fleming's 1890 paper further pointed out that the vacuous space "possesses a curious unilateral conductivity"; that is, it permits current to "flow across the vacuous space from the hot carbon [cathode]to the cooler metal plate [anode], but not in the reverse direction." *Id.* 122.

He noted the ability of the tube to act as a rectifier of alternating current, saying:

"When the lamp is actuated by an *alternating* current a *continuous* current is found flowing through a galvanometer, connected between the insulated plate and *either* terminal of the lamp. The direction of the current through the galvanometer is such as to show that negative electricity is flowing from the plate through the galvanometer to the lamp terminal." *Id.* 120.

Fleming's paper thus noted, contrary to the then popular conception, that it is negative electricity which flows from cathode to anode, but he emphasized that even this had been a part of general scientific knowledge, as follows:

"The effect of heating the negative electrode in facilitating discharge through vacuous spaces has previously been described by W. Hittorf ('Annalen der Physik und Chemie,' vol. 21, 1884, p. 90–139), and it is abundantly confirmed by the above experiments. We may say that a vacuous space bounded by two electrodes—one incandescent, and the other cold—possesses a unilateral conductivity for electric discharge when these electrodes are within a distance of the mean free path of projection of the molecules which the impressed electromotive force can detach and send off from the hot negative electrode.

"This unilateral conductivity of vacuous spaces having unequally heated electrodes has been examined by MM. Elster and Geitel (see 'Wiedemann's Annalen,' vol. 38, 1889, p. 40), and also by Goldstein ('Wied. Ann.,' vol. 24, 1885, p. 83), who in experiments of various kinds have demonstrated that when an electric discharge across a vacuous space takes place from a carbon conductor to another electrode, the discharge takes place at lower electromotive force when the carbon conductor is the negative electrode and is rendered incandescent." *Id.* 125–6.

Fleming's reference in this publication to the unilateral conductivity of the vacuous space between cathode and anode, and the consequent ability of the two to derive a continuous unidirectional current from an alternating current was a recognition that the Edison tube embodying the structure described could be used as a rectifier of alternating current. This knowledge, disclosed by publication more than two years before Fleming's application, was a bar to any claim for a patent for an invention embodying the published disclosure. R. S. §§ 4886, 4920; 35 U. S. C. §§ 31, 69. *Wagner* v. *Meccano Ltd.*, 246 F. 603, 607; cf. *Muncie Gear Co.* v. *Outboard Co., supra,* 766.

It is unnecessary to decide whether Fleming's use of the Edison device for the purpose of rectifying high frequency Hertzian waves, as distinguished from low frequency waves, involved invention over the prior art, or whether the court below rightly held that the devices used by the Government did not infringe the claims sued upon, for we are of the opinion that the court was right in holding that Fleming's patent was rendered invalid by an improper disclaimer. It is plain that Fleming's original Claim 1, so far as applicable to use with low frequency alternating currents, involved nothing new, as Fleming himself must have known in view of his 1890 paper, and as he recognized by his disclaimer in 1915, made twenty-five years after his paper was published and ten years after his patent had been allowed. Its invalidity would defeat the entire patent unless the invalid portion had been claimed "through inadvertence, accident, or mistake, and without any fraudulent or deceptive intention," and was also disclaimed without "unreasonable" neglect or delay. R. S. §§ 4917, 4922; 35 U. S. C. §§ 65, 71; *Ensten* v. *Simon Ascher & Co.*, 282 U. S. 445, 452; *Altoona Theatres* v. *Tri-Ergon Corp.*, 294 U. S. 477, 493; *Maytag Co.* v. *Hurley Co.*, 307 U. S. 243.

We need not stop to inquire whether, as the Government contends, the subject matter of the disclaimer was improper as in effect adding a new element to the claim. See *Milcor Steel Co.* v. *Fuller Co.*, 316 U. S. 143, 147–8. For we think that the court below was correct in holding that the Fleming patent was invalid because Fleming's claim for "more than he had invented" was not inadvertent, and his delay in making the disclaimer was "unreasonable." Both of these are questions of fact, but since the court in its opinion plainly states its conclusions as to them, and those conclusions are supported by substantial evidence, its omission to make formal findings of fact is immaterial. Act of May 22, 1939, 53 Stat. 752, 28 U. S. C. § 288 (b); cf. *American Propeller Co.* v. *United States*, 300 U. S. 475, 479–80; *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U. S. 293.

The purpose of the rule that a patent is invalid in its entirety if any part of it be invalid is the protection of the public from the threat of an invalid patent, and the purpose of the disclaimer statute is to enable the patentee to relieve himself from the consequences of making an invalid claim if he is able to show both that the invalid claim was inadvertent and that the disclaimer was made without unreasonable neglect or delay. *Ensten* v. *Simon Ascher & Co., supra.* Here the patentee has sustained neither burden.

Fleming's paper of 1890 showed his own recognition that his claim of use of his patent for low frequency currents was anticipated by Edison and others. It taxes credulity to suppose, in the face of this publication, that Fleming's claim for use of the Edison tube with low frequency currents was made "through inadvertence, accident or mistake," which is prerequisite to a lawful disclaimer. No explanation or excuse is forthcoming for his claim of invention of a device which he had so often dem-

onstrated to be old in the art, and which he had specifically and consistently attributed to Edison. Nor is any explanation offered for the delay of the patentee—the Marconi Company—in waiting ten years to disclaim the use of the device with low frequency currents and to restrict it to a use with high frequency Hertzian waves which Edison had plainly foreshadowed but not claimed. For ten years the Fleming patent was held out to the public as a monopoly of all its claimed features. That was too long in the absence of any explanation or excuse for the delay, and hence in this case was long enough to invalidate the patent. The conclusion of the Court of Claims not only has support in the evidence, but we can hardly see how on this record any other could have been reached.

The Marconi Company's contention that it nowhere appears that Fleming was not the first inventor of the use of the patented device to rectify high frequency alternating currents is irrelevant to the question of the sufficiency of the disclaimer. The disclaimer itself is an assertion that the claimed use of the invention with low frequencies was not the invention of the patentee, whose rights were derived wholly from Fleming. This improper claim for something not the invention of the patentee rendered the whole patent invalid unless saved by a timely disclaimer which was not made.

The Marconi Company also asserts that, as it is suing as assignee of the patentee, it is unaffected by the provisions of the disclaimer statutes, which it construes as restricting to the "patentee" the consequences of unreasonable delay in making the disclaimer and as exempting the assignee from those consequences by the sentence "But no patentee shall be entitled to the benefits of this section if he has unreasonably neglected or delayed to enter a disclaimer." 35 U. S. C. 71. As the court below found, the Marconi Company was itself the patentee to whom the patent was

issued on the assignment of Fleming's application in conformity to 35 U. S. C. § 44. The right given by § 71 to the patentee or his assignees to sue for infringement upon a proper disclaimer obviously does not relieve the patentee from the consequences of his failure to comply with the statute because he acquired his patent under an assignment of the application. *Altoona Theatres* v. *Tri-Ergon Corp., supra; Maytag Co.* v. *Hurley Co., supra; France Mfg. Co.* v. *Jefferson Electric Co.*, 106 F. 2d 605, 610. Such a contention is not supported by the words of the statute and if allowed would permit the nullification of the disclaimer statute by the expedient of an assignment of the application. We need not consider whether one who has taken an assignment of a patent after its issuance would have any greater rights than his assignor in the event of the latter's undue delay in filing a disclaimer. Compare *Apex Electrical Mfg. Co.* v. *Maytag Co.*, 122 F. 2d 182, 189.

The judgment in No. 373 is vacated and the cause remanded to the Court of Claims for further proceedings not inconsistent with this opinion.

The judgment in No. 369 is affirmed.

So ordered.

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

MR. JUSTICE FRANKFURTER, dissenting in part:

I regret to find myself unable to agree to the Court's conclusion regarding the invalidity of the broad claims of Marconi's patent. Since broad considerations control the significance and assessment of the details on which judgment in the circumstances of a case like this is based, I shall indicate the general direction of my views.

It is an old observation that the training of Anglo-American judges ill fits them to discharge the duties cast

upon them by patent legislation.[1] The scientific attainments of a Lord Moulton are perhaps unique in the annals of the English-speaking judiciary. However, so long as the Congress, for the purposes of patentability, makes the determination of originality a judicial function, judges must overcome their scientific incompetence as best they can. But consciousness of their limitations should make

[1] "Considering the exclusive right to invention as given not of natural right, but for the benefit of society, I know well the difficulty of drawing a line between the things which are worth to the public the embarrassment of an exclusive patent, and those which are not. As a member of the patent board for several years, while the law authorized a board to grant or refuse patents, I saw with what slow progress a system of general rules could be matured. . . . Instead of refusing a patent in the first instance, as the board was authorized to do, the patent now issues of course, subject to be declared void on such principles as should be established by the courts of law. This business, however, is but little analogous to their course of reading, since we might in vain turn over all the lubberly volumes of the law to find a single ray which would lighten the path of the mechanic or the mathematician. It is more within the information of a board of academical professors, and a previous refusal of patent would better guard our citizens against harassment by law-suits. But England had given it to her judges, and the usual predominancy of her examples carried it to ours." Thomas Jefferson to Mr. Isaac M'Pherson, August 13, 1813, Works of Thomas Jefferson, Wash. Ed., vol. VI, pp. 181–82.

"I cannot stop without calling attention to the extraordinary condition of the law which makes it possible for a man without any knowledge of even the rudiments of chemistry to pass upon such questions as these. The inordinate expense of time is the least of the resulting evils, for only a trained chemist is really capable of passing upon such facts, e. g., in this case the chemical character of Von Furth's so-called 'zinc compound,' or the presence of inactive organic substances. . . . How long we shall continue to blunder along without the aid of unpartisan and authoritative scientific assistance in the administration of justice, no one knows; but all fair persons not conventionalized by provincial legal habits of mind ought, I should think, unite to effect some such advance." Judge Learned Hand in *Parke-Davis & Co.* v. *Mulford Co.*, 189 F. 95, 115 (1911).

them vigilant against importing their own notions of the nature of the creative process into Congressional legislation, whereby Congress "to promote the Progress of Science and useful Arts" has secured "for limited Times to . . . Inventors the exclusive Right to their . . . Discoveries." Above all, judges must avoid the subtle temptation of taking scientific phenomena out of their contemporaneous setting and reading them with a retrospective eye.

The discoveries of science are the discoveries of the laws of nature, and like nature do not go by leaps. Even Newton and Einstein, Harvey and Darwin, built on the past and on their predecessors. Seldom indeed has a great discoverer or inventor wandered lonely as a cloud. Great inventions have always been parts of an evolution, the culmination at a particular moment of an antecedent process. So true is this that the history of thought records striking coincidental discoveries—showing that the new insight first declared to the world by a particular individual was "in the air" and ripe for discovery and disclosure.

The real question is how significant a jump is the new disclosure from the old knowledge. Reconstruction by hindsight, making obvious something that was not at all obvious to superior minds until someone pointed it out,—this is too often a tempting exercise for astute minds. The result is to remove the opportunity of obtaining what Congress has seen fit to make available.

The inescapable fact is that Marconi in his basic patent hit upon something that had eluded the best brains of the time working on the problem of wireless communication—Clerk Maxwell and Sir Oliver Lodge and Nikola Tesla. Genius is a word that ought to be reserved for the rarest of gifts. I am not qualified to say whether Marconi was a genius. Certainly the great eminence of Clerk Maxwell and Sir Oliver Lodge and Nikola Tesla

in the field in which Marconi was working is not questioned. They were, I suppose, men of genius. The fact is that they did not have the "flash" (a current term in patent opinions happily not used in this decision) that begot the idea in Marconi which he gave to the world through the invention embodying the idea. But it is now held that in the important advance upon his basic patent Marconi did nothing that had not already been seen and disclosed.

To find in 1943 that what Marconi did really did not promote the progress of science because it had been anticipated is more than a mirage of hindsight. Wireless is so unconscious a part of us, like the automobile to the modern child, that it is almost impossible to imagine ourselves back into the time when Marconi gave to the world what for us is part of the order of our universe. And yet, because a judge of unusual capacity for understanding scientific matters is able to demonstrate by a process of intricate ratiocination that anyone could have drawn precisely the inferences that Marconi drew and that Stone hinted at on paper, the Court finds that Marconi's patent was invalid although nobody except Marconi did in fact draw the right inferences that were embodied into a workable boon for mankind. For me it speaks volumes that it should have taken forty years to reveal the fatal bearing of Stone's relation to Marconi's achievement by a retrospective reading of his application to mean this rather than that. This is for me, and I say it with much diffidence, too easy a transition from what was not to what became.

I have little doubt, in so far as I am entitled to express an opinion, that the vast transforming forces of technology have rendered obsolete much in our patent law. For all I know the basic assumption of our patent law may be false, and inventors and their financial backers do not need the incentive of a limited monopoly to stimulate

invention. But whatever revamping our patent laws may need, it is the business of Congress to do the revamping. We have neither constitutional authority nor scientific competence for the task.

MR. JUSTICE ROBERTS joins in this opinion.

MR. JUSTICE RUTLEDGE, dissenting in part:

Until now law [1] has united with almost universal repute [2] in acknowledging Marconi as the first to establish wireless telegraphy on a commercial basis. Before his invention, now in issue,[3] ether-borne communication traveled some eighty miles. He lengthened the arc to 6,000. Whether or not this was "inventive" legally, it was a great and beneficial achievement.[4] Today, forty years after the event, the Court's decision reduces it to an electrical mechanic's application of mere skill in the art.

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[1] *Marconi* v. *British Radio Tel. & Tel. Co.*, 27 T. L. R. 274; *Marconi* v. *Helsby Wireless Tel. Co.*, 30 T. L. R. 688; *Société Marconi* v. *Société Générale, etc.*, Civil Tribunal of the Seine, 3d Chamber, Dec. 24, 1912; *Marconi Wireless Telegraph Co.* v. *National Electric Signalling Co.*, 213 F. 815 (D. C.); *Marconi Wireless Telegraph Co.* v. *Kilbourne & Clark Mfg. Co.*, 265 F. 644 (C. C. A.), aff'g 239 F. 328 (D. C.).

[2] Cf., e. g., 14 Encyc. Britannica (14th ed.) 869.

[3] His earliest American patent, U. S. Patent No. 586,193, granted on July 13, 1897, later becoming Reissue Patent No. 11,913, is not in suit here. That patent did not embrace many of the crucial claims here involved and its product cannot compare in commercial usefulness with that of the patent in suit.

[4] Courts closer to it chronologically than we are have characterized it as a "conspicuous advance in wireless telegraphy"; "a real accomplishment" and the ideas involved in the patent were said to "have proven of great value to the world," to have brought about "an entirely new and useful result," "a new and very important industrial result" and "a wonderful conquest." "The Marconi patent stands out as an unassailable monument until new discoveries are made." Cf. the authorities cited in note 1, *supra*.

By present knowledge, it would be no more. School boys and mechanics now could perform what Marconi did in 1900. But before then wizards had tried and failed. The search was at the pinnacle of electrical knowledge. There, seeking, among others, were Tesla, Lodge and Stone, old hands and great ones. With them was Marconi, still young as the company went [5] obsessed with youth's zeal for the hunt.

At such an altitude, to work at all with success is to qualify for genius, if that is important. And a short step forward gives evidence of inventive power. For at that height a merely slight advance comes through insight only a first-rate mind can produce. This is so, whether it comes by years of hard work tracking down the sought secret or by intuition flashed from subconsciousness made fertile by long experience or shorter intensive concentration. At this level and in this company Marconi worked and won.

He won by the test of results. No one disputes this. His invention had immediate and vast success, where all that had been done before, including his own work, gave but narrowly limited utility. To make useful improvement at this plane, by such a leap, itself shows high capacity. And that is true, although it was inherent in the situation that Marconi's success should come by only a small margin of difference in conception. There was not room for any great leap of thought, beyond what he and others had done, to bring to birth the practical and useful result. The most eminent men of the time were conscious of the problem, were interested in it, had sought for years the exactly right arrangement, always approaching more nearly but never quite reaching the stage of prac-

[5] He was only twenty-six years old at the time he applied for the patent in suit, but he had already made substantial contributions to the field.

tical success. The invention was, so to speak, hovering in the general climate of science, momentarily awaiting birth. But just the right releasing touch had not been found. Marconi added it.

When to altitude of the plane of conception and results so immediate and useful is added well-nigh unanimous contemporary judgment, one who long afterward would overturn the invention assumes a double burden. He undertakes to overcome what would offer strong resistance fresh in its original setting. He seeks also to overthrow the verdict of time. Long-range retroactive diagnosis, however competent the physician, becomes hazardous by progression as the passing years add distortions of the past and destroy its perspective. No light task is accepted therefore in undertaking to overthrow a verdict settled so long and so well, and especially one so foreign to the art of judges.

In lawyers' terms this means a burden of proof, not insurmountable, but inhospitable to implications and inferences which in less settled situations would be permissible to swing the balance of judgment against the claimed invention. That Marconi received patents elsewhere which, once established, have stood the test of time as well as of contemporary judgment, and secured his American patent only after years were required to convince our office he had found what so many others sought, but emphasizes the weight and clarity of proof required to overcome his claim.

Marconi received patents here, in England, and in France.[6] The American patent was not issued perfunctorily. It came forth only after a long struggle had brought about reversal of the Patent Office's original and later rejections. The application was filed in November,

[6] U. S. Patent No. 763,772; British Patent No. 7777 of 1900; French Patent No. 305,060 of Nov. 3, 1900.

1900. In December it was rejected on Lodge,[7] and an earlier patent to Marconi.[8] It was amended and again rejected. Further amendments followed and operation of the system was explained. Again rejection took place, this time on Lodge, the earlier Marconi, Braun and other patents. After further proceedings, the claims were rejected on Tesla.[9] A year elapsed, but in March, 1904, reconsideration was granted. Some claims then were rejected on Stone,[10] others were amended, still others were cancelled, and finally on June 28, 1904, the patent issued. French and British patents had been granted in 1900.

Litigation followed at once. Among Marconi's American victories were the decisions cited above.[11] Abroad the results were similar.[12] Until 1935, when the Court of Claims held it invalid in this case, 81 Ct. Cl. 671, no court had found Marconi's patent wanting in invention. It stood without adverse judicial decision for over thirty years. In the face of the burden this history creates, we turn to the references, chiefly Tesla, Lodge and Stone. The Court relies principally on Stone, but without deciding whether this was inventive.

It is important, in considering the references, to state the parties' contentions concisely. The Government's statement is that they differ over whether Marconi was first to conceive four-circuit "tuning" for transmission of sound by Hertzian waves. It says this was taught previously by Tesla, Lodge and Stone. Petitioner however says none of them taught what Marconi did. It contends that Marconi was the first to accomplish the kind of tun-

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[7] British patent to Lodge No. 29,505.

[8] Cf. note 3 *supra.*

[9] U. S. Patent to Tesla No. 649,621, May 15, 1900, division of 645,576, March 20, 1900 (filed Sept. 2, 1897).

[10] Cf. text *infra.*

[11] Cf. note 1 *supra.*

[12] *Ibid.*

ing he achieved, and in effect urges this was patentably different from other forms found earlier.

Specifically petitioner urges that Tesla had nothing to do with either Hertzian waves or tuning, but in fact his transmitting and receiving wires could not be tuned.[13] Lodge, it claims, disclosed a tuned antenna, for either transmitter or receiver or both, but the closed circuits associated with the antenna ones were not tuned. Finally it is said Stone does not describe tuning the antenna, but does show tuning of the associated closed circuit. And Marconi tuned both.

Petitioner does not claim the general principles of tuning. It admits they had long been familiar to physicists and that Lodge and others fully understood them. But it asserts Lodge did not know what circuits should be tuned, to accomplish what Marconi achieved, and that, to secure this, "knowledge that tuning is possible is not enough—there is also required the knowledge of whether or not to tune and how much."

Likewise, petitioner does not deny that Stone knew and utilized the principles of tuning; but urges, with respect to the claim he applied them to all of the four circuits, that the only ones tuned, in his original application, were the closed circuits and therefore that the antenna circuits were not tuned; although it is not denied that the effects of tuning the closed circuits were reflected in the open ones by what Stone describes as "producing *forced* simple

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[13] Tesla in fact did not use Hertzian waves. His idea was to make the ether a conductor for long distances by using extremely high voltage, 20,000,000 to 30,000,000 volts, and extremely high altitudes, 30,000 to 40,000 feet or more, to secure transmission from aerial to aerial. Balloons, with wires attached reaching to the ground, were his suggested aerials. His system was really one for transmitting power for motors, lighting, etc., to "any terrestrial distance," though he incidentally mentions "intelligible messages." As he did not use Hertzian waves, he had no such problem of selectivity as Marconi, Lodge, Stone and others were working on later.

harmonic electric vibrations of the same periodicity in an elevated conductor."

The Stone amendments of 1902, made more than a year after Marconi's filing date, admittedly disclose tuning of both the closed and the open circuits, and were made for the purpose of stating expressly the latter effect, claimed to be implicit in the original application. Petitioner denies this was implicit and argues, in effect, that what Stone originally meant by "producing *forced* . . . vibrations" was creating the desired effects in the antenna *by force*, not by tuning; and therefore that the two methods were patentably different.

It seems clear that the parties use the word "tuning" to mean different things and the ambiguity, if there is one, must be resolved before the crucial questions can be stated with meaning. It will aid, in deciding whether there is ambiguity or only confusion, to consider the term and the possible conceptions it may convey in the light of the problems Marconi and Stone, as well as other references, were seeking to solve.

Marconi had in mind first a specific difficulty, as did the principal references. It arose from what, to the time of his invention, had been a baffling problem in the art. Shortly and simply, it was that an electrical circuit which is a good conserver of energy is a bad radiator and, conversely, a good radiator is a bad conserver of energy. Effective use of Hertzian waves over long distances required both effects. To state the matter differently, Lodge had explained in 1894 the difficulties of fully utilizing the principle of sympathetic resonance in detecting ether waves. To secure this, it was necessary, on the one hand, to discharge a long series of waves of equal or approximately equal length. Such a series can be produced only by a circuit which conserves its energy well, what Marconi calls a persistent oscillator. On the other hand, for distant detection, the waves must be of substantial

amplitude, and only a circuit which loses its energy rapidly can transmit such waves with maximum efficiency. Obviously in a single circuit the two desired effects tend to cancel each other, and therefore to limit the distance of detection. Similar difficulty characterized the receiver, for a good radiator is a good absorber, and that very quality disables it to store up and hold the effect of a train of waves, until enough is accumulated to break down the coherer, as detection requires.

Since the difficulty was inherent in a single circuit, whether at one end or the other, Marconi used two in both transmitter and receiver, four in all. In each station he used one circuit to obtain one of the necessary advantages and the other circuit to secure the other advantage. The antenna (or open) circuits he made "good radiators" (or absorbers). The closed circuits he constructed as "good conservers." By coupling the two at each end loosely he secured from their combination the dual advantages he sought. At the transmitter, the closed circuit, by virtue of its capacity for conserving energy, gave persistent oscillation, which passed substantially undiminished through the coupling transformer to the "good radiator" open circuit and from it was discharged with little loss of energy into the ether. Thence it was picked up by the "good absorber" open circuit and passed, without serious loss of energy, through the coupling transformer, into the closed "good conserving" circuit, where it accumulated to break the coherer and give detection.

Moreover, and for present purposes this is the important thing, Marconi brought the closed and open circuits into almost complete harmony by placing variable inductance in each. Through this the periodicity of the open circuit was adjusted automatically to that of the closed one; and, since the circuits of the receiving station were similarly adjustable, the maximum resonance was secured throughout the system. Marconi thus not only solved

the dilemma of a single circuit arrangement; he attained the maximum of resonance and selectivity by providing in each circuit independent means of tuning.

In 1911 this solution was held inventive, as against Lodge, Marconi's prior patents, Braun and other references, in *Marconi* v. *British Radio Tel. & Tel. Co.*, 27 T. L. R. 274. Mr. Justice Parker carefully reviewed the prior art, stated the problem, Marconi's solution, and in disposing of Braun's specification concluded it "did not contain even the remotest suggestion of the problem . . ., much less any suggestion bearing on its solution. . . ." As to Lodge, Mr. Justice Parker observed, referring first to Marconi:

". . . It is important to notice that *in the receiver* the mere introduction of two circuits instead of one was no novelty. A figure in Lodge's 1897 patent shows the open circuit of his receiving aerial linked through a transformer with a closed circuit containing the coherer, *his idea being, as he states, to leave his receiving aerial freer to vibrate electrically without disturbance from attached wires.* This secondary circuit, as shown, *is not tuned to, nor can it be tuned to,* the circuit of the aerial. This, in my opinion, is exceedingly strong evidence that Marconi's 1900 invention was not so obvious as to deprive it of subject matter. In the literature quoted there is no trace of the idea underlying Mr. Marconi's invention, nor, so far as I can see, a single suggestion from which a competent engineer could arrive at this idea." (Emphasis added.)

It was therefore clearly Mr. Justice Parker's view, in his closer perspective to the origin of the invention and the references he considered, that in none of them, and particularly not in Lodge or Braun, was there anticipation of Marconi's solution.

He did not mean that the references did not apply "the principle of resonance as between transmitter and re-

ceiver" or utilize "the principle of sympathetic resonance for the purpose of detection of ether waves." For he expressly attributed to Lodge, in his 1894 lectures, explanation "with great exactness [of] the various difficulties attending the full utilization" of that principle. And in referring to Marconi's first patent, of 1896, the opinion states that Marconi *"for what it was worth . . .* tuned the two circuits [i. e., the sending and receiving ones] together as Hertz had done." (Emphasis added.)

From these and other statements in the opinion it is obvious that Mr. Justice Parker found Marconi's invention in something more than merely the application of the "principle of resonance," or "sympathetic resonance," or its use to "tune" together the transmitting and receiving circuits. For Marconi in his own prior inventions, Lodge and the other references, in fact all who had constructed any system using Hertzian waves capable of transmitting and detecting sound, necessarily had made use, in some manner and to some extent, of "the principle of resonance" or "sympathetic resonance." That principle is inherent in the idea of wireless communication by Hertzian waves. So that, necessarily, all the prior conceptions included the idea that common periodicity must appear in all of the circuits employed.

Nor did Mr. Justice Parker's opinion find the inventive feature in the use of two circuits instead of one, at any rate in the receiver. For he expressly notes this in Lodge. But he points out that Lodge added the separate circuit "to leave his receiving aerial freer to vibrate electrically without disturbance from attached wires." And he goes on to note that this secondary (or closed) circuit not only was not, but could not be, "tuned" to the aerial circuit. And this he finds "exceedingly strong evidence" that "Marconi's 1900 invention was not so obvious as to deprive it of subject matter." Lodge had "tuned" the antenna circuit, by placing in it a variable inductance. But

he did not do this or accomplish the same thing by any other device, such as a condenser, in the closed circuit. And the fact that so eminent a scientist, the one who in fact posed the problem and its difficulties, did not see the need for extending this "independent tuning" (to use Marconi's phrase) to the closed circuit, so as to bring it thus in tune with the open one, was enough to convince Mr. Justice Parker, and I think rightly, that what Marconi did over Lodge was not so obvious as to be without substance.

In short, Mr. Justice Parker found the gist of Marconi's invention, not in mere application of the general principle or principles of resonance to a four-circuit system, or in the use of four circuits or the substitution of two for one in each or either station; but, as petitioner now contends, in recognition of the principle that, whether in the transmitter or the receiver, attainment of the maximum resonance required that means for tuning the closed to the open circuit be inserted in both. That recognized, the method of accomplishing the adjustment was obvious, and different methods, as by using variable inductance or a condenser, were available. As petitioner's reply brief states the matter, "The Marconi invention was not the use of a variable inductance, *nor* indeed *any other specific way* of tuning an antenna—before Marconi it was known that electrical circuits could be tuned or not tuned, by inductance coils or condensers. His broad invention was *the combination of a tuned antenna circuit* and *a tuned closed circuit.*" (Emphasis added.) And it is only in this view that the action of the Patent Office in finally awarding the patent to Marconi can be explained or sustained, for it allowed claims both limited to and not specifying variable inductance. That feature was essential for both circuits in principle, but not in the particular method by which Marconi accomplished it. And it was recognition of this which eventually induced allowance of the claims, notwithstanding the previous

rejections on Lodge, Stone and other references, including all in issue here.

In the perspective of this decade, Marconi's advance, in requiring "independent tuning," that is, positive means of tuning located in both closed and open circuits, seems simple and obvious. It was simple. But, as is often true with great inventions, the simplest and therefore generally the best solution is not obvious at the time, though it becomes so immediately it is seen and stated. Looking back now at Edison's light bulb one might think it absurd that that highly useful and beneficial idea had not been worked out long before, by anyone who knew the elementary laws of resistance in the field of electric conduction. But it would be shocking, notwithstanding the presently obvious character of what Edison did, for any court now to rule he made no invention.

The same thing applies to Marconi. Though what he did was simple, it was brilliant, and it brought big results. Admittedly the margin of difference between his conception and those of the references, especially Lodge and Stone, was small. It came down to this, that Lodge saw the need for and used means for performing the function which variable inductance achieves in the antenna or open circuit, Stone did the same thing in the closed circuit, but Marconi first did it in both. Slight as each of these steps may seem now, in departure from the others, it is as true as it was in 1911, when Mr. Justice Parker wrote, that the very fact men of the eminence of Lodge and Stone saw the necessity of taking the step for one circuit but not for the other is strong, if not conclusive, evidence that taking it for both circuits was not obvious. If this was so clearly indicated that anyone skilled in the art should have seen it, the unanswered and I think unanswerable question remains, why did not Lodge and Stone, both assiduously searching for the secret and both preëminent in the field, recognize the

fact and make the application? The best evidence of the novelty of Marconi's advance lies not in any judgment, scientific or lay, which could now be formed about it. It is rather in the careful, considered and substantially contemporaneous judgments, formed and rendered by both the patent tribunals and the courts when years had not distorted either the scientific or the legal perspective of the day when the invention was made. All of the references now used to invalidate Marconi were in issue, at one time or another, before these tribunals, though not all of them were presented to each. Their unanimous conclusion, backed by the facts which have been stated, is more persuasive than the most competent contrary opinion formed now about the matter could be.

It remains to give further attention concerning Stone. Admittedly his original application did not require tuning, in Marconi's sense, of the antenna circuit, though it specified this for the closed one. He included variable inductance in the latter, but not in the former. His device therefore was, in this respect, exactly the converse of Lodge. But it is said his omission to specify the function (as distinguished from the apparatus which performed it) for the antenna circuit was not important, because the function was implicit in the specification and therefore supported his later amendment, filed more than a year following Marconi's date, expressly specifying this feature for the open circuit.

Substantially the same answer may be made to this as Mr. Justice Parker made to the claim based on Lodge. Tuning both circuits, that is, including in each independent means for variable adjustment, was the very gist of Marconi's invention. And it was what made possible the highly successful result. It seems strange that one who saw not only the problem, but the complete solution, should specify only half what was necessary to achieve it, neglecting to mention the other and equally important

half as well, particularly when, as is claimed, the two were so nearly identical except for location. The very omission of explicit statement of so important and, it is claimed, so obvious a feature is evidence it was neither obvious nor conceived. And the force of the omission is magnified by the fact that its author, when he fully recognized its effect, found it necessary to make amendment to include it, after the feature was expressly and fully disclosed by another. Amendment under such circumstances, particularly with respect to a matter which goes to the root rather than an incident or a detail of the invention, is always to be regarded critically and, when the foundation claimed for it is implicit existence in the original application, as it must be, the clearest and most convincing evidence should be required when the effect is to give priority, by backward relation, over another application intermediately filed.

Apart from the significance of omitting to express a feature so important, I am unable to find convincing evidence the idea was implicit in Stone as he originally filed. His distinction between "natural" and "forced" oscillations seems to me to prove, in the light of his original disclosure, not that "tuning" of the antenna circuit as Marconi required this was implicit, but rather that it was not present in that application at all. It is true he sought, as Marconi did, to make the antenna circuit at the transmitter the source of waves of but a single periodicity and the same circuit at the receiver an absorber only of the waves so transmitted. But the methods they used were not the same. Stone's method was to provide "what are *substantially forced* vibrations" in the transmitter's antenna circuit and, at the receiver, to impose "between the vertical conductor [the antenna] . . . and the translating devices [in the closed circuit] [other] *resonant circuits attuned* to the particular frequency of the electro-magnetic waves

which it is desired to have operate the translating devices." (Emphasis added.) In short, he provided for "tuning," as Marconi did, the transmitter's closed circuit, the receiver's closed circuit and the intermediate circuits which he interposed in the receiver between the open or antenna one and the closed one. But nowhere did he provide for or suggest "tuning," as Marconi did and in his meaning, the antenna circuit of the transmitter or the antenna circuit of the receiver. For resonance in the former he depended upon the introduction, from the closed circuit, of "substantially forced electric vibrations" and for selectivity in the latter he used the intermediate tuned circuits. Stone and Marconi used the same means for creating persistent oscillation, namely, the use of the separate closed circuit; and in this both also developed single periodicity to the extent the variable inductance included there and there only could do so. But while both created persistent oscillation in the same way, Marconi went farther than Stone with single periodicity and secured enhancement of this by placing means for tuning in the antenna circuit, which admittedly Stone nowhere expressly required in his original application. And, since this is the gist of the invention in issue and of the difference between the two, it will not do to dismiss this omission merely with the statement that there is nothing to suggest that Stone "did not desire to have those circuits tuned." Nor in my opinion do the passages in the specifications relied upon as "suggesting" the "independent" tuning of the antenna circuits bear out this inference.

When Stone states that "the vertical conductor at the transmitter station is made the source of . . . waves of but a single periodicity," I find nothing to suggest that this is accomplished by specially tuning that circuit, or, in fact, anything more than that this circuit is a good conductor sending out the single period waves forced into it from the

closed circuit. The same is true of the further statement that "the *translating apparatus* at the receiving station is caused to be selectively responsive to waves of but a single periodicity" (which tuning the intermediate and/or closed circuits there accomplishes), so that "*the transmitting apparatus* corresponds to a tuning fork sending but a single musical tone, and *the receiving apparatus* corresponds to an acoustic resonator capable of absorbing the energy of that single simple musical tone only." (Emphasis added.) This means nothing more than that the transmitter, which includes the antenna, and the receiver, which also includes the antenna, send out and receive respectively a single period wave. It does not mean that the antenna, in either station, was tuned, in Marconi's sense, nor does it suggest this.

The same is true of the other passages relied upon by the Court for suggestion. No word or hint can be found in them that Stone intended or contemplated independently tuning the antenna. They merely suggested, on the one hand, that when "the apparatus" at the receiving station is properly tuned to a particular transmitter, it will receive selectively messages from the latter and, further, that the operator may at will adjust "*the apparatus* at his command" so as to communicate with any one of several sending stations; on the other hand, that "any suitable device" may be used at the transmitter "to develop the simple harmonic force impressed upon" the antenna. "The apparatus," as used in the statements concerning the adjustments at the receiving station, clearly means "the apparatus at his command," that is, the whole of that station's equipment, which contained in the intermediate and closed circuits, but not in the open one, the means for making the adjustments described. There is nothing whatever to suggest including a tuning device also in the open circuit. The statement concerning the use of "any

suitable device" to "develop the simple harmonic force impressed upon the vertical wire" might be taken, in other context, possibly to suggest magnifying the impressed force by inserting a device for that purpose in the open circuit and therefore to come more closely than the other passages to suggesting Marconi's idea. But such a construction would be wholly strained in the absence of any other reference or suggestion in the long application to such a purpose. Standing wholly alone as it does, it would be going far to base anticipation of Marconi's idea upon this language only. The more reasonable and, in view of the total absence of suggestion elsewhere, the only tenable view is that the language was intended to say, not that Stone contemplated including any device for tuning in the open circuit, but that he left to the mechanic or builder the choice of the various devices which might be used, according to preference, to create or "develop," in the closed circuit, the force to be impressed upon the antenna.

Finally, Stone was no novice. He too was "a very expert person and one of the best men in the art." *National Electric Signalling Co.* v. *Telefunken Wireless Tel. Co.*, 209 F. 856, 864 (D. C.). He knew the difference between tuned and untuned circuits, how to describe them, and how to apply them when he wanted to do so. He used this knowledge when he specified including means for tuning in his closed circuit. He did not use it to specify similarly tuning the open one. The omission, in such circumstances, could hardly have been intentional. In my opinion he deliberately selected an aperiodic aerial, one to which the many receiving circuits his application contemplated could be adjusted and one which would carry to them, from his transmitter's tuned periodicity and by its force alone, what it sent forward. In short, Stone deliberately selected an untuned antenna, a tuned

closed circuit, and controlled the periodicity of both, not by independent means in each making them mutually and reciprocally adjustable, but by impressing upon the untuned antenna the forced periodicity of the closed circuit.

It may be that by his method he attained results comparable, or nearly so, to those Marconi achieved. The record does not show that he did so prior to his amendment. If he did, that only goes to show he accomplished in consequence what Marconi did, but by a different method. That both had the same "broad purpose" of providing a high degree of tuning at both stations, and that both may have accomplished this object substantially, does not show that they did so in the same way or that Stone, by his different method, anticipated Marconi.

In my opinion therefore Stone's amendment was not supported by anything in his original application and should not have been allowed. As petitioner says, it added the new feature of tuning the antenna and in that respect resembled the amendment of a Fessenden application "to include the tuning of the closed circuit." *National Electric Signalling Co.* v. *Telefunken Wireless Tel. Co., supra.* The amendment here should receive the same fate as befell the one there involved.

Stone's letters to Baker, quoted in the Court's opinion, show no more than his original application disclosed. There is no hint or suggestion in them of tuning the antenna circuits "independently" as Marconi did. And the correspondence gives further proof he contemplated introducing the inductance coil (or a device equivalent in function) into the closed circuit, but expressed no idea of doing the same thing in the open one.

In my opinion therefore the judgment should be reversed, in so far as it holds Marconi's broad claims invalid.

HIRABAYASHI *v.* UNITED STATES.

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

No. 870. Argued May 10, 11, 1943.—Decided June 21, 1943.

1. Where a defendant is convicted on two counts of an indictment and the sentences are ordered to run concurrently, it is unnecessary on review to consider the validity of the sentence on both of the counts if the sentence on one of them is sustainable. P. 85.
2. Pursuant to Executive Order No. 9066, promulgated by the President on February 19, 1942 while the United States was at war with Japan, the military commander of the Western Defense Command promulgated an order requiring, *inter alia*, that all persons of Japanese ancestry within a designated military area "be within their place of residence between the hours of 8 p. m. and 6 a. m." Appellant, a United States citizen of Japanese ancestry, was convicted in the federal District Court for violation of this curfew order. *Held:*

   (1) By the Act of March 21, 1942, Congress ratified and confirmed Executive Order No. 9066, and thereby authorized and implemented such curfew orders as the military commander should promulgate pursuant to that Executive Order. P. 91.

   (2) It was within the constitutional authority of Congress and the Executive, acting together, to prescribe this curfew order as an emergency war measure. P. 92.

   In the light of all the facts and circumstances, there was substantial basis for the conclusion, in which Congress and the military commander united, that the curfew as applied was a protective measure necessary to meet the threat of sabotage and espionage which would substantially affect the war effort and which might reasonably be expected to aid a threatened enemy invasion. P. 95.

   (3) The curfew order did not unconstitutionally discriminate against citizens of Japanese ancestry. P. 101.

   (a) The Fifth Amendment contains no equal protection clause and it restrains only such discriminatory legislation by Congress as amounts to a denial of due process. P. 100.

   (b) The curfew order as applied, and at the time it was applied, was within the boundaries of the war power. P. 102.

(c) The adoption by the Government, in the crisis of war and of threatened invasion, of measures for the public safety, based upon the recognition of facts and circumstances which indicate that a group of one national extraction may menace that safety more than others, is not to be condemned as unconstitutional merely because in other and in most circumstances racial distinctions are irrelevant. P. 101.

(d) An appropriate exercise of the war power is not rendered invalid by the fact that it restricts the liberty of citizens. P. 99.

(4) The promulgation of the curfew order by the military commander was based on no unconstitutional delegation of legislative power. P. 102.

The essentials of the legislative function are preserved when Congress provides that a statutory command shall become operative upon ascertainment of a basic conclusion of fact by a designated representative of the Government. The Act of March 21, 1942, which authorized that curfew orders be made pursuant to Executive Order No. 9066 for the protection of war resources from espionage and sabotage, satisfies those requirements. P. 104.

Affirmed.

RESPONSE to questions certified by the Circuit Court of Appeals upon an appeal to that court from a conviction in the District Court upon two counts of an indictment charging violations of orders promulgated by the military commander of the Western Defense Command. This Court directed that the entire record be certified so that the case could be determined as if brought here by appeal. See 46 F. Supp. 657.

Messrs. Frank L. Walters and *Harold Evans,* with whom *Messrs. Osmond K. Fraenkel, Arthur G. Barnett, Edwin M. Borchard, Brien McMahon,* and *William Draper Lewis* were on the brief (*Mr. Alfred J. Schweppe* entered an appearance), for Hirabayashi.

Solicitor General Fahy, with whom *Messrs. Edward J. Ennis, Arnold Raum, John L. Burling,* and *Leo Gitlin* were on the brief, for the United States.

Briefs of *amici curiae* were filed by *Messrs. Arthur Garfield Hays, Osmond K. Fraenkel,* and *A. L. Wirin* on behalf

of the American Civil Liberties Union; by *Mr. A. L. Wirin* on behalf of the Japanese American Citizens League; and by *Mr. Jackson H. Ralston* on behalf of the Northern California Branch of the American Civil Liberties Union,—in support of Hirabayashi; and by *Messrs. Robert W. Kenny,* Attorney General of California, *I. H. Van Winkle,* Attorney General of Oregon, *Smith Troy,* Attorney General of the State of Washington, and *Fred E. Lewis,* Chief Assistant and Acting Attorney General of the State of Washington, on behalf of those States,—urging affirmance.

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

Appellant, an American citizen of Japanese ancestry, was convicted in the district court of violating the Act of Congress of March 21, 1942, 56 Stat. 173, which makes it a misdemeanor knowingly to disregard restrictions made applicable by a military commander to persons in a military area prescribed by him as such, all as authorized by an Executive Order of the President.

The questions for our decision are whether the particular restriction violated, namely that all persons of Japanese ancestry residing in such an area be within their place of residence daily between the hours of 8:00 p. m. and 6:00 a. m., was adopted by the military commander in the exercise of an unconstitutional delegation by Congress of its legislative power, and whether the restriction unconstitutionally discriminated between citizens of Japanese ancestry and those of other ancestries in violation of the Fifth Amendment.

The indictment is in two counts. The second charges that appellant, being a person of Japanese ancestry, had on a specified date, contrary to a restriction promulgated by the military commander of the Western Defense Command, Fourth Army, failed to remain in his place of resi-

dence in the designated military area between the hours of 8:00 o'clock p. m. and 6:00 a. m. The first count charges that appellant, on May 11 and 12, 1942, had, contrary to a Civilian Exclusion Order issued by the military commander, failed to report to the Civil Control Station within the designated area, it appearing that appellant's required presence there was a preliminary step to the exclusion from that area of persons of Japanese ancestry.

By demurrer and plea in abatement, which the court overruled (46 F. Supp. 657), appellant asserted that the indictment should be dismissed because he was an American citizen who had never been a subject of and had never borne allegiance to the Empire of Japan, and also because the Act of March 21, 1942, was an unconstitutional delegation of Congressional power. On the trial to a jury it appeared that appellant was born in Seattle in 1918, of Japanese parents who had come from Japan to the United States, and who had never afterward returned to Japan; that he was educated in the Washington public schools and at the time of his arrest was a senior in the University of Washington; that he had never been in Japan or had any association with Japanese residing there.

The evidence showed that appellant had failed to report to the Civil Control Station on May 11 or May 12, 1942, as directed, to register for evacuation from the military area. He admitted failure to do so, and stated it had at all times been his belief that he would be waiving his rights as an American citizen by so doing. The evidence also showed that for like reason he was away from his place of residence after 8:00 p. m. on May 9, 1942. The jury returned a verdict of guilty on both counts and appellant was sentenced to imprisonment for a term of three months on each, the sentences to run concurrently.

On appeal the Court of Appeals for the Ninth Circuit certified to us questions of law upon which it desired in-

structions for the decision of the case. See § 239 of the Judicial Code as amended, 28 U. S. C. § 346. Acting under the authority conferred upon us by that section we ordered that the entire record be certified to this Court so that we might proceed to a decision of the matter in controversy in the same manner as if it had been brought here by appeal. Since the sentences of three months each imposed by the district court on the two counts were ordered to run concurrently, it will be unnecessary to consider questions raised with respect to the first count if we find that the conviction on the second count, for violation of the curfew order, must be sustained. *Brooks* v. *United States,* 267 U. S. 432, 441; *Gorin* v. *United States,* 312 U. S. 19, 33.

The curfew order which appellant violated, and to which the sanction prescribed by the Act of Congress has been deemed to attach, purported to be issued pursuant to an Executive Order of the President. In passing upon the authority of the military commander to make and execute the order, it becomes necessary to consider in some detail the official action which preceded or accompanied the order and from which it derives its purported authority.

On December 8, 1941, one day after the bombing of Pearl Harbor by a Japanese air force, Congress declared war against Japan. 55 Stat. 795. On February 19, 1942, the President promulgated Executive Order No. 9066. 7 Federal Register 1407. The Order recited that "the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities as defined in Section 4, Act of April 20, 1918, 40 Stat. 533, as amended by the Act of November 30, 1940, 54 Stat. 1220, and the Act of August 21, 1941, 55 Stat. 655." By virtue of the authority vested

in him as President and as Commander in Chief of the Army and Navy, the President purported to "authorize and direct the Secretary of War, and the Military Commanders whom he may from time to time designate, whenever he or any designated Commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion."

On February 20, 1942, the Secretary of War designated Lt. General J. L. DeWitt as Military Commander of the Western Defense Command, comprising the Pacific Coast states and some others, to carry out there the duties prescribed by Executive Order No. 9066. On March 2, 1942, General DeWitt promulgated Public Proclamation No. 1. 7 Federal Register 2320. The proclamation recited that the entire Pacific Coast "by its geographical location is particularly subject to attack, to attempted invasion by the armed forces of nations with which the United States is now at war, and, in connection therewith, is subject to espionage and acts of sabotage, thereby requiring the adoption of military measures necessary to establish safeguards against such enemy operations." It stated that "the present situation requires as a matter of military necessity the establishment in the territory embraced by the Western Defense Command of Military Areas and Zones thereof"; it specified and designated as military areas certain areas within the Western Defense Command; and it declared that "such persons or classes of persons as the situation may require" would, by subsequent proclamation, be excluded from certain of these

areas, but might be permitted to enter or remain in certain others, under regulations and restrictions to be later prescribed. Among the military areas so designated by Public Proclamation No. 1 was Military Area No. 1, which embraced, besides the southern part of Arizona, all the coastal region of the three Pacific Coast states, including the City of Seattle, Washington, where appellant resided. Military Area No. 2, designated by the same proclamation, included those parts of the coastal states and of Arizona not placed within Military Area No. 1.

Public Proclamation No. 2 of March 16, 1942, issued by General DeWitt, made like recitals and designated further military areas and zones. It contained like provisions concerning the exclusion, by subsequent proclamation, of certain persons or classes of persons from these areas, and the future promulgation of regulations and restrictions applicable to persons remaining within them. 7 Federal Register 2405.

An Executive Order of the President, No. 9102, of March 18, 1942, established the War Relocation Authority, in the Office for Emergency Management of the Executive Office of the President; it authorized the Director of War Relocation Authority to formulate and effectuate a program for the removal, relocation, maintenance and supervision of persons designated under Executive Order No. 9066, already referred to; and it conferred on the Director authority to prescribe regulations necessary or desirable to promote the effective execution of the program. 7 Federal Register 2165.

Congress, by the Act of March 21, 1942, provided: "That whoever shall enter, remain in, leave, or commit any act in any military area or military zone prescribed, under the authority of an Executive order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions applicable to any such area or zone or contrary

to the order of the Secretary of War or any such military commander, shall, if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty of a misdemeanor and upon conviction shall be liable" to fine or imprisonment, or both.

Three days later, on March 24, 1942, General DeWitt issued Public Proclamation No. 3. 7 Federal Register 2543. After referring to the previous designation of military areas by Public Proclamations Nos. 1 and 2, it recited that ". . . the present situation within these Military Areas and Zones requires as a matter of military necessity the establishment of certain regulations pertaining to all enemy aliens and all persons of Japanese ancestry within said Military Areas and Zones . . ." It accordingly declared and established that from and after March 27, 1942, "all alien Japanese, all alien Germans, all alien Italians, and all persons of Japanese ancestry residing or being within the geographical limits of Military Area No. 1 . . . shall be within their place of residence between the hours of 8:00 P. M. and 6:00 A. M., which period is hereinafter referred to as the hours of curfew." It also imposed certain other restrictions on persons of Japanese ancestry, and provided that any person violating the regulations would be subject to the criminal penalties provided by the Act of Congress of March 21, 1942.

Beginning on March 24, 1942, the military commander issued a series of Civilian Exclusion Orders pursuant to the provisions of Public Proclamation No. 1. Each such order related to a specified area within the territory of his command. The order applicable to appellant was Civilian Exclusion Order No. 57 of May 10, 1942. 7 Federal Register 3725. It directed that from and after 12:00 noon, May 16, 1942, all persons of Japanese ancestry, both alien and non-alien, be excluded from a specified portion of Military Area No. 1 in Seattle, including appellant's place of residence,

and it required a member of each family, and each individual living alone, affected by the order to report on May 11 or May 12 to a designated Civil Control Station in Seattle. Meanwhile the military commander had issued Public Proclamation No. 4 of March 27, 1942, which recited the necessity of providing for the orderly evacuation and resettlement of Japanese within the area, and prohibited all alien Japanese and all persons of Japanese ancestry from leaving the military area until future orders should permit. 7 Federal Register 2601.

Appellant does not deny that he knowingly failed to obey the curfew order as charged in the second count of the indictment, or that the order was authorized by the terms of Executive Order No. 9066, or that the challenged Act of Congress purports to punish with criminal penalties disobedience of such an order. His contentions are only that Congress unconstitutionally delegated its legislative power to the military commander by authorizing him to impose the challenged regulation, and that, even if the regulation were in other respects lawfully authorized, the Fifth Amendment prohibits the discrimination made between citizens of Japanese descent and those of other ancestry.

It will be evident from the legislative history that the Act of March 21, 1942, contemplated and authorized the curfew order which we have before us. The bill which became the Act of March 21, 1942, was introduced in the Senate on March 9th and in the House on March 10th at the request of the Secretary of War who, in letters to the Chairman of the Senate Committee on Military Affairs and to the Speaker of the House, stated explicitly that its purpose was to provide means for the enforcement of orders issued under Executive Order No. 9066. This appears in the committee reports on the bill, which set out in full the Executive Order and the Secretary's letter. 88 Cong. Rec. 2722, 2725; H. R. Rep. No. 1906, 77th Cong.,

2d Sess.; S. Rep. No. 1171, 77th Cong., 2d Sess. And each of the committee reports expressly mentions curfew orders as one of the types of restrictions which it was deemed desirable to enforce by criminal sanctions.

When the bill was under consideration, General DeWitt had published his Proclamation No. 1 of March 2, 1942, establishing Military Areas Nos. 1 and 2, and that Proclamation was before Congress. S. Rep. No. 1171, 77th Cong., 2d Sess., p. 2; see also 88 Cong. Rec. 2724. A letter of the Secretary to the Chairman of the House Military Affairs Committee, of March 14, 1942, informed Congress that "General DeWitt is strongly of the opinion that the bill, when enacted, should be broad enough to enable the Secretary of War or the appropriate military commander to enforce curfews and other restrictions within military areas and zones"; and that General DeWitt had "indicated that he was prepared to enforce certain restrictions at once for the purpose of protecting certain vital national defense interests but did not desire to proceed until enforcement machinery had been set up." H. R. Rep. No. 1906, 77th Cong., 2d Sess., p. 3. See also letter of the Acting Secretary of War to the Chairman of the Senate Military Affairs Committee, March 13, 1942, 88 Cong. Rec. 2725.

The Chairman of the Senate Military Affairs Committee explained on the floor of the Senate that the purpose of the proposed legislation was to provide means of enforcement of curfew orders and other military orders made pursuant to Executive Order No. 9066. He read General DeWitt's Public Proclamation No. 1, and statements from newspaper reports that "evacuation of the first Japanese aliens and American-born Japanese" was about to begin. He also stated to the Senate that "reasons for suspected widespread fifth-column activity among Japanese" were to be found in the system of dual citizenship which Japan deemed applicable to American-

born Japanese, and in the propaganda disseminated by Japanese consuls, Buddhist priests and other leaders, among American-born children of Japanese. Such was stated to be the explanation of the contemplated evacuation from the Pacific Coast area of persons of Japanese ancestry, citizens as well as aliens. 88 Cong. Rec. 2722–26; see also pp. 2729–30. Congress also had before it the Preliminary Report of a House Committee investigating national defense migration, of March 19, 1942, which approved the provisions of Executive Order No. 9066, and which recommended the evacuation, from military areas established under the Order, of all persons of Japanese ancestry, including citizens. H. R. Rep. No. 1911, 77th Cong., 2d Sess. The proposed legislation provided criminal sanctions for violation of orders, in terms broad enough to include the curfew order now before us, and the legislative history demonstrates that Congress was advised that curfew orders were among those intended, and was advised also that regulation of citizen and alien Japanese alike was contemplated.

The conclusion is inescapable that Congress, by the Act of March 21, 1942, ratified and confirmed Executive Order No. 9066. *Prize Cases,* 2 Black 635, 671; *Hamilton* v. *Dillin,* 21 Wall. 73, 96–97; *United States* v. *Heinszen & Co.,* 206 U. S. 370, 382–84; *Tiaco* v. *Forbes,* 228 U. S. 549, 556; *Isbrandtsen-Moller Co.* v. *United States,* 300 U. S. 139, 146–48; *Swayne & Hoyt, Ltd.* v. *United States,* 300 U. S. 297, 300–03; *Mason Co.* v. *Tax Comm'n,* 302 U. S. 186, 208. And so far as it lawfully could, Congress authorized and implemented such curfew orders as the commanding officer should promulgate pursuant to the Executive Order of the President. The question then is not one of Congressional power to delegate to the President the promulgation of the Executive Order, but whether, acting in coöperation, Congress and the Executive have constitutional authority to impose the cur-

few restriction here complained of. We must consider also whether, acting together, Congress and the Executive could leave it to the designated military commander to appraise the relevant conditions and on the basis of that appraisal to say whether, under the circumstances, the time and place were appropriate for the promulgation of the curfew order and whether the order itself was an appropriate means of carrying out the Executive Order for the "protection against espionage and against sabotage" to national defense materials, premises and utilities. For reasons presently to be stated, we conclude that it was within the constitutional power of Congress and the executive arm of the Government to prescribe this curfew order for the period under consideration and that its promulgation by the military commander involved no unlawful delegation of legislative power.

Executive Order No. 9066, promulgated in time of war for the declared purpose of prosecuting the war by protecting national defense resources from sabotage and espionage, and the Act of March 21, 1942, ratifying and confirming the Executive Order, were each an exercise of the power to wage war conferred on the Congress and on the President, as Commander in Chief of the armed forces, by Articles I and II of the Constitution. See *Ex parte Quirin,* 317 U. S. 1, 25–26. We have no occasion to consider whether the President, acting alone, could lawfully have made the curfew order in question, or have authorized others to make it. For the President's action has the support of the Act of Congress, and we are immediately concerned with the question whether it is within the constitutional power of the national government, through the joint action of Congress and the Executive, to impose this restriction as an emergency war measure. The exercise of that power here involves no question of martial law or trial by military tribunal. Cf. *Ex parte Milligan,* 4 Wall. 2; *Ex parte Quirin, supra.* Appellant has been

tried and convicted in the civil courts and has been subjected to penalties prescribed by Congress for the acts committed.

The war power of the national government is "the power to wage war successfully." See Charles Evans Hughes, War Powers Under the Constitution, 42 A. B. A. Rep. 232, 238. It extends to every matter and activity so related to war as substantially to affect its conduct and progress. The power is not restricted to the winning of victories in the field and the repulse of enemy forces. It embraces every phase of the national defense, including the protection of war materials and the members of the armed forces from injury and from the dangers which attend the rise, prosecution and progress of war. *Prize Cases, supra; Miller* v. *United States,* 11 Wall. 268, 303–14; *Stewart* v. *Kahn,* 11 Wall. 493, 506–07; *Selective Draft Law Cases,* 245 U. S. 366; *McKinley* v. *United States,* 249 U. S. 397; *United States* v. *Macintosh,* 283 U. S. 605, 622–23. Since the Constitution commits to the Executive and to Congress the exercise of the war power in all the vicissitudes and conditions of warfare, it has necessarily given them wide scope for the exercise of judgment and discretion in determining the nature and extent of the threatened injury or danger and in the selection of the means for resisting it. *Ex parte Quirin, supra,* 28–29; cf. *Prize Cases, supra,* 670; *Martin* v. *Mott,* 12 Wheat. 19, 29. Where, as they did here, the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility of war-making, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs.

The actions taken must be appraised in the light of the conditions with which the President and Congress were confronted in the early months of 1942, many of which,

since disclosed, were then peculiarly within the knowledge of the military authorities. On December 7, 1941, the Japanese air forces had attacked the United States Naval Base at Pearl Harbor without warning, at the very hour when Japanese diplomatic representatives were conducting negotiations with our State Department ostensibly for the peaceful settlement of differences between the two countries. Simultaneously or nearly so, the Japanese attacked Malaysia, Hong Kong, the Philippines, and Wake and Midway Islands. On the following day their army invaded Thailand. Shortly afterwards they sank two British battleships. On December 13th, Guam was taken. On December 24th and 25th they captured Wake Island and occupied Hong Kong. On January 2, 1942, Manila fell, and on February 10th Singapore, Britain's great naval base in the East, was taken. On February 27th the battle of the Java Sea resulted in a disastrous naval defeat to the United Nations. By the 9th of March Japanese forces had established control over the Netherlands East Indies; Rangoon and Burma were occupied; Bataan and Corregidor were under attack.

Although the results of the attack on Pearl Harbor were not fully disclosed until much later, it was known that the damage was extensive, and that the Japanese by their successes had gained a naval superiority over our forces in the Pacific which might enable them to seize Pearl Harbor, our largest naval base and the last stronghold of defense lying between Japan and the west coast. That reasonably prudent men charged with the responsibility of our national defense had ample ground for concluding that they must face the danger of invasion, take measures against it, and in making the choice of measures consider our internal situation, cannot be doubted.

The challenged orders were defense measures for the avowed purpose of safeguarding the military area in question, at a time of threatened air raids and invasion

by the Japanese forces, from the danger of sabotage and espionage. As the curfew was made applicable to citizens residing in the area only if they were of Japanese ancestry, our inquiry must be whether in the light of all the facts and circumstances there was any substantial basis for the conclusion, in which Congress and the military commander united, that the curfew as applied was a protective measure necessary to meet the threat of sabotage and espionage which would substantially affect the war effort and which might reasonably be expected to aid a threatened enemy invasion. The alternative which appellant insists must be accepted is for the military authorities to impose the curfew on all citizens within the military area, or on none. In a case of threatened danger requiring prompt action, it is a choice between inflicting obviously needless hardship on the many, or sitting passive and unresisting in the presence of the threat. We think that constitutional government, in time of war, is not so powerless and does not compel so hard a choice if those charged with the responsibility of our national defense have reasonable ground for believing that the threat is real.

When the orders were promulgated there was a vast concentration, within Military Areas Nos. 1 and 2, of installations and facilities for the production of military equipment, especially ships and airplanes. Important Army and Navy bases were located in California and Washington. Approximately one-fourth of the total value of the major aircraft contracts then let by Government procurement officers were to be performed in the State of California. California ranked second, and Washington fifth, of all the states of the Union with respect to the value of shipbuilding contracts to be performed.[1]

[1] State Distribution of War Supply and Facility Contracts—June 1940 through December 1941 (issued by Office of Production Management, Bureau of Research and Statistics, January 18, 1942); *Ibid.*—Cumulative through February 1943 (issued by War Production Board, Statistics Division, April 3, 1943).

In the critical days of March 1942, the danger to our war production by sabotage and espionage in this area seems obvious. The German invasion of the Western European countries had given ample warning to the world of the menace of the "fifth column." Espionage by persons in sympathy with the Japanese Government had been found to have been particularly effective in the surprise attack on Pearl Harbor.[2] At a time of threatened Japanese attack upon this country, the nature of our inhabitants' attachments to the Japanese enemy was consequently a matter of grave concern. Of the 126,000 persons of Japanese descent in the United States, citizens and non-citizens, approximately 112,000 resided in California, Oregon and Washington at the time of the adoption of the military regulations. Of these approximately two-thirds are citizens because born in the United States. Not only did the great majority of such persons reside within the Pacific Coast states but they were concentrated in or near three of the large cities, Seattle, Portland and Los Angeles, all in Military Area No. 1.[3]

There is support for the view that social, economic and political conditions which have prevailed since the close of the last century, when the Japanese began to come to this country in substantial numbers, have intensified their solidarity and have in large measure prevented their assimilation as an integral part of the white population.[4] In addition, large numbers of children of Japanese par-

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[2] See "Attack upon Pearl Harbor by Japanese Armed Forces," Report of the Commission Appointed by the President, dated January 23, 1942, S. Doc. No. 159, 77th Cong., 2d Sess., pp. 12–13.

[3] Sixteenth Census of the United States, for 1940, Population, Second Series, Characteristics of the Population (Dept. of Commerce): California, pp. 10, 61; Oregon, pp. 10, 50; Washington, pp. 10, 52. See also H. R. Rep. No. 2124, 77th Cong., 2d Sess., pp. 91–100.

[4] Federal legislation has denied to the Japanese citizenship by naturalization (R. S. § 2169; 8 U. S. C. § 703; see *Ozawa* v. *United States*, 260 U. S. 178), and the Immigration Act of 1924 excluded them from

entage are sent to Japanese language schools outside the regular hours of public schools in the locality. Some of these schools are generally believed to be sources of Japanese nationalistic propaganda, cultivating allegiance to Japan.[5] Considerable numbers, estimated to be approximately 10,000, of American-born children of Japanese parentage have been sent to Japan for all or a part of their education.[6]

Congress and the Executive, including the military commander, could have attributed special significance, in its bearing on the loyalties of persons of Japanese descent, to the maintenance by Japan of its system of dual citizenship. Children born in the United States of Japanese alien parents, and especially those children born before December 1, 1924, are under many circumstances deemed, by Japanese law, to be citizens of Japan.[7] No

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admission into the United States. 43 Stat. 161, 8 U. S. C. § 213. State legislation has denied to alien Japanese the privilege of owning land. 1 California General Laws (Deering, 1931), Act 261; 5 Oregon Comp. Laws Ann. (1940), § 61–102; 11 Washington Rev. Stat. Ann. (Remington, 1933), §§ 10581–10582. It has also sought to prohibit intermarriage of persons of Japanese race with Caucasians. Montana Rev. Codes (1935), § 5702. Persons of Japanese descent have often been unable to secure professional or skilled employment except in association with others of that descent, and sufficient employment opportunities of this character have not been available. Mears, Resident Orientals on the American Pacific Coast (1927), pp. 188, 198–209, 402–03; H. R. Rep. No. 2124, 77th Cong., 2d Sess., pp. 101–38.

[5] Hearings before the Select Committee Investigating National Defense Migration, House of Representatives, 77th Cong., 2d Sess., pp. 11702, 11393–94, 11348.

[6] H. R. Rep. No. 1911, 77th Cong., 2d Sess., p. 16.

[7] Nationality Law of Japan, Article 1 and Article 20, § 3, and Regulations (Ordinance No. 26) of November 17, 1924,—all printed in Flournoy and Hudson, Nationality Laws (1929), pp. 382, 384–87. See also Foreign Relations of the United States, 1924, vol. 2, pp. 411–13.

official census of those whom Japan regards as having thus retained Japanese citizenship is available, but there is ground for the belief that the number is large.[8]

The large number of resident alien Japanese, approximately one-third of all Japanese inhabitants of the country, are of mature years and occupy positions of influence in Japanese communities. The association of influential Japanese residents with Japanese Consulates has been deemed a ready means for the dissemination of propaganda and for the maintenance of the influence of the Japanese Government with the Japanese population in this country.[9]

As a result of all these conditions affecting the life of the Japanese, both aliens and citizens, in the Pacific Coast area, there has been relatively little social intercourse between them and the white population. The restrictions, both practical and legal, affecting the privileges and opportunities afforded to persons of Japanese extraction residing in the United States, have been sources of irritation and may well have tended to increase their isolation, and in many instances their attachments to Japan and its institutions.

Viewing these data in all their aspects, Congress and the Executive could reasonably have concluded that these conditions have encouraged the continued attachment of members of this group to Japan and Japanese institutions.

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[8] Statistics released in 1927 by the Consul General of Japan at San Francisco asserted that over 51,000 of the approximately 63,000 American-born persons of Japanese parentage then in the western part of the United States held Japanese citizenship. Mears, Resident Orientals on the American Pacific Coast, pp. 107–08, 429. A census conducted under the auspices of the Japanese government in 1930 asserted that approximately 47% of American-born persons of Japanese parentage in California held dual citizenship. Strong, The Second-Generation Japanese Problem (1934), p. 142.

[9] H. R. Rep. No. 1911, 77th Cong., 2d Sess., p. 17.

These are only some of the many considerations which those charged with the responsibility for the national defense could take into account in determining the nature and extent of the danger of espionage and sabotage, in the event of invasion or air raid attack. The extent of that danger could be definitely known only after the event and after it was too late to meet it. Whatever views we may entertain regarding the loyalty to this country of the citizens of Japanese ancestry, we cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained. We cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety, which demanded that prompt and adequate measures be taken to guard against it.

Appellant does not deny that, given the danger, a curfew was an appropriate measure against sabotage. It is an obvious protection against the perpetration of sabotage most readily committed during the hours of darkness. If it was an appropriate exercise of the war power its validity is not impaired because it has restricted the citizen's liberty. Like every military control of the population of a dangerous zone in war time, it necessarily involves some infringement of individual liberty, just as does the police establishment of fire lines during a fire, or the confinement of people to their houses during an air raid alarm—neither of which could be thought to be an infringement of constitutional right. Like them, the validity of the restraints of the curfew order depends on all the conditions which obtain at the time the curfew is imposed and which support the order imposing it.

But appellant insists that the exercise of the power is inappropriate and unconstitutional because it discriminates against citizens of Japanese ancestry, in violation of the Fifth Amendment. The Fifth Amendment contains no equal protection clause and it restrains only such discriminatory legislation by Congress as amounts to a denial of due process. *Detroit Bank* v. *United States,* 317 U. S. 329, 337–38, and cases cited. Congress may hit at a particular danger where it is seen, without providing for others which are not so evident or so urgent. *Keokee Coke Co.* v. *Taylor,* 234 U. S. 224, 227.

Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection. *Yick Wo* v. *Hopkins,* 118 U. S. 356; *Yu Cong Eng* v. *Trinidad,* 271 U. S. 500; *Hill* v. *Texas,* 316 U. S. 400. We may assume that these considerations would be controlling here were it not for the fact that the danger of espionage and sabotage, in time of war and of threatened invasion, calls upon the military authorities to scrutinize every relevant fact bearing on the loyalty of populations in the danger areas. Because racial discriminations are in most circumstances irrelevant and therefore prohibited, it by no means follows that, in dealing with the perils of war, Congress and the Executive are wholly precluded from taking into account those facts and circumstances which are relevant to measures for our national defense and for the successful prosecution of the war, and which may in fact place citizens of one ancestry in a different category from others. "We must never forget, that it is *a constitution* we are expounding," "a constitution intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human

affairs." *McCulloch* v. *Maryland*, 4 Wheat. 316, 407, 415. The adoption by Government, in the crisis of war and of threatened invasion, of measures for the public safety, based upon the recognition of facts and circumstances which indicate that a group of one national extraction may menace that safety more than others, is not wholly beyond the limits of the Constitution and is not to be condemned merely because in other and in most circumstances racial distinctions are irrelevant. Cf. *Clarke* v. *Deckebach*, 274 U. S. 392, and cases cited.

Here the aim of Congress and the Executive was the protection against sabotage of war materials and utilities in areas thought to be in danger of Japanase invasion and air attack. We have stated in detail facts and circumstances with respect to the American citizens of Japanese ancestry residing on the Pacific Coast which support the judgment of the war-waging branches of the Government that some restrictive measure was urgent. We cannot say that these facts and circumstances, considered in the particular war setting, could afford no ground for differentiating citizens of Japanese ancestry from other groups in the United States. The fact alone that attack on our shores was threatened by Japan rather than another enemy power set these citizens apart from others who have no particular associations with Japan.

Our investigation here does not go beyond the inquiry whether, in the light of all the relevant circumstances preceding and attending their promulgation, the challenged orders and statute afforded a reasonable basis for the action taken in imposing the curfew. We cannot close our eyes to the fact, demonstrated by experience, that in time of war residents having ethnic affiliations with an invading enemy may be a greater source of danger than those of a different ancestry. Nor can we deny that Congress, and the military authorities acting with its

authorization, have constitutional power to appraise the danger in the light of facts of public notoriety. We need not now attempt to define the ultimate boundaries of the war power. We decide only the issue as we have defined it—we decide only that the curfew order as applied, and at the time it was applied, was within the boundaries of the war power. In this case it is enough that circumstances within the knowledge of those charged with the responsibility for maintaining the national defense afforded a rational basis for the decision which they made. Whether we would have made it is irrelevant.

What we have said also disposes of the contention that the curfew order involved an unlawful delegation by Congress of its legislative power. The mandate of the Constitution that all legislative power granted "shall be vested in Congress" has never been thought, even in the administration of civil affairs, to preclude Congress from resorting to the aid of executive or administrative officers in determining by findings whether the facts are such as to call for the application of previously adopted legislative standards or definitions of Congressional policy.

The purpose of Executive Order No. 9066, and the standard which the President approved for the orders authorized to be promulgated by the military commander—as disclosed by the preamble of the Executive Order—was the protection of our war resources against espionage and sabotage. Public Proclamations Nos. 1 and 2 by General DeWitt, contain findings that the military areas created and the measures to be prescribed for them were required to establish safeguards against espionage and sabotage. Both the Executive Order and the Proclamations were before Congress when the Act of March 21, 1942, was under consideration. To the extent that the Executive Order authorized orders to be promulgated by the military commander to accomplish the declared purpose of the

Order, and to the extent that the findings in the Proclamations establish that such was their purpose, both have been approved by Congress.

It is true that the Act does not in terms establish a particular standard to which orders of the military commander are to conform, or require findings to be made as a prerequisite to any order. But the Executive Order, the Proclamations and the statute are not to be read in isolation from each other. They were parts of a single program and must be judged as such. The Act of March 21, 1942, was an adoption by Congress of the Executive Order and of the Proclamations. The Proclamations themselves followed a standard authorized by the Executive Order—the necessity of protecting military resources in the designated areas against espionage and sabotage. And by the Act, Congress gave its approval to that standard. We have no need to consider now the validity of action if taken by the military commander without conforming to this standard approved by Congress, or the validity of orders made without the support of findings showing that they do so conform. Here the findings of danger from espionage and sabotage, and of the necessity of the curfew order to protect against them, have been duly made. General DeWitt's Public Proclamation No. 3, which established the curfew, merely prescribed regulations of the type and in the manner which Public Proclamations Nos. 1 and 2 had announced would be prescribed at a future date, and was thus founded on the findings of Proclamations Nos. 1 and 2.

The military commander's appraisal of facts in the light of the authorized standard, and the inferences which he drew from those facts, involved the exercise of his informed judgment. But as we have seen, those facts, and the inferences which could be rationally drawn from them, support the judgment of the military commander, that

the danger of espionage and sabotage to our military resources was imminent, and that the curfew order was an appropriate measure to meet it.

Where, as in the present case, the standard set up for the guidance of the military commander, and the action taken and the reasons for it, are in fact recorded in the military orders, so that Congress, the courts and the public are assured that the orders, in the judgment of the commander, conform to the standards approved by the President and Congress, there is no failure in the performance of the legislative function. *Opp Cotton Mills* v. *Administrator,* 312 U. S. 126, 142–46, and cases cited. The essentials of that function are the determination by Congress of the legislative policy and its approval of a rule of conduct to carry that policy into execution. The very necessities which attend the conduct of military operations in time of war in this instance as in many others preclude Congress from holding committee meetings to determine whether there is danger, before it enacts legislation to combat the danger.

The Constitution as a continuously operating charter of government does not demand the impossible or the impractical. The essentials of the legislative function are preserved when Congress authorizes a statutory command to become operative, upon ascertainment of a basic conclusion of fact by a designated representative of the Government. Cf. *The Aurora,* 7 Cranch 382; *United States* v. *Chemical Foundation,* 272 U. S. 1, 12. The present statute, which authorized curfew orders to be made pursuant to Executive Order No. 9066 for the protection of war resources from espionage and sabotage, satisfies those requirements. Under the Executive Order the basic facts, determined by the military commander in the light of knowledge then available, were whether that danger existed and whether a curfew order was an appropriate means of minimizing the danger. Since his findings to

that effect were, as we have said, not without adequate support, the legislative function was performed and the sanction of the statute attached to violations of the curfew order. It is unnecessary to consider whether or to what extent such findings would support orders differing from the curfew order.

The conviction under the second count is without constitutional infirmity. Hence we have no occasion to review the conviction on the first count since, as already stated, the sentences on the two counts are to run concurrently and conviction on the second is sufficient to sustain the sentence. For this reason also it is unnecessary to consider the Government's argument that compliance with the order to report at the Civilian Control Station did not necessarily entail confinement in a relocation center.

Affirmed.

MR. JUSTICE DOUGLAS, concurring:

While I concur in the result and agree substantially with the opinion of the Court, I wish to add a few words to indicate what for me is the narrow ground of decision.

After the disastrous bombing of Pearl Harbor the military had a grave problem on its hands. The threat of Japanese invasion of the west coast was not fanciful but real. The presence of many thousands of aliens and citizens of Japanese ancestry in or near to the key points along that coast line aroused special concern in those charged with the defense of the country. They believed that not only among aliens but also among citizens of Japanese ancestry there were those who would give aid and comfort to the Japanese invader and act as a fifth column before and during an invasion.[1] If the military

[1] Judge Fee stated in *United States* v. *Yasui*, 48 F. Supp. 40, 44–45, the companion case to the present one, "The areas and zones outlined in the proclamations became a theatre of operations, subjected in

were right in their belief that among citizens of Japanese ancestry there was an actual or incipient fifth column, we were indeed faced with the imminent threat of a dire emergency. We must credit the military with as much good faith in that belief as we would any other public official acting pursuant to his duties. We cannot possibly know all the facts which lay behind that decision. Some of them may have been as intangible and as imponderable as the factors which influence personal or business decisions in daily life. The point is that we cannot sit in judgment on the military requirements of that hour. Where the orders under the present Act have some relation to "protection against espionage and against sabotage," our task is at an end.

Much of the argument assumes that as a matter of policy it might have been wiser for the military to have dealt with these people on an individual basis and through the process of investigation and hearings separated those who were loyal from those who were not. But the wisdom or expediency of the decision which was made is not for us to review. Nor are we warranted where national survival is at stake in insisting that those orders should not have been applied to anyone without some evidence of his disloyalty. The orders as applied to the petitioner are not to be tested by the substantial evidence rule. Peacetime procedures do not necessarily fit wartime needs. It is said that if citizens of Japanese ancestry were generally disloyal, treatment on a group basis might be justified. But there is no difference in power when the num-

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localities to attack and all threatened during this period with a full scale invasion. The danger at the time this prosecution was instituted was imminent and immediate. The difficulty of controlling members of an alien race, many of whom, although citizens, were disloyal with opportunities of sabotage and espionage, with invasion imminent, presented a problem requiring for solution ability and devotion of the highest order."

ber of those who are finally shown to be disloyal or suspect is reduced to a small per cent. The sorting process might indeed be as time-consuming whether those who were disloyal or suspect constituted nine or ninety-nine per cent. And the pinch of the order on the loyal citizens would be as great in any case. But where the peril is great and the time is short, temporary treatment on a group basis may be the only practicable expedient whatever the ultimate percentage of those who are detained for cause. Nor should the military be required to wait until espionage or sabotage becomes effective before it moves.

It is true that we might now say that there was ample time to handle the problem on the individual rather than the group basis. But military decisions must be made without the benefit of hindsight. The orders must be judged as of the date when the decision to issue them was made. To say that the military in such cases should take the time to weed out the loyal from the others would be to assume that the nation could afford to have them take the time to do it. But as the opinion of the Court makes clear, speed and dispatch may be of the essence. Certainly we cannot say that those charged with the defense of the nation should have procrastinated until investigations and hearings were completed. At that time further delay might indeed have seemed to be wholly incompatible with military responsibilities.

Since we cannot override the military judgment which lay behind these orders, it seems to me necessary to concede that the army had the power to deal temporarily with these people on a group basis. Petitioner therefore was not justified in disobeying the orders.

But I think it important to emphasize that we are dealing here with a problem of loyalty not assimilation. Loyalty is a matter of mind and of heart not of race. That indeed is the history of America. Moreover, guilt is per-

sonal under our constitutional system. Detention for reasonable cause is one thing. Detention on account of ancestry is another.

In this case the petitioner tendered by a plea in abatement the question of his loyalty to the United States. I think that plea was properly stricken; military measures of defense might be paralyzed if it were necessary to try out that issue preliminarily. But a denial of that opportunity in this case does not necessarily mean that petitioner could not have had a hearing on that issue in some appropriate proceeding. Obedience to the military orders is one thing. Whether an individual member of a group must be afforded at some stage an opportunity to show that, being loyal, he should be reclassified is a wholly different question.

There are other instances in the law where one must obey an order before he can attack as erroneous the classification in which he has been placed. Thus it is commonly held that one who is a conscientious objector has no privilege to defy the Selective Service Act and to refuse or fail to be inducted. He must submit to the law. But that line of authority holds that after induction he may obtain through *habeas corpus* a hearing on the legality of his classification by the draft board.[2] Whether in the present situation that remedy would be available is one

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[2] See *United States* v. *Powell*, 38 F. Supp. 183; *Application of Greenberg*, 39 F. Supp. 13; *United States* v. *Baird*, 39 F. Supp. 392; *Micheli* v. *Paullin*, 45 F. Supp. 687; *United States* v. *Embrey*, 46 F. Supp. 916; *In re Rogers*, 47 F. Supp. 265; *Ex parte Stewart*, 47 F. Supp. 410; *United States* v. *Smith*, 48 F. Supp. 842; *Ex parte Robert*, 49 F. Supp. 131; *United States* v. *Grieme*, 128 F. 2d 811; *Fletcher* v. *United States*, 129 F. 2d 262; *Drumheller* v. *Berks County Local Board No. 1*, 130 F. 2d 610, 612. For cases arising under the Selective Draft Act of 1917, see *United States* v. *Kinkead*, 250 F. 692; *Ex parte McDonald*, 253 F. 99; *Ex parte Cohen*, 254 F. 711; *Arbitman* v. *Woodside*, 258 F. 441; *Ex parte Thieret*, 268 F. 472, 476. And see 10 Geo. Wash. L. Rev. 827.

of the large and important issues reserved by the present decision. It has been suggested that an administrative procedure has been established to relieve against unwarranted applications of these orders. Whether in that event the administrative remedy would be the only one available or would have to be first exhausted is also reserved. The scope of any relief which might be afforded—whether the liberties of an applicant could be restored only outside the areas in question—is likewise a distinct issue. But if it were plain that no machinery was available whereby the individual could demonstrate his loyalty as a citizen in order to be reclassified, questions of a more serious character would be presented. The United States, however, takes no such position. We need go no further here than to deny the individual the right to defy the law. It is sufficient to say that he cannot test in that way the validity of the orders as applied to him.

MR. JUSTICE MURPHY, concurring:

It is not to be doubted that the action taken by the military commander in pursuance of the authority conferred upon him was taken in complete good faith and in the firm conviction that it was required by considerations of public safety and military security. Neither is it doubted that the Congress and the Executive working together may generally employ such measures as are necessary and appropriate to provide for the common defense and to wage war "with all the force necessary to make it effective." *United States* v. *Macintosh,* 283 U. S. 605, 622. This includes authority to exercise measures of control over persons and property which would not in all cases be permissible in normal times.[1]

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[1] *Schenck* v. *United States,* 249 U. S. 47; *Debs* v. *United States,* 249 U. S. 211; *United States* v. *Bethlehem Steel Corp.,* 315 U. S. 289, 305; *Northern Pacific Ry. Co.* v. *North Dakota,* 250 U. S. 135; *Da-*

It does not follow, however, that the broad guaranties of the Bill of Rights and other provisions of the Constitution protecting essential liberties are suspended by the mere existence of a state of war. It has been frequently stated and recognized by this Court that the war power, like the other great substantive powers of government, is subject to the limitations of the Constitution. See *Ex parte Milligan,* 4 Wall. 2; *Hamilton* v. *Kentucky Distilleries Co.,* 251 U. S. 146, 156; *Home Building & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, 426. We give great deference to the judgment of the Congress and of the military authorities as to what is necessary in the effective prosecution of the war, but we can never forget that there are constitutional boundaries which it is our duty to uphold. It would not be supposed, for instance, that public elections could be suspended or that the prerogatives of the courts could be set aside, or that persons not charged with offenses against the law of war (see *Ex parte Quirin,* 317 U. S. 1) could be deprived of due process of law and the benefits of trial by jury, in the absence of a valid declaration of martial law. Cf. *Ex parte Milligan, supra.*

Distinctions based on color and ancestry are utterly inconsistent with our traditions and ideals. They are at variance with the principles for which we are now waging war. We cannot close our eyes to the fact that for centuries the Old World has been torn by racial and religious conflicts and has suffered the worst kind of anguish because of inequality of treatment for different groups. There was one law for one and a different law for another. Nothing is written more firmly into our law than the compact of the Plymouth voyagers to have just

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kota Central Tel. Co. v. *South Dakota,* 250 U. S. 163; *Highland* v. *Russell Car Co.,* 279 U. S. 253; *Selective Draft Law Cases,* 245 U. S. 366.

and equal laws. To say that any group cannot be assimilated is to admit that the great American experiment has failed, that our way of life has failed when confronted with the normal attachment of certain groups to the lands of their forefathers. As a nation we embrace many groups, some of them among the oldest settlements in our midst, which have isolated themselves for religious and cultural reasons.

Today is the first time, so far as I am aware, that we have sustained a substantial restriction of the personal liberty of citizens of the United States based upon the accident of race or ancestry. Under the curfew order here challenged no less than 70,000 American citizens have been placed under a special ban and deprived of their liberty because of their particular racial inheritance. In this sense it bears a melancholy resemblance to the treatment accorded to members of the Jewish race in Germany and in other parts of Europe. The result is the creation in this country of two classes of citizens for the purposes of a critical and perilous hour—to sanction discrimination between groups of United States citizens on the basis of ancestry. In my opinion this goes to the very brink of constitutional power.

Except under conditions of great emergency a regulation of this kind applicable solely to citizens of a particular racial extraction would not be regarded as in accord with the requirement of due process of law contained in the Fifth Amendment. We have consistently held that attempts to apply regulatory action to particular groups solely on the basis of racial distinction or classification is not in accordance with due process of law as prescribed by the Fifth and Fourteenth Amendments. Cf. *Yick Wo* v. *Hopkins,* 118 U. S. 356, 369; *Yu Cong Eng* v. *Trinidad,* 271 U. S. 500, 524–28. See also *Boyd* v. *Frankfort,* 117 Ky. 199, 77 S. W. 669; *Opinion of the Justices,* 207 Mass.

601, 94 N. E. 558. It is true that the Fifth Amendment, unlike the Fourteenth, contains no guarantee of equal protection of the laws. Cf. *Currin* v. *Wallace,* 306 U. S. 1, 14. It is also true that even the guaranty of equal protection of the laws allows a measure of reasonable classification. It by no means follows, however, that there may not be discrimination of such an injurious character in the application of laws as to amount to a denial of due process of law as that term is used in the Fifth Amendment.[2] I think that point is dangerously approached when we have one law for the majority of our citizens and another for those of a particular racial heritage.

In view, however, of the critical military situation which prevailed on the Pacific Coast area in the spring of 1942, and the urgent necessity of taking prompt and effective action to secure defense installations and military operations against the risk of sabotage and espionage, the military authorities should not be required to conform to standards of regulatory action appropriate to normal times. Because of the damage wrought by the Japanese at Pearl Harbor and the availability of new weapons and new techniques with greater capacity for speed and deception in offensive operations, the immediate possibility of an attempt at invasion somewhere along the Pacific Coast had to be reckoned with. However desirable such a procedure might have been, the military authorities could have reasonably concluded at

[2] For instance, if persons of an accused's race were systematically excluded from a jury in a federal court, any conviction undoubtedly would be considered a violation of the requirement of due process of law, even though the ground commonly stated for setting aside convictions so obtained in state courts is denial of equal protection of the laws. Cf. *Glasser* v. *United States,* 315 U. S. 60, with *Smith* v. *Texas,* 311 U. S. 128.

the time that determinations as to the loyalty and dependability of individual members of the large and widely scattered group of persons of Japanese extraction on the West Coast could not be made without delay that might have had tragic consequences. Modern war does not always wait for the observance of procedural requirements that are considered essential and appropriate under normal conditions. Accordingly I think that the military arm, confronted with the peril of imminent enemy attack and acting under the authority conferred by the Congress, made an allowable judgment at the time the curfew restriction was imposed. Whether such a restriction is valid today is another matter.

In voting for affirmance of the judgment I do not wish to be understood as intimating that the military authorities in time of war are subject to no restraints whatsoever, or that they are free to impose any restrictions they may choose on the rights and liberties of individual citizens or groups of citizens in those places which may be designated as "military areas." While this Court sits, it has the inescapable duty of seeing that the mandates of the Constitution are obeyed. That duty exists in time of war as well as in time of peace, and in its performance we must not forget that few indeed have been the invasions upon essential liberties which have not been accompanied by pleas of urgent necessity advanced in good faith by responsible men. Cf. Mr. Justice Brandeis concurring in *Whitney* v. *California,* 274 U. S. 357, 372.

Nor do I mean to intimate that citizens of a particular racial group whose freedom may be curtailed within an area threatened with attack should be generally prevented from leaving the area and going at large in other areas that are not in danger of attack and where special precautions are not needed. Their status as citizens, though subject to requirements of national security and

military necessity, should at all times be accorded the fullest consideration and respect. When the danger is past, the restrictions imposed on them should be promptly removed and their freedom of action fully restored.

MR. JUSTICE RUTLEDGE, concurring:

I concur in the Court's opinion, except for the suggestion, if that is intended (as to which I make no assertion), that the courts have no power to review any action a military officer may "in his discretion" find it necessary to take with respect to civilian citizens in military areas or zones, once it is found that an emergency has created the conditions requiring or justifying the creation of the area or zone and the institution of some degree of military control short of suspending habeas corpus. Given the generating conditions for exercise of military authority and recognizing the wide latitude for particular applications that ordinarily creates, I do not think it is necessary in this case to decide that there is no action a person in the position of General DeWitt here may take, and which he may regard as necessary to the region's or the country's safety, which will call judicial power into play. The officer of course must have wide discretion and room for its operation. But it does not follow there may not be bounds beyond which he cannot go and, if he oversteps them, that the courts may not have power to protect the civilian citizen. But in this case that question need not be faced and I merely add my reservation without indication of opinion concerning it.

Counsel for Parties.

YASUI *v.* UNITED STATES.

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

No. 871. Argued May 11, 1943.—Decided June 21, 1943.

The conviction of a person of Japanese ancestry for violation of a curfew order is sustained upon the authority of *Hirabayashi* v. *United States, ante,* p. 81; although, for purposes stated in the opinion, the cause is remanded to the District Court. P. 117.

48 F. Supp. 40, affirmed.

RESPONSE to questions certified by the Circuit Court of Appeals upon an appeal to that court from a conviction in the District Court for violation of a curfew order. This Court directed that the entire record be certified so that the case could be determined as if brought here by appeal.

Messrs. A. L. Wirin and *E. F. Bernard* (*Mr. Ralph E. Moody* was with the latter on the brief) for Yasui.

Solicitor General Fahy, with whom *Messrs. Edward J. Ennis, Arnold Raum, John L. Burling,* and *Leo Gitlin* were on the brief, for the United States.

Briefs of *amici curiae* were filed by *Messrs. Arthur Garfield Hays, Osmond K. Fraenkel* and *A. L. Wirin,* on behalf of the American Civil Liberties Union; by *Mr. A. L. Wirin* on behalf of the Japanese American Citizens League; and by *Mr. Jackson H. Ralston* on behalf of the Northern California Branch of the American Civil Liberties Union,—in support of Yasui; and by *Messrs. Robert W. Kenny,* Attorney General of California, *I. H. Van Winkle,* Attorney General of Oregon, and *Smith Troy,* Attorney General of the State of Washington, and *Fred E. Lewis,* Chief Assistant and Acting Attorney General of the State of Washington, on behalf of those States,—urging affirmance.

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

This is a companion case to *Hirabayashi* v. *United States, ante,* p. 81.

The case comes here on certificate of the Court of Appeals for the Ninth Circuit, certifying to us questions of law upon which it desires instructions for the decision of the case. § 239 of the Judicial Code as amended, 28 U. S. C. § 346. Acting under that section we ordered the entire record to be certified to this Court so that we might proceed to a decision, as if the case had been brought here by appeal.

Appellant, an American-born person of Japanese ancestry, was convicted in the district court of an offense defined by the Act of March 21, 1942. 56 Stat. 173. The indictment charged him with violation, on March 28, 1942, of a curfew order made applicable to Portland, Oregon, by Public Proclamation No. 3, issued by Lt. General J. L. DeWitt on March 24, 1942. 7 Federal Register 2543. The validity of the curfew was considered in the *Hirabayashi* case, and this case presents the same issues as the conviction on Count 2 of the indictment in that case. From the evidence it appeared that appellant was born in Oregon in 1916 of alien parents; that when he was eight years old he spent a summer in Japan; that he attended the public schools in Oregon, and also, for about three years, a Japanese language school; that he later attended the University of Oregon, from which he received A. B. and LL. B. degrees; that he was a member of the bar of Oregon, and a second lieutenant in the Army of the United States, Infantry Reserve; that he had been employed by the Japanese Consulate in Chicago, but had resigned on December 8, 1941, and immediately offered his services to the military authorities; that he had discussed with an agent of the Federal Bureau of Investiga-

tion the advisability of testing the constitutionality of the curfew; and that when he violated the curfew order he requested that he be arrested so that he could test its constitutionality.

The district court ruled that the Act of March 21, 1942, was unconstitutional as applied to American citizens, but held that appellant, by reason of his course of conduct, must be deemed to have renounced his American citizenship. 48 F. Supp. 40. The Government does not undertake to support the conviction on that ground, since no such issue was tendered by the Government, although appellant testified at the trial that he had not renounced his citizenship. Since we hold, as in the *Hirabayashi* case, that the curfew order was valid as applied to citizens, it follows that appellant's citizenship was not relevant to the issue tendered by the Government and the conviction must be sustained for the reasons stated in the *Hirabayashi* case.

But as the sentence of one year's imprisonment—the maximum permitted by the statute—was imposed after the finding that appellant was not a citizen, and as the Government states that it has not and does not now controvert his citizenship, the case is an appropriate one for resentence in the light of these circumstances. See *Husty* v. *United States*, 282 U. S. 694, 703. The conviction will be sustained but the judgment will be vacated and the cause remanded to the district court for resentence of appellant, and to afford that court opportunity to strike its findings as to appellant's loss of United States citizenship.

So ordered.

SCHNEIDERMAN *v.* UNITED STATES.

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

No. 2. Argued November 9, 1942. Reargued March 12, 1943.—Decided June 21, 1943.

1. Assuming that, in the absence of fraud, a certificate of citizenship can be set aside under § 15 of the Naturalization Act of 1906 as "illegally procured" because the finding by the naturalization court that the applicant was attached to the principles of the Constitution was erroneous, the burden is upon the Government to prove the error by clear, unequivocal and convincing evidence; a mere preponderance of evidence which leaves the issue in doubt will not suffice. P. 124.
2. In construing the Acts of Congress governing naturalization and denaturalization, general expressions should not be so construed as to circumscribe liberty of political thought. P. 132.
3. The Government sued in 1939 to cancel a certificate of citizenship, granted in 1927, charging that it had been "illegally procured," in that the defendant at the time of the naturalization and for five years preceding was not attached to the principles of the Constitution, but was in fact a member of, and affiliated with, and believed in and supported the principles of, certain communistic organizations in the United States, which were opposed to the principles of the Constitution and advocated the overthrow of the Government of the United States by force and violence. *Held:*

   (1) That the evidence, which is reviewed in the opinion, fails to show with the requisite degree of certainty that during the period in question the defendant was not attached to the principles of the Constitution. P. 135.

   (2) Attachment to the principles of the Constitution is not necessarily incompatible with a desire to have it amended. P. 137.

   (3) Utterances of certain leaders of the party organizations in question, advocating force and violence, are not imputable to the defendant. P. 146.

   (4) Under the conflicting evidence in this case, the Court can not say that the Government proved with the requisite certainty that the attitude of the Communist party in the United States in 1927 towards force and violence was in the category of agitation and exhortation calling for present violent action which creates a clear

and present danger of public disorder or other substantive evil, rather than a mere doctrinal justification or prediction of the use of force under hypothetical conditions at some indefinite future time, not calculated or intended to be presently acted upon, but leaving opportunity for general discussion and calm reason. P. 157.

4. The Court does not consider findings made by the District Court in this case upon issues outside of the scope of the complaint; in a denaturalization case, as in a criminal case, the Government is limited to the matters charged in the complaint. P. 159.

119 F. 2d 500, reversed.

CERTIORARI, 314 U. S. 597, to review the affirmance of a judgment (33 F. Supp. 510) which canceled a certificate of citizenship.

Mr. Wendell L. Willkie, with whom *Mrs. Carol King* and *Mr. Carl M. Owen* were on the briefs, for petitioner.

Solicitor General Fahy, with whom *Assistant Attorney General Berge,* and *Messrs. Oscar A. Provost, John Ford Baecher* and *Richard S. Salant* were on the briefs, for the United States.

Pearl M. Hart filed a brief on behalf of the American Committee for Protection of Foreign Born, as *amicus curiae,* urging reversal.

MR. JUSTICE MURPHY delivered the opinion of the Court.

We brought this case here on certiorari, 314 U. S. 597, because of its importance and its possible relation to freedom of thought. The question is whether the naturalization of petitioner, an admitted member of the Communist Party of the United States, was properly set aside by the courts below some twelve years after it was granted. We agree with our brethren of the minority that our relations with Russia, as well as our views regarding its government and the merits of Communism are immaterial to a decision of this case. Our concern is with what Congress

meant by certain statutes and whether the Government has proved its case under them.

While it is our high duty to carry out the will of Congress, in the performance of this duty we should have a jealous regard for the rights of petitioner. We should let our judgment be guided so far as the law permits by the spirit of freedom and tolerance in which our nation was founded, and by a desire to secure the blessings of liberty in thought and action to all those upon whom the right of American citizenship has been conferred by statute, as well as to the native born. And we certainly should presume that Congress was motivated by these lofty principles.

We are directly concerned only with the rights of this petitioner and the circumstances surrounding his naturalization, but we should not overlook the fact that we are a heterogeneous people. In some of our larger cities a majority of the school children are the offspring of parents only one generation, if that far, removed from the steerage of the immigrant ship, children of those who sought refuge in the new world from the cruelty and oppression of the old, where men have been burned at the stake, imprisoned, and driven into exile in countless numbers for their political and religious beliefs. Here they have hoped to achieve a political status as citizens in a free world in which men are privileged to think and act and speak according to their convictions, without fear of punishment or further exile so long as they keep the peace and obey the law.

This proceeding was begun on June 30, 1939, under the provisions of § 15 of the Act of June 29, 1906, 34 Stat. 596, to cancel petitioner's certificate of citizenship granted in 1927. This section gives the United States the right and the duty to set aside and cancel certificates of citizenship on the ground of "fraud" or on the ground that

they were "illegally procured." [1] The complaint charged that the certificate had been illegally procured in that petitioner was not, at the time of his naturalization, and during the five years preceding his naturalization "had not behaved as, a person attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States,[2] but in truth and in fact during all of said times, respondent [petitioner] was a member of and affiliated with and believed in and supported the principles of certain or-

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[1] At the time this proceeding was started this section read in part as follows:

"It shall be the duty of the United States district attorneys for the respective districts, or the Commissioner of Immigration and Naturalization or Deputy Commissioner of Immigration and Naturalization, upon affidavit showing good cause therefor, to institute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud or on the ground that such certificate of citizenship was illegally procured . . . " 8 U. S. C. § 405.

This provision is continued in substance by § 338 of the Nationality Act of 1940, 54 Stat. 1137, 1158, 8 U. S. C. § 738.

[2] Section 4 of the Act of 1906 provided:

"Fourth. It shall be made to appear to the satisfaction of the court admitting any alien to citizenship that immediately preceding the date of his application he has resided continuously within the United States five years at least, and within the State or Territory where such court is at the time held one year at least, and that during that time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same. In addition to the oath of the applicant, the testimony of at least two witnesses, citizens of the United States, as to the facts of residence, moral character, and attachment to the principles of the Constitution shall be required, and the name, place of residence, and occupation of each witness shall be set forth in the record." 34 Stat. 598; 8 U. S. C. § 382.

ganizations then known as the Workers (Communist) Party of America and the Young Workers (Communist) League of America, whose principles were opposed to the principles of the Constitution of the United States and advised, advocated and taught the overthrow of the Government, Constitution and laws of the United States by force and violence." The complaint also charged fraudulent procurement in that petitioner concealed his Communist affiliation from the naturalization court. The Government proceeds here not upon the charge of fraud but upon the charge of illegal procurement.

This is not a naturalization proceeding in which the Government is being asked to confer the privilege of citizenship upon an applicant. Instead the Government seeks to turn the clock back twelve years after full citizenship was conferred upon petitioner by a judicial decree, and to deprive him of the priceless benefits that derive from that status. In its consequences it is more serious than a taking of one's property, or the imposition of a fine or other penalty. For it is safe to assert that nowhere in the world today is the right of citizenship of greater worth to an individual than it is in this country. It would be difficult to exaggerate its value and importance. By many it is regarded as the highest hope of civilized men. This does not mean that once granted to an alien, citizenship cannot be revoked or cancelled on legal grounds under appropriate proof. But such a right once conferred should not be taken away without the clearest sort of justification and proof. So, whatever may be the rule in a naturalization proceeding (see *United States* v. *Manzi*, 276 U. S. 463, 467), in an action instituted under § 15 for the purpose of depriving one of the precious right of citizenship previously conferred we believe the facts and the law should be construed as far as is reasonably possible in favor of the citizen. Especially is this so when the attack is made long after the time when the certificate of

citizenship was granted and the citizen has meanwhile met his obligations and has committed no act of lawlessness. It is not denied that the burden of proof is on the Government in this case. For reasons presently to be stated this burden must be met with evidence of a clear and convincing character that when citizenship was conferred upon petitioner in 1927 it was not done in accordance with strict legal requirements.

We are dealing here with a court decree entered after an opportunity to be heard. At the time petitioner secured his certificate of citizenship from the federal district court for the Southern District of California notice of the filing of the naturalization petition was required to be given ninety days before the petition was acted on (§ 6 of the Act of 1906), the hearing on the petition was to take place in open court (§ 9), and the United States had the right to appear, to cross-examine petitioner and his witnesses, to introduce evidence, and to oppose the petition (§ 11). In acting upon the petition the district court exercised the judicial power conferred by Article III of the Constitution, and the Government had the right to appeal from the decision granting naturalization. *Tutun* v. *United States,* 270 U. S. 568. The record before us does not reveal the circumstances under which petitioner was naturalized except that it took place in open court. We do not know whether or not the Government exercised its right to appear and to appeal. Whether it did or not, the hard fact remains that we are here re-examining a judgment, and the rights solemnly conferred under it.

This is the first case to come before us in which the Government has sought to set aside a decree of naturalization years after it was granted on a charge that the finding of attachment was erroneous. Accordingly for the first time we have had to consider the nature and scope of the Government's right in a denaturalization proceeding to re-examine a finding and judgment of attachment

upon a charge of illegal procurement. Because of the view we take of this case we do not reach, and therefore do not consider, two questions which have been raised concerning the scope of that right.

The first question is whether, aside from grounds such as lack of jurisdiction or the kind of fraud which traditionally vitiates judgments, cf. *United States* v. *Throckmorton,* 98 U. S. 61; *Kibbe* v. *Benson,* 17 Wall. 624, Congress can constitutionally attach to the exercise of the judicial power under Article III of the Constitution, authority to re-examine a judgment granting a certificate of citizenship after that judgment has become final by exhaustion of the appellate process or by a failure to invoke it.[3]

The second question is whether under the Act of 1906 as it was in 1927 the Government, in the absence of a claim of fraud and relying wholly upon a charge of illegal procurement, can secure a *de novo* re-examination of a naturalization court's finding and judgment that an applicant for citizenship was attached to the principles of the Constitution.

We do not consider these questions. For though we assume, without deciding, that in the absence of fraud a certificate of naturalization can be set aside under § 15 as "illegally procured" because the finding as to attachment would later seem to be erroneous, we are of the

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[3] Since 1790 Congress has conferred the function of admitting aliens to citizenship exclusively upon the courts. In exercising their authority under this mandate the federal courts are exercising the judicial power of the United States, conferred upon them by Article III of the Constitution. *Tutun* v. *United States,* 270 U. S. 568. For this reason it has been suggested that a decree of naturalization, even though the United States does not appear, cannot be compared (as was done in *Johannessen* v. *United States,* 225 U. S. 227, 238) to an administrative grant of land or of letters patent for invention, and that the permissible area of re-examination is different in the two situations.

opinion that this judgment should be reversed. If a finding of attachment can be so reconsidered in a denaturalization suit, our decisions make it plain that the Government needs more than a bare preponderance of the evidence to prevail. The remedy afforded the Government by the denaturalization statute has been said to be a narrower one than that of direct appeal from the granting of a petition. *Tutun* v. *United States,* 270 U. S. 568, 579; cf. *United States* v. *Ness,* 245 U. S. 319, 325. *Johannessen* v. *United States* states that a certificate of citizenship is "an instrument granting political privileges, and open like other public grants to be revoked if and when it shall be found to have been unlawfully or fraudulently procured. It is in this respect closely analogous to a public grant of land, . . ." 225 U. S. 227, 238. See also *Tutun* v. *United States, supra.* To set aside such a grant the evidence must be "clear, unequivocal, and convincing"—"it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt." *Maxwell Land-Grant Case,* 121 U. S. 325, 381; *United States* v. *San Jacinto Tin Co.,* 125 U. S. 273, 300; cf. *United States* v. *Rovin,* 12 F. 2d 942, 944. See Wigmore, Evidence, (3d Ed.) § 2498. This is so because rights once conferred should not be lightly revoked. And more especially is this true when the rights are precious and when they are conferred by solemn adjudication, as is the situation when citizenship is granted. The Government's evidence in this case does not measure up to this exacting standard.

Certain facts are undisputed. Petitioner came to this country from Russia in 1907 or 1908 when he was approximately three. In 1922, at the age of sixteen, he became a charter member of the Young Workers (now Communist) League in Los Angeles and remained a member until 1929 or 1930. In 1924, at the age of eighteen, he filed his declaration of intention to become a citizen. Later in the same year or early in 1925 he became a member of the

Workers Party, the predecessor of the Communist Party of the United States. That membership has continued to the present. His petition for naturalization was filed on January 18, 1927, and his certificate of citizenship was issued on June 10, 1927, by the United States District Court for the Southern District of California. He had not been arrested or subjected to censure prior to 1927,[4] and there is nothing in the record indicating that he was ever connected with any overt illegal or violent action or with any disturbance of any sort.

For its case the United States called petitioner, one Humphreys, a former member of the Communist Party, and one Hynes, a Los Angeles police officer formerly in charge of the radical squad, as witnesses, and introduced in evidence a number of documents. Petitioner testified on his own behalf, introduced some documentary evidence, and read into the record transcripts of the testimony of two university professors given in another proceeding.

Petitioner testified to the following: As a boy he lived in Los Angeles in poverty-stricken circumstances and joined the Young Workers League to study what the principles of Communism had to say about the conditions of society. He considered his membership and activities in the League and the Party during the five-year period between the ages of sixteen and twenty-one before he was naturalized, as an attempt to investigate and study the causes and reasons behind social and economic conditions. Meanwhile he was working his way through night high school and college. From 1922 to about 1925 he was "educational director" of the League. The duties of this non-salaried position were to organize classes, open to the public, for the study of Marxist theory, to register students and to send out notices for meetings; petitioner did no

[4] The record contains nothing to indicate that the same is not true for the period after 1927.

teaching. During 1925 and 1926 he was corresponding secretary of the Party in Los Angeles; this was a clerical, not an executive position. In 1928 he became an organizer or official spokesman for the League. His first executive position with the Party came in 1930 when he was made an organizational secretary first in California, then in Connecticut and later in Minnesota where he was the Communist Party candidate for governor in 1932. Since 1934 he has been a member of the Party's National Committee. At present he is secretary of the Party in California.

Petitioner testified further that during all the time he has belonged to the League and the Party he has subscribed to the principles of those organizations. He stated that he "believed in the essential correctness of the Marx theory as applied by the Communist Party of the United States," that he subscribed "to the philosophy and principles of Socialism as manifested in the writings of Lenin," and that his understanding and interpretation of the program, principles and practice of the Party since he joined "were and are essentially the same as those enunciated" in the Party's 1938 Constitution. He denied the charges of the complaint and specifically denied that he or the Party advocated the overthrow of the Government of the United States by force and violence, and that he was not attached to the principles of the Constitution. He considered membership in the Party compatible with the obligations of American citizenship. He stated that he believed in retention of personal property for personal use but advocated social ownership of the means of production and exchange, with compensation to the owners. He believed and hoped that socialization could be achieved here by democratic processes but history showed that the ruling minority has always used force against the majority before surrendering power. By dictatorship of the proletariat petitioner meant that the "majority of the people

shall really direct their own destinies and use the instrument of the state for these truly democratic ends." He stated that he would bear arms against his native Russia if necessary.

Humphreys testified that he had been a member of the Communist Party and understood he was expelled because he refused to take orders from petitioner. He had been taught that present forms of government would have to be abolished "through the dictatorship of the proletariat" which would be established by a "revolutionary process." He asserted that the program of the Party was the socialization of all property without compensation. With regard to advocacy of force and violence he said: "the Communist Party took the defensive, and put the first users of force upon the capitalistic government; they claimed that the capitalistic government would resist the establishment of the Soviet system, through force and violence, and that the working class would be justified in using force and violence to establish the Soviet system of society."

Hynes testified that he had been a member of the Party for eight months in 1922. He stated that the Communist method of bringing about a change in the form of government is one of force and violence; he based this statement upon: "knowledge I have gained as a member in 1922 and from what further knowledge I have gained from reading various official publications, published and circulated by the Communist Party and from observation and actual contact with the activities of the Communist Party . . ." [5] On cross-examination Hynes admitted that he never attempted a philosophic analysis of the literature he read, but only read it to secure evidence, reading and underscoring those portions which, in his opinion,

[5] For a discussion of the adequacy of somewhat similar testimony by Hynes see *Ex parte Fierstein*, 41 F. 2d 53.

"had to do with force or violence or overthrowing of this system of government other than by lawful means provided in the Constitution." He testified that he never saw any behavior on petitioner's part that brought him into conflict with any law.

The testimony of the two professors discussed Marxian theory as evidenced by the writings of Marx, Engels and Lenin, and concluded that it did not advocate the use of force and violence as a method of attaining its objective.

In its written opinion the district court held that petitioner's certificate of naturalization was illegally procured because the organizations to which petitioner belonged were opposed to the principles of the Constitution and advised, taught and advocated the overthrow of the Government by force and violence, and therefore petitioner, "by reason of his membership in such organizations and participation in their activities, was not 'attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same.'" 33 F. Supp. 510, 513.

The district court also made purported findings of facts to the effect that petitioner was not attached to the principles of the Constitution and well disposed to the good order and happiness of the same, and was a disbeliever in organized government, that he fraudulently concealed his membership in the League and the Party from the naturalization court, and that his oath of allegiance was false. The conclusion of law was that the certificate was illegally and fraudulently procured. The pertinent findings of fact on these points, set forth in the margin,[6] are but the most

[6] IV. "The Court finds that it is true that said decree and certificate of naturalization were illegally procured and obtained in this: That respondent [petitioner] was not, at the time of his naturalization by said Court, and during the period of five years immediately preceding

general conclusions of ultimate fact. It is impossible to tell from them upon what underlying facts the court relied, and whether proper statutory standards were observed. If it were not rendered unnecessary by the broad view we take of this case, we would be inclined to reverse

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the filing of his petition for naturalization had not behaved as, a person attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the same.

"The Court finds that it is not true that at the time of the filing of his petition for naturalization respondent was not a disbeliever in or opposed to organized government or a member of or affiliated with any organization or body of persons teaching disbelief in or opposed to organized government.

"The Court finds that in truth and in fact during all of said times respondent had not behaved as a man attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the same, but was a member of and affiliated with and believed in and supported the principles of certain organizations known as the Workers Party of America, the Workers (Communist) Party of America, the Communist Party of the United States of America, the Young Workers League of America, the Young Workers (Communist) League of America and the Young Communist League of America, which organizations were, and each of them was, at all times herein mentioned, a section of the Third International, the principles of all of which said organizations were opposed to the principles of the Constitution of the United States, and advised, advocated, and taught the overthrow of the Government, Constitution and laws of the United States by force and violence and taught disbelief in and opposition to organized government.

V. "The Court further finds that during all of said times the respondent has been and now is a member of said organizations and has continued to believe in, advocate and support the said principles of said organizations."

VI. (The substance of this finding is that petitioner fraudulently concealed his Communist affiliation from the naturalization court. It is not set forth because it is not an issue here. See Note 7, *infra*.)

VII. "The court further finds that it is true that said decree and certificate of naturalization were illegally and fraudulently procured and obtained in this: That before respondent [petitioner] was admitted to citizenship as aforesaid, he declared on oath in open court

and remand to the district court for the purpose of making adequate findings.

The Circuit Court of Appeals affirmed on the ground that the certificate was illegally procured, holding that the finding that petitioner's oath was false was not "clearly erroneous." 119 F. 2d 500.[7] We granted certiorari, and after having heard argument and reargument, now reverse the judgments below.

I

The Constitution authorizes Congress "to establish an uniform rule of naturalization" (Art. I, § 8, cl. 4), and we may assume that naturalization is a privilege, to be given or withheld on such conditions as Congress sees fit. Cf.

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that he would support the Constitution of the United States, and that he absolutely and entirely renounced and abjured all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and that he would support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same, whereas in truth and in fact, at the time of making such declarations on oath in open court, respondent [petitioner] did not intend to support the Constitution of the United States, and did not intend absolutely and entirely to renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and did not intend to support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and/or to bear true faith and allegiance to the same, but respondent at said time intended to and did maintain allegiance and fidelity to the Union of Soviet Socialist Republics and to the said Third International, and intended to adhere to and support and defend and advocate the principles and teachings of said Third International, which principles and teachings were opposed to the principles of the Constitution of the United States and advised, advocated and taught the overthrow of the Government, Constitution and laws of the United States by force and violence."

[7] That court said it was unnecessary to consider the charge of fraudulent procurement by concealment of petitioner's Communist affiliation. The Government has not pressed this charge here, and we do not consider it.

United States v. *Macintosh,* 283 U. S. 605, 615, and the dissenting opinion of Chief Justice Hughes, *ibid.* at p. 627. See also *Tutun* v. *United States,* 270 U. S. 568, 578; *Turner* v. *Williams,* 194 U. S. 279. But because of our firmly rooted tradition of freedom of belief, we certainly will not presume in construing the naturalization and denaturalization acts that Congress meant to circumscribe liberty of political thought by general phrases in those statutes. As Chief Justice Hughes said in dissent in the *Macintosh* case, such general phrases "should be construed, not in opposition to, but in accord with, the theory and practice of our Government in relation to freedom of conscience." 283 U. S. at 635. See also Holmes, J., dissenting in *United States* v. *Schwimmer,* 279 U. S. 644, 653–55.

When petitioner was naturalized in 1927, the applicable statutes did not proscribe communist beliefs or affiliation as such.[8] They did forbid the naturalization of disbelievers in organized government or members of organizations teaching such disbelief. Polygamists and advocates of political assassination were also barred.[9] Applicants for citizenship were required to take an oath to support the Constitution, to bear true faith and allegiance to the same and the laws of the United States, and to renounce all allegiance to any foreign prince, potentate, state or sovereignty.[10] And, it was to "be made to appear to the

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[8] The Nationality Act of 1940, while enlarging the category of beliefs disqualifying persons *thereafter* applying for citizenship, does not in terms make communist beliefs or affiliation grounds for refusal of naturalization. § 305, 54 Stat. 1137, 1141; 8 U. S. C. § 705.

Bills to write a definition of "communist" into the Immigration and Deportation Act of 1918 as amended (40 Stat. 1012, 41 Stat. 1008) and to provide for the deportation of "communists" failed to pass Congress in 1932 and again in 1935. See H. R. 12044, H. Rep. No. 1353, S. Rep. No. 808, 75 Cong. Rec. 12097–108, 72d Cong., 1st Sess. See also H. R. 7120, H. Rep. No. 1023, pts. 1 and 2, 74th Cong., 1st Sess.

[9] § 7 of Act of June 29, 1906, 8 U. S. C. § 364.

[10] § 4 of Act of June 29, 1906, 8 U. S. C. § 381.

satisfaction of the court" of naturalization that immediately preceding the application, the applicant "has resided continuously within the United States five years at least, . . . and that during that time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same." [11] Whether petitioner satisfied this last requirement is the crucial issue in this case.

To apply the statutory requirement of attachment correctly to the proof adduced, it is necessary to ascertain its meaning. On its face the statutory criterion is not attachment to the Constitution, but *behavior* for a period of five years as a man attached to its principles and well disposed to the good order and happiness of the United States. Since the normal connotation of behavior is conduct, there is something to be said for the proposition that the 1906 Act created a purely objective qualification, limiting inquiry to an applicant's previous conduct.[12] If this

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[11] § 4 of Act of June 29, 1906, 8 U. S. C. § 382.

[12] The legislative history of the phrase gives some support to this view. The behavior requirement first appeared in the Naturalization Act of 1795, 1 Stat. 414, which was designed to tighten the Act of 1790, 1 Stat. 103. The discursive debates on the 1795 Act cast little light upon the meaning of "behaved," but indicate that the purpose of the requirement was to provide a probationary period during which aliens could learn of our Constitutional plan. Some members were disturbed by the political ferment of the age and spoke accordingly, while others regarded the United States as an asylum for the oppressed and mistrusted efforts to probe minds for beliefs. It is perhaps significant that the oath, which was adopted over the protest of Madison, the sponsor of the bill, did not require the applicant to swear that he was attached to the Constitution, but only that he would support it. See 4 Annals of Congress, pp. 1004–09, 1021–23, 1026–27, 1030–58, 1062, 1064–66. See also Franklin, Legislative History of Naturalization in the United States (1906), Chapter IV.

The behavior requirement was reënacted in 1802 (2 Stat. 153) at the recommendation of Jefferson for the repeal of the stringent Act

objective standard is the requirement, petitioner satisfied the statute. His conduct has been law abiding in all respects. According to the record he has never been arrested, or connected with any disorder, and not a single written or spoken statement of his, during the relevant period from 1922 to 1927 or thereafter, advocating violent overthrow of the Government, or indeed even a statement, apart from his testimony in this proceeding, that he desired any change in the Constitution has been produced. The sole possible criticism is petitioner's membership and activity in the League and the Party, but those memberships *qua* memberships were immaterial under the 1906 Act.

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of 1798, 1 Stat. 566. See Franklin, *op. cit.*, Chapter VI. It continued unchanged until the Act of 1906 which for the first time imported the test of present belief into the naturalization laws when it provided in § 7 that disbelievers in organized government and polygamists could not become citizens. The continuation of the behavior test for attachment is some indication that a less searching examination was intended in this field—that conduct and not belief (other than anarchist or polygamist) was the criterion. The Nationality Act of 1940 changed the behavior requirement to a provision that no person could be naturalized unless he "has been and still is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States," 54 Stat. 1142, 8 U. S. C. § 707. The Report of the President's Committee to Revise the Nationality Laws (1939) indicates this change in language was not regarded as a change in substance. p. 23. The Congressional committee reports are silent on the question. The sponsors of the Act in the House, however, declared generally an intent to tighten and restrict the naturalization laws. See 86 Cong. Rec. 11939, 11942, 11947, 11949. The chairman of the sub-committee who had charge of the bill stated that "substantive changes are necessary in connection with certain rights, with a view to preventing persons who have no real attachment to the United States from enjoying the high privilege of American nationality." 86 Cong. Rec. 11948. This remark suggests that the change from "behaved as a man attached" to "has been and still is a person attached" was a change in meaning.

In *United States* v. *Schwimmer,* 279 U. S. 644, and *United States* v. *Macintosh,* 283 U. S. 605, however, it was held that the statute created a test of belief—that an applicant under the 1906 Act must not only behave as a man attached to the principles of the Constitution, but must be so attached in fact at the time of naturalization. We do not stop to reëxamine this construction for even if it is accepted the result is not changed. As mentioned before, we agree with the statement of Chief Justice Hughes in dissent in *Macintosh's* case that the behavior requirement is "a general phrase which should be construed, not in opposition to, but in accord with, the theory and practice of our Government in relation to freedom of conscience." 283 U. S. at 635. See also the dissenting opinion of Justice Holmes in the *Schwimmer* case, *supra,* 653–55. As pointed out before, this is a denaturalization proceeding, and it is a judgment, not merely a claim or a grant, which is being attacked. Assuming as we have that the United States is entitled to attack a finding of attachment upon a charge of illegality, it must sustain the heavy burden which then rests upon it to prove lack of attachment by "clear, unequivocal, and convincing" evidence which does not leave the issue in doubt. When the attachment requirement is construed as indicated above, we do not think the Government has carried its burden of proof.

The claim that petitioner was not in fact attached to the Constitution and well disposed to the good order and happiness of the United States at the time of his naturalization and for the previous five year period is twofold: *First,* that he believed in such sweeping changes in the Constitution that he simply could not be attached to it; *Second,* that he believed in and advocated the overthrow by force and violence of the Government, Constitution and laws of the United States.

In support of its position that petitioner was not in fact attached to the principles of the Constitution because of

his membership in the League and the Party, the Government has directed our attention first to petitioner's testimony that he subscribed to the principles of those organizations, and then to certain alleged Party principles and statements by Party Leaders which are said to be fundamentally at variance with the principles of the Constitution. At this point it is appropriate to mention what will be more fully developed later—that under our traditions beliefs are personal and not a matter of mere association, and that men in adhering to a political party or other organization notoriously do not subscribe unqualifiedly to all of its platforms or asserted principles. Said to be among those Communist principles in 1927 are: the abolition of private property without compensation; the erection of a new proletarian state upon the ruins of the old bourgeois state; the creation of a dictatorship of the proletariat; denial of political rights to others than members of the Party or of the proletariat; and the creation of a world union of soviet republics. Statements that American democracy "is a fraud" [13] and that the purposes of the Party are "utterly antagonistic to the purposes for which the American democracy, so called, was formed," [14] are stressed.

Those principles and views are not generally accepted—in fact they are distasteful to most of us—and they call for considerable change in our present form of government and society. But we do not think the Government has carried its burden of proving by evidence which does not leave the issue in doubt that petitioner was not in fact attached to the principles of the Constitution and well disposed to the good order and happiness of the United States when he was naturalized in 1927.

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[13] Program and Constitution of the Workers Party (1921–24).

[14] Acceptance speech of William Z. Foster, the Party's nominee for the Presidency in 1928.

The constitutional fathers, fresh from a revolution, did not forge a political strait-jacket for the generations to come.[15] Instead they wrote Article V and the First Amendment, guaranteeing freedom of thought, soon followed. Article V contains procedural provisions for constitutional change by amendment without any present limitation whatsoever except that no State may be deprived of equal representation in the Senate without its consent. Cf. *National Prohibition Cases,* 253 U. S. 350. This provision and the many important and far-reaching changes made in the Constitution since 1787 refute the idea that attachment to any particular provision or provisions is essential, or that one who advocates radical changes is necessarily not attached to the Constitution.

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[15] Writing in 1816 Jefferson said: "Some men look at constitutions with sanctimonious reverence, and deem them like the ark of the covenant, too sacred to be touched. They ascribe to the men of the preceding age a wisdom more than human, and suppose what they did to be beyond amendment. I knew that age well; I belonged to it, and labored with it. It deserved well of its country. It was very like the present, but without the experience of the present; and forty years of experience in government is worth a century of bookreading; and this they would say themselves, were they to rise from the dead. I am certainly not an advocate for frequent and untried changes in laws and constitutions. I think moderate imperfections had better be borne with; because, when once known, we accommodate ourselves to them, and find practical means of correcting their ill effects. But I know also, that laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy, as civilized society to remain ever under the regimen of their barbarous ancestors." Ford, Jefferson's Writings, vol. X, p. 42.

Compare his First Inaugural Address: "And let us reflect that, having banished from our land that religious intolerance under which mankind so long bled and suffered, we have yet gained little if we

United States v. *Rovin*, 12 F. 2d 942, 944-45.[16] As Justice Holmes said, "Surely it cannot show lack of attachment to the principles of the Constitution that . . . [one] thinks it can be improved." *United States* v. *Schwimmer*, *supra* (dissent). Criticism of, and the sincerity of desires to improve, the Constitution should not be judged by conformity to prevailing thought because, "if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us, but freedom for the thought that we hate." *Id.* See also

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countenance a political intolerance as despotic, as wicked, and capable of as bitter and bloody persecutions. During the throes and convulsions of the ancient world, during the agonizing spasms of infuriated man, seeking through blood and slaughter his long-lost liberty, it was not wonderful that the agitation of the billows should reach even this distant and peaceful shore; that this should be more felt and feared by some and less by others, and should divide opinions as to measures of safety. But every difference of opinion is not a difference of principle. We have called by different names brethren of the same principle. We are all Republicans, we are all Federalists. *If there be any among us who would wish to dissolve this Union or to change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it.* I know, indeed, that some honest men fear that a republican government cannot be strong, that this Government is not strong enough; but would the honest patriot, in the full tide of successful experiment, abandon a government which has so far kept us free and firm on the theoretic and visionary fear that this Government, the world's best hope, may by possibility want energy to preserve itself? I trust not." Richardson, Messages and Papers of the Presidents, vol. I, p. 310 (emphasis added).

[16] See also 18 Cornell Law Quarterly 251; Freund, United States *v.* Macintosh, A Symposium, 26 Illinois Law Review 375, 385; 46 Harvard Law Review 325.

As a matter of fact one very material change in the Constitution as it stood in 1927 when petitioner was naturalized has since been effected by the repeal of the Eighteenth Amendment.

Chief Justice Hughes dissenting in *United States* v. *Macintosh, supra,* p. 635. Whatever attitude we may individually hold toward persons and organizations that believe in or advocate extensive changes in our existing order, it should be our desire and concern at all times to uphold the right of free discussion and free thinking to which we as a people claim primary attachment. To neglect this duty in a proceeding in which we are called upon to judge whether a particular individual has failed to manifest attachment to the Constitution would be ironical indeed.

Our concern is with what Congress meant to be the extent of the area of allowable thought under the statute. By the very generality of the terms employed it is evident that Congress intended an elastic test, one which should not be circumscribed by attempts at precise definition. In view of our tradition of freedom of thought, it is not to be presumed that Congress in the Act of 1906, or its predecessors of 1795 and 1802,[17] intended to offer naturalization only to those whose political views coincide with those considered best by the founders in 1787 or by the majority in this country today. Especially is this so since the language used, posing the general test of "attachment" is not necessarily susceptible of so repressive a construction.[18] The Government agrees that an alien "may think that the laws and the Constitution should be amended in some or many respects" and still be attached to the principles of the Constitution within the meaning of the statute.

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[17] See Note 12, *ante.*

[18] In 1938 Congress failed to pass a bill denying naturalization to any person "who believes in any form of government for the United States contrary to that now existing in the United States, or who is a member of or affiliated with any organization which advocates any form of government for the United States contrary to that now existing in the United States." H. R. 9690, 75th Cong., 3d Sess.

Without discussing the nature and extent of those permissible changes, the Government insists that an alien must believe in and sincerely adhere to the "general political philosophy" of the Constitution.[19] Petitioner is said to be opposed to that "political philosophy," the minimum requirements of which are set forth in the margin.[20] It was argued at the bar that since Article V contains no limitations, a person can be attached to the Constitution no matter how extensive the changes are that he desires, so long as he seeks to achieve his ends within the framework of Article V. But we need not consider the validity of this extreme position for if the Government's construction is accepted, it has not carried its burden of proof even under its own test.

The district court did not state in its findings what principles held by petitioner or by the Communist Party were opposed to the Constitution and indicated lack of attachment. See Note 6, *ante*. In its opinion that court merely relied upon *In re Saralieff*, 59 F. 2d 436, and *United States* v. *Tapolcsanyi*, 40 F. 2d 255, without fresh examination of the question in the light of the present record.

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[19] Brief, pp. 103–04. Supporting this view are *In re Saralieff*, 59 F. 2d 436; *In re Van Laeken*, 22 F. Supp. 145; *In re Shanin*, 278 F. 739. See also *United States* v. *Tapolcsanyi*, 40 F. 2d 255; *Ex parte Sauer*, 81 F. 355; *United States* v. *Olsson*, 196 F. 562, reversed on stipulation, 201 F. 1022.

[20] "The test is . . . whether he substitutes revolution for evolution, destruction for construction, whether he believes in an ordered society, a government of laws, under which the powers of government are granted by the people but under a grant which itself preserves to the individual and to minorities certain rights or freedoms which even the majority may not take away; whether, in sum, the events which began at least no further back than the Declaration of Independence, followed by the Revolutionary War and the adoption of the Constitution, establish principles with respect to government, the individual, the minority and the majority, by which ordered liberty is replaced by disorganized liberty." Brief, p. 105.

33 F. Supp. 510. The Circuit Court of Appeals deduced as Party principles roughly the same ones which the Government here presses and stated "these views are not those of our Constitution." 119 F. 2d at 503–04.

With regard to the Constitutional changes he desired petitioner testified that he believed in the nationalization of the means of production and exchange with compensation, and the preservation and utilization of our "democratic structure . . . as far as possible for the advantage of the working classes." He stated that the "dictatorship of the proletariat" to him meant "not a government, but a state of things" in which "the majority of the people shall really direct their own destinies and use the instrument of the state for these truly democratic ends." None of this is necessarily incompatible with the "general political philosophy" of the Constitution as outlined above by the Government. It is true that the Fifth Amendment protects private property, even against taking for public use without compensation. But throughout our history many sincere people whose attachment to the general constitutional scheme cannot be doubted have, for various and even divergent reasons, urged differing degrees of governmental ownership and control of natural resources, basic means of production, and banks and the media of exchange, either with or without compensation. And something once regarded as a species of private property was abolished without compensating the owners when the institution of slavery was forbidden.[21] Can it be said that the author of the Emancipation Proclamation and the supporters of the Thirteenth Amendment were not attached to the Constitution? We conclude that lack of attachment to the Constitution is not shown on the basis of

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[21] See generally Thorpe, Constitutional History of the United States (1901), vol. III, book V.

Compare the effect of the Eighteenth Amendment.

the changes which petitioner testified he desired in the Constitution.

Turning now to a *seriatim* consideration of what the Government asserts are principles of the Communist Party, which petitioner believed and which are opposed to our Constitution, our conclusion remains the same—the Government has not proved by "clear, unequivocal and convincing" evidence that the naturalization court could not have been satisfied that petitioner was attached to the principles of the Constitution when he was naturalized.

We have already disposed of the principle of nationalization of the agents of production and exchange with or without compensation. The erection of a new proletariat state upon the ruins of the old bourgeois state, and the creation of a dictatorship of the proletariat may be considered together. The concept of the dictatorship of the proletariat is one loosely used, upon which more words than light have been shed. Much argument has been directed as to how it is to be achieved, but we have been offered no precise definition here. In the general sense the term may be taken to describe a state in which the workers or the masses, rather than the bourgeoisie or capitalists are the dominant class. Theoretically it is control by a class, not a dictatorship in the sense of absolute and total rule by one individual. So far as the record before us indicates, the concept is a fluid one, capable of adjustment to different conditions in different countries. There are only meager indications of the form the "dictatorship" would take in this country. It does not appear that it would necessarily mean the end of representative government or the federal system. The Program and Constitution of the Workers Party (1921–24) criticized the constitutional system of checks and balances, the Senate's power to pass on legislation, and the involved procedure

for amending the Constitution, characterizing them as devices designed to frustrate the will of the majority.[22] The 1928 platform of the Communist Party of the United States, adopted after petitioner's naturalization and hence not strictly relevant, advocated the abolition of the Senate, of the Supreme Court, and of the veto power of the President, and replacement of congressional districts with "councils of workers" in which legislative and executive power would be united. These would indeed be significant changes in our present governmental structure—changes which it is safe to say are not desired by the majority of the people in this country—but whatever our personal views, as judges we cannot say that a person who advocates their adoption through peaceful and constitutional means is not in fact attached to the Constitution—those institutions are not enumerated as necessary in the Government's test of "general political philosophy," and it is conceivable that "ordered liberty" could be maintained without them. The Senate has not gone free of criticism and one object of the Seventeenth Amendment was to make it more responsive to the public will.[23] The unicameral legislature is not unknown in the country.[24] It is true that this Court has played a large part in the unfolding of the constitutional plan (sometimes too much so in the opinion of some observers), but we would be arrogant indeed if we presumed that a government of laws, with protection for minority groups, would be impossible without it. Like other agencies of government, this Court at various times in its existence has not escaped

[22] Petitioner testified that this was never adopted, but was merely a draft for study.

[23] See Haynes, The Senate of the United States (1938), pp. 11, 96–98. 106–115, 1068–74.

[24] Compare Nebraska's experiment with such a body. Nebraska Constitution, Article III, § 1. See 13 Nebraska Law Bulletin 341.

the shafts of critics whose sincerity and attachment to the Constitution is beyond question—critics who have accused it of assuming functions of judicial review not intended to be conferred upon it, or of abusing those functions to thwart the popular will, and who have advocated various remedies taking a wide range.[24a] And it is hardly conceivable that the consequence of freeing the legislative branch from the restraint of the executive veto would be the end of constitutional government.[24b] By this discussion we certainly do not mean to indicate that we would favor such changes. Our preference and aversions have no bearing here. Our concern is with the extent of the allowable area of thought under the statute. We decide only that it is possible to advocate such changes and still be attached to the Constitution within the meaning of the Government's minimum test.

If any provisions of the Constitution can be singled out as requiring unqualified attachment, they are the guaranties of the Bill of Rights and especially that of freedom of thought contained in the First Amendment. Cf. Justice Holmes' dissent in *United States* v. *Schwimmer, supra.* We do not reach, however, the question whether petitioner was attached to the principles of the Constitution if he believed in denying political and civil rights to persons not members of the Party or of the so-called proletariat, for on the basis of the record before us it has not been clearly shown that such denial was a principle of the organizations to which petitioner belonged.

[24a] E. g., the recall of judicial decisions. See Theodore Roosevelt, A Charter of Democracy, S. Doc. No. 348, 62d Cong., 2d Sess. For proposed constitutional amendments relating to the judiciary and this Court see H. Doc. No. 353, pt. 2, 54th Cong., 2d Sess., pp. 144–64; S. Doc. No. 93, 69th Cong., 1st Sess., pp. 83, 86, 93, 101, 111, 123, 133.

[24b] For an account of the attacks on the veto power see H. Doc. No. 353, pt. 2, 54th Cong., 2d Sess., pp. 129–34.

Since it is doubtful that this was a principle of those organizations, it is certainly much more speculative whether this was part of petitioner's philosophy. Some of the documents in the record indicate that "class enemies" of the proletariat should be deprived of their political rights.[25] Lenin, however, wrote that this was not necessary to realize the dictatorship of the proletariat.[26] The Party's 1928 platform demanded the unrestricted right to organize, to strike and to picket and the unrestricted right of free speech, free press and free assemblage for the working class. The 1928 Program of the Communist International states that the proletarian State will grant religious freedom, while at the same time it will carry on anti-religious propaganda.

We should not hold that petitioner is not attached to the Constitution by reason of his possible belief in the creation of some form of world union of soviet republics unless we are willing so to hold with regard to those who believe in Pan-Americanism, the League of Nations, Union Now, or some other form of international collaboration

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[25] ABC of Communism; Lenin, State and Revolution; Statutes, Theses and Conditions of Admission to the Communist International; Stalin, Theory and Practice of Leninism; 1928 Program of the Communist International.

[26] "It should be observed that the question of depriving the exploiters of the franchise is purely a Russian question, and not a question of the dictatorship of the proletariat in general. . . . It would be a mistake, however, to guarantee in advance that the impending proletarian revolutions in Europe will all, or for the most part, be necessarily accompanied by the restriction of the franchise for the bourgeoisie. Perhaps they will. After our experience of the war and of the Russian revolution we can say that it will probably be so; but it is not absolutely necessary for the purpose of realizing the dictatorship, it is not an essential symptom of the logical concept 'dictatorship,' it does not enter as an essential condition in the historical and class concept 'dictatorship.'" Selected Works, vol. VII, pp. 142–3. (Placed in evidence by petitioner.)

or collective security which may grow out of the present holocaust. A distinction here would be an invidious one based on the fact that we might agree with or tolerate the latter but dislike or disagree with the former.

If room is allowed, as we think Congress intended, for the free play of ideas, none of the foregoing principles, which might be held to stand forth with sufficient clarity to be imputed to petitioner on the basis of his membership and activity in the League and the Party and his testimony that he subscribed to the principles of those organizations, is enough, whatever our opinion as to their merits, to prove that he was necessarily not attached to the Constitution when he was naturalized. The cumulative effect is no greater.

Apart from the question whether the alleged principles of the Party which petitioner assertedly believed were so fundamentally opposed to the Constitution that he was not attached to its principles in 1927, the Government contends that petitioner was not attached because he believed in the use of force and violence instead of peaceful democratic methods to achieve his desires. In support of this phase of its argument the Government asserts that the organizations with which petitioner was actively affiliated advised, advocated and taught the overthrow of the Government, Constitution and laws of the United States by force and violence, and that petitioner therefore believed in that method of governmental change.

Apart from his membership in the League and the Party, the record is barren of any conduct or statement on petitioner's part which indicates in the slightest that he believed in and advocated the employment of force and violence, instead of peaceful persuasion, as a means of attaining political ends. To find that he so believed and advocated it is necessary, therefore, to find that such was a principle of the organizations to which he belonged and then impute that principle to him on the basis of his

activity in those organizations and his statement that he subscribed to their principles. The Government frankly concedes that "it is normally true . . . that it is unsound to impute to an organization the views expressed in the writings of all its members, or to impute such writings to each member . . ." [27] But the Government contends, however, that it is proper to impute to petitioner certain excerpts from the documents in evidence upon which it particularly relies to show that advocacy of force and violence was a principle of the Communist Party of the United States in 1927, because those documents were official publications carefully supervised by the Party, because of the Party's notorious discipline over its members, and because petitioner was not a mere "rank and file or accidental member of the Party," but "an intelligent and educated individual" who "became a leader of these organizations as an intellectual revolutionary." [28] Since the immediate problem is the determination with certainty of petitioner's beliefs from 1922 to 1927, events and writings since that time have little relevance, and both parties have attempted to confine themselves within the limits of that critical period.

For some time the question whether advocacy of governmental overthrow by force and violence is a principle of the Communist Party of the United States has perplexed courts, administrators, legislators, and students. On varying records in deportation proceedings some courts have held that administrative findings that the Party did so advocate were not so wanting in evidential support as to amount to a denial of due process,[29] others have held

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[27] Brief, pp. 23–24.

[28] Brief, pp. 25–26.

[29] *In re Saderquist*, 11 F. Supp. 525; *Skeffington* v. *Katzeff*, 277 F. 129; *United States* v. *Curran*, 11 F. 2d 683; *Kenmotsu* v. *Nagle*, 44 F. 2d 953; *Sormunen* v. *Nagle*, 59 F. 2d 398; *Branch* v. *Cahill*, 88 F. 2d 545; *Ex parte Vilarino*, 50 F. 2d 582; *Kjar* v. *Doak*, 61 F. 2d 566;

to the contrary on different records,[30] and some seem to have taken the position that they will judicially notice that force and violence is a Party principle.[31] This Court has never passed upon the question whether the Party does so advocate, and it is unnecessary for us to do so now.

With commendable candor the Government admits the presence of sharply conflicting views on the issue of force and violence as a Party principle,[32] and it also concedes that "some communist literature in respect of force and violence is susceptible of an interpretation more rhetorical than literal." [33] It insists, however, that excerpts from the documents on which it particularly relies, are enough to show that the trial court's finding that the Communist Party advocated violent overthrow of the Government was not "clearly erroneous," and hence can not be set aside.[34] As previously pointed out, the trial court's findings do not indicate the bases for its conclusions, but the documents published prior to 1927 stressed by the Government, with the pertinent excerpts noted in the margin,

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Berkman v. *Tillinghast*, 58 F. 2d 621; *United States* v. *Smith*, 2 F. 2d 90; *United States* v. *Wallis*, 268 F. 413.

[30] *Strecker* v. *Kessler*, 95 F. 2d 976, 96 F. 2d 1020, affirmed on other grounds, 307 U. S. 22; *Ex parte Fierstein*, 41 F. 2d 53; *Colyer* v. *Skeffington*, 265 F. 17, reversed *sub nom. Skeffington* v. *Katzeff*, 277 F. 129.

[31] *United States ex rel. Yokinen* v. *Commissioner*, 57 F. 2d 707; *United States* v. *Perkins*, 79 F. 2d 533; *United States ex rel. Fernandas* v. *Commissioner*, 65 F. 2d 593; *Ungar* v. *Seaman*, 4 F. 2d 80; *Ex parte Jurgans*, 17 F. 2d 507; *United States ex rel. Fortmueller* v. *Commissioner*, 14 F. Supp. 484; *Murdoch* v. *Clark*, 53 F. 2d 155; *Wolck* v. *Weedin*, 58 F. 2d 928.

[32] Brief, p. 60.

[33] Brief, p. 77. See also *Colyer* v. *Skeffington*, 265 F. 17, 59, reversed *sub nom. Skeffington* v. *Katzeff*, 277 F. 129. And see Evatt, J., in *King* v. *Hush* (*Ex parte Devanny*), 48 C. L. R. 487, 516–18.

[34] Rule 52 (a) of the Rules of Civil Procedure, 28 U. S. C. A., following § 723 (c).

are: The Communist Manifesto of Marx and Engels;[35] The State and Revolution by Lenin;[36] The Statutes,

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[35] The Manifesto was proclaimed in 1848. The edition in evidence was published by the International Publishers in 1932. Petitioner testified that he believed it to be an authorized publication, that he was familiar with the work, that it was used in classes, and that he thought its principles were correct "particularly as they applied to the period in which they were written and the country about which they were written."

The excerpts stressed are: "The Communists disdain to conceal their views and aims. They openly declare that their ends can be attained only by the forcible overthrow of all existing social conditions."

. . . . . .

"Though not in substance, yet in form, the struggle of the proletariat with the bourgeoisie is at first a national struggle. The proletariat of each country must, of course, first of all settle matters with its own bourgeoisie.

"In depicting the most general phases of the development of the proletariat, we traced the more or less veiled civil war, raging within existing society, up to the point where that war breaks out into open revolution, and where the violent overthrow of the bourgeoisie lays the foundation for the sway of the proletariat."

[36] This work was written in 1917 between the February and October Revolutions in Russia. The copy in evidence was published in 1924 by the Daily Worker Publishing Company. Petitioner testified that it was circulated by the Party and that it was probably used in the classes of which he was "educational director."

The excerpts are:

"Fifth, in the same work of Engels, . . . there is also a disquisition on the nature of a violent revolution; and the historical appreciation of its role becomes, with Engels, a veritable panegyric of a revolution by force. This, of course, no one remembers. To talk or even to think of the importance of this idea, is not considered respectable by our modern Socialist parties, and in the daily propaganda and agitation among the masses it plays no part whatever. Yet it is indissolubly bound up with the 'withering away' of the state in one harmonious whole. Here is Engels' argument:

"'That force also plays another part in history (other than that of a perpetuation of evil), namely a *revolutionary* part; that as Marx

Theses and Conditions of Admission to the Communist International;[37] and The Theory and Practice of Lenin-

says, it is the midwife of every old society when it is pregnant with a new one; that force is the instrument and the means by which social movements hack their way through and break up the dead and fossilized political forms—of all this not a word by Herr Duehring. Duly, with sighs and groans, does he admit the possibility that for the overthrow of the system of exploitation force may, perhaps, be necessary, but most unfortunate if you please, because all use of force, forsooth, demoralizes its user! And this is said in face of the great moral and intellectual advance which has been the result of every victorious revolution! . . . And this turbid, flabby, impotent, parson's mode of thinking dares offer itself for acceptance to the most revolutionary party history has ever known.' "

. . . . . .

"The necessity of systematically fostering among the masses this and only this point of view about violent revolution lies at the root of the whole of Marx's and Engels' teaching, and it is just the neglect of such propaganda and agitation both by the present predominant Social-Chauvinists and the Kautskian schools that brings their betrayal of it into prominent relief."

. . . . . .

(Quoting Engels) " 'Revolution is an act in which part of the population forces its will on the other parts by means of rifles, bayonets, cannon, i. e., by most authoritative means. And the conquering party is inevitably forced to maintain its supremacy by means of that fear which its arms inspire in the reactionaries.' "

[37] Petitioner contends that this document was never introduced in evidence, and the record shows only that it was marked for identification. The view we take of the case makes it immaterial whether this document is in evidence or not. The copy furnished us was printed in 1923 under the auspices of the Workers Party. Hynes testified that it was an official publication, but not widely circulated. Petitioner had no recollection of the particular pamphlet and testified that the American party was not bound by it.

The excerpts are:

"That which before the victory of the proletariat seems but a theoretical difference of opinion on the question of 'democracy,' be-

ism, written by Stalin.[38] The Government also sets forth excerpts from other documents which are entitled to little

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comes inevitably on the morrow of the victory, a question which can only be decided by force of arms."

. . . . .

"The working class cannot achieve the victory over the bourgeoisie by means of the general strike alone, and by the policy of folded arms The proletariat must resort to an armed uprising."

. . . . .

"The elementary means of the struggle of the proletariat against the rule of the bourgeoisie is, first of all, the method of mass demonstrations. Such mass demonstrations are prepared and carried out by the organized masses of the proletariat, under the direction of a united, disciplined, centralized Communist Party. *Civil war is war.* In this war the proletariat must have its efficient political officers, its good political general staff, to conduct operations during all the stages of that fight.

"The mass struggle means a whole system of developing demonstrations growing ever more acute in form, and logically leading to an uprising against the capitalist order of the government. In this warfare of the masses developing into a civil war, the guiding party of the proletariat must, as a general rule, secure every and all lawful positions, making them its auxiliaries in the revolutionary work, and subordinating such positions to the plans of the general campaign, that of the mass struggle."

[38] The copy in evidence was printed by the Daily Worker Publishing Company either in 1924 or 1925. Petitioner was familiar with the work, but not the particular edition, and testified that it was probably circulated by the Party. He had read it, but probably after his naturalization. Hynes and Humphreys testified that it was used in communist classes.

The excerpts are:

"Marx's limitation with regard to the 'continent' has furnished the opportunists and mensheviks of every country with a pretext for asserting that Marx admitted the possibility of a peaceful transformation of bourgeois democracy into proletarian democracy, at least [in] some countries (England and America). Marx did in fact recognize the possibility of this in the England and America of 1860, where

weight because they were published after the critical period.[39]

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monopolist capitalism and Imperialism did not exist and where militarism and bureaucracy were as yet little developed. But now the situation in these countries is radically different; Imperialism has reached its apogee there, and there militarism and bureaucracy are sovereign. In consequence, Marx's restriction no longer applies."

"With the Reformist, reform is everything, whilst in revolutionary work it only appears as a form. This is why with the reformist tactic under a bourgeois government, all reform tends inevitably to consolidate the powers that be, and to weaken the revolution.

"With the revolutionary, on the contrary, the main thing is the revolutionary work and not the reform. For him, reform is only an accessory of revolution."

[39](a) Program of the Communist International, adopted in 1928 and published by the Workers Library Publishers, Inc., in 1929:

"Hence, revolution is not only necessary because there is no other way of overthrowing the *ruling* class, but also because, only in the process of revolution is the *overthrowing* class able to purge itself of the dross of the old society and become capable of creating a new society."

Petitioner "agreed with the general theoretical conclusions stated in" this Program, but he regarded "the application of that theory" as "something else."

(b) Programme of the Young Communist International, published in 1929: "An oppressed class which does not endeavor to possess and learn to handle arms would deserve to be treated as slaves. We would become bourgeois pacifists or opportunists if we forget that we are living in a class society, and that the only way out is through class struggle and the overthrow of the power of the ruling class. Our slogan must be: 'Arming of the proletariat, to conquer, expropriate and disarm the bourgeoisie.' Only after the proletariat has disarmed the bourgeoisie will it be able, without betraying its historic task, to throw all arms on the scrap heap. This the proletariat will undoubtedly do. But only then, and on no account sooner."

(c) Why Communism, written by Olgin, and published first in 1933, by the Workers Library Publishers:

"We Communists say that there is one way to abolish the capitalist State, and that is to smash it by force. To make Communism possible

The bombastic excerpts set forth in Notes 35 to 38 inclusive, upon which the Government particularly relies, lend considerable support to the charge. We do not say that a reasonable man could not possibly have found, as the district court did, that the Communist Party in 1927 actively urged the overthrow of the Government by force and violence.[40] But that is not the issue here. We are not concerned with the question whether a reasonable man might so conclude, nor with the narrow issue whether ad-

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the workers must take hold of the State machinery of capitalism and destroy it."

Petitioner testified that he had not read this book, but that it had been widely circulated by the Party.

[40] Since the district court did not specify upon what evidence its conclusory findings rested, it is well to mention the remaining documents published before 1927 which were introduced into evidence and excerpts from which were read into the record, but upon which the Government does not specifically rely with respect to the issue of force and violence. Those documents are: Lenin, Left Wing Communism, first published in English about 1920; Bucharin and Preobraschensky, ABC of Communism, written in 1919 and published around 1921 in this country (petitioner testified that this was never an accepted work and that its authors were later expelled from the International); International of Youth, a periodical published in 1925; The 4th National Convention of the Workers Party of America, published in 1925; The Second Year of the Workers Party in America (1924); and, The Program and Constitution of the Workers Party of America, circulated around 1924. With the exception of these last two documents, the excerpts read into the record from these publications contain nothing exceptional on the issue of force and violence. The excerpts from the last two documents stress the necessity for Party participation in elections, but declare that the Party fosters no illusions that the workers can vote their way to power, the expulsion of the Socialist members of the New York Assembly (see Chafee, Free Speech in the United States (1941), pp. 269–82) being cited as an example in point. These statements are open to an interpretation of prediction, not advocacy of force and violence. Cf. Note 48, *infra*.

ministrative findings to that effect are so lacking in evidentiary support as to amount to a denial of due process. As pointed out before, this is a denaturalization proceeding in which, if the Government is entitled to attack a finding of attachment as we have assumed, the burden rests upon it to prove the alleged lack of attachment by "clear, unequivocal and convincing" evidence. That burden has not been carried. The Government has not proved that petitioner's beliefs on the subject of force and violence were such that he was not attached to the Constitution in 1927.

In the first place this phase of the Government's case is subject to the admitted infirmities of proof by imputation.[41] The difficulties of this method of proof are here increased by the fact that there is, unfortunately, no absolutely accurate test of what a political party's principles are.[42] Political writings are often over-exaggerated polemics bearing the imprint of the period and the place in which written.[43] Philosophies cannot generally be studied *in vacuo*. Meaning may be wholly distorted by lifting sentences out of context, instead of construing them as part of an organic whole. Every utterance of party leaders is not taken as party gospel. And we would deny our experience as men if we did not recognize that official party programs are unfortunately often opportunistic de-

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[41] As Chief Justice (then Mr.) Hughes said in opposing the expulsion of the Socialist members of the New York Assembly: ". . . it is of the essence of the institutions of liberty that it be recognized that guilt is personal and cannot be attributed to the holding of opinion or to mere intent in the absence of overt acts; . . ." Memorial of the Special Committee Appointed by the Association of the Bar of the City of New York, New York Legislative Documents, vol. 5, 143d Session (1920), No. 30, p. 4.

[42] See Chafee, Free Speech in the United States (1941), pp. 219–24.

[43] See Note 33, *ante*.

vices as much honored in the breach as in the observance.[44] On the basis of the present record we cannot say that the Communist Party is so different in this respect that its principles stand forth with perfect clarity, and especially is this so with relation to the crucial issue of advocacy of force and violence, upon which the Government admits the evidence is sharply conflicting. The presence of this conflict is the second weakness in the Government's chain of proof. It is not eliminated by assiduously adding further excerpts from the documents in evidence to those culled out by the Government.

The reality of the conflict in the record before us can be pointed out quickly. Of the relevant prior to 1927 documents relied upon by the Government three are writings of outstanding Marxist philosophers, and leaders, the fourth is a world program.[45] The Manifesto of 1848 was proclaimed in an autocratic Europe engaged in suppressing the abortive liberal revolutions of that year. With this background, its tone is not surprising.[46] Its authors later stated, however, that there were certain countries, "such as the United States and England in which the workers may hope to secure their ends by peaceful means." [47] Lenin doubted this in his militant work, The State and Revolution, but this was written on the eve of the Bolshevist revolution in Russia and may be interpreted as intended in part to justify the Bolshevist

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[44] See Bryce, the American Commonwealth (1915) vol. II, p. 334; III Encyclopedia of the Social Sciences, p. 164.

[45] See Notes 35 to 38 inclusive, *ante*.

[46] Petitioner testified that he believed its principles, particularly as they applied to the period and country in which written. See Note 35, *ante*.

[47] Marx, Amsterdam Speech of 1872; see also Engels' preface to the First English Translation of Capital (1886).

course and refute the anarchists and social democrats.[48] Stalin declared that Marx's exemption for the United States and England was no longer valid.[49] He wrote, however, that "the proposition that the prestige of the Party can be built upon violence . . . is absurd and absolutely incompatible with Leninism." [50] And Lenin wrote "In order to obtain the power of the state the class conscious workers must win the majority to their side. As long as no violence is used against the masses, there is no other road to power. We are not Blanquists, we are not in favor of the seizure of power by a minority." [51] The 1938 Constitution of the Communist Party of the United States, which petitioner claimed to be the first and only written constitution ever officially adopted by the Party and which he asserted enunciated the principles of the Party as he understood them from the beginning

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[48] Lenin's remarks on England have been interpreted as simply predicting, not advocating, the use of violence there. See the introduction to Strachey, The Coming Struggle for Power (1935).

[49] See Note 38, *ante*.

[50] Stalin, Leninism, vol. I, pp. 282–83. Put in evidence by petitioner.

[51] Lenin, Selected Works, vol. VI. Put in evidence by petitioner. In the same work is the following:

"Marxism is an extremely profound and many sided doctrine. It is, therefore, not surprising that *scraps* of quotations from Marx—especially when the quotations are *not* to the point—can always be found among the 'arguments' of those who are breaking with Marxism. A military conspiracy is Blanquism *if* it is not organized by the party of a definite class; *if* its organizers have not reckoned with the political situation in general and the international situation in particular; *if* the party in question does not enjoy the sympathy of the majority of the people, as proved by definite facts; *if* the development of events in the revolution has not led to the virtual dissipation of the illusions of compromise entertained by the petty bourgeoisie; *if* the majority of the organs of the revolutionary struggle which are recognized to be 'authoritative' or have otherwise established themselves, such as the Soviets, have not been won over; *if* in the army (in time of war) sentiments hostile to a government which drags out an unjust war

of his membership, ostensibly eschews resort to force and violence as an element of Party tactics.[52]

A tenable conclusion from the foregoing is that the Party in 1927 desired to achieve its purpose by peaceful and democratic means, and as a theoretical matter justified the use of force and violence only as a method of preventing an attempted forcible counter-overthrow once the Party had obtained control in a peaceful manner, or as a method of last resort to enforce the majority will if at some indefinite future time because of peculiar circumstances constitutional or peaceful channels were no longer open.

There is a material difference between agitation and exhortation calling for present violent action which creates a clear and present danger of public disorder or other substantive evil, and mere doctrinal justification or prediction of the use of force under hypothetical conditions at some indefinite future time—prediction that is not calculated or intended to be presently acted upon, thus

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against the will of the people have not become fully matured; *if* the slogans of the insurrection (such as 'All power to the Soviets,' 'Land to the peasants,' 'Immediate proposal of a democratic peace to all the belligerent peoples, coupled with the immediate abrogation of all secret treaties and secret diplomacy,' etc.) have not acquired the widest renown and popularity; *if* the advanced workers are not convinced of the desperate situation of the masses and of the support of the countryside, as demonstrated by an energetic peasant movement, or by a revolt against the landlords and against the government that defends the landlords; *if* the economic situation in the country offers any real hope of a favorable solution of the crisis by peaceful and parliamentary means."

[52] Article X, § 5. Party members found to be strike-breakers, degenerates, habitual drunkards, betrayers of Party confidence, provocateurs, advocates of terrorism and violence as a method of Party procedure, or members whose actions are detrimental to the Party and the working class, shall be summarily dismissed from positions of responsibility, expelled from the Party and exposed before the general public.

leaving opportunity for general discussion and the calm processes of thought and reason. Cf. *Bridges* v. *California,* 314 U. S. 252, and Justice Brandeis' concurring opinion in *Whitney* v. *California,* 274 U. S. 357, 372–80. See also *Taylor* v. *Mississippi,* 319 U. S. 583. Because of this difference we may assume that Congress intended, by the general test of "attachment" in the 1906 Act, to deny naturalization to persons falling into the first category but not to those in the second. Such a construction of the statute is to be favored because it preserves for novitiates as well as citizens the full benefit of that freedom of thought which is a fundamental feature of our political institutions. Under the conflicting evidence in this case we cannot say that the Government has proved by such a preponderance of the evidence that the issue is not in doubt, that the attitude of the Communist Party of the United States in 1927 towards force and violence was not susceptible of classification in the second category. Petitioner testified that he subscribed to this interpretation of Party principles when he was naturalized, and nothing in his conduct is inconsistent with that testimony. We conclude that the Government has not carried its burden of proving by "clear, unequivocal, and convincing" evidence which does not leave "the issue in doubt," that petitioner obtained his citizenship illegally. In so holding we do not decide what interpretation of the Party's attitude toward force and violence is the most probable on the basis of the present record, or that petitioner's testimony is acceptable at face value. We hold only that where two interpretations of an organization's program are possible, the one reprehensible and a bar to naturalization and the other permissible, a court in a denaturalization proceeding, assuming that it can re-examine a finding of attachment upon a charge of illegal procurement, is not justified in canceling a certificate of citizenship by imputing the reprehensible interpretation to a

member of the organization in the absence of overt acts indicating that such was his interpretation. So uncertain a chain of proof does not add up to the requisite "clear, unequivocal, and convincing" evidence for setting aside a naturalization decree. Were the law otherwise, valuable rights would rest upon a slender reed, and the security of the status of our naturalized citizens might depend in considerable degree upon the political temper of majority thought and the stresses of the times. Those are consequences foreign to the best traditions of this nation and the characteristics of our institutions.

II

This disposes of the issues framed by the Government's complaint which are here pressed. As additional reasons for its conclusion that petitioner's naturalization was fraudulently and illegally procured, the district court found, however, that petitioner was a disbeliever in, and a member of an organization teaching disbelief in, organized government,[53] and that his oath of allegiance, required by 8 U. S. C. § 381, was false. These issues are outside the scope of the complaint,[54] as is another ground urged

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[53] In 1927 naturalization was forbidden to such persons by § 7 of the Act of 1906, 34 Stat. 598, 8 U. S. C. § 364. Compare § 305 of the Nationality Act of 1940, 54 Stat. 1141, 8 U. S. C. § 705.

[54] The complaint did incorporate by reference an affidavit of cause, required by 8 U. S. C. § 405, in which the affiant averred that petitioner's naturalization was illegally and fraudulently obtained, in that he did not behave as a man and was not a man attached to the Constitution but was a member of the Communist Party which was opposed to the Government and advocated its overthrow by force and violence, and in that: "At the time he took said oath of allegiance, he did not in fact intend to support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same."

While this affidavit is part of the complaint, we think it was not intended to be an additional charge, but was included only to show

in support of the judgment below as to which the district court made no findings.[55] Because they are outside the scope of the complaint, we do not consider them. As we said in *De Jonge* v. *Oregon,* "Conviction upon a charge not made would be sheer denial of due process." 299 U. S. 353, 362. A denaturalization suit is not a criminal proceeding. But neither is it an ordinary civil action since it involves an important adjudication of status. Consequently we think the Government should be limited, as in a criminal proceeding, to the matters charged in its complaint.

One other ground advanced in support of the judgment below was not considered by the lower courts and does not merit detailed treatment. It is that petitioner was not entitled to naturalization because he was deportable in 1927 under the Immigration Act of 1918 (40 Stat. 1012, as amended by 41 Stat. 1008; 8 U. S. C. § 137) as an alien member of an organization advocating overthrow of the Government of the United States by force and violence. This issue is answered by our prior discussion of the evidence in this record relating to force and violence. Assuming that deportability at the time of naturalization satisfies the requirement of illegality under § 15 which governs this proceeding, the same failure to establish adequately the attitude toward force and violence of the

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compliance with the statute. The attachment averment of the affidavit is elaborated and set forth as a specific charge in the complaint. The failure to do likewise with the averment of a false oath is persuasive that the issue was not intended to be raised. When petitioner moved for a non-suit at the close of the Government's case, the United States attorney did not contend, in stating what he conceived the issues were, that the question of a false oath was an issue.

[55] This contention is that petitioner was not well disposed to the good order and happiness of the United States because he believed in and advocated general resort to illegal action, other than force and violence, as a means of achieving political ends.

organizations to which petitioner belonged forbids his denaturalization on the ground of membership.

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

Reversed.

MR. JUSTICE DOUGLAS, concurring:

I join in the Court's opinion and agree that petitioner's want of attachment in 1927 to the principles of the Constitution has not been shown by "clear, unequivocal and convincing" evidence. The United States, when it seeks to deprive a person of his American citizenship, carries a heavy burden of showing that he procured it unlawfully. That burden has not been sustained on the present record, as the opinion of the Court makes plain, unless the most extreme views within petitioner's party are to be imputed or attributed to him and unless all doubts which may exist concerning his beliefs in 1927 are to be resolved against him rather than in his favor. But there is another view of the problem raised by this type of case which is so basic as to merit separate statement.

Sec. 15 of the Naturalization Act gives the United States the power and duty to institute actions to set aside and cancel certificates of citizenship on the ground of "fraud" or on the ground that they were "illegally procured." Sec. 15 "makes nothing fraudulent or unlawful that was honest and lawful when it was done. It imposes no new penalty upon the wrongdoer. But if, after fair hearing, it is judicially determined that by wrongful conduct he has obtained a title to citizenship, the act provides that he shall be deprived of a privilege that was never rightfully his." *Johannessen* v. *United States,* 225 U. S. 227, 242–243. And see *Luria* v. *United States,* 231 U. S. 9, 24. "Wrongful conduct"—like the statutory words "fraud" or "illegally procured"—are strong words. Fraud con-

notes perjury, concealment, falsification, misrepresentation or the like. But a certificate is illegally, as distinguished from fraudulently, procured when it is obtained without compliance with a "condition precedent to the authority of the Court to grant a petition for naturalization." *Maney* v. *United States,* 278 U. S. 17, 22.

Under the Act in question, as under earlier and later Acts,[1] Congress prescribed numerous conditions precedent to the issuance of a certificate. They included the requirement that the applicant not be an anarchist or polygamist (§ 7), the presentation of a certificate of arrival (*United States* v. *Ness,* 245 U. S. 319), the requirement that the final hearing be had in open court (*United States* v. *Ginsberg,* 243 U. S. 472), the residence requirement (R. S. § 2170), the general requirement that the applicant be able to speak the English language (§ 8), etc. The foregoing are illustrative of one type of condition which Congress specified. Another type is illustrated by the required finding of attachment. Sec. 4, as it then read, stated that it "shall be made to appear to the satisfaction of the court" that the applicant "has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same." [2] It is my view that Congress by that provision made the finding the condition preced-

[1] For the Act in its present form see 8 U. S. C. § 501 *et seq.*

[2] This provision was recast by the Act of March 2, 1929, 45 Stat. 1513–1514, 8 U. S. C. § 707 (a) (3), into substantially its present form. For the legislative history see 69 Cong. Rec. 841; S. Rep. No. 1504, 70th Cong., 2d Sess. The provision now reads: "No person, except as hereinafter provided in this chapter, shall be naturalized unless such petitioner . . . (3) during all the periods referred to in this subsection has been and still is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States."

ent, not the weight of the evidence underlying the finding. Such a finding can of course be set aside under § 15 on grounds of fraud. But so far as certificates "illegally procured" are concerned, this Court has heretofore permitted § 15 to be used merely to enforce the express conditions specified in the Act. It is of course true that an applicant for citizenship was required to come forward and make the showing necessary for the required findings. § 4. But under this earlier Act, it was not that showing but the finding of the court which Congress expressed in the form of a condition. If § 15 should be broadened by judicial construction to permit the findings of attachment to be set aside for reasons other than fraud, then the issue of illegality would be made to turn not on the judge being satisfied as to applicant's attachment but on the evidence underlying that finding. Such a condition should not be readily implied.

If an anarchist is naturalized, the United States may bring an action under § 15 to set aside the certificate on the grounds of illegality. Since Congress by § 7 of the Act forbids the naturalization of anarchists, the alien anarchist who obtains the certificate has procured it illegally whatever the naturalization court might find. The same would be true of communists if Congress declared they should be ineligible for citizenship. Then proof that one was not a communist and did not adhere to that party or its belief would become like the other express conditions in the Act a so-called "jurisdictional" fact "upon which the grant is predicated." *Johannessen* v. *United States, supra,* p. 240. But under this Act Congress did not treat communists like anarchists. Neither the statute nor the official forms used by applicants called for an expression by petitioner of his attitude on, or his relationship to, communism, or any other foreign political creed except anarchy and the like.

The findings of attachment are entrusted to the naturalization court with only the most general standard to guide it. That court has before it, however, not only the applicant but at least two witnesses. It makes its appraisal of the applicant and it weighs the evidence. Its conclusion must often rest on imponderable factors. In the present case we do not know how far the naturalization court probed into petitioner's political beliefs and affiliations. We do not know what inquiry it made. All we do know is that it was satisfied that petitioner was "attached to the principles of the Constitution of the United States." But we must assume that that finding which underlies the judgment granting citizenship (cf. *Tutun* v. *United States*, 270 U. S. 568) was supported by evidence. We must assume that the evidence embraced all relevant facts since no charge of concealment or misrepresentation is now made by respondent. And we must assume that the applicant and the judge both acted in utmost good faith.

If the applicant answers all questions required of him, if there is no concealment or misrepresentation, the findings of attachment cannot be set aside on the grounds of illegality in proceedings under § 15. It does not comport with any accepted notion of illegality to say that in spite of the utmost good faith on the part of applicant and judge and in spite of full compliance with the express statutory conditions a certificate was illegally procured because another judge would appraise the evidence differently. That would mean that the United States at any time could obtain a trial *de novo* on the political faith of the applicant.

It is hardly conceivable that Congress intended that result under this earlier Act except for the narrow group of political creeds such as anarchy for which it specially provided. Chief Justice Hughes stated in his dissent in *United States* v. *Macintosh*, 283 U. S. 605, 635, that the

phrase "attachment to the principles of the Constitution" is a general one "which should be construed, not in opposition to, but in accord with, the theory and practice of our Government in relation to freedom of conscience." We should be mindful of that criterion in our construction of § 15. If findings of attachment which underly certificates may be set aside years later on the evidence, then the citizenship of those whose political faiths become unpopular with the passage of time becomes vulnerable. It is one thing to agree that Congress could take that step if it chose. See *Turner* v. *Williams*, 194 U. S. 279. But where it has not done so in plain words, we should be loath to imply that Congress sanctioned a procedure which in absence of fraud permitted a man's citizenship to be attacked years after the grant because of his political beliefs, social philosophy, or economic theories. We should not tread so close to the domain of freedom of conscience without an explicit mandate from those who specify the conditions on which citizenship is granted to or withheld from aliens. At least when two interpretations of the Naturalization Act are possible we should choose the one which is the more hospitable to that ideal for which American citizenship itself stands.

Citizenship can be granted only on the basis of the statutory right which Congress has created. *Tutun* v. *United States, supra.* But where it is granted and where all the express statutory conditions precedent are satisfied we should adhere to the view that the judgment of naturalization is final and conclusive except for fraud. Since the United States does not now contend that fraud vitiates this certificate the judgment below must be reversed.

MR. JUSTICE RUTLEDGE, concurring:

I join in the Court's opinion. I add what follows only to emphasize what I think is at the bottom of this case.

Immediately we are concerned with only one man, William Schneiderman. Actually, though indirectly, the

decision affects millions. If, seventeen years after a federal court adjudged him entitled to be a citizen, that judgment can be nullified and he can be stripped of this most precious right, by nothing more than reëxamination upon the merits of the very facts the judgment established, no naturalized person's citizenship is or can be secure. If this can be done after that length of time, it can be done after thirty or fifty years. If it can be done for Schneiderman, it can be done for thousands or tens of thousands of others.

For all that would be needed would be to produce some evidence from which any one of the federal district judges could draw a conclusion, concerning one of the ultimate facts in issue, opposite from that drawn by the judge decreeing admission. The statute does not in terms prescribe "jurisdictional" facts.[1] But all of the important ones are "jurisdictional," or have that effect, if by merely drawing contrary conclusion from the same, though conflicting, evidence at any later time a court can overturn the judgment. An applicant might be admitted today upon evidence satisfying the court he had complied with all requirements. That judgment might be affirmed on appeal and again on certiorari here. Yet the day after, or ten years later, any district judge could overthrow it, on the same evidence, if it was conflicting or gave room for contrary inferences, or on different evidence all of which might have been presented to the first court.[2]

If this is the law and the right the naturalized citizen acquires, his admission creates nothing more than citizenship in attenuated, if not suspended, animation. He acquires but prima facie status, if that. Until the Gov-

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[1] Cf., however, the concurring opinion of Mr. Justice Douglas, *ante*, p. 161.

[2] There is no requirement that the evidence be different from what was presented on admission or "newly discovered."

ernment moves to cancel his certificate and he knows the outcome, he cannot know whether he is in or out. And when that is done, nothing forbids repeating the harrowing process again and again, unless the weariness of the courts should lead them finally to speak *res judicata.*

No citizen with such a threat hanging over his head could be free. If he belonged to "off-color" organizations or held too radical or, perhaps, too reactionary views, for some segment of the judicial palate, when his admission took place, he could not open his mouth without fear his words would be held against him. For whatever he might say or whatever any such organization might advocate could be hauled forth at any time to show "continuity" of belief from the day of his admission, or "concealment" at that time. Such a citizen would not be admitted to liberty. His best course would be silence or hypocrisy. This is not citizenship. Nor is it adjudication.

It may be doubted that the framers of the Constitution intended to create two classes of citizens, one free and independent, one haltered with a lifetime string tied to its status. However that may be, and conceding that the power to revoke exists and rightly should exist to some extent, the question remains whether the power to admit can be delegated to the courts in such a way that their determination, once made, determines and concludes nothing with finality.

If every fact in issue, going to the right to be a citizen, can be reëxamined, upon the same or different proof, years or decades later; and if this can be done *de novo,* as if no judgment had been entered, whether with respect to the burden of proof required to reach a different decision or otherwise, what does the judgment determine? What does it settle with finality? If review is had and the admission is affirmed, what fact is adjudicated, if next day any or all involved can be redecided to the contrary? Can

Congress, when it has empowered a court to determine and others to review and confirm, at the same time or later authorize any trial court to overturn their decrees, for causes other than such as have been held sufficient to overturn other decrees? [3]

I do not undertake now to decide these questions. Nor does the Court. But they have a bearing on the one which is decided. It is a *judgment* which is being attacked. *Tutun* v. *United States,* 270 U. S. 568. Accordingly, it will not do to say the issue is identical with what is presented in a naturalization proceeding, is merely one of fact, upon which therefore the finding of the trial court concludes, and consequently we have no business to speak or our speaking is appellate intermeddling. That ignores the vital fact that it is a *judgment,* rendered in the exercise of the judical power created by Article III, which it is sought to overthrow,[4] not merely a grant like a patent to land or for invention.[5] Congress has plenary power over naturalization. That no one disputes. Nor that this power, for its application, can be delegated to the courts. But this is not to say, when Congress has so placed it, that body can decree in the same breath that the judgment rendered shall have no conclusive effect. Limits it may place. But that is another matter from making an adjudication under Article III merely an advisory opinion or prima facie evidence of the fact or all the facts determined. Congress has, with limited exceptions, plenary power over the jurisdiction of the federal courts.[6] But to confer the jurisdiction and at the same time nullify entirely the effects of its exercise are not matters heretofore thought,

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[3] Cf. *United States* v. *Throckmorton,* 98 U. S. 61; *Kibbe* v. *Benson,* 17 Wall. 624. No such cause for cancellation is involved here.

[4] *Tutun* v. *United States,* 270 U. S. 568.

[5] Cf. *Johannessen* v. *United States,* 225 U. S. 227.

[6] Cf. *Lockerty* v. *Phillips,* 319 U. S. 182.

when squarely faced, within its authority.[7] To say therefore that the trial court's function in this case is the same as was that of the admitting court is to ignore the vast difference between overturning a judgment, with its adjudicated facts, and deciding initially upon facts which have not been adjudged. The argument made from the deportation statutes likewise ignores this difference.

It is no answer to say that Congress provided for the redetermination as a part of the statute conferring the right to admission and therefore as a condition of it. For that too ignores the question whether Congress can so condition the judgment and is but another way of saying that a determination, made by an exercise of judicial power under Article III, can be conditioned by legislative mandate so as not to determine finally any ultimate fact in issue.

The effect of cancellation is to nullify the judgment of admission. If it is a judgment, and no one disputes that it is, that quality in itself requires the burden of proof the court has held that Congress intended in order to overturn it. That it is a judgment, and one of at least a coördinate court, which the cancellation proceeding attacks and seeks to overthrow, requires this much at least, that solemn decrees may not be lightly overturned and that citizens may not be deprived of their status merely because one judge views their political and other beliefs with a more critical eye or a different slant, however honestly and sincerely, than another. Beyond this we need not go now in decision. But we do not go beyond our function or usurp another tribunal's when we go this far.

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[7] Cf. *United States* v. *Ferreira*, 13 How. 40; *Gordon* v. *United States*, 2 Wall. 561; *Id.*, 117 U. S. 697; *United States* v. *Jones*, 119 U. S. 477; *Pocono Pines Assembly Hotels Co.* v. *United States*, 73 Ct. Cls. 447; 76 Ct. Cls. 334; *Ex parte Pocono Pines Assembly Hotels Co.*, 285 U. S. 526.

The danger, implicit in finding too easily the purpose of Congress to denaturalize Communists, is that by doing so the status of all or many other naturalized citizens may be put in jeopardy. The other and underlying questions need not be determined unless or until necessity compels it.

MR. CHIEF JUSTICE STONE, dissenting:

The two courts below have found that petitioner, at the time he was naturalized, belonged to Communist Party organizations which were opposed to the principles of the Constitution, and which advised, advocated and taught the overthrow of the Government by force and violence. They have found that petitioner believed in and supported the principles of those organizations. They have found also that petitioner "was not, at the time of his naturalization . . ., and during the period of five years immediately preceding the filing of his petition for naturalization had not behaved as, a person attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the same."

I think these findings are abundantly supported by the evidence, and hence that it is not within our judicial competence to set them aside—even though, sitting as trial judges, we might have made some other finding. The judgment below, cancelling petitioner's citizenship on the ground that it was illegally obtained, should therefore be affirmed. The finality which attaches to the trial court's determinations of fact from evidence heard in open court, and which ordinarily saves them from an appellate court's intermeddling, should not be remembered in every case save this one alone.

It is important to emphasize that the question for decision is much simpler than it has been made to appear. It is whether petitioner, in securing his citizenship by naturalization, has fulfilled a condition which Congress

has imposed on every applicant for naturalization—that during the five years preceding his application "he has behaved as a man . . . attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same." [1] Decision whether he was lawfully entitled to the citizenship which he procured, and consequently whether he is now entitled to retain it, must turn on the existence of his attachment to the principles of the Constitution when he applied for citizenship, and that must be inferred by the trier of fact from his conduct during the five-year period. We must decide not whether the district court was compelled to find want of attachment, but whether the record warrants such a finding.

The question then is not of petitioner's opinions or beliefs—save as they may have influenced or may explain his conduct showing attachment, or want of it, to the principles of the Constitution. It is not a question of freedom of thought, of speech or of opinion, or of present imminent danger to the United States from our acceptance as citizens of those who are not attached to the principles of our form of government. The case obviously has nothing to do with our relations with Russia, where petitioner

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[1] By § 4 of the Act of June 29, 1906, 34 Stat. 598, it is provided:

"Fourth. It shall be made to appear to the satisfaction of the court admitting any alien to citizenship that immediately preceding the date of his application he has resided continuously within the United States five years at least, and within the State or Territory where such court is at the time held one year at least, and that during that time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same. In addition to the oath of the applicant, the testimony of at least two witnesses, citizens of the United States, as to the facts of residence, moral character, and attachment to the principles of the Constitution shall be required, and the name, place of residence, and occupation of each witness shall be set forth in the record."

was born, or with our past or present views of the Russian political or social system. The United States has the same interest as other nations in demanding of those who seek its citizenship some measure of attachment to its institutions. Our concern is only that the declared will of Congress shall prevail—that no man shall become a citizen or retain his citizenship whose behavior for five years before his application does not show attachment to the principles of the Constitution.

The Constitution has conferred on Congress the exclusive authority to prescribe uniform rules governing naturalization. Article I, § 8, cl. 4. Congress has exercised that power by prescribing the conditions, in conformity to which aliens may obtain the privilege of citizenship. Under the laws and Constitution of the United States, no person is given any right to demand citizenship, save upon compliance with those conditions. "An alien who seeks political rights as a member of this Nation can rightfully obtain them only upon terms and conditions specified by Congress. Courts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will in respect of a matter so vital to the public welfare." *United States* v. *Ginsberg*, 243 U. S. 472, 474. And whenever a person's right to citizenship is drawn in question, it is the judge's duty loyally to see to it that those conditions have not been disregarded.

The present suit by the United States, to cancel petitioner's previously granted certificate of citizenship, was brought pursuant to an Act of Congress (§ 15 of the Act of June 29, 1906, 34 Stat. 601), enacted long prior to petitioner's naturalization. Section 15 authorizes any court by a suit instituted by the United States Attorney to set aside a certificate of naturalization "on the ground of fraud or on the ground that such certificate of citizenship was illegally procured." Until now this Court, with-

out a dissenting voice, has many times held that in a suit under this statute it is the duty of the court to render a judgment cancelling the certificate of naturalization if the court finds upon evidence that the applicant did not satisfy the conditions which Congress had made prerequisite to the award of citizenship. *Johannessen* v. *United States,* 225 U. S. 227; *Luria* v. *United States,* 231 U. S. 9; *Maibaum* v. *United States,* 232 U. S. 714; *United States* v. *Ginsberg,* 243 U. S. 472; *United States* v. *Ness,* 245 U. S. 319; *Maney* v. *United States,* 278 U. S. 17, 23; *Schwinn* v. *United States,* 311 U. S. 616.

Provision for such a review of the judgment awarding citizenship is within the legislative power of Congress and plainly is subject to no constitutional infirmity, *Johannessen* v. *United States, supra,* 236–40, especially where, as here, the statute antedated petitioner's citizenship and the review was thus a condition of its award. *Luria* v. *United States, supra,* 24. Our decisions have uniformly recognized that Congress, which has power to deny citizenship to aliens altogether, may safeguard the grant of this privilege, precious to the individual and vital to the country's welfare, by such procedure for determining the existence of indispensable requisites to citizenship as has been established in § 15. "No alien has the slightest right to naturalization unless all statutory requirements are complied with; and every certificate of citizenship must be treated as granted upon condition that the Government may challenge it as provided in § 15 and demand its cancellation unless issued in accordance with such requirements. If procured when prescribed qualifications have no existence in fact it is illegally procured; a manifest mistake by the judge cannot supply these nor render their existence non-essential." *United States* v. *Ginsberg, supra,* 475. Speaking for a unanimous Court, Mr. Justice Brandeis thus stated what was, until today, the settled law: "If a certificate is procured when the pre-

scribed qualifications have no existence in fact, it may be cancelled by suit." *Tutun* v. *United States*, 270 U. S. 568, 578. Congress has not seen fit to interpose any statute of limitations. And there is no suggestion that the Government was derelict in not bringing the suit earlier or that petitioner has been prejudiced by delay. Hence the issue before us is whether petitioner, when naturalized, satisfied the statutory requirements. It is the same issue as would be presented by an appeal from a judgment granting or denying naturalization upon the evidence here presented, although it may be assumed that in this proceeding the burden of proof rests on the Government, which has brought the suit, to establish petitioner's want of qualifications.

We need not stop to consider whether petitioner's failure, in his naturalization proceeding, to disclose facts which could have resulted in a denial of his application, constituted fraud within the meaning of the statute. For present purposes it is enough that the evidence supports the conclusion of the courts below as to petitioner's want of attachment to the principles of the Constitution, and, that § 15 has, ever since its enactment in 1906, been construed by this Court as requiring certificates of citizenship to be cancelled as illegally procured whenever the court finds on evidence that at the time of naturalization the applicant did not in fact satisfy the statutory prerequisites.

To meet the exigencies of this case, it is now for the first time proposed by the concurring opinion of Mr. Justice Douglas that a new construction be given to the statute which would preclude any inquiry concerning the fact of petitioner's attachment to the Constitution. It is said that in a § 15 proceeding the only inquiry permitted, apart from fraud, is as to the regularity of the naturalization proceedings on their face; that—however

much petitioner fell short of meeting the statutory requirements for citizenship—if he filed, as he did, pro forma affidavits of two persons, barely stating that he met the statutory requirements of residence, moral character and attachment to the Constitution, and if the court on the basis of the affidavits made the requisite findings and order, then all further inquiry is foreclosed.

To this easy proposal for the emasculation of the statute there are several plain and obvious answers.

Section 15 authorizes and directs the Government to institute the suit to cancel the certificate of naturalization on the ground of fraud or on the ground that the certificate was illegally procured. Until now it has never been thought that a certificate of citizenship procured by one who has not satisfied the statutory conditions for citizenship, is nevertheless lawfully procured. But the concurring opinion of Mr. Justice Douglas suggests that, for purposes of § 15, "attachment to the principles of the Constitution" is not a condition of becoming a citizen. It suggests that the statute is satisfied, even though the applicant was never in fact attached to the principles of the Constitution, so long as such attachment was made to appear, from pro forma affidavits, to the satisfaction of the naturalization court. This is said to be the case regardless of whether in fact the affidavits, and the certificate of citizenship based on them, are wholly mistaken, and despite the fact that the naturalization proceeding, as apparently it was here, is an ex parte proceeding in which the Government is not represented.

It would seem passing strange that Congress—which authorized cancellation of citizenship under § 15 for failure to hold the naturalization hearing in open court instead of in the judge's chambers (*United States* v. *Ginsberg, supra*), or for failure to present the requisite certificate of arrival in this country (*Maney* v. *United States,*

supra)—should be thought less concerned with the applicant's attachment to the principles of the Constitution and that he be well disposed to the good order and happiness of the United States. For what could be more important in the selection of citizens of the United States than that the prospective citizen be attached to the principles of the Constitution?

Moreover, if in the absence of fraud the finding of the naturalization court in this case is final and hence beyond the reach of a § 15 proceeding, it would be equally final in the case of a finding, contrary to the actual fact, that the applicant had been for five years a continuous resident in the United States, since that requirement too is set forth in the sentence of § 4 which provides that "it shall be made to appear to the satisfaction of the court." Yet it is settled that a certificate of citizenship based on a mistaken finding of five years residence is subject to revocation. *United States* v. *Ginsberg, supra.* And in *Schwinn* v. *United States, supra,* it appeared, from extrinsic evidence first offered in a § 15 proceeding, that the witnesses at the naturalization hearing had been mistaken as to the length of time they had known the applicant, and that for a part of the five-year period no witness had been produced with actual knowledge of the applicant's residence or qualifications. We held, without dissent, 311 U. S. 616, "that the certificate of citizenship was illegally procured," and for that reason we affirmed a judgment cancelling it.[2] If we are to give effect to the language and purpose of Congress, it would seem that we must reach the same result in the case of the naturalization court's mistaken or unwarranted finding of attachment to the principles of the Constitution, even though

[2] The district court's decision was based on both fraud and illegality. The circuit court of appeals relied upon fraud alone, 112 F. 2d 74, but our affirmance was rested "on the sole ground" of illegality.

the conduct of the applicant and his witnesses at the naturalization hearing fell short of perjury.

The purpose of § 15—like that of § 11, which authorizes the Government to appear in a naturalization proceeding to contest the application—is not merely to insure the formal regularity of the proceeding, but to protect the United States from the injury which would result from the acceptance as citizens of any who are not lawfully entitled to become citizens. Congress left the naturalization proceeding simple and inexpensive, by permitting it ordinarily to be conducted ex parte. Thus approximately 200,000 certificates of naturalization were issued during the year in which petitioner became a citizen. Annual Report of the Secretary of Labor, 1940, p. 115. But by § 15 Congress afforded the Government an independent opportunity to inquire into any naturalization if upon later scrutiny it appeared that the certificate of citizenship had not been lawfully procured. As the Court declared in *United States* v. *Ness, supra,* 327, "§ 11 and § 15 were designed to afford cumulative protection against fraudulent or illegal naturalization." All this was made abundantly clear by decisions of this Court more than twenty-five years ago. See *Johannessen* v. *United States, supra; Luria* v. *United States, supra; United States* v. *Ginsberg, supra; United States* v. *Ness, supra,* 325–27. In the intervening years Congress has often revised the naturalization laws, but it has not thought it appropriate to modify this Court's interpretation of the function of § 15 in the naturalization procedure.

This is persuasive that the interpretation of § 15 now proposed defies the purpose and will of Congress. It is inconceivable that Congress should have intended that a naturalized citizen's attachment to the principles of the Constitution—the most fundamental requirement for citizenship—should be the one issue which, in the absence

of fraud, the Government is foreclosed from examining. To limit the Government to proof of fraud in such cases is to read "illegality" out of the statute in every instance where an alien demonstrably not attached to the principles of the Constitution has procured a certificate of citizenship. Even if we were to recast an Act of Congress in accordance with our own notions of policy, it would be difficult to discover any considerations warranting the adoption of a device whose only effect would be to make certain that persons never entitled to the benefits of citizenship could secure and retain them. That could not have been the object of Congress in enacting § 15.

As we are not here considering whether petitioner's certificate of naturalization was procured by fraud, there is no occasion, and indeed no justification, for importing into this case the rule, derived from land fraud cases, that fraud, which involves personal moral obliquity, must be proved by clear and convincing evidence. The issue is not whether petitioner committed a crime but whether he should be permitted to enjoy citizenship when he has never satisfied the basic conditions which Congress required for the grant of that privilege. We are concerned only with the question whether petitioner's qualifications were so lacking that he was not lawfully entitled to the privilege of citizenship which he has procured. There is nothing in § 15, nor in any of our numerous decisions under it, to suggest that such an issue is to be tried as fraud is tried, or that it is not to be resolved, as are other cases, by the weight of evidence. No plausible reason has been advanced why it should not be. But the point need not be labored, for no matter how it is determined it can give no aid or comfort to petitioner. The evidence in this case to which I shall refer and on which the courts below were entitled to rely is clear, not speculative; and since petitioner himself has not challenged it, the trial court was

entitled to accept it as convincing, which it evidently did.

The statute does not, as seems to be suggested, require as a condition of citizenship that a man merely be capable of attachment to the principles of the Constitution—a requirement which presumably all mankind could satisfy. It requires instead that the applicant be in fact attached to those principles when he seeks naturalization, and § 15 makes provision for the Government to institute an independent suit, subsequent to naturalization, to inquire whether that condition was then in fact fulfilled. Congress has exhibited no interest in petitioner's capabilities. Nor did Congress require only that it be not impossible for petitioner to have an attachment to the principles of the Constitution. The Act specifies the fact of attachment as the test, requiring this to be affirmatively shown by the applicant; and by § 15 Congress provided a means for the United States to ascertain that fact by a judicial determination.

The prescribed conditions for the award of citizenship by naturalization are few and readily understood, and we must accept them as the expression of the Congressional judgment that aliens not satisfying those requirements are not worthy to be admitted to the privilege of citizenship. Congress has declared that before one is entitled to that privilege he must take the oath of allegiance "that he will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same." Act of June 29, 1906, § 4 (Third), 34 Stat. 597. And as I have said, the applicant must make it appear to the court admitting him to citizenship that for the five years preceding the date of his application he has resided continuously within the United States and "that during that time he has behaved as a man of good

moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same."

Moreover, at the time of petitioner's naturalization, the statutes of the United States excluded from admission into this country "aliens who believe in, advise, advocate, or teach, or who are members of or affiliated with any organization, association, society, or group, that believes in, advises, advocates, or teaches: (1) the overthrow by force or violence of the Government of the United States . . ." Act of October 16, 1918, § 1, 40 Stat. 1012, as amended by subsection (c) of the Act of June 5, 1920, 41 Stat. 1008, 1009. The statutes also barred admission to the United States of "aliens who . . . knowingly circulate, distribute, print, or display, or knowingly cause to be circulated, distributed, printed, published, or displayed . . . any written or printed matter . . . advising, advocating, or teaching: (1) the overthrow by force or violence of the Government of the United States . . ." *Ibid.*, subsection (d). And by § 2 of the Act of October 16, 1918, it was provided that any alien who, after entering the United States, "is found . . . to have become thereafter, a member of any one of the classes of aliens" just enumerated, shall be taken into custody and deported. See *Kessler* v. *Strecker*, 307 U. S. 22. Quite apart from the want of attachment to the Constitution and the consequent disqualification of such aliens for citizenship, their belonging to any of these classes would disqualify them for citizenship since their presence in the United States, without which they cannot apply for citizenship, would be unlawful. And in the light of the evidence—presently to be discussed—even the Court's opinion concedes (p. 153) "We do not say that a reasonable man could not possibly have found, as the district court did, that the Communist Party in 1927 actively urged the overthrow of the Government by

force and violence." In addition, the evidence makes it clear beyond all reasonable doubt that petitioner, up to the time of his naturalization, was an alien who knowingly circulated or distributed, or caused to be circulated or distributed, printed matter advocating the overthrow of the Government by force or violence.

Wholly apart from the deportation statute, the judgment should be affirmed because the trial court was justified in finding that petitioner, in 1927, was not and had not been attached to the principles of the Constitution. My brethren of the majority do not deny that there are principles of the Constitution. The Congress of 1795, which passed the statute requiring an applicant for naturalization to establish that he has "behaved as a man . . . attached to the principles of the Constitution" (1 Stat. 414), evidently did not doubt that there were. For some of its members had sat in the Constitutional Convention. In the absence of any disclaimer I shall assume that there are such principles and that among them are at least the principle of constitutional protection of civil rights and of life, liberty and property, the principle of representative government, and the principle that constitutional laws are not to be broken down by planned disobedience. I assume also that all the principles of the Constitution are hostile to dictatorship and minority rule; and that it is a principle of our Constitution that change in the organization of our government is to be effected by the orderly procedures ordained by the Constitution and not by force or fraud. With these in mind, we may examine petitioner's behavior as disclosed by the record, during the five years which preceded his naturalization, in order to ascertain whether there was basis in the evidence for the trial judge's findings. In determining whether there was evidence supporting the finding of petitioner's want of attachment to constitutional principles, courts must look, as the statute admonishes, to see whether in the five-

year period petitioner behaved as a man attached to the principles of the Constitution. And we must recognize that such attachment or want of it is a personal attribute to be inferred from all the relevant facts and circumstances which tend to reveal petitioner's attitude toward those principles.

Petitioner, who is an educated and intelligent man, took out his first papers in 1924, when he was eighteen years of age, and was admitted to citizenship on June 10, 1927, when nearly twenty-two. Since his sixteenth year he has been continuously and actively engaged in promoting in one way or another the interests of various Communist Party organizations affiliated with and controlled as to their policy and action by the Third International, the parent Communist organization, which had its headquarters and its Executive Committee in Moscow.[3]

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[3] During the whole period relevant to this litigation, the Communist Party was a world organization, known as the Third Communist International (or Comintern), created in 1919, of which the Communist Parties in each country were sections. The supreme governing body of the Third Communist International—which exercised control of the Party program, tactics and organization—was the World Congress of the Communist International. Between meetings of the Congress its authority was vested in the Executive Committee of the Communist International. The resolutions of the Congress, and between meetings those of the Executive Committee, were binding on all sections. In the United States the Workers Party of America, a Communist organization, was established in 1921. It was affiliated with the Communist International, and had sent delegates to the Third World Congress of the International earlier in that year. The Workers Party of America has been since continued, and successively known as the Workers (Communist) Party and as the Communist Party of the United States of America. The Party sent accredited representatives to the Communist International and recognized the leadership of the International. It was affiliated with the Third International, of which it constituted a section. All the events with which this litigation is concerned occurred long prior to the dissolution of the Comintern in May 1943.

The evidence shows petitioner's loyalty to the Communist Party organizations; that as a member of the Party he was subject to and accepted its political control, and that as a Party member his adherence to its political principles and tactics was required by its constitution.

Petitioner was born in Russia on August 1, 1905, and came to the United States in 1907 or 1908. In 1922, when a 16-year old student at a night high school in Los Angeles, he became one of the organizers and charter members of the Young Workers League of California. For two or three years—and during the five-year period which we are examining—he was educational director of the League; it was his duty "to organize forums and studies for classes." "My job was to register students in the classes and send out notices for meetings; in other words, to organize the educational activities of the League for which instructors were supplied." The outlines of the curriculum of this educational program were established by the League's national committee. The League (whose name was later changed to the Young Communist League) was affiliated with the Communist International.[4] In 1928, just after he was naturalized, petitioner became "organizer" or "director" of the League—"I was the official spokesman for the League and directed its administrative and political affairs and educational affairs." Petitioner was a delegate to the League's National Con-

[4] The Young Workers League was affiliated with the Young Communist International and the Communist International. It sent delegates to the Congress of the Young Communist International. It was also closely related to the Workers Party, and sent delegates to the Party Conventions. At its Third National Convention, the Party adopted the following resolution:

"The task of reaching the youth with the message of Communism, of interesting them in our cause and organizing them for the militant struggle against the existing social order and its oppression and exploitation is of major importance for the whole Communist movement. In carrying on this work the Young Workers League is pre-

vention in 1922, and again in 1925. Meanwhile, on February 8, 1924, he had filed a declaration of intention to become a citizen of the United States.

At the end of 1924, petitioner joined the Workers Party (which later changed its name to the Workers Communist Party and still later to the Communist Party of the United States of America). The Party was a section of the Third International. The Party constitution, at the time petitioner became a member, provided (Article III, § 1) that "every person who accepts the principles and tactics of the Workers Party of America and agrees to submit to its discipline and engage actively in its work shall be eligible to membership." Applicants for membership were required (Article III, § 2) to sign an application card reading as follows: "The undersigned declares his adherence to the principles and tactics of the Workers Party of America as expressed in its program and constitution and agrees to submit to the discipline of the party and to engage actively in its work." It was likewise provided (Article X, §§ 1, 2) that "all decisions of the governing bodies of the Party shall be binding upon the membership and subordinate units of the organization," and that "any member or organization violating the decisions of the Party shall be subject to suspension or expulsion." [5] During 1925 and 1926 petitioner was "cor-

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paring the fighters for Communism who will soon stand in the ranks of the Party as part of its best fighters."

The Second Year of the Workers Party of America. Report of The Central Executive Committee to the Third National Convention. Held in Chicago, Illinois, Dec. 30, 31, 1923 and Jan. 1, 2, 1924. Theses, Program, Resolutions. Published by the Literature Department, Workers Party of America, 1009 N. State St., Chicago, Ill. (p. 122.)

[5] Program and Constitution, Workers Party of America. Adopted at National Convention, New York City, December 24–25–26–27, 1921. Amended at National Convention, Chicago, Ill., December 30–

responding secretary" of the Workers Party in Los Angeles. As such, he wrote down the minutes and sent out communications for meetings; and a letter which he signed in his capacity as "city central secretary" indicates that he was in charge of outgoing correspondence with affiliates of the Party. In 1925 he attended the Party convention.

After his naturalization, petitioner attended the Sixth World Congress of the Communist International, at Moscow, in 1928; and from 1929 to 1930 he was district organizational secretary of the Party for a district which included Arizona, Nevada and California. At various subsequent times he was district organizer in Connecticut, in Minnesota, and in California. He ran twice as the Party's candidate for governor of Minnesota. He held other official positions in the Party, and at the time of the hearing in the district court was California State Secretary of the Party and a member of the State Central Committee. These facts, while not directly probative of his behavior during the five-year period 1922–1927, at least establish that his early devotion to the Party organizations was not transitory, nor inconsistent with his genuine and settled convictions.

The evidence shows and it is not denied that the Communist Party organization at the time in question was a revolutionary party having as its ultimate aim generally, and particularly in England and the United States, the overthrow of capitalistic government, and the substitution for it of the dictatorship of the proletariat. It sought to accomplish this through persistent indoctrination of the people in capitalistic countries with Party principles, by the organization in those countries of sections of the

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31, 1923, and January 1, 1924. Published by Literature Department, Workers Party of America, 1113 W. Washington Boulevard, Chicago, Ill.

Third International, by systematic teaching of Party principles at meetings and classes held under Party auspices, and by the publication and distribution of Communist literature which constituted one of the basic principles of Party action.

In accordance with the policy established at its Second World Congress in 1920, the Party press was brought under Party control through ownership of the various publication agencies. Strict adherence to Party principles was demanded of all publications, which were required to be edited by Party members of proved loyalty to the proletarian revolution. Propaganda was required to conform to the program and decisions of the Third International. Editors were removed and Party members expelled for noncompliance. Publications not conforming to Party principles were barred from Party classes.

Many such Communist Party publications were introduced at the trial and constitute a large part of the evidence in this case. Perusal of the record can leave no doubt of petitioner's unqualified loyalty to the Communist Party. His continuous services to the Party for twenty years in a great variety of capacities, and his familiarity with Party programs and literature, are convincing proof of his complete devotion to Communist Party principles, and his desire to advance them. Throughout he has been a diligent student of Party publications. Many of them were used in the Communist classes of which he was educational director in the years immediately preceding his naturalization. All were particularly brought to his attention as they were introduced in evidence and excerpts relative to the issues were discussed in open court. Except as may be later noted, he did not deny familiarity with them or disavow their teachings. They were the official exposition of the doctrines of the Party to which he had formally pledged his alle-

giance, diligently disseminated by him for the indoctrination of his fellow countrymen, especially the members of the Youth organizations of the Party. In the circumstances, and especially in the absence of any disavowal by petitioner or the assertion by him of ignorance of the principles which they proclaimed, they are persuasive evidence of the nature and extent of his want of attachment to the principles of the Constitution. In appraising them in this aspect it will be most useful to state in somewhat summary form some of the teachings of these publications, classified with reference to principles of the Constitution to which they relate, and to give a few typical examples, of which many more could be given from the evidence.

Unless otherwise noted, I shall refer only to those with which petitioner was familiar and which were published under the auspices of the Party and by its official publication agencies.

As I have said, it is not questioned that the ultimate aim of the Communist Party in 1927 and the years preceding was the triumph of the dictatorship of the proletariat and the consequent overthrow of capitalistic or bourgeois government and society. Attachment to such dictatorship can hardly be thought to indicate attachment to the principles of an instrument of government which forbids dictatorship and precludes the rule of the minority or the suppression of minority rights by dictatorial government. But the Government points especially to the methods by which that end was to be achieved to show that those who pursue or advocate such methods exhibit their want of attachment to the principles of the Constitution. Methods repeatedly and systematically advocated, in the Communist Party literature to which I have referred, include first a softening up process by which the breakdown and disintegration of capitalistic governments was to be achieved by systematic

and general resort to violation of the laws, and second, the overthrow of capitalistic governments by force and violence.

It was proclaimed that "For all countries, even for most free 'legal' and 'peaceful' ones in the sense of a lesser acuteness in the class struggle, the period has arrived, when it has become absolutely necessary for every Communist party to join systematically lawful and unlawful work, lawful and unlawful organization. . . . The class struggle in almost every country of Europe and America is entering the phase of civil war. Under such conditions the Communists can have no confidence in bourgeois laws. They should create everywhere a parallel illegal apparatus, which at the decisive moment should do its duty by the party, and in every way possible assist the revolution. In every country where, in consequence of martial law or of other exceptional laws, the Communists are unable to carry on their work lawfully, a combination of lawful and unlawful work is absolutely necessary." [6] "Opposition

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[6] See pp. 18, 28, of Statutes, Theses and Conditions of Admission to the Communist International. Adopted by the Second Congress of the Communist International, July 17 to August 7, 1920. The edition of this document in evidence in the present case was published in March, 1923, under the auspices of the Workers Party of America, and contained the following statement on the inside front cover:

"The Workers Party declares its sympathy with the principles of the Communist International and enters the struggle against American capitalism, the most powerful of the capitalist groups, under the inspiration and leadership of the Communist International.

"It rallies to the call 'WORKERS OF THE WORLD UNITE.' "

Petitioner testified that he had no recollection of "this particular edition" but that "I have no doubt that possibly a pamphlet" like it was sold in Party bookstores. This document was marked for identification and the court later denied a motion to exclude it and other exhibits from the evidence. During the trial petitioner's counsel twice referred to the document as having been put in evidence. Petitioner's counsel included it, with all other exhibits in evidence or offered for identification, in his designation of the record to be made

in principle to underground (illegal) work and an unwillingness to understand the absolute necessity for a Communist Party of combining legal with illegal work" was in fact one ground for expulsion from the Party of a minority faction.[7] Advocacy of illegal conduct generally was accompanied by advocacy of particular types of illegality. The Party was instructed to arouse workers to "mass violation" of an injunction "whenever and wherever an injunction is issued by courts against strikers."[8] In the literature of the period now in question unlawful tactics were particularly to be directed toward government armed forces. In addition to "systematic unlawful work," "it is especially necessary to carry on unlawful work in the army, navy, and police."[9] Refusal to participate in "persistent and systematic propaganda and agitation" in the army was "equal to treason to the revo-

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up in the circuit court of appeals. It was so included by order of the court. Despite the Government's oversight in failing formally to say that the exhibit was being introduced in evidence, it obviously was deemed to be in evidence by both the parties and the trial court. The exhibit is unquestionably relevant and competent evidence, and it became a part of the record before the courts below.

[7] See p. 94 of The 4th National Convention of the Workers (Communist) Party of America. Held in Chicago, Ill., August 21–30, 1925. Published by the Daily Worker Publishing Co., 1113 W. Washington Blvd., Chicago, Ill. The publisher's notice inside the back cover stated that this pamphlet was "absolutely indispensable to any member of the party." The pamphlet, which was the official report of the convention, was sold and circulated by the Party in Los Angeles in 1925. Petitioner disclaimed familiarity with the literature of this convention, but testified that he had attended the convention. He also testified he was in agreement with the general program and principles of the Workers (Communist) Party.

[8] *Ibid.* p. 107. This was part of a resolution, adopted unanimously by the Party Convention, relating to "Party Policies for Trade Union Work."

[9] Statutes, Theses and Conditions of Admission to the Communist International (see note 6, *supra*), p. 19.

lutionary cause, and incompatible with affiliation with the Third International," [10] and this because "it is necessary, above all things, to undermine and destroy the army in order to overcome the bourgeoisie." [11]

There is abundant documentary evidence of the character already described to support the court's finding that the Communist Party organizations, of which petitioner was a member, diligently circulated printed matter which advocated the overthrow of the Government of the United States by force and violence, and that petitioner aided in that circulation and advocacy. From the beginning, and during all times relevant to this inquiry, there is evidence that the Communist Party organizations advocated the overthrow of capitalistic governments by revolution to be accomplished, if need be, by force of arms. We need not stop to consider the much discussed question whether this meant more than that force was to be used if established governments should be so misguided as to refuse to make themselves over into proletarian dictatorships by amendment of their governmental structures, or should have the effrontery to defend themselves from lawless or subversive attacks. For in any case the end contemplated was the overthrow of government, and the measures advocated were force and violence.

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[10] *Ibid.* p. 28.

[11] A B C of Communism, p. 69. This was written by N. Bucharin & E. Preobraschensky, in 1919, translated into English in June, 1921, and published between 1920 and 1924 by the Lyceum-Literature Department, Workers Party of America, 799 Broadway, New York City. There was evidence that this pamphlet was a basic work of Party study classes in 1924 and 1925; that it was expressly designed for such purposes, was officially circulated by the Party, and was still advertised by the Workers Library Publishers in 1928. Petitioner testified that he had read the work and was familiar with it, although he said that the authors had later been expelled from the Russian Communist Party.

The fountainhead of Communist principles, the Communist Manifesto, published by Marx and Engels in 1848, had openly proclaimed that Communist ends could be attained "only by the forcible overthrow of all existing social conditions." After 1920 these teachings were revived and restated in Party publications which, in the period we are now considering, were used in the Communist educational program that petitioner was directing. They recognized that "the proletarian revolution is impossible without the violent destruction of the bourgeois governmental machine and the putting of a new one in its place"; that "the dictatorship of the proletariat cannot be the result of the peaceful development of bourgeois society and democracy; it can be the result only of the destruction of the bourgeois army and State machine, the bourgeois administrative apparatus and the whole bourgeois political system"; that "the dictatorship of the proletariat is born not of the bourgeois state of things, but of its destruction after the overthrow of the bourgeoisie, of the expropriation of landed proprietors and capitalists, of the socialization of the essential instruments and means of production, of the development of the proletarian revolution through violence. The dictatorship of the proletariat is the revolutionary power resting on violence against the bourgeoisie." [12]

Petitioner testified that at the time of his naturalization he subscribed to the philosophy and principles of socialism as manifested in the writings of Lenin. *The State*

[12] The Theory and Practice of Leninism, by Stalin, pp. 33, 32, 30–31. Published for the Workers Party of America by the Daily Worker Publishing Co., Chicago, Ill. This pamphlet was used in Communist Party classes in 1924 and 1925, and was circulated by the Literature Department of the Communist Party and sold in Party bookshops. Five thousand copies were published between January 15 and August 1, 1925.

and Revolution, by Lenin, with which petitioner was familiar, and which was circulated by the Literature Department of the Communist Party in 1924 and 1925 and used by Communist Party classes, declared: "The necessity of systematically fostering among the masses this and only this point of view about violent revolution lies at the root of the whole of Marx's and Engels' teaching, and it is just the neglect of such propaganda and agitation both by the present predominant Social-Chauvinists and the Kautskian schools that brings their betrayal of it into prominent relief." [13] And in order that there might be no misunderstanding of the term "revolution," Engels' definition of revolution was revived and restated as follows: "Revolution is an act in which part of the population forces its will on the other parts by means of rifles, bayonets, cannon, i. e., by most authoritative means. And the conquering party is inevitably forced to maintain its supremacy by means of that fear which its arms inspire in the reactionaries." [14] "That which before the victory of the proletariat seems but a theoretical difference of opinion on the question of 'democracy,' becomes inevitably on the morrow of the victory, a question which can only be decided by force of arms." [15] "The working class cannot achieve victory over the bourgeois by means of the general strike alone, and by the policy of folded arms. The proletariat must resort to an armed uprising." [16] "To say that the revolution can be achieved without civil war is to say that a 'peaceful' revolution is possible. . . . Marx was a believer in civil war—that is, the armed struggle of

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[13] P. 16, new edition, April, 1924. Published for the Workers Party of America by The Daily Worker Publishing Co., Chicago, Ill.

[14] *Ibid.*, p. 44.

[15] Statutes, Theses and Conditions of Admission to the Communist International (see note 6, *supra*), p. 15.

[16] *Ibid.*, p. 36.

the proletariat against the bourgeoisie. . . . The teachers of Socialism took the revolution very seriously. It was clear to them that the proletariat could not convert the bourgeoisie, and that the workers would have to impose their will upon their enemies through a war carried on by guns and bayonets." [17]

The Party teachings in this and other publications were that revolution by force of arms was a universal principle and consequently one which embraced the United States, and obviously was intended to do so when taught in Communist classes in the United States. Communist publications in evidence were at pains to point out that "Marx's limitation with regard to the 'continent' has furnished the opportunists and mensheviks of every country with a pretext for asserting that Marx admitted the possibility of a peaceful transformation of bourgeois democracy into proletariat democracy, at least [in] some countries (England and America). . . . But now the situation in these countries is radically different. Imperialism has reached its apogee there, and there militarism and bureaucracy are sovereign. In consequence Marx's restriction no longer applies." [18]

In order to determine whether petitioner's behavior established his attachment to the principles of the Constitution, we are entitled to consider the political system which his Party proposed to establish and toward which his own efforts in promoting the Communist cause were directed. About this there is and can be no serious dispute. Under the new system existing constitutional principles were to be abandoned. In the new government to be established by the Communists, the freedoms guaran-

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[17] A B C of Communism (see note 12, *supra*), pp. 109–10.

[18] The Theory and Practice of Leninism, by Stalin (see note 12, *supra*), p. 32. To the same effect see The State and Revolution, by Lenin (note 13, *supra*), p. 26.

teed by the Bill of Rights were to be ended. ". . . There can be no talk of 'freedom' for everybody. The dictatorship of the proletariat is incompatible with the freedom of the bourgeoisie. The dictatorship is, in fact, necessary to deprive the bourgeoisie of their freedom, to chain them hand and foot in order to make it absolutely impossible for them to fight the revolutionary proletariat." [19] There was to be "immediate and unconditional confiscation of the estates of the landowners and big landlords" and "no propaganda can be admitted in the ranks of the Communist parties in favor of an indemnity to be paid to the owners of large estates for their expropriation." [20] The new state was not to include "representatives of the former ruling classes." [21] "The dictatorship of the proletariat cannot be a 'complete democracy, a democracy for *all*, for rich and poor alike; it has to be a State that is democratic, but only *for the proletariat and the propertyless*, a State that is dictatorial, but only *against the bourgeoisie*.' . . . Under the dictatorship of the proletariat, democracy *is proletarian:* it is democracy for the exploited majority, based on the limitation of the rights of the exploiting minority and directed against this minority." [22]

The aims of the Communists could be achieved only by "the annihilation of the entire bourgeois governmental apparatus, parliamentary, judicial, military, bureaucratic, administrative, municipal," and it was necessary for the Communists "to break and destroy" the "apparatus." [23] The annihilation of the existing political structure was

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[19] A B C of Communism (see note 11, *supra*), pp. 65–66.

[20] Statutes, Theses and Conditions of Admission to the Communist International (see note 6, *supra*), p. 82.

[21] *Ibid.*, p. 46.

[22] The Theory and Practice of Leninism, by Stalin (see note 12, *supra*), pp. 31–32.

[23] Statutes, Theses and Conditions of Admission to the Communist International (see note 6, *supra*), pp. 11, 44.

deemed as necessary in the United States as elsewhere.[24] If elected to public office the Communist was directed to "facilitate this task of destruction" of the existing "apparatus," since the "bourgeois State organizations" were to be utilized only "with the object of destroying them." [25]

It is unnecessary to give further examples of the teachings of Communist Party organizations with which the documentary evidence is shot through and through. Appended to this opinion are excerpts from two exhibits. These have been chosen, not because they prove more than others but only because they express in short form ideas which permeate all. The evidence, as a whole, and the exhibits which we have especially mentioned, show a basis for finding in the Party teachings, during the period in question, an unqualified hostility to the most fundamental and universally recognized principles of the Constitution. On the argument we were admonished that petitioner favored change in our form of government, which is itself a principle of the Constitution, since the Constitution provides for its own amendment, and that in any case the Communist Party had greatly modified its aims in more recent years. It is true that the Constitution provides for its own amendment by an orderly procedure but not through the breakdown of our governmental system by lawless conduct and by force. It can hardly satisfy the requirement of "attachment to the principles of the Constitution" that one is attached to the means for its destruction. And whether at some time after 1927 the Party may have abandoned these doctrines is immaterial.

It would be little short of preposterous to assert that vigorous aid knowingly given by a pledged Party member

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[24] See note 18, *supra*.

[25] Statutes, Theses and Conditions of Admission to the Communist International (see note 6, *supra*), pp. 44, 45, 46.

in disseminating the Party teachings, to which reference has been made, is compatible with attachment to the principles of the Constitution. On the record before us it would be difficult for a trial judge to conclude that petitioner was not well aware that he was a member of and aiding a party which taught and advocated the overthrow of the Government of the United States by force and violence. It would be difficult also to find as a fact that petitioner behaved as a man attached to the principles of the Constitution. The trial judge found that he did not. And the same evidence would seem to furnish plain enough support for the trial judge's further finding that petitioner did not behave as a man attached "to the good order and happiness" of the United States.

Petitioner's pledge of adherence to Communist Party principles and tactics, and his membership in the Communist organizations, were neither passive nor indolent. His testimony shows clearly that during the crucial years he was a young man of vigorous intellect and strong convictions. He spent his time actively arranging for the dissemination of a gospel of which he never has asserted either ignorance or disbelief. His wide acquaintance with Party literature, and his zealous promotion of Party interests for many years, preclude the supposition that he did not know the character of its teachings and did not aid in their advocacy. They are persuasive that he was without attachment to the constitutional principles which those teachings aimed to destroy. Yet the Court's opinion seems to tell us that the trier of fact must not examine petitioner's gospel to find out what kind of man he was, or even what his gospel was; that the trier of fact could not "impute" to petitioner any genuine attachment to the doctrines of these organizations whose teachings he so assiduously spread. It might as well be said that it is impossible to infer that a man is attached to the principles of a religious movement from the fact that he conducts

its prayer meetings, or, to take a more sinister example, that it could not be inferred that a man is a Nazi and consequently not attached to constitutional principles who, for more than five years, had diligently circulated the doctrines of *Mein Kampf*.

In neither case of course is the inference inevitable. It is possible, though not probable or normal, for one to be attached to principles diametrically opposed to those, to the dissemination of which he has given his life's best effort. But it is a normal and sensible inference which the trier of fact is free to make that his attachment is to those principles rather than to constitutional principles with which they are at war. A man can be known by the ideas he spreads as well as by the company he keeps. And when one does not challenge the proof that he has given his life to spreading a particular class of well-defined ideas, it is convincing evidence that his attachment is to them rather than their opposites. In this case it is convincing evidence that petitioner, at the time of his naturalization, was not entitled to the citizenship he procured because he was not attached to the principles of the Constitution of the United States and because he was not well disposed to the good order and happiness of the same.

MR. JUSTICE ROBERTS and MR. JUSTICE FRANKFURTER join in this dissent.

APPENDIX.

Excerpts from Exhibit 26—STATUTES, THESES AND CONDITIONS OF ADMISSION TO THE COMMUNIST INTERNATIONAL (see note 6, *supra*):

"The Communist International makes its aim to put up an armed struggle for the overthrow of the International bourgeoisie and to create an International Soviet Republic as a transition stage to the complete abolition of the State. The Communist International considers the dictatorship of the proletariat as the only means for the liberation of humanity from the horrors of capitalism.

The Communist International considers the Soviet form of government as the historically evolved form of this dictatorship of the proletariat." p. 4.

"Under the circumstances which have been created in the whole world, and especially in the most advanced, most powerful, most enlightened and freest capitalist countries by militarist imperialism—oppression of colonies and weaker nations, the universal imperialist slaughter, the 'peace' of Versailles—to admit the idea of a voluntary submission of the capitalists to the will of the majority of the exploited, of a peaceful, reformist passage to Socialism, is not only to give proof of an extreme petty bourgeois stupidity, but it is a direct deception of the workmen, a disguisal of capitalist wage-slavery, a concealment of the truth. This truth is that the bourgeoisie, the most enlightened and democratic portion of the bourgeoisie, is even now not stopping at deceit and crime, at the slaughter of millions of workmen and peasants, in order to retain the right of private ownership over the means of production. Only a violent defeat of the bourgeoisie, the confiscation of its property, the annihilation of the entire bourgeois governmental apparatus, parliamentary, judicial, military, bureaucratic, administrative, municipal, etc., even the individual exile or internment of the most stubborn and dangerous exploiters, the establishment of a strict control over them for the repression of all inevitable attempts at resistance and restoration of capitalist slavery—only such measures will be able to guarantee the complete submission of the whole class of exploiters." p. 11.

"That which before the victory of the proletariat seems but a theoretical difference of opinion on the question of 'democracy,' becomes inevitably on the morrow of the victory, a question which can only be decided by force of arms." p. 15.

"For all countries, even for most free 'legal' and 'peaceful' ones in the sense of a lesser acuteness in the class struggle, the period has arrived, when it has become absolutely necessary for every Communist party to join systematically lawful and unlawful work, lawful and unlawful organization." p. 18.

"It is especially necessary to carry on unlawful work in the army, navy, and police, as, after the imperialist slaughter, all the governments in the world are becoming afraid of the national armies, open to all peasants and workingmen, and they are setting up in secret all kinds of select military organizations recruited from the bourgeoisie and especially provided with improved technical equipment." p. 19.

"The class struggle in almost every country of Europe and America is entering the phase of civil war. Under such conditions the Communists can have no confidence in bourgeois laws. They should create everywhere a parallel illegal apparatus, which at the decisive moment should do its duty by the party, and in every way possible assist the revolution. In every country where, in consequence of martial law or of other exceptional laws, the Communists are unable to carry on their work lawfully, a combination of lawful and unlawful work is absolutely necessary." p. 28.

"A persistent and systematic propaganda and agitation is necessary in the army, where Communist groups should be formed in every military organization. Wherever, owing to repressive legislation, agitation becomes impossible, it is necessary to carry on such agitation illegally. But refusal to carry on or participate in such work should be considered equal to treason to the revolutionary cause, and incompatible with affiliation with the Third International." p. 28.

"Each party desirous of affiliating with the Communist International should be obliged to render every possible assistance to the Soviet Republics in their struggle against all counter-revolutionary forces. The Communist parties should carry on a precise and definite propaganda to induce the workers to refuse to transport any kind of military equipment intended for fighting against the Soviet Republics, and should also by legal or illegal means carry on a propaganda amongst the troops sent against the workers' republics, etc." p. 30.

"The world proletariat is confronted with decisive battles. We are living in an epoch of civil war. The critical hour has struck. In almost all countries where there

is a labor movement of any importance the working class, arms in hand, stands in the midst of fierce and decisive battles. Now more than ever is the working class in need of a strong organization. Without losing an hour of invaluable time, the working class must keep on indefatigably preparing for the impending decisive struggle." p. 33.

"Until the time when the power of government will have been finally conquered by the proletariat, until the time when the proletarian rule will have been firmly established beyond the possibility of a bourgeois restoration, the Communist Party will have in its organized ranks only a minority of the workers. Up to the time when the power will have been seized by it, and during the transition period, the Communist Party may, under favorable conditions, exercise undisputed moral and political influence on all the proletarian and semi-proletarian classes of the population; but it will not be able to unite them within its ranks. Only when the dictatorship of the workers has deprived the bourgeoisie of such powerful weapons as the press, the school, parliament, the church, the government apparatus, etc.; only when the final overthrow of the capitalist order will have become an evident fact—only then will all or almost all the workers enter the ranks of the Communist Party." pp. 33–34.

"The working class cannot achieve the victory over the bourgeoisie by means of the general strike alone, and by the policy of folded arms. The proletariat must resort to an armed uprising." p. 36.

"As soon as Communism comes to light, it must begin to elucidate the character of the present epoch (the culminations of capitalism, imperialistic self-negation and self-destruction, uninterrupted growth of civil war, etc.). Political relationships and political groupings may be different in different countries, but the essence of the matter is everywhere the same: we must start with the direct preparation for a proletarian uprising, politically and technically, for the destruction of the bourgeoisie and for the creation of the new poletarian state.

"Parliament at present can in no way serve as the arena of a struggle for reform, for improving the lot of the work-

ing people, as it has at certain periods of the preceding epoch. The centre of gravity of political life at present has been completely and finally transferred beyond the limits of parliament. On the other hand, owing not only to its relationship to the working masses, but also to the complicated mutual relations within the various groups of the bourgeois itself, the bourgeoisie is forced to have some of its policies in one way or another passed through parliament, where the various cliques haggle for power, exhibit their strong sides and betray their weak ones, get themselves unmasked, etc., etc. Therefore it is the immediate historical task of the working class to tear this apparatus out of the hands of the ruling classes, to break and destroy it, and to create in its place a new proletarian apparatus. At the same time, however, the revolutionary general staff of the working class is vitally concerned in having its scouting parties in the parliamentary institutions of the bourgeoisie, in order to facilitate this task of destruction." pp. 44–45.

"Parliamentarism cannot be a form of proletarian government during the transition period between the dictatorship of the bourgeoisie and that of the proletariat. At the moment when the accentuated class struggle turns into civil war, the proletariat must inevitably form its State organization as a fighting organization, which cannot contain any of the representatives of the former ruling classes; all fictions of a 'national will' are harmful to the proletariat at that time, and a parliamentary division of authority is needless and injurious to it; the only form of proletarian dictatorship is a Republic of Soviets.

"The bourgeois parliaments, which constitute one of the most important apparatus of the State machinery of the bourgeoisie, cannot be won over by the proletariat any more than can the bourgeois order in general. The task of the proletariat consists in blowing up the whole machinery of the bourgeoisie, in destroying it, and all the parliamentary institutions with it, whether they be republican or constitutional-monarchical." pp. 45–46.

"Consequently, Communism repudiates parliamentarism as the form of the future; it renounces the same as a form of the class dictatorship of the proletariat; it repudiates the possibility of winning over the parliaments;

its aim is to destroy parliamentarism. Therefore it is only possible to speak of utilizing the bourgeois State organizations with the object of destroying them. The question can only and exclusively be discussed on such a plane.

"All class struggle is a political struggle, because it is finally a struggle for power. Any strike, when it spreads through the whole country, is a menace to the bourgeois State, and thus acquires a political character. To strive to overthrow the bourgeoisie, and to destroy its State, means to carry on political warfare. To create one's own class apparatus—for the bridling and suppression of the resisting bourgeoisie, whatever such an apparatus may be—means to gain political power." p. 46.

"The mass struggle means a whole system of developing demonstrations growing ever more acute in form, and logically leading to an uprising against the capitalist order of government. In this warfare of the masses developing into a civil war, the guiding party of the proletariat must, as a general rule, secure every and all lawful positions, making them its auxiliaries in the revolutionary work, and subordinating such positions to the plans of the general campaign, that of the mass struggle." p. 47.

"On the other hand, an acknowledgement of the value of parliamentary work in no wise leads to an absolute, in-all-and-any-case acknowledgement of the necessity of concrete elections and a concrete participation in parliamentary sessions. The matter depends upon a series of specific conditions. Under certain circumstances it may become necessary to leave the parliament. The Bolsheviks did so when they left the pre-parliament in order to break it up, to weaken it, and to set up against it the Petrograd Soviet, which was then prepared to head the uprising; they acted in the same way in the Constituent Assembly on the day of its dissolution, converting the Third Congress of Soviets into the centre of political events. In other circumstances a boycotting of the elections may be necessary, and a direct, violent storming of both the great bourgeois State apparatus and the parliamentary bourgeois clique, or a participation in the elections with a boycott of the parliament itself, etc.

"In this way, while recognizing as a general rule the necessity of participating in the election to the central parliament, and the institutions of local self-government, as well as in the work in such institutions, the Communist Party must decide the question concretely, according to the specific conditions of the given moment. Boycotting the elections or the parliament, or leaving the parliament, is permissible, chiefly when there is a possibility of an immediate transition to an armed fight for power." p. 49.

"A Communist delegate, by decision of the Central Committee, is bound to combine lawful work with unlawful work. In countries where the Communist delegate enjoys a certain inviolability, this must be utilized by way of rendering assistance to illegal organizations and for the propaganda of the party." p. 51.

"Each Communist member [of the legislature] must remember that he is not a 'legislator' who is bound to seek agreements with the other legislators, but an agitator of the Party, detailed into the enemy's camp in order to carry out the orders of the Party there. The Communist member is answerable not to the wide mass of his constituents, but to his own Communist Party—whether lawful or unlawful." p. 52.

"The propaganda of the right leaders of the Independents (Hilferding, Kautsky, and others), proving the compatibility of the Soviet 'system' with the bourgeois Constituent Assembly, is either a complete misunderstanding of the laws of development of a proletarian revolution, or a conscious deceiving of the working class. The Soviets are the dictatorship of the proletariat. The Constituent Assembly is the dictatorship of the bourgeoisie. To unite and reconcile the dictatorship of the working class with that of the bourgeoisie is impossible." p. 64.

"After the victory of the proletariat in the towns, this class [the landed peasants or farmers] will inevitably oppose it by all means, from sabotage to open armed counter-revolutionary resistance. The revolutionary proletariat must, therefore, immediately begin to prepare the necessary force for the disarmament of every single man of this class, and together with the overthrow of the capi-

talists in industry, the proletariat must deal a relentless, crushing blow to this class. To that end it must arm the rural proletariat and organize Soviets in the country, with no room for exploiters, and a preponderant place must be reserved to the proletarians and the semi-proletarians." p. 80.

"The revolutionary proletariat must proceed to an immediate and unconditional confiscation of the estates of the landowners and big landlords . . . No propaganda can be admitted in the ranks of the Communist parties in favor of an indemnity to be paid to the owners of large estates for their expropriation." p. 82.

Excerpts from Exhibit 8—THE STATE AND REVOLUTION, by Lenin (see note 13, *supra*):

"We have already said above and shall show more fully at a later stage that the teaching of Marx and Engels regarding the inevitability of a violent revolution refers to the capitalist State. It cannot be replaced by the proletarian State (the dictatorship of the proletariat) through mere 'withering away,' but, in accordance with the general rule, can only be brought about by a violent revolution. The hymn sung in its honor by Engels and fully corresponding to the repeated declarations of Marx (see the concluding passages of the Poverty of Philosophy and the Communist Manifesto, with its proud and open declaration of the inevitability of a violent revolution; also Marx's Criticism of the Gotha Program of 1875, in which, thirty years after, he mercilessly castigates its opportunist character)—this praise is by no means a mere 'impulse,' a mere declamation, or a mere polemical sally. The necessity of systematically fostering among the masses this and only this point of view about violent revolution lies at the root of the whole of Marx's and Engels' teaching, and it is just the neglect of such propaganda and agitation both by the present predominant Social-Chauvinists and the Kautskian schools that brings their betrayal of it into prominent relief.

"The substitution of a proletarian for the capitalist State is impossible without violent revolution, while the abolition of the proletarian State, that is, of all States, is only possible through 'withering away.'" pp. 15–16.

"The State is a particular form of organization of force; it is the organization of violence for the purpose of holding down some class. What is the class which the proletariat must hold down? It can only be, naturally, the exploiting class, i. e., the bourgeoisie. The toilers need the State only to overcome the resistance of the exploiters, and only the proletariat can guide this suppression and bring it to fulfilment—the proletariat, the only class revolutionary to the finish, the only class which can unite all the toilers and the exploited in the struggle against the capitalist class for its complete displacement from power." pp. 17–18.

"The doctrine of the class-war, as applied by Marx to the question of the State and of the Socialist revolution, leads inevitably to the recognition of the political supremacy of the proletariat, of its dictatorship, i. e., of an authority shared with none else and relying directly upon the armed force of the masses. The overthrow of the capitalist class is feasible only by the transformation of the proletariat into the ruling class, able to crush the inevitable and desperate resistance of the bourgeoisie, and to organize, for the new settlement of economic order, all the toiling and exploited masses.

"The proletariat needs the State, the centralized organization of force and violence, both for the purpose of guiding the great mass of the population—the peasantry, the lower middle-class, the semi-proletariat—in the work of economic Socialist reconstruction." pp. 18–19.

"But, if the proletariat needs the State, as a particular form of organization of force against the capitalist class, the question almost spontaneously forces itself upon us: Is it thinkable that such an organization can be created without a preliminary breaking up and destruction of the machinery of government created for its own use by the capitalist class? The Communist Manifesto leads us straight to this conclusion, and it is of this conclusion that Marx wrote summing up the practical results of the revolutionary experience gained between 1849 and 1851." p. 19.

"Hence Marx excluded England, where a revolution, even a people's revolution, could be imagined and was then possible, without the preliminary condition of the

destruction 'of the available ready machinery of the State.'

"Today, in 1917, in the epoch of the first great imperialist war, this distinction of Marx's becomes unreal, and England and America, the greatest and last representatives of Anglo-Saxon 'liberty,' in the sense of the absence of militarism and bureaucracy, have today completely rolled down into the dirty, bloody morass of military-bureaucratic institutions common to all Europe, subordinating all else to themselves. Today, both in England and in America, the 'preliminary condition of any real people's revolution' is the break-up, the shattering of the 'available ready machinery of the State' (perfected in those countries between 1914 and 1917, up to the 'European' general imperialist standard)." p. 26.

"But from this capitalist democracy—inevitably narrow, stealthily thrusting aside the poor, and therefore to its core, hypocritical and treacherous—progress does not march along a simple, smooth and direct path to 'greater and greater democracy,' as the Liberal professors and the lower middle class Opportunists would have us believe. No, progressive development—that is, towards Communism—marches through the dictatorship of the proletariat; and cannot do otherwise, for there is no one else who can break the resistance of the exploiting capitalists, and no other way of doing it.

"And the dictatorship of the proletariat—that is, the organization of the advance-guard of the oppressed as the ruling class, for the purpose of crushing the oppressors—cannot produce merely an expansion of democracy. Together with an immense expansion of democracy—for the first time becoming democracy for the poor, democracy for the people, and not democracy for the rich folk—the dictatorship of the proletariat will produce a series of restrictions of liberty in the case of the oppressors, exploiters, and capitalists. We must crush them in order to free humanity from wage-slavery; their resistance must be broken by force. It is clear that where there is suppression there must also be violence, and there cannot be liberty or democracy.

"Engels expressed this splendidly in his letter to Bebel when he said, as the reader will remember, that 'the pro-

letariat needs the State, not in the interests of liberty, but for the purpose of crushing its opponents; and, when one will be able to speak of freedom, the State will have ceased to exist.'

"Democracy for the vast majority of the nation, and the suppression by force—that is, the exclusion from democracy—of the exploiters and oppressors of the nation: this is the modification of democracy which we shall see during the transition from Capitalism to Communism." pp. 63–64.

"Again, during the transition from Capitalism to Communism, suppression is still necessary; but in this case it is the suppression of the minority of exploiters by the majority of exploited. A special instrument, a special machine for suppression—that is, the 'State'—is necessary, but this is now a transitional State, no longer a State in the ordinary sense of the term. For the suppression of the minority of exploiters by the majority of those who were but yesterday wage slaves, is a matter comparatively so easy, simple and natural that it will cost far less bloodshed than the suppression of the risings of the slaves, serfs or wage laborers, and will cost the human race far less." pp. 64–65.

MR. JUSTICE JACKSON:

I do not participate in this decision. This case was instituted in June of 1939 and tried in December of that year. In January 1940, I became Attorney General of the United States and succeeded to official responsibility for it. 309 U. S. iii. This I have considered a cause for disqualification, and I desire the reason to be a matter of record.

552826—44——18

DECISIONS PER CURIAM, ETC., FROM JUNE 15, 1943, THROUGH JUNE 21, 1943.*

No. 1056. JACK LINCOLN SHOPS, INC. *v.* STATE DRY CLEANERS' BOARD ET AL. Appeal from the Supreme Court of Oklahoma. June 21, 1943. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. *Nebbia* v. *New York,* 291 U. S. 502; *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379; *Olsen* v. *Nebraska,* 313 U. S. 236; and *Dunn* v. *Ohio,* 318 U. S. 739. MR. JUSTICE ROBERTS took no part in the consideration or decision of this case. *Messrs. John B. Dudley* and *Duke Duvall* for appellant. Reported below: 192 Okla. 251, 135 P. 2d 332.

No. 1064. PREBYL *v.* PRUDENTIAL INSURANCE CO. ET AL. Appeal from the Supreme Court of Nebraska. June 21, 1943. *Per Curiam:* The motion for leave to proceed *in forma pauperis* is granted. The appeal is dismissed for the want of jurisdiction. § 237 (a), Judicial Code, as amended, 28 U. S. C., § 344 (a). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari as required by § 237 (c) of the Judicial Code as amended, 28 U. S. C., § 344 (c), certiorari is denied. MR. JUSTICE ROBERTS and MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case. *Milton Prebyl, pro se.* Reported below: 142 Neb. 532, 6 N. W. 2d 881.

No. —. EX PARTE WARREN WOCKNER. June 21, 1943. Application denied. MR. JUSTICE ROBERTS and MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application.

*For decisions on applications for certiorari, see *post,* pp. 209, 210; rehearing, *post,* p. 213.

No. —. Ex parte Wolfgang Achtner; and

No. —. Ex parte Franz Moedlhammer. June 21, 1943. Applications denied without prejudice to applications to the District Court. Mr. Justice Roberts and Mr. Justice Douglas took no part in the consideration or decision of these applications.

No. —. Sabin et al. *v.* Levorsen et al. June 21, 1943. Motion for stay denied. Mr. Justice Roberts and Mr. Justice Douglas took no part in the consideration or decision of this application.

No. —, original. Ex parte Earl Collins; and

No. —, original. Ex parte Joseph E. Sheppard. June 21, 1943. The motions for leave to file petitions for writs of habeas corpus are denied. Mr. Justice Roberts and Mr. Justice Douglas took no part in the consideration or decision of these applications.

DECISIONS GRANTING CERTIORARI, FROM JUNE 15, 1943, THROUGH JUNE 21, 1943.

Nos. 945 and 946. Ford Motor Co. *v.* Gordon Form Lathe Co. See *post*, p. 213.

No. 1055. Falbo *v.* United States. June 21, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Messrs. Hayden C. Covington* and *Victor F. Schmidt* for petitioner. *Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. Robert S. Erdahl* for the United States. Reported below: 135 F. 2d 464.

No. 1036. ESTATE OF ROGERS ET AL. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. June 21, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. MR. JUSTICE MURPHY took no part in the consideration or decision of this application. *Mr. John W. Drye, Jr.* for petitioners. *Solicitor General Fahy* for respondent. Reported below: 135 F. 2d 35.

No. 1039. J. I. CASE CO. *v.* NATIONAL LABOR RELATIONS BOARD. June 21, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. MR. JUSTICE ROBERTS took no part in the consideration or decision of this application. *Messrs. Clark M. Robertson, John C. Gall,* and *Ben T. Reidy* for petitioner. *Solicitor General Fahy, Messrs. Robert L. Stern, Robert B. Watts, Ernest A. Gross,* and *Miss Ruth Weyand* for respondent. Reported below: 134 F. 2d 70.

DECISIONS DENYING CERTIORARI, FROM JUNE 15, 1943, THROUGH JUNE 21, 1943.

No. 1064. PREBYL *v.* PRUDENTIAL INSURANCE CO. ET AL. See *ante,* p. 208.

No. 1035. MILLER, DOING BUSINESS AS MILLER MOTOR FREIGHT SERVICE, ET AL. *v.* BATES. June 21, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. I. Nathaniel Treblow* for petitioners. *Mr. David Vorhaus* for respondent. Reported below: 133 F. 2d 645.

No. 1040. DAVIS *v.* MASSACHUSETTS. June 21, 1943. Petition for writ of certiorari to the Supreme Court of Texas denied. *Messrs. Dan Moody* and *W. L. Matthews*

for petitioner. *Mr. Benjamin Albert Greathouse* for respondent. Reported below: 140 Tex. 398, 168 S. W. 2d 216.

No. 1045. FIRST NATIONAL BENEFIT SOCIETY *v.* STUART, COLLECTOR OF INTERNAL REVENUE. June 21, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Allan K. Perry* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.*, and *Messrs. Sewall Key, Samuel H. Levy,* and *Paul R. Russell* for respondent. Reported below: 134 F. 2d 438.

No. 1046. DURABLE TOY & NOVELTY CORP. *v.* J. CHEIN & Co., INC., ET AL. June 21, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. John P. Chandler* for petitioner. Reported below: 133 F. 2d 853.

No. 1049. NIKOLAS ET AL. *v.* WITTER. June 21, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Walter E. Wiles* and *Harry G. Hershenson* for petitioners. *Mr. Hymen S. Gratch* for respondent. Reported below: 134 F. 2d 839.

No. 1050. ORDER OF UNITED COMMERCIAL TRAVELERS *v.* MOORE. June 21, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Harry L. Greene* and *E. W. Dillon* for petitioner. *Mr. Welborn B. Cody* for respondent. Reported below: 134 F. 2d 558.

No. 1054. GRECO *v.* UNITED STATES. June 21, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Frederic M. P.*

Pearse for petitioner. *Solicitor General Fahy, Assistant Attorney General Berge, Mr. Robert S. Erdahl* and *Miss Beatrice Rosenberg* for the United States. Reported below: 134 F. 2d 1023.

No. 1070. GUYTON *v.* UNITED STATES. June 21, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Mack Taylor* for petitioner. *Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. Robert S. Erdahl* for the United States. Reported below: 134 F. 2d 618.

No. 1015. SMITH *v.* LOUISIANA & ARKANSAS RAILWAY CO. June 21, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. MR. JUSTICE BLACK is of opinion that certiorari should be granted. *Messrs. Wils Davis* and *W. S. Atkins* for petitioner. *Mr. A. L. Burford* for respondent. Reported below: 133 F. 2d 436.

No. 1069. KUSHNER *v.* UNITED STATES. June 21, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Messrs. Samuel M. Ostroff* and *Herman Mendes* for petitioner. *Solicitor General Fahy, Assistant Attorney General Berge, Mr. Robert S. Erdahl* and *Miss Beatrice Rosenberg* for the United States. Reported below: 135 F. 2d 668.

No. 1081. ARNOLD *v.* UNITED STATES. June 21, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Mr. Maury Hughes* for petitioner. Reported below: 134 F. 2d 1023.

No. 1082. FARRIS *v.* VIRGINIA. June 21, 1943. Petition for writ of certiorari to the Hustings Court of the City of Richmond denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Mr. L. Gleason Gianniny* for petitioner. *Mr. Abram P. Staples,* Attorney General of Virginia, for respondent.

No. 1085. FRAME *v.* AMRINE, WARDEN, KANSAS STATE PENITENTIARY. June 21, 1943. Petition for writ of certiorari to the Supreme Court of Kansas denied. MR. JUSTICE ROBERTS and MR. JUSTICE DOUGLAS took no part in the consideration or decision of these applications. *Perry Frame, pro se.*

No. 1099. SHEPPARD *v.* MASSACHUSETTS. June 21, 1943. Motion for stay denied. Petition for writ of certiorari to the Supreme Judicial Court of Massachusetts denied. MR. JUSTICE DOUGLAS and MR. JUSTICE ROBERTS took no part in the consideration or decision of these applications. *Mr. Edward A. Ryan* for petitioner. Reported below: 313 Mass. 590, 48 N. E. 2d 630.

DECISIONS GRANTING REHEARING, FROM JUNE 15, 1943, THROUGH JUNE 21, 1943.

Nos. 945 and 946. FORD MOTOR CO. *v.* GORDON FORM LATHE CO. June 21, 1943. The petition for rehearing is granted and the order entered June 7, 1943, 319 U. S. 738, is vacated. The petition for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit is granted. MR. JUSTICE ROBERTS and MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Messrs. Drury W. Cooper* and *I. Joseph Farley* for petitioner. Reported below: 133 F. 2d 487.

DECISIONS DENYING REHEARING, FROM JUNE 15, 1943, THROUGH JUNE 21, 1943.*

No. 226. WATERMAN *v.* SOMERVELL ET AL. June 21, 1943. Third petition for rehearing denied. MR. JUSTICE ROBERTS, MR. JUSTICE DOUGLAS and MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application. 318 U. S. 798.

No. 495. BURFORD ET AL. *v.* SUN OIL CO. ET AL.;
No. 496. SUN OIL CO. ET AL. *v.* BURFORD ET AL.;
No. 553. GALLOWAY *v.* UNITED STATES;
No. 939. WATSON ET AL. *v.* CASPERS;
No. 960. PATTERSON ET AL. *v.* THE TEXAS COMPANY;
No. 962. MESCALL *v.* W. T. GRANT CO.; and
No. 1034. ALLEN *v.* UNITED STATES. June 21, 1943. Petitions for rehearing denied. MR. JUSTICE ROBERTS and MR. JUSTICE DOUGLAS took no part in the consideration or decision of these applications. 319 U. S. 315 (Nos. 495–496), 372 (No. 553), 757 (No. 939), 759 (No. 962), 761 (No. 960), 769 (No. 1034).

No. 528. HASTINGS ET AL. *v.* SELBY OIL & GAS CO. ET AL.;
No. 935. KELLEY ET AL. *v.* EVERGLADES DRAINAGE DISTRICT; and
No. 948. UNITED STATES GYPSUM CO. *v.* STORNELLI. June 21, 1943. Petitions for rehearing denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of these applications. 319 U. S. 348, 415, 760.

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*See Table of Cases Reported in this volume for earlier decisions in these cases, unless otherwise indicated.

No. 824. METROPOLITAN-COLUMBIA STOCKHOLDERS, INC., ET AL. *v.* CITY OF NEW YORK. June 21, 1943. Second petition for rehearing denied. MR. JUSTICE ROBERTS and MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. 319 U. S. 740.

STATEMENT SHOWING THE NUMBER OF CASES FILED, DISPOSED OF, AND REMAINING ON DOCKETS, AT CONCLUSION OF OCTOBER TERMS—1940, 1941 AND 1942

	ORIGINAL			APPELLATE			TOTALS		
Terms	1940	1941	1942	1940	1941	1942	1940	1941	1942
Number of cases on dockets	15	12	15	1,094	1,290	1,103	1,109	1,302	1,118
Cases disposed of during terms	6	2	5	979	1,166	992	985	1,168	997
Number of cases remaining on dockets	9	10	10	115	124	111	124	134	121

	TERMS		
	1940	1941	1942
Distribution of cases disposed of during terms:			
Original cases	6	2	5
Appellate cases on merits	286	381	261
Petitions for certiorari	693	785	731
Distribution of cases remaining on dockets:			
Original cases	9	10	10
Appellate cases on merits	67	65	75
Petitions for certiorari	48	59	36

JUNE 21, 1943.

CASES ADJUDGED
IN THE
SUPREME COURT OF THE UNITED STATES
AT
OCTOBER TERM, 1943.

EX PARTE ABERNATHY.

NO. —. ON MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF HABEAS CORPUS.*

Decided October 18, 1943.

1. The exercise by this Court of the power conferred upon it to issue writs of habeas corpus (28 U. S. C. §§ 377, 451) in aid of its appellate jurisdiction is discretionary; and, save in exceptional circumstances, the Court does not exercise the power where an adequate remedy may be had in a lower federal court or where, if the relief sought is from a judgment of a state court, the petitioner has not exhausted his remedies in the state courts. P. 219.
2. Refusal of the writ, without more, is not an adjudication on the merits and is to be taken as without prejudice to an application to any other court for the relief sought. P. 220.

Applications denied.

PER CURIAM.

The applications are severally denied.

In these cases petitioners invoke the exercise of the jurisdiction conferred on this Court by 28 U. S. C. §§ 377,

* Together with No. —, *Ex parte Dexter C. Dayton;* No. —, *Ex parte Frederick T. Hansen and Sam Bonjiorno;* No. —, *Ex parte Floyd J. Kesling;* No. —, *Ex parte Louis Burall;* No. —, *Ex parte Oliver Gobin;* No. —, *Ex parte Peter J. C. Donnelly;* No. —, *Ex parte Alfred Maurice;* No. —, *Ex parte Sol Goldsmith;* No. —, *Ex parte Paul Davis;* No. —, *Ex parte Robert Hutto;* No. —, *Ex parte Alfred Friters;* No. —, *Ex parte Wilfred Doza;* No. —, *Ex parte R. J. Hughes;* and No. —, *Ex parte John Russell Miller,* also on motions for leave to file petitions for writs of habeas corpus.

451, to issue writs of habeas corpus in aid of its appellate jurisdiction. Cf. *Ex parte Peru,* 318 U. S. 578, 582–3. That jurisdiction is discretionary, *id.* 584; *Bowen* v. *Johnston,* 306 U. S. 19, 27, and this Court does not, save in exceptional circumstances, exercise it in cases where an adequate remedy may be had in a lower federal court, *Ex parte Current,* 314 U. S. 578; *Ex parte Spaulding,* 317 U. S. 593; *Ex parte Hawk,* 318 U. S. 746, or, if the relief sought is from the judgment of a state court, where the petitioner has not exhausted his remedies in the state courts, *Mooney* v. *Holohan,* 294 U. S. 103, 115; *Ex parte Botwinski,* 314 U. S. 586; *Ex parte Davis,* 317 U. S. 592, 318 U. S. 412; *Ex parte Williams,* 317 U. S. 604. Refusal of the writ, without more, is not an adjudication on the merits and is to be taken as without prejudice to an application to any other court for the relief sought.

UNITED STATES EX REL. McCANN *v.* ADAMS, WARDEN, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 371. Decided November 8, 1943.

The petition to the District Court for a writ of habeas corpus adequately raised the issue, not previously adjudicated, whether, in a prosecution in the District Court which resulted in a judgment of conviction, the petitioner had intelligently—with full knowledge of his rights and capacity to understand them—waived his right to the assistance of counsel and to trial by jury; and, in the circumstances, the petitioner was entitled to an opportunity to establish his claim. P. 221.

136 F. 2d 680, reversed.

PETITION for a writ of certiorari to review the affirmance of an order denying an application for a writ of habeas corpus.

Gene McCann, pro se.

Solicitor General Fahy, Assistant Attorney General Tom C. Clark, and *Mr. Oscar A. Provost* were on the brief for respondents.

PER CURIAM.

This proceeding is a sequel to *Adams* v. *U. S. ex rel. McCann,* 317 U. S. 269. We there reversed an order of the Circuit Court of Appeals of the Second Circuit discharging the present relator from custody. We did so because we held that, if his waiver was the exercise of an intelligent choice made with the considered approval of the trial court, he could as a matter of law waive his right to a jury trial without being represented by counsel. After the case went back to the Circuit Court of Appeals on mandate and further steps not necessary here to recount were taken, the relator filed a petition for a writ of *habeas corpus* in the District Court which, with supporting affidavits, adequately raised the issue whether in fact he intelligently—with full knowledge of his rights and capacity to understand them—waived his right to the assistance of counsel and to trial by jury. That issue, as appears from our former opinion, was explicitly withdrawn from consideration on the *habeas corpus* proceedings previously before the Circuit Court of Appeals. 126 F. 2d 774. That issue, now fairly tendered by the petition for *habeas corpus* below, has never been adjudicated on its merits by the lower courts. But it is no longer within the bosom of the trial court. Nor can it be disposed of on the appeal of his conviction, for the claim rests on materials *dehors* the trial proceedings. It is a claim which the relator should be allowed to establish, if he can. We cannot say that, in the light of the supporting affidavits, the petition for a writ of *habeas corpus* was palpably unmeritorious, and should have been dismissed without more. We are compelled therefore to accede to the Government's consent to a reversal of the order of the

Circuit Court of Appeals affirming the order denying the application for the writ of *habeas corpus*.

The motion for leave to proceed *in forma pauperis* and the petition for certiorari are therefore granted and the judgment is reversed for further proceedings not inconsistent with this opinion. Petitioner's applications for other relief are denied.

So ordered.

HUNTER COMPANY, INC. *v.* McHUGH, COMMISSIONER OF CONSERVATION, ET AL.

APPEAL FROM THE SUPREME COURT OF LOUISIANA.

No. 25. Argued October 18, 19, 1943.—Decided November 8, 1943.

1. The only order of the State Commissioner of Conservation which was before the state courts in this case having been superseded by later orders, the cause has become moot so far as it is concerned with the original order; and this Court, in reviewing on appeal the judgment of the highest court of the State, is not free to, and will not, adjudicate the constitutionality of the later orders, where the state court has had no opportunity to pass upon their validity under state law or the Federal Constitution. P. 226.
2. A State has constitutional power to regulate production of oil and gas so as to prevent waste and to secure equitable apportionment among landholders of the migratory gas and oil underlying their land, fairly distributing among them the costs of production and of the apportionment. P. 227.
3. Upon the record in this case, Act No. 157 of the Louisiana Acts of 1940 can not be held invalid on its face. P. 228.

Dismissed.

APPEAL from a judgment, 202 La. 97, 11 So. 2d 495, which, reversing a decision of a lower state court, sustained the constitutional validity, as applied to the appellant, of an order promulgated by the State Commissioner of Conservation under authority of a state statute providing for regulation of the production of oil and gas.

Messrs. Joe T. Cawthorn and *John M. Madison,* with whom *Mr. C. Huffman Lewis* was on the brief, for appellant.

Messrs. George A. Wilson and *T. Hale Boggs,* with whom *Messrs. Arthur O'Quin* and *M. C. Thompson* were on the brief, for the Commissioner of Conservation; and *Mr. Arthur O'Quin,* with whom *Messrs. M. C. Thompson* and *Leon O'Quin* were on the brief, for the Southern Production Co.,—appellees.

Messrs. J. Howard Marshall and *Robert E. Hardwicke* filed a brief on behalf of Harold L. Ickes, Petroleum Administrator for War, as *amicus curiae,* supporting the constitutionality of the state Act.

PER CURIAM.

Appellant is the lessee under an oil and gas lease of 190 acres in the Logansport Field in Louisiana. Under permit from the state it has drilled a well on the leased area, which was completed about June 1, 1938, and came into production in December, 1940. To enable it to reach a market for the natural gas produced by this well, appellant has constructed and owns a pipe line which extends from its well to the line of the United Gas Pipe Line Company.

"For the prevention of waste and to avoid the drilling of unnecessary wells," § 8 (b) of Act No. 157 of the Louisiana Acts of 1940, authorizes the State Commissioner of Conservation to establish drilling units for any oil or gas pool, except "where conditions are such that it would be impracticable or unreasonable to use a drilling unit at the present stage of development." The statute defines a drilling unit as "the maximum area which may be efficiently and economically drained by one well."

Section 9 (a) provides that where a drilling unit embraces separately owned tracts the owners may agree to

pool their interests, but provides that in default of such agreement "the Commissioner shall, if found by him to be necessary for the prevention of waste or to avoid the drilling of unnecessary wells, require such owners to do so and to develop their lands as a drilling unit"; such orders "shall be made after notice and hearing, and shall be upon terms and conditions which are just and reasonable, and will afford to the owner of each tract the opportunity to recover or receive his just and equitable share of the oil and gas in the pool without unnecessary expense." The section also provides:

"The portion of the production allocated to the owner of each tract included in a drilling unit formed by a pooling order shall, when produced, be considered as if it had been produced from such tract by a well drilled thereon. In the event such pooling is required, the cost of development and operation of the pooled unit chargeable by the operator to the other interested owner or owners shall be limited to the actual expenditures required for such purpose, not in excess of what are reasonable, including a reasonable charge for supervision. In the event of any dispute relative to such costs, the Commissioner shall determine the proper costs, after due notice to all interested parties and hearing thereon."

Proceeding under Act No. 157, the Commissioner, after notice and hearing, on October 16, 1941, promulgated Order No. 28–B, which designated drilling units of 320 acres for the production of gas from the Logansport Field, allowed the drilling of only one well on each such unit, required the operator of a well drilled before the effective date of the order to designate his drilling area, required him to account to each owner or lessee of land within the unit for the oil and gas produced, and provided for a bi-monthly determination by the Commissioner of the amount of the allowable gas production for each unit.

The order also authorized the Commissioner, upon a showing by any operator that any part of the order as applied to his well "will result in waste, or as to such operator is unreasonable" to make an exception to the directions of the order, provided that such exception "will not result in waste in the field as a whole" or give the operator an "inequitable and unfair advantage over another operator or other operators in the field."

Less than thirty days after the promulgation of this order, no application having been made by an adjacent landowner to require pooling, appellant, without having designated a drilling unit or made application to the Commissioner to make an exception to the order, brought the present suit in the Louisiana civil district court to enjoin the enforcement of Act No. 157 and of order No. 28–B or any similar order. By its bill of complaint appellant asserted that the order was invalid under the state constitution and laws, and violated the Fourteenth Amendment in that it made no provision for the payment to appellant of the reasonable value of its lease and for reimbursing it for the cost of development of the gas, including the cost of drilling its well and laying its pipe line.

The Civil District Court held Act No. 157 and order No. 28–B as applied to appellant to be null and void and enjoined enforcement of the Act and order or any similar order against appellant. The Supreme Court of Louisiana, 202 La. 97, 11 So. 2d 495, set this judgment aside and ordered the complaint dismissed. It held that the order was a valid exercise of state power to prevent future waste of a natural resource of the state and that under the provisions of § 9 (a) of the Act and of the order appellant was entitled to retain its proportionate share of the gas, and to reimburse itself from the proceeds of all the gas for the proportionate share of the cost of drilling and operation changeable to the other landowners in the drilling unit.

The case comes here on appeal under § 237 (a) of the Judicial Code, 28 U. S. C. § 344 (a), appellant assigning as error that the Act and order deprive it of property without due process of law by compelling it to combine its leasehold with the land of others within the drilling unit for the purpose of gas production and to share with them its pipe line and other facilities for the production and marketing of gas, for which no compensation is provided by the Act or order.

After the appeal was docketed in this Court appellee Southern Products Co., which had been allowed to intervene in the state courts, moved to dismiss the appeal as moot by reason of the promulgation by the Commissioner of new orders No. 28–C and No. 28–C–10, which operated to supersede order No. 28–B so far as applicable to appellant's leasehold. Order No. 28–C prescribed enlarged drilling units comprising 640 acres for the Logansport Field. It made other provisions not now material for the regulation of production applicable to the prescribed units. A later order, No. 28–C–10, designated appellant as the operator of a unit and directed that it should be entitled to receive and retain all proceeds derived from the sale of the product of the well after deduction of royalties and costs of production until it should have recovered the costs of drilling and equipping the well and laying and operating the pipe line, and that the balance of the proceeds should be distributed among the landholders within the unit, including appellant, in proportion to their acreage within the unit.

Order No. 28–C was promulgated on February 10, 1942, before the judgments of both the Civil District Court on February 26, 1942 and the Louisiana Supreme Court on November 30, 1942. Although no reason appears why its invalidity could not have been urged before those courts, the order is not in the record and does not appear to have been considered by either state court. Order No. 28–C–10

was promulgated on February 25, 1943, after the decision and judgment of the Louisiana Supreme Court. The only order before the state courts was No. 28–B, to which alone their decisions relate and to which alone appellant's assignments of error in this Court are directed. Its operation has been superseded by orders No. 28–C and No. 28–C–10, under which it appears that both the Commissioner and appellant are now proceeding as controlling the operation of appellant's well, and those orders were not before the state courts or considered by them.

The cause has thus become moot so far as it is concerned with order No. 28–B and this Court, in reviewing on appeal the judgment of the State Supreme Court is not free to, and will not adjudicate the constitutionality of orders No. 28–C and No. 28–C–10 where the state court whose judgment is under review has had no opportunity to pass upon their validity under state law or the Constitution of the United States. See *McGoldrick* v. *Compagnie Generale,* 309 U. S. 430, 433 *et seq.*

A minority of the Court are of opinion that in these circumstances there is no outstanding order which this Court can review and that the appeal should for that reason alone be dismissed.

In the present posture of the record, so far as the appeal seeks to bring before us for review the judgment of the state court sustaining the constitutionality of the statute, the record presents no substantial federal question. We have held that a state has constitutional power to regulate production of oil and gas so as to prevent waste and to secure equitable apportionment among landholders of the migratory gas and oil underlying their land, fairly distributing among them the costs of production and of the apportionment. *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61, 77; *Bandini Petroleum Co.* v. *Superior Court,* 284 U. S. 8, 22; *Champlin Refining Co.* v. *Corporation Commission,* 286 U. S. 210, 232–4; *Thompson* v.

Consolidated Gas Corp., 300 U. S. 55, 76–7; *Patterson* v. *Stanolind Oil & Gas Co.*, 305 U. S. 376, 379, and cases cited. On this appeal, absent from the record any operative order implementing Act No. 157, we cannot say that the application of the Act can be enjoined as invalid on its face, for we cannot say that no order could be made by the Commissioner which would apportion the production and distribute the costs of production and of the apportionment in a manner which would be consonant both with the requirements of the statute and the Federal Constitution, compare *Patterson* v. *Stanolind Oil & Gas Co., supra,* with *Thompson* v. *Consolidated Gas Corp., supra.* It will be time enough to consider the constitutionality of any particular apportionment and distribution of costs when we have before us the specific provisions of an order directing them which has been subjected to the scrutiny of the state court. See *Bandini Petroleum Co.* v. *Superior Court, supra.*

The appeal will be dismissed for want of a properly presented substantial federal question.

So ordered.

MEREDITH ET AL. *v.* WINTER HAVEN ET AL.

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

No. 42. Argued October 22, 1943.—Decided November 8, 1943.

1. Where a federal court has jurisdiction of a case, though solely by diversity of citizenship, the difficulties of ascertaining what the state courts may thereafter determine the state law to be do not in themselves afford a sufficient ground for declining to exercise the jurisdiction. P. 234.

   So held in respect of a suit instituted in a federal district court in Florida, the decision of which was concerned solely with the extent of the liability of a Florida municipality upon its refunding bonds.

2. In the absence of some recognized public policy or defined principle guiding the exercise of the jurisdiction conferred, which would in

exceptional cases warrant its non-exercise, it has from the first been deemed to be the duty of the federal courts, if their jurisdiction is properly invoked, to decide questions of state law whenever necessary to the rendition of judgment. When such exceptional circumstances are not present, denial of that opportunity by the federal courts, merely because the answers to the questions of state law are difficult or uncertain or have not yet been given by the highest court of the State, would thwart the purpose of the jurisdictional act. P. 234. 134 F. 2d 202, reversed.

CERTIORARI, 319 U. S. 736, to review a judgment which, in a suit based on diversity of citizenship, directed dismissal without prejudice to the plaintiff's right to proceed in the state court.

Messrs. D. C. Hull and *John L. Graham,* with whom *Messrs. Erskine W. Landis* and *J. Compton French* were on the brief, for petitioners.

Mr. Giles J. Patterson for respondents.

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

Petitioners sought a judgment granting equitable relief in the District Court below, whose jurisdiction rested solely on diversity of citizenship. The question is whether the Circuit Court of Appeals, on appeal from the judgment of the District Court, rightly declined to exercise its jurisdiction on the ground that decision of the case on the merits turned on questions of Florida constitutional and statutory law which the decisions of the Florida courts had left in a state of uncertainty.

Petitioners brought this suit in the District Court for Southern Florida, alleging by their bill of complaint that they are owners and holders of General Refunding Bonds issued in 1933 by respondent, the City of Winter Haven, Florida; that by their terms the bonds are callable by the city on any interest date on tender of their principal

amount and accrued interest, including a specified amount (depending on the date of call) of the interest payable upon the deferred-interest coupons attached to the bonds; that the city is about to call and retire the bonds without providing for payment of the deferred-interest coupons. The bill of complaint prayed a declaration that this could not lawfully be done and an injunction restraining the city from doing it.

In the event that the court should determine that the obligation of the deferred-interest coupons is unenforceable, then it was prayed that the court declare that petitioners are entitled to enforce the obligation for payment, principal and interest, of the amount of the original bonded indebtedness of the city which was refunded by the General Refunding Bonds now held by petitioners, and that the court enjoin the city and its officials, respondents here, from failing or refusing to pay the interest due on such refunded bonds, as provided by the resolution of the city commissioners authorizing the issue and sale of the General Refunding Bonds in 1933.

The District Court granted respondents' motion to dismiss the complaint on the grounds that it failed to state a cause of action and that the questions of law involved had been determined adversely to petitioners by the Supreme Court of Florida. The Court of Appeals, without passing on the merits, reversed and directed that the cause be dismissed without prejudice to petitioners' right to proceed in the state courts to secure a determination of the questions of state law involved. 134 F. 2d 202.

The Court of Appeals agreed with petitioners that the bill of complaint presented a justiciable controversy requiring determination, that they were entitled to a judgment declaring the law of Florida with respect to the validity of the deferred-interest coupons, and that if petitioners' contentions were sustained they were entitled

to a declaration in their favor and an injunction implementing the declaration. But upon an examination of the Florida decisions the court concluded that the applicable law of Florida was not clearly settled and stable, but was quite the contrary, citing *Sullivan* v. *Tampa,* 101 Fla. 298, 134 So. 211; *Columbia County Commissioners* v. *King,* 13 Fla. 451; *State ex rel. Nuveen* v. *Greer,* 88 Fla. 249, 102 So. 739; *Humphreys* v. *State ex rel. Palm Beach Co.,* 108 Fla. 92, 145 So. 858; *Alta-Cliff Co.* v. *Spurway,* 113 Fla. 633, 152 So. 731; *Lee* v. *Bond-Howell Lumber Co.,* 123 Fla. 202, 166 So. 733; and *Andrews* v. *Winter Haven,* 148 Fla. 144, 3 So. 2d 805. It expressed doubt as to what the Florida law, applicable to the facts presented, now is or will be declared to be, and in view of this uncertainty, since no federal question was presented and the jurisdiction was invoked solely on grounds of diversity of citizenship, it thought that petitioners should be required to proceed in the state courts.

Although the opinion below refers to the suit as one for a declaratory judgment, the declaration of rights prayed, as is usually the case in suits for an injunction, is an indispensable prerequisite to the award of one or the other of the forms of equitable relief which petitioners seek in the alternative. Hence, so far as we are concerned with the necessity and propriety of a determination by a federal court of questions of state law, the case does not differ from an ordinary equity suit in which, both before and since *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, federal courts have been called upon to decide state questions in order to render a judgment.

The facts as presented by the amended bill of complaint and the motion to dismiss raise two issues of state law, one and possibly both of which must be decided if petitioners are to have the benefit which they seek of the jurisdiction conferred on district courts in diversity cases. The first question arises from the fact that the Refunding Bonds of

1933 were issued without a referendum to the freehold voters of the city. Article IX, § 6 of the Florida constitution provides that municipalities "shall have power to issue bonds only after the same shall have been approved by a majority of the votes cast in an election," in which a majority of the freeholders of the municipality shall participate, but dispenses with this requirement in the case of "refunding" bonds. The question is whether, under the applicable decisions of the Florida courts, the provision for deferred-interest coupons could rightly be included in the obligation of the Refunding Bonds of 1933 without a referendum. If it be decided that the provision could not be included and that the coupons are invalid, the second question is whether petitioners, as holders of refunding bonds, are entitled, under § 20 of the resolution of the city commissioners authorizing the Refunding Bond issue,[1] to recover the principal and interest of an equivalent amount of the bonds refunded. This question, unlike the first, so far as appears, has not been passed upon by the Florida courts.

Several decisions of the Supreme Court of Florida have declared that where bonds to be refunded contain no provision for deferred-interest coupons, refunding bonds containing such coupons would impose "new and additional or more burdensome terms" (*Outman* v. *Cone,* 141 Fla. 196, 199, 192 So. 611, 613) which may not be included in refunding bonds unless they are approved by referendum in accordance with Article IX, § 6. *Outman* v.

[1] "Section 20. That if any clause, section, paragraph or provision of this resolution or of the General Refunding Bonds hereby authorized be declared unenforcible by any Court of final jurisdiction, it shall not affect or invalidate any remainder thereof, and if any of the bonds hereby authorized be adjudged illegal or unenforcible in whole or in part, the holders thereof shall be entitled to assume the position of holders of a like amount of the indebtedness hereby provided to be refunded and as such enforce their claim for payment."

Cone, supra; Taylor v. *Williams,* 142 Fla. 402, 195 So. 175; *Andrews* v. *Winter Haven, supra.*

As appears from the amended bill of complaint, after the present suit was begun the Supreme Court of Florida decided the case of *Andrews* v. *Winter Haven, supra.* This case involved the same issue of Refunding Bonds as is here in question. The Florida court held that the deferred-interest coupons are invalid; that the purported obligation of the invalid coupons is severable from the obligations to pay the principal of the bonds and current interest on the other coupons, which obligations are valid and enforceable; and that the bonds are subject to call upon tender of the stipulated principal and interest without including any amount purporting to be payable on the deferred-interest coupons.

It is the contention of petitioners that the *Andrews* case is not controlling because it, as well as *Outman* v. *Cone, supra,* and *Taylor* v. *Williams, supra,* which it cited and followed, is inconsistent with earlier decisions of the Supreme Court of Florida antedating the Refunding Bonds of 1933, particularly *Sullivan* v. *Tampa, supra; State* v. *Miami,* 103 Fla. 54, 137 So. 261; *State* v. *Special Tax School District,* 107 Fla. 93, 144 So. 356; *Bay County* v. *State,* 116 Fla. 656, 157 So. 1; *State* v. *Citrus County,* 116 Fla. 676, 157 So. 4; *State* v. *Sarasota County,* 118 Fla. 629, 159 So. 797. Petitioners also insist that, in deciding the *Andrews* case, the attention of the Supreme Court of Florida was not directed to the doctrine which it had earlier announced in *Columbia County Commissioners* v. *King, supra,* and in *State ex rel. Nuveen* v. *Greer, supra,* that by the law of Florida a contract is governed by the laws declared at the time the contract was made, and that consequently the court did not apply the doctrine. And finally it is said that the weight of the *Outman* and *Andrews* cases as precedents is impaired by the fact that although they appear on the record to be

adversary litigations they were not in fact vigorously contested.

While the rulings of the Supreme Court of Florida in the *Andrews* case must be taken as controlling here unless it can be said with some assurance that the Florida Supreme Court will not follow them in the future, see *Wichita Royalty Co.* v. *City National Bank,* 306 U. S. 103, 107; *Fidelity Trust Co.* v. *Field,* 311 U. S. 169, 177–178; *West* v. *American Telephone & Telegraph Co.,* 311 U. S. 223, 236, we assume, as the Court of Appeals has indicated, that the Supreme Court of the State may modify or even set them aside in future decisions. But we are of opinion that the difficulties of ascertaining what the state courts may hereafter determine the state law to be do not in themselves afford a sufficient ground for a federal court to decline to exercise its jurisdiction to decide a case which is properly brought to it for decision.

The diversity jurisdiction was not conferred for the benefit of the federal courts or to serve their convenience. Its purpose was generally to afford to suitors an opportunity in such cases, at their option, to assert their rights in the federal rather than in the state courts. In the absence of some recognized public policy or defined principle guiding the exercise of the jurisdiction conferred, which would in exceptional cases warrant its non-exercise, it has from the first been deemed to be the duty of the federal courts, if their jurisdiction is properly invoked, to decide questions of state law whenever necessary to the rendition of a judgment. *Commonwealth Trust Co.* v. *Bradford,* 297 U. S. 613, 618; *Risty* v. *Chicago, R. I. & P. Ry. Co.,* 270 U. S. 378, 387; *Kline* v. *Burke Construction Co.,* 260 U. S. 226, 234–235; *McClellan* v. *Carland,* 217 U. S. 268, 281–282. When such exceptional circumstances are not present, denial of that opportunity by the federal courts merely because the answers to the questions of state law are difficult or uncertain or have not yet been given by

the highest court of the state, would thwart the purpose of the jurisdictional act.

The exceptions relate to the discretionary powers of courts of equity. An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity. *Beal* v. *Missouri Pacific R. Co.*, 312 U. S. 45, 50. Exercise of that discretion by those, as well as by other courts having equity powers, may require them to withhold their relief in furtherance of a recognized, defined public policy. *Di Giovanni* v. *Camden Insurance Assn.*, 296 U. S. 64, 73, and cases cited. It is for this reason that a federal court having jurisdiction of the cause may decline to interfere with state criminal prosecutions except when moved by most urgent considerations, *Spielman Motor Co.* v. *Dodge*, 295 U. S. 89, 95; *Beal* v. *Missouri Pacific R. Co.*, *supra*, 49–51; *Douglas* v. *Jeannette*, 319 U. S. 157; or with the collection of state taxes or with the fiscal affairs of the state, *Matthews* v. *Rodgers*, 284 U. S. 521; *Stratton* v. *St. Louis Southwestern Ry. Co.*, 284 U. S. 530; *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U. S. 293; or with the state administrative function of prescribing the local rates of public utilities, *Central Kentucky Gas Co.* v. *Railroad Commission*, 290 U. S. 264, 271 *et seq.* and cases cited; or to interfere, by appointing a receiver, with the liquidation of an insolvent state bank by a state administrative officer, where there is no contention that the interests of creditors and stockholders will not be adequately protected, *Pennsylvania* v. *Williams*, 294 U. S. 176; *Gordon* v. *Ominsky*, 294 U. S. 186; *Gordon* v. *Washington*, 295 U. S. 30; cf. *Kelleam* v. *Maryland Casualty Co.*, 312 U. S. 377, 381. Similarly it may refuse to appraise or shape domestic policy of the state governing its administrative agencies. *Railroad Commission* v. *Rowan & Nichols Oil Co.*, 311 U. S. 570; *Burford* v. *Sun Oil Co.*, 319 U. S. 315. And it may of course decline to ex-

ercise the equity jurisdiction conferred on it as a federal court when the plaintiff fails to establish a cause of action. *Cavanaugh* v. *Looney*, 248 U. S. 453; *Gilchrist* v. *Interborough Rapid Transit Co.*, 279 U. S. 159. So too a federal court, adhering to the salutary policy of refraining from the unnecessary decision of constitutional questions, may stay proceedings before it, to enable the parties to litigate first in the state courts questions of state law, decision of which is preliminary to, and may render unnecessary, decision of the constitutional questions presented. *Railroad Commission* v. *Pullman Co.*, 312 U. S. 496; cf. *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478. It is the court's duty to do so when a suit is pending in the state courts, where the state questions can be conveniently and authoritatively answered, at least where the parties to the federal court action are not strangers to the state action. *Chicago* v. *Fieldcrest Dairies*, 316 U. S. 168. In thus declining to exercise their jurisdiction to enforce rights arising under state laws, federal courts are following the same principles which traditionally have moved them, because of like considerations of policy, to refuse to give an extraordinary remedy for the protection of federal rights. *United States ex rel. Greathouse* v. *Dern*, 289 U. S. 352, 359–361; see *Virginian Ry. Co.* v. *System Federation*, 300 U. S. 515, 551–552 and cases cited; cf. *Securities & Exchange Comm'n* v. *United States Realty Co.*, 310 U. S. 434, 455 *et seq.*

But none of these considerations, nor any similar one, is present here. Congress having adopted the policy of opening the federal courts to suitors in all diversity cases involving the jurisdictional amount, we can discern in its action no recognition of a policy which would exclude cases from the jurisdiction merely because they involve state law or because the law is uncertain or difficult to determine. The decision of this case is concerned solely with the extent of the liability of the city on its Refund-

ing Bonds. Decision here does not require the federal court to determine or shape state policy governing administrative agencies. It entails no interference with such agencies or with the state courts. No litigation is pending in the state courts in which the questions here presented could be decided. We are pointed to no public policy or interest which would be served by withholding from petitioners the benefit of the jurisdiction which Congress has created with the purpose that it should be availed of and exercised subject only to such limitations as traditionally justify courts in declining to exercise the jurisdiction which they possess. To remit the parties to the state courts is to delay further the disposition of the litigation which has been pending for more than two years and which is now ready for decision. It is to penalize petitioners for resorting to a jurisdiction which they were entitled to invoke, in the absence of any special circumstances which would warrant a refusal to exercise it.

Erie R. Co. v. *Tompkins, supra,* did not free the federal courts from the duty of deciding questions of state law in diversity cases. Instead it placed on them a greater responsibility for determining and applying state laws in all cases within their jurisdiction in which federal law does not govern. Accepting this responsibility, as was its duty, this Court has not hesitated to decide questions of state law when necessary for the disposition of a case brought to it for decision, although the highest court of the state had not answered them, the answers were difficult, and the character of the answers which the highest state courts might ultimately give remained uncertain. *Wichita Royalty Co.* v. *City National Bank, supra; West* v. *American Telephone & Telegraph Co., supra,* 236–237; *Fidelity Trust Co.* v. *Field, supra,* 177–180; *Six Companies* v. *Joint Highway District,* 311 U. S. 180, 188; *Stoner* v. *New York Life Ins. Co.,* 311 U. S. 464; *Palmer* v. *Hoffman,* 318 U. S. 109, 116–118. Even though our de-

cisions could not finally settle the questions of state law involved, they did adjudicate the rights of the parties with the aid of such light as was afforded by the materials for decision at hand, and in accordance with the applicable principles for determining state law. In this case, as in those, it being within the jurisdiction conferred on the federal courts by Congress, we think the plaintiffs, petitioners here, were entitled to have such an adjudication.

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

Reversed.

MR. JUSTICE BLACK and MR. JUSTICE JACKSON are of the opinion that the judgment should be affirmed for the reasons stated in the opinion of the Circuit Court of Appeals, 134 F. 2d 202.

BELL *v.* PREFERRED LIFE ASSURANCE SOCIETY ET AL.

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

No. 17. Argued October 12, 13, 1943.—Decided November 8, 1943.

1. Where both actual and punitive damages are recoverable under a complaint invoking the jurisdiction of the federal district court on the ground of diversity of citizenship, each must be considered to the extent claimed in determining whether the jurisdictional amount is involved. P. 240.
2. A complaint in a federal district court, invoking jurisdiction on the ground of diversity of citizenship, alleged that the plaintiff had been induced to purchase a certificate of insurance through fraudulent misrepresentations by the defendants' agent as to the value, and claimed $200,000 as actual and punitive damages. The record showed that the plaintiff had paid $202.35 on the certificate, which had a maximum potential value of $1,000. *Held:*

(1) Whether the decision be controlled by the law of Alabama, where the certificate was issued and mailed, or by the law of South

Carolina, where the alleged fraudulent misrepresentations were made, and even though recovery of actual damages be limited to $1,000, the plaintiff's allegations of fraud, if properly proved, might justify an award exceeding $3,000; and therefore the requisite jurisdictional amount was involved. Pp. 240–241.

(2) The complaint sufficiently alleged the equivalent of "gross fraud," within the meaning of the law of Alabama, even though the fraud was not formally alleged to be "gross." P. 241.

(3) This Court is unable to say that the Alabama law as to punitive damages precludes in this case a verdict for actual and punitive damages exceeding $3,000. P. 242.

(4) The question of jurisdictional amount can not be determined on the assumption that a verdict for that amount would be excessive and could be set aside. P. 243.

3. A complaint filed in a federal court should not be dismissed for want of jurisdiction merely because of a technical defect such as may be the subject of a special motion to clarify. P. 242.

131 F. 2d 516, reversed.

CERTIORARI, 318 U. S. 755, to review the affirmance of a judgment dismissing a suit brought in the District Court on the ground of diversity of citizenship.

Messrs. R. K. Wise and *Warren E. Miller* for petitioner.

Mr. Richard T. Rives, with whom *Mr. A. F. Whiting* was on the brief, for respondents.

MR. JUSTICE BLACK delivered the opinion of the Court.

The question here is whether petitioner's complaint was properly dismissed on the ground that the matter in controversy did not really and substantially exceed $3,000 as required by §§ 24 and 37 of the Judicial Code.[1]

Filed in the federal court for the Middle District of Alabama, petitioner's complaint alleged that he had been induced to purchase an insurance certificate through fraudulent misrepresentations of respondents' agent bear-

[1] 36 Stat. 1091, 1098; U. S. C. Tit. 28, §§ 41, 80. The complaint alleged diversity of citizenship as the basis for federal jurisdiction.

ing upon its actual value, and claimed $200,000 as actual and punitive damages.[2] The record shows that at the time of the dismissal petitioner had paid only $202.35 on his certificate, and that its maximum potential value was only $1,000. From this the District Court declared that it was "apparent to a legal certainty," *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U. S. 283, 289, that petitioner could in no event be entitled to more than $1,000, and therefore concluded that the requisite $3,000 was not really and substantially involved. The Circuit Court of Appeals affirmed,[3] holding that the claim of $200,000 damages was "entirely colorable for the purpose of conferring jurisdiction" since it was "legally inconceivable" that petitioner's allegations could justify an award in excess of the value of his $1,000 certificate.

Where both actual and punitive damages are recoverable under a complaint each must be considered to the extent claimed in determining jurisdictional amount.[4] Therefore even though the petitioner is limited to actual damages of $1,000, as both courts held, the question remains whether it is apparent to a legal certainty from the complaint that he could not recover, in addition, sufficient punitive damages to make up the requisite $3,000. If the controlling law is that of South Carolina, where the

[2] The complaint further alleged official misconduct on the part of certain officers of respondent society, and joined them as separate defendants. Petitioner contends that these allegations with the accompanying prayers for relief are sufficient in themselves to establish that the matter in dispute exceeds $3,000, on any of three theories: A class action under Rule 23 of the Federal Rules of Civil Procedure; a derivative action against the officers for the benefit of the society; or an original action to reorganize a mutual insurance society properly brought by a member. As our decision indicates, we find it unnecessary to pass upon these contentions.

[3] 131 F. 2d 516.

[4] *Barry* v. *Edmunds*, 116 U. S. 550, 560; *Scott* v. *Donald*, 165 U. S. 58, 89, 90.

alleged fraudulent misrepresentations are said to have occurred, petitioner clearly might recover an award exceeding $3,000.[5] Respondents urge however that the law of Alabama, where the insurance certificate was issued and mailed, must control. We need not pass upon this question for we are satisfied that under the law of Alabama as well as that of South Carolina petitioner's allegations of fraud if properly proved might justify an award exceeding $3,000.

Respondents assert that petitioner's complaint does not allege that type of "gross fraud" essential for an award of punitive damages under Alabama law. The Supreme Court of Alabama has declared that in an action for deceit "gross fraud" which will support punitive damages may be defined as "representations made with a knowledge of their falseness (or so recklessly made as to amount to the same thing), and with the purpose of injuring the plaintiff." *Southern Building & Loan Assn.* v. *Dinsmore,* 225 Ala. 550, 552, 144 So. 21, 23. In the instant case the complaint alleges that the fraudulent representations "were false, and were known to be false when made and uttered with a reckless disregard for the truth"; that petitioner "relied upon them, and had a right to rely upon them"; and that he "would not have applied for such certificate except for such false representations." Plainly, then, this complaint alleges the equivalent of "gross fraud" as those words are defined by the Alabama courts.[6] And, even if

[5] Respondents did not seriously contend otherwise, and the South Carolina cases cited to us apparently foreclosed such a contention: *Eaddy* v. *Greensboro-Fayetteville Bus Lines,* 191 S. C. 538, 5 S. E. 2d 281; *Cook* v. *Metropolitan Life Ins. Co.,* 186 S. C. 77, 194 S. E. 636; *Crosby* v. *Metropolitan Life Ins. Co.,* 167 S. C. 255, 166 S. E. 266. In this latter case it appears that punitive damages of $1,211.70 were allowed although the actual damages were only $11.70.

[6] Had petitioner's complaint been filed in a state court in Alabama, it would have supported a verdict and judgment for punitive damages. The Alabama Supreme Court holds that, "It is not necessary

the fraud were not formally alleged to be "gross," a complaint filed in a federal court should not be dismissed for want of jurisdiction because of a mere technical defect such as would make it subject to a special motion to clarify. See *Sparks* v. *England,* 113 F. 2d 579; cf. *Chicago, R. I. & P. Ry. Co.* v. *Schwyhart,* 227 U. S. 184, 194.

Respondents also maintain that, even if it would warrant some punitive damages, the complaint could not under Alabama law warrant enough to support a judgment of $3,000. It is true as respondents point out that the Alabama Supreme Court has said that the amount of punitive damages "ought . . . to bear proportion to the actual damages sustained," *Mobile & Montgomery R. Co.* v. *Ashcraft,* 48 Ala. 15, 33; and that, while such damages "must rest in large measure within the discretion of the jury," this is not an "unbridled discretion." *Alabama Water Service Co.* v. *Harris,* 221 Ala. 516, 519, 129 So. 5, 7. But neither in these cases, nor in any others cited to us, has that court held that punitive and actual damages must bear a definite mathematical relationship.[7] That there is no such legal formula seems apparent from the rule relied upon by respondents as the correct Alabama rule regarding the measure of punitive damages, namely, that "The nature of the case should be considered, the character and extent of injury likely to result from disregard

to claim punitive damages specially, for they are not special damages. It is not necessary to allege the matter of aggravation which justifies their recovery." *Fidelity-Phenix Fire Ins. Co.* v. *Murphy,* 226 Ala. 226, 232, 146 So. 387.

[7] In *U. S. Fidelity & Guaranty Co.* v. *Millonas,* 206 Ala. 147, 154, 89 So. 732, the court permitted an award of $6,000 after finding that the actual damage suffered could in no event exceed $1,000. And in *Alabama Great Southern R. Co.* v. *Sellers,* 93 Ala. 9, 9 So. 375, where the jury returned a verdict of $500, it was held that the trial court did not err in refusing to charge that punitive damages could not be imposed if the plaintiff suffered only nominal actual damage.

of duty, and all the attendant circumstances." *Alabama Water Service Co.* v. *Harris, supra,* 519. In the *Harris* case the court further emphasized the wide scope of allowable punitive damages by saying that a jury's award is not to be disturbed if, "allowing all presumptions in favor of" it, the court is not "clearly convinced it is so excessive as to demand the interposition of this court." *Ibid.* Considering these general principles of Alabama law, we are unable to say that under petitioner's complaint evidence could not be introduced at a trial justifying a jury verdict for actual and punitive damages exceeding $3,000. Nor can this controversy as to jurisdictional amount be decided on the assumption "that a verdict, if rendered for that amount, would be excessive and set aside for that reason—a statement which could not, at any rate, be judicially made before such a verdict was in fact rendered." *Barry* v. *Edmunds, supra,* 565.

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

Reversed.

CARTER *v.* KUBLER.

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

No. 18. Argued October 13, 1943.—Decided November 8, 1943.

The conciliation commissioner, making a reappraisal of the debtor's property pursuant to § 75 (s) (3) of the Bankruptcy Act, erred in basing the valuation partly on evidence obtained by his personal investigation without the knowledge or consent of the parties; but, in the circumstances of this case, the error was cured upon review in the District Court, which reëxamined all the competent evidence introduced at the hearing before the commissioner and thereupon modified the latter's valuation. P. 246.

131 F. 2d 222, affirmed.

CERTIORARI, 318 U. S. 753, to review the affirmance, upon appeal by the debtor, of a judgment modifying an order of a conciliation commissioner.

Mr. Elmer McClain for petitioner.

Mr. T. W. Kimber for respondent.

MR. JUSTICE MURPHY delivered the opinion of the Court.

The narrow issues presented by this case are whether it was error under § 75 (s)(3) of the Bankruptcy Act[1] for a conciliation commissioner to fix a valuation partly on the basis of his personal investigation and, if so, whether that error was cured on review by the District Court.

Petitioner, the farmer debtor, was adjudicated a bankrupt under § 75 (s). After a $5,800 appraisal of his farm had been approved by a conciliation commissioner, petitioner was permitted to retain possession of the property for the statutory three-year period. At the end of that time, he petitioned the District Court for a reappraisal of the property for redemption purposes, pursuant to § 75 (s) (3).[2] The judge then referred the matter to the same conciliation commissioner who had approved the original appraisal and directed that he "have a reappraisement of the farm made and that the secured creditor be afforded an opportunity to present evidence as to the present fair value of such farm and that the conciliation commissioner

[1] 11 U. S. C. § 203 (s) (3).

[2] The pertinent portion of § 75 (s) (3) provides that "upon request of any secured or unsecured creditor, or upon request of the debtor, the court shall cause a reappraisal of the debtor's property, or in its discretion set a date for hearing, and after such hearing, fix the value of the property, in accordance with the evidence submitted, and the debtor shall then pay the value so arrived at into court . . . and thereupon the court shall, by an order, turn over full possession and title of said property, free and clear of encumbrances to the debtor."

determine the correct appraised value and fix a reasonable time within which the debtor shall redeem the farm from the mortgage lien, failing in which a public sale is ordered."

Pursuant to this order, the conciliation commissioner held hearings to determine the fair and reasonable value of the farm in question. Respondent, the secured mortgage holder, called five witnesses whose estimates of the value of the farm ranged from approximately $29,000 to $33,000. The values given by petitioner's five witnesses were from $6,500 to $12,000. All but one of these witnesses were subjected to cross-examination. Subsequently, the conciliation commissioner made the following finding: "After hearing the testimony given by the several witnesses, and studying the briefs furnished by the defendant and the plaintiff, and upon a personal investigation by the conciliation commissioner of the value of said farm, I hereby fix the value of said farm at $150 per acre [approximately $25,000 for the entire farm]." The commissioner did not indicate when or under what circumstances his personal investigation had been made.

Petitioner then requested the District Court to review and reverse the commissioner's order allowing him to redeem the farm on payment of $25,000. Included in the specification of errors was the claim that the valuation was erroneous and void "because made and fixed by the conciliation commissioner upon a personal investigation . . . made outside of and independent of the hearings . . . at which personal investigation neither the petitioner herein nor his counsel was afforded opportunity to offer counter evidence or to cross-examine concerning the evidence adduced by said personal investigation." The District Court, after reviewing the entire testimony introduced at the hearing before the commissioner and after reading the briefs submitted by the parties, concluded that the commissioner's estimate was too

high and reduced the valuation to $20,000. It does not appear that the District Court made any use or mention of the commissioner's personal investigation in arriving at this valuation or that any evidence was utilized other than that properly introduced at the hearing before the commissioner.

Petitioner renewed his objection to the personal investigation in his appeal to the Circuit Court of Appeals. The latter, however, merely stated that there was no abuse of judicial discretion by the District Court in fixing the valuation at $20,000 and that there was no reversible error. 131 F. 2d 222. We granted certiorari, limited to the question of the propriety of the commissioner's personal investigation, because of an asserted conflict with *Moser* v. *Mortgage Guarantee Co.*, 123 F. 2d 423.

We are of the opinion that the conciliation commissioner erred in fixing the value of the property partly upon his personal investigation, but that, under the circumstances of this case, such error was cured inasmuch as the District Court reëxamined all the evidence properly introduced at the hearing before the commissioner and thereupon modified the latter's valuation.

Section 75 (s) (3) makes clear the impropriety of the conciliation commissioner's action. If the District Court conducts a hearing to determine the value of the property or if the conciliation commissioner is authorized to hold such a hearing, the statute provides that the valuation shall be fixed "in accordance with the evidence submitted" at the hearing. The statute confers no authority on either the judge or the commissioner to act personally as an appraiser or to conduct his own factual inquiry absent the knowledge and consent of the parties to the hearing. The valuation must thus be determined solely from the evidence adduced at the hearing and the use of evidence obtained in any other manner is improper. *Moser* v. *Mortgage Guarantee Co., supra; Equitable Life As-*

surance Society v. *Deutschle,* 132 F. 2d 525. And the parties are entitled to a valuation based on a strict adherence to this orderly procedure. *John Hancock Mutual Life Ins. Co.* v. *Bartels,* 308 U. S. 180; *Borchard* v. *California Bank,* 310 U. S. 311.

Moreover, once a hearing has been ordered, § 75 (s) (3) necessarily guarantees that it shall be a fair and full hearing. The basic elements of such a hearing include the right of each party to be apprized of all the evidence upon which a factual adjudication rests, plus the right to examine, explain or rebut all such evidence. Tested by that standard, the personal investigation by the conciliation commissioner cannot be justified. It was apparently made without petitioner's knowledge or consent and no opportunity was accorded petitioner to examine or rebut the evidence obtained in the course of such investigation. The use of this evidence was therefore inconsistent with the right to a fair and full hearing. *Moser* v. *Mortgage Guarantee Co., supra,* Wigmore on Evidence, § 1169 (3rd edition).[3]

The irregularity of the commissioner's personal investigation, however, appears to have been cured by the District Court's review and modification of the commissioner's valuation. Order 47 of the General Orders in Bankruptcy,[4] which is applicable to the review of the commissioner's valuation,[5] provides in effect that the commissioner's findings of fact shall be accepted by the

[3] See also *Atlantic & Birmingham Ry. Co.* v. *Cordele,* 125 Ga. 373, 54 S. E. 155; *Ralph* v. *Southern Ry. Co.,* 160 S. C. 229, 158 S. E. 409; *Denver Omnibus & Cab Co.* v. *J. R. Ward Auction Co.,* 47 Colo. 446, 107 P. 1073; *Elston* v. *McGlauflin,* 79 Wash. 355, 140 P. 396; *Anderson* v. *Leblang,* 125 Misc. 820, 211 N. Y. S. 613.

[4] 11 U. S. C. following § 53.

[5] Sec. 75 (s) (4) of the Bankruptcy Act, 11 U. S. C. § 203 (s) (4); Order 50 (11) of the General Orders in Bankruptcy, 11 U. S. C. following § 53; *Equitable Life Assurance Society* v. *Carmody,* 131 F. 2d 318, 322; *Rait* v. *Federal Land Bank,* 135 F. 2d 447, 450.

judge "unless clearly erroneous." Order 47 further provides that "the judge after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions."

Had the District Court done no more than summarily affirm and adopt without change the commissioner's finding of a $25,000 value, the defect upon which that finding rested would not have been cured and petitioner would have been deprived of the fair hearing to which he was entitled. *Moser* v. *Mortgage Guarantee Co., supra.* But here the commissioner's error was brought to the judge's attention by petitioner and we cannot assume that the judge was unmindful of this objection. The District Court disregarded the commissioner's $25,000 valuation, heard argument by counsel, made an independent and complete review of the conflicting evidence introduced at the hearing before the commissioner, and fixed the valuation at $20,000 "under the evidence before me." All of this was authorized by Order 47 inasmuch as the commissioner's personal investigation made his finding as to value "clearly erroneous."

It is thus apparent that the error of which petitioner complains was cured by the District Court. Since none of the evidence procured by the commissioner through his personal investigation was included in the record certified to the judge, it cannot be said that the judge's $20,000 valuation was in any way grounded on such improper evidence. Petitioner had full opportunity to examine and rebut all the evidence utilized by the judge in fixing this valuation.

This procedure, furthermore, gave petitioner the full and fair hearing guaranteed to him by Congress. If the conciliation commissioner is properly authorized to conduct a reappraisal hearing and commits an error which can be and is corrected by the District Court on appeal,

the hearing contemplated by § 75 (s) (3) has been had. A party is not entitled to a trial de novo as of right on the review in the District Court, *Equitable Life Assurance Society* v. *Carmody*, 131 F. 2d 318, and none was requested by petitioner. Nor is there any requirement that the judge must reverse and remand the case to the commissioner for further hearings or for his considered judgment based solely on the competent evidence. To so hold would render nugatory the discretionary power given the judge by Order 47 to receive further evidence himself or to modify or reject, in whole or in part, the commissioner's findings on appeal. In addition, it would make mandatory what is at most a discretionary power of the judge under § 75 (s) (3) to authorize a hearing before the commissioner.

The judgment below is accordingly

Affirmed.

CONSUMERS IMPORT CO. ET AL. *v.* KABUSHIKI KAISHA KAWASAKI ZOSENJO ET AL.

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

No. 32. Argued October 21, 1943.—Decided November 8, 1943.

1. For damage to cargo by fire not caused by the "design or neglect" of the shipowner, the Fire Statute extinguishes claims against the vessel as well as claims against the owner. P. 253.
2. That the contracts of affreightment were signed "for master" does not require a different result. P. 252.
3. There was in this case no waiver of immunity under the Fire Statute. P. 254.
4. *The Etna Maru*, 33 F. 2d 232, to the extent that it conflicts herewith, is disapproved. P. 256.

133 F. 2d 781, affirmed.

CERTIORARI, 319 U. S. 734, to review the affirmance of a decree (39 F. Supp. 349) which, in a suit by cargo claim-

ants, exonerated the owner and bareboat charterer of the vessel from liability for damage by fire.

Mr. T. Catesby Jones, with whom *Messrs. D. Roger Englar, Ezra G. Benedict Fox,* and *Thomas H. Middleton* were on the brief, for petitioners.

Mr. George C. Sprague for respondents.

Mr. Justice Jackson delivered the opinion of the Court.

Petitioners, Consumers Import Company and others, hold bills of lading covering several hundred shipments of merchandise. The shipments were damaged or destroyed by fire or by the means used to extinguish fire on board the Japanese ship *Venice Maru* on August 6, 1934, on voyage from Japan to Atlantic ports of the United States. Respondent Kabushiki Kaisha Kawasaki Zosenjo owned the *Venice Maru* and let her to the other respondent, Kawasaki Kisen Kabushiki Kaisha, under a bareboat form of charter. The latter was operating her as a common carrier.

Damage to the cargo is conceded from causes which are settled by the findings below, which we decline to review.[1] Upwards of 660 tons of sardine meal in bags was stowed in a substantially solid mass in the hold. In view of its susceptibility to heating and combustion it had inadequate ventilation. As the ship neared the Panama Canal, fire broke out, resulting in damage to cargo and ship. The cause of the fire is found to be negligent stowage of the fish meal, which made the vessel unseaworthy. The negligence was that of a person employed to supervise loading to whom responsibility was properly delegated and who was qualified by experience to perform the work. No negligence or design of the owner or charterer is found.

[1] The facts are considered at length in the opinion of the Court of Appeals, 133 F. 2d 781.

The cargo claimants filed libels *in rem* against the ship and *in personam* against the charterer for breach of contracts of carriage. The owner joined the charterer in a proceeding in admiralty to decree exemption from or limitation of liability. Stipulation and security were substituted for the ship in the custody of the court.[2] The District Court applied the so-called "Fire Statute" to exonerate the owner entirely and the charterer and the ship in all except matters not material to the issue here. The Circuit Court of Appeals affirmed, taking a view of the statute in conflict with that of the Fifth Circuit in *The Etna Maru,* 33 F. 2d 232. To resolve the conflict we granted certiorari expressly limited to the question, "Does the Fire Statute extinguish maritime liens for cargo damage, or is its operation confined to *in personam* liability only?" [3]

The Fire Statute reads: "No owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner." [4] The statute also provides that a charterer such as we have here stands in the position of the owner for purposes of limitation or exemption of liability.[5]

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[2] Admiralty Rule 51.

The Alien Property Custodian on July 30, 1942, vested in himself all property in the United States of respondent Kawasaki Kisen Kabushiki Kaisha. Vesting Orders 77 and 80, 7 Federal Register 7048, 7049. On March 15, 1943, he vested in himself all property of Tokyo Marine & Fire Insurance Co. Ltd., a Japanese corporation which advanced cash collateral to the surety who became such in the *ad interim* stipulation. Vesting Order 1084, 8 Federal Register 3647.

[3] 319 U. S. 734.

[4] Act of March 3, 1851, § 1, now 46 U. S. C. § 182, formerly R. S. § 4282.

[5] Act of March 3, 1851, § 5, now 46 U. S. C. § 186.

Since "neglect of the owner" means his personal negligence, or in case of a corporate owner, negligence of its managing officers and agents as distinguished from that of the master or subordinates,[6] the findings below take the case out of the only exception provided by statute.

Apart from this inapplicable exception the immunity granted appears on its face complete. But claimants contend that because their contracts of affreightment were signed "for master" they became under maritime law ship's contracts, independently of any owners' contracts, and that the ship itself stands bound to the cargo though the owner may be freed. It seems unnecessary to examine the validity of the claim that apart from the statute claimants under the circumstances would have a lien on the vessel, or to review the historical development of the fiction that the ship for some purposes is treated as a jural personality apart from that of its owner. If we assume that the circumstances are appropriate otherwise for such a lien as claimants assert, it only brings us to the question whether the Fire Statute cuts across it as well as other doctrines of liability and extinguishes claims against the vessel as well as against the owner.

The provision here in controversy is § 1 of the Act of March 3, 1851. Despite its all but a century of existence, the contention here made has never been before this Court. Sections 3 and 4 of the same Act in other circumstances provided limitations of liability, and as to them a question was considered by this Court in *The City of Norwich*, 118 U. S. 468, 502 (1886), stated thus: "It is next contended that the act of Congress does not extend to the exoneration of the ship, but only exonerates the owners by a surrender of the ship and freight, and, therefore, that the plea of limited liability cannot be received in a pro-

[6] *Walker* v. *Transportation Co.*, 3 Wall. 150; *Craig* v. *Continental Ins. Co.*, 141 U. S. 638, 647; *Earle & Stoddart* v. *Ellerman's Wilson Line*, 287 U. S. 420, 424.

ceeding *in rem.*" The Court rejected the contention and held that when the owner satisfied the limited obligation fixed on him by statute, owner and vessel were both discharged. The Court said that "To say that an owner is not liable, but that his vessel is liable, seems to us like talking in riddles." The riddle after more than half a century repeated to us in different context does not appear to us to have improved with age.

In the meantime, with the exception of *The Etna Maru,* the lower federal courts have uniformly construed the statutes as exonerating the ship as well as the owner.[7] We would be reluctant to overturn an interpretation supported by such consensus of opinion among courts of admiralty, even if its justification were more doubtful than this appears.[8]

Petitioners say, however, that such of these decisions as are not distinguishable were "ill-considered." We think that the better reason as well as the weight of authority refutes petitioners. To sustain their contention would deny effect to the Fire Statute as an immunity and convert it into a limitation of liability to the value of the ship. This is what Congress did in other sections of the same Act [9] and elsewhere,[10] which suggests that it used different language here because it had a different purpose to accomplish. Congress has said that the owner shall not "answer for" this loss in question. Claimant says this means in effect that he shall answer only with his ship. But the owner would never answer for a loss except with

[7] *Dill* v. *The Bertram,* Fed. Cas. 3910; *Keene* v. *The Whistler,* Fed. Cas. 7645; *The Rapid Transit,* 52 F. 320; *The Salvore,* 60 F. 2d 683; *The Older,* 65 F. 2d 359; *The President Wilson,* 5 F. Supp. 684; see *Earle & Stoddart* v. *Ellerman's Wilson Line,* 287 U. S. 420, 427, n. 3; *The Buckeye State,* 39 F. Supp. 344, 346–47.

[8] See *United States* v. *Ryan,* 284 U. S. 167, 174; *Missouri* v. *Ross,* 299 U. S. 72, 75.

[9] §§ 2, 3, Act of March 3, 1851.

[10] Harter Act of February 13, 1893, 46 U. S. C. §§ 190–96.

his property, since execution against the body was not at any time in legislative contemplation. There could be no practical exoneration of the owner that did not at the same time exempt his property. If the owner by statute is told that he need not "make good" to the shipper, how may we say that he shall give up his ship for that very purpose? It seems to us that Congress has, with the exception stated in the Act, extinguished fire claims as an incident of contracts of carriage, and that no fiction as to separate personality of the ship may revive them. There may, of course, be a waiver of the benefits of the Fire Statute, but none is present in this case.

Claimants urge that the statute as construed goes beyond any other exemption from liability for negligence allowed to a common carrier, and that it should therefore be curtailed by strict construction. We think, however, that claimants' contention would result in a frustration of the purpose of the Act.

At common law the shipowner was liable as an insurer for fire damage to cargo.[11] We may be sure that this legal policy of annexing an insurer's liability to the contract of carriage loaded the transportation rates of prudent carriers to compensate the risk. Long before Congress did so, England had separated the insurance liability from the carrier's duty.[12] To enable our merchant marine to compete, Congress enacted this statute.[13] It was a sharp de-

[11] *New Jersey Steam Navigation Co.* v. *Merchants' Bank*, 6 How. 344, 381. The Act of March 3, 1851, followed soon after and probably was enacted in consequence of this decision. See *The Great Western*, 118 U. S. 520, 533.

[12] This Court has heretofore pointed out that the Act of March 3, 1851 was patterned on English statutes, including Act of 7 George II, c. 15, passed in 1734, and 26 George III, c. 86 (1786). See *Norwich Co.* v. *Wright*, 13 Wall. 104, 117 *et seq.*; *The Main* v. *Williams*, 152 U. S. 122, 124.

[13] Senator Hamlin reported the bill from the Committee on Commerce on January 25, 1851 and said, "This bill is predicated on what

parture from the concepts that had usually governed the common carrier relation, but it is not to be judged as if applied to land carriage, where shipments are relatively multitudinous and small and where it might well work injustice and hardship. The change on sea transport seems less drastic in economic effects than in terms of doctrine. It enabled the carrier to compete by offering a carriage rate that paid for carriage only, without loading it for fire liability. The shipper was free to carry his own fire risk, but if he did not care to do so it was well known that those who made a business of risk-taking would issue him a separate contract of fire insurance. Congress had simply severed the insurance features from the carriage features of sea transport and left the shipper to buy each separately. While it does not often come to the surface of the record in admiralty proceedings, we are not unaware that in commercial practice the shipper who buys carriage from the shipowner usually buys fire protection from an insurance company, thus obtaining in two contracts what once might have been embodied in one. The purpose of the statute to relieve carriage rates of the insurance burden would be largely defeated if we were to adopt an interpretation which would enable cargo claimants and

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is now the English law, and it is deemed advisable by the Committee on Commerce that the American marine should stand at home and abroad as well as the English marine." 23 Cong. Globe 332.

On February 26, 1851, speaking to the bill, Senator Hamlin said: "These are the provisions of the bill. It is true that the changes are most radical from the common law upon the subject; but they are rendered necessary, first, from the fact that the English common law system really never had an application to this country, and, second, that the English Government has changed the law, which is a very strong and established reason why we should place our commercial marine upon an equal footing with hers. Why not give to those who navigate the ocean as many inducements to do so as England has done? Why not place them upon that great theatre where we are to have the great contest for the supremacy of the commerce of the world? That is what this bill seeks to do, and it asks no more." 23 Cong. Globe 715.

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their subrogees to shift to the ship the risk of which Congress relieved the owner. This would restore the insurance burden at least in large part to the cost of carriage and hamper the competitive opportunity it was purposed to foster by putting our law on an equal basis with that of England.

Our conclusion is that any maritime liens for claimants' cargo damage are extinguished by the Fire Statute. In so far as the decision in *The Etna Maru* conflicts, it is disapproved, and the judgment of the court below is

Affirmed.

MERCHANTS NATIONAL BANK OF BOSTON, EXECUTOR, *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 30. Argued October 19, 1943.—Decided November 15, 1943.

1. Section 303 (a) (3) of the Revenue Act of 1926, which allows deduction for estate tax purposes of amounts bequeathed to or for the use of charities, was validly implemented by Treasury Regulations 80 (1934 ed.), Arts. 44 and 47, which provide that, where a trust is created for both charitable and private purposes, the charitable bequest, to be deductible, must have at the testator's death a value "presently ascertainable, and hence severable from the interest in favor of the private use," and further, to the extent that there is a power in a private donee or trustee to divert the property from the charity, "deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power." P. 260.
2. Under a trust created by will, the income was to be paid to the testator's widow for life, and on her death all but a specified amount of the principal was to go to designated charities. The trustee was authorized, in his discretion, to invade the corpus for the "comfort, support, maintenance, and/or happiness" of the widow, and was directed to exercise that discretion with liberality towards the widow and to consider her "welfare, comfort and happiness prior to claims

of residuary beneficiaries," i. e., the charities. In 1937 the trust realized gains from the sale of securities. *Held:*

(1) A deduction under § 303 (a) (3) of the Revenue Act of 1926, for purposes of the federal estate tax, was properly disallowed. P. 261.

(2) A deduction for federal income tax purposes, under § 162 (a) of the Revenue Act of 1936, which permits a deduction of that part of gross income "which pursuant to the terms of the will . . . is during the taxable year . . . permanently set aside" for charitable purposes, was properly disallowed. P. 263.

132 F. 2d 483, affirmed.

CERTIORARI, 319 U. S. 734, to review the reversal of a decision of the Board of Tax Appeals, 45 B. T. A. 270, which set aside a determination of deficiencies in income and estate taxes.

Mr. Edward C. Thayer for petitioner.

Mr. Arnold Raum, with whom *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key* and *Morton K. Rothschild* and *Miss Helen R. Carloss* were on the brief, for respondent.

MR. JUSTICE RUTLEDGE delivered the opinion of the Court.

Ozro M. Field died in Massachusetts in 1936, leaving a gross estate of some $366,000. In his will he provided, after certain minor bequests, that the residue of his estate be held in trust, the income to go to his wife for life, and on her death all but $100,000 of the principal [1] to go "free and discharged of this trust" to certain named charities. Under the trust set up by the will, the trustee, petitioner here, was authorized to invade the corpus "at such time or times as my said Trustee shall in its sole discretion deem

[1] The $100,000 was to remain in trust, the income to go in equal shares to his three adopted children and a niece of his wife, and on the death of the last of these beneficiaries the corpus was also to go to the named charities.

wise and proper for the comfort, support, maintenance, and/or happiness of my said wife, and it is my wish and will that in the exercise of its discretion with reference to such payments from the principal of the trust fund to my said wife, May L. Field, my said Trustee shall exercise its discretion with liberality to my said wife, and consider her welfare, comfort and happiness prior to claims of residuary beneficiaries under this trust."

In 1937 the trust realized gains of $100,900.31 from the sale of securities in its portfolio.

In filing estate and income tax returns petitioner, which was also Mr. Field's executor, sought to deduct $128,276.94 from the gross estate and the $100,900.31 from the 1937 income of the trust, on the theory that those sums constituted portions of a donation to charity and were therefore deductible respectively under § 303 (a) (3) of the Revenue Act of 1926 (44 Stat. 72)[2] and § 162 (a) of the Revenue Act of 1936 (49 Stat. 1706).[3]

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[2] Section 303 provides:

"For the purpose of the tax the value of the net estate shall be determined—

"(a) In the case of a resident, by deducting from the value of the gross estate—

. . . . . .

"(3) The amount of all bequests, legacies, devises, or transfers, to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, . . ."

[3] Section 162 provides:

"The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—

"(a) There shall be allowed as a deduction (in lieu of the deduction for charitable, etc., contributions authorized by section 23 (o)) any part of the gross income, without limitation, which pursuant to the terms of the will or deed creating the trust, is during the taxable year

The commissioner disallowed the deductions and determined deficiencies of $26,290.93 in estate tax and $42,825.69 in income tax for 1937, but on the taxpayer's petition for review the Board of Tax Appeals (now the Tax Court) upheld the latter's contentions. The Court of Appeals reversed the Board of Tax Appeals, 132 F. 2d 483, and we granted certiorari because of an asserted conflict with decisions of other circuit courts [4] and this Court.[5] 319 U. S. 734.

There is no question that the remaindermen here were charities. The case, at least under § 303 (a) (3), turns on whether the bequests to the charities have, as of the testator's death, a "presently ascertainable" value or, put another way, on whether, as of that time, the extent to which the widow would divert the corpus from the charities could be measured accurately.

Although Congress, in permitting estate tax deductions for charitable bequests, used the language of outright transfer, it apparently envisaged deductions in some circumstances where contingencies, not resolved at the testator's death, create the possibility that only a calculable portion of the bequest may reach ultimately its charitable destination.[6] The Treasury has long accommodated the

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paid or permanently set aside for the purposes and in the manner specified in section 23 (o), or is to be used exclusively for religious, charitable, scientific, literary, or educational purposes. . . ."

[4] Compare the decision below with *Hartford-Connecticut Trust Co.* v. *Eaton*, 36 F. 2d 710 (C. C. A. 2d); *First National Bank* v. *Snead*, 24 F. 2d 186 (C. C. A. 5th); *Lucas* v. *Mercantile Trust Co.*, 43 F. 2d 39 (C. C. A. 8th); *Commissioner* v. *Bank of America Assn.*, 133 F. 2d 753 (C. C. A. 9th); *Commissioner* v. *F. G. Bonfils Trust*, 115 F. 2d 788 (C. C. A. 10th).

[5] See *Ithaca Trust Co.* v. *United States*, 279 U. S. 151.

[6] E. g., the not unusual case of a bequest of income for life intervening between the testator and the charity, requiring computation, with the aid of reliable actuarial techniques and data, of present value from future worth. Compare the provisions for charitable deductions in

administration of the section to the narrow leeway thus allowed to charitable donors who wish to combine some private benefaction with their charitable gifts. The limit of permissible contingencies has been blocked out in a more convenient administrative form in Treasury Regulations which provide that, where a trust is created for both charitable and private purposes the charitable bequest, to be deductible, must have, at the testator's death, a value "presently ascertainable, and hence severable from the interest in favor of the private use," [7] and further, to the extent that there is a power in a private donee or trustee to divert the property from the charity, "deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power." [8] These Regulations are appropriate implementations of § 303 (a) (3), and, having been in effect under successive reënactments of that provision, define the framework of the inquiry in cases of this sort. Cf. *Helvering* v. *Winmill*, 305 U. S. 79; *Taft* v. *Commissioner*, 304 U. S. 351.

Whatever may be said with respect to computing the present value of the bequest of the testator who dilutes his charity only to the extent of first affording specific private legatees the usufruct of his property for a fixed period, a different problem is presented by the testator who, preferring to *insure* the comfort and happiness of his private legatees, hedges his philanthropy, and permits invasion of the corpus for their benefit. At the very least a possibility that part of the principal will be used is then created, and the present value of the remainder which the charity will receive becomes less readily ascertainable. Not infrequently the standards by which the extent of permis-

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the Revenue Acts of 1918—§ 403 (a) (3) (40 Stat. 1098); 1921—§ 403 (a) (3) (42 Stat. 279); 1924—§ 303 (a) (3) (43 Stat. 306); 1926—§ 303 (a) (3) (44 Stat. 72).

[7] Treasury Regulations 80 (1934 ed.) Art. 44.

[8] Treasury Regulations 80 (1934 ed.) Art. 47.

sible diversion of corpus is to be measured embrace factors which cannot be accounted for accurately by reliable statistical data and techniques. Since, therefore, neither the amount which the private beneficiary will use nor the present value of the gift can be computed, deduction is not permitted. Cf. *Humes* v. *United States,* 276 U. S. 487.

For a deduction under § 303 (a) (3) to be allowed, Congress and the Treasury require that a highly reliable appraisal of the amount the charity will receive be available, and made, at the death of the testator. Rough guesses, approximations, or even the relatively accurate valuations on which the market place might be willing to act are not sufficient. Cf. *Humes* v. *United States,* 276 U. S. 487, 494. Only where the conditions on which the extent of invasion of the corpus depends are fixed by reference to some readily ascertainable and reliably predictable facts do the amount which will be diverted from the charity and the present value of the bequest become adequately measurable. And, in these cases, the taxpayer has the burden of establishing that the amounts which will either be spent by the private beneficiary or reach the charity are thus accurately calculable. Cf. *Bank of America Assn.* v. *Commissioner,* 126 F. 2d 48 (C. C. A.).

In this case the taxpayer could not sustain that burden. Decedent's will permitted invasion of the corpus of the trust for "the comfort, support, maintenance and/or happiness of my wife." It enjoined the trustee to be liberal in the matter, and to consider her "welfare, comfort and happiness prior to the claims of residuary beneficiaries," i. e., the charities.

Under this will the extent to which the principal might be used was not restricted by a fixed standard based on the widow's prior way of life. Compare *Ithaca Trust Co.* v. *United States,* 279 U. S. 151. Here, for example, her "happiness" was among the factors to be considered by the trustee. The sums which her happiness might require to

be expended are of course affected by the fact that the trust income was not insubstantial and that she was sixty-seven years old with substantial independent means and no dependent children.[9] And the laws of Massachusetts may restrict the exercise of the trustee's discretion somewhat more narrowly than a liberal reading of the will would suggest, although that is doubtful. Cf. *Dana* v. *Dana,* 185 Mass. 156, 70 N. E. 49, and compare *Sparhawk* v. *Goldthwaite,* 225 Mass. 414, 114 N. E. 718. Indeed one might well "guess, or gamble . . . , or even insure against" the principal being expended here. Cf. *Humes* v. *United States, supra.* But Congress has required a more reliable measure of possible expenditures and present value than is now available for computing what the charity will receive. The salient fact is that the purposes for which the widow could, and might wish to have the funds spent do not lend themselves to reliable prediction.[10] This is not

[9] The Board of Tax Appeals found that decedent had adopted three children—two girls and a boy—before his marriage to the present Mrs. Field. She never adopted the children. The two girls were married to husbands fully able to support them, and the boy was nearly twenty-one at the testator's death.

Immediately after decedent's death the widow owned income-producing property worth about $104,000. Her total income from her own property and the trust, and the amounts she has actually expended have been as follows:

Period	*Income*	*Expenditures*
1936 (7 months)	$10,735.35	$1,853.99
1937	24,738.57	10,357.91
1938	17,480.85	11,055.91
1939	17,448.23	12,024.92
1940	16,959.66	13,389.31
	$87,362.66	$48,682.04

[10] E. g., the Board found that since her husband's death, Mrs. Field purchased two automobiles and a fur coat, took two pleasure trips, gave financial assistance to a niece, helped send a grand nephew through medical school, and purchased a fur coat for one of her husband's daughters.

a "standard fixed in fact and capable of being stated in definite terms of money." Cf. *Ithaca Trust Co.* v. *United States, supra.* Introducing the element of the widow's happiness and instructing the trustee to exercise its discretion with liberality to make her wishes prior to the claims of residuary beneficiaries brought into the calculation elements of speculation too large to be overcome, notwithstanding the widow's previous mode of life was modest and her own resources substantial. We conclude that the commissioner properly disallowed the deduction for estate tax purposes.

The deduction for income tax purposes stands on no better footing. Congress permitted a deduction of that part of gross income "which pursuant to the terms of the will . . . is during the taxable year . . . permanently set aside" for charitable purposes. In view of the explicit requirement that the income be permanently set aside, there is certainly no more occasion here than in the case of the estate tax to permit deduction of sums whose ultimate charitable destination is so uncertain.

Accordingly, the decision of the Court of Appeals is

Affirmed.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE JACKSON concurs, dissenting:

The Tax Court applied the correct rule of law in determining whether the gifts to charity were so uncertain as to disallow their deduction. That rule is that the deduction may be made if on the facts presented the amount of the charitable gifts are affected by "no uncertainty appreciably greater than the general uncertainty that attends human affairs." *Ithaca Trust Co.* v. *United States,* 279 U. S. 151, 154. In that event the standard fixed by the will is "capable of being stated in definite terms of money." *Id.,* p. 154. The mere possibility of invasion of the corpus is not enough to defeat the deduction. The

Tax Court applied that test to these facts. 45 B. T. A. 270, 273–274. Where its findings are supported by substantial evidence they are conclusive. We may modify or reverse such a decision only if it is "not in accordance with law." 44 Stat. 110, 26 U. S. C. § 1141 (c) (i). See *Wilmington Trust Co.* v. *Helvering,* 316 U. S. 164, 168. The discretion to pay to the wife such principal amounts as the trustee deems proper for her "happiness" introduces of course an element of uncertainty beyond that which existed in the *Ithaca Trust Co.* case. There the trustee only had authority to withdraw from the principal and pay to the wife a sum "necessary to suitably maintain her in as much comfort as she now enjoys." But the frugality and conservatism of this New England corporate trustee, the habits and temperament of this sixty-seven year old lady, her scale of living, the nature of the investments—these facts might well make certain what on the face of the will might appear quite uncertain. We should let that factual determination of the Tax Court stand, even though we would decide differently were we the triers of fact.

ROBERTS *v.* UNITED STATES.

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

No. 19. Argued October 15, 18, 1943.—Decided November 22, 1943.

A federal District Court, having by a valid judgment sentenced a defendant to a term of imprisonment (less than the maximum) and ordered suspension of execution of the sentence and release of the defendant on probation, is without authority thereafter on revocation of probation to set aside that sentence and increase the term of imprisonment. Construing Probation Act, §§ 1, 2. Pp. 266, 272. 131 F. 2d 392, reversed.

CERTIORARI, 318 U. S. 753, to review the affirmance of a judgment revoking probation and resentencing a defendant in a criminal case.

Mr. Newton B. Powell, with whom *Mr. Benton Littleton Britnell* was on the brief, for petitioner.

Mr. Paul A. Freund, with whom *Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Messrs. Oscar A. Provost* and *W. Marvin Smith* and *Miss Melva M. Graney* were on the brief, for the United States.

MR. JUSTICE BLACK delivered the opinion of the Court.

In April, 1938, petitioner pleaded guilty to a violation of 18 U. S. C. 409 and the District Court entered a judgment sentencing him to pay a fine of $250 and to serve two years in a federal penitentiary. Acting under authority of the Probation Act[1] the court then suspended execution of the sentence conditioned upon payment of the fine, and ordered petitioner's release on probation for a five-year period. The fine was paid and he was released. In June, 1942, the court after a hearing revoked the probation, set aside the original sentence of two years, and imposed a new sentence of three years. The Circuit Court of Appeals affirmed, 131 F. 2d 392. Certiorari was granted because of the importance of questions raised concerning administration of the Probation Act.

The power of the District Court to increase the sentence from two to three years is challenged on two grounds: (1) Properly interpreted the Probation Act does not authorize a sentence imposed before probation, the execution of which has been suspended, to be set aside and increased upon revocation of probation; (2) If construed to grant such power, the Act to that extent violates the prohibition against double jeopardy contained in the Fifth Amendment. We do not reach this second question.

If the authority exists in federal courts to suspend or to increase a sentence fixed by a valid judgment, it must be derived from the Probation Act. The government

[1] 43 Stat. 1259; 46 Stat. 503; 48 Stat. 256; 53 Stat. 1223, 1225; U. S. C. Title 18, §§ 724–728.

concedes that federal courts had no such power prior to passage of that Act. See *Ex parte United States,* 242 U. S. 27; *United States* v. *Mayer,* 235 U. S. 55; *Ex parte Lange,* 18 Wall. 163; *United States* v. *Benz,* 282 U. S. 304. In the instant case that part of the original judgment which suspended execution of the two-year sentence and released the petitioner on probation was authorized by the literal language of § 1 of the Probation Act (U. S. C. Title 18, § 724) granting the District Court power "to suspend the . . . execution of sentence and to place the defendant upon probation. . . ." But before we can conclude that the Act authorized the District Court thereafter to increase the sentence imposed by the original judgment we must find in it a legislative grant of authority to do four things: revoke probation; revoke suspension of execution of the original sentence; set aside the original sentence; and enter a new judgment for a longer imprisonment.

We are asked by the government to find this legislative grant in § 2 of the Act as amended (U. S. C. Title 18, § 725) a part of which is set out below.[2] It is clear that power to do the first two things, revoke the probation and the suspension of sentence, is expressly granted by § 2. It is equally clear that power to do the third, set aside the original sentence, is not expressly granted. If we find this power we must resort to inference.

Except by strained construction we could not infer from the express grant of power to revoke probation or suspension of sentence the further power to set aside the original

[2] "At any time within the probation period the probation officer may arrest the probationer . . . or the court which has granted the probation may issue a warrant for his arrest, . . . [and] such probationer shall forthwith be taken before the court. . . . Thereupon the court may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed." 43 Stat. 1260; 48 Stat. 256.

sentence. Neither probation nor suspension of execution rescinded the judgment sentencing petitioner to imprisonment; [3] the one merely ordered that petitioner be released under the supervision of probation officials, the other that enforcement of his sentence be postponed. Upon their revocation, without further court action, the original sentence remained for execution as though it had never been suspended. Cf. *Miller* v. *Aderhold,* 288 U. S. 206, 211.

If then the power to set aside and increase the prison term of the original sentence is to be inferred at all from § 2, it must be drawn from the clause which empowers the court after revocation of the probation and the suspension of sentence to "impose any sentence which might originally have been imposed." It is undisputed in the instant case that the court could originally have imposed a three-year sentence. Therefore the existence of power to set aside the first judgment in order to increase the sentence would be a perfectly logical inference from the clause if it stood alone, because two valid sentences for the same conviction cannot coexist. But the clause cannot be read in isolation; it must be read in the context of the entire Act. And in the absence of compelling language we should not read into it an inferred grant of power which necessarily would bring it into irreconcilable conflict with other provisions of the Act.

To accept the government's interpretation of this clause would produce such a conflict. Section 1 of the the Probation Act provides the procedural plan for release on probation. After judgment of guilt, the trial court is

[3] Cf. *United States* v. *Pile,* 130 U. S. 280; *United States* v. *Weiss,* 28 F. Supp. 598, 599; *Pernatto* v. *United States,* 107 F. 2d 372; *Kriebel* v. *United States,* 10 F. 2d 762; *Ackerson* v. *United States,* 15 F. 2d 268, 269; *Moss* v. *United States,* 72 F. 2d 30, 32; *King* v. *Commonwealth,* 246 Mass. 57, 60, 140 N. E. 253; *Belden* v. *Hugo,* 88 Conn. 500, 504, 91 A. 369; *In re Hall,* 100 Vt. 197, 202, 136 A. 24.

authorized "to suspend the *imposition* or *execution* of sentence and to place the defendant upon probation. . . ." (Italics supplied.) By this language Congress conferred upon the court a choice between imposing sentence before probation is awarded or after probation is revoked. In the first instance the defendant would be sentenced in open court to imprisonment for a definite period; in the second, he would be informed in open court that the imposition of sentence was being postponed. In both instances he then would be informed of his release on probation upon conditions fixed by the court. The difference in the alternative methods is plain. Under the first, where execution of sentence is suspended, the defendant leaves the court with knowledge that a fixed sentence for a definite term of imprisonment hangs over him; under the second, he is made aware that no definite sentence has been imposed and that if his probation is revoked the court will at that time fix the term of his imprisonment. It is at once apparent that if we accept the government's interpretation this express distinction which § 1 draws between the alternative methods of imposing sentence would be completely obliterated. In the words of the government, any sentence pronounced upon the defendant before his release on probation would be a "dead letter." Thus the express power to suspend execution of sentence granted by § 1 would, by an inference drawn from § 2, be reduced to a meaningless formality. No persuasive reasons relating to congressional or administrative policy have been suggested to us which justify construing § 2 in this manner.

The ten-year legislative history of the Probation Act strongly suggests that Congress intended to draw a sharp distinction between the power to suspend execution of a sentence and the alternative power to defer its imposition. The first probation legislation was passed by Congress in 1917 but failed to receive the President's signa-

ture. As originally introduced this bill provided only for the suspension of imposition of sentence.[4] After extended hearings the Senate Judiciary Committee reported it with amendments including two which were intended to grant courts power to choose between suspending imposition and suspending execution.[5] But when the bill finally passed both Houses the power to suspend imposition had been eliminated and only the power to suspend execution remained.[6] Between 1917 and 1925, when the present Act was passed and approved by the President, the several congressional committees interested in probation legislation considered numerous bills. Some provided only for suspension of imposition, some only for suspension of execution, and some for either method as the court saw fit.[7] During this period there were advocates of those bills which provided for the suspension of imposition of sentence, but others opposed such bills. Attorney General Palmer, belonging to the latter group, expressed his opposition to a bill which provided for the suspension of imposition, pointing out that, "The judge may also, in his discretion, terminate the probation at any time within the period specified and require the defendant to serve not a sentence *which had been originally pronounced upon him,* but a sentence to be pronounced at the time of the termination of the probation for the act contemplates that in

[4] Hearings before subcommittee of the Committee on the Judiciary, U. S. Senate, on S. 1092, 64th Cong., 1st Sess., March 25, 1916, pp. 5, 6.

[5] Report No. 887, Senate Committee on the Judiciary, 64th Cong., 2d Sess.

[6] 54 Cong. Rec. 3637, 4373; Hearings before the House Committee on the Judiciary, 66th Cong., 2d Sess., on H. R. 340, 1111 and 12036, March 9, 1920, pp. 106–107, 112–113.

[7] Summaries of state legislation were inserted into the records of the committee hearings and many witnesses discussed such legislation. See, e. g., *Ibid.*, 123–130, 38–44. Like the bills before Congress, the state probation acts were not uniform in their treatment of suspension of sentence.

granting probation a court suspends *even the imposition of a sentence.* . . . The conferring of such powers upon judges would not, it seems to me, contribute to the proper and uniform administration of criminal justice." [8] (Italics supplied.) In the end Congress declined to adopt one method of suspension to the exclusion of the other and instead granted the courts power to apply either method according to the circumstances of each individual case. From this compromise of the conflicting views on the proper method of suspension we may conclude that Congress indicated approval of the natural consequences of the application of each method. As understood by Attorney General Palmer one of these consequences was that when the method of suspension of execution was used the defendant could be required to serve only the sentence which had been originally pronounced upon him.

A construction of the Act to preserve the distinctive characteristics of the two methods of suspension is not inconsistent with the manner in which it has been enforced and administered. From the passage of the Act until 1940 [9] the Attorney General exercised supervision over administration of the Act.[10] In 1930 the Attorney Gen-

[8] *Ibid.*, 105.

[9] In 1940 administration of the probation system was transferred to the Administrative Office of the United States Courts under the provisions of an Act passed August 7, 1939. 53 Stat. 1223, 1225.

[10] The original Act required probation officers to "make such reports to the Attorney General as he may at any time require." 43 Stat. 1261. In June, 1925, three months after enactment of the law, the Attorney General sent to all United States District Judges a memorandum of suggestions in which he comprehensively discussed the duties of judges and probation officers and requested that monthly reports be made to him concerning the probation activities in each court. See 1925 Annual Reports and Proceedings of the National Probation Association, 227–230. In 1930 an amendment to the Probation Act stated that the Attorney General should "endeavor by all suitable means to promote the efficient administration of the probation system and the enforcement of the probation laws in all United States courts." 46 Stat. 503, 504. See also 53 Stat. 1225.

eral in a carefully considered opinion reached the conclusion that if Congress had intended by § 2 of the Probation Act "to create such an important power, [as that for which the government here contends] it would seem that more explicit language would have been used." 36 O. A. G. 186, 192. A comprehensive two-volume report by the Attorney General entitled "Survey of Release Procedures" published in 1939 adopted this interpretation of § 2: "Where imposition of sentence was originally suspended and probation granted, and the probation and suspension are later revoked, it is plain that before the offender can be imprisoned imposition of sentence is necessary. And since the case reverts to its status at the time probation was granted, the court clearly is free to impose 'any sentence which might originally have been imposed.' 18 U. S. C. § 725 (1934). But where the court imposed sentence but suspended the execution of it, it would seem that when the suspension of execution is revoked the original sentence becomes operative." Significantly, the report further pointed out that "No case has been found wherein the court, upon revocation of suspension of execution, increased the original sentence." [11]

So far as pointed out to us the present and two other cases are the only ones in which federal courts have, upon revocation of probation, increased a definite sentence which had been imposed upon an offender prior to his release on probation. Cf. *United States* v. *Moore,* 101 F. 2d 56; *Remer* v. *Regan,* 104 F. 2d 704. The *Moore* case

[11] Attorney General's Survey of Release Procedures, Vol. I, p. 13. Asserting that there is a distinction between a decrease and an increase of sentence, the report further stated: "However, it has been held that when suspension of execution is revoked the court may modify the original sentence so as to decrease the term of imprisonment." *Ibid.* Two Circuit Courts of Appeals had construed the Act as authorizing in that circumstance a judgment which reduced the term of the original sentence. *United States* v. *Antinori* (C. C. A. 5), 59 F. 2d 171; *Scalia* v. *United States* (C. C. A. 1), 62 F. 2d 220.

was decided January 16, 1939, without discussion of the power of the court to increase the sentence. The *Regan* case was decided May 26, 1939, and the court pointed out that defendant apparently conceded that imposition of an increased sentence was authorized by the Probation Act. We have, therefore, an administration of the probation law from its passage in 1925 until 1939, in which the Attorney General not only assumed but expressly stated by official opinion that a definite sentence, execution of which had been suspended, could not be increased after the suspension had been revoked for breach of probation conditions; and in which the federal courts had apparently not undertaken to act contrary to the Attorney General's interpretation.

To construe the Probation Act as not permitting the increase of a definite term of imprisonment fixed by a prior valid sentence gives full meaning and effect both to the first and second sections of the Act. In no way does it impair the Act's usefulness as an instrument to accomplish the basic purpose of probation, namely to provide an individualized program offering a young or unhardened offender an opportunity to rehabilitate himself without institutional confinement under the tutelage of a probation official and under the continuing power of the court to impose institutional punishment for his original offense in the event that he abuse this opportunity. To accomplish this basic purpose Congress vested wide discretion in the courts. See *Burns* v. *United States,* 287 U. S. 216. Thus Congress conferred upon the courts the power to decide in each case whether to impose a definite term of imprisonment in advance of probation or to defer the imposition of sentence, the alternative to be adopted to depend upon the character and circumstances of the individual offender. All we now hold is that having exercised its discretion by sentencing an offender to a

definite term of imprisonment in advance of probation, a court may not later upon revocation of probation set aside that sentence and increase the term of imprisonment.

Reversed.

Dissenting opinion of MR. JUSTICE FRANKFURTER, in which the CHIEF JUSTICE and MR. JUSTICE REED concur.

The device of probation grew out of a realization that to make the punishment fit the criminal requires wisdom seldom available immediately after conviction. Imposition of sentence at that time is much too often an obligation to exercise caprice, and to make convicted persons serve such a sentence is apt to make law a collaborator in new anti-social consequences. Probation is an experimental device serving both society and the offender. It adds the means for exercising wisely that discretion which, within appropriate limits, is given to courts. The probation system was devised to allow persons guilty of anti-social conduct to continue at large but under appropriate safeguards. The hope of the system is that the probationer will derive encouragement and collaboration in his endeavors to remain in society and never serve a day in prison. The fulfillment of that hope largely rests on the efficacy of the probation system, and that depends on a sufficient number of trained and skilful probation officers. Thus the probation system is in effect a reliance on the future to reveal treatment appropriate to the probationer. In the nature of things, knowledge which may thus be gained is not generally available when the moment for conventional sentencing arrives. Since assessment of an appropriate punishment immediately upon conviction becomes very largely a judgment based on speculation, the function of probation is to supplant such speculative judgment by judgment based on experience. For this

reason probation laws fix a tolerably long period of probation, as, for instance, the five-year period of the Federal Probation Act.

In view of all that led to the adoption of probation and the light its workings have cast, the imposition of a suspended term sentence is meaningless if indeed it does not contradict the central idea underlying probation. A convicted person who is given a term sentence and then placed on probation hopes never to spend a day in prison. The court returning the probationer to the community likewise assumes that the influence of probation will save the probationer from future imprisonment. To treat the pronouncement of a term sentence as a kind of bargain whereby the probationer knows that, no matter what, he cannot be put in prison beyond the term so named is to give a wholly unreal interpretation to the procedure. We certainly should not countenance the notion that a probationer has a vested interest in the original sentence nor encourage him to weigh the length of such a sentence against any advantages he may find in violating his probation. To bind the court to such a sentence is undesirable in its consequences and violative of the philosophy of probation. As we pointed out very recently, the difference to a probationer between imposition of sentence followed by probation and suspension of the imposition of sentence "is one of trifling degree." *Korematsu* v. *United States,* 319 U. S. 432, 435. The fact is that term sentences of which the execution is suspended are likely to be as full of vagaries and as unrelated to insight relevant to treatment for particular individuals, as are term sentences the execution of which is not suspended. The capricious nature of such defined sentences dominates all statistical and other evidence regarding conventional judicial sentencing, e. g., *Criminal Justice in Cleveland* (1922) 303 *et seq.* and particularly Tables 20 and 21, and *Ambard* v. *Attorney General for Trinidad and Tobago* [1936] A. C. 322, and

has led to suggestions for more scientific methods of sentencing, see Smith, Alfred E., *Progressive Democracy* (1928) 209 *et seq.;* Warner and Cabot, *Judges and Law Reform* (1936) 156 *et seq.;* Cantor, *Crime and Society* (1939) 254 *et seq.;* Glueck, *Criminal Careers in Retrospect* (1943) c. XVII.

If the experience of the District Court for the Southern District of New York—the district having the heaviest volume of federal criminal prosecutions—is a fair guide, the imposition of sentence is more frequently suspended than is its execution. The only practical result of the strained reading of the powers of the district courts by the decision today may well lead trial judges generally to place probationers on probation without any tentative sentence. A construction which leads to such a merely formal result, one so easily defeated in practice, should be avoided unless the purpose, the text and the legislative history of the Act converge toward it. The policy of probation clearly counsels against it, and neither the words of the Act nor their legislative history contradict that policy. So far as it is significant on this phase, the legislative history looks against rather than for such an undesirable construction. In contrast to the present Act, the first measure passed by Congress conferred only the power to suspend execution of sentence and upon its revocation required the defendant "to serve the sentence . . . originally imposed." H. R. 20414, 64th Cong., 2d Sess. (1917). This enactment suffered a pocket veto. In reporting the present legislation to the House of Representatives, its Committee on the Judiciary explained that "In case of failure to observe these conditions [of probation], those on probation may be returned to the court for sentence." H. Report No. 1377, 68th Cong., 2d Sess., 2.

And the text of the legislation does not defeat this policy. Indubitably petitioner was arrested and brought before the court during his period of probation. In that event

the statute is explicit in its direction that "the court may revoke the probation . . . and may impose any sentence which might originally have been imposed." The court having followed the mandate of the statute, it seems irrelevant and unimportant whether petitioner became a probationer either by a postponement of sentence or by a suspension of a sentence already imposed. We cannot say that the statute does not contemplate that the new sentence which it authorizes shall be effective. The obvious purpose is that it should become so either by superseding any sentence earlier imposed or by revoking the suspension of imposition of sentence if none was imposed. Such is the plain meaning and effect of the direction that upon the arrest of the probationer "the court may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed." In other words, suspension whether of the sentence or of its execution leaves a trial court free to commit the criminal to prison if he fails to meet the test of freedom during the probationary period.

It would be strange if the Constitution stood in the way of a system so designed for the humane treatment of offenders. To vest in courts the power of adjusting the consequences of criminal conduct to the character and capacity of an offender, as revealed by a testing period of probation, of course does not offend the safeguard of the Fifth Amendment against double punishment. By forbidding that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb," that Amendment guarded against the repetition of history by trying a man twice in a new and independent case when he already had been tried once, see Holmes, J., in *Kepner* v. *United States*, 195 U. S. 100, 134, or punishing him for an offense when he had already suffered the punishment for it. But to set a man at large after conviction on condition of his good be-

havior and on default of such condition to incarcerate him, is neither to try him twice nor to punish him twice. If Congress sees fit, as it has seen fit, to employ such a system of criminal justice there is nothing in the Constitution to hinder.

UNITED STATES v. DOTTERWEICH.

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

No. 5. Argued October 12, 1943.—Decided November 22, 1943.

Upon review of the conviction of a corporate officer on informations charging the corporation and him with shipping in interstate commerce adulterated and misbranded drugs, in violation of § 301 of the Federal Food, Drug, and Cosmetic Act, *held:*

1. The provision of § 305 of the Act, that before reporting a violation to the United States attorney the Administrator shall give to the person against whom such proceeding is contemplated a notice and an opportunity to present his views, does not create a condition precedent to a prosecution under the Act. P. 278.

2. It was open to the jury to find the officer guilty though failing to find the corporation guilty. P. 279.

3. Where there is no guaranty such as under § 303 (c) of the Act affords immunity from prosecution, that section can not be read as relieving corporate officers and agents from liability for violation of § 301. P. 283.

4. The District Court properly left to the jury the question of the officer's responsibility for the shipment; and the evidence was sufficient to support the verdict. P. 285.

131 F. 2d 500, reversed.

CERTIORARI, 318 U. S. 753, to review the reversal of a conviction for violation of the Federal Food, Drug, and Cosmetic Act.

Solicitor General Fahy, with whom *Assistant Attorneys General Wendell Berge* and *Tom C. Clark,* and *Messrs. Oscar A. Provost, Edward G. Jennings,* and *Valentine Brookes* were on the brief, for the United States.

Mr. Samuel M. Fleischman, with whom *Mr. Robert J. Whissel* was on the brief, for respondent.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This was a prosecution begun by two informations, consolidated for trial, charging Buffalo Pharmacal Company, Inc., and Dotterweich, its president and general manager, with violations of the Act of Congress of June 25, 1938, c. 675, 52 Stat. 1040, 21 U. S. C. §§ 301–392, known as the Federal Food, Drug, and Cosmetic Act. The Company, a jobber in drugs, purchased them from their manufacturers and shipped them, repacked under its own label, in interstate commerce. (No question is raised in this case regarding the implications that may properly arise when, although the manufacturer gives the jobber a guaranty, the latter through his own label makes representations.) The informations were based on § 301 of that Act (21 U. S. C. § 331), paragraph (a) of which prohibits "The introduction or delivery for introduction into interstate commerce of any . . . drug . . . that is adulterated or misbranded." "Any person" violating this provision is, by paragraph (a) of § 303 (21 U. S. C. § 333), made "guilty of a misdemeanor." Three counts went to the jury—two, for shipping misbranded drugs in interstate commerce, and a third, for so shipping an adulterated drug. The jury disagreed as to the corporation and found Dotterweich guilty on all three counts. We start with the finding of the Circuit Court of Appeals that the evidence was adequate to support the verdict of adulteration and misbranding. 131 F. 2d 500, 502.

Two other questions which the Circuit Court of Appeals decided against Dotterweich call only for summary disposition to clear the path for the main question before us. He invoked § 305 of the Act requiring the Administrator, before reporting a violation for prosecution by a

United States attorney, to give the suspect an "opportunity to present his views." We agree with the Circuit Court of Appeals that the giving of such an opportunity, which was not accorded to Dotterweich, is not a prerequisite to prosecution. This Court so held in *United States* v. *Morgan,* 222 U. S. 274, in construing the Food and Drugs Act of 1906, 34 Stat. 768, and the legislative history to which the court below called attention abundantly proves that Congress, in the changed phraseology of 1938, did not intend to introduce a change of substance. 83 Cong. Rec. 7792–94. Equally baseless is the claim of Dotterweich that, having failed to find the corporation guilty, the jury could not find him guilty. Whether the jury's verdict was the result of carelessness or compromise or a belief that the responsible individual should suffer the penalty instead of merely increasing, as it were, the cost of running the business of the corporation, is immaterial. Juries may indulge in precisely such motives or vagaries. *Dunn* v. *United States,* 284 U. S. 390.

And so we are brought to our real problem. The Circuit Court of Appeals, one judge dissenting, reversed the conviction on the ground that only the corporation was the "person" subject to prosecution unless, perchance, Buffalo Pharmacal was a counterfeit corporation serving as a screen for Dotterweich. On that issue, after rehearing, it remanded the cause for a new trial. We then brought the case here, on the Government's petition for certiorari, 318 U. S. 753, because this construction raised questions of importance in the enforcement of the Federal Food, Drug, and Cosmetic Act.

The court below drew its conclusion not from the provisions defining the offenses on which this prosecution was based (§§ 301 (a) and 303 (a)), but from the terms of § 303 (c). That section affords immunity from prosecution if certain conditions are satisfied. The condition relevant to this case is a guaranty from the seller of the innocence of

his product. So far as here relevant, the provision for an immunizing guaranty is as follows:

"No person shall be subject to the penalties of subsection (a) of this section . . . (2) for having violated section 301 (a) or (d), if he establishes a guaranty or undertaking signed by, and containing the name and address of, the person residing in the United States from whom he received in good faith the article, to the effect, in case of an alleged violation of section 301 (a), that such article is not adulterated or misbranded, within the meaning of this Act, designating this Act . . ."

The Circuit Court of Appeals found it "difficult to believe that Congress expected anyone except the principal to get such a guaranty, or to make the guilt of an agent depend upon whether his employer had gotten one." 131 F. 2d 500, 503. And so it cut down the scope of the penalizing provisions of the Act to the restrictive view, as a matter of language and policy, it took of the relieving effect of a guaranty.

The guaranty clause cannot be read in isolation. The Food and Drugs Act of 1906 was an exertion by Congress of its power to keep impure and adulterated food and drugs out of the channels of commerce. By the Act of 1938, Congress extended the range of its control over illicit and noxious articles and stiffened the penalties for disobedience. The purposes of this legislation thus touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection. Regard for these purposes should infuse construction of the legislation if it is to be treated as a working instrument of government and not merely as a collection of English words. See *Hipolite Egg Co.* v. *United States,* 220 U. S. 45, 57, and *McDermott* v. *Wisconsin,* 228 U. S. 115, 128. The prosecution to which Dotterweich was subjected is based on a now familiar type of legislation whereby penalties serve as effective means

of regulation. Such legislation dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger. *United States* v. *Balint,* 258 U. S. 250. And so it is clear that shipments like those now in issue are "punished by the statute if the article is misbranded [or adulterated], and that the article may be misbranded [or adulterated] without any conscious fraud at all. It was natural enough to throw this risk on shippers with regard to the identity of their wares . . ." *United States* v. *Johnson,* 221 U. S. 488, 497–98.

The statute makes "any person" who violates § 301 (a) guilty of a "misdemeanor." It specifically defines "person" to include "corporation." § 201 (e). But the only way in which a corporation can act is through the individuals who act on its behalf. *New York Central & H. R. R. Co.* v. *United States,* 212 U. S. 481. And the historic conception of a "misdemeanor" makes all those responsible for it equally guilty, *United States* v. *Mills,* 7 Pet. 138, 141, a doctrine given general application in § 332 of the Penal Code (18 U. S. C. § 550). If, then, Dotterweich is not subject to the Act, it must be solely on the ground that individuals are immune when the "person" who violates § 301 (a) is a corporation, although from the point of view of action the individuals are the corporation. As a matter of legal development, it has taken time to establish criminal liability also for a corporation and not merely for its agents. See *New York Central & H. R. R. Co.* v. *United States, supra.* The history of federal food and drug legislation is a good illustration of the elaborate phrasing that was in earlier days deemed necessary to fasten criminal liability on corporations. Section 12 of the Food and Drugs Act of 1906 provided that, "the act, omission, or failure of any officer, agent, or other person

acting for or employed by any corporation, company, society, or association, within the scope of his employment or office, shall in every case be also deemed to be the act, omission, or failure of such corporation, company, society, or association as well as that of the person." By 1938, legal understanding and practice had rendered such statement of the obvious superfluous. Deletion of words—in the interest of brevity and good draftsmanship [1]—superfluous for holding a corporation criminally liable can hardly be found ground for relieving from such liability the individual agents of the corporation. To hold that the Act of 1938 freed all individuals, except when proprietors, from the culpability under which the earlier legislation had placed them is to defeat the very object of the new Act. Nothing is clearer than that the later legislation was designed to enlarge and stiffen the penal net and not to narrow and loosen it. This purpose was unequivocally avowed by the two committees which reported the bills to the Congress. The House Committee reported that the Act "seeks to set up effective provisions against abuses of consumer welfare growing out of inadequacies in the Food and Drugs Act of June 30, 1906." (H. Rep. No. 2139, 75th Cong., 3d Sess., p. 1.) And the Senate Committee explicitly pointed out that the new legislation "must not weaken the existing laws," but on the contrary "it must strengthen and extend that law's protection of the consumer." (S. Rep. No. 152, 75th Cong., 1st Sess., p. 1.) If the 1938 Act were construed as it was below, the penalties of the law could be imposed only in the rare case where the corporation is merely an individual's *alter ego*. Corporations carrying on an illicit trade would be subject only to what the House Committee described as a "license fee

[1] "The bill has been made shorter and less verbose than previous bills. That has been done without deleting any effective provisions." S. Rep. No. 152, 75th Cong., 1st Sess., p. 2.

for the conduct of an illegitimate business." [2] A corporate officer, who even with "intent to defraud or mislead" (§ 303b), introduced adulterated or misbranded drugs into interstate commerce could not be held culpable for conduct which was indubitably outlawed by the 1906 Act. See, e. g., *United States* v. *Mayfield,* 177 F. 765. This argument proves too much. It is not credible that Congress should by implication have exonerated what is probably a preponderant number of persons involved in acts of disobedience—for the number of non-corporate proprietors is relatively small. Congress, of course, could reverse the process and hold only the corporation and allow its agents to escape. In very exceptional circumstances it may have required this result. See *Sherman* v. *United States,* 282 U. S. 25. But the history of the present Act, its purposes, its terms, and extended practical construction lead away from such a result once "we free our minds from the notion that criminal statutes must be construed by some artificial and conventional rule." *United States* v. *Union Supply Co.,* 215 U. S. 50, 55.

The Act is concerned not with the proprietory relation to a misbranded or an adulterated drug but with its distribution. In the case of a corporation such distribution must be accomplished, and may be furthered, by persons standing in various relations to the incorporeal proprietor. If a guaranty immunizes shipments of course it immunizes all involved in the shipment. But simply because if there had been a guaranty it would have been received by the proprietor, whether corporate or individual, as a safeguard for the enterprise, the want of a guaranty

[2] In describing the penalty provisions of § 303, the House Committee reported that the Bill "increases substantially the criminal penalties . . . which some manufacturers have regarded as substantially a license fee for the conduct of an illegitimate business." H. Rep. No. 2139, 75th Cong., 3d Sess., p. 4.

does not cut down the scope of responsibility of all who are concerned with transactions forbidden by § 301. To be sure, that casts the risk that there is no guaranty upon all who according to settled doctrines of criminal law are responsible for the commission of a misdemeanor. To read the guaranty section, as did the court below, so as to restrict liability for penalties to the only person who normally would receive a guaranty—the proprietor—disregards the admonition that "the meaning of a sentence is to be felt rather than to be proved." *United States* v. *Johnson*, 221 U. S. 488, 496. It also reads an exception to an important provision safeguarding the public welfare with a liberality which more appropriately belongs to enforcement of the central purpose of the Act.

The Circuit Court of Appeals was evidently tempted to make such a devitalizing use of the guaranty provision through fear that an enforcement of § 301 (a) as written might operate too harshly by sweeping within its condemnation any person however remotely entangled in the proscribed shipment. But that is not the way to read legislation. Literalism and evisceration are equally to be avoided. To speak with technical accuracy, under § 301 a corporation may commit an offense and all persons who aid and abet its commission are equally guilty. Whether an accused shares responsibility in the business process resulting in unlawful distribution depends on the evidence produced at the trial and its submission—assuming the evidence warrants it—to the jury under appropriate guidance. The offense is committed, unless the enterprise which they are serving enjoys the immunity of a guaranty, by all who do have such a responsible share in the furtherance of the transaction which the statute outlaws, namely, to put into the stream of interstate commerce adulterated or misbranded drugs. Hardship there doubtless may be under a statute which thus penalizes the transaction though consciousness of wrongdoing be totally wanting.

Balancing relative hardships, Congress has preferred to place it upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce, rather than to throw the hazard on the innocent public who are wholly helpless.

It would be too treacherous to define or even to indicate by way of illustration the class of employees which stands in such a responsible relation. To attempt a formula embracing the variety of conduct whereby persons may responsibly contribute in furthering a transaction forbidden by an Act of Congress, to wit, to send illicit goods across state lines, would be mischievous futility. In such matters the good sense of prosecutors, the wise guidance of trial judges, and the ultimate judgment of juries must be trusted. Our system of criminal justice necessarily depends on "conscience and circumspection in prosecuting officers," *Nash* v. *United States,* 229 U. S. 373, 378, even when the consequences are far more drastic than they are under the provision of law before us. See *United States* v. *Balint, supra* (involving a maximum sentence of five years). For present purpose it suffices to say that in what the defense characterized as "a very fair charge" the District Court properly left the question of the responsibility of Dotterweich for the shipment to the jury, and there was sufficient evidence to support its verdict.

Reversed.

MR. JUSTICE MURPHY, dissenting:

Our prime concern in this case is whether the criminal sanctions of the Federal Food, Drug, and Cosmetic Act of 1938 plainly and unmistakably apply to the respondent in his capacity as a corporate officer. He is charged with violating § 301 (a) of the Act, which prohibits the introduction or delivery for introduction into interstate commerce of any adulterated or misbranded drug. There is

no evidence in this case of any personal guilt on the part of the respondent. There is no proof or claim that he ever knew of the introduction into commerce of the adulterated drugs in question, much less that he actively participated in their introduction. Guilt is imputed to the respondent solely on the basis of his authority and responsibility as president and general manager of the corporation.

It is a fundamental principle of Anglo-Saxon jurisprudence that guilt is personal and that it ought not lightly to be imputed to a citizen who, like the respondent, has no evil intention or consciousness of wrongdoing. It may be proper to charge him with responsibility to the corporation and the stockholders for negligence and mismanagement. But in the absence of clear statutory authorization it is inconsistent with established canons of criminal law to rest liability on an act in which the accused did not participate and of which he had no personal knowledge. Before we place the stigma of a criminal conviction upon any such citizen the legislative mandate must be clear and unambiguous. Accordingly that which Chief Justice Marshall has called "the tenderness of the law for the rights of individuals" [1] entitles each person, regardless of economic or social status, to an unequivocal warning from the legislature as to whether he is within the class of persons subject to vicarious liability. Congress cannot be deemed to have intended to punish anyone who is not "plainly and unmistakably" within the confines of the statute. *United States* v. *Lacher,* 134 U. S. 624, 628; *United States* v. *Gradwell,* 243 U. S. 476, 485.

Moreover, the fact that individual liability of corporate officers may be consistent with the policy and purpose of a public health and welfare measure does not authorize this Court to impose such liability where Congress has not

[1] *United States* v. *Wiltberger,* 5 Wheat. 76, 95.

clearly intended or actually done so. Congress alone has the power to define a crime and to specify the offenders. *United States* v. *Wiltberger,* 5 Wheat. 76, 95. It is not our function to supply any deficiencies in these respects, no matter how grave the consequences. Statutory policy and purpose are not constitutional substitutes for the requirement that the legislature specify with reasonable certainty those individuals it desires to place under the interdict of the Act. *United States* v. *Harris,* 177 U. S. 305; *Sarlls* v. *United States,* 152 U. S. 570.

Looking at the language actually used in this statute, we find a complete absence of any reference to corporate officers. There is merely a provision in § 303 (a) to the effect that "any person" inadvertently violating § 301 (a) shall be guilty of a misdemeanor. Section 201 (e) further defines "person" as including an "individual, partnership, corporation, and association." [2] The fact that a corporate officer is both a "person" and an "individual" is not indicative of an intent to place vicarious liability on the officer. Such words must be read in light of their statutory environment.[3] Only if Congress has otherwise specified an

[2] The normal and necessary meaning of such a definition of "person" is to distinguish between individual enterprises and those enterprises that are incorporated or operated as a partnership or association, in order to subject them all to the Act. This phrase cannot be considered as an attempt to distinguish between individual officers of a corporation and the corporate entity. Lee, "Corporate Criminal Liability," 28 Col. L. Rev. 1, 181, 190.

[3] Compare *United States* v. *Cooper Corp.,* 312 U. S. 600, 606, and *Davis* v. *Pringle,* 268 U. S. 315, 318, holding that the context and legislative history of the particular statutes there involved indicated that the words "any person" did not include the United States. But in *Georgia* v. *Evans,* 316 U. S. 159, and *Ohio* v. *Helvering,* 292 U. S. 360, these considerations led to the conclusion that "any person" did include a state. See also 40 Stat. 1143, which specifically includes officers within the meaning of "any person" as used in the Revenue Act of 1918.

552826—44——23

intent to place corporate officers within the ambit of the Act can they be said to be embraced within the meaning of the words "person" or "individual" as here used.

Nor does the clear imposition of liability on corporations reveal the necessary intent to place criminal sanctions on their officers. A corporation is not the necessary and inevitable equivalent of its officers for all purposes.[4] In many respects it is desirable to distinguish the latter from the corporate entity and to impose liability only on the corporation. In this respect it is significant that this Court has never held the imposition of liability on a corporation sufficient, without more, to extend liability to its officers who have no consciousness of wrongdoing.[5] Indeed, in a closely analogous situation, we have held that the vicarious personal liability of receivers in actual charge and control of a corporation could not be predicated on the statutory liability of a "company," even when the policy and purpose of the enactment were consistent with personal liability. *United States* v. *Harris, supra.*[6] It fol-

[4] In *Park Bank* v. *Remsen,* 158 U. S. 337, 344, this Court said, "It is the corporation which is given the powers and privileges and made subject to the liabilities. Does this carry with it an imposition of liability upon the trustee or other officer of the corporation? The officer is not the corporation; his liability is personal, and not that of the corporation, nor can it be counted among the powers and privileges of the corporation."

[5] For an analysis of the confusion on this matter in the state and lower federal courts, see Lee, "Corporate Criminal Liability," 28 Col. L. Rev. 1, 181.

[6] In that case we had before us Rev. Stat. §§ 4386–4389, which penalized "any company, owner or custodian of such animals" who failed to comply with the statutory requirements as to livestock transportation. A railroad company violated the statute and the government sought to impose liability on the receivers who were in actual charge of the company. It was argued that the word "company" embraced the natural persons acting on behalf of the company and that to hold such officers and receivers liable was within the policy and purpose of

lows that express statutory provisions are necessary to satisfy the requirement that officers as individuals be given clear and unmistakable warning as to their vicarious personal liability. This Act gives no such warning.

This fatal hiatus in the Act is further emphasized by the ability of Congress, demonstrated on many occasions, to apply statutes in no uncertain terms to corporate officers as distinct from corporations.[7] The failure to mention officers specifically is thus some indication of a desire to exempt them from liability. In fact the history

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so humane a statute. We rejected this contention in language peculiarly appropriate to this case (177 U. S. at 309):

"It must be admitted that, in order to hold the receivers, they must be regarded as included in the word 'company.' Only by a strained and artificial construction, based chiefly upon a consideration of the mischief which the legislature sought to remedy, can receivers be brought within the terms of the law. But can such a kind of construction be resorted to in enforcing a penal statute? Giving all proper force to the contention of the counsel of the Government, that there has been some relaxation on the part of the courts in applying the rule of strict construction to such statutes, it still remains that the intention of a penal statute must be found in the language actually used, interpreted according to its fair and obvious meaning. It is not permitted to courts, in this class of cases, to attribute inadvertence or oversight to the legislature when enumerating the classes of persons who are subjected to a penal enactment, nor to depart from the settled meaning of words or phrases in order to bring persons not named or distinctly described within the supposed purpose of the statute."

[7] "Whenever a corporation shall violate any of the penal provisions of the antitrust laws, such violation shall be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have authorized, ordered, or done any of the acts constituting in whole or in part such violation." 15 U. S. C. § 24.

"The courts of bankruptcy . . . are hereby invested . . . with such jurisdiction at law and in equity as will enable them to . . . (4) arraign, try, and punish bankrupts, officers, and other persons, and the agents, officers, members of the board of directors or trustees, or other

of federal food and drug legislation is itself illustrative of this capacity for specification and lends strong support to the conclusion that Congress did not intend to impose liability on corporate officers in this particular Act.

Section 2 of the Federal Food and Drugs Act of 1906, as introduced and passed in the Senate, contained a provision to the effect that any violation of the Act by a corporation should be deemed to be the act of the officer responsible therefor and that such officer might be punished as though it were his personal act.[8] This clear imposition of criminal responsibility on corporate officers, however, was not carried over into the statute as finally enacted. In its place appeared merely the provision that "when construing and enforcing the provisions of this Act, the act, omission, or failure of any officer, agent, or other person acting for or employed by any corporation . . . within the scope of his employment or office, shall in every case be also deemed to be the act, omission, or failure of such corporation . . . as well as that of the person."[9] This provision had the effect only of making corporations

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similar controlling bodies, of corporations for violations of this Act." 30 Stat. 545.

"Any such common carrier, or any officer or agent thereof, requiring or permitting any employee to go, be, or remain on duty in violation of the next preceding section of this chapter shall be liable to a penalty . . ." 45 U. S. C. § 63.

"A mortgagor who, with intent to defraud, violates any provision of subsection F, section 924, and if the mortgagor is a corporation or association, the president or other principal executive officer of the corporation or association, shall upon conviction thereof be held guilty of a misdemeanor . . ." 46 U. S. C. § 941 (b).

[8] S. 88, 59th Cong., 1st Sess. Senator Heyburn, one of the sponsors of S. 88, stated that this was "a new feature in bills of this kind. It was intended to obviate the possibility of escape by the officers of a corporation under a plea, which has been more than once made, that they did not know that this was being done on the credit of or on the responsibility of the corporation." 40 Cong. Rec. 894.

[9] 34 Stat. 772, 21 U. S. C. § 4.

responsible for the illegal acts of their officers and proved unnecessary in view of the clarity of the law to that effect. *New York Central & H. R. R. Co.* v. *United States,* 212 U. S. 481.

The framers of the 1938 Act were aware that the 1906 Act was deficient in that it failed "to place responsibility properly upon corporate officers." [10] In order "to provide the additional scope necessary to prevent the use of the corporate form as a shield to individual wrongdoers," [11] these framers inserted a clear provision that "whenever a corporation or association violates any of the provisions of this Act, such violation shall also be deemed to be a violation of the individual directors, officers, or agents of such corporation or association who authorized, ordered, or did any of the acts constituting, in whole or in part, such violation." [12] This paragraph, however, was deleted from the final version of the Act.

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[10] Senate Report No. 493, 73d Cong., 2d Sess., p. 21.

[11] *Ibid.,* p. 22. This report also stated that "it is not, however, the purpose of this paragraph to subject to liability those directors, officers, and employees, who merely authorize their subordinates to perform lawful duties and such subordinates, on their own initiative, perform those duties in a manner which violates the provisions of the law. However, if a director or officer personally orders his subordinate to do an act in violation of the law, there is no reason why he should be shielded from personal responsibility merely because the act was done by another and on behalf of a corporation."

[12] This provision appears in several of the early versions of the Act introduced in Congress. S. 1944, 73d Cong., 1st Sess., § 18 (b); S. 2000, 73d Cong., 2d Sess., § 18 (b); S. 2800, 73d Cong., 2d Sess., § 18 (b); S. 5, 74th Cong., 1st Sess., § 709 (b); S. 5, 74th Cong., 2d Sess., § 707 (b), as reported to the House, which substituted the word "personally" for the word "authorized" in the last clause of the paragraph quoted above. A variation of this provision appeared in S. 5, 75th Cong., 1st Sess., § 2 (f), and made a marked distinction between the use of the word "person" and the words "director, officer, employee, or agent acting for or employed by any person." All of these bills also contained the present definition of "person" as including "individual, partnership, corporation, and association."

We cannot presume that this omission was inadvertent on the part of Congress. *United States* v. *Harris, supra* at 309. Even if it were, courts have no power to remedy so serious a defect, no matter how probable it otherwise may appear that Congress intended to include officers; "probability is not a guide which a court, in construing a penal statute, can safely take." *United States* v. *Wiltberger, supra* at 105. But the framers of the 1938 Act had an intelligent comprehension of the inadequacies of the 1906 Act and of the unsettled state of the law. They recognized the necessity of inserting clear and unmistakable language in order to impose liability on corporate officers. It is thus unreasonable to assume that the omission of such language was due to a belief that the Act as it now stands was sufficient to impose liability on corporate officers. Such deliberate deletion is consistent only with an intent to allow such officers to remain free from criminal liability. Thus to apply the sanctions of this Act to the respondent would be contrary to the intent of Congress as expressed in the statutory language and in the legislative history.

The dangers inherent in any attempt to create liability without express Congressional intention or authorization are illustrated by this case. Without any legislative guides, we are confronted with the problem of determining precisely which officers, employees and agents of a corporation are to be subject to this Act by our fiat. To erect standards of responsibility is a difficult legislative task and the opinion of this Court admits that it is "too treacherous" and a "mischievous futility" for us to engage in such pursuits. But the only alternative is a blind resort to "the good sense of prosecutors, the wise guidance of trial judges, and the ultimate judgment of juries." Yet that situation is precisely what our constitutional system sought to avoid. Reliance on the legislature to define crimes and criminals distinguishes our form of juris-

prudence from certain less desirable ones. The legislative power to restrain the liberty and to imperil the good reputation of citizens must not rest upon the variable attitudes and opinions of those charged with the duties of interpreting and enforcing the mandates of the law. I therefore cannot approve the decision of the Court in this case.

MR. JUSTICE ROBERTS, MR. JUSTICE REED and MR. JUSTICE RUTLEDGE join in this dissent.

CAFETERIA EMPLOYEES UNION, LOCAL 302, ET AL. *v.* ANGELOS ET AL.

NO. 36. CERTIORARI TO THE COURT OF APPEALS OF NEW YORK.*

Argued November 8, 1943.—Decided November 22, 1943.

1. In the circumstances of this case, the state court's broad injunction against picketing of places of business by members of a labor organization infringed the constitutional guarantee of freedom of speech. P. 295.
2. A State can not, by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him, exclude workmen in a particular industry from presenting their case to the public in a peaceful way. P. 296.
3. The right to peaceful picketing can not be taken away merely because in the course of the picketing there may have been isolated incidents of abuse falling far short of violence. *Drivers' Union* v. *Meadowmoor Co.*, 312 U. S. 287, distinguished. P. 296.

289 N. Y. 498, 507, 46 N. E. 2d 903, 908, reversed.

CERTIORARI, 319 U. S. 778, to review affirmances of decrees granting injunctions against picketing. See also 264 App. Div. 708, 34 N. Y. S. 2d 408.

*Together with No. 37, *Cafeteria Employees Union, Local 302, et al.* v. *Tsakires et al.*, also on writ of certiorari to the Court of Appeals of New York.

Mr. Louis B. Boudin for petitioners.

Mr. Abraham Michael Katz submitted for respondents.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

We brought these two cases here to determine whether injunctions sanctioned by the New York Court of Appeals exceeded the bounds within which the Fourteenth Amendment confines state power. 319 U. S. 778. They were argued together and, being substantially alike, can be disposed of in a single opinion.

We start with the Court of Appeals' view of the facts. In No. 36, petitioners, a labor union and its president, picketed a cafeteria in an attempt to organize it. The cafeteria was owned by the respondents, who themselves conducted the business without the aid of any employees. Picketing was carried on by a parade of one person at a time in front of the premises. The successive pickets were "at all times orderly and peaceful." They carried signs which tended to give the impression that the respondents were "unfair" to organized labor and that the pickets had been previously employed in the cafeteria. These representations were treated by the court below as knowingly false in that there had been no employees in the cafeteria and the respondents were "not unfair to organized labor." It also found that pickets told prospective customers that the cafeteria served bad food, and that by "patronizing" it "they were aiding the cause of Fascism."

The circumstances in No. 37 differ from those in No. 36 only in that pickets were found to have told prospective customers that a strike was in progress and to have "insulted customers . . . who were about to enter" the cafeteria. Upon a finding that respondents required equitable relief to avoid irreparable damages and that there was no "labor dispute" under the New York analogue

of the Norris-La Guardia Act (§ 876–a of the New York Civil Practice Act), the trial court enjoined petitioners in broad terms from picketing at or near respondents' places of business. The decrees were affirmed by the Appellate Division (264 App. Div. 708, 34 N. Y. S. 2d 408), and were finally sustained by the Court of Appeals, its Chief Judge and two Judges dissenting. 289 N. Y. 498, 507, 46 N. E. 2d 903.

In *Senn* v. *Tile Layers Union,* 301 U. S. 468, this Court ruled that members of a union might, "without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution." 301 U. S. at 478. Later cases applied the *Senn* doctrine by enforcing the right of workers to state their case and to appeal for public support in an orderly and peaceful manner regardless of the area of immunity as defined by state policy. *A. F. of L.* v. *Swing,* 312 U. S. 321; *Bakery Drivers Local* v. *Wohl,* 315 U. S. 769. To be sure, the *Senn* case related to the employment of "peaceful picketing and truthful publicity." 301 U. S. at 482. That the picketing under review was peaceful is not questioned. And to use loose language or undefined slogans that are part of the conventional give-and-take in our economic and political controversies—like "unfair" or "fascist"—is not to falsify facts. In a setting like the present, continuing representations unquestionably false and acts of coercion going beyond the mere influence exerted by the fact of picketing, are of course not constitutional prerogatives. But here we have no attempt by the state through its courts to restrict conduct justifiably found to be an abusive exercise of the right to picket. We have before us a prohibition as unrestricted as that which we found to transgress state power in *A. F. of L.* v. *Swing, supra.* The Court here, as in the *Swing* case, was probably led into error by assuming that if a controversy does not come within the scope of state legislation limit-

ing the issue of injunctions, efforts to make known one side of an industrial controversy by peaceful means may be enjoined. But, as we have heretofore decided, a state cannot exclude working men in a particular industry from putting their case to the public in a peaceful way "by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him." *A. F. of L.* v. *Swing*, 312 U. S. at 326.

The present situation is thus wholly outside the scope of the decision in *Milk Wagon Drivers Union* v. *Meadowmoor Co.*, 312 U. S. 287. There we sustained the equity power of a state because the record disclosed abuses deemed not episodic and isolated but of the very texture and process of the enjoined picketing. But we also made clear "that the power to deny what otherwise would be lawful picketing derives from the power of the states to prevent future coercion. Right to free speech in the future cannot be forfeited because of dissociated acts of past violence." 312 U. S. at 296. Still less can the right to picket itself be taken away merely because there may have been isolated incidents of abuse falling far short of violence occurring in the course of that picketing.

The judgments must be reversed and the causes returned to the state court for further proceedings not inconsistent with this opinion.

Reversed.

SWITCHMEN'S UNION OF NORTH AMERICA ET AL. *v.* NATIONAL MEDIATION BOARD ET AL.

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

No. 48. Argued October 15, 1943.—Decided November 22, 1943.

A dispute having arisen between two labor organizations as to representation of employees of a carrier for collective bargaining, the services of the National Mediation Board were invoked pursuant to § 2, Ninth of the Railway Labor Act. One of the organizations sought to be the representative of all yardmen; the other, to be the representative of certain smaller groups. The Board directed an election, designating all yardmen as participants. The first organization was chosen representative, and the Board certified the result to the carrier. The second organization and some of its members brought suit in the federal District Court, challenging the Board's determination as to participants in the election and seeking cancellation of the certificate. *Held* that the District Court was without jurisdiction to review the action of the Board in issuing the certificate. P. 300.

1. The language of the Railway Labor Act and the legislative history of § 2, Ninth thereof support the conclusion that the intent of Congress was that the Board's certification of representatives for collective bargaining should not be judicially reviewable. P. 306.

(a) Constitutional questions aside, it is for Congress to determine how the rights which it creates shall be enforced. P. 301.

(b) Where Congress has not expressly authorized judicial review, the type of problem involved and the history of the statute in question are relevant in determining whether judicial review may nonetheless be supplied. P. 301.

2. The broad grant to the federal district courts, by Jud. Code § 24 (8), of original jurisdiction of all "suits and proceedings arising under any law regulating commerce," can not sustain jurisdiction in this case. P. 300.

3. That the Board's certification of representatives of employees for collective bargaining is conclusive does not of itself make such certification judicially reviewable. P. 303.

4. *Shields* v. *Utah Idaho Central R. Co.*, 305 U. S. 177, distinguished. P. 306.

135 F. 2d 785, reversed.

CERTIORARI, 319 U. S. 736, to review the affirmance of a judgment dismissing the complaint in a suit challenging the action of the National Mediation Board in certifying representatives for collective bargaining.

Mr. Donald R. Richberg, with whom *Mr. Rufus G. Poole* was on the brief, for petitioners.

Mr. Robert L. Stern, with whom *Solicitor General Fahy* was on the brief, for the National Mediation Board et al.; and *Mr. Bernard M. Savage,* with whom *Mr. Alfred L. Bennett* was on the brief, for the Brotherhood of Railroad Trainmen,—respondents.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This is an action by the petitioners, the Switchmen's Union of North America and some of its members against the National Mediation Board, its members, the Brotherhood of Railroad Trainmen, and the New York Central Railroad Company and the Michigan Central Railroad Company. The individual plaintiffs are members and officials of the Switchmen's Union and employees of the respondent carriers.

Petitioners were plaintiffs in the District Court. A certification of representatives for collective bargaining under § 2, Ninth of the Railway Labor Act (44 Stat. 577, 48 Stat. 1185) was made by the Board to the carriers.[1]

[1] Sec. 2, Ninth provides: "If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such

This certification followed the invocation of the services of the Board to investigate a dispute among the yardmen as to their representative. The Brotherhood sought to be the representative for all the yardmen of the rail lines operated by the New York Central system. The Switchmen contended that yardmen of certain designated parts of the system should be permitted to vote for separate representatives instead of being compelled to take part in a system-wide election.

The Board designated all yardmen of the carriers as participants in the election. The election was held and the Brotherhood was chosen as the representative. Upon the certification of the result to the carriers, petitioners sought to have the determination by the Board of the participants and the certification of the representative cancelled. This suit for cancellation was brought in the District Court. That court upheld the decision of the Board to the effect that all yardmen in the service of a carrier should select a single representative for collective bargaining. The Circuit Court of Appeals affirmed by a divided vote. 135 F. 2d 785. The case is here on a petition for a writ of cer-

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certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph."

tiorari which we granted because of the importance of the problems which are raised.

We do not reach the merits of the controversy. For we are of the opinion that the District Court did not have the power to review the action of the National Mediation Board in issuing the certificate.

Sec. 24 (8) of the Judicial Code, 28 U. S. C. § 41 (8), gives the federal district courts "original jurisdiction" of all "suits and proceedings arising under any law regulating commerce." We may assume that if any judicial review of the certificate of the Board could be had, the District Court would have jurisdiction by reason of that provision of the Judicial Code. See *Louisville & Nashville R. Co.* v. *Rice,* 247 U. S. 201; *Mulford* v. *Smith,* 307 U. S. 38; *Peyton* v. *Railway Express Agency,* 316 U. S. 350. But we do not think that that broad grant of general jurisdiction may be invoked in face of the special circumstances which obtain here.

If the absence of jurisdiction of the federal courts meant a sacrifice or obliteration of a right which Congress had created, the inference would be strong that Congress intended the statutory provisions governing the general jurisdiction of those courts to control. That was the purport of the decisions of this Court in *Texas & New Orleans R. Co.* v. *Brotherhood of Clerks,* 281 U. S. 548, and *Virginian Ry. Co.* v. *System Federation,* 300 U. S. 515. In those cases it was apparent that but for the general jurisdiction of the federal courts there would be no remedy to enforce the statutory commands which Congress had written into the Railway Labor Act. The result would have been that the "right" of collective bargaining was unsupported by any legal sanction. That would have robbed the Act of its vitality and thwarted its purpose. Such considerations are not applicable here. The Act in § 2, Fourth writes into law the "right" of the "majority of any craft or class of employees" to "determine who shall be

the representative of the craft or class for the purposes of this Act." That "right" is protected by § 2, Ninth which gives the Mediation Board the power to resolve controversies concerning it and as an incident thereto to determine what is the appropriate craft or class in which the election should be held. See *Brotherhood of Railroad Trainmen* v. *National Mediation Board,* 88 F. 2d 757; *Brotherhood of Railroad Trainmen* v. *National Mediation Board,* 135 F. 2d 780. A review by the federal district courts of the Board's determination is not necessary to preserve or protect that "right." Congress for reasons of its own decided upon the method for the protection of the "right" which it created. It selected the precise machinery and fashioned the tool which it deemed suited to that end. Whether the imposition of judicial review on top of the Mediation Board's administrative determination would strengthen that protection is a considerable question.[2] All constitutional questions aside, it is for Congress to determine how the rights which it creates shall be enforced. *Tutun* v. *United States,* 270 U. S. 568, 576–577. In such a case the specification of one remedy normally excludes another. See *Arnson* v. *Murphy,* 109 U. S. 238; *Wilder Mfg. Co.* v. *Corn Products Refining Co.,* 236 U. S. 165, 174–175; *United States* v. *Babcock,* 250 U. S. 328, 331; *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U. S. 381, 404.

Generalizations as to when judicial review of administrative action may or may not be obtained are of course hazardous. Where Congress has not expressly authorized judicial review, the type of problem involved and the history of the statute in question become highly relevant in determining whether judicial review may be nonetheless supplied. See *United States* v. *Griffin,* 303 U. S. 226, 232–237. As is indicated at some length in *General Commit-*

[2] "Even courts have been known to make rulings thought by counsel to be erroneous." *Crane* v. *Hahlo,* 258 U. S. 142, 148.

tee of Adjustment v. *Missouri-Kansas-Texas R. Co., post,* p. 323, the emergence of railway labor problems from the field of conciliation and mediation into that of legally enforcible rights has been quite recent. Until the 1926 Act the legal sanctions of the various acts had been few. The emphasis of the legislation had been on conciliation and mediation; the sanctions were publicity and public opinion. Since 1926 there has been an increasing number of legally enforcible commands incorporated into the Act. And Congress has utilized administrative machinery more freely in the settlement of disputes. But large areas of the field still remain in the realm of conciliation, mediation, and arbitration. On only a few phases of this controversial subject has Congress utilized administrative or judicial machinery and invoked the compulsions of the law. We need not recapitulate that history here. Nor need we reiterate what we have said in the *Missouri-Kansas-Texas R. Co.* case beyond our conclusion that Congress intended to go no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate.

In that connection the history of § 2, Ninth is highly relevant. It was introduced into the Act in 1934 as a device to strengthen and make more effective the processes of collective bargaining. *Virginian Ry. Co.* v. *System Federation, supra,* pp. 543–549. It was aimed not only at company unions which had long plagued labor relations (*id.,* pp. 545–547) but also at numerous jurisdictional disputes between unions. Commissioner Eastman, draftsman of the 1934 amendments, explained the bill at the Congressional hearings. He stated that whether one organization or another was the proper representative of a particular group of employees was "one of the most controversial questions in connection with labor organization matters." Hearings, Committee on Interstate & Foreign Commerce, House of Representatives, on H. R. 7650, 73d Cong., 2d

Sess., p. 40. He stated that it was very important "to provide a neutral tribunal which can make the decision and get the matter settled." *Id.*, p. 41. But the problem was deemed to be so "highly controversial" that it was thought that the prestige of the Mediation Board might be adversely affected by the rulings which it would have to make in these jurisdictional disputes. *Id.*, p. 40. And see Hearings, Committee on Interstate Commerce, U. S. Senate, on S. 3266, 73d Cong., 2d Sess., pp. 134–135. Accordingly § 2, Ninth was drafted so as to give to the Mediation Board the power to "appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election." That was added so that the Board's "own usefulness of settling disputes that might arise thereafter might not be impaired." S. Rep. No. 1065, 73d Cong., 2d Sess., p. 3. Where Congress took such great pains to protect the Mediation Board in its handling of an explosive problem, we cannot help but believe that if Congress had desired to implicate the federal judiciary and to place on the federal courts the burden of having the final say on any aspect of the problem, it would have made its desire plain.

The fact that the certificate of the Mediation Board is conclusive is of course no ground for judicial review. *Great Northern Ry. Co.* v. *United States*, 277 U. S. 172, 182. Congress has long delegated to executive officers or executive agencies the determination of complicated questions of fact and of law. And where no judicial review was provided by Congress this Court has often refused to furnish one even where questions of law might be involved. See *Louisiana* v. *McAdoo*, 234 U. S. 627, 633; *United States* v. *George S. Bush & Co.*, 310 U. S. 371; *Work* v. *Rives*, 267 U. S. 175; *United States* v. *Babcock*, *supra*. We need not determine the full reach of that rule. See *Bates & Guild Co.* v. *Payne*, 194 U. S. 106; *Houston* v. *St. Louis Inde-*

pendent Packing Co., 249 U. S. 479. But its application here is most appropriate by reason of the pattern of this Act.

While the Mediation Board is given specified powers in the conduct of elections, there is no requirement as to hearings. And there is no express grant of subpoena power. The Mediation Board makes no "order." And its only ultimate finding of fact is the certificate. *Virginian Ry. Co.* v. *System Federation, supra,* p. 562. The function of the Board under § 2, Ninth is more the function of a referee. To this decision of the referee Congress has added a command enforcible by judicial decree. But the "command" is that "of the statute, not of the Board." *Id.*, p. 562.

The statutory mandate is that "the carrier shall treat with the representative so certified." § 2, Ninth. But the scheme of § 2, Ninth is analogous to that which existed in *Butte, A. & P. Ry. Co.* v. *United States,* 290 U. S. 127. In that case Congress provided compensation to the owners of short-line railroads for losses attributable to federal control of the main systems during the first World War. The Interstate Commerce Commission was directed by § 204 of the Transportation Act of 1920 to ascertain the amount of deficits or losses and to "certify to the Secretary of the Treasury the several amounts payable" to the carriers. And the Secretary of the Treasury was "authorized and directed thereupon to draw warrants in favor of each such carrier upon the Treasury of the United States for the amount shown in such certificate as payable thereto." Payments were made to the Butte company on such a certificate and the United States instituted suit to recover on the theory that the money had been disbursed on an erroneous interpretation of the statute. This Court, speaking through Mr. Justice Brandeis, held that since authority to interpret the statute was "essential to the performance of the duty imposed upon the Commission"

and since "Congress did not provide a method of review," the Government, as well as the carrier, was "remediless whether the error be one of fact or of law." *Id.*, pp. 142–143. Cf. *United States* v. *Great Northern Ry. Co.*, 287 U. S. 144.

In the present case the authority of the Mediation Board in election disputes to interpret the meaning of "craft" as used in the statute is no less clear and no less essential to the performance of its duty. The statutory command that the decision of the Board shall be obeyed is no less explicit. Under this Act Congress did not give the Board discretion to take or withhold action, to grant or deny relief. It gave it no enforcement functions. It was to find the fact and then cease. Congress prescribed the command. Like the command in the *Butte Ry.* case it contained no exception. Here as in that case the intent seems plain—the dispute was to reach its last terminal point when the administrative finding was made. There was to be no dragging out of the controversy into other tribunals of law.

That conclusion is reinforced by the highly selective manner in which Congress has provided for judicial review of administrative orders or determinations under the Act. There is no general provision for such review. But Congress has expressly provided for it in two instances. Thus Congress gave the National Railroad Adjustment Board jurisdiction over disputes growing out of "grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions." § 3, First (i). The various divisions of the Adjustment Board have authority to make awards. § 3, First (k)–(o). And suits based on those awards may be brought in the federal district courts. § 3, First (p). In such suits "the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated." The other instance in the Act where Congress provided for

judicial review is under § 9. The Act prescribes machinery for the voluntary arbitration of labor controversies. § 5, Third; § 7; § 8. It is provided in § 9 that an award of a board of arbitration may be impeached by an action instituted in a federal district court on the grounds specified in § 9, one of which is that "the award plainly does not conform to the substantive requirements laid down by this Act for such awards, or that the proceedings were not substantially in conformity with this Act." § 9, Third (a). When Congress in § 3 and in § 9 provided for judicial review of two types of orders or awards and in § 2 of the same Act omitted any such provision as respects a third type, it drew a plain line of distinction. And the inference is strong from the history of the Act that that distinction was not inadvertent. The language of the Act read in light of that history supports the view that Congress gave administrative action under § 2, Ninth a finality which it denied administrative action under the other sections of the Act.

Shields v. *Utah Idaho Central R. Co.*, 305 U. S. 177, is not opposed to that view. That case involved a determination by the Interstate Commerce Commission under § 1, First of the Act that the lines of the carrier in question did not constitute an interurban electric railway. The result was that the railroad company was a "carrier" within the meaning of the Act and subject to its criminal penalties. The carrier brought a suit in equity against a United States Attorney to restrain criminal prosecutions under the Act. This Court allowed the action to be maintained even though the Railway Labor Act contained no provision for judicial review of such rulings. But the decision was placed on the traditional use of equity proceedings to enjoin criminal proceedings. 305 U. S. p. 183. Moreover, it was the action of the Interstate Commerce Commission which this Court held to be reviewable. Although the authority of the Commission derived from the

Railway Labor Act, this Court quite properly related the issue not to railway labor disputes but to those transportation problems with which the Commission had long been engaged. And see *Shannahan* v. *United States*, 303 U. S. 596. The latter have quite a different tradition in federal law than those pertaining to carrier-employee relationships.

What is open when a court of equity is asked for its affirmative help by granting a decree for the enforcement of a certificate of the Mediation Board under § 2, Ninth raises questions not now before us. See *Virginian Ry. Co.* v. *System Federation, supra*, pp. 559–562.

Reversed.

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

MR. JUSTICE REED, dissenting:

This is an action by the petitioners, the Switchmen's Union of North America (hereinafter referred to as the Switchmen) and some of its members against the National Mediation Board, its members, the Brotherhood of Railroad Trainmen (hereafter referred to as the Brotherhood) and the New York Central Railroad Company and the Michigan Central Railroad Company, carrier employers of the members of the before-mentioned unions. The individual petitioners are members and officials of the Switchmen's Union and employees of one or the other of the carriers.

Petitioners were plaintiffs in the United States District Court for the District of Columbia. A certification of representatives for collective bargaining under § 2, Ninth, of the Railway Labor Act [1] was made by the Board to the carriers. This certification followed the invocation of the services of the Board to investigate a dispute among

[1] 44 Stat. 577, as amended 48 Stat. 1185.

the yardmen of the carriers as to their representative. The Brotherhood sought to be the representative for all the yardmen of rail lines, including the Michigan Central, operated by the New York Central Railroad Company and obtained the designation of participants in the election for representative of the employees upon this wide basis. The Switchmen contended that yardmen of certain designated parts of the carrier property should be permitted to choose separately their own representatives instead of being compelled to take part in a carrier-wide election.[2]

The Board of Mediation is the agency created by statute to designate employees who may participate in the selection of representatives under the Act.[3] The Board under-

[2] Finding 7 of the District Court shows the distribution of yardmen of the New York Central Lines based upon union affiliation, as follows:

"7. There are approximately 6,087 yardmen employed by the Railroad Company. At the time the Board's services were invoked the plaintiff Switchmen's Union represented the yardmen in all but nine yards on the New York Central—Lines West of Buffalo and in all yards on the Michigan Central west of the Detroit River, including the South Bend Transfer Crews. The defendant Brotherhood represented yardmen in yards on the Michigan Central east of the Detroit River, in nine yards on the New York Central—Lines West of Buffalo, and all yardmen on the New York Central—Lines East of Buffalo, the Toledo and Ohio Central, The Big Four, and the Boston and Albany; and at that time no one questioned the right of the Brotherhood to represent the yardmen employed on the four last mentioned lines."

[3] 48 Stat. 1185, 1188–9, § 2:

"Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon

took to perform this function and made its findings and conclusions after presentation of the issues by the Brotherhood, the Switchmen and other intervenors. The Board concluded that the

"Railway Labor Act vests the Board with no discretion to split a single carrier or combine two or more carriers for the purpose of determining who shall be eligible to vote for a representative of a craft or class of employees under Section 2, Ninth, of the Act, and the argument that it has such power fails to furnish any basis of law for such administrative discretion."

Consequently the Board found that the "New York Central Railroad Company and all of its operated subsidiaries . . . is a single carrier" and

"all of the employees of any given craft or class, such as yardmen, in the service of a carrier so determined must therefore be taken together as constituting the proper basis for determining their representation in conformity with Section 2, Ninth, of the Railway Labor Act.

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receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph."

"The mediator assigned to the investigation of this dispute will therefore proceed accordingly with the completion of his duties in connection with the Board's investigation of this dispute. That is to say, he shall regard as the proper basis for the representation of the yardmen in the service of the entire New York Central Railroad Company all of the yardmen in such service." The election based upon this determination and certification followed in due course.

After the Board's designation of all yardmen of the carrier lines as participants in the election, the election was held and the Brotherhood chosen as the representative. As stated in the court's opinion, upon the certification of the result to the carriers, petitioners sought to have the determination by the Board of the participants and the certification of the representatives cancelled. But in addition an injunction against the Brotherhood and the carriers was asked to restrain them from negotiating agreements concerning the craft of yardmen on the carriers' lines. This suit was brought in the District Court. It was there dismissed on the ground that the conclusion of the Board that all yardmen in the service of a single carrier may be taken together as constituting a proper basis for selecting a representative for collective bargaining "is reasonable, proper and not an abuse of discretion" and therefore should not be set aside. This decree was affirmed by the United States Court of Appeals for the District of Columbia but upon the ground of lack of power in the Board to act otherwise if the lines involved were a single carrier. The unity of the carrier is accepted.[4]

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[4] *Switchmen's Union* v. *National Mediation Board*, 135 F. 2d 785, 796:

"The argument was made to the Congressional Committees that the precise language now under consideration would bring possible repercussion in railway labor relations. Specific amendments were proposed which would have allowed the division of a craft or class. Congress

As treated by the Board and the courts below the problem presented by this case is one of statutory interpretation, whether or not § 2, Ninth, gives discretion to the Board to split the crafts of a single carrier into smaller units so that the members of such units may choose representatives of employees. This Court bases its conclusion upon the lack of power in any court to pass upon such an issue and leaves the interpretation of the authority granted by § 2, Ninth, finally to the Board. With this denial of judicial power, I cannot agree.

The constitutional validity of the principle of collective bargaining concerning "grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions" [5] of employees of interstate carriers is accepted.[6] It follows that the Congress, as an incident to such legislation, has the power to designate the representative of the employees or group or craft of em-

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was not persuaded that the unification process was not in the best interest of employees and carriers. It is for Congress to determine policy. Our province is to keep the Board within the confines of that policy. We are of the opinion that the Board correctly determined it had no discretion to deny the request of a majority of the yardmen employed by the Railroad Company to appoint a representative for their craft."

[5] 48 Stat. 1185, 1186–7, § 2:

"(1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this Act; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide 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."

[6] *Virginian Ry. Co.* v. *System Federation,* 300 U. S. 515, 553; *Texas & New Orleans R. Co.* v. *Brotherhood of Clerks,* 281 U. S. 548, 570.

ployees for the purpose of bargaining. Instead of making such selection itself Congress has delegated to the employees the choice of the representatives [7] and the determination of these representatives, in case of any dispute as to their identity, to the National Mediation Board. As these delegations are surrounded by adequate standards no question is raised as to the validity of the statutory provisions for the selection or determination of the representatives. Cf. *Opp Cotton Mills* v. *Administrator of Wage and Hour Division,* 312 U. S. 126, 142–146.

Where duties are delegated, as here, to administrative officers, those administrative officers are authorized to act only in accordance with the statutory standards enacted for their guidance. Otherwise we should risk administrative action beyond or contrary to the legislative will. Cf. *United States* v. *Carolina Freight Carriers Corp.,* 315 U. S.

[7] 48 Stat. 1185, 1187, § 2:

"Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided,* That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization."

475, 489. The Railway Labor Act does not provide specifically for judicial review of the certification by the Mediation Board under § 2, Ninth, of representatives, even though that certification is based upon an erroneous interpretation of the statute. Nor is there any clause in the Act granting to interested parties, generally, a right to have actions of the Board reviewed. Where an Act fails to provide for review of preliminary rulings determining status in preparation for subsequent action,[8] or performing administrative duties which were not final in character,[9] such rulings have not been considered as subject to review by virtue of general statutory review provisions. The reason that review is not allowed at such a stage is that the rulings or orders are only preparation for future effective action. The *Rochester Telephone Corporation* case, 307 U. S. at 143–4, teaches that where this otherwise abstract determination of status has instantaneous, final effect, such determination comes under general statutory review provisions. In the present instance the certification of § 2, Ninth, is but a preparatory step to bring about the collective bargaining which is the essential purpose of the Act but it does have an immediate effect since it destroys the petitioners' alleged right to participate in an election based on their view of the proper electoral unit. Yet there is no direct review of the certification, general or special, by the terms of the Railway Labor Act.

Nor is there necessarily an opportunity to attack the certification in later proceedings. An award of the Adjustment Board probably could not be challenged by the parties, in a judicial proceeding for its enforcement, on the ground that the representatives were not properly

[8] *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 130; *Shannahan* v. *United States,* 303 U. S. 596, 599.

[9] *United States* v. *Griffin,* 303 U. S. 226, 234; *United States* v. *Los Angeles & Salt Lake R. Co.,* 273 U. S. 299, 309–310.

chosen since this error would be irrelevant to the employee's rights.[10] On the other hand, the award of a board of arbitration under § 7 is subject to attack through statutory review provided by § 9, First, Second and Third. We construe the provision of Third (a) that the award may be impeached because "the proceedings were not substantially in conformity with this Act" to refer to the selection of bargaining representatives.[11] No other orders under the Act, legally binding on employees, spring from acts of bargaining representatives.[12]

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[10] § 3 (m), (n), (o), (p).

[11] 44 Stat. 577, 585, § 9:

"Third. Such petition for the impeachment or contesting of any award so filed shall be entertained by the court only on one or more of the following grounds:

"(a) That the award plainly does not conform to the substantive requirements laid down by this Act for such awards, or that the proceedings were not substantially in conformity with this Act; . . ."

That "proceeding" has such a meaning is strongly indicated by § 7, First, which reads as follows:

"Sec. 7. First. Whenever a controversy shall arise between a carrier or carriers and its or their employees which is not settled either in conference between representatives of the parties or by the appropriate adjustment board or through mediation, in the manner provided in the preceding sections, such controversy may, by agreement of the parties to such controversy, be submitted to the arbitration of a board of three (or, if the parties to the controversy so stipulate, of six) persons: . . ."

A binding arbitration brought about by improperly chosen representatives would be farcical.

[12] 44 Stat. 577, 586–7, as amended by 48 Stat. 1185, 1197, § 7:

"*Emergency Board.* Sec. 10. If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this Act and should, in the judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute. Such board shall be composed of such number of persons as to the President may seem desirable: *Provided, however,* That

The petitioners may not have an opportunity to impeach or contest an award of a board of arbitration reached after collective bargaining. The negotiations between the certified representative and the carriers may not require orders of the Adjustment Board or the board of arbitration. Mediation may compose the differences. § 5. In such cases there is no opportunity for the petitioners to intervene. As a consequence the Switchmen's Union and its members are left without an opportunity specifically provided by the Act to contest the ruling of the Board of Mediation that the Act "vests the Board with no discretion to split a single carrier . . . for the purpose of determining who shall be eligible to vote for a representative of a craft or class of employees under Section 2, Ninth, of the Act, . . ." They exhausted their administrative remedy when they appeared before the Mediation Board. 303 U. S. 41, 50.

The members of the Switchmen's Union and the Union itself, in view of the fact that it was the bargaining representative of its members prior to this controversy (R. 79), have an interest recognized by law in the selection of representatives. *Texas & New Orleans R. Co.* v. *Brotherhood of Clerks,* 281 U. S. 548, 571. This right adheres to his condition as an employee as a right of privacy does to a person. This right is created for these employees by the Railway Labor Act and, in appropriate proceedings, a remedy, provided by the general jurisdiction of district courts, to test the extent of this right to select representatives follows from the creation of the right unless negatived by statute, withdrawal of jurisdiction or the like,

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no member appointed shall be pecuniarily or otherwise interested in any organization of employees or any carrier. The compensation of the members of any such board shall be fixed by the President. Such board shall be created separately in each instance and it shall investigate promptly the facts as to the dispute and make a report thereon to the President within thirty days from the date of its creation."

when the right is claimed to be infringed. *Id.*, 569–70. *Virginian Ry. Co.* v. *System Federation,* 300 U. S. 515, 543. The remedy may not be available to parties with a standing to enforce it because, for example, the infringement may be by governmental action without consent of the Government to be sued for a wrong committed by it. The fact that the remedy may come from the general jurisdiction of the courts rather than from the review provisions of the Act is not significant. We cannot conclude that because no statutory review exists no remedy for misinterpretation of statutory powers is left. No such presumption of obliteration of rights may be entertained. *A. F. of L.* v. *Labor Board,* 308 U. S. 401, 412; *United States* v. *Griffin,* 303 U. S. 226, 238; *Shannahan* v. *United States,* 303 U. S. 596, 603.

The Court in this case and in *General Committee of Adjustment* v. *Missouri-Kansas-Texas R. Co., post,* p. 323, gives as reasons for denying power to the courts to determine the meaning of the statute the history of federal railway labor legislation and the omission of any provision in this Act for review of the determination of voting participants under § 2, Ninth.

The history of this legislation is adequately stated in the opinions to which reference is made in the preceding paragraph. From their review of the successive enactments in this field, it is plain that until the 1926 Act, the scheme for adjustment of railway labor disputes was without legal sanctions. In that Act, § 2, Third,[13] § 9, Second,[14]

[13] 44 Stat. 577, 578, § 2:

"Third. Representatives, for the purposes of this Act, shall be designated by the respective parties in such manner as may be provided in their corporate organization or unincorporated association, or by other means of collective action, without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other."

[14] *Id.*, 585, § 9:

"Second. An award acknowledged and filed as herein provided shall be conclusive on the parties as to the merits and facts of the con-

providing for the enforcement of arbitration awards, and § 10, authorizing emergency boards and forbidding changes in the conditions out of which the controversy arose for thirty days after the creation of an emergency board, established rights which were legally enforceable. The statute made the awards of § 9 subject to judicial control but only a dictum of this Court as to § 10 and judicial interpretation of § 2, Third, provided judicial sanction to compel compliance with their provisions. *Texas & New Orleans R. Co.* v. *Brotherhood of Clerks*, 281 U. S. 548, 564, 566–70.

The 1934 Act was directed particularly at control over the initial step in collective bargaining—the determination of the employees' representatives. Section 2, Ninth, here under examination, was an entirely new provision.[15] By the *Clerks* case, just cited, decided in 1929 and well known as a landmark of labor law, this Court had upheld judicial compulsion on the carrier to prohibit its interference in the selection of employee representatives even though there was no statutory authority for such judicial action.[16] Section 2, Ninth, of the 1934 Act created by

troversy submitted to arbitration, and unless, within ten days after the filing of the award, a petition to impeach the award, on the grounds hereinafter set forth, shall be filed in the clerk's office of the court in which the award has been filed, the court shall enter judgment on the award, which judgment shall be final and conclusive on the parties."

[15] Other completely new sections were the "General Purposes" of § 2 and § 2, Fourth, Fifth, Seventh, Eighth and Tenth. By Tenth criminal sanctions were applied to compel carrier compliance with the commands of Fourth, Fifth, Seventh and Eighth. These subdivisions were concerned with the right of employees to organize and to choose freely their representatives.

[16] 281 U. S. 548, 569:

"The absence of penalty is not controlling. The creation of a legal right by language suitable to that end does not require for its effectiveness the imposition of statutory penalties. Many rights are enforced for which no statutory penalties are provided. In the case of the statute in question, there is an absence of penalty, in the sense of specially prescribed punishment, with respect to the arbitral awards and

its terms a right in employees to participate in an election under the designation of the Board in accordance with the authorization of the statute. It was only natural therefore that Congress should assume that where its own creature, the Mediation Board, was charged with interference with the right of employees by a misconstruction of the statute under which it existed, that error of law would be subject to judicial examination to determine the correct meaning.

Nothing to which our attention has been called appears in the legislative history indicating a determination of Congress to exclude the courts from their customary power to interpret the laws of the nation in cases or controversies arising from administrative violations of statutory standards. No intention to refuse judicial aid in administration of the Act is apparent. Attention was called just above to the criminal sanctions written into § 2, Tenth. In addition provision is made in the Act for judicial review of the orders of the National Railroad Adjustment Board, § 3, First (p), and board of arbitration awards, § 9, Third. Furthermore, the National Mediation Board has appeared in many court cases, as here, involving its certifications and so far as appears neither the parties nor the courts have questioned judicial power.[17] The Board

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the prohibition of change in conditions pending the investigation and report of an emergency board, but in each instance a legal obligation is created and the statutory requirements are susceptible of enforcement by proceedings appropriate to each. The same is true of the prohibition of interference or coercion in connection with the choice of representatives. The right is created and the remedy exists. *Marbury* v. *Madison*, 1 Cranch 137, 162, 163."

[17] *Brotherhood of Railroad Trainmen* v. *National Mediation Board*, 88 F. 2d 757; *National Federation of Railway Workers* v. *National Mediation Board*, 110 F. 2d 529; *Order of Railway Conductors* v. *National Mediation Board*, 113 F. 2d 531. See also *Association of Clerical Employees* v. *Railway Clerks*, 85 F. 2d 152; *Brotherhood of Clerks* v. *Virginian Ry. Co.*, 125 F. 2d 853; *Brotherhood of Locomotive*

feels that such review has been profitable.[18] Against these later facts, the earlier reliance, prior to 1926, on voluntary action to enforce the railway labor statutes has little significance.

Nor in view of the statements and the decision in the *Clerks* case, do we think that the omission of statutory review from the provisions of § 2, Ninth, is important.

Firemen & Enginemen v. *Kenan*, 87 F. 2d 651; *Nashville, C. & St. L. Ry.* v. *Railway Employees' Dept.*, 93 F. 2d 340; *Brotherhood of Clerks* v. *Nashville, C. & St. L. Ry. Co.*, 94 F. 2d 97.

[18] Annual Report of the National Mediation Board, 1938, p. 5:

"The two cases decided by the courts clarifying the discretion vested in the National Mediation Board in connection with representation disputes both arose on the Nashville, Chattanooga & St. Louis Railway, and both were decided by the United States Circuit Court of Appeals for the Sixth Circuit. The first case [*Nashville, C. & St. L. Ry.* v. *Railway Employees Department, A. F. of L.*, 93 F. 2d 340] settled the issue concerning the right of furloughed employees retaining an employment status to vote in representation elections. The second decision [*Brotherhood of Clerks* v. *Nashville, C. & St. L. Ry. Co.*, 94 F. 2d 97] held that the National Mediation Board, when establishing eligible lists of voters and conducting elections in order to determine the representative of employees of a carrier by craft or class must do so with due regard for all of the facts, historical and otherwise, which have operated to shape the craft or class of employees on the carrier concerned as well as on railroads generally. Both decisions are very helpful to the Board in that they serve to settle issues which, in the past, have frequently arisen to trouble the orderly and prompt adjustment of disputes over representation between different factions among employees."

Id., 1942, p. 7:

"During the 8-year experience of the Board under the representation provisions of the law it is gratified to be able to report that in all but a few instances its actions in interpreting and applying these provisions of the law have been sustained by the courts. In all instances, however, the Board has benefited by court review and analysis of its actions and the facts of the disputes. The court rulings and opinions have clarified and settled many disputed points of the law and the Board's authority. Thus they constitute a valuable contribution in the solution of labor disputes."

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The requirement of that very subsection that "the carrier shall treat with the representatives so certified" was construed as an affirmative command open to judicial enforcement without specific statutory authority. *Virginian Ry. Co.* v. *System Federation,* 300 U. S. 515, 544.

Butte, A. & P. Ry. Co. v. *United States,* 290 U. S. 127, is cited as authority for a conclusion that delegation of an administrative duty carries to the appointee the authority to finally construe the statute since such authority was " 'essential to the performance of the duty imposed upon the Commission' and since 'Congress did not provide a method of review,' the Government, as well as the carrier, was 'remediless whether the error be one of fact or of law.' " This was a case in which the Government ordered payments to carriers as compensation for deficits incurred during federal operation of the railways. It was determined that Congress intended to leave finally the determination of the beneficiaries to its agent, the Interstate Commerce Commission. This intention is far easier to deduce when the Congress is dealing with its own money than where it creates rights of suffrage for citizens to exercise for the improvement of their economic condition.

The *Virginian Railway* case presents a much closer analogy to the present controversy. As pointed out above, it dealt with the carrier's duty to "treat with" employees declared by § 2, Ninth. Employees sought and obtained a judicial order directing the railroad to negotiate on the ground that new duties, requirements and rights were created "mandatory in form and capable of enforcement by judicial process." Despite the absence of statutory authority for court action it was held Congress intended legal sanction. A prohibition of negotiation, such as petitioners seek here, is *a fortiori,* within judicial competence.[19]

[19] Compare *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U. S. 381, 391, where this Court took cognizance of a suit seeking judicial review

One factor to test the intention of Congress, it is suggested in the M. K. T. opinion of today, *post*, p. 323, is whether Congress was willing to crystallize the problem into "statutory commands." The statutory command for which determination is sought here is that the Board exercise its discretion. In the same opinion, it is said, "the command of the Act should be explicit and the purpose to afford a judicial remedy plain before an obligation enforcible in the courts should be implied." Here, Congress has unequivocally provided that "employees shall have the right to organize and bargain collectively through representatives" chosen by the majority of each "craft or class." The special competence of the National Mediation Board lies in the field of labor relations rather than in that of statutory construction. Of course the judiciary does not make the administrative determination. "The functions of the courts cease when it is ascertained that the findings of the Commission meet the statutory test." *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381, 400. Likewise, the National Mediation Board may be conceded discretion to make any reasonable determination of the meaning of the words, "craft or class." Cf. *Gray* v. *Powell*, 314 U. S. 402. By requiring a plain sanction for a judicial remedy, the court authorizes the Mediation Board to determine not only questions judicially found to be committed to its discretion, as in *Gray* v. *Powell, supra*, but the statutory limits of its own powers as well. It seems more consonant with the genius of our institutions [20] to assume,

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of administrative action without such authority in the statute under attack. See § 6, Bituminous Coal Act, 50 Stat. 85. Review was had under Judicial Code § 24 (1) and 28 U. S. C. § 380 (a).

[20] An erroneous order of the Secretary of the Interior was similarly canceled when, without statutory authority, he struck the name of an enrollee from the rolls of an Indian Nation. This Court said: "But, as has been affirmed by this court in former decisions, there is no place in our constitutional system for the exercise of arbitrary

not that the purpose to apply a legal sanction must be plain, but that in the absence of any express provision to the contrary, Congress intended the general judicial authority conferred by the Judicial Code to be available to a union and its members aggrieved by an administrative order presumably irreconcilable with a statutory right so explicitly framed as the right to bargain through representatives of the employees' own choosing.[21]

The petitioners assert their rights as rights arising under the Railway Labor Act, which is stated to be a law of the United States relating to interstate commerce. If this allegation is correct, and we think it is, there is jurisdiction of the subject matter of the suit under Judicial Code, § 24 (8): "The district courts shall have original jurisdiction as follows: . . . Eighth. Of all suits and proceedings arising under any law regulating commerce." The general purpose of the Act is to avoid interruption to commerce by prohibition of interference with the employees' freedom of association and by provision for collective bargaining to settle labor disputes.[22] This regulates commerce.

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power, and if the Secretary has exceeded the authority conferred upon him by law, then there is power in the courts to restore the status of the parties aggrieved by such unwarranted action." *Garfield* v. *Goldsby*, 211 U. S. 249, 262. Cf. *Ness* v. *Fisher*, 223 U. S. 683, 694. Compare *Ickes* v. *Fox*, 300 U. S. 82; *West* v. *Standard Oil Co.*, 278 U. S. 200, 220; *Work* v. *Louisiana*, 269 U. S. 250, 254.

[21] When Congress has intended to bar access to the courts, in whole or in part, it has understood how to express its determination. Emergency Price Control Act of 1942, § 204, 56 Stat. 23; chap. 335, 23 Stat. 350; § 4 (b), 44 Stat. 828.

[22] 48 Stat. 1185, 1187, § 2:

"First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof." See note 5.

The right to select representatives with whom carriers must bargain was created by the Act and the remedy sought here arises under that law. Since the cause of action "had its origin and is controlled by" the Railway Labor Act, it arises under it. *Peyton* v. *Railway Express Agency,* 316 U. S. 350; *Mulford* v. *Smith,* 307 U. S. 38, 46; *Turner Lumber Co.* v. *Chicago, M. & St. P. Ry. Co.,* 271 U. S. 259, 261; *Louisville & Nashville R. Co.* v. *Rice,* 247 U. S. 201.

Since the Court declines federal jurisdiction, it is useless to discuss either the merits or the other procedural questions such as jurisdiction in equity to grant the injunction requested, the power to vacate the order of the Mediation Board or the effect of the Norris-La Guardia Act.

MR. JUSTICE ROBERTS and MR. JUSTICE JACKSON join in this dissent.

GENERAL COMMITTEE OF ADJUSTMENT OF THE BROTHERHOOD OF LOCOMOTIVE ENGINEERS FOR THE MISSOURI-KANSAS-TEXAS RAILROAD *v.* MISSOURI-KANSAS-TEXAS RAILROAD CO. ET AL.

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

No. 23. Argued October 14, 1943.—Decided November 22, 1943.

Between a labor organization which was the duly designated bargaining representative for the craft of engineers employed by certain carriers, and another which was the duly designated bargaining representative for the craft of firemen employed on the same lines, a dispute arose relative to the calling of men for emergency service as engineers. Efforts to settle the dispute having failed, the matter was submitted to the National Mediation Board, and a mediation agreement between the Firemen and the carriers resulted. The Engineers then brought an action in the federal District Court for a declaratory judgment that the agreement was in violation of the Railway Labor Act and that the Engineers should be declared to be

the sole representative of the craft of engineers with the exclusive right to bargain for them. The carriers in their answer prayed that the court declare the respective rights of the parties. The Firemen, though challenging the jurisdiction of the court, in the alternative asked that the agreement be declared void. *Held* that the issues tendered were not justiciable and that the District Court was without jurisdiction to resolve the controversy. P. 327.

1. The case involves no right which under the Railway Labor Act is enforcible by the courts; and therefore the action is not one "arising under any law regulating commerce" and not within the original jurisdiction of the District Court under Jud. Code § 24 (8). P. 337.

In view of the pattern of the Railway Labor Act and its history, the command of the Act should be explicit and the purpose to afford a judicial remedy plain before an obligation enforcible in the courts should be implied. P. 337.

2. The District Court was without power to enter a declaratory decree for the benefit of any of the parties. P. 337.

132 F. 2d 91, reversed.

CERTIORARI, 319 U. S. 736, to review a judgment which modified and affirmed a decree dismissing the complaint in an action for a declaratory judgment.

Messrs. John W. Madden, Jr. and *Harold N. McLaughlin,* with whom *Mr. Clarence E. Weisell* was on the brief, for petitioner.

Mr. Lucian Touchstone, with whom *Messrs. Allen Wight* and *C. S. Burg* were on the brief, for the Missouri-Kansas-Texas Railroad Co., et al.; and *Mr. Harold C. Heiss,* with whom *Messrs. Russell B. Day* and *T. D. Gresham* were on the brief, for the General Grievance Committee of the Brotherhood of Locomotive Firemen and Enginemen,— respondents.

Solicitor General Fahy and *Mr. Robert L. Stern* filed a brief on behalf of the United States, as *amicus curiae,* urging reversal.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This case involves a dispute under the Railway Labor Act concerning the authority of two railroad Brotherhoods to represent certain employees in collective bargaining with the defendant-carriers. The petitioner (hereinafter called the Engineers) is a committee of the Brotherhood of Locomotive Engineers which has been and is the duly designated bargaining representative for the craft of engineers employed by the carriers. The third-party defendant (hereinafter called the Firemen) is a committee of the Brotherhood of Locomotive Firemen and Enginemen which has been and is the duly designated bargaining representative for the craft of firemen on the same lines. Each craft has long had an agreement with the carriers concerning rules, rates of pay, and working conditions. The agreement with the Engineers states that the right to make and interpret contracts, rules, rates and working agreements for locomotive engineers is vested in that committee. The agreement with the Firemen contains a similar provision concerning members of that craft. Both agreements also contain rules governing the demotion of engineers to be firemen, the promotion of firemen to be engineers, and return of demoted engineers to their former work.[1] For many years the two Brotherhoods had an

[1] Generally speaking, employees hired under collective bargaining agreements as firemen immediately begin to acquire seniority as such. After a certain period firemen are required to take an engineer's examination. Vacant positions as engineers are filled from the list of those who have passed the qualifying tests. When it is necessary to reduce the force of working engineers those with the lowest seniority are dropped and they resume their positions as firemen in accordance with the seniority in that craft. As a result, firemen with a lower seniority are moved down the ladder of jobs. Thus the most junior firemen are deprived of work and furloughed until their services are needed. When a vacancy occurs in the engineers' ranks or when the work of engineers increases, all move up the ladder of jobs again.

agreement which established rules and regulations on these subjects and which provided machinery for resolving disputes which might arise between them. This agreement was cancelled in 1927. The present dispute arose since that time and relates to the calling of engineers for emergency service. In general the Engineers and the carriers had a working arrangement providing (1) that, excepting Smithville, Texas, the senior available demoted engineer whose home terminal was at the place where the service was required or the man assigned to the particular run as fireman, if he had greater seniority as engineer, would be chosen when it was necessary to call an engineer for emergency service; (2) that the regulation of the engineers' working lists was to be handled by the Engineers' local chairman, not by the management; and (3) that at Smithville, emergency work would be performed by advancing the assignment of engineers in the so-called "pool," [2] instead of calling in emergency engineers. These arrangements were not satisfactory to the Firemen. After protest to the carriers and after a failure of the Brotherhoods to resolve their dispute the matter was submitted to the National Mediation Board for mediation. The Engineers did not participate. The Firemen and the carriers entered into the Mediation Agreement of December 12, 1940, the validity of which is here challenged. The effect of that agreement was in general to eliminate the preference previously given to engineers of the home terminal and the special arrangement at Smithville in favor of the pool engineers. It also changed the practice respecting the handling of the engineers' working lists—

[2] Engineers are generally assigned in order of seniority to regular runs (both passenger and freight), then to pool freight service (which rotates irregular runs among the pool members on a first in first out basis), and then to extra boards of engineers from which assignments are made as positions are available. If no engineer in those categories is available, the senior available qualified engineer working as a fireman is called as an "emergency" engineer.

thereafter the assignments would be handled by the management assisted by the local chairmen of the two groups. After making the agreement the carriers gave notice to the Engineers that they were cancelling previous arrangements with that Brotherhood.

The Engineers then brought this action for a declaratory judgment (48 Stat. 955, 28 U. S. C. § 400) that the agreement of December 12, 1940, was in violation of the Railway Labor Act (44 Stat. 577, 48 Stat. 1185, 45 U. S. C. § 151) and that the Engineers should be declared to be the sole representative of the locomotive engineers with the exclusive right to bargain for them. The carriers in their answer prayed that the court declare the respective rights of the parties. And the Firemen, though challenging the jurisdiction of the court, in the alternative asked that the agreement of December 12, 1940, be declared valid. The District Court dismissed the petition, holding that the carriers had a right to contract with either of the crafts with reference to the problems in question. The Circuit Court of Appeals held that both crafts were interested in the subject matter of the dispute, that neither craft had an exclusive right to bargain concerning the matters in issue, that the representatives of both crafts should confer and if possible agree, and that the agreement of December 12, 1940, might be terminated by the carriers if not acquiesced in by the Engineers. 132 F. 2d 91.

The case is here on a petition for certiorari which we granted because of the importance of the problems raised by the assumption of jurisdiction over such controversies by the federal courts.

The bulk of the argument here relates to the merits of the dispute. But we do not intimate an opinion concerning them. For we are of the view that the District Court was without power to resolve the controversy.

It is our view that the issues tendered by the present litigation are not justiciable—that is to say that Congress

by this Act has foreclosed resort to the courts for enforcement of the claims asserted by the parties.

The history of this legislation has been traced in earlier cases coming before this Court. See *Pennsylvania R. Co.* v. *Railroad Labor Board,* 261 U. S. 72; *Pennsylvania System Federation* v. *Pennsylvania R. Co.,* 267 U. S. 203; *Texas & New Orleans R. Co.* v. *Brotherhood of Clerks,* 281 U. S. 548; *Virginian Ry. Co.* v. *System Federation No. 40,* 300 U. S. 515. The present Act is the product of some fifty years of evolution.[3] For many years the

[3] The first of seven statutes enacted during this period was the Arbitration Act of 1888, 25 Stat. 501. This act provided for the voluntary arbitration of disputes and authorized the President to set up investigating committees. It was superseded in 1898 by the Erdman Act (30 Stat. 424) which provided machinery for arbitration and also introduced for the first time the policy of mediation. The mediators were the chairman of the Interstate Commerce Commission and the United States Commissioner of Labor. Next came the Newlands Act of 1913 (38 Stat. 103) which established a permanent Board of Mediation and Conciliation. Under both the Erdman and Newlands acts, mediation was to be employed first, and upon failure of that the mediators were to attempt to have the parties arbitrate. In 1916 Congress passed the Adamson Act (39 Stat. 721) in settlement of a dispute over the eight-hour day. That act provided for an eight-hour day for train operators and a commission to enforce it. Upon return of the railroads to private ownership, the Esch-Cummins law was passed. See Title III of the Transportation Act of 1920, 41 Stat. 456. This act differed from the earlier legislation by providing for public representation on a newly created Railroad Labor Board, by permitting the Board to investigate all disputes of its own initiative, and by placing the primary burden of settlement of disputes on direct negotiations between the parties. In 1926 Congress passed the first Railway Labor Act (44 Stat. 577) which was amended in 1934, 48 Stat. 1185. See Alderman, The History of Federal Legislation Dealing with Machinery for Settling Disputes Concerning Wages and Working Conditions of Employees of Interstate Railroads (1938); The Railway Labor Act and the National Mediation Board (1940), pp. 7–8, 67–76; Fisher, Industrial Disputes (1940), pp. 154–86; Johnson, Government Regulation of Transportation (1938), pp. 190–206; Parmelee, The Modern Railway (1940), pp. 420–35; Spencer, The

only sanctions under the various Congressional enactments in this field were publicity and public opinion. A conspicuous example concerns the Railroad Labor Board, constituted under the Transportation Act of 1920. It had important functions to perform. But this Court held in the *Federation No. 90* case (267 U. S. 203) that the Board's decisions were not supported by any legal sanctions. The parties to the labor controversies covered by the Act were not "in any way to be forced into compliance with the statute or with the judgments pronounced by the Labor Board, except through the effect of adverse public opinion." *Id.*, p. 216. The 1926 Act (44 Stat. 577) made a basic change in the pattern of the railway labor legislation which had preceded.[4] Conciliatory means were adhered to; provisions for mediation and arbitration were adopted; and the use of that machinery on a voluntary basis was encouraged.[5] But Congress also supported its policy with the imposition of some rules of conduct for breach of which the courts afford a sanction. Thus Congress stated in § 2, Third of the 1926 Act that the choice by employees of their collective bargaining representatives should be free from the carriers' coercion and influence. That "definite statutory prohibition of conduct which would thwart the declared purpose" of the Act was held by this Court in the *Clerks* case to be enforcible in an appropriate suit. 281 U. S. 548, 568. As stated by Chief Justice Hughes in that case:

"Freedom of choice in the selection of representatives on each side of the dispute is the essential foundation of

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National Railroad Adjustment Board (1938), pp. 1–16; Witte, The Government in Labor Disputes (1932), pp. 238–44; Wolf, The Railroad Labor Board (1927), pp. 1–13; Garrison, The National Railroad Adjustment Board: A Unique Administrative Agency, 46 Yale L. J. 567.

[4] The Railway Labor Act and the National Mediation Board (1940), pp. 1–8.

[5] S. Rep. No. 222, 69th Cong., 1st Sess., p. 4.

the statutory scheme. All the proceedings looking to amicable adjustments and to agreements for arbitration of disputes, the entire policy of the Act, must depend for success on the uncoerced action of each party through its own representatives to the end that agreements satisfactory to both may be reached and the peace essential to the uninterrupted service of the instrumentalities of interstate commerce may be maintained. There is no impairment of the voluntary character of arrangements for the adjustment of disputes in the imposition of a legal obligation not to interfere with the free choice of those who are to make such adjustments. On the contrary, it is of the essence of a voluntary scheme, if it is to accomplish its purpose, that this liberty should be safeguarded. The definite prohibition which Congress inserted in the Act can not therefore be overridden in the view that Congress intended it to be ignored. As the prohibition was appropriate to the aim of Congress, and is capable of enforcement, the conclusion must be that enforcement was contemplated." 281 U. S. p. 569.

Thus what had long been a "right" of employees enforcible only by strikes and other methods of industrial warfare emerged as a "right" enforcible by judicial decree. The right of collective bargaining was no longer dependent on economic power alone.

Further protection was accorded that right by the amendments which were added in 1934. Thus § 2, Ninth provided machinery strengthening the representation provisions of the Act. H. Rep. No. 1944, 73d Cong., 2d Sess., p. 2. That new provision gave the National Mediation Board an adjudicatory function in the settlement of representation disputes. It provided for a reference to that Board of representation disputes arising among a carrier's employees. It charged the Board with the "duty" upon the request of either party to the dispute to investigate the controversy and to certify the name or names

of the designated and authorized representatives of the employees. And Congress added the command that "Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act." It was that specific command for disobedience of which this Court held in the *Virginian Ry. Co.* case (300 U. S. 515) that courts would provide a remedy. That result was reached over the objection that § 2, Ninth stated a policy but created no rights or duties enforcible by judicial decree. This Court reviewed the history of § 2, Ninth—its purpose and meaning. It concluded that the provision in question was "mandatory in form and capable of enforcement by judicial process." *Id.*, p. 545. It observed that if the provision were construed as being precatory only, its addition to the Act was "purposeless"; that only a requirement of "some affirmative act on the part of the employer" would add to the 1926 Act. *Id.*, p. 547. The Court accordingly concluded that the command of § 2, Ninth could not have been intended to be without legal sanction.

Other similar statutory commands or prohibitions were provided by Congress. The right of the majority of a craft or class to determine who shall be the craft or class representative (§ 2, Fourth); the right of the employees to designate as their representative one who is not an employee of the carrier (§ 2, Third); the prohibition against "yellow dog" contracts (§ 2, Fifth) are illustrative.[6] Moreover, administrative machinery was provided for the adjudication of certain controversies. Congress established the National Railroad Adjustment Board for the settlement of specific types of disputes or grievances between employees and the carrier. § 3. And Congress gave the courts jurisdiction to entertain suits based on the awards of the Adjustment Board. § 3, First (p). That

[6] Criminal penalties were added by § 2, Tenth for the wilful violation of certain provisions of the Act including the three just mentioned.

feature of the Act, as well as § 2, Ninth which placed on the Mediation Board definite adjudicatory functions, transferred certain segments of railway labor problems from the realm of conciliation and mediation to tribunals of the law. The new administrative machinery plus the statutory commands and prohibitions marked a great advance in supplementing negotiation and self-help with specific legal sanctions in enforcement of the Congressional policy.

But it is apparent on the face of the Act that while Congress dealt with this subject comprehensively, it left the solution of only some of those problems to the courts or to administrative agencies. It entrusted large segments of this field to the voluntary processes of conciliation, mediation, and arbitration. Thus by § 5, First, Congress provided that either party to a dispute might invoke the services of the Mediation Board in a "dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference" and any other "dispute not referable" to the Adjustment Board and "not adjusted in conference between the parties or where conferences are refused." [7] Beyond the mediation machinery furnished by the Board lies arbitration. § 5, First and Third, § 7. In case both fail there is the Emergency Board which may be established by the President under § 10. In short, Congress by this legislation has freely employed the traditional instruments of mediation, conciliation and arbitration. Those instruments, in addition to the available economic weapons, remain unchanged in large areas of this railway labor field. On only certain phases of this controversial subject has Congress utilized

[7] The Mediation Board also has power of interpretation of mediation agreements. § 5, Second. It likewise has duties with respect to the arbitration of disputes. See § 5, Third. Mediation is the Board's "most important task." Eighth Annual Report, National Mediation Board (1942) p. 4.

administrative or judicial machinery and invoked the compulsions of the law. Congress was dealing with a subject highly charged with emotion. Its approach has not only been slow; it has been piecemeal. Congress has been highly selective in its use of legal machinery. The delicacy of these problems has made it hesitant to go too fast or too far. The inference is strong that Congress intended to go no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate.

That history has a special claim here. It must be kept in mind in analyzing a bill of complaint which, like the present one, seeks to state a cause of action under the Railway Labor Act and asks that judicial power be exerted in enforcement of an obligation which it is claimed Congress has created.

The Engineers assert that the carriers had no right under the Act to negotiate with the Firemen on the subject of emergency engineers and that the Mediation Agreement of December 12, 1940, is therefore void. They rely on § 2, Fourth of the Act and on § 2, First and Ninth.[8] Sec. 2, Fourth states that "Employees shall have the right to organize and bargain collectively through representatives of their own choosing." But that great right, which Congress in 1926 at last supported with legal sanctions, is not challenged here. The Engineers and the Firemen are the collective bargaining agents for their respective crafts and are acknowledged as such. Their authority so to act is not

[8] Respondents in support of their prayers for declaratory relief rely not only on the implications from these and other sections of the Act but also on the proviso clause of § 1, Fifth to the effect "That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this Act or by the orders of the Commission."

challenged. Nor is it apparent how the majority rule provision of § 2, Fourth is involved here. It states that "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act." But concededly the Engineers represent a majority of the craft of engineers and the Firemen a majority of the firemen's craft. The principle of majority representation is not challenged. Nor does § 2, Second make justiciable what otherwise is not. It provides that "All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute." As we have already pointed out, § 2, Ninth, after providing for a certification by the Mediation Board of the particular craft or class representative, states that "the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act." That command of § 2, Ninth was enforced in the *Virginian Ry. Co.* case. But § 2, Second, like § 2, First,[9] merely states the policy which those other provisions buttress with more particularized commands.

It is true that the present controversy grows out of an application of the principles of collective bargaining and majority rule. It involves a jurisdictional dispute—an asserted overlapping of the interests of two crafts. It necessitates a determination of the point where the au-

[9] Sec. 2, First provides: "It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

thority of one craft ends and the other begins or of the zones where they have joint authority. In the *Clerks* case and in the *Virginian Ry. Co.* case the Court was asked to enforce statutory commands which were explicit and unequivocal. But the situation here is different. Congress did not attempt to make any codification of rules governing these jurisdictional controversies. It did not undertake a statement of the various principles of agency which were to govern the solution of disputes arising from an overlapping of the interests of two or more crafts. It established the general principles of collective bargaining and applied a command or prohibition enforcible by judicial decree to only some of its phases. The contention, however, is that the rule which Congress intended to govern can be found from the implications of the Act. Thus it is argued that the reasons which support the holding in the *Virginian Ry. Co.* case that the right of majority craft representation is exclusive also suggest that Congress intended to write into the Railway Labor Act a restriction on the rules and working conditions concerning which the craft has the right to contract. It is pointed out that if the jurisdiction of a craft within which the exclusive right may be exercised is not limited, then disputes between unions may defeat the express purposes of the Act. In that connection reference is made to the statement of this Court in the *Virginian Ry. Co.* case (300 U. S. p. 548) that the Act imposes upon the carrier "the affirmative duty to treat only with the true representative, and hence the negative duty to treat with no other." That expresses the basic philosophy of § 2, Ninth. But the decision does not imply, as is argued here, that every representation problem arising under the Act presents a justiciable controversy. It does not suggest that the respective domains for two or more overlapping crafts should be litigated in the federal district courts.

It seems to us plain that when Congress came to the question of these jurisdictional disputes, it chose not to leave their solution to the courts. As we have already pointed out, Congress left the present problems far back in the penumbra of those few principles which it codified. Moreover, it selected different machinery for their solution. Congress did not leave the problem of inter-union disputes untouched. It is clear from the legislative history of § 2, Ninth that it was designed not only to help free the unions from the influence, coercion and control of the carriers but also to resolve a wide range of jurisdictional disputes between unions or between groups of employees.[10] H. Rep. No. 1944, *supra,* p. 2; S. Rep. No. 1065, 73d Cong., 2d Sess., p. 3. However wide may be the range of jurisdictional disputes embraced within § 2, Ninth,[11] Congress did not select the courts to resolve them. To the contrary, it fashioned an administrative remedy and left that group of disputes to the National Mediation Board. If the present dispute falls within § 2, Ninth, the administrative remedy is exclusive.[12] If a narrower view of § 2, Ninth is taken, it is difficult to believe that Congress

[10] This is made clear by Commissioner Eastman, the draftsman of the 1934 amendments, in his testimony at the hearings. See Hearings, Committee on Interstate and Foreign Commerce, House of Representatives, 73d Cong., 2d Sess., on H. R. 7650, pp. 39–41, 45, 57–58, 59.

[11] It is apparently the view of the National Mediation Board that § 2, Ninth was designed to cover only those disputes entailing an election by employees of their representatives. See *Brotherhood of Railroad Trainmen* v. *National Mediation Board,* 135 F. 2d 780, 782. In an election case the Board may have to make a preliminary determination as to the eligibility of voters involving the type of problem presented here. See *Brotherhood of Railroad Trainmen* v. *National Mediation Board,* 88 F. 2d 757, dealing with the question whether brakemen having seniority as conductors could vote in the conductors' election.

[12] Whether judicial power may ever be exerted to require the Mediation Board to exercise the "duty" imposed upon it under § 2, Ninth and, if so, the type or types of situations in which it may be invoked present questions not involved here.

saved some jurisdictional disputes for the Mediation Board and sent the parties into the federal courts to resolve the others. Rather the conclusion is irresistible that Congress carved out of the field of conciliation, mediation and arbitration only the select list of problems which it was ready to place in the adjudicatory channel. All else it left to those voluntary processes whose use Congress had long encouraged to protect these arteries of interstate commerce from industrial strife. The concept of mediation is the antithesis of justiciability.

In view of the pattern of this legislation and its history the command of the Act should be explicit and the purpose to afford a judicial remedy plain before an obligation enforcible in the courts should be implied. Unless that test is met the assumption must be that Congress fashioned a remedy available only in other tribunals. There may be as a result many areas in this field where neither the administrative nor the judicial function can be utilized. But that is only to be expected where Congress still places such great reliance on the voluntary process of conciliation, mediation and arbitration. See H. Rep. No. 1944, 73d Cong., 2d Sess., p. 2. Courts should not rush in where Congress has not chosen to tread.

We are here concerned solely with legal rights under this federal Act which are enforcible by courts. For unless such a right is found it is apparent that this is not a suit or proceeding "arising under any law regulating commerce" over which the District Court had original jurisdiction by reason of § 24 (8) of the Judicial Code, 28 U. S. C. § 41 (8). Cf. *Puerto Rico* v. *Russell & Co.*, 288 U. S. 476, 483; *Gully* v. *First National Bank*, 299 U. S. 109; *Peyton* v. *Railway Express Agency*, 316 U. S. 350, 352. When a court has jurisdiction it has of course "authority to decide the case either way." *The Fair* v. *Kohler Die Co.*, 228 U. S. 22, 25. But in this case no declaratory decree should have been entered for the benefit of any of

the parties. Any decision on the merits would involve the granting of judicial remedies which Congress chose not to confer.

Reversed.

MR. JUSTICE JACKSON concurs in the result.

MR. JUSTICE ROBERTS and MR. JUSTICE REED are of the view that the Court should entertain jurisdiction of the present controversy for the reasons set out in the dissent in *Switchmen's Union* v. *National Mediation Board, ante,* p. 307.

GENERAL COMMITTEE OF ADJUSTMENT OF THE BROTHERHOOD OF LOCOMOTIVE ENGINEERS FOR THE PACIFIC LINES OF SOUTHERN PACIFIC CO. *v.* SOUTHERN PACIFIC CO. ET AL.

NO. 27. CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.*

Argued October 14, 15, 1943.—Decided November 22, 1943.

Upon the authority of *General Committee of Adjustment* v. *Missouri-Kansas-Texas R. Co., ante,* p. 323, and *Switchmen's Union* v. *National Mediation Board, ante,* p. 297, *held* that the questions in this case—arising out of a so-called jurisdictional controversy between labor unions—are not justiciable issues under the Railway Labor Act and the District Court was without power to resolve them. P. 343.

132 F. 2d 194, reversed.

CERTIORARI, 319 U. S. 736, on cross-petitions to review a judgment which modified and affirmed a decree determining on the merits a suit for a declaratory judgment.

*Together with No. 41, *General Grievance Committee of the Brotherhood of Locomotive Firemen and Enginemen* v. *General Committee of Adjustment of the Brotherhood of Locomotive Engineers for the Pacific Lines of Southern Pacific Co. et al.,* also on certiorari to the Circuit Court of Appeals for the Ninth Circuit.

Messrs. Clarence E. Weisell and *George M. Naus,* with whom *Mr. Harold N. McLaughlin* was on the briefs, for the General Committee of Adjustment of the Brotherhood of Locomotive Engineers, petitioner in No. 27 and respondent in No. 41; *Mr. Donald R. Richberg,* with whom *Messrs. Felix T. Smith* and *Francis R. Kirkham* were on the brief, for the General Grievance Committee of the Brotherhood of Locomotive Firemen and Enginemen, petitioner in No. 41 and respondent in No. 27.

Mr. Burton Mason, with whom *Messrs. C. W. Durbrow* and *Henley C. Booth* were on the brief, for the Southern Pacific Co., respondent in Nos. 27 and 41.

Solicitor General Fahy and *Mr. Robert L. Stern* filed a brief on behalf of the United States, as *amicus curiae,* urging affirmance.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

These are companion cases to *General Committee of Adjustment* v. *Missouri-Kansas-Texas R. Co., ante,* p. 323, and *Switchmen's Union* v. *National Mediation Board, ante,* p. 297. They are here on a petition and on a cross-petition for writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit. No. 41, the cross-petition, involves a dispute between the collective bargaining representatives of the locomotive engineers and of the locomotive firemen on the Pacific lines of the Southern Pacific Co. The controversy involves the same basic question as is present in the *Missouri-Kansas-Texas R. Co.* case. The committee for the engineers (hereinafter called the Engineers) brought this action for a declaratory judgment that provisions of a June, 1939 agreement between the carrier and the committee for the firemen (hereinafter called the Firemen) concerning the demotion of engineers to firemen and the calling of firemen for service as emergency

engineers were invalid under the Railway Labor Act. The courts below undertook to resolve the controversy. See 132 F. 2d 194, 202–206. For the reasons stated in the *Missouri-Kansas-Texas R. Co.* case we think that the questions are not justiciable issues under the Railway Labor Act.

The question presented in No. 27 is related to the questions in the other two cases. In the suit brought by the Engineers (No. 41) a declaratory judgment was also asked that Article 51, § 1 of the collective bargaining agreement between the carrier and the Firemen was invalid under the Railway Labor Act. That section provides: "The right of any *engineer,* fireman, hostler or hostler helper to have the regularly constituted committee of his organization represent him in the handling of his grievances, in accordance with the laws of his organization and under the recognized interpretation of the General Committee making the schedule involved, is conceded."

The question whether the Engineers were the exclusive representatives of engineers in the handling of their individual grievances was the subject of dispute by the Engineers with this carrier and also with the Firemen. It was one of several subjects on which the Firemen had a strike ballot taken in 1937. Following the vote to strike, the President appointed an Emergency Board [1] under § 10 of the Act to investigate and report on this and other disputes. The Board reported in 1937. The dispute has continued to date.

The Engineers and the Firemen are the majority representatives of their respective crafts under the Act. The Engineers contend that the Firemen have no right to represent men working as engineers in the handling of individual grievances involving an interpretation of the collective bargaining agreement which the Engineers ne-

[1] The Board was appointed April 14, 1937, and was composed of G. Stanleigh Arnold, Charles Kerr, and Dexter M. Keezer.

gotiated. Their position is that under the Act they are the exclusive representative of the individual engineer in that class of disputes which he has with the carrier as well as the exclusive representative of the craft for purposes of collective bargaining. The District Court refused to declare that the inclusion of the word "engineer" in Article 51, Sec. 1 of the agreement was unlawful under the Act. The Circuit Court of Appeals affirmed that judgment. 132 F. 2d 194–202.

The Engineers place their chief reliance on those provisions of § 2, Fourth which state: (1) that employees "shall have the right to organize and bargain collectively through representatives of their own choosing"; and (2) that the "majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act." And it is pointed out that by reason of § 2, Eighth the provisions of § 2, Fourth become a part of each contract of employment. Some support is also sought from § 2, Second and Sixth. The former provides that "all disputes" between a carrier and its employees shall be considered in conference between representatives of the parties. The latter provision says that in case of a dispute as to grievances "it shall be the duty of the designated representative" of the carrier and of the employees to specify a time and place for a conference. From these provisions it is argued that the collective bargaining representative of a craft becomes the exclusive representative for all purposes of the Act—the protection of the individual's as well as the craft's interests. On the other hand, the carrier and the Firemen contend that the Act limits the exclusive representation of the collective bargaining agent to the interests of the craft. They contend that this is the true meaning of § 2, Fourth. They also rely on § 3, First (i) which states that prior to a reference of disputes between employees and carriers to the Adjustment Board they "shall be handled

in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes." They claim that "usual manner" means the prior practice and that that shows a uniform acceptance of the right of the aggrieved employee to select his own representative. They point out that § 2, Third and Fourth prohibit the carrier from influencing employees in their choice of representatives. The argument is that a contract by the carrier with the Engineers giving the latter the exclusive right to represent engineers in the presentation of their individual claims would in effect coerce all Engineers into joining that union in violation of § 2, Third and Fourth.

The parties base their respective arguments not only on the language of the Act and its legislative history but also on various trade union practices and analogous problems arising under the National Labor Relations Act. From these various materials each seeks to prove that Congress has fashioned a federal rule (enforcible in the courts) concerning the authority of collective bargaining agents to represent various classes of employees on their individual grievances.[2] All of these would be relevant data for con-

[2] Reference is also made to certain informal rulings by the National Mediation Board that the individual employee has the right under the Act to select his own representative in such a case. And considerable stress is given to the following statement of the Emergency Board, *supra* note 1, appointed in 1937:

"This legislation was enacted for the purpose of protecting national transportation against the consequences of labor disputes between carriers and their employees. It was devised by representatives of management, the employees, and the public. It secured the benefits of unhampered collective bargaining to the several crafts or classes engaged in the work of railway transportation. When a craft or class, through representatives chosen by a majority, negotiates a contract with a carrier, all members of the craft or class share in the rights secured by the contract, regardless of their affiliations with any organization of employees. It is clearly provided that these rights may be protected by negotiation or by the several methods of adjustment

struction of the Act if the courts had been entrusted with the task of resolving this type of controversy. But we do not think they were.

We have here no question involving the representation of individual employees before the National Railroad Adjustment Board.[3] We are concerned only with a problem of representation of employees before the carriers on certain types of grievances[4] which, though affecting individuals, present a dispute like the one at issue in the *Missouri-Kansas-Texas R. Co.* case. It involves, that is to say, a jurisdictional controversy between two unions. It raises the question whether one collective bargaining agent or the other is the proper representative for the presentation of certain claims to the employer. It involves a determination of the point where the exclusive jurisdiction of one craft ends and where the authority of another craft begins. For the reasons stated in our opinions in the *Missouri-Kansas-Texas R. Co.* case and in the

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established by the Act. It is true that the representatives of the majority represent the whole craft or class in the *making* of an agreement for the benefit of all, but it is equally true that nothing in the Act denies the right to any employee, or group of employees, to enforce through representatives of his or their own choosing, his or their rights under any such agreement. The whole spirit and intention of the Act is contrary to the use of any coercion or influence against the exercise of an individual's liberty in his choice of representatives in protecting his individual rights secured by law or contract."

[3] The Act provides for proceedings before the Adjustment Board in disputes growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions. § 3, First (i). In such cases the parties "may be heard either in person, by counsel, or by other representatives, as they may respectively elect." § 3, First (j).

[4] These do not include personal injury claims and the like. They embrace claims which though strictly personal arise out of and involve an interpretation of the collective bargaining agreement which the Engineers negotiated and under which the individual engineer is working.

Switchmen's case, we believe that Congress left the so-called jurisdictional controversies between unions to agencies or tribunals other than the courts. We see no reason for differentiating this jurisdictional dispute from the others. Whether different considerations would be applicable in case an employee were asserting that the Act gave him the privilege of choosing his own representative for the prosecution of his claims is not before us.

Reversed.

MR. JUSTICE JACKSON concurs in the result.

MR. JUSTICE ROBERTS and MR. JUSTICE REED are of the view that the Court should entertain jurisdiction of the present controversies for the reasons set out in the dissent in *Switchmen's Union* v. *National Mediation Board, ante,* p. 307.

SECURITIES AND EXCHANGE COMMISSION *v.* C. M. JOINER LEASING CORPORATION ET AL.

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

No. 24. Argued October 18, 1943.—Decided November 22, 1943.

1. The transactions involved in this case were not simply sales and assignments of interests in land, but by the nature of the offers were within the terms "investment contracts" and "any interest or instrument commonly known as a 'security,'" and were therefore sales of "securities" within the meaning of § 2 (1) of the Securities Act of 1933. P. 351.
2. The *ejusdem generis* rule and the maxim *expressio unius est exclusio alterius* are subordinate to the doctrine that courts will construe the details of an Act in conformity with its dominating general purpose, will read text in the light of context, and, so far as the meanings of the words fairly permit, will interpret the text so as to carry out in particular cases the generally expressed legislative policy. P. 350.

3. The transactions were not beyond the scope of the Act merely because the offerings were of leases and assignments which under state law conveyed interests in real estate. P. 352.
4. In a civil action a preponderance of the evidence is sufficient to establish that what were being sold were "securities" under the Act. P. 355.

133 F. 2d 241, reversed.

CERTIORARI, 318 U. S. 755, to review the affirmance of a judgment denying an injunction in a suit instituted by the Commission to restrain violations of the Securities Act of 1933.

Mr. John F. Davis, with whom *Solicitor General Fahy* and *Messrs. Richard S. Salant, Milton V. Freeman,* and *Louis Loss* were on the brief, for petitioner.

Mr. David A. Frank for respondents.

MR. JUSTICE JACKSON delivered the opinion of the Court.

The Securities and Exchange Commission brought this action in District Court to restrain respondents from further violations of §§ 5 (a) and 17 (a) (2) and (3) of the Securities Act of 1933.[1] The District Court denied relief and the Circuit Court of Appeals affirmed upon a construction of the statute which excludes from its operation all trading in oil and gas leases. 133 F. 2d 241. As this presents a question important to the administration of the Act we granted certiorari.[2]

Respondents and one Johnson, a defendant against whom a decree was taken by consent, engaged in a campaign to sell assignments of oil leases. The underlying leases, acreage from which was being sold, are not in the record. They required, as appears from the assignments, annual rental in case of delayed drilling of $1 per year.

[1] 48 Stat. 74, 15 U. S. C. § 77e (a) and § 77q (a), (2), (3).
[2] 318 U. S. 755.

It also seems that these leases were granted by the landowners on an agreement that a test well would be drilled by the lessees. One Anthony blocked up leases on about 4,700 acres of land in McCulloch County, Texas, in consideration of drilling a test well. Defendant Joiner testified that he acquired 3,002 of these acres for "practically nothing except to drill a well." Anthony was a driller and agreed to do the drilling which the Joiner Company undertook to finance, expecting to raise most of the funds for this purpose from the resale of small parcels of acreage. The sales campaign was by mail addressed to upwards of 1,000 prospects in widely scattered parts of the country and actual purchasers, about fifty in number, were located in at least eighteen states and the District of Columbia. Leasehold subdivisions offered never exceeded twenty acres and usually covered two and a half to five acres. The prices ranged from $5 to $15 per acre. The largest single purchase shown by the record was $100, and the great majority of purchases amounted to $25 or less. All buyers were given the opportunity to pay these sums in installments, and some did so.

The sales literature nowhere mentioned drilling conditions which the purchaser would meet or costs which he would incur if he attempted to develop his own acreage. On the other hand, it assured the prospect that the Joiner Company was engaged in and would complete the drilling of a test well so located as to test the oil-producing possibilities of the offered leaseholds. The leases were offered on these terms: "You may have ten acres around one or both wells at $5 per acre cash payable by August 1st, 1941 and $5 per acre additional payable November 1st, 1941 or thirty days after both wells are completed." Other language in the advertising literature emphasized the character of the purchase as an investment and as a participation in an enterprise.[3]

[3] The following are extracts from letters signed by the Joiner Company and by Joiner: "We are pleased to report our Concho County

The trial court made findings of what amounted to fraud, and the Circuit Court of Appeals approved, saying, "the evidence would justify stronger findings of fraud." [4] However, both courts refused injunction be-

well drilling at approximately 2510 feet in a very good formation. We are sending out 800 feet of 8¼ inch casing to be run in the McCulloch County well tomorrow. Both wells should be completed during next month . . . This offer goes to you who now have a lease around one or both of these locations, and also to you who have at some time invested in a lease or leases around some well that the C. M. Joiner Interests have drilled. . . . we are submitting this proposition to you in language that will appeal only to business people who are interested in making an investment where they have a good chance for splendid returns on the investment." "There has nothing happened to either of these wells that would lessen the prospects for the opening of a new oil field. . . . We feel that if we are to get the law of average that one or both these wells should be producers. I know you would like the thrill that comes to those owning a lease around a producing well. . . . if you send in an order for twenty acres . . . you will get ten acres Free in the next block of acreage we drill which is most likely to be in Concho County, Texas. You will really be in the oil business." "Remember, if *you* do not make money on your investment it will be impossible for us to make money. . . . Fortunes made in oil go to those who invest. We believe you should invest here, and now!"

There is also on the circulars and selling letters the following statement:

"Because these securities are believed exempted from registration they have not been registered with the Securities and Exchange Commission; but such exemption, if available, does not indicate that the Securities have been either approved or disapproved by the Commission or that the Commission has considered the accuracy or completeness of the statements in this communication."

The origin of this is uncertain from the evidence. Joiner says he "got it" from the Commission. What weight, if any, should be given under the circumstances to this characterization of what was being sold as "securities" is not clear. They had to be securities to be exempt securities under the Act. 15 U. S. C. § 77c.

[4] The nature of the misrepretentations is not material to the question here. They related generally to the location of the properties in respect of producing territory.

cause, as the Court of Appeals stated, it could "find simply sales and assignments of legal and legitimate oil and gas leases, i. e., sales of interests in land." It was thought that these assignments could not be proved to be "securities" or "investment contracts" under § 2 (1) of the Act.

Undisputed facts seem to us, however, to establish the conclusion that defendants were not, as a practical matter, offering naked leasehold rights. Had the offer mailed by defendants omitted the economic inducements of the proposed and promised exploration well, it would have been a quite different proposition. Purchasers then would have been left to their own devices for realizing upon their rights. They would have anticipated waiting an indefinite time, paying delayed drilling rental meanwhile until some chance exploration proved or disproved the productivity of their acres. Their alternative would have been to test their own leases at a cost of $5,000 or more per well.[5]

But defendants offered no such dismal prospect. Their proposition was to sell documents which offered the purchaser a chance, without undue delay or additional cost, of sharing in discovery values which might follow a current exploration enterprise. The drilling of this well was not an unconnected or uncontrolled phenomenon to which salesmen pointed merely to show the possibilities of the offered leases. The exploration enterprise was woven into these leaseholds, in both an economic and a legal sense; the undertaking to drill a well runs through the whole transaction as the thread on which everybody's beads were strung. An agreement to drill formed the consideration upon which Anthony was able to collect leases on 4,700 acres. It was in return for assumption of this agreement

[5] Joiner's well was to cost over $5,000. The estimated average cost of drilling wells in West Central Texas is about $10,000. See table reproduced in House Hearings on H. Res. 290 and H. R. 7372, 76th Cong., 3d Sess. (1939) Pt. I, p. 350.

that Joiner got 3,002 of the acres, leaving Anthony about 1,700 acres for his trouble. And it was his undertaking to drill the well which enabled Joiner to finance it by the sale of acreage. By selling from 1,000 to 2,000 acres at from $5 to $15 per acre, he could fulfill his obligation to drill the well, recoup his incidental expenses and those of the selling intermediaries, and have a thousand acres left for the gamble, with no investment of his own; and if he sold more, he would have a present profit. Without the drilling of the well, no one's leases had any value, and except for that undertaking they had been obtained at no substantial cost. The well was necessary not only to fulfill the hopes of purchasers but apparently even to avoid forfeiture of their leases.

Whether, as the dissenting Judge below suggests, the assignee acquired a legal right to compel the drilling of the test well is a question of state law which we find it unnecessary to determine. The terms of the offering as quoted above, either by itself or when read in connection with the agreement to drill as consideration for the original leases, might be taken to embody an implied agreement to complete the wells. But at any rate, the acceptance of the offer quoted made a contract in which payments were timed and contingent upon completion of the well and therefore a form of investment contract in which the purchaser was paying both for a lease and for a development project.

It is clear that an economic interest in this well-drilling undertaking was what brought into being the instruments that defendants were selling and gave to the instruments most of their value and all of their lure. The trading in these documents had all the evils inherent in the securities transactions which it was the aim of the Securities Act to end.

It is urged that the definition of "security" which controls the scope of this Act [6] falls short of including these transactions. Respondents invoke the *"ejusdem generis* rule" to constrict the more general terms substantially to the specific terms which they follow. And they invoke the ancient maxim *"expressio unius est exclusio alterius"* to exclude sales of leasehold subdivisions by the acre because the statute expressly includes sales of leasehold subdivisions by undivided shares.

Some rules of statutory construction come down to us from sources that were hostile toward the legislative process itself and thought it generally wise to restrict the operation of an act to its narrowest permissible compass.[7] However well these rules may serve at times to aid in deciphering legislative intent, they long have been subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general pur-

[6] Section 2 (1) of the Act, 15 U. S. C. § 77b (1), provides:

"The term 'security' means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a 'security,' or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing."

[7] In the first edition of Statutes and Statutory Construction by Sutherland he no doubt expressed the impression gleaned from extensive reading of cases when he wrote in the preface (1890): "The natural tendency and growth of the law is towards system and towards certainty, towards modes of operation at once practical and just, by the process of its intelligent judicial administration; but this process is impaired by overwork and legislative interference." In the third edition (1943) Horack observes in the preface: "The third edition reflects the growing acceptance of statutes as a creative element in the law rather than, as Sutherland suggested in the first edition, as 'legislative interference'."

pose, will read text in the light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy.[8]

In the Securities Act the term "security" was defined to include by name or description many documents in which there is common trading for speculation or investment. Some, such as notes, bonds, and stocks, are pretty much standardized and the name alone carries well-settled meaning. Others are of more variable character and were necessarily designated by more descriptive terms, such as "transferable share," "investment contract," and "in general any interest or instrument commonly known as a security." We cannot read out of the statute these general descriptive designations merely because more specific ones have been used to reach some kinds of documents. Instruments may be included within any of these definitions, as matter of law, if on their face they answer to the name or description. However, the reach of the Act does not stop with the obvious and commonplace. Novel, uncommon, or irregular devices, whatever they appear to be, are also reached if it be proved as matter of fact that they were widely offered or dealt in under terms or courses of dealing which established their character in commerce as "investment contracts," or as "any interest or instrument commonly known as a 'security.'" The proof here seems clear that these defendants' offers brought their instruments within these terms.

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[8] This Court has refused to follow the "ejusdem generis" rule, even in criminal cases, where its application seemed to conflict with the general purpose of an act. *United States* v. *Gilliland*, 312 U. S. 86, 93; *Prussian* v. *United States*, 282 U. S. 675, 679; and *Gooch* v. *United States*, 297 U. S. 124, 128; see also *Helvering* v. *Stockholms Enskilda Bank*, 293 U. S. 84, 88–89.

It has also treated the maxim "expressio unius est exclusio alterius" as but an aid to construction. *United States* v. *Barnes*, 222 U. S. 513, 519; *Springer* v. *Philippine Islands*, 277 U. S. 189, 206; *Neuberger* v. *Commissioner*, 311 U. S. 83, 88.

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It is urged that because the definition mentions "fractional undivided interest in oil, gas or other mineral rights," it excludes sales of leasehold subdivisions by parcels. Oil and gas rights posed a difficult problem to the legislative draftsman. Such rights were notorious subjects of speculation and fraud, but leases and assignments were also indispensable instruments of legitimate oil exploration and production. To include leases and assignments by name might easily burden the oil industry by controls that were designed only for the traffic in securities. This was avoided by including specifically only that form of splitting up of mineral interests which had been most utilized for speculative purposes. We do not think the draftsmen thereby immunized other forms of contracts and offerings which are proved as matter of fact to answer to such descriptive terms as "investment contracts" and "securities."

Nor can we agree with the court below that defendants' offerings were beyond the scope of the Act because they offered leases and assignments which under Texas law conveyed interests in real estate.[9] In applying acts of this general purpose, the courts have not been guided by the nature of the assets back of a particular document or offering.[10] The test rather is what character the instru-

[9] *Downman* v. *Texas*, 231 U. S. 353; *Texas Co.* v. *Daugherty*, 107 Tex. 226, 176 S. W. 2d 717; *Railroad Commission* v. *Rowan & Nichols Oil Co.*, 310 U. S. 573, 579.

[10] One's cemetery lot is not ordinarily thought of as an investment and is most certainly real estate. But when such interests become the subjects of speculation in connection with the cemetery enterprise, courts have held conveyances of these lots to be securities. *Matter of Waldstein*, 160 Misc. 763, 291 N. Y. S. 697; *Holloway* v. *Thompson*, 42 N. E. 2d 421 (Ind. App.). For other instances where purported sales of property have been held "investment contracts" see *Securities & Exchange Comm'n* v. *Crude Oil Corp.*, 93 F. 2d 844 (interest in oil royalties sold as bill of sale for specified number of barrels of oil); *Securities & Exchange Comm'n* v. *Tung Corporation*, 32 F. Supp. 371; *Securities & Exchange Comm'n* v. *Bailey*, 41 F. Supp. 647 (land bearing

ment is given in commerce by the terms of the offer, the plan of distribution, and the economic inducements held out to the prospect. In the enforcement of an act such as this it is not inappropriate that promoters' offerings be judged as being what they were represented to be.

Finally it is urged that we must interpret with strictness the scope of this Act because violations of it are crimes.[11] Some authority is cited and a great array could be assembled to support the general proposition that penal statutes must be strictly construed. An almost equally impressive collection can be made of decisions holding that remedial statutes should be liberally construed. What, then, shall we say of the construction of a section like this which may be the basis of either civil proceedings of a preventive or remedial nature or of punitive proceedings, or perhaps both?

Different courts have given different answers to the general question.[12] Since 1911, all states except Nevada have enacted some type of "Blue Sky Law." While the laws are not uniform, they generally contain both civil and criminal sanctions, and all have the dominating purpose to prevent and punish fraudulent floating of securities.[13] The weight of authority is committed to a liberal construction,[14] although some courts tend toward strict construc-

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tung trees, to be developed by seller); *Securities & Exchange Comm'n* v. *Payne*, 35 F. Supp. 873 (silver foxes); *Prohaska* v. *Hemmer-Miller Development Co.*, 256 Ill. App. 331 (farm land, to be paid for with proceeds of crops raised by vendor); *Kerst* v. *Nelson*, 171 Minn. 191, 213 N. W. 904 (land to be cultivated as a vineyard by a third party); *Stevens* v. *Liberty Packing Corp.*, 111 N. J. Eq. 61, 161 A. 193 (rabbits).

[11] 15 U. S. C. § 77t.

[12] See 3 Sutherland on Statutory Construction (3d ed. 1943) § 5703.

[13] Smith, State Blue Sky Laws and the Federal Securities Act, 34 Michigan Law Review 1135.

[14] See note 10 *supra*; *Wagner* v. *Kelso*, 195 Iowa 959, 193 N. W. 1; *Wigington* v. *Mid-Continent Royalty Co.*, 130 Kan. 785, 288 P. 749; *People* v. *Montague*, 280 Mich. 610, 274 N. W. 347; *State* v. *Hofacre*,

tion,[15] and some have seemed to differentiate according to the use being made of the statute, inclining to a strict construction when a criminal penalty is being imposed and a more liberal one when civil remedies are being applied.[16]

But this Court, as early as 1820, speaking through Chief Justice Marshall, said: "The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. . . . It is said, that notwithstanding this rule, the intention of the law maker must govern in the construction of penal, as well as other statutes. This is true. But this is not a new independent rule which subverts the old. It is a modification of the ancient maxim, and amounts to this, that though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the legislature has obviously used them, would comprehend." *United States* v. *Wiltberger,* 5 Wheat. 76, 95.

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206 Minn. 167, 288 N. W. 13; *State* v. *Pullen,* 58 R. I. 294, 192 A. 473; *Kadane* v. *Clark,* 135 Tex. 496, 143 S. W. 2d 197; *Klatt* v. *Guaranteed Bond Co.,* 213 Wis. 12, 250 N. W. 825.

In Texas itself, oil and gas leases have been held by the Supreme Court to be securities within the state act, notwithstanding the fact that the act expressly includes only "any interest in or under" such leases. *Kadane* v. *Clark, supra.*

[15] *Westenhaver* v. *Dunnavant,* 225 Ala. 400, 143 So. 823; *Somers* v. *Commercial Finance Corp.,* 245 Mass. 286, 139 N. E. 837; *New Amsterdam Casualty Co.* v. *Hyde,* 148 Ore. 229, 34 P. 2d 930, 35 P. 2d 980; *Miller* v. *Stuart,* 69 Utah 250, 253 P. 900.

[16] See 3 Sutherland on Statutory Construction (3d ed. 1943) § 7104 and cases cited in note 8 thereunder.

This rule in substance was repeated in *United States* v. *Hartwell,* 6 Wall. 385, 396, which said also: "The rule of strict construction is not violated by permitting the words of the statute to have their full meaning, or the more extended of two meanings, as the wider popular instead of the more narrow technical one; but the words should be taken in such a sense, bent neither one way nor the other, as will best manifest the legislative intent." The principle has been followed in *United States* v. *Corbett,* 215 U. S. 233, 242; *Donnelley* v. *United States,* 276 U. S. 505, 512; *United States* v. *Giles,* 300 U. S. 41, 48.

In the present case we do nothing to the words of the Act; we merely accept them. It would be necessary in any case for any kind of relief to prove that documents being sold were securities under the Act. In some cases it might be done by proving the document itself, which on its face would be a note, a bond, or a share of stock. In others proof must go outside the instrument itself as we do here. Where this proof is offered in a civil action, as here, a preponderance of the evidence will establish the case; if it were offered in a criminal case, it would have to meet the stricter requirement of satisfying the jury beyond reasonable doubt.

We hold that the court below erred in denying an injunction under the undisputed facts of this case and its findings. The judgment is

Reversed.

MR. JUSTICE ROBERTS is of the opinion that the judgment should be affirmed.

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

MIDSTATE HORTICULTURAL CO., INC. *v.* PENNSYLVANIA RAILROAD CO.

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

No. 40. Argued October 21, 22, 1943.—Decided November 22, 1943.

An action by a carrier to recover from a shipper the full amount of transportation charges for shipments over its own and connecting carriers' lines is subject to the three years' limitation of § 16 (3) (a) of the Interstate Commerce Act; and the limitation cannot be extended by an express agreement between the carrier and shipper entered into prior to the expiration of the period. P. 358.

21 Cal. 2d 243, 131 P. 2d 544, reversed.

CERTIORARI, 319 U. S. 735, to review the affirmance of a judgment (124 P. 2d 902) for the carrier in an action against a shipper to recover the amount of transportation charges.

Mr. Theo. J. Roche, with whom *Messrs. Hiram W. Johnson, Theodore H. Roche,* and *James Farraher* were on the brief, for petitioner.

Mr. John Dickinson, with whom *Messrs. William F. Zearfaus, John B. Prizer,* and *Frederic D. McKenney* were on the brief, for respondent.

MR. JUSTICE RUTLEDGE delivered the opinion of the Court.

The case is here on certiorari to the Supreme Court of California. Respondent sued to recover the full amount of freight charges on twenty-one carloads of grapes shipped by petitioner over its own and connecting carriers' lines from California to stated destinations in New York and New Jersey. The ultimate question is whether the action was brought in time under § 16 (3) (a) of the Interstate Commerce Act. This provided:

"All actions at law by carriers subject to this Act for recovery of their charges, or any part thereof, shall be begun within three years from the time the cause of action accrues, and not after." [1]

In the application presented by this record, the question turns on whether the section's limitation can be waived by express agreement made before the period ends. The agreement was made, at petitioner's request, three days before the term expired for suing on account of the first shipment. By its terms, in consideration of respondent's forbearance to sue for a specified time, petitioner undertook not to "plead in any such suit the defense of any gen-

[1] 49 U. S. C. § 16 (3) (a), 43 Stat. 633. Other pertinent parts of § 16, as it was in force when this cause of action arose, were as follows:

"(3) (b) All complaints against carriers subject to this Act for the recovery of damages not based on overcharges shall be filed with the commission within two years from the time the cause of action accrues, and not after, subject to subdivision (d).

"(c) For recovery of overcharges action at law shall be begun or complaint filed with the commission against carriers subject to this Act within three years from the time the cause of action accrues, and not after, subject to subdivision (d), except that if claim for the overcharge has been presented in writing to the carrier within the three-year period of limitation said period shall be extended to include six months from the time notice in writing is given by the carrier to the claimant of disallowance of the claim, or any part or parts thereof, specified in the notice.

"(d) If on or before expiration of the two-year period of limitation in subdivision (b) or of the three-year period of limitation in subdivision (c) a carrier subject to this Act begins action under subdivision (a) for recovery of charges in respect of the same transportation service, or, without beginning action, collects charges in respect of that service, said period of limitation shall be extended to include ninety days from the time such action is begun or such charges are collected by the carrier."

As to the section's legislative history, including changes made since this suit arose, see note 15 *infra*.

eral or special statute of limitations." [2] Two months later, but within the extended time, petitioner finally declined to pay and respondent began this action.[3]

In all stages of the litigation petitioner has contended that the statute prohibits maintenance of the action, notwithstanding its agreement. Respondent has taken the contrary view, as have the California District Court of Appeal, one judge dissenting (124 P. 2d 902), and the California Supreme Court (21 Cal. 2d 243, 131 P. 2d 544). We think petitioner's position must be sustained. In short this is that the agreement is invalid as being contrary to the intent and effect of the section and the Act.

In classical statement, the question has been posed as whether the section operates, with the lapse of time, to

[2] After various recitals including one fixing the time within which the deferred suit might be brought, the agreement provided:

"Now therefore in consideration of the forbearance of The Pennsylvania Railroad Company to bring such a suit against the Mid State Horticultural Company, Inc. prior to October 28, 1935, the said Mid State Horticultural Company, Inc. hereby agrees that if and when The Pennsylvania Railroad Company may find it necessary to bring such an action, it, the said Mid State Horticultural Company, Inc., will not plead in any such suit the defense of any general or special statute of limitations. . . ."

[3] The following additional facts reveal more of the full character of the controversy:

In accordance with petitioner's diversion orders, respondent delivered the shipments to Jerome Distributing Company in October and November, 1932. Jerome gave respondent its checks to cover the freight and received receipted freight bills, which it used to obtain a settlement of accounts with petitioner the latter says it would not have made without them. The checks were dishonored on presentment for payment. Thereafter respondent sought without success to collect from Jerome. It sued and obtained a judgment which it could not satisfy because of Jerome's insolvency.

The time for suing on account of the first shipment expired October 28, 1935. Some time before this, respondent apparently threatened to sue petitioner and the latter requested time to investigate. Respondent acceded, and on October 25, 1935, petitioner executed the agreement not to plead the statute.

extinguish the right which is the foundation for the claim or merely to bar the remedy for its enforcement; [4] and in this case, consistently with the pattern, the debate has moved back to whether the cause of action is one created by the statute or one arising from the common law,[5] with the attributed consequence in the one case that the bar is absolute and invariable by any act of the parties, in the other that it may be waived by contract or otherwise.[6] Petitioner urges that the carrier's common law right to collect transportation charges from the shipper, which was strictly contractual, no longer exists, but has been replaced with one prescribed by the Act. This, it says, now fixes the character and dimensions of the carrier's recovery, including the time within which it may be had. Respondent however insists the Act has not superseded, but has merely modified its common law contractual right; and in this respect it asserts a distinction between cases, like this one, in which the carrier seeks the full amount of the transportation charges and others in which the suit is for only

[4] The inquiry traditionally is cast in this mold regardless of whether the ultimate question concerns such varied problems as the propriety of invoking the *lex fori* rather than the *lex loci*, of waiving the defense or estopping the defendant from asserting it, or of extending the period of limitation after it has once lapsed. See, e. g., Story, Conflict of Laws (8th ed.) § 582; Beale, Conflict of Laws (1935) §§ 604, 605; Goodrich, Conflict of Laws (1927) §§ 85, 86; Ailes, Limitation of Actions and the Conflict of Laws, 31 Mich. L. Rev. 474; *Bement* v. *Grand Rapids & Indiana Ry. Co.*, 194 Mich. 64, 160 N. W. 424; *Gauthier* v. *Atchison, T. & S. F. Ry. Co.*, 176 Wis. 245, 186 N. W. 619; *McLearn* v. *Hill*, 276 Mass. 519, 177 N. E. 617; *Danzer & Co.* v. *Gulf & Ship Island R. Co.*, 268 U. S. 633.

[5] Characteristically the inquiry follows this course too, however diverse the ultimate questions, in actions under wrongful death statutes, the Federal Employers' Liability Act, or directors' liability statutes, whether the limitation is imposed in the act creating the liability or a different one. See note 4 *supra* and cf. *Davis* v. *Mills*, 194 U. S. 451.

[6] Compare, e. g., *Bement* v. *Grand Rapids & Indiana Ry. Co.*, 194 Mich. 64, 160 N. W. 424, with *McLearn* v. *Hill*, 276 Mass. 519, 177 N. E. 617.

a part of them [7] or in which the shipper sues the carrier to recover excess charges paid or damages for the charging of unreasonable rates.[8]

We do not think the decision should turn on refinements over whether the residuum of freedom to contract which the Act leaves to the parties or the quantum of restriction it imposes [9] constitutes the gist of the action. Origin of the right is not *per se* conclusive whether the limitation of time "extinguishes" it or "merely bars the remedy" with the accepted alternative consequences respecting waiver. Source is merely evidentiary, with other factors, of legislative intent whether the right shall be enforceable in any event after the prescribed time, which is the ultimate question.[10] The test of creation may aid when origin is clear.[11] It is not conclusive when the source is hybrid, as is true of the carrier's contract, which has become a complex or resultant of the former freedom of contract and statutory restrictions. It does not follow from the survival of the common law elements, as respondent maintains, that Congress did not intend the limitation to be absolute. And this seems impliedly conceded when the debate shifts, as it has, to whether the policy of interstate commerce legislation contemplates the one result or the other. This is the controlling question. Respecting it

[7] E. g., *Wisconsin Bridge & Iron Co.* v. *Illinois Terminal Co.*, 88 F. 2d 459 (C. C. A.); cf. *Button* v. *Atchison, T. & S. F. Ry. Co.*, 1 F. 2d 709 (C. C. A.); *Galveston, H. & S. A. Ry. Co.* v. *Webster Co.*, 27 F. 2d 765 (D. C.).

[8] E. g., *A. J. Phillips Co.* v. *Grand Trunk Western Ry. Co.*, 236 U. S. 662; *Kansas City Southern Ry. Co.* v. *Wolf*, 261 U. S. 133.

[9] Cf. *Louisville & Nashville R. Co.* v. *Central Iron & Coal Co.*, 265 U. S. 59; *Alton R. Co.* v. *Gillarde*, 379 Ill. 308; *Pennsylvania R. Co.* v. *Lord & Spencer*, 295 Mass. 179, 3 N. E. 2d 213; *Galveston, H. & S. A. Ry. Co.* v. *Webster Co.*, 27 F. 2d 765 (D. C.).

[10] *Davis* v. *Mills*, 194 U. S. 451, 454; see also *Gregory* v. *Southern Pacific Co.*, 157 F. 113 (C. C. D. Ore.); *Osborne* v. *Grand Trunk Ry. Co.*, 87 Vt. 104, 88 A. 512.

[11] *Ibid.*

the consistent patterns of legislation followed in the Act and of judicial decision in treating problems of time limitation and related questions arising under it furnish the more persuasive indicia of Congress' intention.

Section 16 is an integral part of the Interstate Commerce Act and of the comprehensive scheme of regulation it imposes. The Act is affected throughout its provisions, with the object not merely of regulating the relations of carrier and shipper *inter se,* but of securing the general public interest in adequate, nondiscriminatory transportation at reasonable rates.[12] Accordingly, in respect to many matters concerning which variation in accordance with the exigencies of particular circumstances might be permissible, if only the parties' private interests or equities were involved, rigid adherence to the statutory scheme and standards is required. This "obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination." *Louisville & Nashville R. Co.* v. *Maxwell,* 237 U. S. 94, 97.

With setting in such a statute, § 16 expresses the specific policy of the Act with reference to the assertion of stale claims. On the section's face, this policy is one of uniformity and equality of treatment, as between carrier and shipper. The section contains not one, but several limitations. All are of short duration.[13] They apply to various kinds of relief allowed in relation to matters governed by the Act. These include proceedings before the Commission and in the courts, by both shippers and carriers. The several provisions are cast in uniform terms.[14] Not

[12] Cf. *Pittsburgh, C., C. & St. L. Ry. Co.* v. *Fink,* 250 U. S. 577; *Louisville & Nashville R. Co.* v. *Maxwell,* 237 U. S. 94; *Arkansas Fertilizer Co.* v. *United States,* 193 F. 667 (Commerce Court).

[13] The uniform period is now two years. Cf. note 15 *infra.*

[14] All follow the formula "within —— years, but not after." Respondent rightly says the formula itself, particularly as it includes

all were brought into the section at the same time. But the legislative history shows a constant tendency toward making them uniform in time and the purpose of placing the carrier and the shipper on equal terms in this respect.[15] Upon the face of the section nothing suggests that the limitations are to be given other than identical effects, except as the language specifies variations. In particular, contrary to respondent's contention, there is no indication

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"and not after," is not conclusive, since it has received different constructions in respect to the present issue. Thus, the phrase appeared in the earliest English general statutes of limitations, cf. 7 Chitty's English Statutes (6th ed.) 618–619, 619–625; and is found frequently in state statutes without having the effect to outlaw waivers. Cf. *Bewley* v. *Power*, Hayes & Jones Exch. Rep. 368 (1833); *Crane* v. *Abel*, 67 Mich. 242, 34 N. W. 658; *In re Estate of King*, 94 Mich. 411, 54 N. W. 178; *Dickson* v. *Slater Steel Rig Co.*, 138 Okla. 238, 280 P. 817. On the other hand, special statutes employing the phrase have received opposing constructions. Cf. the state wrongful death statute involved in *The Harrisburg*, 119 U. S. 199. See generally 132 A. L. R. 292 *et seq.*

[15] For the succession of enactments by which § 16 (3) assumed its present form see 34 Stat. 590; 41 Stat. 491–2; 43 Stat. 633; 54 Stat. 912–13; cf. 49 U. S. C. A. § 16 (3), Historical Note. Briefly, § 16 (3) (a) was enacted first as part of the Transportation Act of 1920, 41 Stat. 491–2. Previously state statutes supplied limitations upon carriers' suits for their charges, cf. *Button* v. *Atchison, T. & S. F. Ry. Co.*, 1 F. 2d 709, and upon certain shippers' suits against carriers (not based upon an order of the Interstate Commerce Commission), cf. *Louisiana & Western R. Co.* v. *Gardiner*, 273 U. S. 280. Concurrently from 1906 the Hepburn Act (34 Stat. 590) supplied limitations upon shippers' assertion of claims for damages before the Interstate Commerce Commission and in suits to enforce its orders. Section 16 (3) assumed substantially its present form in the Act of June 7, 1924, 43 Stat. 633; although after this action was brought the Transportation Act of 1940, 54 Stat. 912–13, reduced the period for carriers' suits from three to two years, to make it conform finally with the time allowed shippers for testing the reasonableness of the carrier's rate, etc. From 1920 to 1940 this conformity had been achieved by extending the time for shippers' proceedings where the carrier in due season began suit to recover its charges. Cf. 43. Stat. 633, § 16 (3) (d).

that, in applying the section, the carrier shall be given an advantage not allowed to the shipper or one, in some instances, when the carrier is plaintiff, which it cannot enjoy in others. Rather, the section's terms, particularly in subdivision (a),[16] their uniformity in all the limitations, its legislative history, and its setting in a statute designed certainly as much for the shipper's as for the carrier's benefit and in so many respects to avoid discriminatory practices and effects, all point to uniform construction of the limitations imposed. And this, we think, is the effect of the decisions which have construed them or predecessor provisions.[17]

With a single exception, *Pennsylvania R. Co.* v. *Susquehanna Collieries Co.*, 23 F. 2d 499 (D. C.), the federal courts have not decided squarely whether an agreement such as is presented here is valid. In that suit to recover demurrage charges the court sustained and gave effect to the contract. But we think this is contrary to the general course of decision which has construed the section and predecessor limitations.

With the one exception, the decisions have fixed the pattern, in respect to a variety of issues relating to application of the limitations, that lapse of the statutory period "not only bars the remedy but destroys the liability." That is true of this Court's decisions [18] and those of the inferior federal courts.[19] It is true of suits by shippers

[16] The subdivision applies a single limitation to "*all* actions at law by carriers," whether "for recovery of their charges, *or any part thereof*." (Emphasis added.) Cf. note 1 *supra*.

[17] Cf. note 15 *supra*.

[18] Cf., e. g., *A. J. Phillips Co.* v. *Grand Trunk Western Ry. Co.*, 236 U. S. 662; *United States ex rel. Louisville Cement Co.* v. *Interstate Commerce Comm'n*, 246 U. S. 638; *Kansas City Southern Ry. Co.* v. *Wolf*, 261 U. S. 133; *William Danzer & Co.* v. *Gulf & Ship Island R. Co.*, 268 U. S. 633.

[19] Cf. *Wisconsin Bridge & Iron Co.* v. *Illinois Terminal Co.*, 88 F. 2d 459 (C. C. A.); *Button* v. *Atchison, T. & S. F. Ry. Co.*, 1 F. 2d 709

against carriers and of suits by carriers against shippers.[20] It is true with respect to every limitation imposed by § 16, unless that of subdivision (a) in favor of the carrier is to be excepted when its suit is for the full amount of its charges, though not when it is for only part of them.[21]

The purport of the decisions is that Congress intended, when the period has run, to put an end to the substantive claim and the corresponding liability. The cause of action, the very foundation for relief, is extinguished. Thus, in *A. J. Phillips Co.* v. *Grand Trunk Western Ry. Co.*, this Court held the objection to the timeliness of the shipper's suit properly was raised by demurrer, and said that "the lapse of time . . . destroys the liability . . . whether complaint is filed with the Commission or suit is brought in a court of competent jurisdiction." 236 U. S. 662, 667. And it assigned as a reason for this view "the requirements of uniformity which, in this as in so many other instances must be borne in mind in construing the Commerce Act," including the carrier's obligations to adhere to the legal rate, make only lawful refunds, and refrain from discriminating among shippers "by silence or by express waiver, to preserve to the Phillips Company a right of action which the statute required should be asserted within a fixed period." *Ibid.* In *United States ex rel. Louisville Cement Co.* v. *Interstate Commerce Comm'n*, 246 U. S. 638, the conception of the *Phillips* case was applied to proceedings before the Commission, as the *Phillips* opinion had forecast. The Court held that the limitation goes to the Commission's jurisdiction, so that on the one hand it has no power to act when the time has expired, on the other mandamus will lie to compel exercise of the jurisdiction

(C. C. A.); *Pennsylvania R. Co.* v. *Carolina Portland Cement Co.*, 16 F. 2d 760 (C. C. A.).

[20] Cf. notes 18, 19 *supra.*

[21] Cf. note 7 *supra.*

when the period has not passed.[22] The other decisions cited above give effect to this pattern in various applications.

Respondent attempts to avoid the conclusion to which the pattern points by urging that when the choice of extending the period is the carrier's rather than the shipper's, opportunities for discrimination disappear; and the policy otherwise embedded in § 16 does not require enforcement of its terms. Rather, it says, to enforce them would violate the very policy upon which the *Phillips* case based the carrier's immunity to suit after the period. And further to support this view, especially as it requires distinguishing results favorable to the carrier from those adverse to it, it is said the legislative history of the incorporation into § 16 of the limitation upon the carrier's recovery of its full charges requires it to be given a different effect from that given all other limitations created by the section.

The argument is ingenious, but not convincing. In the absence of explicit direction, it cannot be assumed or inferred that Congress intended to adopt one policy for the carrier and another for the shipper, to give the former an absolute shield, the latter one penetrable by all the devices and occasions which interrupt or extend the period of an ordinary general statute of limitations. Still less can it be implied that Congress intended the identical provision, subdivision (a), to work one way when the carrier sues only for part, another when it sues for the whole of its charges. That it is prohibited to discriminate among shippers, in applying the section's limitations, does not mean that in adopting them Congress intended to discriminate against all shippers in favor of the carrier. Nor does it mean the carrier may discriminate among shippers when it sues for all, but may not do so when it sues for only part of its charges. The fallacy is in assuming, first, that the section reflects only the Act's general policy against

[22] The latter was the particular result in the case, since the court found the period had not run prior to beginning of the proceeding.

discrimination in respect to rates, rebates, etc.; and, second, that this would be made effective by treating the limitation as absolute to cut off the carrier's liability, but variable when the shipper's is involved. Neither assumption is true.

That the section does involve the statute's general policy against discrimination is clear from the opinion in the *Phillips* case and others cited. But this is true only so far as that policy is consistent with the particular policy laid down by the section, namely, that of strictly limiting the time within which claims may be asserted, as likewise appears from the decisions. In the *Phillips* case, there was no apparent clash between the two policies. Nor in this case is there more than an apparent one.

It is true the effect of holding the period invariable will be, when it has run, to relieve the shipper entirely of paying; and thus the carrier, by agreeing not to sue until later, may in effect allow the shipper a preference. But it has this within its control. And the same effect may follow when the amount unpaid is only a part of the total charge. It may follow in any case, whether the suit is for all or merely part, since the carrier, without agreement, may neglect or fail to sue and thus in effect allow the preference. Likewise, when the shipper sues, the carrier may suffer judgment by confession or default and so, in effect, accomplish the "preference," if the amount claimed is more than is rightfully due the shipper. When it is that and no more, allowing the carrier to escape by pleading the bar of the statute has the effect of permitting it to inflict a discrimination, as respondent concedes the statute requires.

The concession destroys its case. The consequences for discrimination are the same, whether the carrier or the

shipper sues, since in the one case it may create a preference by foregoing suit, in the other by failing to defend. And it is as much an answer, in the one case as in the other, that the carrier's failure to assert its rights would violate its duty to collect.[23] That duty, and the results of failure to discharge it, may be the same, regardless of whether the carrier sues or defends, depending upon whether the amount claimed is rightfully due.

The paramount policy of § 16 is to secure promptness in collection. That policy would not be promoted by construing the period as variable when it works to bar the carrier's claim but invariable when the shipper sues. Nor does a legislative history which discloses a purpose to put carrier and shipper in equal position with reference to limitations of time sustain an inference that they are to be given effects favorable only to the carrier.

We are not unmindful of the hardship to respondent in the special circumstances, though petitioner asserts it would suffer equal hardship if the decision were the other way. Nor do we ignore the strong equitable considerations which, in relation to other types of legislation not so permeated with provisions and policies for protecting the general public interest, might move against denying effect to such an agreement. But this case boils down to an old adage about sauce and geese, which need not be given citation.

The judgment is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

Reversed.

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[23] Cf. *A. J. Phillips Co.* v. *Grand Trunk Western Ry. Co.*, 236 U. S. 662, 667–668; *Arkansas Fertilizer Co.* v. *United States*, 193 F. 667, 671 (Commerce Court).

INTERSTATE COMMERCE COMMISSION ET AL. *v.* HOBOKEN MANUFACTURERS' RAILROAD CO.

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

No. 43. Argued November 9, 1943.—Decided December 6, 1943.

Appellee, a terminal switching railroad, maintained with trunk lines joint rates on traffic which it interchanged with (inter alia) Seatrain. Much of the traffic so interchanged moved on lighterage-free rates, under which appellee was obligated to load and unload cars at shipside. Seatrain operated vessels on which it transported loaded railroad cars. By Seatrain's method, cars were loaded on and unloaded from its vessels by means of a cradle; and the necessity and expense of loading and unloading freight to and from the cars, usual on interchange with other water carriers, were eliminated. Under a contract between them, appellee made payments to Seatrain in respect of interchanged traffic moving on lighterage-free rates, the payments approximating the cost of unloading or loading freight cars. In 1936 appellee filed with the Interstate Commerce Commission a complaint seeking an increase of its divisions of the joint lighterage-free rates and an adjustment with respect to traffic moving on Commission-prescribed rates subsequent to the filing of the complaint, so as to compensate it for its contract payments to Seatrain. The Commission found that appellee's divisions with the payments to Seatrain excluded were "not unjust, unreasonably low, inequitable, or unduly prejudicial"; that the corresponding divisions received by the trunk lines were "not unjust, unreasonably high, inequitable, or unduly preferential of them"; and dismissed the complaint. *Held:*

1. Although Seatrain's service has since February, 1942, been discontinued, the complaint sought adjustment of divisions received on Commission-prescribed rates subsequent to its filing, and to that extent at least the case is not moot. P. 376.

2. The Commission's findings that appellee's transportation service with respect to carload freight interchanged with Seatrain begins and ends at Seatrain's cradle; that the rail lines perform the interchange transportation service covered by their tariffs "when they place the cars in or take them from the Seatrain cradle"; and that consequently the payments made by appellee to Seatrain "cover no part of its transportation service under the lighterage-

free rates and are in addition to the full costs of that service," are supported by evidence. P. 377.

3. The Commission's determination of the point in time and space at which a carrier's transportation service begins or ends is an administrative finding which, if supported by evidence, is conclusive on the courts. P. 378.

4. Appellee is entitled to receive by way of divisions only its just and equitable share of the proceeds of the joint rail transportation service rendered, and can not claim as a part of its share the costs of a service which is not a part of the rail service called for by the joint rates. P. 379.

5. From the Commission's finding that the loading and unloading of its vessels is incident to Seatrain's transportation service, it follows that Seatrain is entitled to compensation therefor in its tariffs, which if inadequate may be increased, rather than through participation, by way of allowances paid to it by appellee, in the proceeds of a joint rail service of which it performs no part. P. 379.

6. Whether the payments to Seatrain induced the performance of an interchange service resulting in savings to the rail carriers is irrelevant to a determination of divisions of the joint rates for the rail service of which the ship loading and unloading service performed by Seatrain is not a part. P. 380.

7. Section 15 (6) of the Interstate Commerce Act, which authorizes the division of joint rates applicable to a transportation service, contemplates only the apportionment of the proceeds of that service among the parties to it and not the compensation of others for a service not covered by the joint rates to be divided. P. 380.

8. Prescription by the Interstate Commerce Commission of divisions of joint rates is not a mere partition of property, but is an aspect of the general rate policy which Congress has directed the Commission to establish and administer in the public interest. At least where the Commission prescribes for the complaining party a fair return for the transportation service which it renders, the question as to what is a proper division is one for the Commission's discretion, reviewable only for unreasonableness, departure from statutory standards, or lack of evidentiary support. P. 381.

9. The Commission's determinations of rate policy in this case can not be set aside as arbitrary or as resulting in unjust divisions. P. 382.

10. The Commission's refusal to include in appellee's divisions payments which were voluntarily made to Seatrain does not constitute confiscation of appellee's property. P. 382.

47 F. Supp. 779, reversed.

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

Mr. E. M. Reidy, with whom *Mr. Daniel W. Knowlton* was on the brief, for the Interstate Commerce Commission; and *Mr. Willis T. Pierson*, with whom *Messrs. Thomas P. Healy, Francis R. Cross, Joseph F. Eshelman*, and *R. Aubrey Bogley* were on the brief, for the Baltimore & Ohio Railroad Co. et al.,—appellants.

Mr. Parker McCollester, with whom *Mr. Wilbur LaRoe, Jr.* was on the brief, for appellee.

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

This is an appeal under 28 U. S. C. §§ 47a, 345, from a judgment by which the District Court for New Jersey, three judges sitting, set aside an order of the Interstate Commerce Commission, 47 F. Supp. 779.

The question is whether appellee, a terminal switching rail carrier, is entitled to an increase in the divisions which it now receives out of joint class and commodity freight rates maintained by it and numerous trunk line carriers, appellants here, on traffic interchanged by appellee at Hoboken, New Jersey, with Seatrain Lines, Inc., a common carrier by water. The answer depends upon whether the Commission is required to treat as part of appellee's costs of performing its carrier service as prescribed by the joint rates, allowances paid by appellee for services performed by Seatrain in effecting the interchange. The Commission's order dismissed a complaint by which appellee sought to have the Commission prescribe for it increased divisions. 234 I. C. C. 114. The order, reviewable by the District Court, is reviewable by this court on appeal. *Alton R. Co.* v. *United States*, 287 U. S. 229, 237–40;

Baltimore & Ohio R. Co. v. *United States,* 298 U. S. 349, 358; *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 142.

Appellee, Hoboken Manufacturers' Railroad Company, operates a terminal switching line extending along the waterfront of Hoboken, New Jersey, for a distance of 1.632 miles. It connects with the Erie Railroad and over it with other trunk lines reaching New York Harbor. Numerous piers on New York Harbor are served by Hoboken, at which the vessels of various steamship lines regularly dock, including those of Seatrain.

Seatrain is a common carrier by water, subject to the Commission's jurisdiction under § 1 (1a) of the Interstate Commerce Act, 49 U. S. C. § 1 (1a), by reason of its control of Hoboken. Investigation of Seatrain Lines, Inc., 195 I. C. C. 215, 206 I. C. C. 328. Since 1932 it has operated vessels in which it transports freight in loaded railroad cars between Hoboken, New Jersey, Havana, Cuba, and Belle Chasse, Louisiana, a point on the Mississippi River near New Orleans. The loaded cars which it transports are placed upon standard gauge railroad tracks located upon four decks of the Seatrain vessels. In loading the vessel, each car is switched onto a track located on a cradle placed alongside the vessel. An overhead crane lifts the cradle containing the car, swings it over the vessel and lowers it through a hatch to the appropriate deck where the car is moved onto one of the railroad tracks on the deck.

In unloading the procedure is reversed. Each car is moved from the deck track onto the cradle. The cradle containing the car is then lifted by the crane and placed on the dock alongside the vessel where the car is switched by Hoboken over its own tracks to a connecting trunk line over which it proceeds to its rail destination. By this operation the expense is avoided of loading and unloading freight into and from the cars at shipside, ordinarily inci-

dent to exchange of traffic between rail and water carriers.

In 1932 Seatrain secured control of Hoboken by the acquisition of all of its shares of capital stock except the qualifying shares of five directors, and the two corporations were brought under the management of common officers. In 1936 Hoboken filed a complaint with the Interstate Commerce Commission under §§ 1 (4) and 15 (6) alleging that the divisions it was receiving out of joint class and commodity rates maintained by it and the trunk lines, appellants here, on carload rail traffic interchanged with Seatrain were too low, and asking an increase. It also sought adjustment of all divisions with respect to such traffic moving under rates prescribed by the Commission subsequent to the date of filing the complaint.

Part of the traffic interchanged with Seatrain moves on so-called lighterage-free rates, and part on non-lighterage-free rates. Under the lighterage-free rates the rail carriers obligate themselves to place freight within reach of ship's tackle, and to receive freight at the foot of ship's tackle—an obligation which normally requires unloading and loading of cars and may also require lighterage and various other services. Hoboken has generally provided for this loading and unloading service by contract with the steamship companies with which it interchanges traffic. The work is done with steamship stevedore labor for which Hoboken has paid the steamship companies at the rate of approximately 75 cents a ton. Under non-lighterage-free rates the shipper performs or provides for necessary loading or unloading of cars, in which case Hoboken has only a switching service to perform.

On carload traffic interchanged with water carriers other than Seatrain's and moving on lighterage-free rates, which is loaded or unloaded by Hoboken or at its expense, Hoboken's division of the joint through rate has been $1.35 per ton. On carload traffic moving to and from Hoboken on non-lighterage-free rates, which is loaded or unloaded

by the shipper or consignee or at his expense, Hoboken's division has been 60 cents per ton.[1]

Since November, 1932, which was shortly after Seatrain acquired stock ownership control of Hoboken, it has paid to Seatrain a tonnage allowance on interchanged freight other than coal. At first 40 cents a ton, the allowance on lighterage-free freight was, in 1937, increased to 73 cents a ton, which is the approximate cost of loading or unloading carload freight. At the same time the 40 cents allowance on non-lighterage-free freight was abolished. Upon Seatrain freight moving on lighterage-free rates, the trunk lines accord to Hoboken a 60 cents per ton switching division, the same as for freight moving on non-lighterage-free rates, since with the one as with the other there is no necessity for the car loading service.

In the proceedings before the Commission Hoboken asked for the existing division of 60 cents per ton out of non-lighterage-free rates and for an increase to $1.35 per ton in its division out of lighterage-free rates on traffic interchanged with Seatrain, on the ground that its tonnage allowances to Seatrain are a part of its costs of performing its rail transportation service with respect to the Seatrain traffic, and that in any case the trunk lines, parties to the joint rates, are benefited by Seatrain's shiploading devices to the extent that the rail carriers are relieved of the 75 cents per ton loading and unloading charge which they would otherwise incur.

The Commission rendered its report after a full hearing at which evidence was taken.[2] It found from the evidence

[1] These divisions have been increased by 5 or 10%, depending on the commodity shipped, as a result of a general rate increase authorized in Fifteen Percent Case, 1937–1938, 226 I. C. C. 41.

[2] For prior reports of the Commission dealing with various aspects of Seatrain's method of operation see Investigation of Seatrain Lines, Inc., 195 I. C. C. 215, 206 I. C. C. 328; Seatrain Lines *v.* Akron, C. & Y. Ry. Co., 226 I. C. C. 7, 243 I. C. C. 199; Hoboken Mfrs. R. Co. *v.* Abilene & Southern Ry. Co., 237 I. C. C. 97, 248 I. C. C. 109.

that Seatrain had established its shiploading devices at large expense and had by their adoption made unnecessary, in the interchange of traffic with Seatrain, the loading and unloading of the cars at shipside, which would otherwise be required by the lighterage-free tariffs; that in effecting the interchange "the rail lines do all that is required when they place the cars in or take them from the Seatrain cradle"; and that "the payments which complainant makes to Seatrain cover no part of its transportation service under the lighterage-free rates and are in addition to the full costs of that service."

The Commission recognized that if the payments by Hoboken to Seatrain are not borne in part by the rail lines through a decrease in their divisions and a corresponding increase in Hoboken's divisions "they will receive an unearned benefit" since, by reason of Seatrain's shiploading method, they are relieved of the necessity of compensating Hoboken for performance of the loading and unloading service ordinarily called for by their lighterage-free tariffs. It pointed out, however, that lighterage-free rates "are based on average conditions," and said that if a steamship line now docking on the New York waterfront and served by lighter at the New Jersey rail carriers' expense should shift to a dock with direct rail connections on the New Jersey shore a similar unearned benefit would result; yet "it would hardly be suggested" that the rail carriers should compensate the steamship company for the shift. Moreover it found no evidence that the payments were necessary to induce Seatrain to furnish its shiploading service. It stated that Hoboken's contract with Seatrain was not such evidence in view of Seatrain's control of Hoboken; that it did not appear that Seatrain received such payments from any independent rail connection; and that Seatrain's method of transfer by which it receives and delivers loaded cars has sufficient advantages to impel its use

by Seatrain regardless of contributing payments by its rail connections.

It concluded that Seatrain's improved method of transfer is only an incident to its plan of transportation, that the transfer is consequently not a necessary part of the rail transportation service and that Hoboken is adequately compensated for its part in that service without including the payments to Seatrain in its divisions. The Commission accordingly found that Hoboken's divisions with the payments to Seatrain excluded "are not unjust, unreasonably low, inequitable, or unduly prejudicial" and that the corresponding divisions received by the trunk lines "are not unjust, unreasonably high, inequitable, or unduly preferential of them," and ordered Hoboken's complaint dismissed.

The District Court sustained the Commission's findings that Hoboken's rail transportation service begins and ends at Seatrain's cradle, and that the payments by Hoboken to Seatrain "do not constitute a legitimate transportation cost," and held that upon these findings "supported by evidence" the Commission's "judgment is final." But it thought that even though the contract payments should be disregarded Hoboken might be obligated to pay to Seatrain the reasonable value to it of the use of the Seatrain method of interchange, and that if that use were found to have no value, at least any "windfall" resulting to the rail carriers as a whole should be divided equitably among them.

The District Court accordingly set the Commission's order aside and remanded the cause to the Commission, directing it to consider whether the Seatrain devices "are an efficient aid to railroad transportation"; if it found that they were, to evaluate their worth to Hoboken and to include in Hoboken's costs the amount of a legitimate payment for their use; and if it found that they were not,

to determine whether any windfall to the rail carriers resulted from their use and to establish an equitable basis for its division among the rail carriers. The Commission has brought the case here on assignments of error challenging the District Court's determination that compensation for any part of Hoboken's payments to Seatrain should have been included in Hoboken's divisions.

Section 15 (6) of the Interstate Commerce Act directs that whenever the Commission, upon complaint or on its own motion, determines that the divisions of joint rates applicable to the transportation of passengers or property, "are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial" as between carriers parties to such rates, "the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers." In cases where the joint rate has been established pursuant to a finding or order of the Commission, it may also determine and order just and reasonable divisions for the period subsequent to the filing of the complaint "and require adjustment to be made" in accordance with its determination.

At the outset it is necessary to consider the suggestion that the case may have become moot by reason of the fact that since February, 1942, Seatrain's vessels have been in Government service and Seatrain's service has been discontinued. We may assume that the resumption of the service is so uncertain as to render it conjectural whether the Commission's present determination will be given any future operation. But that determination under § 15 (6) is decisive of appellee's request for adjustment of the divisions of joint rates prescribed by the Commission which have been collected since the beginning of the present proceeding. *Brimstone Railroad & Canal Co.* v. *United States*, 276 U. S. 104, 121–3. While the present record does not disclose the full extent to which joint rates,

divisions of which are here sought, were prescribed by the Commission, it does appear that the Commission has in prior proceedings prescribed joint rail-water-rail rates between eastern trunk line and New England territories and southwestern territory applicable over Seatrain lines, to which Hoboken, Seatrain, and most if not all of the trunk lines which are appellants here are parties. Seatrain Lines *v.* Akron, C. & Y. Ry. Co., 226 I. C. C. 7, 243 I. C. C. 199. As to them decision of this case controls the division of rates for the period since appellee's complaint was filed with the Commission. To that extent at least the case is not moot.

Apart from the Commission's exclusion of Hoboken's tonnage allowances to Seatrain, we have no occasion to consider the sufficiency of the present divisions to Hoboken. The Commission found, upon abundant evidence, that they "are sufficient to cover the cost of the service performed by complainant and also a reasonable return on the property owned or used by it in performing such service." And appellee conceded before the Commission that if the payments to Seatrain are not to be considered a part of appellee's costs the divisions are adequate and "we are not entitled to anything more."

As essential steps in determining whether Hoboken's payments to Seatrain are a part of the rail transportation costs, we think the court below correctly sustained the Commission's findings that Hoboken's transportation service with respect to carload freight interchanged with Seatrain begins and ends at Seatrain's cradles; that the rail lines perform the interchange transportation service covered by their tariffs "when they place the cars in or take them from the Seatrain cradle"; and that consequently the allowances paid by Hoboken "cover no part of its transportation service under the lighterage-free rates and are in addition to the full costs of that service." These findings were based upon an extensive examination

of the method of interchange of freight between rail and water carriers generally and between Hoboken and Seatrain. It is not and could not be seriously contended that they are unsupported by evidence.

We are of opinion that these findings are decisive of this appeal. The Commission's determination of the point in time and space at which a carrier's transportation service begins or ends is an administrative finding which, if supported by evidence, is conclusive on the courts. *Los Angeles Switching Case,* 234 U. S. 294, 311–14; *United States* v. *American Sheet & Tin Plate Co.,* 301 U. S. 402, 408; *United States* v. *Pan American Petroleum Corp.,* 304 U. S. 156, 158; *Baltimore & Ohio R. Co.* v. *United States,* 305 U. S. 507, 525–6; *Swift & Co.* v. *United States,* 316 U. S. 216, 222–5 and cases cited. In the *Tin Plate* and *Pan American* cases this Court sustained the Commission's order prohibiting, as in violation of § 6 (7) of the Act, payment of allowances to an industry by rail carriers for spotting cars on its industrial tracks. The Court accepted as controlling the Commission's findings that under prevailing conditions and practice the interchange tracks of the industry were convenient and usual points for the receipt and delivery of the interchanged cars, that the rail line-haul service accordingly ended there and that for that reason the industry performed no service in spotting cars on its own tracks for which the rail carrier was compensated under its line-haul tariffs and for which the industry was entitled to be compensated by allowances out of the line-haul charges.

The same principles apply in prescribing divisions of joint rail carrier charges where, independently of considerations not present here, the measure of the carrier's participation in the joint transportation service is the measure of its divisions of the joint transportation charges, *New England Divisions Case,* 261 U. S. 184, 195; *United States* v. *Abilene & Southern Ry. Co.,* 265 U. S. 274, 284;

Baltimore & Ohio R. Co. v. *United States, supra,* 360–62; Sharfman, Interstate Commerce Commission, vol. III–B, pp. 287–8, and the carrier is entitled to "just compensation only for what it actually does," *Tap Line Cases,* 234 U. S. 1, 29; cf. *Louisiana & Pine Bluff Ry. Co.* v. *United States,* 257 U. S. 114, 118.

Here the Commission was concerned with the divisions of joint rail rates which covered the rail carrier service between inland points of rail shipment or destination and the point of interchange at Hoboken. The Commission has found that this point is the Seatrain cradle at shipside, and that the service rendered by Seatrain in loading and unloading the loaded freight cars upon and from its vessels is no part of the rail carrier service with respect to which divisions are here sought. Consequently neither Hoboken nor Seatrain is entitled to compensation out of the joint rail haul charges for the ship loading and unloading service. Since Hoboken is entitled to receive by way of divisions only its just and equitable share of the proceeds of the joint rail transportation service rendered, it cannot claim as a part of its share the costs of a service which is not a part of the rail service called for by the joint rates. Neither the joint rates of the rail carriers nor the rates of Seatrain are here under attack and presumptively they yield adequate but not excessive compensation for the transportation services rendered under them. *Beaumont, S. L. & W. Ry. Co.* v. *United States,* 282 U. S. 74, 90; *Baltimore & Ohio R. Co.* v. *United States, supra,* 356.

From these findings of the Commission, and its further finding that the interchange service rendered by Seatrain is incident to Seatrain's transportation service, it would seem to follow that Seatrain is entitled to compensation for it as such, and presumably is so compensated by its tariffs. If the compensation is inadequate the remedy lies in an increase in Seatrain's rates or in its divisions of joint rail and

water transportation rates—for which it has an application pending before the Commission, Seatrain Lines *v.* Akron, Canton & Youngstown Ry. Co., No. 28668, filed May 22, 1941—rather than in its participation, by way of allowances paid to it by Hoboken, in the proceeds of a joint rail service of which it performs no part.

Hence the District Court's direction to the Commission to determine what part of the value of the interchange service rendered by Seatrain should "be allowed in establishing Hoboken's legitimate costs," as an "aid to railroad transportation," is inconsistent with its conclusion that the Commission correctly found that the payments by Hoboken to Seatrain "do not constitute a legitimate transportation cost," and that Seatrain's interchange service is no part of the rail transportation. If these findings be sustained, as they must, inquiry whether the payments to Seatrain have induced the performance of an interchange service resulting in savings to the rail carriers is irrelevant to a determination of divisions of the joint rates for the rail service of which the ship loading and unloading service performed by Seatrain is not a part. Cf. *Lehigh Valley R. Co.* v. *United States,* 243 U. S. 444, 446–7.

Section 15 (6), which authorizes the division of joint rates applicable to a transportation service, contemplates only the apportionment of the proceeds of that service among the parties to it and not the compensation of others for a service not covered by the joint rates to be divided. Seatrain is not a party to this proceeding and it is not a necessary party to a proceeding to fix divisions of a joint rail rate—or of a portion of a joint rail-water rate—in which it does not participate. *United States* v. *Abilene & Southern Ry. Co., supra,* 283; *Beaumont, S. L. & W. Ry. Co.* v. *United States, supra.* We are accordingly not concerned with the adequacy of Seatrain's tariffs to compensate for its ship loading and unloading service or with the

lawfulness of the payments to it by Hoboken. A determination by the Commission of the extent of the saving to the rail carriers attributable to Hoboken's payments to Seatrain was therefore not prerequisite to its order prescribing divisions. And its order is adequately supported by its findings that the rail transportation service begins and ends with the placing of the cars in Seatrain's cradles, and that the ship loading and unloading service forms no part of the rail transportation.

These findings, as we have seen, are based upon substantial evidence and since they are dispositive of the case we need not examine the evidence further to ascertain whether it supports the Commission's additional finding that payment of the allowances to Seatrain was not necessary to induce Seatrain to perform its ship loading service in a manner which resulted in savings to the rail carriers.

There is an additional reason why the case should not be sent back to the Commission to reconsider its decision that Hoboken should receive no part of whatever windfall may result to the rail carriers from the use of Seatrain's method of loading and unloading. The prescription of divisions where carriers are unable to agree is not a mere partition of property. It is one aspect of the general rate policy which Congress has directed the Commission to establish and administer in the public interest. *New England Divisions Case, supra,* 195; *United States* v. *Abilene & Southern Ry. Co., supra,* 284–5; *Baltimore & Ohio R. Co.* v. *United States, supra,* 358–60. On such an issue, at least where the Commission prescribes for the complaining party a fair return for the transportation service which it renders, the question as to what is a proper division is one for the Commission's discretion, reviewable only for unreasonableness, departure from statutory standards, or lack of evidentiary support. *New England Divisions Case, supra,* 204; *Baltimore & Ohio R. Co., supra,* 359; *Missis-*

sippi Valley Barge Line Co. v. *United States,* 292 U. S. 282, 286–7; *Board of Trade* v. *United States,* 314 U. S. 534, 546; *Barringer & Co.* v. *United States,* 319 U. S. 1, 6–7.

The Commission has determined that it is more consistent with the nature of lighterage-free rates, which are "based on average conditions," that the switching carrier receive only fair compensation for the performance of whatever service may be required of it by the tariffs and the method of rail-water interchange, than that it share in any windfall resulting from the use of an economical method of interchange. And it stated in its report that in general the divisions of a short switching line should be determined on the basis of full remuneration for its services, without regard to the level of the joint rates, unless they are as a whole unremunerative.[3] We can hardly say that such determinations of rate policy are arbitrary, or result in such unjust divisions that the court must set them aside. Cf. *O'Keefe* v. *United States,* 240 U. S. 294, 303–4.

We need not consider whether the contention that the Commission's order is confiscatory adds anything to the contention that the divisions which the Commission approved are unjust, unreasonably low, or inequitable. Compare *Baltimore & Ohio R. Co.* v. *United States, supra,* 364–9 with *id.* 383–5. As we have seen, the claim of confiscation is restricted to the Commission's refusal to allow as a part of appellee's divisions the payments made by it to Seatrain. These payments, voluntarily made by appellee, were not exacted by the Commission. The Commission's refusal to include them in divisions of which they were not lawfully a part, not being an infringement of any right of

[3] See also Divisions of Joint Rates for Transportation of Stone, 41 I. C. C. 321, 328; Rates of Peoria & Pekin Union Ry. Co., 93 I. C. C. 3, 22; 115 I. C. C. 469, 481–97, 501; Hoboken Mfrs. R. Co. *v.* Atchison, T. & S. F. Ry. Co., 132 I. C. C. 579; Western M. Ry. Co. *v.* Maryland & P. R. Co., 167 I. C. C. 57, 63.

appellee, is obviously not confiscation of its property. Cf. *General American Tank Car Corp.* v. *Terminal Co.*, 308 U. S. 422, 428; *Louisiana & Pine Bluff Ry. Co.* v. *United States, supra.* The Commission's order is sustained and the judgment of the District Court setting it aside is reversed.

Reversed.

COLORADO *v.* KANSAS ET AL.

BILL IN EQUITY.

No. 5, original. Argued October 11, 12, 1943.—Decided December 6, 1943.

In a suit involving use of the waters of the Arkansas River, brought by Colorado against Kansas and a Kansas user, *held:*

1. Colorado is entitled to an injunction against further prosecution of suits by the Kansas user against Colorado users. P. 391.

2. *Kansas* v. *Colorado,* 206 U. S. 46, made no allocation between the States of the waters of the river. P. 391.

3. Kansas is not entitled on the record to an apportionment in second-feet or acre-feet. P. 391.

4. In controversies involving the relative rights of States, the burden on the complaining State is much heavier than that generally required to be borne by private parties, and this Court will intervene only where a case is fully and clearly proved. P. 393.

5. Kansas' allegations that Colorado's use has materially increased since the decision in *Kansas* v. *Colorado,* and that the increase has worked a serious detriment to the substantial interests of Kansas, are not sustained by the evidence. P. 400.

6. Relief other than the restraint of further prosecution of suits by the Kansas user against Colorado users is denied to both States. P. 400.

ORIGINAL suit in equity by Colorado against Kansas and the Finney County (Kansas) Water Users' Association.

Messrs. Gail L. Ireland, Attorney General of Colorado, *Jean S. Breitenstein,* and *Henry C. Vidal,* with whom *Messrs. Arthur C. Gordon* and *A. W. McHendrie* were on the brief, for complainant.

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Messrs. W. E. Stanley and *Eldon Wallingford,* Assistant Attorney General of Kansas, with whom *Mr. A. B. Mitchell,* Attorney General, was on the brief, for defendants.

Solicitor General Fahy, on behalf of the United States, and *Messrs. Walter R. Johnson,* Attorney General of Nebraska, and *Paul F. Good,* on behalf of that State, filed briefs as *amici curiae,* suggesting the elimination, from the form of final decree proposed by the Special Master, of language relating to state ownership of waters of the Arkansas River.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

This suit is the latest of a series of litigations between Kansas, or her citizens, and Colorado, or her citizens, concerning their respective rights to the beneficial use of the waters of the Arkansas River.

The river has its origin in central Colorado, and is a mountain torrent for 130 miles to a point near Canon City where it enters a foothill region ending near Pueblo. Thence it traverses the high plains of eastern Colorado and western Kansas. In the areas mentioned the stream is non-navigable.

In 1901 Kansas brought suit against Colorado in this court for an injunction restraining the latter from diverting, or permitting anyone under her authority to divert, waters of the river within Colorado, and for general relief. *Kansas* v. *Colorado,* 206 U. S. 46.[1] Kansas in her bill alleged that the waters of the river had been used for irrigation in her western counties and that, after establishment of these uses, Colorado began systematically to appropri-

[1] The court overruled a demurrer to the bill and required Colorado to answer. *Kansas* v. *Colorado,* 185 U. S. 125.

ate and divert them between Canon City and the Kansas state line for irrigating non-riparian arid lands; that, by 1891, all the natural flow, and much of the flood waters, had been appropriated in Colorado so that the average flow had been greatly reduced and the natural flow completely cut off.

Colorado replied that the stream was not continuous except at times of flood; that, in a state of nature, its bed east of Pueblo was frequently dry; that Colorado and her citizens had diverted and used only the perennial flow above Canon City and what had been done in effect conserved water for delivery into Kansas. She denied she had substantially diminished the flow of the river at the state line. She asserted she was entitled to consume the entire flow; but alleged that, in any view, her total appropriations did not amount to an infringement of Kansas' rights calling for judicial interference.

The court denied Kansas' contention that she was entitled to have the stream flow as it flowed in a state of nature. It denied Colorado's claim that she could dispose of all the waters within her borders, and owed no obligation to pass any of them on to Kansas. It declared that as each State had an equality of right each stood before the court on the same level as the other; that inquiry was not confined to the question whether any portion of the river waters were withheld by Colorado but must include the effect of what had been done upon the conditions in the respective States; and that the court must adjust the dispute on the basis of equality of rights to secure, so far as possible, to Colorado, the benefits of irrigation, without depriving Kansas of the benefits of a flowing stream. The measure of the reciprocal rights and obligations of the States was declared to be an equitable apportionment of the benefits of the river. The court added that, before the developments in Colorado consequent upon irrigation

were to be destroyed or materially affected, Kansas must show not merely some technical right but one which carried corresponding benefits.

On examination of the proofs, the court concluded that diversions authorized by Colorado embraced more water than the total flow at Canon City. It found, however, that no clear showing was made as to what surplus water, if any, was contributed by the tributaries below that point or as to the proportion of the diverted water returned to the river by seepage. The opinion described the diversions in each State, analyzed the use made of the water and the benefits derived from it in each, considered population tables and agricultural statistics bearing upon the growth of the communities adjacent to the river in each, and stated conclusions, now material, as follows: That the result of Colorado's appropriations had been beneficial reclamation of many acres; that, while the influence of Colorado's diversions had been of perceptible injury to portions of the Arkansas valley in Kansas, yet to the great body of the valley the diminution of flow had worked little, if any, detriment; that regarding the interests of both States, and the right of each to receive benefit through irrigation and otherwise from the waters of the stream, the court was not satisfied that Kansas had made out a case entitling it to a decree. The court added that if depletion by Colorado continued to increase there would come a time when Kansas might justly say that there was no longer an equitable distribution of benefits and might rightly call for relief against Colorado and her citizens. Accordingly the bill was dismissed without prejudice to future action by Kansas. The taking of evidence ended June 16, 1905, and the decision of the court was announced May 13, 1907.

October 30, 1909, the Finney County Water Users' Association, which maintained the so-called Farmers' Ditch in Kansas, applied to a Kansas court for adjudication

of priorities as between various Kansas users of the river water. One of the defendants, the United States Irrigating Company, removed the cause to the United States District Court. A consent decree was entered May 16, 1911, which provided for the allocation and rotation of use amongst certain, but not all, of the Kansas ditches, including the Farmers' Ditch. It was, however, provided that the settlement should remain binding upon the parties only until the adjudication of other litigation next to be noticed.

August 27, 1910, United States Irrigating Company sued Graham Ditch Co. and others holding Colorado priorities, in the United States District Court for Colorado, to obtain an adjudication of priorities as between Kansas users and Colorado users. The Finney County Association was denied leave to intervene. Evidence was taken, but the suit was settled by a contract of February 19, 1916. By this settlement, the Colorado defendants agreed to recognize priorities as of August 27, 1910, for all the Kansas ditches in Finney County except the Farmers' Ditch; not to apply for, or claim, priorities for storage purposes on the Purgatoire River, a tributary of the Arkansas, or below the mouth of the Purgatoire, of a date earlier than August 27, 1910; and to pay the costs of suit and an additional sum to the Kansas interests. The Kansas ditches agreed to accept the priority date of August 27, 1910, and the quantities of water specified in the contract, as a definition and determination of their rights. The defendants complied with the terms of the contract.

The Finney County Association declined to become a party to the contract and, on November 27, 1916, brought suit in the United States District Court for Colorado against the same defendants for relief like that sought in the United States Irrigating Company's suit. January 29, 1923, the Finney County Association brought a second suit in the same court against other Colorado defendants

for similar relief. January 24, 1928, Colorado filed the present bill against Kansas and the Finney County Association.

After formal recitals, the bill refers to our earlier decision, states that, in reliance upon it, money has been spent in the improvement of the irrigation systems in Colorado, recites the prior and the pending private litigation against Colorado appropriators, alleges that the establishment of an interstate priority schedule sought in the pending suits would disrupt and destroy Colorado's administration of the waters of the Arkansas basin and result in conflict of state authority, asserts that no proper settlement of the relative rights of the States can be obtained in suits by Kansas appropriators against Colorado appropriators, outlines other injury to Colorado threatened by prosecution of the pending cases to judgment, and prays that the Finney County Association be enjoined from further pressing those suits, that Kansas and her citizens be enjoined from litigating, or attempting to litigate, the relative rights of the two States and their citizens to the waters of the river on claims similar to those made by the Association in its pending suits, and that the rights of Colorado and her citizens as determined by the judgment in *Kansas* v. *Colorado* be protected.

Kansas' answer admits some allegations of the bill and denies others, sets forth her alleged rights in the waters of the river, recites appropriations by Kansas residents and citizens, diversions by Colorado citizens under appropriations junior in time and inferior in right to those made in Kansas, and asserts that, since the filing of the complaint in *Kansas* v. *Colorado,* Colorado users have largely increased their appropriations and diversions, and threaten further to increase them, to the injury of Kansas users. She prays that the court protect and quiet her rights and those of her citizens and residents, including the Finney

County Association, to their appropriations, that the rights of her citizens and residents to divert water from the river for irrigation be decreed in second feet and that Colorado, her officers, agents, and citizens be perpetually enjoined from diverting any waters from the river or its tributaries in Colorado until the rights of Kansas, her citizens and residents, are satisfied.

The Finney County Association filed an answer admitting and denying averments of the bill and affirmatively praying that Colorado and her citizens be enjoined from diverting water from the river until the Association's right to 250 second feet is satisfied. The issues were made up by Colorado's reply.

Pursuant to our order, evidence was taken by a Commissioner. Thereupon the cause was referred to a Master with leave to take additional evidence, and direction, in the light of all the evidence, to state findings of fact, conclusions of law, and to recommend a form of decree. The evidence consists of some seven thousand typewritten pages of testimony and 368 exhibits covering thousands of pages.

The Master states that the "evidence is voluminous and conflicting on many of the material issues of fact," but his report contains no discussion or analysis of the proofs. Apart from formal recitals, the report consists of fourteen findings of fact,—more properly conclusions of fact,—nine conclusions of law, and a recommended form of decree. Each party has filed exceptions.

Three questions emerge from the pleadings. (1) Is Colorado entitled to an injunction against the further prosecution of litigation by Kansas users against Colorado users? (2) Does the situation call for allocation of the waters of the basin as between Colorado and Kansas in second feet or acre feet? (3) Has Kansas proved that Colorado has substantially and injuriously aggravated

conditions which existed at the time of her earlier suit?

The Master concluded that the first question should be answered in the affirmative. Kansas has not excepted to the conclusion or to the corresponding provisions of the proposed decree.

Bearing upon the second question, the Master found that "the average annual natural flow of the river and its tributaries" is 1,240,000 acre feet, and the "average annual dependable and fairly continuous water supply and flow" 1,110,000 acre feet. He recommends that the dependable flow be allocated 925,000 acre feet to Colorado and 185,000 acre feet to Kansas, 150,000 thereof between April 1 and October 1, and 35,000 between October 1 and April 1 of each year—that is, five-sixths to Colorado and one-sixth to Kansas. He submits a form of decree embodying this allocation and adjusting required deliveries in the same proportions upward or downward in accordance with annual flows in excess of, or less than, the stated average annual dependable flow. He has not attempted to define flood waters or the extent to which they are unusable by either State, and suggests no provision whereby their occurrence may be taken into account in defining Colorado's obligation to deliver water to Kansas. The form of decree requires measurement of flow by gauges, one at Canon City and the other at the mouth of the Purgatoire, and deliveries to Kansas prorated to the total of the flows at those points.

Both States except to these features of the decree as ambiguous and impossible of administration. Kansas, while asserting that the award to her is inadequate, professes her willingness to accept the recommended allocation, but insists that the decree require Colorado to deliver the quantity of water awarded to Kansas when and as demanded by her. Colorado asserts that the recommended decree—much more Kansas' proposed amendment—

would entail serious and unjustified damage to her interests, if indeed compliance with its terms were possible.

In respect of the third question, the Master finds:

"There has been since the taking of testimony in the case of Kansas against Colorado cited in 206 U. S. 46, in 1907, a material increase in the river depletion by Colorado of the water supply of the Arkansas River, which has been consumed and used by Colorado users for irrigation purposes and which has diminished the flow of the water into the State of Kansas and that by reason thereof there have been injuries to the substantial interests in Kansas."

No exception is taken to the Master's recommendation that an injunction issue against further prosecution of the Finney County Association suits against Colorado users. In our view such an injunction is appropriate, and should be granted.

Colorado urges that our decision in *Kansas* v. *Colorado, supra,* amounted to an allocation of the flow of the Arkansas River between the two States. We cannot accept this view. In that case Kansas labored under a burden of proof applicable in litigation between quasi-sovereign states, of which more hereafter. The dismissal of her bill resulted from the conclusion that she had failed to sustain the burden. But from the decision then rendered it follows that unless Kansas can show a present situation materially different from that disclosed in the earlier case she cannot now obtain relief.

The prayer of Kansas for an apportionment in second feet or acre feet cannot be granted. In our former decision we ruled that Kansas was not entitled to a specific share of the waters as they flowed in a state of nature, that it did not then appear that Colorado had appropriated more than her equitable share of the flow, and that if Kansas were later to be accorded relief, she must show additional takings working serious injuries to her sub-

stantial interests. This was in accord with other decisions in similar controversies.[2]

The reason for judicial caution in adjudicating the relative rights of States in such cases is that, while we have jurisdiction of such disputes,[3] they involve the interests of quasi-sovereigns, present complicated and delicate questions, and, due to the possibility of future change of conditions, necessitate expert administration rather than judicial imposition of a hard and fast rule. Such controversies may appropriately be composed by negotiation and agreement, pursuant to the compact clause of the federal Constitution. We say of this case, as the court has said of interstate differences of like nature, that such mutual accommodation and agreement should, if possible, be the medium of settlement, instead of invocation of our adjudicatory power.[4]

It follows that the Master erred in attempting to divide what he designated as the "average annual dependable" water supply of the Arkansas River in Colorado into frac-

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[2] See the cases in notes 3, 4 and 6 *infra*. In *New Jersey* v. *New York*, 283 U. S. 336, 347, the prayer of Pennsylvania for such an allocation was denied. *Wyoming* v. *Colorado*, 259 U. S. 419, is not an exception. As it happened, the doctrine of appropriation had always prevailed in each of the States there concerned and furnished the most appropriate and accurate measure of their respective rights of appropriation of the flow of the Laramie River. It was, therefore, possible in enforcing equitable apportionment, to limit the amount of water which Colorado might, without injury to Wyoming's interests, divert to another water shed, to an amount not exceeding the unappropriated flow.

[3] *Missouri* v. *Illinois*, 180 U. S. 208; *Kansas* v. *Colorado*, 206 U. S. 46, 95, 96.

[4] See *Washington* v. *Oregon*, 214 U. S. 205, 218; *Minnesota* v. *Wisconsin*, 252 U. S. 273, 283; *New York* v. *New Jersey*, 256 U. S. 296, 313. Compare the Colorado River Compact of Nov. 24, 1922, authorized by Act of August 19, 1921, 42 Stat. 171, and dismissed in *Arizona* v. *California*, 292 U. S. 341, 345; and compare *Hinderlider* v. *La Plata River Co.*, 304 U. S. 92.

tions and awarding those fractions to the States respectively. Such a controversy as is here presented is not to be determined as if it were one between two private riparian proprietors or appropriators.[5]

The lower State is not entitled to have the stream flow as it would in nature regardless of need or use.[6] If, then, the upper State is devoting the water to a beneficial use, the question to be decided, in the light of existing conditions in both States, is whether, and to what extent, her action injures the lower State and her citizens by depriving them of a like, or an equally valuable, beneficial use.[7]

We come now to the vital question whether Kansas has made good her claim to relief founded on the charge that Colorado has, since our prior decision, increased depletion of the water supply to the material damage of Kansas' substantial interests. The question must be answered in the light of rules of decision appropriate to the quality of the parties and the nature of the suit.

In such disputes as this, the court is conscious of the great and serious caution with which it is necessary to approach the inquiry whether a case is proved. Not every matter which would warrant resort to equity by one citizen against another would justify our interference with the action of a State, for the burden on the complaining State is much greater than that generally required to be borne by private parties. Before the court will intervene the case must be of serious magnitude and fully and clearly proved.[8] And in determining whether one State

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[5] *Kansas* v. *Colorado, supra,* 100.

[6] *Kansas* v. *Colorado, supra,* 85, 101–102; *Connecticut* v. *Massachusetts,* 282 U. S. 660, 669–670; *Washington* v. *Oregon,* 297 U. S. 517, 523, 526.

[7] Cases cited in Note 8.

[8] *Missouri* v. *Illinois,* 200 U. S. 496, 520–521; *New York* v. *New Jersey,* 256 U. S. 296, 309; *North Dakota* v. *Minnesota,* 263 U. S. 365, 374; *Connecticut* v. *Massachusetts,* 282 U. S. 660, 669; *Alabama* v. *Arizona,* 291 U. S. 286, 292; *Washington* v. *Oregon,* 297 U. S. 517, 522.

is using, or threatening to use, more than its equitable share of the benefits of a stream, all the factors which create equities in favor of one State or the other must be weighed as of the date when the controversy is mooted.

On this record there can be no doubt that a decree such as the Master recommends, or an amendment or enlargement of that decree in the form Kansas asks, would inflict serious damage on existing agricultural interests in Colorado. How great the injury would be it is difficult to determine, but certainly the proposed decree would operate to deprive some citizens of Colorado, to some extent, of their means of support. It might indeed result in the abandonment of valuable improvements and actual migration from farms. Through practice of irrigation, Colorado's agriculture in the basin has grown steadily for fifty years. With this development has gone a large investment in canals, reservoirs, and farms. The progress has been open. The facts were of common knowledge.

The controversy was litigated in 1901. Kansas was denied relief in 1907. The dispute between appropriators in the two States was brought into court in 1910 and settled in 1916. The Finney County Association sued Colorado appropriators in 1916 and 1923. Even if Kansas' claims of increased depletion and ensuing damage are taken at face value, it is nevertheless evident that while improvements based upon irrigation went forward in Colorado for twenty-one years, Kansas took no action until Colorado filed the instant complaint in 1928.

These facts might well preclude the award of the relief Kansas asks. But, in any event, they gravely add to the burden she would otherwise bear, and must be weighed in estimating the equities of the case.[9]

The Master concludes that there has been a material increase in depletion by Colorado, a consequent diminution

[9] *Washington* v. *Oregon*, 297 U. S. 517, 526.

of flow across the state line, and injury to the substantial interests of Kansas. His report does not state what he considers material; or the extent of the diminution of flow; or the interests of Kansas which have been injured and the extent of the injury. We must, therefore, turn to the evidence to resolve the issues.

Kansas asserts that since the decision of *Kansas* v. *Colorado, supra*, Colorado has increased her consumptive use of the water of the Arkansas River by an annual average of between 300,000 and 400,000 acre feet. Witnesses so testified and, to support their conclusions, submitted elaborate calculations and analyses exhibiting the alleged total water supply of the river basin in Colorado and the alleged amount of water passing in the bed of the stream across the state line. A witness submitted tables covering the period 1895–1930 from which he deduced an average yearly water supply of 1,240,000 acre feet and an average annual dependable supply of 1,110,000 acre feet. He presented figures to show that Colorado's consumptive use had increased to the extent of an annual average of 300,000 acre feet. He reached this result by using estimated flow across the state line between 1895 and 1908 and measured flow between 1908 and 1930, during which period a gauging station was maintained at Holly near the line. Measurements indicate that, during the latter period, the average annual state line flow was 260,700 acre feet.[10] If, as claimed, this flow remained after an additional average annual depletion of 300,000 acre feet by Colorado, the average annual flow in the earlier period, 1895 to 1908, would necessarily have been greater by 300,000, or would have averaged 560,700 acre feet. The witness' own exhibit shows that he assumed an average annual state line flow for the period

[10] In computing average annual flows, flood waters are included in the reckoning. As later shown, such annual averages do not represent the quantities of water usable by diversion ditches for irrigation.

1895–1899 of 300,000 acre feet, for 1900–1904, of 470,000 acre feet, and, for 1905–1909, of 454,000 acre feet, or an annual average over the total period, 1895–1909, of 408,000 acre feet. On his own estimates the claimed average annual depletion of 300,000 acre feet could not have taken place. Moreover, the force of this evidence is weakened by Kansas' allegations in *Kansas* v. *Colorado, supra.* In her bill in that case she alleged Colorado had totally destroyed the normal flow of the river exclusive of floods whereas she now asserts that the flow at the time of the earlier suit was such that Colorado has been able to deplete it on an annual average of 300,000 acre feet.

The records of Colorado's consumption and ditch diversions, and the Colorado and Kansas exhibits showing the divertible and usable state line flow, rebut such an increase as Kansas asserts. Kansas' expert witness himself testified that the diversion records show no material change in Colorado diversions since 1905 and that if acreage in Colorado has expanded under the ditches on the main stem of the river it has done so because of an improved duty of water; that, during the period, the river gains due to return flow have increased, the consumptive use of water has declined, and relatively the stream flows have improved.

The Kansas ditches are capable of diverting water only up to 2,000 c. f. s. When the flow is greater the excess cannot be diverted and used. It is admitted that the character of the flow of the river in Colorado is variable from year to year, from season to season, and from day to day, and the main river below Canon City may be almost without water one day, run a flood the next day, and, on the following day, be in practically its original condition. Thus it appears that both in Colorado and in Kansas there may at one time be flood water unavailable for direct diversion and, at another, not enough water to supply the capacity of diversion ditches. The critical matter is

the amount of divertible flow at times when water is most needed for irrigation. Calculations of average annual flow, which include flood flows, are, therefore, not helpful in ascertaining the dependable supply of water usable for irrigation. That supply has, in Colorado, been supplemented by the extensive use of reservoirs for storage of flood waters and winter flows not usable or needed for irrigation. Though western Kansas affords sites for similar storage reservoirs, but one small basin has been constructed in that State. On the other hand, the storage in Colorado, and the release of stored water to supplement the natural flow of the stream in times of need, operates by seepage and return to the channel to stabilize and improve the flow at the state line and, to that extent, benefits irrigation in Kansas.

Kansas relies heavily upon the increase of irrigated acreage in Colorado since our decision in 1907. The testimony in the earlier case was closed in 1905. The then latest available census—for 1902—reported 300,115 acres under irrigation in the Arkansas basin in Colorado. In its opinion the court referred to this figure. The next census—for 1909—gives the Colorado acreage as 464,236. The later reports disclose an addition of less than 5,000 acres between 1909 and 1939. Thus a total of about 170,000 additional acres has been put under irrigation since 1902. On its face this record would seem to indicate a large increase of consumptive use by Colorado, but the acreage under irrigation does not afford a reliable measure of actual consumption. When first turned in, the water is rapidly absorbed by the sub-soil with consequent high consumption. By continued irrigation the sub-soil becomes saturated, the water table rises, and water, in increasing quantities, flows back to the stream. Ultimately consumption falls well below diversion. The returned water again may be diverted and again supply return flows. Since the decision in the earlier case, studies

of return flows have been made which indicate a steady reduction in the quantity of water consumed per acre of irrigated land.

Practically all of the affected Kansas ditches are in three western counties. Tables taken from the United States census show that, in 1899, acreage irrigated in these counties was 6% of that irrigated in the Colorado basin. In 1909 it was 7%, in 1929, 9.7%, and, in 1939, 10.7%. It seems that Colorado cannot have depleted the usable supply passing into Kansas if acreage under irrigation is any measure of depletion.

Whatever may be said of the practices of Colorado since 1905, Kansas is not entitled to relief unless she shows they clearly have entailed serious damage to her substantial interests and those of her citizens. It is not necessary to quote the findings of this court made in the earlier case. We need only say they disclose that some ditches in western Kansas had been abandoned for lack of available water and all ditches were suffering from shortages of flow. The court pointed out that Colorado had authorized diversions in excess of the flow at Canon City. And the record in the present case indicates that, except for seepage and return flow, the appropriations Colorado has authorized from the basin, as a whole, exceed the available dependable flow of the stream and its tributaries, and this appears to have been true also in 1901. It appears, nevertheless, that, since 1904, an increased quantity of usable water has passed the state line, for it is testified by Kansas' expert witness that, between 1895 and 1902, no divertible water passed the line and none between 1903 and 1907, except in 1903 and 1905, whereas in each year since 1908 divertible water has crossed the state line in varying quantities and, in most years, in substantial amounts.

Kansas, however, insists that 414,000 acres in western Kansas are susceptible of successful irrigation, and much of this land would have been irrigated had Colorado not

deprived Kansas of her equitable share of the flow. The evidence is that the acreage now irrigated in Kansas lies close to the river and along the river bottom. The land claimed to be susceptible of irrigation extends many miles from the bed of the river. We are asked to speculate as to how much of this land would have been put under irrigation under more favorable circumstances.

As has been pointed out, despite Colorado's alleged increased depletion, the acreage under irrigation in western Kansas through existing ditches has steadily increased, over the period 1895–1939, from approximately 15,000 acres to approximately 56,000 acres. Moreover, the arid lands in western Kansas are underlaid at shallow depths with great quantities of ground water available for irrigation by pumping at low initial and maintenance cost. There is persuasive testimony that farmers who could be served from existing ditches have elected not to take water therefrom but to install pumping systems because of lower cost.

Again, there is serious question whether lands which are not riparian may divert the water from the stream for irrigation. In the earlier suit Kansas asserted,[11] and the court held,[12] that the common law prevailed in Kansas and governed the rights of riparian owners. It is true that the rule as to riparian rights has been expanded by the common law of Kansas to permit a riparian proprietor reasonable use of the waters of a stream for irrigation.[13] But such use is subject to the rights of other riparian owners to a like reasonable use. What is reasonable must, in each instance, be determined in the light of total supply and total need of all riparian owners.[14] It is also true that, beginning in 1886, Kansas, by statute, recognized appro-

[11] 206 U. S. 51, 52, 58, 59, 60, 61.

[12] *Ibid.*, 95, 99, 102, 104.

[13] *Campbell* v. *Grimes*, 62 Kan. 503, 64 P. 62.

[14] *Clark* v. *Allaman*, 71 Kan. 206, 80 P. 571.

priation for irrigation. But there is doubt whether the privilege is not restricted to riparian owners in some portions of the State. The Supreme Court of Kansas has held that, where a title originates in a grant antedating the Act of 1886, the right of appropriation is limited by the common law as to riparian rights, which are rights of property derived from the original patent or deed in the line of title.[15] It seems that title to much of the land along the Arkansas Valley in western Kansas was originally granted or patented prior to 1886. The brief and argument of Kansas, while referring to the statutes of the State authorizing appropriation, make no reference to the Kansas decisions and no showing with respect to the right of non-riparian owners to appropriate waters against objection by other such owners.

The official census figures submitted bearing upon population of the western counties of Kansas, and the agricultural production in them, give no support to a claim that the inhabitants have suffered for lack of arable and productive land. Generally speaking, the population has steadily increased and the agricultural production has also risen throughout the period in question.

All these considerations persuade us that Kansas has not sustained her allegations that Colorado's use has materially increased, and that the increase has worked a serious detriment to the substantial interests of Kansas.

A decree should be entered enjoining the further prosecution of the Finney County Association's suits, and dismissing the prayers of both States for other relief. The parties may submit such a decree.

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[15] *Frizell* v. *Bindley*, 144 Kan. 84, 58 P. 2d 95. Cf. *Smith* v. *Miller*, 147 Kan. 40, 75 P. 2d 273.

Counsel for Parties.

CRESCENT EXPRESS LINES, INC. *v.* UNITED STATES ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 65. Argued November 19, 1943.—Decided December 6, 1943.

1. Upon an application for a certificate authorizing operations as a common carrier under the "grandfather clause" of the Motor Carrier Act, the Interstate Commerce Commission issued a certificate more limited than that indicated in its earlier "compliance order." *Held* that the applicant was not deprived of any procedural right. P. 404.
2. Under the "grandfather clause" of the Motor Carrier Act, the Interstate Commerce Commission issued a common carrier certificate limited to "special operations," "non-scheduled door-to-door service," "irregular routes," and "transportation of not more than six persons in any one vehicle." *Held* authorized by the Act and supported by the evidence. P. 405.
3. The limitation of the certificate to "transportation of not more than six persons in any one vehicle" is not inconsistent with the proviso of § 208 of the Motor Carrier Act forbidding restriction of the right of a carrier to add equipment. Pp. 406, 409.
4. It was the intent of Congress to limit applicants under the "grandfather clause" to the type of equipment and service previously offered. P. 410.

49 F. Supp. 92, affirmed.

APPEAL from a decree of a District Court of three judges dismissing the complaint in a suit to set aside an order of the Interstate Commerce Commission.

Mr. George H. Rosen for appellant.

Mr. E. M. Reidy, with whom *Solicitor General Fahy* and *Messrs. Walter J. Cummings, Jr.* and *Daniel W. Knowlton* were on the brief, for the Interstate Commerce Commission, appellee. The cause was submitted by *Mr. Henry P. Goldstein* for the Mountain Transit Corporation, and by *Mr. James F. X. O'Brien* for the Hudson Transit Lines, Inc., appellees.

MR. JUSTICE REED delivered the opinion of the Court.

This appeal brings here for review a judgment of a district court[1] upholding an order of the Interstate Commerce Commission, specifying limitations in a certificate proposed to be issued to appellant as a common carrier.

The order bears the limitations upon its face, as follows:

"The service to be rendered by applicant, as authorized by the order of which this is a part, in interstate or foreign commerce as a common carrier by motor vehicle of passengers and their baggage, in special operations, in non-scheduled door-to-door service, limited to the transportation of not more than six passengers in any one vehicle, but not including the driver thereof, and not including children under ten years of age who do not occupy a seat or seats, during the season extending from June 1 to October 1, inclusive, over irregular routes,"

between New York, N. Y., and points in Sullivan and Ulster Counties, New York.

Following the enactment of the Motor Carrier Act of 1935, 49 Stat. 543, 49 U. S. C. §§ 301 *et seq.*, the appellant's predecessor, a partnership, made timely application for a certificate of public convenience and necessity under the grandfather clause of the Act, 49 U. S. C. § 306 (a).

As appears from the application and the evidence, the appellant's operations began in 1928 when Herman Trevax purchased a seven-passenger sedan and began carrying passengers to summer resorts in the mountains of New York State. Between 1930 and 1933, three others purchased cars, joined Trevax in this business and opened an office in New York. All this was prior to the critical date of June 1, 1935, fixed by § 306 (a) to determine the

[1] 28 U. S. C. §§ 47, 47a.

eligibility of applicants for certificates because of their former (grandfather) operation.

The partners advertised "7 Passengers Cars Leaving Daily to All Parts of the Mountains," "From Your Home to Your Hotel." An affidavit stated that the partners would "transport people to hotels located in all roads and by-roads." The owners of several resort hotels stated that the applicant had supplied cars for carrying guests between their hotels and New York City. Former passengers described the convenience of the service and from their descriptions of the trips, it appears that the routes followed were irregular and taken to fit the needs of each passenger. The firm owned no buses of any kind.

On June 20, 1938, the Commission issued an order that it would, on compliance with conditions not here pertinent, grant a certificate authorizing Crescent to operate

"as a common carrier by motor vehicle of passengers and their baggage, over the regular route, between fixed termini, and to and from intermediate and off-route points, during the season extending from the 1st of June to the 1st of October, inclusive,"

between New York City and named towns in Sullivan and Ulster Counties, New York, by way of New Jersey.

Protests were filed by several competing carriers, who considered the compliance order too broad. On September 14, 1938, the parties were notified that the objections had been deemed sufficient to warrant referring the case back to the field force for further investigation. An informal hearing, which the applicant did not attend, was held on December 1, 1938.

The Commission then deferred determination of the applicant's rights until the decision of a number of test cases involving carriers performing a similar service. See Sullivan County Highway Line Application, 21 M. C. C. 717, reconsidered, 30 M. C. C. 133; Irving Nudelman Ap-

plication, 22 M. C. C. 275, reconsidered, 28 M. C. C. 91. In the meantime, the partners sold their business to the present appellant, which was substituted before the Commission by order of October 31, 1940. On September 2, 1941, the second order, providing for a more limited certificate, quoted at the beginning of this opinion, was issued.

(1) Appellant contends that the changes to which it objects in the last order as compared with the earlier were made without proper hearing or evidence. This argument proceeds upon the assumption that the earlier conclusions, as embodied in the 1938 order, endow appellant with something akin to a right to receive ultimately a certificate embodying the terms of the order.[2] However, under § 306 the Commission was directed to issue the certificates to applicants under the grandfather clause without further proof of convenience or necessity and without further proceedings. Its routine practice was to refer the application to its field force for investigation.[3] The applicant appeared before this examiner prior to the first order of the Commission. The compliance order was made upon the application, the supporting affidavits and questionnaire. The mass of applications forced this summary procedure.[4] The compliance order gave opportunity to the applicant or other parties in interest to protest its conclusions. The order remains

[2] These preliminary orders are spoken of as compliance orders. Such a descriptive word is applicable because the orders direct the issue of a certificate in accordance with the terms of the compliance order, if no objection is filed and if the applicant complies with the statutory and regulatory requirements of security for protection of the public, rates, fares, charges and tariffs. 49 U. S. C. §§ 315–317.

[3] 51st Annual Report of the Interstate Commerce Commission, pp. 70–72.

[4] 51st Annual Report of the Interstate Commerce Commission, pp. 67, 68, 71; 55th Annual Report of the Interstate Commerce Commission, p. 110. See *Gregg Cartage Co.* v. *United States*, 316 U. S. 74, 84.

under the control of the Commission. § 321 (b). This application was treated in the foregoing manner.

Nothing inimical to the applicant on the protests of its competitors developed from the hearing of December 1, 1938. Applicant protested in writing the order of September 2, 1941, filed a brief in support of its protest and upon the refusal of Division 5 on March 17, 1942, to allow the protest, renewed it before the entire Commission where it was again denied July 13, 1942. At no time has appellant offered to present additional evidence of operations prior to June 1, 1935. It seems plain to us that appellant has been afforded ample opportunity to present its application with all supporting data. In view of these facts, we do not find it necessary to resolve a question as to whether or not appellant had actual notice of the meeting of December 1, 1938.

(2) A further contention of appellant is that the record "does not support the Commission in restricting the appellant to door-to-door service over irregular routes in non-scheduled operations," which were described as special operations. As the district court's interpretation of the order, that "door-to-door service" allowed the appellant to transport passengers from their office or station in the city as well as from the passengers' residences to the mountains and vice versa, is not challenged, that provision requires no further examination. Evidently from the advertisement quoted on p. 403, *supra,* both of these types of business were sought.

The objection of appellant to "irregular routes" appears to be that only special or charter operations entitle a motor carrier to a certificate for irregular routes. § 307. Therefore if appellant's operations are scheduled operations between fixed termini, as appellant also contends, the order ought to require a regular route. However, we think the evidence is clear that prior to the critical date, June 1, 1935, the operations of appellant were special and non-sched-

uled. Consequently the insertion of the privilege for irregular routes was correct.

In answer to the inquiry as to whether special or charter operations were conducted prior to June 1, 1935, appellant answered, "no special operations." [5] However, the record shows a number of instances where passengers made individual arrangements for their transportation to and from the mountains. No schedule of arrival or departure appears in the record. Instead of publishing arrivals and departures, routes, stops, et cetera, the advertisements referred to daily trips and asked prospective customers to arrange for reservations. There was convincing evidence that applicant's service prior to June 1, 1935, was special and non-scheduled.

The evidence also is plain that the appellant did not operate between fixed termini. A map was filed with the application showing not a single destination in the mountains but numerous ones, which are described by appellant in its application as follows:

"Applicant obtains its traffic in the Boroughs of Manhattan and Bronx, New York, and transports said traffic to the Counties of Sullivan and Ulster, in the State of New York. On return trips the applicant obtains its traffic in and about Woodbourne, New York, more specifically within a radius of twenty (20) miles from Woodbourne, New York, and transports such traffic to the five boroughs of New York City."

(3) Finally, appellant urges that it is beyond the power of the Commission to limit its operations to "transportation of not more than six passengers in any one vehicle."

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[5] The Commission construes "charter" to refer to one contractor taking over all the vehicle for a trip or trips and "special" to transportation services on week-end, holidays or other special occasions when the carrier assembles the passengers and sells individual tickets. *Re Fordham Bus Corp.*, 29 M. C. C. 293, 297, 41 F. Supp. 712.

The freedom is claimed to use buses or other multiple passenger type of conveyance.

Section 208 of the Act, 49 Stat. 543, 552, 49 U. S. C. § 308, provides, with reference to grandfather clause carriers,

"That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require." [6]

The scope of the Commission's authority under this section depends upon the meaning given to the word, "business." The appellant argues that it would be engaged in the same business if, in lieu of using seven-passenger sedans, it undertook to haul larger numbers of passengers in buses. But the special advantage to the public inherent in the use of small vehicles operating as occasion demands from door-to-door rather than between terminals, sets off the appellant's business from the service provided by regular lines operating heavier equipment. Irving Nudelman Application, 28 M. C. C. 91, 95–6. The limitation to six passengers in one load is less restrictive than limitation to a particular type of vehicle

[6] The bill as drafted by the Federal Coordinator of Transportation did not contain the proviso. S. Doc. No. 152, 73d Cong., 2d Sess., pp. 47 and 357. The addition was explained by Senator Wheeler, the Chairman of the Interstate Commerce Committee, as follows: "Section 208 (a), page 26, as amended, permits the Commission to attach to all certificates, whether granted under the grandfather clause or otherwise, reasonable terms, conditions, and limitations. In order to meet criticisms that the effect of these provisions would be to check the natural growth of operations if every increase in facilities required authorization by the Commission, the committee has amended section 208 (a) . . ." 79 Cong. Rec. 5654.

since it allows the carrier to employ sedans, open cars, station wagons, or any other suitable motor vehicle. 28 M. C. C. at 96. This allows flexibility in equipment while continuing the same business. 22 M. C. C. 285. The line between six-passenger and larger scale operation must be drawn somewhere, and the Commission has fixed it where the appellant conducted its business on June 1, 1935. The Crescent partnership gave some indication that it appreciated these special differences when in 1938 it proposed to change its name to Crescent Cadillac Service, "for the sake of a better business name," thus emphasizing the commercial significance of the sedan-type vehicle. It appears from the application that Crescent owned no buses; it operated nothing but sedans. To authorize the appellant to change to the business of carrying passengers by bus would alter the position in the transportation system which it occupied on June 1, 1935. *Noble* v. *United States,* 319 U. S. 88.[7]

If the holder of a grandfather certificate for this distinctive door-to-door service could develop his operations so that they would be substantially those of a bus line, the ability of the Commission to carry out its duties of regulation in the public interest would be seriously impaired. Since § 308 requires the Commission to specify the service to be rendered, this could not be done without power also to specify the general type of vehicle to be used. We

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[7] The *Noble* case was a contract carrier application under 49 U. S. C. § 309. Under subsection (b) the Commission was required to specify in the permit the "business of the contract carrier covered thereby."

We held that it was proper to limit the permit so that only shippers who "operate food canneries or meat packing businesses," in particular localities, might be served. This limitation corresponded to the type of trade previously enjoyed by the carrier. The carrier contended for a limitation only as to commodities. The proviso in § 309 (b), applicable in the *Noble* case, covers substantially the same ground as the proviso in § 308 dealt with in the present opinion.

agree with the Commission that the proviso is a prohibition against a limitation on the addition of more vehicles of the authorized type, not a prohibition of the specification of the type. See Irving Nudelman Application, 28 M. C. C. 91.[8]

We are of the view that the power of the Commission to limit the certificate as it proposes to do is in accord with the purposes of the Motor Carrier Act. When Congress provided for certificates to cover all carriers which were already in operation, it did not throw open the motor transportation system to more destructive competition than that already existing. The right to certificates was limited to those then in bona fide operation "over the route or routes or within the territory for which application is made." 49 U. S. C. § 306.

The statute, we have said, contemplated "substantial parity" between future and prior operations. *Alton R. Co.* v. *United States,* 315 U. S. 15, 22. "As the Act is remedial and to be construed liberally, the proviso defining exemptions is to be read in harmony with the purpose of the measure and held to extend only to carriers plainly within its terms." *McDonald* v. *Thompson,* 305 U. S. 263, 266; *Gregg Cartage Co.* v. *United States,* 316 U. S. 74, 83. Consequently we held in *United States* v. *Maher,* 307 U. S. 148, that operations over irregular routes did not provide the requisite continuity to support an application for regular service between fixed termini, even when the highway between the fixed termini had been occasionally used for part of the distance in the irregular route operations.

[8] Numerous instances of limitation of type are given in the Nudelman opinion. The rule of the Nudelman case has been applied in Rubin and Greenfield Application, 33 M. C. C. 383, and Greenberg Application, 33 M. C. C. 725. See also Davidson Transfer & Storage Co. Application, 32 M. C. C. 777.

When the Commission requires the applicant under the grandfather clause to limit its future operations to the type of equipment and service previously offered, it acts within its power and in accord with the purpose of Congress to maintain motor transportation facilities appropriate to the needs of the public. S. Rep. No. 482, 74th Cong., 1st Sess. If there is a need for a different type of service for this transportation, applications may be filed under § 307.

Affirmed.

ESTATE OF ROGERS ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 66. Argued November 18, 19, 1943.—Decided December 6, 1943.

1. The value of property in respect of which a decedent exercised by will a general power of appointment, *held,* under § 302 (f) of the Revenue Act of 1926, includible in his gross estate for the purpose of the federal estate tax, without deduction for any property appointed to persons who (under the will of the creator of the power) would have come into enjoyment of other interests in the property had the power not been exercised. P. 413.
2. Whether under § 302 (f) there has been a "passing" of property by a testamentary exercise of a general power of appointment is a federal question, once state law has made clear that the appointment had legal validity and brought into being new interests in property. P. 414.
3. *Helvering* v. *Grinnell,* 294 U. S. 153, distinguished. P. 415.

135 F. 2d 35, affirmed.

CERTIORARI, 320 U. S. 210, to review the reversal of a decision of the Board of Tax Appeals which determined that there was an overpayment of estate tax.

Mr. John W. Drye, Jr. for petitioners.

Assistant Attorney General Samuel O. Clark, Jr., with whom *Solicitor General Fahy* and *Messrs. Sewall Key, J. Louis Monarch,* and *Alvin J. Rockwell* were on the brief, for respondent.

Mr. William G. Heiner filed a brief on behalf of Thomas D. Allison, Administrator, as *amicus curiae,* in support of petitioner.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This case requires us to determine whether and what interests that came into enjoyment upon the death of the donee of a general power of appointment should be included for federal estate tax purposes in the donee's gross estate. § 302 (f) of the Revenue Act of 1926, c. 27, 44 Stat. (part 2) 9, 71, as amended by § 803 (b) of the Revenue Act of 1932, c. 209, 47 Stat. 169, 279, 26 U. S. C. § 811 (f).

The problem arises from the following circumstances. Rogers Sr. gave his son, the decedent, a general testamentary power of appointment over certain property, with limitations in default of the appointment to the heirs, under New York law, of the son. On the son's death these heirs were his widow, a daughter and a son, to each of whom would have come upon default one-third of the property. However, the decedent did exercise his power. His will, as determined by a decree of the Surrogate's Court of the County of New York, New York (New York Law Journal, November 9, 1938, p. 1542, and 170 Misc. 85, 9 N. Y. S. 2d 586), created the following interests so far as here relevant: a fraction of the appointable property, 6.667%, went in three equal shares to the widow, the daughter, and a grandson; of the balance, two equal shares were put in trust for the benefit of the widow and daughter, respectively, while the other third was ap-

pointed outright to the grandson. The decedent made no appointment to his son.

In determining the value of the gross estate, the Commissioner included the value of all property of which decedent disposed by appointment. He did so by applying the direction of § 302 of the Revenue Act of 1926, whereby

"The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property

. . . . . .

"(f) To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will . . ." 44 Stat. (part 2) 9, 70–71, as amended by § 803 (b) of the Revenue Act of 1932, c. 209, 47 Stat. 169, 279, 26 U. S. C. § 811 (f).

The Board of Tax Appeals reduced the value of his gross estate by excluding the value of the property which passed to the widow and daughter.[1] It did so on the ground that that which came to these two under the power was less in value than would have come to them under the will of the donor of the power had that power not been exercised by the donee. On review the Circuit Court of Appeals for the Second Circuit reversed the Board and reinstated the deficiency determined by the Commissioner, taxing all the property which the decedent appointed. Two of the judges expressed distinct views, the third concurred in the result without joining either of his brethren. 135 F. 2d 35. Because of the importance of the issue to the administration of federal estate taxation as well as to settle an asserted conflict between the Second Circuit

[1] The Board of Tax Appeals had originally taken a different view. Leser *v.* Commissioner, 17 B. T. A. 266, 273. But *Helvering* v. *Grinnell*, 294 U. S. 153, led it to change its view. Webster *v.* Commissioner, 38 B. T. A. 273, 284–289.

and the Third and Fourth Circuits (*Rothensies* v. *Fidelity-Philadelphia Trust Co.*, 112 F. 2d 758; *Legg's Estate* v. *Commissioner*, 114 F. 2d 760, and see *Lewis* v. *Rothensies*, 138 F. 2d 129), we brought the case here. 320 U. S. 210.

We agree with the decision below. A contrary view would mean that the decedent did nothing so far as he created interests for his widow and daughter, although undeniably the donee, by his will, exercised his power of appointment. Nothing of a taxable nature happened, it is urged, no property "passed" through this exercise of his power because by his will the donee gave interests to appointees who, if he had not exercised the power, would have come into enjoyment of interests in the property though to be sure other interests than the donee saw fit to give them.

The argument derives from considerations irrelevant to the ascertainment of the incidence of the federal estate tax. In law also the right answer usually depends on putting the right question. For the purpose of ascertaining the corpus on which an estate tax is to be assessed, what is decisive is what values were included in dispositions made by a decedent, values which but for such dispositions could not have existed. That other values, whether worth more or less as to some of the beneficiaries, would have ripened into enjoyment if a testator had not exercised his privilege of transmitting property does not alter the fact that he and no one else did transmit property which it was his to do with as he willed. And that is precisely what the federal estate tax hits—an exercise of the privilege of directing the course of property after a man's death. Whether for purposes of local property law testamentary dominion over property is deemed a "special" or a "general" power of appointment, *Morgan* v. *Commissioner*, 309 U. S. 78; whether local tax legislation deems the appointed interest to derive from the will of the donor or that of the donee of the power, *Matter of*

Duryea, 277 N. Y. 310, 14 N. E. 2d 369; whether for some purposes in matters of local property law title is sometimes traced to the donee of a power and for other purposes to the donor, cf. *Chanler* v. *Kelsey,* 205 U. S. 466, 474, are matters of complete indifference to the federal fisc.

Whether by a testamentary exercise of a general power of appointment property passed under § 302 (f) is a question of federal law, once state law has made clear, as it has here, that the appointment had legal validity and brought into being new interests in property. See *Helvering* v. *Stuart,* 317 U. S. 154. Were it not so, federal tax legislation would be the victim of conflicting state decisions on matters relating to local concerns and quite unrelated to the single uniform purpose of federal taxation. *Lyeth* v. *Hoey,* 305 U. S. 188, 191–194. In taxing "property passing under a general power of appointment exercised . . . by will," Congress did not deal with recondite niceties of property law nor incorporate a crazy-quilt of local formalisms or historic survivals. "The importation of these distinctions and controversies from the law of property into the administration of the estate tax precludes a fair and workable tax system." *Helvering* v. *Hallock,* 309 U. S. 106, 118. Congress used apt language to tax dispositions which came into being by the exercise of a testamentary privilege availed of by a decedent and which in no other way could have come into being. Such is the present case. To bring about the results which decedent sought to bring about, he had to deal with the whole of the corpus over which he had the power of disposition. To give what he wanted to give and to withhold what he wanted to withhold, Rogers Jr. had to do what he did. And so what is taxed is what Rogers Jr. gave, not what Rogers Sr. left. The son's appointees got what they got not because he chose to use one set of words rather than another set of words, but because he willed to give them the property that he willed. If the result of his testa-

mentary disposition is to subject his beneficence to the estate tax, that is always the effect of an estate tax.

Nothing that was decided or said in *Helvering* v. *Grinnell,* 294 U. S. 153, stands in the way of this conclusion. Where a donee of a power merely echoes the limitations over upon default of appointment he may well be deemed not to have exercised his power, and therefore not to have passed any property under such a power. That case is a far cry from this. To suggest that all the property necessary to effectuate the arrangements made by decedent's will did not constitute property passing under his testamentary power would disregard the fact that he had complete dominion over this property and disposed of all of it as his fancy, not at all as his father's will, dictated. Indulgence of that testamentary fancy to the full extent assessed by the Commissioner is what § 302 (f) taxes.

Affirmed.

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

MR. CHIEF JUSTICE STONE and MR. JUSTICE ROBERTS, dissenting:

We are of opinion that the judgment should be reversed.

This litigation is concerned only with the tax to be paid on the exercise of the testamentary power which purported to give outright to decedent's wife and daughter, each, about 7% of one-third of the trust fund created under the earlier will and the income for life from the remainder of that third, instead of the outright gift of a full one-third of the trust fund which, in default of appointment, each was entitled to receive under the earlier and then operative will.

The only effect of the exercise of the power upon the shares of the wife and daughter was to diminish the gifts

which they were already entitled to receive under the earlier will. The Board of Tax Appeals has found that, as a result of the exercise of the power, the value of the property which the two appointees will receive is less than each was entitled to receive under the first will, which fixed their rights as legatees subject only to exercise of the power.

We think that neither the history nor the words of the taxing statute justify any assumption that in enacting a tax on testamentary gifts it was the purpose of Congress to tax also the exercise of a testamentary power to deprive a legatee of part of his legacy in addition to taxing the use of the power to appoint that part to a third person. The statute lays a tax on gifts such as the earlier will in this case made to the wife and to the daughter and as now interpreted the statute imposes a second tax on the testamentary exercise of the power to diminish the gifts previously made to them by will. Authority for so incongruous a result is found in the provisions of § 302 (f) of the Revenue Act of 1926, which directs the inclusion in the decedent's estate for taxation, of "the value" of property "to the extent of any property passing under a general power of appointment" exercised by a decedent. The statute thus selects property values passing under the exercise of a power of appointment as the measure of the tax. It gives no indication that beyond this it is concerned with the technical quality of estates passing under either the will or the subsequent exercise of the power. And, unlike later amendments to the estate tax statute, Revenue Act of 1942, § 403, 56 Stat. 942; cf. 26 U. S. C. § 811 (d), it taxes not the mere existence of a power to affect the disposition of property, but its exercise to bestow on the appointee such property values.

Looking to the words of the statute in the light of its purpose, we think that the effective operation of the exer-

cise of the power to transfer property values was the intended subject of the tax, and not a use of the power which adds nothing to, but subtracts from, gifts already made and subject to taxation. This Court so stated in *Helvering* v. *Grinnell,* 294 U. S. 153. We can hardly suppose that a purported exercise of a power to make to the wife and daughter gifts, identical with those to which they were already entitled under the will, or to appoint to a third person an interest less than the whole in the shares given to them by the will, would result in a tax on the shares which the wife and daughter were permitted to retain.

To say that such a tax must be imposed because by a different form of words the same end is attained, is to sacrifice substance to form in the application of a taxing statute which is concerned only with substance, the effective transfer of property values to an appointee. *Helvering* v. *Grinnell, supra,* 156; *Rothensies* v. *Fidelity-Philadelphia Trust Co.,* 112 F. 2d 758; *Legg's Estate* v. *Commissioner,* 114 F. 2d 760. We have too often committed ourselves to the proposition that taxation is a practical matter concerned with substance rather than form, see *Bowers* v. *Kerbaugh-Empire Co.,* 271 U. S. 170, 174; *Chase National Bank* v. *United States,* 278 U. S. 327, 336; *Corliss* v. *Bowers,* 281 U. S. 376, 378; *Griffiths* v. *Commissioner,* 308 U. S. 355, 357–8; *Helvering* v. *Hallock,* 309 U. S. 106, 116–19; *Helvering* v. *Horst,* 311 U. S. 112, 116–19, to depart from it now.

COMMISSIONER OF INTERNAL REVENUE *v.* GOOCH MILLING & ELEVATOR CO.

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

No. 53. Argued November 12, 1943.—Decided December 6, 1943.

1. Upon a taxpayer's appeal from the Commissioner's determination of a deficiency in tax for 1936, the Board of Tax Appeals was without jurisdiction to determine the amount of a 1935 overpayment (refund of which was barred by limitations) and to credit such overpayment against the deficiency. Internal Revenue Code, § 272 (g). P. 419.
2. The Board of Tax Appeals was without jurisdiction in such case to apply the doctrine of equitable recoupment. P. 420.

133 F. 2d 131, reversed.

CERTIORARI, 319 U. S. 737, to review the reversal of a decision of the Board of Tax Appeals redetermining deficiencies in income and excess-profits taxes.

Miss Helen R. Carloss, with whom *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key* and *Bernard Chertcoff* were on the brief, for petitioner.

Mr. D. M. Kelleher, with whom *Mr. F. W. McReynolds* was on the brief, for respondent.

MR. JUSTICE MURPHY delivered the opinion of the Court.

The jurisdiction of the Board of Tax Appeals [1] to determine and to apply a prior tax overpayment against a tax

[1] Section 504 (a) of the Revenue Act of 1942, c. 619, 56 Stat. 798, 957, changed the name of the Board of Tax Appeals to The Tax Court of the United States. Section 504 (b) provided that this change in name was to have no effect on the jurisdiction, powers and duties of the agency. See also H. Rep. No. 2333, 77th Cong., 2d Sess., pp. 172–173.

deficiency for a particular year is the sole question presented by this case. The Board held that it did not possess such jurisdiction, but the court below reversed, 133 F. 2d 131. We granted certiorari, 319 U. S. 737, the problem being one of importance in the administration of the revenue laws.

An audit made in 1938 of the books of the respondent corporation disclosed an erroneous valuation of its inventory of June 30, 1935.[2] Because of this error, respondent had been overassessed and had overpaid its income and excess profits taxes for the 1935 fiscal year. This excess payment was not subject to refund because barred by the statute of limitations. On the basis of the adjusted inventory, however, the Commissioner determined that there was a tax deficiency for the 1936 fiscal year. The overpayment of the prior fiscal year exceeded the amount of this deficiency. On appeal to the Board for a redetermination of the deficiency, the respondent sought in its amended petition to have the 1935 overpayment applied as an offset or recoupment against the 1936 deficiency. The Board, consistent with its past decisions,[3] refused to grant this relief "for jurisdictional reasons."

We hold that the Board's position was correct and that it had no jurisdiction to determine or to apply any overpayment of the taxes for the 1935 fiscal year against the 1936 deficiency.

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[2] The respondent filed its tax returns on the basis of a fiscal year ending on June 30. The inventory of June 30, 1935, was common to successive years, being the closing inventory for the 1935 fiscal year and the opening inventory for the 1936 fiscal year.

[3] See, for example, Appeal of R. P. Hazzard Co., 4 B. T. A. 150; Appeal of Cornelius Cotton Mills, 4 B. T. A. 255; Appeal of Dickerman & Englis, Inc., 5 B. T. A. 633; B. T. Couch Glue Co. *v.* Commissioner, 12 B. T. A. 1321; Gould-Mersereau Co. *v.* Commissioner, 21 B. T. A. 1316; Heyl *v.* Commissioner, 34 B. T. A. 223; Red Wing Potteries *v.* Commissioner, 43 B. T. A. 841; Elbert *v.* Commissioner, 2 T. C., No. 113.

The Board is but "an independent agency in the Executive Branch of the Government," [4] and the legislative pattern of its jurisdiction is clear and unambiguous. The Board is confined to a determination of the amount of deficiency or overpayment for the particular tax year as to which the Commissioner determines a deficiency and as to which the taxpayer seeks a review of the deficiency assessment. Internal Revenue Code, §§ 272, 322 (d). It has no power to order a refund or credit should it find that there has been an overpayment in the year in question. *United States ex rel. Girard Trust Co.* v. *Helvering,* 301 U. S. 540, 542. Section 272 (g) of the Internal Revenue Code specifically provides that "the Board in redetermining a deficiency in respect of any taxable year shall consider such facts with relation to the taxes for other taxable years as may be necessary correctly to redetermine the amount of such deficiency, but in so doing shall have no jurisdiction to determine whether or not the tax for any other taxable year has been overpaid or underpaid."

The Board's want of jurisdiction to apply the doctrine of equitable recoupment in this case is manifest from these statutory provisions. The Commissioner assessed a deficiency only for the 1936 fiscal year and it was this assessment of which the respondent sought a review. The Board thus had jurisdiction to do no more than redetermine the 1936 deficiency distinct from any overpayment or underpayment in any prior or subsequent year. There was no occasion here for the Board to exercise its power under § 272 (g) to consider any facts relating to the taxes for the 1935 fiscal year.[5] The redetermination of the tax liability for the 1936 fiscal year was in no way dependent

[4] 53 Stat. 158, 26 U. S. C. § 1100.

[5] The Board has not hesitated to exercise its jurisdiction under § 272 (g) to consider the taxes for other taxable years insofar as relevant to the correct redetermination of the deficiency in question. See Evens & Howard Fire Brick Co. *v.* Commissioner, 8 B. T. A. 867;

on any prior tax assessment or overpayment. Likewise, neither the fact that the prior overpayment could no longer be refunded nor the fact that the overpayment exceeded the amount of the deficiency had any relevance whatever to the redetermination of the correct tax for the 1936 fiscal year. The respondent, in other words, was seeking to have the 1935 overpayment used, not as an aid in redetermining the 1936 deficiency, but as an affirmative defense or offset to that deficiency.[6] This necessarily involved a determination of whether there was an overpayment during the 1935 fiscal year. The absolute and unequivocal language of the proviso of § 272 (g), however, placed such a determination outside the jurisdiction of the Board. Thus to allow the Board to give effect to an equitable defense which of necessity is based upon a determination foreign to the Board's jurisdiction would be contrary to the expressed will of Congress.[7]

We are not called upon to determine the scope of equitable recoupment when it is asserted in a suit for refund of taxes in tribunals possessing general equity jurisdiction. Cf. *Bull* v. *United States,* 295 U. S. 247; *Stone* v. *White,*

Commercial Trust Co. *v.* Commissioner, 8 B. T. A. 1138; D. N. & E. Walter & Co. *v.* Commissioner, 10 B. T. A. 620; J. C. Blair Co. *v.* Commissioner, 11 B. T. A. 673; *Greenleaf Textile Corp.* v. *Commissioner,* 26 B. T. A. 737, affirmed 65 F. 2d 1017; W. M. Ritter Lumber Co. *v.* Commissioner, 30 B. T. A. 231, 277.

[6] As we said in *Bull* v. *United States,* 295 U. S. 247, 262, "recoupment is in the nature of a defense arising out of some feature of the transaction upon which the plaintiff's action is grounded."

[7] Before § 272 (g) of the Internal Revenue Code was enacted, the Board held that it had jurisdiction to determine an overpayment for a year as to which no deficiency had been found by the Commissioner and to apply that overpayment against the liability for the year as to which he had found a deficiency, thus giving effect to the doctrine of equitable recoupment. Appeal of E. J. Barry, 1 B. T. A. 156. Soon thereafter, however, Congress passed § 274 (g) of the Revenue Act of 1926 (now § 272 (g) of the Internal Revenue Code) taking such jurisdiction away from the Board.

301 U. S. 532. But its use in proceedings before the Board is governed by the circumscribed jurisdiction of that agency. The Internal Revenue Code, not general equitable principles, is the mainspring of the Board's jurisdiction. Until Congress deems it advisable to allow the Board to determine the overpayment or underpayment in any taxable year other than the one for which a deficiency has been assessed, the Board must remain impotent when the plea of equitable recoupment is based upon an overpayment or underpayment in such other year. The judgment of the court below is therefore reversed and that of the Board of Tax Appeals is affirmed.

Reversed.

COLGATE-PALMOLIVE-PEET CO. *v.* UNITED STATES.

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

Nos. 38 and 39. Argued November 8, 1943.—Decided December 13, 1943.

1. The tax imposed by § 602½ of the Revenue Act of 1934 upon the "first domestic processing" of designated oils applies to the first domestic processing after the effective date of the Act, even though there was domestic processing prior to that date. P. 424.
2. The 1936 amendment of § 602½ does not require a different result. P. 427.
3. This construction of § 602½ is in accord with its legislative history and its general purpose to promote the interests of domestic oil producers. P. 429.

130 F. 2d 913, affirmed.

CERTIORARI, 319 U. S. 778, to review the affirmance of judgments, 37 F. Supp. 794, dismissing the complaints in two suits for the recovery of taxes.

Mr. Mason Trowbridge, with whom *Messrs. E. Ennalls Berl, Albert C. Wall, Blevins C. Dunklin,* and *Edward J. O'Mara* were on the brief, for petitioner.

Mr. Alvin J. Rockwell, with whom *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Mr. Sewall Key* were on the brief, for the United States.

MR. JUSTICE REED delivered the opinion of the Court.

These two writs of certiorari were granted to review a judgment of the Circuit Court of Appeals for the Third Circuit denying recovery to the petitioner of taxes paid to the United States aggregating $2,532,643.16. The issues in the two cases are identical. Each case covers a separate period of time.

The suits were brought in the United States District of Delaware under Judicial Code § 24 (20). Recovery was there also denied. We granted certiorari because of a conflict of decisions. 319 U. S. 778. See *Harrison* v. *Durkee Famous Foods,* 136 F. 2d 303; *Loose-Wiles Biscuit Co.* v. *Rasquin,* 95 F. 2d 438; *Tasty Baking Co.* v. *United States,* 38 F. Supp. 844; *Cincinnati Soap Co.* v. *United States,* 22 F. Supp. 141.

The issue is narrow and may be simply stated. In the Revenue Act of 1934, § 602½, 48 Stat. 763, an excise tax was levied on the "first domestic processing" of certain foreign oils—coconut, sesame, palm, et cetera.[1] When the

[1] 48 Stat. 763, § 602½. Processing Tax on Certain Oils.

"(a) There is hereby imposed upon the first domestic processing of coconut oil, sesame oil, palm oil, palm kernel oil, or sunflower oil, or of any combination or mixture containing a substantial quantity of any one or more of such oils with respect to any of which oils there has been no previous first domestic processing, a tax of 3 cents per pound, to be paid by the processor. . . . For the purposes of this section the term 'first domestic processing' means the first use in the United States,

Act was approved on May 10, 1934, this petitioner had on hand large quantities of these oils which had gone through one or more domestic processings. After the effective date, all of this oil was subjected to further processing upon which petitioner paid a tax, recovery of which is here sought. The taxpayer urges that the taxable event fixed by the statute is the first domestic processing, without regard to when it occurs. The phrase is defined by the statute as "the first use in the United States . . . of the article" taxed. Since the effective date of the Act is May 10, 1934, the taxpayer concludes that if the first use in this country occurs after that date, it is a taxable event, and if it occurs before May 10, 1934, it is not a taxable event. The Government reads the Act differently. To it, the Act imposes a tax on the first domestic processing after the effective date of the Act, regardless of the prior domestic processing. The litigants agree that the section is not retroactive. The facts are not in dispute.

The section in question does not make clear whether the "first domestic processing" is the first which takes place in this country or the first after the passage of the Act. The definition in § 602½ does not aid the interpretation. "First use" may be first after importation or first after the Act. The likelihood that tax statutes look to the future and not the past indicates that processings after the effective date were meant to be taxed. Cf. *Hassett* v. *Welch,* 303 U. S. 303; *Shwab* v. *Doyle,* 258 U. S. 529. This likelihood does not depend upon any taxation of a past event but upon the reasonable probability that Congress would wish to tax future processings. The insertion of the qualifying adjective "first" was probably due to a desire to avoid accumulative taxes on suc-

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in the manufacture or production of an article intended for sale, of the article with respect to which the tax is imposed, but does not include the use of palm oil in the manufacture of tin plate."

cessive processings. Treas. Reg. 48, Art. 1, as amended by T. D. 4695.

An examination of the general Congressional purposes intended to be served by the Act will further aid in the resolution of this dispute. This tax has been held by this Court to be a valid exercise of the taxing power. *Cincinnati Soap Co.* v. *United States,* 301 U. S. 308, 312. But the legislative history cannot be read without reaching a conviction that the advantages which would result to American vegetable oil producers from the heavy tax on oils not produced in the continental United States played a leading part in promoting the legislation.[2] *Id.,* 320. The tax yielded substantial revenues, which were remitted to the Philippine Government, since the Philippines were the source of many of the products taxed.

A desire for equality among taxpayers is to be attributed to Congress, rather than the reverse. Yet the omission by Congress of a tax upon the first processing which followed the enactment of the Act would give users of the oils who had treated them prior to the Act a definite advantage over their competitors who had not done so. The advantage would be slight if Congress had supposed the tax would finally be borne by the consumer rather than by the manufacturer, but here the purpose was to restrict the domestic market for imported oils, and Congress probably would not intend that manufacturers should find a market for the foreign oil at a price enhanced by the full amount of the tax. Again, if petitioner's argument is sound, the Congressional purpose to create an advantage for domestic oil producers would be frustrated to the extent that tax-free foreign oils on hand could continue to compete with the domestic product. A major purpose of the legislation would be temporarily defeated in part by freeing from the tax oil which had received one domestic processing.

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[2] 78 Cong. Rec. 2785, 2793, 2930, 3007, 6311–16, 6380–95, 7246, 7976.

The Treasury promptly interpreted the Act to apply to all first processings after its effective date. Treas. Reg. 48, Art. 1 (l), August 17, 1934. This action of the Treasury, with its wide experience in tax matters, has weight in our conclusion, notwithstanding the prompt challenge of the taxpayer and others similarly situated. *United States* v. *American Trucking Assns.*, 310 U. S. 534, 549.

In reaching the conclusion that the "first domestic processing" is the first after the passage of the Act, we do not disregard some circumstances vigorously pressed upon us by petitioner which give color to the opposite interpretation. The taxpayer points to the fact that the phrase "first domestic processing" was used earlier in § 9 (a) of the Agricultural Adjustment Act of May 12, 1933, 48 Stat. 31, 35, which levied a similar processing tax upon the first domestic processing of the basic agricultural commodities—wheat, cotton, corn, hogs, rice, tobacco and milk—and that, at the time this tax was placed on foreign oils, a regulation of the Commissioner of Internal Revenue was in effect which interpreted the phrase as being the first domestic processing whenever it occurred and therefore as relieving a processor of the tax when the first domestic processing took place prior to the effective date of the A. A. A. Treas. Reg. 81, as amended, T. D. 4403, November 2, 1933.

The answer to this argument arises from the difference between the two Acts as to the taxation of floor stocks. Under the A. A. A. commodities which had undergone their first domestic processing prior to the passage of the Act bore a corresponding floor stock tax. 48 Stat. 40, § 16. A subsequent processing tax would have created double taxation and an inequality among taxpayers which the compensating floor stock tax had obviated. The exemption of subsequent domestic processing by the Treasury Regulations was thus compelled by the Act itself. Cf. Treas. Reg. 82, Floor Stocks under the A. A. A. No such provision

appears in the Revenue Act of 1934 or any later legislation supplementing § 602½. Phrases without definite legal connotation which are alike take their meaning from their context. The "first domestic processing" of the A. A. A. naturally refers to the first in point of time to avoid double taxation, while the same words in this Act just as naturally refer to the first after the Act to avoid inequalities. Double taxation does not arise from the later Act.

For a further point, petitioner calls attention to the action of Congress in amending § 602½ in the Revenue Act of 1936, 49 Stat. 1742, by adding fatty acids and salts derived from the taxed oils with the proviso that the tax should not apply:

"(*1*) with respect to any fatty acid or salt resulting from *a previous first domestic processing taxed under this section* or upon which an import tax has been paid under section 601 (c) (8) of the Revenue Act of 1932, as amended, or (*2*) with respect to any combination or mixture by reason of its containing an oil, fatty acid, or salt with respect to which there has been *a previous first domestic processing* or upon which an import tax has been paid under such section 601 (c) (8)."

This amendment came from the Conference Committee without comment. H. Rep. No. 3068, 74th Cong., 2d Sess., p. 17. Its origin was in the Senate. The purpose of the exemption was said to be "to avoid double taxation." S. Rep. No. 2156, 74th Cong., 2d Sess., Title V. Petitioner's contention is that "the Conference Committee wrote into the amendment two different clauses, one of them . . . creating an exemption of mixtures and combinations conditioned upon a 'previous first domestic processing' and the other creating an exemption of fatty acids and salts conditioned upon their 'resulting from a previous first domestic processing *taxed under this section.*'" Therefore, Congress is said by peti-

tioner to have recognized two classes of first domestic processings; one taxed under the section, the other not taxed. In the absence of some expression of such intention, however, beyond the words quoted, we are not convinced that the difference in language was meant to evidence a difference in meaning. Cf. *Haggar Co.* v. *Helvering,* 308 U. S. 389, 400. The careful provision requiring payments of applicable import taxes under all conditions tends to the contrary conclusion. We think the purpose of the 1936 amendment was to add new taxable articles and to make plain the purpose to free them from double taxation. If the articles are not exempt from the 3 cent excise because of foreign processing, we see no reason to exempt them because of domestic processing prior to the Act.

Finally we consider petitioner's argument that House Report (Conference) No. 1385, 73d Cong., 2d Sess., p. 30, manifests the intention of Congress to tax only the "first domestic processing" which occurs after the Act when there has been no previous domestic processing prior to the Act. This report deals with the Revenue Act of 1934. The Senate amended the section of the House bill which taxed foreign oils by the addition of other foreign vegetable oils and marine oils. The Conference accepted the amendment in regard to the marine oils but changed "the point of imposition of the tax in the case of imported whale oil, imported fish oil, and imported marine animal oil to the importation instead of the first domestic processing." These were all the marine oils in the Senate amendment.

By the Conference amendment these marine oils were placed in an entirely different section, 602, of the Revenue Act of 1934. It amended 601 (c), Revenue Act of 1932, which imposed an excise tax on the domestic producer or the importer of lubricating oils, grain extracts, petroleum,

coal, lumber, et cetera, by adding these marine oils to the taxable articles.[3] Regulations treated marine oils upon the same basis as the other taxed imports in the section.[4] Consequently marine oils imported prior to the Revenue Act of 1934 escaped taxation when eventually processed. This inequality of treatment, under the Government theory, between importations of vegetable oils and importations of marine oils indicates, says the petitioner, that the Government is wrong and Congress intended to tax processing only when a prior domestic processing either before or after the Act had not occurred. The Conference change, says petitioner, "was merely a shift of the tax on these particular oils from the first processing after the entry (the point of imposition under Section 602½) to the entry itself." But though Congress may have been willing to defer protection of American producers from marine oils, it nowhere indicated that handlers of other oils already processed should obtain a trade advantage through exemption.

We are confronted with an ambiguity of phrase which yields to the intent of Congress as disclosed by the legislative history. In such circumstances, we follow the general

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[3] 48 Stat. 762, § 602. Tax on Certain Oils.

"Section 601 (c) of the Revenue Act of 1932 is amended by adding at the end thereof a new paragraph as follows:

"'(8) Whale oil (except sperm oil), fish oil (except cod oil, cod-liver oil, and halibut-liver oil), marine animal oil, and any combination or mixture containing a substantial quantity of any one or more of such oils, 3 cents per pound. The tax on the articles described in this paragraph shall apply only with respect to the importation of such articles after the date of the enactment of the Revenue Act of 1934, and shall not be subject to the provisions of subsection (b) (4) of this section (prohibiting drawback) or section 629 (relating to expiration of taxes).'"

[4] Treasury Department Bureau of Customs Circular Letter, No. 1202, May 11, 1934; T. D. 45751; T. D. 47448.

purpose of the Act to promote the interests of domestic oil producers through an excise tax.

Affirmed.

MR. JUSTICE ROBERTS and MR. JUSTICE JACKSON took no part in the consideration or decision of this case.

MAGNOLIA PETROLEUM CO. *v.* HUNT.

CERTIORARI TO THE COURT OF APPEAL, FIRST CIRCUIT, OF LOUISIANA.

No. 29. Submitted October 20, 1943.—Decided December 20, 1943.

1. Since each of the States of the Union has constitutional authority to make its own law with respect to persons and events within its borders, the full faith and credit clause does not ordinarily require it to substitute for its own local law the conflicting law of another State, even though that law is of controlling force in the courts of that State with respect to the same persons and events. P. 436.
2. Under the full faith and credit clause, judgments are, for most purposes, upon a footing different from the local law of a State, when judicial recognition of either is sought in another State. P. 437.
3. With few exceptions, the full faith and credit clause renders that which has been adjudicated in one State res judicata to the same extent in every other. P. 438.

   When a state court refuses credit to the judgment of a sister State, an asserted federal right is denied and the sufficiency of the grounds of denial are for this Court to determine. P. 443.

   These results flow from the unifying purpose of the full faith and credit clause to give nation-wide effect to rights judicially established in any part of the nation. P. 439.
4. Respondent, resident in Louisiana and there employed by petitioner, was injured in Texas in the course of his employment. Respondent sought and was awarded compensation under the Texas Workmen's Compensation Law. Payments were made as required by the award, which became final. In Texas, a compensation award which has become final is res judicata, and is entitled to the same faith and credit as a judgment of a court, and an award may not be had when an employee has

sought and received for his injury compensation under the laws of another State. Respondent later brought suit in a Louisiana court for a further recovery under the Louisiana Workmen's Compensation Law, and obtained a judgment against the employer for the amount of compensation fixed by that law, less the amount received under the Texas award. *Held:*

(1) Under the full faith and credit clause, the Texas compensation award was a bar to recovery in the Louisiana proceeding. *Chicago, R. I. & P. Ry. Co.* v. *Schendel*, 270 U. S. 611, followed. P. 441.

(2) The interest of Louisiana in awarding compensation to Louisiana employees who are injured out of the State—vis-à-vis the interest of Texas in awarding compensation for an injury occurring within its borders—is not sufficient to permit it to ignore the bar of the Texas award. P. 440.

(3) The liability established by the Louisiana judgment is not reconcilable with the rights conferred on the employer by the Texas award and the full faith and credit clause. P. 442.

(4) Whether the proceeding before the Texas board be regarded as a "judicial proceeding" or its award is a "record" within the meaning of the full faith and credit clause and the Act of Congress implementing it, both judicial proceedings and records are required to be given full faith and credit. P. 443.

(5) The suggestion that the Texas award does not bar the recovery in Louisiana because the employee's suit there was on a different cause of action is untenable. P. 443.

It is unnecessary to decide what effect would be required to be given to the Texas award if under Texas law an award of compensation in another State would not bar an award in Texas. P. 443.

10 So. 2d 109, reversed.

CERTIORARI, 319 U. S. 734, to review the affirmance of a judgment for the plaintiff in a suit by an employee against an employer to recover compensation for an injury received in the course of the employment. The highest court of the State refused writs of certiorari and review.

Messrs. Cullen R. Liskow and *Homer Hendricks* submitted for petitioner.

Sullivan H. Hunt, pro se.

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

The question for decision is whether, under the full faith and credit clause, Art. IV, § 1 of the Constitution of the United States, an award of compensation for personal injury under the Texas Workmen's Compensation Law, Title 130 of the Revised Civil Statutes of Texas, bars a further recovery of compensation for the same injury under the Louisiana Workmen's Compensation Law, Title 34, Chapter 15 of the Louisiana General Statutes.

Magnolia Petroleum Company, petitioner here, employed respondent in Louisiana as a laborer in connection with the drilling of oil wells. In the course of his employment respondent, a Louisiana resident, went from Louisiana to Texas, and while working there for petitioner on an oil well, he was injured by a falling drill stem. He sought and procured in Texas an award of compensation for his injury under its Workmen's Compensation Law,[1] and petitioner's insurer made payments of compen-

[1] An employer becomes subject to the Act by becoming a subscriber under it by giving notice to the Industrial Accident Board (Texas Rev. Civ. Stat., Title 130, Art. 8308, § 18 a) and providing insurance required by the Act (Art. 8308). If an employee of a subscriber sustains an injury in the course of his employment, he is entitled to compensation without regard to the fault of the employer (Art. 8306, § 3 b), unless he has given timely notice of his intention not to waive his rights of action at common law and under other statutes of Texas. In that event he may sue for the remedies which they afford (Art. 8306, § 3 a). Employees of non-subscribers are not entitled to workmen's compensation, but may sue to recover for injuries received in the course of their employment without being subject to certain common law defenses (Art. 8306, §§ 1, 4). When an employee is entitled to compensation, he has no other right of action against the employer for injuries (Art. 8306, § 3).

The statute specifies the amounts of compensation, including expenses, payable for various injuries (Art. 8306, §§ 6–18). It provides that awards are to be made in the first instance by the Industrial

sation as required by the statute and the award. The award became final in accordance with the terms of the Texas statute.[2]

Respondent then brought the present proceeding in the Louisiana District Court to recover compensation for his injury under the Louisiana Workmen's Compensation Law.[3] Petitioner filed exceptions to respondent's petition

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Accident Board (Art. 8307). In order to obtain a review of an award, a party must within 20 days give notice that he will not abide by it and within 20 days after giving notice, must file suit in an appropriate court (Art. 8307, § 5). In such a suit the trial is de novo (*id.*). If no such notice is given, or no such suit is filed within the times prescribed, the award becomes final (*id.*).

[2] Respondent filed with the Texas Industrial Accident Board a claim for compensation for his injury under the Texas Workmen's Compensation Law, as is the usual method of instituting a proceeding before the Board. Without awaiting an award on respondent's claim petitioner's insurer paid respondent compensation for his injury at the statutory maximum rate for seventy-three weeks. A dispute as to the proper prognosis of respondent's injury, a request for advice made by respondent to the Board, and a suspension by the insurer of further compensation payments to respondent, on the ground that his total disability had terminated, all prompted the Board to set the case for a hearing on his pending claim. Respondent received notice of the hearing and was requested to furnish medical evidence of his continued disability. Upon his failure to do this, the Board entered on December 3, 1940, as the full compensation for his injury, an award of a lump sum for total disability for 75 weeks and of weekly payments for partial disability for a further period of 125 weeks, and directed that payments already made by the insurer be credited upon the award. Respondent was notified as to the appeal he was required to take if he was dissatisfied with the award. No appeal was taken, and the award became final. Tex. Rev. Civ. Stat., Art. 8307, § 5. Respondent has refused payments which have been tendered to him subsequent to the making of the Texas award. On December 18, 1940, he began the present suit in Louisiana.

[3] The statute is applicable to all employees in certain specified hazardous occupations (including the work performed by respondent), and to employees in other occupations by voluntary contract between

on the ground that the recovery sought was barred as res judicata by the Texas award which, by virtue of the constitutional command, was entitled in the Louisiana courts to full faith and credit. The District Court overruled the exceptions and gave judgment for the amount of the compensation fixed by the Louisiana statute, after deducting the amount of the Texas payments. The Louisiana Court of Appeal affirmed, 10 So. 2d 109, and the Supreme Court of Louisiana refused writs of certiorari and review for the reason that it found "no error of law in the judgment complained of." We granted certiorari, 319 U. S. 734, because of the importance of the constitutional question presented and to resolve an apparent conflict of the decision below with our decisions in *Chicago, R. I. & P. Ry. Co.* v. *Schendel*, 270 U. S. 611, and *Williams* v. *North Carolina*, 317 U. S. 287; cf. *Alaska Packers Assn.* v. *Industrial Accident Comm'n*, 294 U. S. 532; *Pacific Employers Ins. Co.* v. *Industrial Accident Comm'n*, 306 U. S. 493.

In Texas a compensation award against the employer's insurer (with exceptions not here applicable, cf. Revised

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the employer and the employee. La. Gen. Stat., Title 34, Ch. 15, § 4391. Such employees as receive injuries in the course of their employment are entitled to compensation (§ 4392) in specified amounts (§ 4398), unless the contract of employment provides otherwise (§ 4393), whether the injury is or is not due to the fault of the employer (§ 4427). If the employee elects to be covered under the Act, but the employer elects not to be, then in suits by the employee to recover for injuries received in the course of his employment, certain common law defenses are abolished (§ 4394). The compensation award may be fixed by agreement of the parties (§ 4407), or may be obtained by suit in the district court (§ 4408), with right of appeal to the appropriate appellate courts (§ 4409). And as in the present case, the statute is deemed under some circumstances to be applicable to injuries received by the employee without the state. *Hargis* v. *McWilliams Co.*, 9 La. App. 108, 119 So. 88; *Selser* v. *Bragmans Bluff Lumber Co.*, 146 So. 690 (La. App.).

Civil Statutes, Art. 8306, § 5) is explicitly made by statute in lieu of any other recovery for injury to the employee, since Art. 8306, § 3 provides that employees subject to the Act "shall have no right of action against their employer or against any agent, servant or employé of said employer for damages for personal injuries . . . but such employés . . . shall look for compensation solely to the association [the insurer]." A compensation award which has become final "is entitled to the same faith and credit as a judgment of a court." See *Ocean Accident & Guarantee Corp.* v. *Pruitt*, 58 S. W. 2d 41, 44–45 (Tex. Comm. App.), holding that an award is res judicata, not only as to all matters litigated, but as to all matters which could have been litigated in the proceeding with respect to the right to compensation for the injury. To the same effect are *Traders & General Ins. Co.* v. *Baker*, 111 S. W. 2d 837, 839, 840 (Tex. Comm. App.); *Middlebrook* v. *Texas Indemnity Ins. Co.*, 112 S. W. 2d 311, 315 (Tex. Civ. App.); cf. *Federal Surety Co.* v. *Cook*, 119 Tex. 89, 24 S. W. 2d 394. The Texas Court of Civil Appeals formerly held that a Texas employee could recover compensation of his Texas employer for an injury in another state for which he had already recovered compensation in that state. *Texas Employers' Ins. Assn.* v. *Price*, 300 S. W. 667. But in declining to review the case, the Texas Supreme Court expressly pointed out that this ruling had not been challenged, and that it was leaving the question undecided, 300 S. W. 672. The right of a second recovery in such circumstances was promptly abolished by statute. Revised Civil Statutes, Art. 8306, § 19. And under this statute a compensation award may not be had in Texas if the employee has claimed and received compensation for his injury under the laws of another state. *Travelers Insurance Co.* v. *Cason*, 132 Tex. 393, 396, 124 S. W. 2d 321.

The Louisiana Court of Appeal recognized that Texas had jurisdiction to award compensation to respondent for the injury received while working for petitioner within the state, and that the award has the same force and effect in Texas as a judgment rendered by a court of competent jurisdiction in that state. But it thought that full faith and credit did not require the Louisiana courts to give effect to the judgment as res judicata because Louisiana, despite the command of the full faith and credit clause, was entitled to give effect to its own statute prescribing compensation for resident employees of a resident employer even though the injury occurred outside the state.

It does not appear, nor is it contended, that Louisiana more than Texas allows in its own courts a second recovery of compensation for a single injury. The contention is that since Louisiana is better satisfied with the measure of recovery allowed by its own laws, it may deny full faith and credit to the Texas award, which respondent has procured by his election to pursue his remedy in that state. In thus refusing, on the basis of state law and policy, to give effect to the Texas award as a final adjudication of respondent's claim for compensation for his injury suffered in Texas, the Louisiana court ignored the distinction, long recognized and applied by this Court, and recently emphasized in *Williams* v. *North Carolina, supra,* 294–296, between the faith and credit required to be given to judgments and that to which local common and statutory law is entitled under hte Constitution and laws of the United States.

In the case of local law, since each of the states of the Union has constitutional authority to make its own law with respect to persons and events within its borders, the full faith and credit clause does not ordinarily require it to substitute for its own law the conflicting law of another state, even though that law is of controlling force in the courts of that state with respect to the same persons and

events. *Pink* v. *A. A. A. Highway Express,* 314 U. S. 201, 209–211 and cases cited; *Klaxon Co.* v. *Stentor Co.,* 313 U. S. 487, 496–498. It was for this reason that we held that the state of the employer and employee is free to apply its own compensation law to the injury of the employee rather than the law of another state where the injury occurred. *Alaska Packers Assn.* v. *Industrial Accident Comm'n, supra,* 544–550. And for like reasons we held also that the state of the place of injury is free to apply its own law to the exclusion of the law of the state of the employer and employee. *Pacific Employers Ins. Co.* v. *Industrial Accident Comm'n, supra,* 502–505.

But it does not follow that the employee who has sought and recovered an award of compensation in either state may then have recourse to the laws and courts of the other to recover a second or additional award for the same injury. Where a court must make choice of one of two conflicting statutes of different states and apply it to a cause of action which has not been previously litigated, there can be no plea of res judicata. But when the employee who has recovered compensation for his injury in one state seeks a second recovery in another he may be met by the plea that full faith and credit requires that his demand, which has become res judicata in one state, must be recognized as such in every other.

The full faith and credit clause and the Act of Congress implementing it have, for most purposes, placed a judgment on a different footing from a statute of one state, judicial recognition of which is sought in another. Article IV, § 1, of the Constitution commands that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State," and provides that "Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof." And Congress has provided that judgments "shall have such

faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken." Act of May 26, 1790, c. 11, 1 Stat. 122, as amended, 28 U. S. C. § 687.

From the beginning this Court has held that these provisions have made that which has been adjudicated in one state res judicata to the same extent in every other. *Hampton* v. *McConnell,* 3 Wheat. 234, 235; *Christmas* v. *Russell,* 5 Wall. 290; *Fauntleroy* v. *Lum,* 210 U. S. 230; *Kenney* v. *Supreme Lodge,* 252 U. S. 411; *Milwaukee County* v. *White Co.,* 296 U. S. 268; *Davis* v. *Davis,* 305 U. S. 32, 40; *Titus* v. *Wallick,* 306 U. S. 282, 291–292; *Williams* v. *North Carolina, supra.* Even though we assume for present purposes that the command of the Constitution and the statute is not all-embracing, and that there may be exceptional cases in which the judgment of one state may not override the laws and policy of another,[4] this Court is the final arbiter of the extent of the exceptions. *Alaska Packers Assn.* v. *Industrial Accident Comm'n, supra,* 547; *Titus* v. *Wallick, supra,* 291. And we pointed out in *Williams* v. *North Carolina, supra,* 294–295, that "the actual exceptions have been few and far between. . . ."

We are aware of no such exception in the case of a money judgment rendered in a civil suit. Nor are we aware of any considerations of local policy or law which could rightly be deemed to impair the force and effect which the full faith and credit clause and the Act of Congress require to be given to such a judgment outside the state of its rendition. *Milwaukee County* v. *White Co., supra,* 277, 278.

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[4] See, e. g., *Huntington* v. *Attrill,* 146 U. S. 657; *Fall* v. *Eastin,* 215 U. S. 1; *Olmsted* v. *Olmsted,* 216 U. S. 386; *Converse* v. *Hamilton,* 224 U. S. 243; *Hood* v. *McGehee,* 237 U. S. 611; *Broderick* v. *Rosner,* 294 U. S. 629, 642; cf. *Wisconsin* v. *Pelican Ins. Co.,* 127 U. S. 265, 293 with *Milwaukee County* v. *White Co., supra,* 278.

The constitutional command requires a state to enforce a judgment of a sister state for its taxes, *Milwaukee County* v. *White Co., supra,* or for a gambling debt, *Fauntleroy* v. *Lum, supra,* or for damages for wrongful death, *Kenney* v. *Supreme Lodge, supra,* although the suit in which the judgment was obtained could not have been maintained under the laws and policy of the forum to which the judgment is brought. It compels enforcement of a judgment in that forum, even though a suit upon the original cause of action was barred there by limitations before the judgment was procured, *Christmas* v. *Russell, supra; Roche* v. *McDonald,* 275 U. S. 449. It demands recognition of it even though the statute on which the judgment was founded need not be applied in the state of the forum because in conflict with the laws and policy of that state. *Kenney* v. *Supreme Lodge, supra; Titus* v. *Wallick, supra; Williams* v. *North Carolina, supra.*

These consequences flow from the clear purpose of the full faith and credit clause to establish throughout the federal system the salutary principle of the common law that a litigation once pursued to judgment shall be as conclusive of the rights of the parties in every other court as in that where the judgment was rendered, so that a cause of action merged in a judgment in one state is likewise merged in every other. The full faith and credit clause like the commerce clause thus became a nationally unifying force. It altered the status of the several states as independent foreign sovereignties, each free to ignore rights and obligations created under the laws or established by the judicial proceedings of the others, by making each an integral part of a single nation, in which rights judicially established in any part are given nation-wide application. *Milwaukee County* v. *White Co., supra,* 276, 277; *Williams* v. *North Carolina, supra,* 295. Because there is a full faith and credit clause a defendant

may not a second time challenge the validity of the plaintiff's right which has ripened into a judgment and a plaintiff may not for his single cause of action secure a second or a greater recovery.

Here both Texas and Louisiana have undertaken to adjudicate the rights of the same parties arising from a single injury sustained in the course of employment under the same contract. Each state has awarded to respondent compensation for that injury. But whether the Texas award purported also to adjudicate the rights and duties of the parties under the Louisiana law or to control persons and courts in Louisiana is irrelevant to our present inquiry. For Texas is without power to give extraterritorial effect to its laws. See *New York Life Insurance Co.* v. *Head,* 234 U. S. 149; *Home Insurance Co.* v. *Dick,* 281 U. S. 397. The significant question in this case is whether the full faith and credit clause has deprived Louisiana of the power to deny that the Texas award has the same binding effect on the parties in Louisiana as it has in Texas.

It is not, as the state court thought, a sufficient answer to the bar of the Texas award to assert that Louisiana has a recognized interest in awarding compensation to Louisiana employees who are injured out of the state, see *Alaska Packers Assn.* v. *Industrial Accident Comm'n, supra,* for Texas, the state in which the injury occurred, has a like interest in making an award, see *Pacific Employers Ins. Co.* v. *Industrial Accident Comm'n, supra.* And in each of the cases we have cited, the state to which the judgment was brought had an interest in the subject matter of the suit and a public policy contrary to that of the state in which the judgment was obtained. No convincing reason is advanced for saying that Louisiana has a greater interest in awarding compensation for an injury suffered in an industrial accident, than North Carolina had in

determining the marital status of its domiciliary against whom a divorce decree had been rendered in another state, *Williams* v. *North Carolina, supra,* or Mississippi in stamping out gambling within its borders, *Fauntleroy* v. *Lum, supra,* or South Carolina in requiring a parent to support his child who was domiciled within that state, *Yarborough* v. *Yarborough,* 290 U. S. 202.

In each of these cases the words and purpose of the full faith and credit clause were thought to demand that the interest of the state in which the judgment was obtained and was res judicata, should override the laws and policy of the forum to which the judgment was taken. And we can perceive no tenable ground for saying that a compensation award need not be given the same effect as res judicata in another state as it has in the state where rendered.[5]

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[5] But cf. American Law Institute, Restatement of Conflict of Laws (1934) § 403:

"Award already had under the Workmen's Compensation Act of another state will not bar a proceeding under an applicable Act, but the amount paid on a prior award in another state will be credited on the second award."

This would seem to be intended as nothing more than a statement of local rules of conflict of laws when unaffected by the full faith and credit clause, since full faith and credit, if it does not require that a first award bar a second, would not compel credits upon the second award of payments made under the first. If more was intended, the statement is, as the Advisers to the American Law Institute stated, "surprising." Proceedings of American Law Institute (1932) Vol. X, p. 76. It is the more so as the statement would then conflict with the *ratio decidendi* of *Chicago, R. I. & P. Ry. Co.* v. *Schendel,* 270 U. S. 611, which had been decided some six years before. Even as a matter of local law while the decision of the state courts on this point are in conflict, the following are contrary to the rule expressed in the Restatement: *Hughey* v. *Ware,* 34 N. M. 29, 276 P. 27; *Tidwell* v. *Chattanooga Boiler & T. Co.,* 163 Tenn. 420, 648, 43 S. W. 2d 221, 45 S. W. 2d 528; *DeGray* v. *Miller Bros. Const. Co.,* 106 Vt. 259, 277–278, 173 A. 556.

Such was the decision of this Court in *Chicago, R. I. & P. Ry. Co.* v. *Schendel, supra,* in which recovery of an award of compensation under the Iowa Workmen's Compensation Act was held to bar recovery in a suit against the employer in Minnesota to recover for the same injury under the Federal Employers' Liability Act. Both states had, as in this case, allowed recovery, as they were free to do but for the full faith and credit clause. This Court held that the employee, having had his remedy by the judgment in Iowa, was precluded by the full faith and credit clause from pursuing a remedy for his injury in another state. The remedies afforded to respondent by the Texas and Louisiana Workmen's Compensation Laws are likewise rendered mutually exclusive by the Texas judgment and the full faith and credit clause. The Texas award, being a bar to any further recovery of compensation for respondent's injury, is, by virtue of the full faith and credit clause, exclusive of his remedy under the Louisiana Act.

It lends no support to the decision of the Louisiana court in this case to say that Louisiana has chosen to be more generous with an employee than Texas has. Indeed no constitutional question would be presented if Louisiana chose to be generous to the employee out of the general funds in its Treasury. But here it is petitioner who is required to provide further payments to respondent, contrary to the terms of the Texas award, which, if the full faith and credit clause is to be given any effect, was a conclusive determination between the parties that petitioner should be liable for no more than the amount of the Texas award. For this reason it is not enough to say that a practical reconciliation of the interests of Texas and Louisiana has been effected by the Louisiana court. There has been no reconciliation of the liability established by the Louisiana judgment with the rights conferred on petitioner by the Texas award and the full faith and credit clause.

Here the finding of the Louisiana court that the Texas award had the force and effect of a judgment of a court of that state and is res judicata there, is in conformity to the determinations of the courts of Texas and has not been challenged by the parties. We have no occasion to consider what effect would be required to be given to the Texas award if the Texas courts held that an award of compensation in another state would not bar an award in Texas, for as we have seen, Texas does not allow such a second recovery. And if the award of compensation in Texas were not res judicata there, full faith and credit would, of course, be no bar to the recovery of an award in another state. *Chicago, R. I. & P. Ry. Co.* v. *Elder,* 270 U. S. 611, 622–623.

Whether the proceeding before the State Industrial Accident Board in Texas be regarded as a "judicial proceeding," or its award is a "record" within the meaning of the full faith and credit clause and the Act of Congress, the result is the same. For judicial proceedings and records of the state are both required to have "such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken."

The decision of the state court is not supported by the suggestion that the Texas award is not res judicata in Louisiana because respondent's suit there was on a different cause of action. When a state court refuses credit to the judgment of a sister state because of its opinion of the nature of the cause of action or the judgment in which it is merged, an asserted federal right is denied and the sufficiency of the grounds of denial are for this Court to decide. *Titus* v. *Wallick, supra,* 291 and cases cited; and see *Adam* v. *Saenger,* 303 U. S. 59, 64 and cases cited. Respondent's injury in Texas did not give rise to two causes of action merely because recovery in each state is

under a different statute, or because each affords a different measure of recovery.[6] *Chicago, R. I. & P. Ry. Co.* v. *Schendel, supra; Baltimore Steamship Co.* v. *Phillips,* 274 U. S. 316; see *Wabash R. Co.* v. *Hayes,* 234 U. S. 86, 90. The grounds of recovery are the same in one state as in the other—the injury to the employee in the course of his employment. The whole tendency of our decisions under the full faith and credit clause is to require a plaintiff to try his whole cause of action and his whole case at one time. He cannot split up his claim and "*a fortiori* he cannot divide the grounds of recovery." *United States* v. *California & Oregon Land Co.,* 192 U. S. 355, 358. Respondent was free to pursue his remedy in either state but, having chosen to seek it in Texas, where the award was res judicata, the full faith and credit clause precludes him from again seeking a remedy in Louisiana upon the same grounds. The fact that a suitor has been denied a remedy by one state because it does not afford a remedy for the particular wrong alleged, may not bar recovery in another state which does provide a remedy. See *Troxell* v. *Delaware, L. & W. R. Co.,* 227 U. S. 434; cf. *Ash Sheep Co.* v. *United States,* 252 U. S. 159, 170. But as we decided in the *Schendel* case it is a very different matter to say that recovery can be had in every state which affords a remedy.

The suggestion that there is a second and different cause of action in Louisiana, merely because Louisiana law authorizes compensation, and in a different measure than does Texas, or because the jurisdiction of the court of one state depends on the place of the injury and that of the other on the place of the employment contract, would if accepted prove too much. Apart from the demands of full faith and credit, recovery in a transitory action for injury

[6] Any implication to the contrary in *Troxell* v. *Delaware, L. & W. R. Co.,* 227 U. S. 434, must be considered as overruled by *Wabash R. Co.* v. *Hayes,* 234 U. S. 86, 90; cf. *Baltimore Steamship Co.* v. *Phillips,* 274 U. S. 316, 323.

to person or property, whether in tort or for compensation, can of course only be had in conformity to the law of the state where the action is maintained. Even where the state of the forum adopts and applies as its own the law of the state where the injury was inflicted, the extent to which it shall apply in its own courts a rule of law of another state is itself a question of local law of the forum. *Finney* v. *Guy,* 189 U. S. 335; *Klaxon Co.* v. *Stentor Co., supra,* 496, 497; cf. *Worcester County Trust Co.* v. *Riley,* 302 U. S. 292, 299. And the law of a state is embodied as well in its common law rules as in its statutes. *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, 78, 79; see Mr. Justice Holmes, dissenting in *Black & White Taxicab Co.* v. *Brown & Yellow Taxicab Co.,* 276 U. S. 518, 532–536.

If an employee employed in one state but injured in another has a different cause of action for compensation in each state because each has its own compensation statute, it could as well be argued in any case where plaintiff has recovered a judgment in one state, and seeks a second recovery in a second state for the same injury, that he is suing upon a second and different cause of action. But it has never been thought that an actionable personal injury gives rise to as many causes of action as there are states whose laws will permit a suit to recover for the injury or that despite the full faith and credit clause the injured person, more than one entitled to recover for breach of contract, could go from state to state to recover in each damages or compensation for his injury. A judgment in tort or in contract is not immune from the requirement of full faith and credit because the successful plaintiff could have maintained his suit under the law of other states and have secured a larger recovery in some, or because the jurisdiction of the court in one state to hear the cause may depend upon some facts different from the facts necessary to sustain the jurisdiction in another. Cf. *Baltimore Steamship Co.* v. *Phillips, supra; Eldred* v. *Bank,* 17 Wall.

545; *Wabash R. Co.* v. *Hayes, supra; Kenney* v. *Supreme Lodge, supra.* And we cannot say that a workmen's compensation award for injury stands on any different footing. In fact *Chicago, R. I. & P. Ry. Co.* v. *Schendel, supra,* held that it did not and we see no reason to depart from its ruling.

Reversed.

By MR. JUSTICE JACKSON:

I concur with the opinion of the CHIEF JUSTICE.

If the Court were to reconsider *Williams* v. *North Carolina,* 317 U. S. 287, in the light of the views expressed by MR. JUSTICE BLACK, I should adhere to the views I expressed in dissent there. Until we do so, I consider myself bound by that decision. Whatever might be the law if that case had never been decided, I am unable to see why the controlling principles it announced under the full faith and credit clause to reverse the North Carolina decision therein do not require reversal of the Louisiana decision under review. I agree with the dissent that Louisiana has a legitimate interest to protect in the subject matter of this litigation, but so did North Carolina in the *Williams* case. I am unable to see how Louisiana can be constitutionally free to apply its own workmen's compensation law to its citizens despite a previous adjudication in another state if North Carolina was not free to apply its own matrimonial policy to its own citizens after judgment on the subject in Nevada. Is Louisiana's social interest in seeing that its labor contracts carry adequate workmen's compensation superior constitutionally to North Carolina's interest in seeing that people who contract marriage there are protected in the rights they acquire? It is true that someone might have to take care of the Louisiana citizen who is injured but inadequately compensated in Texas, as it was true in the *Williams* case that someone might have to care for those deprived of their marriage status by the foreign divorce decree.

Overruling a precedent always introduces some confusion and the necessity for it may be unfortunate. But it is as nothing to keeping on our books utterances to which we ourselves will give full faith and credit only if the outcome pleases us. I shall abide by the *Williams* case until it is taken off our books, and for that reason concur in the decision herein.

MR. JUSTICE DOUGLAS, dissenting:

While I have joined in the opinion of MR. JUSTICE BLACK, certain observations in the concurring opinion lead me to add a few words.

I do not agree with the view that the full faith and credit clause is to be enforced "only if the outcome pleases us." We are dealing here with highly controversial subjects where honest differences of opinion are almost certain to occur. Each case involves a clash between the policies of two sovereign States. The question is not which policy we prefer; it is whether the two conflicting policies can somehow be accommodated. The command of the full faith and credit clause frequently makes a reconciliation of the two interests impossible. One must give way in the larger interest of the federal union. The question in each case is whether as a practical matter there is room for adjustment, consistent with the requirements of full faith and credit. *Williams* v. *North Carolina,* 317 U. S. 287, is a recent example. One domiciled in Nevada was granted a divorce from his North Carolina spouse on notice by publication. The question for us was whether that decree was a defense to a prosecution for bigamy in North Carolina. Such questions of status, i. e., marital capacity, involve conflicts between the policies of two States which are quite irreconcilable as compared with the present situation.

If the claim under the Texas Act had been denied because of statutory defenses accorded the employer, I do not

suppose that the requirements of full faith and credit would bar the subsequent claim under a Louisiana statute which did not recognize such defenses. At least *Troxell* v. *Delaware, L. & W. R. Co.*, 227 U. S. 434, which has never been overruled, points to that result for it held that a denial of recovery under a state act was no barrier to a suit under a federal act for the same injury. If the full faith and credit clause would not prevent a recovery under the Louisiana Act where an award under the Texas Act had been denied, I do not see how Louisiana can be prevented from granting a recovery after Texas has made an award. The action of Texas would be as definite and final an adjudication of the rights and duties of the parties under the Texas statute in the one case as in the other. Moreover, the two statutes are not mutually exclusive as was true in *Chicago, R. I. & P. Ry. Co.* v. *Schendel*, 270 U. S. 611. Thus a determination that an employer is under the Texas Act does not mean conversely that he is excluded from the coverage of Louisiana's law.

The principle of the *Troxell* case seems apposite here since the claim in Texas was only one for "compensation under the Employers Liability Act" of that State. And the Texas award purported to do no more than to adjudicate rights and duties under the Texas Act. For it provided that when fully paid it would discharge the insurer "from all liability by reason of *this claim for compensation.*" If the Texas award had undertaken to adjudicate the rights and duties of the parties under the Louisiana contract of employment, which we are told carries the right to compensation under the Louisiana Act (10 So. 2d 109, 112), the result would be quite different. Then the judgment, like the divorce decree in the *Williams* case, would undertake to regulate the relationship of the parties, or their rights and duties which flow from it, as respects their undertakings in another State. And since Texas would have had jurisdiction over the parties its

decree would be a bar to the present action in Louisiana. But there is nothing in the Texas proceeding or in the Texas award to indicate that that was either intended or done. The most charitable construction is that Texas undertook to adjust the rights and duties of the parties and to regulate their relationship only so long as they remained subject to the jurisdiction of Texas.

Under the circumstances disclosed the situation is thus quite different from the usual transitory action or from a decree which undertakes to sever marital bonds between one domiciled in a state and a non-resident. But even if the Texas award were less clear than I think it is, I would resolve all doubts against an inference that rights under the Louisiana contract were adjudicated in Texas. Such a course seems to me essential so that the greatest possible accommodations of the interests of the two States, consistent with the requirements of full faith and credit, may be had whether the matter be divorce, workmen's compensation or any other subject on which state policies differ.

On its face *Yarborough* v. *Yarborough,* 290 U. S. 202, might seem to look the other way. There a Georgia decree of permanent alimony for a child was held to be entitled to full faith and credit in South Carolina where the child subsequently sought additional allowances. But the Georgia decree was more clearly an adjudication of the aggregate liability of the defendant than was the Texas award in the present case, for it relieved the father on compliance with its provisions of "all payments of alimony." 290 U. S. p. 207. Moreover, the father was not a resident of South Carolina but had long been domiciled in Georgia. The Court specifically reserved the question whether the Georgia decree would be entitled to full faith and credit as a final discharge of the duty to support had the father been domiciled in South Carolina. 290 U. S.

p. 213. Here the Texas award is not only a limited one. The employee is domiciled in Louisiana, the employer is authorized to do business in Louisiana. The employment contract is a Louisiana contract. Louisiana has such a considerable interest at stake that I would allow its policy to be obliterated or subordinated only in case what took place in Texas is irreconcilable with what Louisiana now seeks to do. I do not think it is.

It is thus apparent that the decision of *Williams* v. *North Carolina* is no shelter in the present controversy.

MR. JUSTICE MURPHY joins in this dissent.

MR. JUSTICE BLACK, dissenting:

The respondent Hunt is a resident of Louisiana, employed in that state by the petitioner and sent by the petitioner to do work in Texas. While in Texas he was seriously injured in the course of his employment. Confined to a hospital he was told that he could not recover compensation unless he signed two forms presented to him. As found by the Louisiana trial judge there was printed on each of the forms "in small type" the designation "Industrial Accident Board, Austin, Texas." To get his compensation Hunt signed the forms and the Texas insurer began to pay. Returning to his home in Louisiana Hunt apparently discovered that his interests would be more fully protected under Louisiana law and notified the insurer of an intention to claim under the statute of that state. The insurer immediately stopped payment to him and notified the Texas Board to that effect. Four days later, without any request from Hunt, the Board notified him at his Louisiana home that a hearing would be held in Texas within two and a half weeks "to determine the liability of the insurance company" under Texas law. Hunt did not participate in that proceeding. The Texas Board thereafter made an award to him which, under the

law of Texas, was equivalent to a judgment against the insurer. Before the Texas award became final Hunt, who had declined to accept any money under it, filed suit against his employer in the courts of Louisiana under the Workmen's Compensation Law of Louisiana. He recovered a judgment for a substantially larger sum than had been allowed him under the Texas award, from which the Louisiana court deducted the sum he had already received from the Texas insurer.

The employer has contended here that the Texas award against the insurer was a judgment which under the full faith and credit clause precluded the employee from any further relief in the courts of Louisiana. The Court today agrees with the employer, holding that while in "exceptional cases . . . the judgment of one state may not override the laws and policy of another, this Court is the final arbiter of the extent of the exceptions." The Court declines to recognize an exception in the case now before us, buttressing its conclusion with a contention that the case of *Chicago, R. I. & P. Ry. Co.* v. *Schendel,* 270 U. S. 611, requires such a result.

I disagree. As I see it, this case properly involves two separate legal questions: (1) Did Texas intend the award of its Industrial Accident Board against the insurer to bar the right granted the employee by the Louisiana Workmen's Compensation Law to collect from his employer for the same injury the difference between the compensation allowed by Texas and the more generous compensation allowed by Louisiana? (2) Assuming the Texas award was intended to constitute such a bar, does the interest of Louisiana in regulating the employment contracts of its residents nevertheless permit it to grant that larger measure of compensation which as a matter of local policy it believes necessary? The decision of the Court on both of these issues appears to me to be wrong.

I.

Where a state court refuses to recognize the judgment of a sister state as a bar to an asserted cause of action, the full faith and credit clause cannot raise a federal question unless the judgment would have been a bar to a similar suit in that sister state. R. S. § 905, U. S. C. Title 28, § 687; *Titus* v. *Wallick,* 306 U. S. 282. Even where the judgment would bar the suit in the sister state, "as this Court has often recognized, there are many judgments which need not be given the same force and effect abroad which they have at home, and there are some, though valid in the state where rendered, to which the full faith and credit clause gives no force elsewhere." Dissenting opinion, *Yarborough* v. *Yarborough,* 290 U. S. 202, 213, 214, 215. Whether Texas intended that its award should bar the employee here from recovering compensation under the Louisiana law is an issue upon which Texas courts have not spoken. In fact, they absolutely refuse to entertain any suits at all based on the Louisiana Workmen's Compensation Law. *Johnson* v. *Employers Liability Corp.,* 99 S. W. 2d 979.

The general rule of res judicata announced by Texas courts is that a judgment on the merits constitutes "a finality as to the claim or demand in controversy, concluding parties and those in privity with them . . . as to every matter which was offered and received to sustain or defeat the claim or demand, [and] as to any other admissible matter which might have been offered for that purpose." *Rio Bravo Oil Co.* v. *Hebert,* 130 Tex. 1, 8, 9, 106 S. W. 2d 242, 246. The opinion of Section A of the Texas Commission of Appeals in *Ocean Accident & Guarantee Corp.* v. *Pruitt,* 58 S. W. 2d 41, 44–45, relied upon by the Court, presents an application of this rule to Texas workmen's compensation awards. There it was held that an employee who had been denied a compensation award by

the Accident Board could not bring a second proceeding before the Board against the same insurer to recover compensation for the same injuries. In the instant case the situation is entirely different. The parties are not the same; the issues are not the same; and the two proceedings are not under the same Act. The proceeding in this case before the Texas Board was against the insurer only and the award entered, by its express terms, was limited to a release of the insurance company from further liability. The liability of the employer under Louisiana law was not in issue before the Board and could not have been put in issue. The employer was not a party to that proceeding; nor was there "privity" between the insurer and the employer since the insurer's liability did not extend to rights which the employee might have against his employer under Louisiana law. Moreover the jurisdiction of the Accident Board is limited to administration of the Texas Workmen's Compensation Act; even if the issues of liability under Louisiana law had been raised they could not have been decided by that Board. The decision of this Court today, therefore, is tantamount to holding that Texas intended to extinguish a claim against the employer in a proceeding in which the employer was not a party and the issue of its liability under Louisiana law was not allowed to be raised. I cannot impute such an intention to Texas.

The statutes of Texas lend support to the view that the Accident Board's award was not intended to bar the employee's rights against his employer arising under the law of Louisiana. Under the Texas statutes an award of the Accident Board neither adds to nor subtracts from an employer's liability to an injured employee. That liability is fixed, not by an award, but by a tripartite contract implied by the Texas statute between the employer, the employee, and the insurer, under which the employee

agrees not to sue the employer for occupational injuries under the common law or statutes of Texas.[1] An employee who fails to elect to retain his common law remedies against his employer is deemed to have waived only his "right of action at common law or under any statute of *this state*." [2] (Italics supplied.) Clearly this Texas statute did not intend that a workman who elected to come under the compensation act should thereby lose any rights created by the laws of other states. That section of the Texas statutes relied upon by the Court requires no different result. It provides that an employee injured "outside of the State" cannot recover under the Texas act if "he has elected to pursue his remedy and recovers in the state where such injury occurred." [3] Plainly this latter statute pertains only to the right of recovery under Texas law; it does not purport to affect rights under the laws of other states. Nor does it proceed on any theory of res judicata for if an employee fails to recover in the other state he can nevertheless recover an award in Texas. And in any event the statute could not apply to the instant case, for this employee's injury did not occur "outside" of Texas. The dictum of the *Travelers Insurance Co.* v. *Cason*, 132 Tex. 393, 396, 124 S. W. 2d 321, referred

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[1] Cf. *Anderson-Berney Realty Co.* v. *Plasida Soria*, 123 Tex. 100, 67 S. W. 2d 222. If petitioner had any defense to Hunt's suit under Louisiana law, it was not the award but the implied contract. See *Middleton* v. *Texas Power & Light Co.*, 108 Tex. 96, 185 S. W. 556, aff'd 249 U. S. 152. Petitioner, however, pleaded only the award for its defense.

[2] Texas Rev. Civ. Stat., Title 130, Art. 8306, § 3 (a). I do not agree with the Court that § 3 of this Article purports to compel an employee to waive rights which arise under the laws of another state. Such a construction would reduce the above quoted language of § 3 (a) to deceptive verbiage.

[3] Rev. Civ. Stat., Article 8306, § 19. Apparently only one other state, Oregon, has a statute comparable to this. See Oregon Code (1935, Supplement) § 49–1813a.

to by the Court, pertains to the rights of a Texas workman who was injured in Pennsylvania.

In the absence of compelling language this Court should not construe the statutes of Texas in such a manner that grave questions of their constitutionality are raised. Cf. *Yarborough* v. *Yarborough, supra,* 213, 214. It is extremely doubtful whether Texas has the power, by any legal device, to preclude a sister state from granting to its own residents employed within its own borders that measure of compensation for occupational injuries which it deems advisable. "A state can legislate only with reference to its own jurisdiction; and the full faith and credit clause does not require the enforcement of every right which has ripened into a judgment of another state or has been conferred by its statutes." *Broderick* v. *Rosner,* 294 U. S. 629, 642. The practical result of the decision here is to hold that Texas has power to nullify a Louisiana statute which gives the beneficial protection of workmen's compensation to an injured workman who is a resident of Louisiana and made his contract of employment there. I "am not persuaded that the full faith and credit clause gives sanction to such control by one state of the internal affairs of another." *Yarborough* v. *Yarborough, supra,* 214.

II.

It is apparently conceded that Louisiana would not have been required to apply the Texas statute had there not been a judgment in the particular case by the Texas tribunal. This freedom of the state to apply its own policy in workmen's compensation cases despite a conflicting statute in the state in which the accident occurs rests on the theory that the state where the workman is hired or is domiciled has a genuine and special interest in the outcome of the litigation. *Alaska Packers Assn.* v. *Industrial Accident Comm'n,* 294 U. S. 532, 541–543, 549; cf. *Pacific*

Employers Ins. Co. v. *Industrial Accident Comm'n,* 306 U. S. 493, 503. These cases mark recognition of the fact that the authority of the states to act in any field is to be measured as much by vital state interests as by technical legal concepts. Cf. *Hoopeston Canning Co.* v. *Cullen,* 318 U. S. 313. The argument of state interest is hardly less compelling when Louisiana chooses to reject as decisive of the issues of the case a foreign judgment than when it rejects a foreign statute.

The interest of Texas in providing compensation for an injured employee who like respondent was only temporarily employed in the state is not the same as that of Louisiana where the respondent was domiciled and where the contract of employment was made. Someone has to take care of an individual who has received, as has respondent, an injury which permanently disables him from performance of his work. If employers or the consumers of their goods do not shoulder this responsibility, the general public of a state must. Neither state merely vindicates a private wrong growing out of tortious conduct. *McKane* v. *New Amsterdam Casualty Co.,* 199 So. 175, 179 (Ct. of App. of La., Orleans); *Texas Employers' Ins. Assn.* v. *Price,* 291 S. W. 287, 290. The Louisiana Act was passed in the interest of the general welfare of the people of Louisiana. *Puchner* v. *Employers' Liability Corp.,* 198 La. 922, 5 So. 2d 288.[4] If it chooses to be more generous to injured workmen than Texas, no Constitutional issue is presented.

[4] The classic theory of the interest of a state in workmen's compensation was expressed by this Court in upholding the constitutionality of a state compensation system: In the absence of a workmen's compensation system, "the injured workman is left to bear the greater part of industrial accident loss, which because of his limited income he is unable to sustain, so that he and those dependent upon him are overcome by poverty and frequently become a burden upon public or private charity." *New York Central R. Co.* v. *White,* 243 U. S. 188, 197.

The decision of the Court is not required by the *Schendel* case. In that case an employee brought an action in a Minnesota court under the Federal Employers' Liability Act. His employer brought an action in Iowa under the state law, the result of which was a holding by the Iowa court that the action had occurred in intrastate commerce. This Court held in the *Schendel* case, which was a review of the Minnesota proceedings, that the decision of the Iowa court that the accident occurred in intrastate commerce was res judicata and that the employee could not attempt to show that the accident had in fact occurred in interstate commerce as would have been necessary to bring the case within the coverage of the federal Act. The case is wholly distinguishable since the policy of the Federal Employers' Liability Act has not been thought to require that a federal award supplement a state workmen's compensation award. The statutes involved were not conflicting but were mutually exclusive, the federal Act covering only injuries in interstate commerce, U. S. C. Title 45, § 51 *et seq.*

Today's decision is flatly in conflict with accepted law and practice. The Restatement of Conflict of Laws, § 403 states categorically that an "award already had under the Workmen's Compensation Act of another state will not bar a proceeding under an applicable Act, but the amount paid on a prior award in another state will be credited on the second award," and one of the foremost studies of workmen's compensation states the same rule.[5] Even in the absence of an express statute several state courts have explicitly approved this practice. *Gilbert* v. *Des Lauriers Column Mould Co.*, 180 App. Div. 59, 167 N. Y. S. 274; *Interstate Power Co.* v. *Industrial Commission*, 203 Wis. 466, 234 N. W. 889; see similarly *McLaughlin's Case*, 274 Mass. 217, 174 N. E. 338; *Migues's Case*,

[5] Dodd, *Administration of Workmen's Compensation* (1936) pp. 819, 820. See also to the same effect 2 Beale, *The Conflict of Laws* (1935) § 403.1.

281 Mass. 373, 183 N. E. 847. Texas itself for a time applied a similar ruling. *Texas Employers' Ins. Assn.* v. *Price,* 300 S. W. 667.

North Carolina provides by statute in cases like the present that the employee should be entitled to receive compensation provided that if he receives compensation from a state other than North Carolina, he will be given no more compensation by North Carolina than would raise the total recovery to the maximum allowed by the North Carolina law.[6] Six other states have similar statutes.[7] The Committee on Workmen's Compensation Legislation of the International Association of Industrial Accident Boards and Commissions has drafted a uniform state law on the subject which, were it applicable in the instant case, would permit the employee to waive his rights under the Louisiana law by bringing an action under the Texas law only by filing a written waiver with a Louisiana Commission which would not be binding until approved by such a Commission.[8] This proposed uniform state law would presumably be unconstitutional under the decision announced today since it would leave in Louisiana the power to decide whether the employee should receive ad-

[6] N. C. Code (1939) § 8081 (rr).

[7] Florida: Florida Statutes (1941) § 440.09 (1); Georgia: Georgia Code (1933) § 114–411; Maryland: Maryland Annotated Code (1939), Flack's Edition, Art. 101, § 80 (3); Ohio: Page's Ohio General Code, § 1465–68; South Carolina: S. C. Code (1942) § 7035–39; and Virginia: Virginia Code (1942) § 1887 (37). No less than thirty-four states have enacted statutes which expressly permit recovery of workmen's compensation under specified circumstances for injuries received in another state. And the courts of nine additional states have construed statutes which are not express to achieve the same result. See Schneider, Workmen's Compensation Law (1941) Vol. 1, c. 5, pp. 441–568; Schneider, Workmen's Compensation Statutes (1939), Vols. 1–4.

[8] U. S. Bureau of Labor Statistics Bulletin No. 577 (1933) pp. 15–16.

ditional compensation despite the effect which Texas might seek to give to its award.

Whether the theory is that Texas did not intend its judgment to bar a proceeding in Louisiana or that the Texas workmen's compensation law is so incompatible with the policy of Louisiana that Louisiana is not bound by the Texas judgment, the result should be the same: There should be no Constitutional barrier preventing a state in effect from increasing the workmen's compensation award of another state in a case in which it has jurisdiction over the participants and the social responsibility for the results. Where two states both have a legitimate interest in the outcome of workmen's compensation litigation, the question of whether the second state which considers the case should abide by the decision of the first is a question of policy which should be decided by the state legislatures and courts.[9] Certainly fair argument can be made for either disposition of the policy question. Texas itself decided the question one way by decision in the *Price* case, 300 S. W. 667, *supra,* and, to a limited extent, the other way by statute.[10] State laws vary, and uniformity is not the highest value in the law of workmen's compensation, a point well made by the Supreme Court of Wisconsin when confronted with this very prob-

[9] "The interest, which New Hampshire has, in exercising that control, derived from the presence of employer and employe within its borders, and the commission of the tortious act there, is at least as valid as that of Vermont, derived from the fact that the status is that of its citizens, and originated when they were in Vermont, before going to New Hampshire. I can find nothing in the history of the full faith and credit clause, or the decisions under it, which lends support to the view that it compels any state to subordinate its domestic policy, with respect to persons and their acts within its borders, to the laws of any other." Concurring opinion in *Bradford Electric Light Co.* v. *Clapper,* 286 U. S. 145, 163, 164.

[10] Rev. Civ. Stat., Article 8306, § 19.

lem in *Interstate Power Co.* v. *Industrial Commission, supra,* 477:

"This state adopted a very liberal act, and it is reasonably to be inferred that the legislature was more concerned with making certain that workmen within its jurisdiction should get all the benefits of the act than it was with any conflicts or legal difficulties which might arise out of lack of uniformity. Our plain duty is to give to the act its intended effect, and to leave to the legislature the enactment of provisions designed to limit its operation in the interest of uniformity."

Much has been made in the argument here of the alleged vice of double recovery which is said to be allowed the respondent. Let me emphasize that there is no double recovery. In the first place the Louisiana court has deducted from its judgment the amount of the Texas payments. In the second place the aggregate of the awards from both states, if added together, would be far less than the total loss suffered by respondent. The Texas allowance scarcely amounts to a "recovery" in the sense of giving full compensation for loss, and has been described by a Texas court to be "more in the nature of a pension than a liability for breach of contract, or damages intact." *Texas Employers' Ins. Assn.* v. *Price,* 300 S. W. 667, *supra,* 669. See also *Biddinger* v. *Steininger-Taylor Co.,* 25 Ohio Dec. 603, 608.

The Court seems in some parts of its opinion to adopt a wholly new and far reaching policy relating to the power of states to allow complete indemnification for a personal injury by permitting more than one suit against the wrongdoer, and to engraft this policy on to the full faith and credit clause. Courts schooled in the common law have long objected to what has been designated "splitting a cause of action." They have phrased this policy objection in many common law concepts, one of which has been

the doctrine of "election of remedies." This predilection of common law judges in favor of compelling the aggregation of all possible elements of damage into one law suit is here apparently elevated to a position of Constitutional impregnability in the full faith and credit clause. The Court now seems to interpret that clause to prohibit a recovery of full compensation for a personal injury in more than one suit even if one or more states think full compensation can best be accorded in this manner. The practical result of this drastic new Constitutional doctrine is that State B must give *more* faith and credit to State A's judgment for damages for personal injury than State A itself intended the judgment should be given. State A's and State B's judgments are said to be mutually exclusive, not because either state made them so, but apparently on the ground that the full faith and credit clause imposes a rule of substantive law which requires this result. This doctrine would accord to the full faith and credit clause a meaning which it would have had if its authors had stated, "Full Faith and Credit shall be given in each State to the . . . judicial Proceedings of every other State, *and in addition two recoveries shall never be allowed by separate states for losses resulting from a single personal injury.*" When the authors of the Constitution desired to prohibit two criminal prosecutions for the same offense, they had no difficulty in expressing their views.[11] Had they wished to hobble the states in their efforts to provide more than one remedy in order to accomplish full justice in civil cases, I think they could and would have expressed themselves with equal clarity and emphasis.

[11] United States Constitution, Fifth Amendment. It has been held that, consistent with the Fifth Amendment, the federal government can impose criminal liability upon an individual for the same conduct for which he has been tried and convicted under a state criminal statute. *United States* v. *Lanza*, 260 U. S. 377.

III.

The effect of the decision of this Court today is to strike down as unconstitutional an important provision of the workmen's compensation laws of at least eleven states. For more than half a century the power of the states to regulate their domestic economic affairs has been narrowly restricted by judicial interpretation of the federal Constitution. The chief weapon in the arsenal of restriction, only recently falling into disrepute because of overuse, is the due process clause. The full faith and credit clause, used today to serve the same purposes, is no better suited to control the freedom of the states. The practical question now before us can be decided by the states in many ways and most of the states which have expressed themselves seem ready to dispose of the problem as has Louisiana. Our notions of policy should not permit the Constitution to become a barrier to free experimentation by the states with the problems of workmen's compensation.

MR. JUSTICE DOUGLAS, MR. JUSTICE MURPHY, and MR. JUSTICE RUTLEDGE concur in this opinion.

ATLANTIC REFINING CO. *v.* MOLLER.

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

No. 56. Argued December 7, 1943.—Decided December 20, 1943.

Section 15 of an Act of March 3, 1899, makes it unlawful "to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft." *Held:*

1. An exception to § 15 is recognized where literal compliance with its terms would create a danger to navigation which a departure from its terms could avoid or lessen. P. 466.

2. The circumstances in which a vessel in this case was twice anchored in a navigable channel during a fog warranted an exception to § 15 in each instance. P. 467.

134 F. 2d 1000, reversed.

CERTIORARI, 319 U. S. 737, to review the reversal of a decree which, in a suit in admiralty arising out of a collision, awarded damages to the libellant and dismissed a cross-libel, 40 F. Supp. 641. The reviewing court found statutory negligence on the part of the libellant's vessel, and ordered a division of the damages.

Mr. Otto Wolff, Jr. for petitioner.

Mr. J. Harry La Brum, with whom *Mr. Leonard J. Matteson* was on the brief, for respondent.

MR. JUSTICE BLACK delivered the opinion of the Court.

While lying at anchor in the channel of the Delaware River the tanker "Bohemian Club," owned by the petitioner, was struck by the motor vessel "Laura Maersk," owned by the respondent. Damage to each vessel resulted, for which the respective owners sought recovery in this admiralty proceeding. The District Court found that the collision was caused by the excessive rate of speed at which the "Laura Maersk" was proceeding down the channel, rendered judgment for the full amount of damages inflicted upon the "Bohemian Club," and dismissed the cross-libel of respondent against the "Bohemian Club." 40 F. Supp. 641. The Circuit Court of Appeals approved the District Court's finding that the "Laura Maersk" was negligent but concluded, with one judge dissenting, that the "Bohemian Club" was also negligent, and reversed with directions that the rule of divided damages be applied. 134 F. 2d 1000. See *The Schooner Catharine* v. *Dickinson,* 17 How. 170, 177–178; *The North Star,* 106 U. S. 17, 20. The Circuit Court's conclusion that the

"Bohemian Club" was negligent rested upon its interpretation of the following portion of § 15 of an Act of March 3, 1899: "It shall not be lawful to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft." [1] We granted certiorari because of an alleged conflict among the circuits as to the proper interpretation to be given this Act.[2]

The findings of both courts show that the accident happened under the following circumstances. At about 7:30 A. M. the "Bohemian Club," 435 feet long, was proceeding northward on the east side of the channel of the Delaware River when she encountered a dense fog. Unable to move without endangering herself and other vessels, and unable to obtain anchorage within a distance of five miles, she dropped anchor along her course in the channel. At this point the channel was approximately 1,200 feet wide, and northbound vessels were required to use the 400 feet adjacent to the channel's eastern boundary. Under the circumstances, the safest course of conduct for the "Bohemian Club" was to anchor where it did. About 10 A. M. the fog lifted slightly and the Master discovered a large steel buoy about 150 feet to the northeast of the vessel. The tide was then ebb, and was flowing away from the buoy, but was due to change to flood shortly. Fearing that this change might cause the vessel to foul the buoy, the Master had the anchor lifted, the engines put slow ahead, and the rudder put hard right. In less

[1] 30 Stat. 1152; U. S. C. Title 33, § 409. The Act imposes penal sanctions for violations of § 15. See §§ 16–18. However this section has been interpreted as establishing a standard of care applicable in ordinary negligence actions for damages. See *Otto Marmet Coal Co.* v. *Fieger-Austin Dredging Co.*, 259 F. 435; *The William C. Atwater*, 110 F. 2d 644; *The Southern Cross*, 93 F. 2d 297.

[2] See, for example, *The City of Norfolk*, 266 F. 641; *The A. P. Skidmore*, 115 F. 791; *The Socony No. 9*, 74 F. 2d 233.

than five minutes, however, the fog again dropped, and the vessel was again anchored. This time, apparently because she had been carried by the tide, the "Bohemian Club" lay somewhat south and west of her original position so that she partially obstructed the western part of the channel used by southbound vessels. There was, however, ample room in the western part of the channel for a southbound vessel to pass the "Bohemian Club"; in fact, since the western part of the channel was twice as wide as the eastern part, there was more space for southbound vessels to pass than there had been for northbound vessels to pass when the "Bohemian Club" was anchored in the eastern part of the channel. There are no findings that the Master of the "Bohemian Club" had any reason to believe that his vessel constituted a more dangerous obstruction to river traffic in general [3] in her second position than in her original position. In compliance with the statutory requirement imposed on vessels which are compelled to anchor in the fog, the "Bohemian Club's" fog bell was rung rapidly for five seconds at minute intervals;[4] and, in addition, lookouts were stationed on the bridge and forecastle. Despite these precautions the "Laura Maersk," southbound at what both courts agreed was an unreasonable speed, crashed into the "Bohemian Club" about one hour and fifteen minutes after she anchored the second time.

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[3] The opinion of the Circuit Court emphasizes the fact that the "Bohemian Club" did not obstruct southbound traffic in her first position but did obstruct this traffic in her second position. Since, however, the "Bohemian Club" obstructed the northbound traffic in her first position, this fact could not be material unless there was evidence that her Master should have anticipated that the volume of southbound traffic would be heavier than that of northbound traffic. No finding on this question is disclosed by the record.

[4] Article 15, Navigation Rules for Harbors, Rivers, and Inland Waters; 30 Stat. 99; U. S. C. Title 33, § 191 (2) (d).

The question for decision is whether the Circuit Court correctly held that the action of the "Bohemian Club" in anchoring in the channel at the point of the collision was unlawful under § 15 of the Act of March 3, 1899. The command of § 15 forbidding vessels to "anchor . . . in navigable channels" has uniformly been interpreted not to be absolute.[5] An exception to the duty required by this section has been recognized where literal compliance with its terms would create a danger to navigation which could be avoided or reduced by violation of its terms. See *The Socony No. 9,* 74 F. 2d 233, 234. As a practical matter an opposite construction would defeat the plain purpose of § 15 to maintain and promote the safety of navigation. It would, in addition, be out of harmony with Article 27 of the general Navigation Rules for Harbors, Rivers, and Inland Waters, which requires that "in obeying and construing these rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the . . . rules necessary in order to avoid immediate danger."[6] Cf. *The Cayuga,* 14 Wall. 270, 275, 276. Furthermore Article 15 of these general Rules, above referred to, contemplated that under some circumstances vessels may be compelled to anchor in foggy weather, and prescribed sound signals which vessels so anchored must use.

In the instant case the Circuit Court of Appeals recognized that the duty imposed by § 15 is not absolute and held that, under the circumstances, the act of the "Bohemian Club" in anchoring on the east side of the channel was lawful. The Court felt compelled, however, to hold that the act of anchoring on the west side was unlawful under § 15. We think this section does not require such a

[5] *The Europe,* 190 F. 475, 479; *The Caldy,* 153 F. 837, 840; see also the cases cited in Note 2, *supra.*

[6] 30 Stat. 102, U. S. C. Title 33, § 212.

holding. Whether anchored on the east or the west side of the channel the "Bohemian Club" would, within the literal terms of the section, "obstruct the passage of other vessels." The District Court found that when the fog enveloped the "Bohemian Club" for the second time, "the least dangerous course" was to anchor on the west side of the channel; and this finding was not disturbed by the Circuit Court. Under a proper construction of § 15, therefore, the circumstances which necessitated both the first and second anchorings of the "Bohemian Club" were equally sufficient to warrant an exception to the duty which it requires. Whether the act of lifting anchor and moving to the western part of the channel to avoid the danger of the buoy constituted negligence is a question wholly outside § 15. Since the holding of the Circuit Court rested upon an erroneous interpretation and application of this section, its judgment must be reversed.

Reversed.

COMMISSIONER OF INTERNAL REVENUE *v.* HEININGER.

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

No. 63. Argued November 12, 1943.—Decided December 20, 1943.

1. Attorney's fees and other legal expenses, reasonable in amount, incurred by a taxpayer (a licensed dentist engaged in selling artificial dentures by mail) in resisting issuance by the Postmaster General of a "fraud order" which would destroy his business, and in connection with subsequent proceedings on judicial review, the final result of which was unsuccessful for the taxpayer, *held,* in computing income tax under the Revenue Acts of 1936 and 1938, deductible under § 23 (a) as "ordinary and necessary" expenses of the business. P. 472.
2. The policy of 39 U. S. C. §§ 259 and 732, which authorize the Postmaster General to issue fraud orders, will not be frustrated by allowance of the deduction. P. 474.

3. The Board of Tax Appeals was not required to regard an administrative finding of guilt under 39 U. S. C. §§ 259 and 732 as barring the deduction. P. 475.
4. Whether an expenditure is directly related to a business and whether it is ordinary and necessary are in most instances questions of fact, the decision of which by the Board of Tax Appeals is binding on the courts; but here the Board denied the claimed deduction not by an independent exercise of judgment but upon the erroneous view that denial was required as a matter of law. P. 475.

133 F. 2d 567, affirmed.

CERTIORARI, 319 U. S. 740, to review the reversal of a decision of the Board of Tax Appeals, 47 B. T. A. 95, which affirmed the Commissioner's determination of a deficiency in income tax.

Mr. Valentine Brookes, with whom *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key* and *J. Louis Monarch* were on the brief, for petitioner.

Mr. Floyd Lanham for respondent.

Mr. Henry J. Richardson filed a brief, as *amicus curiae,* in support of respondent.

MR. JUSTICE BLACK delivered the opinion of the Court.

The question here is whether lawyer's fees and related legal expenses paid by respondent are deductible from his gross income under § 23 (a) of the Revenue Acts of 1936 and 1938 as ordinary and necessary expenses incurred in carrying on his business.[1]

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[1] Revenue Act of 1936, c. 690, 49 Stat. 1658.

"Sec. 23. Deductions from Gross Income.

"In computing net income there shall be allowed as deductions:

"(a) Expenses.—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, . . ."

Section 23 (a) of the Revenue Act of 1938, c. 289, 52 Stat. 460, is identical with § 23 (a) of the Revenue Act of 1936.

The fees and expenses were incurred under the following circumstances. From 1926 through 1938 respondent, a licensed dentist of Chicago, Illinois, made and sold false teeth. During the tax years 1937 and 1938 this was his principal business activity. His was a mail order business. His products were ordered, delivered, and paid for by mail. Circulars and advertisements sent through the mail proclaimed the virtues of his goods in lavish terms. At hearings held before the Solicitor of the Post Office Department pursuant to U. S. C., Title 39, §§ 259 and 732, respondent strongly defended the quality of his workmanship and the truthfulness of every statement made in his advertisements, but the Postmaster General found that some of the statements were misleading and some claimed virtues for his goods which did not exist. Thereupon, on February 19, 1938, a fraud order was issued forbidding the Postmaster of Chicago to pay any money orders drawn to respondent and directing that all letters addressed to him be stamped "Fraudulent" and returned to the senders. Such a sweeping deprivation of access to the mails meant destruction of respondent's business. He therefore promptly sought an injunction in a United States District Court contending that there was no proper evidential basis for the fraud order. On review of the record that Court agreed with him and enjoined its enforcement. The Court of Appeals drew different inferences from the record, held that the evidence did support the order, and remanded with instructions to dissolve the injunction and dismiss the bill. *Farley* v. *Heininger,* 105 F. 2d 79. Respondent's petition for certiorari was denied by this Court on October 9, 1939. *Heininger* v. *Farley,* 308 U. S. 587.

During the course of the litigation in the Post Office Department and the courts respondent incurred lawyer's fees and other legal expenses in the amount of $36,600, admitted to be reasonable. In filing his tax returns for the years

1937 and 1938 he claimed these litigation expenses as proper deductions from his gross receipts of $287,000 and $150,000. The Commissioner denied them on the ground that they did not constitute ordinary and necessary expenses of respondent's business. The Board of Tax Appeals [2] affirmed the Commissioner, 47 B. T. A. 95, and the Circuit Court of Appeals reversed and remanded. 133 F. 2d 567. We granted certiorari because of an alleged conflict with the decisions of other circuits.[3]

There can be no doubt that the legal expenses of respondent were directly connected with "carrying on" his business. *Kornhauser* v. *United States,* 276 U. S. 145, 153; cf. Appeal of Backer, 1 B. T. A. 214; *Pantages Theatre Co.* v. *Welch,* 71 F. 2d 68. Our enquiry therefore is limited to the narrow issue of whether these expenses were "ordinary and necessary" within the meaning of § 23 (a). In determining this issue we do not have the benefit of an interpretative departmental regulation defining the application of the words "ordinary and necessary" to the particular expenses here involved. Cf. *Textile Mills Securities Corp.* v. *Commissioner,* 314 U. S. 326, 338. Nor do we have the benefit of the independent judgment of the Board of Tax Appeals. It did not deny the deductions claimed by respondent upon its own interpretation of the words "ordinary and necessary" as applied to its findings of fact. Cf. *Hormel* v. *Helvering,* 312 U. S. 552, 555, 556. The interpretation it adopted was declared to be required by the Second Circuit Court's reversal of the Board's view in National

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[2] Section 504 (a) of the Revenue Act of 1942, c. 619, 56 Stat. 798, 957, U. S. C., Title 26, § 1100 changes the name of the Board of Tax Appeals to "The Tax Court of the United States."

[3] *Helvering* v. *National Outdoor Advertising Bureau,* 89 F. 2d 878 (C. C. A. 2); *Helvering* v. *Superior Wines & Liquors,* 134 F. 2d 373 (C. C. A. 8).

Outdoor Advertising Bureau *v.* Commissioner, 32 B. T. A. 1025.[4]

It is plain that respondent's legal expenses were both "ordinary and necessary" if those words be given their commonly accepted meaning. For respondent to employ a lawyer to defend his business from threatened destruction was "normal"; it was the response ordinarily to be expected. Cf. *Deputy* v. *du Pont,* 308 U. S. 488, 495; *Welch* v. *Helvering,* 290 U. S. 111, 114; *Kornhauser* v. *United States, supra.* Since the record contains no suggestion that the defense was in bad faith or that the attorney's fees were unreasonable, the expenses incurred in defending the business can also be assumed appropriate and helpful, and therefore "necessary." Cf. *Welch* v. *Helvering, supra,* 113; *Kornhauser* v. *United States, supra,* 152. The government does not deny that the litigation expenses would have been ordinary and necessary had the proceeding failed to convince the Postmaster General that respondent's representations were fraudulent.[5] Its argument is that dentists in the mail order business do not ordinarily and necessarily attempt to sell false teeth by

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[4] *Helvering* v. *National Outdoor Advertisement Bureau, supra,* Note 3. In that case the taxpayer had incurred legal expenses defending a suit begun by the United States to enjoin violations of the Sherman Act. It had successfully defended part of the charges against it, but had agreed to the entry of a consent decree of injunction as to the balance. The Board held that all of the legal expenses were ordinary and were proximately connected with the taxpayer's business, and that to allow them as deductions would not be against public policy. The Circuit Court reversed as to that portion of the expenses attributable to the consent decree. See also *Helvering* v. *Superior Wines & Liquors, supra,* Note 3, where the Board was reversed for allowing a taxpayer in the liquor business to deduct lawyer's fees incurred in connection with a compromise of liability for civil penalties assessed for improper bookkeeping under U. S. C., Title 26, §§ 2857 *et seq.*

[5] See Note 8, *infra.*

fraudulent representations as to their quality; that respondent was found by the Postmaster General to have attempted to sell his products in this manner; and that therefore the litigation expenses, which he would not have incurred but for this attempt, cannot themselves be deemed ordinary and necessary. We think that this reasoning, though plausible, is unsound in that it fails to take into account the circumstances under which respondent incurred the litigation expenses. Cf. *Welch* v. *Helvering, supra,* 113, 114. Upon being served with notice of the proposed fraud order respondent was confronted with a new business problem which involved far more than the right to continue using his old advertisements. He was placed in a position in which not only his selling methods but also the continued existence of his lawful business were threatened with complete destruction. So far as appears from the record respondent did not believe, nor under our system of jurisprudence was he bound to believe, that a fraud order destroying his business was justified by the facts or the law. Therefore he did not voluntarily abandon the business but defended it by all available legal means. To say that this course of conduct and the expenses which it involved were extraordinary or unnecessary would be to ignore the ways of conduct and the forms of speech prevailing in the business world. Cf. *Welch* v. *Helvering, supra,* 115. Surely the expenses were no less ordinary or necessary than expenses resulting from the defense of a damage suit based on malpractice, or fraud, or breach of fiduciary duty. Yet in these latter cases legal expenses have been held deductible without regard to the success of the defense.[6]

[6] Malpractice: C. B. V.–1, 226; Fraud: *Helvering* v. *Hampton,* 79 F. 2d 358; Breach of fiduciary duty: Keeler *v.* Commissioner, 23 B. T. A. 467. See also the examples of deductible expenses set forth in *Kornhauser* v. *United States,* 276 U. S. 145.

The Bureau of Internal Revenue, the Board of Tax Appeals, and the federal courts have from time to time, however, narrowed the generally accepted meaning of the language used in § 23 (a) in order that tax deduction consequences might not frustrate sharply defined national or state policies proscribing particular types of conduct. A review of the situations which have been held to belong in this category would serve no useful purpose for each case should depend upon its peculiar circumstances.[7] A few examples will suffice to illustrate the principle involved. Where a taxpayer has violated a federal or a state statute and incurred a fine or penalty he has not been permitted a tax deduction for its payment.[8] Similarly, one who has incurred expenses for certain types of lobbying and political pressure activities with a view to influencing federal legislation has been denied a deduction.[9] And a taxpayer who has made payments to an influential party precinct captain in order to obtain a state printing contract has not been allowed to deduct

[7] For a collection and analysis of many of the cases see Note (1941) 54 Harv. L. Rev. 852; 4 Mertens, Law of Federal Income Taxation (1942) §§ 25.35–25.37, 25.102–25.105.

[8] *Great Northern Ry. Co.* v. *Commissioner,* 40 F. 2d 372; Bonnie Bros. *v.* Commissioner, 15 B. T. A. 1231; *Burroughs Bldg. Material Co.* v. *Commissioner,* 47 F. 2d 178; Appeal of Columbus Bread Co., 4 B. T. A. 1126. A taxpayer who has been prosecuted under a federal or state statute and convicted of a crime has not been permitted a tax deduction for his attorney's fee. Estate of Thompson *v.* Commissioner, 21 B. T. A. 568; *Burroughs Bldg. Material Co.* v. *Commissioner, supra.* But if he has been acquitted, a deduction has been allowed. *Commissioner* v. *People's-Pittsburgh Trust Co.,* 60 F. 2d 187; cf. Citron-Byer Co. *v.* Commissioner, 21 B. T. A. 308; Headley *v.* Commissioner, 37 B. T. A. 738. Cf. *Helvering* v. *Superior Wines & Liquors, supra,* Note 3.

[9] *Textile Mills Securities Corp.* v. *Commissioner,* 314 U. S. 326, 338. Cf. *Commissioner* v. *Sunset Scavenger Co.,* 84 F. 2d 453.

their amount from gross income.[10] It has never been thought, however, that the mere fact that an expenditure bears a remote relation to an illegal act makes it non-deductible. The language of § 23 (a) contains no express reference to the lawful or unlawful character of the business expenses which are declared to be deductible. And the brief of the government in the instant case expressly disclaims any contention that the purpose of tax laws is to penalize illegal business by taxing gross instead of net income. Cf. *United States* v. *Sullivan,* 274 U. S. 259.

If the respondent's litigation expenses are to be denied deduction, it must be because allowance of the deduction would frustrate the sharply defined policies of 39 U. S. C. §§ 259 and 732 which authorize the Postmaster General to issue fraud orders. The single policy of these sections is to protect the public from fraudulent practices committed through the use of the mails. It is not their policy to impose personal punishment on violators; such punishment is provided by separate statute,[11] and can be imposed only in a judicial proceeding in which the accused has the benefit of constitutional and statutory safeguards appropriate to trial for a crime. Nor is it their policy to deter persons accused of violating their terms from employing counsel to assist in presenting a bona fide defense to a proposed fraud order. It follows that to allow the deduction of respondent's litigation expenses would not frustrate the policy of these statutes; and to deny the deduction would attach a serious punitive consequence to the Postmaster General's finding which Congress has not expressly or impliedly indicated should result from such a

[10] *Rugel* v. *Commissioner,* 127 F. 2d 393. Cf. Kelley-Dempsey & Co. *v.* Commissioner, 31 B. T. A. 351, where deduction was denied for the expense of commercial extortion.

[11] Criminal Code, § 215; 25 Stat. 873; 35 Stat. 1130; U. S. C., Title 18, § 338.

finding. We hold therefore that the Board of Tax Appeals was not required to regard the administrative finding of guilt under 39 U. S. C. §§ 259 and 732 as a rigid criterion of the deductibility of respondent's litigation expenses.

Whether an expenditure is directly related to a business and whether it is ordinary and necessary are doubtless pure questions of fact in most instances. Except where a question of law is unmistakably involved a decision of the Board of Tax Appeals on these issues, having taken into account the presumption supporting the Commissioner's ruling,[12] should not be reversed by the federal appellate courts.[13] Careful adherence to this principle will result in a more orderly and uniform system of tax deductions in a field necessarily beset by innumerable complexities. Cf. *Hormel* v. *Helvering, supra.* However, as we have pointed out above, the Board of Tax Appeals here denied the claimed deduction not by an independent exercise of judgment but upon a mistaken conviction that denial was required as a matter of law. We therefore affirm the judgment of the Circuit Court of Appeals reversing and remanding the cause to the Board of Tax Appeals.

Affirmed.

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[12] See *Welch* v. *Helvering,* 290 U. S. 111, 115.

[13] Cf. *Helvering* v. *Lazarus & Co.,* 308 U. S. 252, 255; *Dobson* v. *Commissioner, post,* p. 489.

BRADY, ADMINISTRATRIX, *v.* SOUTHERN RAILWAY CO.

CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA.

No. 26. Argued October 19, 1943.—Decided December 20, 1943.

1. Upon review here of a state court decision under the Federal Employers' Liability Act, the question whether the evidence was sufficient to justify submission of the case to the jury is for the determination of this Court. P. 479.
2. Only by a uniform federal rule as to the sufficiency of the evidence may litigants under the federal Act receive similar treatment in all States. P. 479.
3. Where in a suit under the Federal Employers' Liability Act the evidence is such that a verdict for the defendant is the only reasonable conclusion, the trial court should determine the proceeding by non-suit, directed verdict, or otherwise in accordance with the applicable practice without submission to the jury, or by judgment *non obstante veredicto*. P. 479.
4. The rule as to when a directed verdict is proper is applicable to questions of proximate cause. P. 483.
5. Evidence in this case under the Federal Employers' Liability Act *held* insufficient to warrant submission of the case to the jury. P. 480.

   (a) That the derailer was not equipped with a light was not evidence of negligence of the carrier. P. 480.

   (b) Relative to misuse of the derailer, there was no evidence from which the jury could find negligence on the part of employees of the carrier other than the decedent. P. 481.

   (c) The degree of care which it must exercise did not require the carrier to guard against a car striking the derailer from an unexpected direction. P. 483.

   (d) Liability of the carrier can not be predicated on the existence of the defective rail, since the rail was suitable for ordinary use, was not the proximate cause of the accident, and misuse of the derailer was not a danger reasonably to be anticipated. P. 482.

222 N. C. 367, 23 S. E. 2d 334, affirmed.

CERTIORARI, 319 U. S. 777, to review the reversal of a judgment for the plaintiff in an action under the Federal Employers' Liability Act.

Messrs. Welch Jordan and *D. E. Hudgins,* with whom *Messrs Julius C. Smith* and *C. Clifford Frazier* were on the brief, for petitioner.

Mr. Sidney S. Alderman, with whom *Messrs. Russell M. Robinson, S. R. Prince, H. G. Hedrick,* and *W. T. Joyner* were on the brief, for respondent.

MR. JUSTICE REED delivered the opinion of the Court.

This case arose under the Federal Employers' Liability Act.[1] Certiorari to the Supreme Court of North Carolina was sought and granted to consider the retroactivity of the last amendment to the Act in conjunction with the contention that there was error in the ruling which held the case improperly submitted to the jury by the trial court. 319 U. S. 777. Our conclusion makes it unnecessary to consider the former problem.

The decedent, Earle A. Brady, was a brakeman. At the time of his death he was employed in that capacity in interstate commerce by the respondent, Southern Railway Company. The accident occurred during a switching movement in Virginia. The freight train upon which decedent was acting as brakeman came north over a main line and passed a switch which led into a storage track running south parallel to and on the east of the main line. There were four other members of the crew—the engineer, the fireman, the flagman and the conductor.

After the entire train passed the switch, it was stopped and backed into the storage track to permit another northbound train to go through on the main line and to pick up twelve cars at the south end of the storage track. After the other train passed, decedent's train, without picking up the storage track cars, pulled out on to the main line, backed southwardly beyond a vehicular grade cross-

[1] 35 Stat. 65, as amended; 36 Stat. 291; and 53 Stat. 1404.

ing which passed over the main line and the storage track about one-eighth of a mile south of the switchpoints, left the caboose and all the cars except the four nearest the engine on the main line and returned north for the purpose of again backing into the storage track to pick up the storage track cars. After coupling these cars on to the four next to the engine, the intended movement was to pull out again on the main line, back the train southwardly to the cars left on the main line, couple up all the cars and proceed on the journey to the north.

As the engine and four cars backed slowly into the storage track, the decedent was riding the southeastern step of the rear car, a gondola. It was 6:30 A. M. on Christmas morning and so dark the work was carried on by lantern signals. The trucks hit the wrong end of a derailer, located three or four car lengths from the switch, which was closed so as to prevent cars on the storage track from drifting accidentally onto the main line.[2] The contact derailed the cars and threw decedent to instant death under the wheels.

Damages were sought for the alleged negligence of the carrier in failing to furnish a reasonably safe place to work by reason of defects in the track and derailer and, we assume since it was submitted to the jury and passed upon by the Supreme Court of North Carolina, 222 N. C. at 370, 23 S. E. 2d 334, 337, by the act of some other employee in improperly closing the derailer after the beginning and

[2] A derailer is a small but heavy iron device attached to a rail which opens and closes over the rail by a lever, so as to derail or turn off the track cars approaching the closed derailer from the expected direction. When the derailer is open trains may pass in either direction without interference. A train or car approaching a closed derailer from the unexpected or wrong direction may successfully roll over the obstruction but more probably they, too, would be derailed. The apparatus is not designed when closed to safely permit the passage of cars from the unexpected direction.

before the fatal phase of the switching movement. Further there was a charge of negligence in failing to provide a light or other warning to indicate the dangerous position of the derailer. A judgment for $20,000 was obtained in the Superior Court which was reversed in the state Supreme Court on the ground of the failure of the evidence to support the jury's verdict.

There is thus presented the problem of whether sufficient evidence of negligence is furnished by the record to justify the submission of the case to the jury. In Employers' Liability cases, this question must be determined by this Court finally. Through the supremacy clause of the Constitution, Art. VI, we are charged with assuring the act's authority in state courts. Only by a uniform federal rule as to the necessary amount of evidence may litigants under the federal act receive similar treatment in all states. *Western & Atlantic R. Co.* v. *Hughes,* 278 U. S. 496, 498; *Chicago, M. & St. P. Ry. Co.* v. *Coogan,* 271 U. S. 472, 474. Cf. *United Gas Co.* v. *Texas,* 303 U. S. 123, 143. It is true that this Court has held that a state need not provide in F. E. L. A. cases any trial by jury according to the requirements of the Seventh Amendment. *Minneapolis & St. Louis R. Co.* v. *Bombolis,* 241 U. S. 211. But when a state's jury system requires the court to determine the sufficiency of the evidence to support a finding of a federal right to recover, the correctness of its ruling is a federal question. The weight of the evidence under the Employers' Liability Act must be more than a scintilla before the case may be properly left to the discretion of the trier of fact—in this case, the jury. *Western & Atlantic R. Co.* v. *Hughes, supra; Baltimore & Ohio R. Co.* v. *Groeger,* 266 U. S. 521, 524. Cf. *Gunning* v. *Cooley,* 281 U. S. 90, 94; *Commissioners* v. *Clark,* 94 U. S. 278, 284. When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceed-

ing by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims. *Galloway* v. *United States,* 319 U. S. 372; *Pence* v. *United States,* 316 U. S. 332; *Baltimore & Ohio R. Co.* v. *Groeger,* 266 U. S. 521, n. 1; *Anderson* v. *Smith,* 226 U. S. 439; *Coughran* v. *Bigelow,* 164 U. S. 301, 307; *Gunning* v. *Cooley,* 281 U. S. 90, 93, note; *Seaboard Air Line* v. *Padgett,* 236 U. S. 668, 673; *Parks* v. *Ross,* 11 How. 362, 373. See IX Wigmore on Evidence (3d ed., 1940), §§ 2494 *et seq.*

An examination of the proven facts to determine whether they are sufficient to permit a verdict by the jury for the decedent's estate based upon reason is of no doctrinal importance. Every case varies. However, the soundness of the judgment entered in the state Supreme Court depends upon an appraisal of the evidence and, as to this, there is a difference of opinion here. Our conclusion is that there is failure to show in the record any negligence of the carrier from not putting a light on the derailer or by the action of other employees than decedent in closing the derailer.

As to the light, it is nowhere shown that it was customary or even desirable in the operation of this or any other railroad to equip derailers with such a signal. Apparently lights on a derailer are not used on storage tracks where, as at the place of the accident, an automatic block system functions.

Nor do we find any evidence upon which a jury could find negligence of other employees of the carrier in setting the derailer without warning the decedent. On the first backward movement into the storage track, the engineer and fireman were in the engine cab at the front of the train. There is no evidence that either left that posi-

tion until after the accident. As the entire train passed the derailer then without incident and again upon its exit from the storage track to return to the main line to cut the train, there is no suggestion that the derailer was not open during that part of the movement. As petitioner states, "during switching operations it is the usual rule and custom for the derailer to be kept off the track until the switching operation is completed." This time the switch was closed between the movement just referred to and the return of the engine and four cars to the storage track to pick up the cars waiting transportation.

The evidence shows without contrary intimation that on the first movement into the storage track the twelve cars to be picked up later were south of the crossing and therefore more than an eighth of a mile from the switch. "When the cars or the train was backed into the pass track to let the northbound train pass, I [the conductor] threw the switch and the derailer and then came back to the crossing to await the other movement—to keep from hitting an automobile." "When that movement was made—when they backed out on the main line—I was at this crossing, protecting the crossing. In the backing up movement I protected the crossing and then they cut out the four cars. The engine came over the crossing; cut off somewhere five or six cars south of the crossing. I was not up north of the engine when they cut the cars out. I was back up here. I rode the caboose car back. When they came on down I stayed on the caboose car and Mr. Brady stayed where the four or five cars were. He cut those out. I didn't see him. I was checking on those cars. I had left the caboose. I was not far from those twelve cars so I left the caboose to check up on the cars. While I was over there I heard the blast of the locomotive engine. I didn't see how the cars were derailed—left the track—nor did I see where Mr. Brady was at that time." Obviously the conductor, in order to get near the twelve stored cars,

hopped the caboose at the crossing as it backed up on the main line. The flagman testified that the conductor came back and watched the crossing after the train first backed into the storage track. The flagman also testified that on leaving the caboose after the second train passed he, the flagman, went south to check up on the twelve stored cars and never touched either the switch or the derailer.

The undisputed testimony as to the significant movements of the decedent, Brady, as given by the engineer, follows:

"When we backed into the pass or storage track the first time and got in there to wait for No. 30 to go by, I saw Mr. Brady close the switch and the derailer. Mr. Brady gave me the signal to come back out. He set the derailer not to derail and opened the switch for me to come out and I came on out. Then I pulled out and back down south on the northbound track beyond the crossing. Mr. Brady was on the four cars and I saw him get off these four cars. He rode back north on these four cars 'til he got north of the switch. He got off the car and throwed the switch and got back and signaled me back. From the time I came out of the switch until I came back in there I never seen anybody else in there, other than Mr. Brady."

With the record evidence as to the action of the crew in this condition, it appears obvious that there is nothing to show negligence by any of the other servants of the carrier.

We now turn to the third instance of alleged negligence. This is the existence to the knowledge of the carrier of a rail, opposite the derailer, so worn on top and sides that in the opinion of qualified experts it permitted the thrust of the east wheels of the car, as they rose over the "wrong end" of the derailer, to force the flange on the west wheels over the defective rail and so to derail the cars, when no such derailment would have occurred, "nine times out of

ten, if the best type" rail was in use. There is no evidence of the unsuitability of the rail for ordinary use.

Such evidence, we assume, would justify a finding for petitioners, if the defective rail was the proximate cause of the derailment and the backing of the train improperly over the closed derailer a danger reasonably to be anticipated. As to the likelihood of cars passing over the wrong end of derailers, one witness with ten years' experience as a brakeman testified that he recalled three or four instances. Another, the Superintendent of the railroad with 22 years' experience said, "It happens very frequently. I would say yes, I have seen it 25 to 50 times." The rule as to when a directed verdict is proper, heretofore referred to, is applicable to questions of proximate cause. *Atchison, T. & S. F. Ry. Co.* v. *Toops,* 281 U. S. 351; *St. Louis-San Francisco Ry. Co.* v. *Mills,* 271 U. S. 344, 348; *New York Central R. Co.* v. *Ambrose,* 280 U. S. 486; *Baltimore & Ohio R. Co.* v. *Tindall,* 47 F. 2d 19; *Texas Gulf Sulphur Co.* v. *Portland Gas Light Co.,* 57 F. 2d 801. Cf. *Story Parchment Co.* v. *Paterson Co.,* 282 U. S. 555, 566.

The Supreme Court of North Carolina was of the view that striking a derailer from the unexpected direction "was so unusual, so contrary to the purpose" of the derailer that provision to guard against such a happening was beyond the requirement of due care. With this we agree. Bare possibility is not sufficient. *Milwaukee & St. Paul Ry. Co.* v. *Kellogg,* 94 U. S. 469, at 475:

"But it is generally held, that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

Events too remote to require reasonable prevision need not be anticipated. It was so held as to an intervening

embargo after a delay in transit which was caused by negligence. *The Malcolm Baxter*, 277 U. S. 323, 334. Cf. *Northern Ry. Co.* v. *Page*, 274 U. S. 65, 74; *St. Louis-San Francisco Ry. Co.* v. *Mills*, *supra*. Liability arises from negligence not from injury under this Act. And that negligence must be the cause of the injury. *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 67. Here the rail was sufficient for ordinary use, and the carrier was not obliged to foresee and guard against misuse of the derailer, even though the misuse occurred as often as the evidence indicated. It was the wrongful use of the derailer that immediately occasioned the harm. Decedent had first closed and then opened the derailer on the first movement. He signalled the train to back into the storage track just before the fatal accident. Although this misuse of the derailer was an act of negligence, it is mere speculation as to whether that negligence is chargeable to the decedent or another. Without this unexpected occurrence, the adequacy of the rail vis-à-vis a properly used derailer is unquestioned. It was entirely disconnected from the earlier act of the carrier in placing the weak rail in the track. The mere fact that with a sound rail the accident might not have happened is not enough. The carrier's negligence must be a link in an unbroken chain of reasonably foreseeable events.[3]

Affirmed.

MR. JUSTICE BLACK, dissenting:

Twelve North Carolina citizens who heard many witnesses and saw many exhibits found on their oaths that the railroad's employees were negligent. The local trial judge sustained their finding. Four members of this Court agree with the local trial judge that the jury's conclusion was reasonable. Nevertheless five members of the Court

[3] See e. g., *The Squib Case*, 2 W. Bl. 892. Cf. 1 Cooley on Torts (4th Ed., 1932) § 50, n. 25, and collection of cases.

purport to weigh all the evidence offered by both parties to the suit, and hold the conclusion was unreasonable. Truly, appellate review of jury verdicts by application of a supposed norm of reasonableness gives rise to puzzling results.[1]

Although I do not agree that the "uniform federal rule" on directed verdicts announced by the Court correctly states the law, I place my dissent on the ground that, whatever rule be applied, petitioner sufficiently alleged and proved at least two separate acts of negligence attributable to the respondent railroad but for which the decedent Brady would probably have escaped death. The first was the act of one of respondent's trainmen in negligently closing the derailer; the second, the act of respondent's maintenance crew in negligently keeping a defective rail opposite that derailer. Proof of either was sufficient in itself to support a jury verdict against respondent under the terms of the Federal Employers' Liability Act.[2]

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[1] For an enlightening exposition of the uncertainties generated by excessive judicial use of the norm of reasonableness, see Jackson, Trial Practice in Accident Litigation (1930), 15 Cornell Law Quarterly, 194 *et seq.* It was the writer's opinion that there was "a persistent, insidious, and plausible tendency toward uncertainty in everything that legal reasoning touches," and that this tendency was "easier to illustrate than to describe." Had today's decision then been available, it could well have been added to the several decisions which were used as illustrations. Likewise the criticism which the writer directed at these illustrative decisions is exactly applicable to what the Court today, by applying a legal doctrine misnamed "proximate cause," has done to the Federal Employers' Liability Act. For what it has done is to choose "between two lines of public policy. It could not think in the simple terms of the statutory command; it reverted to the complex legal reasoning involving a combination of principles and depending upon multiplied conditions which the statute tried to supersede."

[2] "Every common carrier by railroad while engaging in commerce between any of the several States or Territories . . . shall be liable in damages to any person suffering injury while he is employed by such

Negligence in closing derailer. A contributing cause to decedent's death was that the derailer was in a closed position at the time the engineer backed the engine and four cars into it. That the derailer should have been open is not disputed. The evidence was sufficient to show that the employee who negligently closed the derailer must have been either the flagman, the conductor, or the decedent. The flagman expressly denied that he closed the derailer, but the conductor made no such denial. Petitioner, although deprived of decedent's testimony, did produce evidence from which the jury could find that it was not decedent who closed it. Testimony established that decedent knew of the existence and location of the derailer, that he was an experienced brakeman, and that he would be aware of the danger of riding a freight car over a closed derailer. From these facts the jury could find that decedent thought the derailer was open since he would not likely have signalled the train over a closed derailer at the peril of his own safety and protection. Cf. *Atchison, T. & S. F. Ry. Co.* v. *Toops,* 281 U. S. 351, 356. A similar inference is not justified as regards the flagman and conductor for the evidence shows that at the time of the accident both were a half mile away and therefore were not imperiled by the decedent's signalling back the train and were not in a position to have prevented the signal.[3]

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carrier in such commerce, or, in case of the death of such employee, to his or her personal representative . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, . . . or other equipment." 35 Stat. 65, as amended; 53 Stat. 1404; U. S. C., Title 45, § 51.

[3] Uncontradicted testimony showed that both the flagman and the conductor were under the duty to operate the derailer in switching operations when the train was long. Here the train was four hundred yards in length. The conductor admitted that he had operated the derailer once during the switching operation, and that he had been

Having thus brought forth evidence that one of respondent's employees negligently closed the derailer and that decedent was not that employee, petitioner had proved a case for the jury. I cannot agree with the view apparently adopted by the Court that the petitioner was required to pin the negligence on a particular one of decedent's fellow employees. No such burden is imposed by the Federal Act. It provides merely that a railroad is liable "for . . . death resulting in whole or *in part* from the negligence of *any* of the . . . employees." (Italics supplied.) [4]

Negligence in keeping defective rail opposite derailer. There was evidence to show that the rail of the pass track opposite the derailer had been used for twenty-six years; that the top of the rail was decayed, rusty, badly worn, and thin; that with bare fingers metal slivers could easily be picked from both sides of the rail; and that some of the cross ties were old, not properly supported by ballast, and sloped toward the defective rail. Petitioner then offered expert evidence, contradicted by respondent's expert evidence, that the derailment would not have occurred but for this defective rail. The Court declines to give any effect whatever to all of this evidence on two stated grounds: (1) That the rail was suitable for ordinary use and the backing of the train improperly over the closed derailer was not "a danger reasonably to have been anticipated"; (2) That the "weak rail" was not the "proximate cause" of the death.

It is difficult to imagine how, except by sheer guessing, or by drawing upon some undisclosed superior fund of wisdom, the Court reaches the conclusion that respondent

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in a place where he could have closed it before the engine and four cars backed into it. Not one of the conductor's fellow employees testified as to what the conductor was doing at the time when the derailer must have been closed.

[4] See Note 2, *supra*.

need not have foreseen that trains would be backed over the wrong end of closed derailers. The evidence of railroad men who had worked on railroads showed it was foreseeable. Doubtless judges know more about formal logic and legal principles than do brakemen, engineers, and divisional superintendents. I am not so certain that they know more about the danger of keeping a defective rail immediately opposite a derailer. The Divisional Superintendent of the Southern Railway Company, put on the stand by the respondent, testified that trains backed over closed derailers "very frequently." He himself had seen it happen "on 25 to 50 occasions." And undisputed evidence, including photographs, showed that respondent had foreseen this likelihood to the extent that the top of the derailer had a special groove to hold the flange of a wheel as it passed over the back of the derailer. That a train would ordinarily not be backed over a closed derailer except for the personal negligence of the train crew is not determinative of the issue of foreseeability. The standard of reasonable conduct may require the defendant to protect the plaintiff against "that occasional negligence which is one of the ordinary incidents of human life and therefore to be anticipated. . . ." [5] And the mere fact that the negligence of the respondent in placing the weak rail in the track occurred several years before the accident does not establish that the subsequent injury was not foreseeable. The negligent conduct of respondent not only consisted of "placing the weak rail in the track"; it also consisted of keeping the "weak rail" there.

Nor is it easy to comprehend why the defective rail was not the "proximate cause" of the injury. It was the last "link in an unbroken chain of reasonably foreseeable events" which cost the employee his life. Surely this rail

[5] Restatement of Torts § 302, Comment *l*. See also Prosser on Torts (1941) § 37, p. 243.

was the "proximate cause" if those words be used to mean an event which contributes to produce a result, which is the meaning Congress intended when it made railroads liable for the injury or death of an employee "due to" or "resulting in whole or in part from" the railroad's negligence.[6] The record shows that two expert witnesses with many years of railroad experience testified that the accident was caused by the defective rail. That one of these witnesses on cross-examination stated the derailment would not have occurred "nine times out of ten" if there had been a sound rail hardly justifies a directed verdict against petitioner. The fact of causation is no different from any other fact and does not have to be proved with absolute certainty; ninety per cent certainty should suffice to make it an issue for the jury. That a sound rail would have given the deceased nine chances out of ten to escape death should be enough to give his family and the community the protection which the Act contemplates.

MR. JUSTICE DOUGLAS, MR. JUSTICE MURPHY, and MR. JUSTICE RUTLEDGE concur in this opinion.

DOBSON *v.* COMMISSIONER OF INTERNAL REVENUE.

NO. 44. CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.*

Argued November 8, 1943.—Decided December 20, 1943.

1. The Tax Court was not required by any statute, applicable regulation, or principle of law to treat as taxable income of the taxpayer a recovery—in respect of a loss (on a sale of stock) deducted and

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[6] See Note 2, *supra.*

*Together with No. 45, *Dobson* v. *Commissioner of Internal Revenue,* No. 46, *Estate of Collins* v. *Commissioner of Internal Revenue,* and No. 47, *Harwick* v. *Commissioner of Internal Revenue,* also on writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit.

allowed on returns for an earlier year, adjustment of the tax liability for which was barred by limitations—where it found that, viewing as a whole the transactions out of which the recovery arose, the taxpayer had realized no economic gain and had derived no tax benefit from the loss deduction; and the Circuit Court of Appeals on review was without power to order that the recovery be treated as taxable income rather than as a return of capital. P. 506.

2. Where no constitutional question is involved, and in the absence of a controlling statute or regulation, a determination of the Tax Court as to whether particular transactions are integrated or separated for tax purposes is no more reviewable than any other question of fact. P. 502.
3. When the reviewing court can not separate the elements of a decision so as to identify a clear-cut mistake of law, the decision of the Tax Court must stand. P. 502.
4. In determining questions of law, courts may properly attach weight to decisions of such questions by an administrative body having special competence to deal with the subject matter; and though decisions of the Tax Court may not be binding precedents for courts dealing with similar problems, uniform administration would be promoted by conforming to them where possible. P. 502.

133 F. 2d 732, affirmed in part; reversed in part.

CERTIORARI, 319 U. S. 739–740, to review a judgment which, on review of decisions of the Board of Tax Appeals redetermining deficiencies in income tax, in No. 47 affirmed and in Nos. 44–46 reversed. See 46 B. T. A. 765, 770.

Mr. William L. Prosser, with whom *Mr. Leland W. Scott* was on the brief, for petitioners.

Mr. Samuel H. Levy, with whom *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Mr. Sewall Key* were on the brief, for respondent.

MR. JUSTICE JACKSON delivered the opinion of the Court.

These four cases were consolidated in the Court of Appeals. The facts of one will define the issue present in all.

The taxpayer, Collins, in 1929 purchased 300 shares of stock of the National City Bank of New York which carried certain beneficial interests in stock of the National City Company. The latter company was the seller and the transaction occurred in Minnesota. In 1930 Collins sold 100 shares, sustaining a deductible loss of $41,600.80, which was claimed on his return for that year and allowed. In 1931 he sold another 100 shares, sustaining a deductible loss of $28,163.78, which was claimed in his return and allowed. The remaining 100 shares he retained. He regarded the purchases and sales as closed and completed transactions.

In 1936 Collins learned that the stock had not been registered in compliance with the Minnesota Blue Sky Laws and learned of facts indicating that he had been induced to purchase by fraudulent representations. He filed suit against the seller alleging fraud and failure to register. He asked rescission of the entire transaction and offered to return the proceeds of the stock, or an equivalent number of shares plus such interest and dividends as he had received. In 1939 the suit was settled, on a basis which gave him a net recovery of $45,150.63, of which $23,296.45 was allocable to the stock sold in 1930 and $6,454.18 allocable to that sold in 1931. In his return for 1939 he did not report as income any part of the recovery. Throughout that year adjustment of his 1930 and 1931 tax liability was barred by the statute of limitations.

The Commissioner adjusted Collins' 1939 gross income by adding as ordinary gain the recovery attributable to the shares sold, but not that portion of it attributable to the shares unsold. The recovery upon the shares sold was not, however, sufficient to make good the taxpayer's original investment in them. And if the amounts recovered had been added to the proceeds received in 1930 and 1931 they would not have altered Collins' income tax liability for those years, for even if the entire deductions

claimed on account of these losses had been disallowed, the returns would still have shown net losses.

Collins sought a redetermination by the Board of Tax Appeals, now the Tax Court. He contended that the recovery of 1939 was in the nature of a return of capital from which he realized no gain and no income either actually or constructively, and that he had received no tax benefit from the loss deductions. In the alternative he argued that if the recovery could be called income at all it was taxable as capital gain. The Commissioner insisted that the entire recovery was taxable as ordinary gain and that it was immaterial whether the taxpayer had obtained any tax benefits from the loss deduction reported in prior years. The Tax Court sustained the taxpayer's contention that he had realized no taxable gain from the recovery.[1]

The Court of Appeals concluded that the "tax benefit theory" applied by the Tax Court "seems to be an injection into the law of an equitable principle, found neither in the statutes nor in the regulations." Because the Tax Court's reasoning was not embodied in any statutory precept, the court held that the Tax Court was not authorized to resort to it in determining whether the recovery should be treated as income or return of capital. It held as matter of law that the recoveries were neither return of capital nor capital gain, but were ordinary income in the year received.[2] Questions important to tax administration were involved, conflict was said to exist, and we granted certiorari.[3]

It is contended that the applicable statutes and regulations properly interpreted forbid the method of calculation followed by the Tax Court. If this were true, the Tax Court's decision would not be "in accordance with law" and the Court would be empowered to modify or reverse

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[1] Estate of Collins *v.* Commissioner, 46 B. T. A. 765.

[2] 133 F. 2d 732.

[3] 319 U. S. 739.

it.[4] Whether it is true is a clear-cut question of law and is for decision by the courts.

The court below thought that the Tax Court's decision "evaded or ignored" the statute of limitation, the provision of the Regulations that "expenses, liabilities, or deficit of one year cannot be used to reduce the income of a subsequent year," [5] and the principle that recognition of a capital loss presupposes some event of "realization" which closes the transaction for good. We do not agree. The Tax Court has not attempted to revise liability for earlier years closed by the statute of limitation, nor used any expense, liability, or deficit of a prior year to reduce the income of a subsequent year. It went to prior years only to determine the nature of the recovery, whether return of capital or income. Nor has the Tax Court reopened any closed transaction; it was compelled to determine the very question whether such a recognition of loss had in fact taken place in the prior year as would necessitate calling the recovery in the taxable year income rather than return of capital.

The 1928 Act provides that "The Board in redetermining a deficiency in respect of any taxable year shall consider such facts with relation to the taxes for other taxable years as may be necessary correctly to redetermine the amount of such deficiency. . . ." [6] The Tax Court's inquiry as to past years was authorized if "necessary correctly to redetermine" the deficiency. The Tax Court thought in this case that it was necessary; the Court of Appeals apparently thought it was not. This precipitates a question not raised by either counsel as to whether the court is empowered to revise the Tax Court's decision

[4] Revenue Act of 1926 § 1003 (b), 44 Stat. 9, 110, now Internal Revenue Code § 1141 (c) (1).

[5] Treasury Regulations 103, § 19.43–2.

[6] Revenue Act of 1928 § 272 (g), 45 Stat. 854, now Internal Revenue Code § 272 (g).

as "not in accordance with law" because of such a difference of opinion.

With the 1926 Revenue Act, Congress promulgated, and at all times since has maintained, a limitation on the power of courts to review Board of Tax Appeals (now the Tax Court) determinations. ". . . such courts shall have power to affirm or, if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board . . ." [7] However, even a casual survey of decisions in tax cases, now over 5,000 in number, will demonstrate that courts, including this Court, have not paid the scrupulous deference to the tax laws' admonitions of finality which they have to similar provisions in statutes relating to other tribunals.[8] After thirty years of income tax history the volume of tax litigation necessary merely for statutory interpretation would seem due to subside. That it shows no sign of diminution suggests that many decisions have no value as precedents because they determine only fact questions peculiar to particular cases. Of course frequent amendment of the statute causes continuing uncertainty and litigation, but all too often amendments are themselves made necessary by court decisions. Increase of potential tax litigation due to more taxpayers and higher rates lends new importance to observance of statutory limitations on review of tax decisions. No other branch of the law touches human

[7] Revenue Act of 1926 § 1003 (b), 44 Stat. 9, 110, now Internal Revenue Code § 1141 (c) (1).

[8] Compare *Helvering* v. *Tex-Penn Oil Co.*, 300 U. S. 481, and *Bogardus* v. *Commissioner*, 302 U. S. 34, with *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125 (Federal Communications Commission); *Shields* v. *Utah Idaho Central R. Co.*, 305 U. S. 177 (Interstate Commerce Commission); *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381, 399–400; *Gray* v. *Powell*, 314 U. S. 402 (Bituminous Coal Commission); *Labor Board* v. *Waterman S. S. Corp.*, 309 U. S. 206 (National Labor Relations Board).

activities at so many points. It can never be made simple, but we can try to avoid making it needlessly complex.

It is more difficult to maintain sharp separation of court and administrative functions in tax than in other fields. One reason is that tax cases reach circuit courts of appeals from different sources and do not always call for observance of any administrative sphere of decision. Questions which the Tax Court considers at the instance of one taxpayer may be considered by many district courts at the instance of others.

The Tucker Act authorizes district courts, sitting without jury as courts of claims, to hear suits for recovery of taxes alleged to have been "erroneously or illegally assessed or collected." [9] District courts also entertain common law actions against collectors to recover taxes erroneously demanded and paid under protest. Trial may be by jury, but waiver of jury is authorized [10] and in tax cases jury frequently is waived. In such cases the findings of the court may be either special or general. The scope of review on appeal may be affected by the nature of the proceeding, the kind of findings, and whether the jury was waived under a particular statutory authorization or independently of it.[11] The multiplicity and complexity of rules is such that often it is easier to review the whole case on the merits than to decide what part of it is reviewable and under what rule. The reports contain many cases in which the question is passed over without mention.

Another reason why courts have deferred less to the Tax Court than to other administrative tribunals is the man-

[9] 28 U. S. C. § 41 (20).

[10] 28 U. S. C. § 773; Act of May 29, 1930, c. 357, 46 Stat. 486.

[11] 28 U. S. C. § 875. See Carloss, Monograph on Findings of Fact (Supt. of Documents, 1934) 4. Some 280 cases on the review of findings of fact are considered.

ner in which Tax Court finality was introduced into the law.

The courts have rather strictly observed limitations on their reviewing powers where the limitation came into existence simultaneously with their duty to review administrative action in new fields of regulation. But this was not the history of the tax law. Our modern income tax experience began with the Revenue Act of 1913. The World War soon brought high rates. The law was an innovation, its constitutional aspects were still being debated, interpretation was just beginning, and administrators were inexperienced. The Act provided no administrative review of the Commissioner's determinations. It did not alter the procedure followed under the Civil War income tax by which an aggrieved taxpayer could pay under protest and then sue the Collector to test the correctness of the tax.[12] The courts by force of this situation entertained all manner of tax questions, and precedents rapidly established a pattern of judicial thought and action whereby the assessments of income tax were reviewed without much restraint or limitation. Only after that practice became established did administrative review make its appearance in tax matters.

Administrative machinery to give consideration to the taxpayer's contentions existed in the Bureau of Internal Revenue from about 1918 but it was subordinate to the Commissioner.[13] In 1923, the situation was brought to the attention of Congress by the Secretary of the Treasury, who proposed creation of a Board of Tax Appeals, within the Treasury Department, whose decision was to conclude Government and taxpayer on the question of assessment and leave the taxpayer to pay the tax and then

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[12] See *Cheatham* v. *United States*, 92 U. S. 85, 89.

[13] For an account thereof, see opinion of Mr. Justice Brandeis in *Williamsport Wire Rope Co.* v. *United States*, 277 U. S. 551, 562, n. 7.

test its validity by suit against the Collector.[14] Congress responded by creating the Board of Tax Appeals as "an independent agency in the executive branch of the Government." [15] The Board was to give hearings and notice thereof and "make a report in writing of its findings of fact and decision in each case." [16] But Congress dealt cautiously with finality for the Board's conclusions, going only so far as to provide that in later proceedings the findings should be "prima facie evidence of the facts therein stated." [17] So the Board's decisions first came before the courts under a statute which left them free to go into both fact and law questions. Two years later Congress reviewed and commended the work of the new Board,[18] increased salaries and lengthened the tenure of its members,[19] provided for a direct appeal from the Board's decisions to the circuit courts of appeals or the Court of Appeals of the District of Columbia,[20] and enacted the present provision limiting review to questions of law.[21]

But this restriction upon judicial review of the Board's decisions came only after thirteen years of income tax experience had established a contrary habit. Precedents had accumulated in which courts had laid down many rules of taxation not based on statute but upon their ideas of right accounting or tax practice. It was difficult to

[14] Annual Report of Secretary of Treasury, Finance 1 (1923) 10; Hamel, Practice and Evidence before the U. S. Board of Tax Appeals (1938) 5.

[15] Revenue Act of 1924 § 900 (k), 43 Stat. 253, 336.

[16] *Id.*, § 900 (h).

[17] *Id.*, § 900 (g).

[18] H. R. Rep. No. 1, 69th Cong., 1st Sess.; Sen. Rep. No. 52, 69th Cong., 1st Sess.

[19] Revenue Act of 1926 §§ 901 (a), 900, 44 Stat. 9, 106, 105.

[20] *Id.*, § 1001 (a), 44 Stat. 9, 109.

[21] *Id.*, § 1003 (b), 44 Stat. 9, 110.

shift to a new basis. This Court applied the limitation, but with less emphasis and less forceful resolution of borderline cases in favor of administrative finality than it has employed in reference to other administrative determinations.[22]

That neglect of the congressional instruction is a fortuitous consequence of this evolution of the Tax Court rather than a deliberate or purposeful judicial policy is the more evident when we consider that every reason ever advanced in support of administrative finality applies to the Tax Court.

The court is independent, and its neutrality is not clouded by prosecuting duties. Its procedures assure fair hearings. Its deliberations are evidenced by careful opinions. All guides to judgment available to judges are habitually consulted and respected. It has established a tradition of freedom from bias and pressures.[23] It deals with a subject that is highly specialized and so complex as to be the despair of judges. It is relatively better staffed for its task than is the judiciary.[24] Its members not infrequently bring to their task long legislative or adminis-

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[22] E. g., *Helvering* v. *Rankin*, 295 U. S. 123, 131; *Helvering* v. *Tex-Penn Oil Co.*, 300 U. S. 481, 491; *Bogardus* v. *Commissioner*, 302 U. S. 34, 38–39. For a sample of the diverse treatment of Board decisions when reviewed by this Court, see *Elmhurst Cemetery Co.* v. *Commissioner*, 300 U. S. 37; *Palmer* v. *Commissioner*, 302 U. S. 63, 70; *Helvering* v. *National Grocery Co.*, 304 U. S. 282, 294; *Colorado National Bank* v. *Commissioner*, 305 U. S. 23; *Helvering* v. *Lazarus & Co.*, 308 U. S. 252; *Griffiths* v. *Commissioner*, 308 U. S. 355; *Helvering* v. *Kehoe*, 309 U. S. 277; *Higgins* v. *Commissioner*, 312 U. S. 212; *Powers* v. *Commissioner*, 312 U. S. 259; *Wilmington Trust Co.* v. *Helvering*, 316 U. S. 164, 168; *Merchants National Bank* v. *Commissioner*, *ante*, p. 256. Compare the foregoing with the cases cited *supra* note 8.

[23] See reports of congressional committees on the Revenue Act of 1926, cited *supra* note 18.

[24] See Miller, Supporting Personnel of Federal Courts, 29 A. B. A. Journal 130, 131.

trative experience in their subject. The volume of tax matters flowing through the Tax Court keeps its members abreast of changing statutes, regulations, and Bureau practices, informed as to the background of controversies and aware of the impact of their decisions on both Treasury and taxpayer. Individual cases are disposed of wholly on records publicly made, in adversary proceedings, and the court has no responsibility for previous handling. Tested by every theoretical and practical reason for administrative finality, no administrative decisions are entitled to higher credit in the courts. Consideration of uniform and expeditious tax administrations require that they be given all credit to which they are entitled under the law.

Tax Court decisions are characterized by substantial uniformity. Appeals fan out into courts of appeal of ten circuits and the District of Columbia. This diversification of appellate authority inevitably produces conflict of decision, even if review is limited to questions of law. But conflicts are multiplied by treating as questions of law what really are disputes over proper accounting. The mere number of such questions and the mass of decisions they call forth become a menace to the certainty and good administration of the law.[25]

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[25] "Judge-made law is particularly prolific in connection with federal taxation, coming, as it does, from so many courts of coordinate jurisdiction. And the constant outpouring of decisions has steadily increased in volume. For the year 1920 a leading tax service catalogued only 300 decisions; CCH Federal Tax Service (1921). . . . Today one must look to approximately 20,000 court and Board decisions, many pages of regulations, and about 5,000 rulings. Since 1924 the Board of Tax Appeals alone has published about 8,500 opinions, as well as approximately 4,000 unreported memorandum opinions. For the fiscal years 1935, 1936 and 1937, the number of Board dockets appealed to the Circuit Courts of Appeal has amounted, on the average, to 509 each year. The Supreme Court's balance sheet shows that federal taxation was the principal concern of that Court during the 1934 term, with 44

To achieve uniformity by resolving such conflicts in the Supreme Court is at best slow, expensive, and unsatisfactory. Students of federal taxation agree that the tax system suffers from delay in getting the final word in judicial review, from retroactivity of the decision when it is obtained, and from the lack of a roundly tax-informed viewpoint of judges.[26]

Perhaps the chief difficulty in consistent and uniform compliance with the congressional limitation upon court

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decisions being handed down in that field. During the three years, 1935, 1936, and 1937, the Supreme Court rendered decisions in 84 federal tax cases." Paul, Selected Studies in Federal Taxation (1938) 2, n. 2.

"As of December 31, 1936, 4,700 decisions had been appealed to the Circuit Courts of Appeal (or the Court of Appeals of the District of Columbia) of which 3,996 had been disposed of. This left a pending Appellate docket of 704." *Id.*, 140, n. 133.

[26] Paul, Selected Studies in Federal Taxation (1938) 204, n. 18, comments on the number and variety of the sources contributing to tax law.

See Griswold, Book Review, 56 Harv. L. Rev. 1354.

Magill, The Impact of Federal Taxes (1943) 209, says: "At the present time, it is impossible to obtain a really authoritative decision of general application upon important questions of law for many years after the close of any taxable year. The average period between the taxable year in dispute and a Supreme Court decision relating thereto is nine years. Meanwhile confusion reigns in the day-by-day settlement of the more debatable questions of the tax law. One circuit court holds that a certain situation gives rise to tax liability; another circuit holds the contrary. The Commissioner and the lower federal courts are both confronted with the problem of reconciling the irreconcilable. A great part of the criticism of changing interpretations of the law announced by the Commissioner of Internal Revenue is properly attributable to the multitude of tribunals with original jurisdiction in tax cases, and to the absence of provision for decisions with nationwide authority in the majority of cases. If we were seeking to secure a state of complete uncertainty in tax jurisprudence, we could hardly do better than to provide for 87 Courts with original jurisdiction, 11 appellate bodies of coördinate rank, and only a discretionary review of relatively few cases by the Supreme Court."

review lies in the want of a certain standard for distinguishing "questions of law" from "questions of fact." This is the test Congress has directed, but its difficulties in practice are well known and have been subject of frequent comment. Its difficulty is reflected in our labeling some questions as "mixed questions of law and fact" [27] and in a great number of opinions distinguishing "ultimate facts" from evidentiary facts.[28]

It is difficult to lay down rules as to what should or should not be reviewed in tax cases except in terms so general that their effectiveness in a particular case will depend largely upon the attitude with which the case is approached. However, all that we have said of the finality of administrative determination in other fields is applicable to determinations of the Tax Court. Its decision, of course, must have "warrant in the record" and a reasonable basis in the law. But "the judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 146; *Swayne & Hoyt, Ltd.* v. *United States,* 300 U. S. 297, 304; *Mississippi Valley Barge Line Co.* v. *United States,* 292 U. S. 282, 286-7; *Gray* v. *Powell,* 314 U. S. 402, 412; *Helvering* v. *Clifford,* 309 U. S. 331, 336; *United States* v. *Louisville & Nashville R. Co.,* 235 U. S. 314, 320; *Wilmington Trust Co.* v. *Helvering,* 316 U. S. 164, 168.

Congress has invested the Tax Court with primary authority for redetermining deficiencies, which constitutes the greater part of tax litigation. This requires it to consider both law and facts. Whatever latitude exists in

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[27] E. g., *Helvering* v. *Rankin,* 295 U. S. 123, 131; *Helvering* v. *Tex-Penn Oil Co.,* 300 U. S. 481, 491; *Bogardus* v. *Commissioner,* 302 U. S. 34, 39.

[28] E. g., *Anderson* v. *Commissioner,* 78 F. 2d 636; *Childers* v. *Commissioner,* 80 F. 2d 27; *Eaton* v. *Commissioner,* 81 F. 2d 332; *Rankin* v. *Commissioner,* 84 F. 2d 551.

resolving questions such as those of proper accounting, treating a series of transactions as one for tax purposes, or treating apparently separate ones as single in their tax consequences, exists in the Tax Court and not in the regular courts; when the court cannot separate the elements of a decision so as to identify a clear-cut mistake of law, the decision of the Tax Court must stand. In view of the division of functions between the Tax Court and reviewing courts it is of course the duty of the Tax Court to distinguish with clarity between what it finds as fact and what conclusion it reaches on the law. In deciding law questions courts may properly attach weight to the decision of points of law by an administrative body having special competence to deal with the subject matter. The Tax Court is informed by experience and kept current with tax evolution and needs by the volume and variety of its work. While its decisions may not be binding precedents for courts dealing with similar problems, uniform administration would be promoted by conforming to them where possible.

The Government says that "the principal question in this case turns on the application of the settled principle that the single year is the unit of taxation." But the Tax Court was aware of this principle and in no way denied it. Whether an apparently integrated transaction shall be broken up into several separate steps and whether what apparently are several steps shall be synthesized into one whole transaction is frequently a necessary determination in deciding tax consequences.[29] Where no statute or regulation controls, the Tax Court's selection of the course to follow is no more reviewable than any other question of fact. Of course we are not here considering the scope of review where constitutional questions are involved. The

[29] See Paul, "Step Transactions," Selected Studies in Federal Taxation (1938) 203.

Tax Court analyzed the basis of the litigation which produced the recovery in this case and the obvious fact that "regarding the series of transactions as a whole it is apparent that no gain was actually realized." It found that the taxpayer had realized no tax benefits from reporting the transaction in separate years. It said the question under these circumstances was whether the amount the taxpayer recovered in 1939 "constitutes taxable income, even though he realized no economic gain." It concluded that the item should be treated as a return of capital rather than as taxable income. There is no statute law to the contrary, and the administrative rulings in effect at the time tended to support the conclusion.[30] It is true that the Board in a well considered opinion reviewed a number of court holdings, but it did so for the purpose of showing that they did not fetter its freedom to reach the decision it thought sound. With this we agree.

Viewing the problem from a different aspect, the Government urges in this Court that although the recovery is capital return, it is taxable in its entirety because taxpayer's basis for the property in question is zero. The argument relies upon § 113 (b) (1) (A) of the Internal Revenue Code, which provides for adjusting the basis of property for "expenditures, receipts, losses, or other items, properly chargeable to capital account." This provision, it is said, requires that the right to a deduction for a capital loss be treated as a return of capital. Consequently, by deducting in 1930 and 1931 the entire difference between the cost of his stock and the proceeds of the sales, taxpayer reduced his basis to zero. But the statute contains no such fixed rule as the Government would have us read into it. It does not specify the circumstances or manner in

[30] General Counsel's Memorandum 20854, 1939–1 Cum. Bull. 102, following G. C. M. 18525, 1937–1 Cum. Bull. 80; revoked by G. C. M. 22163, 1940–2 Cum. Bull. 76. This dealt with bad debt recoveries.

which adjustments of the basis are to be made, but merely provides that "Proper adjustment . . . shall in all cases be made" for the items named if "properly chargeable to capital account." What, in the circumstances of this case, was a proper adjustment of the basis was thus purely an accounting problem and therefore a question of fact for the Tax Court to determine. Evidently the Tax Court thought that the previous deductions were not altogether "properly chargeable to capital account" and that to treat them as an entire recoupment of the value of taxpayer's stock would not have been a "proper adjustment." We think there was substantial evidence to support such a conclusion.

The Government relies upon *Burnet* v. *Sanford & Brooks Co.*, 282 U. S. 359, for the proposition that losses of one year may not offset receipts of another year. But the case suggested its own distinction: "While [the money received] equalled, and in a loose sense was a return of, expenditures made in performing the contract, still, as the Board of Tax Appeals found, the expenditures were made in defraying the expenses. . . . They were not capital investments, the cost of which, if converted, must first be restored from the proceeds before there is a capital gain taxable as income." 282 U. S. at 363–64. It is also worth noting that the Court affirmed the Board's decision, which had been upset by the circuit court of appeals, and answered, in part, the contention of the circuit court that certain regulations were applicable by saying, ". . . nor on this record do any facts appear tending to support the burden, resting on the taxpayer, of establishing that the Commissioner erred in failing to apply them." 282 U. S. at 366–67.

It is argued on behalf of the Commissioner that the Court should overrule the Board by applying to this question rules of law laid down in decisions on the analogous problem raised by recovery of bad debts charged off with-

out tax benefit in prior years. The court below accepted the argument. However, instead of affording a reason for overruling the Tax Court, the history of the bad debt recovery question illustrates the mischief of overruling the Tax Court in matters of tax accounting. Courts were persuaded to rule as matter of law that bad debt recoveries constitute taxable income, regardless of tax benefit from the charge-off.[31] The Tax Court had first made a similar holding,[32] but had come to hold to the contrary.[33] Substitution of the courts' rule for that of the Tax Court led to such hardships and inequities that the Treasury appealed to Congress to extend relief.[34] It did so.[35] The

[31] *Commissioner* v. *United States & International Securities Corp.*, 130 F. 2d 894; *Helvering* v. *State-Planters Bank & Trust Co.*, 130 F. 2d 44.

[32] Lake View Trust & Savings Bank *v.* Commissioner, 27 B. T. A. 290.

[33] Central Loan & Investment Co. *v.* Commissioner, 39 B. T. A. 981; Citizens State Bank *v.* Commissioner, 46 B. T. A. 964.

[34] Mr. Randolph Paul, Tax Adviser to the Secretary of the Treasury, in a statement to the House Committee on Ways and Means said: "The Secretary has pointed out that wartime rates make it imperative to eliminate as far as possible existing inequities which distort the tax burden of certain taxpayers. I should like to discuss the inequities which the Secretary mentioned, as well as a few additional hardships. . . .

"(c) *Recoveries of bad debts and taxes.*—If a taxpayer who has taken a bad debt deduction later receives payment of such debt, such payment must be included in his income even though he obtained no tax benefit from the deduction in the prior year. While this result is theoretically proper under our annual system of taxation, it may produce severe hardships in certain cases through a distortion of the taxpayer's real income. At the same time, any departure from our annual system of taxation always produces administrative difficulties which serve to impede the collection of taxes.

"It is believed that the hardships can be removed and the administrative difficulties kept to a minimum by excluding from income amounts received in payment of the debt to the extent that the deduction on account of the debt in the prior year did not produce a tax benefit. The troublesome question whether a benefit resulted should

Government now argues that by extending legislative relief in bad debt cases Congress recognized that in the absence of specific exemption recoveries are taxable as income. We do not find that significance in the amendment. A specific statutory exception was necessary in bad debt cases only because the courts reversed the Tax Court and established as matter of law a "theoretically proper" rule which distorted the taxpayer's income. Congress would hardly expect the courts to repeat the same error in another class of cases, as we would do were we to affirm in this case.[36]

The Government also suggested that "If the tax benefit rule were judicially adopted the question would then arise of how it should be determined," and the difficulties of determining tax benefits, it says, create "an objection in itself to an attempt to adopt such a rule by judicial action." We are not adopting any rule of tax benefits. We only hold that no statute or regulation having the force of one and no principle of law compels the Tax Court to find taxable income in a transaction where as matter of fact it found no economic gain and no use of the transaction to gain tax benefit. The error of the court below consisted of

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be determined pursuant to regulations prescribed by the Commissioner with the approval of the Secretary. It is also suggested that this treatment be extended to refunds of taxes previously deducted." Hearings before Committee on Ways and Means on Revenue Revision of 1942, 77th Cong., 2d Sess., Vol. I, 80, 87–88.

[35] Revenue Act of 1942 § 116, 56 Stat. 798, 812.

[36] The question of whether a recovery is properly accounted for as income in the year received or should be related to a previous reported deduction without tax benefit is one with a long history and much conflict. It arises not only in case of recoveries of previously charged-off bad debts and recoveries of the type we have here. It is also present in case of refund of taxes or cancellation of expenses or interest previously reported as accrued, adjustments of depreciation and depletion or amortization, and other similar situations.

treating as a rule of law what we think is only a question of proper tax accounting.

There is some difference in the facts of these cases. In two of them the Tax Court sustained deficiencies because it found that the deductions in prior years had offset gross income for those years and therefore concluded that the recoveries must to that extent be treated as taxable gain.[37] The taxpayers object that this conclusion disregards certain exemptions and credits which would have been available to offset the increased gross income in the prior years, so that the deductions resulted in no tax savings. In determining whether the recoveries were taxable gain, however, the Tax Court was free to decide for itself what significance it would attach to the previous reduction of taxable income as contrasted with reduction of tax. The statute gives no inkling as to the correctness or incorrectness of the Tax Court's view, and we can find no compelling reason to substitute our judgment. In No. 47 the decision of the Tax Court was upheld by the court below, and in that case the judgment is affirmed. In Nos. 44, 45, and 46, the Court of Appeals reversed the Tax Court, and for the reasons stated its judgments in those cases are reversed.

No. 47 affirmed.
Nos. 44, 45, 46 reversed.

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[37] Dobson *v.* Commissioner, 46 B. T. A. 770.

ILLINOIS STEEL CO. *v.* BALTIMORE & OHIO RAILROAD CO.

CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

No. 99. Argued December 16, 1943.—Decided January 3, 1944.

1. A state court decision interpreting clauses of a uniform bill of lading prescribed by the Interstate Commerce Commission under authority of the Interstate Commerce Act, in a suit by a carrier to recover charges for an interstate shipment, is reviewable here by certiorari under Jud. Code § 237 (b). P. 511.
2. The consignor of an interstate shipment upon a uniform bill of lading stipulated that charges were "to be prepaid" and also signed the "non-recourse" clause. Because of the manner in which the shipment was handled by the consignee upon delivery, a higher rate than that specified in the bill of lading became applicable. *Held* that the carrier was not entitled to recover the additional charges from the consignor. P. 515.

   With respect to the charges here, the prepayment clause did not, either by its design or by the intention of the parties, curtail the operation of the "non-recourse" clause. P. 515.
3. A carrier may insure collection of unanticipated freight charges by demanding, pursuant to § 7 of the conditions of the uniform bill of lading, the consignor's guarantee of all charges. P. 515.

316 Ill. App. 516, 46 N. E. 2d 144, reversed.

CERTIORARI, *post*, p. 721, to review a judgment which reversed a judgment for the defendant in a suit to recover freight charges. Leave to appeal to the highest court of the State was denied by that court.

Mr. Paul R. Conaghan for petitioner.

Mr. Francis R. Cross, with whom *Mr. George E. Hamilton* was on the brief, for respondent.

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

Decision in this case turns on the proper interpretation to be given to several clauses of the uniform bill of lading

approved by the Interstate Commerce Commission as authorized by §§ 1 (6), 12 and 15 (1) of the Interstate Commerce Act, as amended, 49 U. S. C. §§ 1 (6), 12, 15 (1), which make it the duty of interstate rail carriers to adopt and observe the form and substance of bills of lading approved by the Commission. Matter of Bills of Lading, 52 I. C. C. 671, 685, 686; 64 I. C. C. 347, 351–352; 64 I. C. C. 357; 66 I. C. C. 63; 167 I. C. C. 214; 172 I. C. C. 362; 245 I. C. C. 527.

Petitioner was the consignor upon through bills of lading of a number of rail shipments of sulphate of ammonia for export. The shipments were from Gary, Indiana to Baltimore, Maryland over the lines of connecting railroads, of which respondent was the terminal carrier. Each bill of lading [1] contained a clause, inserted by petitioner, the consignor, in conformity to instructions appearing on the bill, and providing that freight was "to be prepaid"; and also the so-called non-recourse clause which petitioner signed and which read: "If this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement: The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges. (See Section 7 of conditions.)" [2] Petitioner at shipment paid the freight charges specified in the bills of lading, which were computed at the export freight rate. The bills of lading included a receipt for specified sums paid

[1] Specimen forms of the uniform bills of lading, prescribed for interstate rail shipments during the period when the shipments concerned in this action were made, may be found in Consolidated Freight Classification No. 7 (1932) pp. 52–56.

[2] § 7 of the conditions of the bill of lading, so far as relevant, is set out at page 512, *infra*. The parties have stipulated that the non-recourse clause contained in the bills of lading in this case were in the form quoted in the text. The form approved by the Commission varies slightly in details immaterial here. See Consolidated Freight Classification No. 7, *supra*, p. 52.

to the carrier "to apply in prepayment of the charges." The record does not disclose who was the owner of the sulphate, or what further relations existed between consignor and consignee.

The parties concede that upon delivery of the shipments at Baltimore, the consignee did not handle the sulphate as required by the provisions of the export tariff, and that the delivery or the method of handling subjected the shipments to the higher domestic freight rate. The parties have also stipulated that respondent is entitled to recover from petitioner, additional freight charges to the extent of the difference between the export rate and the higher domestic rate, unless recovery is barred by the clauses of the bills of lading to which we have referred.

Respondent brought the present suit in the Illinois Superior Court to recover the additional freight due upon the shipments. The Superior Court gave judgment for petitioner, which the Illinois Appellate Court reversed, 316 Ill. App. 516, 46 N. E. 2d 144, and the Illinois Supreme Court denied leave to appeal. We granted certiorari, *post*, p. 721, the interpretation of the uniform bill of lading in the circumstances of this case being a question of public importance.

Pursuant to Congressional authority, the Interstate Commerce Commission has prescribed uniform forms of bills of lading, including that involved in this case. Matter of Bills of Lading, *supra*. In promulgating them, the Commission has stated that it was doing so in the interest of uniformity and to prevent discriminations. 52 I. C. C. 671, 676–677, 678; 64 I. C. C. 357, 363, 364. It has found that the prescribed forms are just and reasonable, 52 I. C. C. 671, 740, and that any other would be unreasonable, 64 I. C. C. 357, 360–361, 364.

The construction of the clauses of a bill of lading, adopted by the Commission and prescribed by Congress for interstate rail shipments, presents a federal question.

Georgia, F. & A. Ry. Co. v. *Blish Milling Co.*, 241 U. S. 190, 194–195; *Chesapeake & Ohio Ry. Co.* v. *Martin*, 283 U. S. 209, 212–213. Such has been the consistent ruling of this Court where the question presented concerned the conditions in bills of lading affecting the liability of the carrier such as are required by the Carmack Amendment, as amended, 49 U. S. C. § 20 (11). *Georgia, F. & A. Ry. Co.* v. *Blish Milling Co., supra; Atchison, T. & S. F. Ry. Co.* v. *Harold*, 241 U. S. 371; *St. Louis, I. M. & S. Ry. Co.* v. *Starbird*, 243 U. S. 592; *Gulf, C. & S. F. Ry. Co.* v. *Texas Packing Co.*, 244 U. S. 31, 34; *American Railway Express Co.* v. *Lindenburg*, 260 U. S. 584; *Chesapeake & Ohio Ry. Co.* v. *Martin, supra;* cf. *Peyton* v. *Railway Express Agency*, 316 U. S. 350.

Since the clauses of the uniform bill of lading govern the rights of the parties to an interstate shipment and are prescribed by Congress and the Commission in the exercise of the commerce power, they have the force of federal law and questions as to their meaning arise under the laws and Constitution of the United States. Hence we have jurisdiction to review their determination by the state courts, in a suit by the carrier to recover freight charges. Judicial Code § 237 (b), 28 U. S. C. § 344 (b); *Pittsburgh, C., C. & St. L. Ry. Co.* v. *Fink*, 250 U. S. 577, 581–583; *New York Central & H. R. R. Co.* v. *York & Whitney Co.*, 256 U. S. 406, 408; cf. *Sola Electric Co.* v. *Jefferson Co.*, 317 U. S. 173, 176–177; *Peyton* v. *Railway Express Agency, supra; Southern Railway Co.* v. *Prescott*, 240 U. S. 632, 639–640.

The shipments by petitioner being in interstate commerce, the rail freight rates are those stated in the tariffs filed with the Interstate Commerce Commission. They cannot be lawfully released by the carrier or altered by others who have assumed the duty to pay them. See *Midstate Horticultural Co.* v. *Pennsylvania R. Co., ante*, p. 356; *Pittsburgh, C., C. & St. L. Ry. Co.* v. *Fink, supra,*

581–583. The tariffs do not prescribe who is to pay the freight charges, but subject to the prohibition against unlawful discrimination and the limitations imposed by the uniform bill of lading, the parties to the shipment, as between themselves, are free to stipulate who shall pay them. See *Louisville & Nashville R. Co.* v. *Central Iron Co.*, 265 U. S. 59, 65–67.

Section 7 of the conditions of the uniform bill of lading provides that the owner or consignee shall pay the freight and all other lawful charges upon the transported property, and except in those instances where it may be lawfully authorized to do so, that no railroad carrier shall deliver or relinquish, at destination, possession of the property covered by the bill of lading until all tariff rates and charges have been paid. Cf. § 3 (2) of the Interstate Commerce Act, as amended, 49 U. S. C. § 3 (2). But it further provides that "The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided [3]) shall not be liable for such charges. . . . Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. . . ."

[3] The exception, inapplicable here, is in the case where a consignee, other than the consignor, is an agent with no beneficial title in the goods, and has notified the carrier of these facts. In such a case the consignee is not "liable for transportation charges . . . (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him," but the consignor is liable for such charges. Cf. § 3 (2) of the Interstate Commerce Act, as amended, 49 U. S. C. § 3 (2).

Under these provisions, if the non-recourse clause is not signed by the consignor, he remains liable to the carrier for all lawful charges. The carrier is free to demand payment in advance by the consignor, or it may decline to make delivery to the consignee until the freight charges are paid or guaranteed, or if delivery is made to the consignee without payment, the consignee is also liable for all freight charges. But if the non-recourse clause is signed by the consignor and no provision is made for prepayment of freight, delivery of the shipment to the consignee relieves the consignor of liability, see *Louisville & Nashville R. Co.* v. *Central Iron Co., supra,* 66, n. 3, and acceptance of the delivery establishes the liability of the consignee to pay all freight charges. *Pittsburgh, C., C. & St. L. Ry. Co.* v. *Fink, supra; New York Central & H. R. R. Co.* v. *York & Whitney Co., supra.*

In the light of these long-established rules of liability the facts of the present case raise only a single question, whether the stipulation in the bills of lading for the prepayment of freight restricts the operation of the non-recourse clause so that, despite its presence in the bills of lading, recourse may be had to petitioner for charges in addition to those which it prepaid at shipment, the additional charges arising only by reason of events which occurred on or after the delivery of the shipments to the consignee.

The Illinois Appellate Court thought, and respondent argues here, that this liability was imposed on the consignor only because the prepayment clause was so in conflict with the non-recourse clause as to nullify the latter and thus revive the obligation which, in the absence of that clause, rests on the consignor to pay all lawful charges on his shipments. The question is whether there is such a conflict as to require this result. For we must assume that both clauses were intended by the parties to have some effect, and hence, unless unavoidably in conflict, they

must, so far as they reasonably may, be reconciled so that each will have some scope for operation.

The obvious purpose and effect of the non-recourse clause is to relieve the shipper from liability for freight charges, upon delivery to the consignee. Such a purpose is consistent with an intention that in case of prepayment of a portion of the freight charge, the carrier should, after delivery, look solely to the consignee for the remainder of the charge. Since, by the uniform bill of lading, the parties to a rail shipment are left free to relieve the consignor from liability by their contract, such an arrangement would be within their competence and would release the consignor from liability to the extent of the unpaid freight charges.

It could not be said that by agreeing to pay a part of the charges in advance, the consignor has agreed to pay more, or that the non-recourse clause would cease to be effective as to the unpaid charges because the consignor had paid or undertaken to pay some of them. The words of § 7 of the conditions of the bill of lading are to the effect that if the consignor stipulates that the carrier shall not deliver "without requiring payment of such charges" and the carrier makes delivery, the consignor "shall not be liable for such charges." In this context, "such charges" are the lawful charges which the consignor has not paid or stipulated to pay in advance.

We discern no policy underlying the uniform bill of lading or in the provisions of § 7 which would deny the application of the non-recourse clause where the consignor has stipulated for advance payment of some but less than all of the lawful charges. And no plausible reason is advanced why an agreement by the consignor to pay a part of the lawful charges should be deemed to deprive him of the benefit of the non-recourse clause beyond the amount he has undertaken to pay.

We think that the same considerations point here to the reconciliation of the conflict which the Illinois court thought to exist in this case. For in the present circumstances we cannot say that the prepayment clause contemplated payment by the consignor of the additional charges demanded at the domestic tariff rate and hence we find no irreconcilable conflict between the prepayment and non-recourse clauses.

Petitioner's stipulation was that the freight charges were "to be prepaid" and the bill of lading acknowledged receipt of specified sums "to apply in prepayment of the charges." Hence the stipulation was for an obligation to be performed in advance of the transportation or at the most in advance of delivery to the consignee. This obligation could not have contemplated payment of more than all the lawful charges upon the consignor's shipment as tendered and transported in conformity to the billing. No more could prepayment be made, before either shipment or delivery, of a charge which might never be incurred, and which could be, only after the transportation was completed and delivery made to the consignee.

It is familiar experience, as in this case, that undercharges may occur which could not be subject to prepayment either because they are not lawful charges on the shipment as tendered and billed, or because they depend upon events occurring after the transportation has been completed. In either case we conclude that the reasonable construction of the prepayment clause is that, with respect to these charges, it did not, either by its design or by the intention of the parties, curtail the operation of the non-recourse clause, so as to deprive petitioner, the consignor, of the immunity from liability for which it was entitled to stipulate by the non-recourse clause. See *Chicago Great Western Ry. Co.* v. *Hopkins,* 48 F. Supp. 60. This construction does not leave the carrier unprotected with respect to the collection of unanticipated

freight charges, for it may always insure their collection by demanding the consignor's guarantee of all charges, pursuant to § 7 of the conditions of the uniform bill of lading, a provision which presupposes that the prepayment of freight clause is not as broad as the authorized guarantee.

In the special circumstances of this case we have no occasion to consider the broader contention of petitioner that the prepayment clause contemplated an undertaking upon its part to pay only the amount of freight charges specified on the face of the bill of lading, whether or not they were computed at the lawful rate on the shipments as tendered and billed.

Reversed.

MR. JUSTICE ROBERTS concurs in the result.

DIXIE PINE PRODUCTS CO. *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 84. Argued December 14, 15, 1943.—Decided January 3, 1944.

1. A taxpayer who kept his books on the accrual basis deducted on his income tax returns for 1937 state taxes assessed against him during the taxable year. He was contesting in the state courts his liability for the taxes, was later adjudged exempt therefrom, and never actually paid them. *Held* that, under the Revenue Act of 1936, the deduction was properly disallowed. P. 519.
2. The Board of Tax Appeals applied the correct rule of law in this case, and the court below properly refused to disturb its determination. *Dobson* v. *Commissioner, ante,* p. 489. P. 519.

134 F. 2d 273, affirmed.

CERTIORARI, *post,* p. 720, to review the affirmance of a decision of the Board of Tax Appeals, 45 B. T. A. 286, which sustained the Commissioner's determination of a tax deficiency.

Mr. T. J. Wills for petitioner.

Mr. Arnold Raum, with whom *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Mr. Sewall Key,* and *Mrs. Maryhelen Wigle* were on the brief, for respondent.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The question presented concerns the propriety of the respondent's disallowance of a deduction from income which petitioner took in its federal income tax return for 1937.

In 1936 the Mississippi taxing authorities declared that a solvent used by petitioner in its business was gasoline within the meaning of a state law defining gasoline and laying a tax upon its receipt and use. Accordingly a tax was assessed against the petitioner with respect to the receipt and use of the solvent in 1936. Petitioner paid the tax, and, in the same year, brought suit against the Motor Vehicle Commissioner of Mississippi alleging that the solvent was not within the comprehension of the state law and that the Commissioner should be temporarily and permanently enjoined from future collections of tax in respect of it. The Commissioner's demurrer to the complaint was sustained but, on appeal, the Supreme Court of Mississippi decided that, on the pleadings, the solvent was not within the definition of gasoline contained in the state statute. After this decision petitioner denied that it owed, and ceased and refused to pay, any gasoline tax on solvent used by it.

In December 1937, on advice of counsel, petitioner (which kept its books and filed its federal income tax returns on the accrual basis) made book entries accruing gasoline tax assessed by the Motor Vehicle Commissioner in 1937. The actual accrual entries were made sometime between January 1 and March 15, 1938, as of December 31,

1937, in the amount of approximately $21,000, and petitioner deducted this amount from income in making its 1937 federal income tax return, although the sum had not been, and never was, paid.

In December 1938 petitioner and the Attorney General of Mississippi filed an agreed statement of facts in the state court suit, and, in the same month, the trial judge entered a final decree perpetually enjoining the Motor Vehicle Commissioner from assessing gasoline tax on the solvent used by petitioner. This decree was subsequently affirmed by the Supreme Court of Mississippi. In its 1938 federal income tax return petitioner, by way of compensating entry, included the sum of $21,000 as income and as a recovery, in view of the Mississippi trial court's decree of December 1938.

The sole question is whether the Commissioner was right in disallowing the deduction for the tax year 1937. The Board of Tax Appeals held that he was,[1] and the court below affirmed its decision.[2] We took the case because of a conceded conflict in principle with decisions in other circuits.[3]

Section 23 (c) of the Revenue Act of 1936[4] permits the deduction from gross income of taxes "paid or accrued within the taxable year." Sections 41, 42, and 43 make provision for tax accounting on the accrual basis, where the taxpayer keeps his books on that principle, provided his method clearly reflects his income in any taxable year.

The provisions of the Revenue Act of 1936 worked no significant change over earlier Acts respecting the permissible basis of calculating annual taxable income. The applicable principles of accounting on the accrual basis had

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[1] 45 B. T. A. 286.

[2] 134 F. 2d 273.

[3] *Commissioner* v. *Central United National Bank*, 99 F. 2d 568; *J. A. Dougherty's Sons* v. *Commissioner*, 121 F. 2d 700; *Davies' Estate* v. *Commissioner*, 126 F. 2d 294.

[4] 49 Stat. 1648, 1659.

been adduced and applied by the Board of Tax Appeals in numerous decisions.[5] It has never been questioned that a taxpayer who accounts on the accrual basis may, and should, deduct from gross income a liability which really accrues in the taxable year.[6] It has long been held that in order truly to reflect the income of a given year, all the events must occur in that year which fix the amount and the fact of the taxpayer's liability for items of indebtedness deducted though not paid;[7] and this cannot be the case where the liability is contingent and is contested by the taxpayer.[8] Here the taxpayer was strenuously contesting liability in the courts and, at the same time, deducting the amount of the tax, on the theory that the state's exaction constituted a fixed and certain liability. This it could not do. It must, in the circumstances, await the event of the state court litigation and might claim a deduction only for the taxable year in which its liability for the tax was finally adjudicated.[9]

To this effect are the decisions of the Board of Tax Appeals in numerous cases, and the instant decision was in line with earlier rulings as to proper tax accounting practice. Since the Board applied the correct rule of law, its determination that the item in question was not properly deducted on the accrual basis is entitled to the finality indicated by *Dobson* v. *Helvering, ante,* p. 489. The court below properly refused to disturb the Board's determination.

Affirmed.

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[5] See *Lucas* v. *American Code Co.,* 280 U. S. 445, notes 1 and 3, pp. 450, 452.

[6] *United States* v. *Anderson,* 269 U. S. 422; *American National Co.* v. *United States,* 274 U. S. 99; *Niles Bement Pond Co.* v. *United States,* 281 U. S. 357; *Aluminum Castings Co.* v. *Routzahn,* 282 U. S. 92; cf. *Continental Tie & Lumber Co.* v. *United States,* 286 U. S. 290.

[7] *United States* v. *Anderson, supra,* 441.

[8] *Lucas* v. *American Code Co., supra,* 450, 451.

[9] Cf. *Brown* v. *Helvering,* 291 U. S. 193.

HILL, ADMINISTRATOR, *v.* HAWES ET AL., TRUSTEES.

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

No. 4. Argued December 6, 1943.—Decided January 3, 1944.

1. Rule 10 of the Rules of the United States Court of Appeals for the District of Columbia, limiting to 20 days the time within which an appeal may be taken to that court from a judgment of the District Court of the United States for the District of Columbia, sustained. P. 522.

   The statutory power of the court to adopt the rule (Act of July 30, 1894, amending Act of Feb. 9, 1893) was not altered by the Judicial Code (1911), or the Act of Feb. 13, 1925, or the Rules of Civil Procedure.

2. The clerk of the District Court of the United States for the District of Columbia having failed upon entry of judgment to notify the parties as required by Rule 77 (d) of the Rules of Civil Procedure, the judge at the same term ordered the judgment vacated and entry of a new judgment, of which notice was sent in compliance with the rules. *Held* that the time for appeal began to run from the date of the entry of the second judgment. P. 523.

76 U. S. App. D. C. 308, 132 F. 2d 569, reversed.

CERTIORARI, 318 U. S. 753, to review a judgment dismissing an appeal as out of time.

Mr. Henry Lincoln Johnson, Jr., with whom *Mr. Thurman L. Dodson* was on the brief, for petitioner.

Mr. John B. Gunion for Francis L. Hawes, Trustee, respondent.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

This case presents important questions respecting the rule-making power of the United States Court of Appeals for the District of Columbia touching appeals to that court and the powers of the District Court of the United

States for the District of Columbia to vacate its judgments.

Rule 10 of the Rules of the Court of Appeals, as it stood when applied in this case, was:

"No . . . judgment . . . of the District Court of the United States for the District of Columbia, or of any justice thereof, shall be reviewed by the Court of Appeals, unless the appeal shall be taken within 20 days after the . . . judgment . . . complained of shall have been made or pronounced. . . ." [1]

In the instant case a judge of the District Court, after a hearing on a complaint and answer, on May 7, 1940, signed a judgment dismissing the complaint. The clerk noted the judgment in the docket. This entry, pursuant to Rule 79 (a) of the Rules of Civil Procedure, made the judgment effective at the date of entry. (See Rule 58.)

The twenty-day period for appeal expired May 27 but no notice of appeal was filed until June 3. Rule 77 (d) of the Rules of Civil Procedure imposed on the clerk the duty, immediately upon the entry of the judgment, to send notice of such entry, in the way specified by Rule 5, but it is agreed that no such notice was sent.

June 6 the petitioner filed a motion to enter judgment and to direct the clerk to notify the parties. The reasons stated in support of the motion were that the clerk had failed to enter the day or the month of the judgment as required by the rules of court and had failed to notify the parties. The motion was not acted on until June 24, when the court denied it.

In the meantime, on June 13, the trial judge ordered the judgment of May 7 vacated "for the reason that the clerk failed under Rule 77 (d) of the Rules of Civil Procedure to serve a notice of the entry of judgment by mail on the plaintiff . . . and to make a note in the docket of the

[1] February 1, 1941, the rule was amended to substitute a period of 30 days for the 20 days theretofore provided.

mailing." The same day the judge signed and filed a second judgment in the same terms as that of May 7, which was duly noted in the docket. The petitioner filed a notice of appeal from this judgment on June 14. The respondent moved to dismiss the appeal as taken out of time. The court below granted the motion and dismissed the appeal.[2]

The petitioner urges that the rule of the court below fixing 20 days as the period within which appeal may be taken is contrary to law and that, even though the rule is valid, the appeal was timely because taken within 20 days of the judgment finally entered.

First. We hold that Rule 10 of the Court of Appeals is within the competence of that court. The court was established by the Act of February 9, 1893,[3] which, in § 6, empowered it to "make such rules and regulations as may be necessary and proper for the transaction of the business to be brought before it, and for the time and method of the entry of appeals." The Act of July 30, 1894,[4] amended § 6 to read that the court might make "such rules and regulations as may be necessary and proper for the transaction of its business and the taking of appeals to said court." Both of these statutes were later than the Act of March 3, 1891,[5] which created circuit courts of appeals and provided for appeals to such courts within six months after the entry of judgment. The Judicial Code adopted March 3, 1911,[6] did not alter or enlarge the provisions of the Act of March 3, 1891, *supra.*

In *Ex parte Dante,* 228 U. S. 429, decided April 28, 1913, this court affirmed the validity of Rule 10. This decision necessarily imports that the statute conferring power on

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[2] 132 F. 2d 569; 76 U. S. App. D. C. 308.

[3] c. 74, 27 Stat. 434.

[4] c. 172, 28 Stat. 160.

[5] c. 517, § 11, 26 Stat. 826, 829.

[6] 36 Stat. 1087.

the Court of Appeals to set the time for appeal was not superseded by the legislation creating and defining the jurisdiction of circuit courts of appeals. No reference is made to the United States Court of Appeals for the District of Columbia in § 8 (c) of the Act of February 13, 1925, which reduced to three months the time within which to take appeals to the circuit courts of appeals.[7] The Federal Rules of Civil Procedure have not altered statutory provisions respecting the time for taking appeals from district courts. It follows that the court below possesses the statutory power to set the time within which an appeal from the District Court must be taken.

Second. It goes without saying that the District Court could not extend the period fixed by Rule 10. The respondent urges that the vacation of the judgment of May 7, and the entry of a new judgment on June 13, amounted merely to an attempted extension of the time for appeal; that judgment was duly entered and became final on May 7; that the clerk's neglect to comply with Rule 77 (d) in the matter of notice does not affect its validity or its finality, and that the notice of appeal of June 14 was consequently out of time and the court below properly dismissed the appeal on that ground. We cannot agree.

It is true that Rule 77 (d) does not purport to attach any consequence to the failure of the clerk to give the prescribed notice; but we can think of no reason for requiring the notice if counsel in the cause are not entitled to rely upon the requirement that it be given. It may well be that the effect to be given to the rule is that, although the judgment is final for other purposes, it does not become final for the purpose of starting the running of the period for appeal until notice is sent in accordance with the rule. The Federal Rules of Civil Procedure permit the amendment or vacation of a judgment for clerical mistakes or

[7] c. 229, 43 Stat. 936, 940.

errors arising from oversight or omission and authorize the court to relieve a party from a judgment or order taken against him through his mistake, inadvertence, surprise or excusable neglect. (See Rule 60 (a) (b).) These rules do not in terms apply to the situation here present, as the court below held. But we think it was competent for the trial judge, in the view that the petitioner relied upon the provisions of Rule 77 (d) with respect to notice, and in the exercise of a sound discretion, to vacate the former judgment and to enter a new judgment of which notice was sent in compliance with the rules. The term had not expired and the judgment was still within control of the trial judge for such action as was in the interest of justice to a party to the cause.

The judgment is reversed and the cause is remanded to the court below for further proceedings in conformity with this opinion.

Reversed.

MR. CHIEF JUSTICE STONE, dissenting:

I do not understand that the Court rests its decision on the ground that Rule 77 (d) of the Rules of Civil Procedure makes notice of entry prerequisite to the finality of the judgment for purposes of appeal. If it does, most else that is said is unnecessary to the decision. In any case what is said seems to me to be untenable in principle and without support in authority.

To say that a district court can rightly extend the prescribed time for taking an appeal by the reëntry, pro forma, of a final judgment after the time to appeal from it has expired, is to disregard considerations of certainty and stability which have hitherto been considered of first importance in the appellate practice of the federal courts. It is to sanction the regulation of the time for appeal by courts, contrary to the appeal statute, and without support in law or any rule of court. Rule 60, which permits

amendment of the judgment or relief of a party from it, in circumstances not here present, gives no warrant for enlarging the time for appeal by reëntry of a judgment which is not amended and from no part of which any party has been relieved.

In the federal courts there is no right to appeal save as it is granted by Congress or a rule of court which is authorized by Congress and has the force of law. See *Heike* v. *United States,* 217 U. S. 423, 428; *Ex parte Dante,* 228 U. S. 429, 432. It is in the public interest, and it is the very purpose of limiting the period for appeal, to set a definite and ascertainable point of time when litigation shall be at an end unless within that time application for appeal has been made; and if it has not, to advise prospective appellees that they are freed of the appellant's demands. *Matton Steamboat Co.* v. *Murphy,* 319 U. S. 412, 415.

That purpose is defeated if judges may enlarge the time for appeal beyond the period prescribed by law, whether by an order purporting directly to extend it or by reëntry, without change, of a judgment which has already become final. It is for that reason that this Court has consistently ruled that no federal judge or court possesses the power to extend the time for appeal beyond the statutory period by any form of judicial action which falls short of a reconsideration of the provisions of the judgment in point of substance so as to postpone its finality.

The decisions are numerous and diligence of court and counsel has revealed no exceptions. *Credit Company* v. *Arkansas Central Ry. Co.,* 128 U. S. 258, is representative of the unbroken current of authority. There, in dismissing an appeal as untimely the Court, speaking by Mr. Justice Bradley, said at page 261: "The attempt made, in this case, to anticipate the actual time of presenting and filing the appeal, by entering an order *nunc pro tunc,* does not help the case. When the time for taking an

appeal has expired, it cannot be arrested or called back by a simple order of court. If it could be, the law which limits the time within which an appeal can be taken would be a dead letter."

At the last term of Court we held that the reëntry of its final judgment by a state appellate court, with only formal changes not affecting any matter adjudicated, did not enlarge the time to appeal to this Court. *Department of Banking* v. *Pink,* 317 U. S. 264. And at the same term we held that a motion to amend a final judgment would not toll the time for appeal unless the amendments proposed were of substance rather than form, *Leishman* v. *Associated Electric Co.,* 318 U. S. 203, 205–6—an inquiry which presupposed that reëntry of the judgment without formal change could not enlarge the time. To the same effect are *Pfister* v. *Northern Illinois Finance Corp.,* 317 U. S. 144, 149–51; *Zimmern* v. *United States,* 298 U. S. 167. And in *Wayne Gas Co.* v. *Owens-Illinois Glass Co.,* 300 U. S. 131, 137, this Court, citing *In re Stearns & White Co.,* 295 F. 833; *Bonner* v. *Potterf,* 47 F. 2d 852, 855; *United States* v. *East,* 80 F. 2d 134, 135, declared that where it appears that a rehearing has been granted only for the purpose of extending the time of appeal the appeal must be dismissed—a statement equally applicable to the reëntry of the judgment solely for that purpose.

Petitioner, by the exercise of the diligence required by the Federal Rules of Civil Procedure could have learned of the entry of the judgment against him and have taken a timely appeal. His case is not hard enough to afford even the proverbial apology for our saying that federal judges, by the reëntry of a judgment for no other purpose, are free to make a dead letter of the statutory limit of the period for appeal.

MR. JUSTICE MURPHY concurs.

UNITED STATES *v.* GASKIN.

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

No. 68. Argued December 7, 8, 1943.—Decided January 3, 1944.

1. It is an offense under § 269 of the Criminal Code to arrest a person with intent to hold him in peonage. P. 528.
   That the person shall have rendered service in consequence of the arrest is not an element of the offense.
2. The rules requiring definiteness and strict construction of a criminal statute do not require distortion or nullification of its evident meaning and purpose. P. 529.

50 F. Supp. 607, reversed.

APPEAL under the Criminal Appeals Act from a judgment of the District Court sustaining a demurrer to an indictment.

Mr. W. Marvin Smith, with whom *Solicitor General Fahy, Assistant Attorney General Berge, Messrs. Oscar A. Provost* and *George Earl Hoffman,* and *Miss Beatrice Rosenberg* were on the brief, for the United States.

Mr. Marion B. Knight, with whom *Messrs. A. L. Brogden* and *Harley Langdale* were on the brief, for appellee.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

An indictment was returned against the appellee in the District Court for Northern Florida which charged that he arrested one Johnson "to a condition of peonage," upon a claim that Johnson was indebted to him, and with intent to cause Johnson to perform labor in satisfaction of the debt, and that he forcibly arrested and detained Johnson against his will and transported him from one place to another within Florida. There was no allegation

that Johnson rendered any labor or service in consequence of the arrest. From a judgment sustaining a demurrer,[1] the United States appealed.[2]

The charge is laid under § 269 of the Criminal Code,[3] which is: "Whoever holds, arrests, returns, or causes to be held, arrested, or returned, or in any manner aids in the arrest or return of any person to a condition of peonage, shall be fined . . . or imprisoned . . ."

The District Court held that the statute imposes no penalty for an arrest with intent to compel the performance of labor or service unless the person arrested renders labor or service for a master following the arrest.

We think this was error. Section 269 derives from § 1 of the Act of March 2, 1867,[4] which abolished and prohibited the system known as peonage in any territory or state, nullified any law, ordinance, regulation, or usage inconsistent with the prohibition, and added criminal sanctions in the language now constituting § 269. The Act was passed further to implement the Thirteenth Amendment and is directed at individuals whether or not acting under color of law or ordinance.[5]

The section makes arrest of a person with intent to place him in a state of peonage a separate and independent offense. It penalizes "whoever holds, arrests, returns, or causes to be held, arrested, or returned . . . any person to a condition of peonage." The language is inartistic. The appropriate qualifying preposition for the word "holds" is "in." An accurate qualifying phrase for the

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[1] 50 F. Supp. 607.

[2] Pursuant to the Criminal Appeals Act, 18 U. S. C. § 682.

[3] 18 U. S. C. § 444.

[4] 14 Stat. 546.

[5] *Clyatt* v. *United States*, 197 U. S. 207, 218; *Bailey* v. *Alabama*, 219 U. S. 219, 241; *United States* v. *Reynolds*, 235 U. S. 133; *Taylor* v. *Georgia*, 315 U. S. 25.

verb "arrests" would be "to place in or return to" peonage. But the compactness of phrasing and the lack of strict grammatical construction does not obscure the intent of the Act. Years ago this Court indicated that the disjunctive phrasing imports that each of the acts,—holding, arresting, or returning,—may be the subject of indictment and punishment.[6] We think that view is sound apart from any consideration of the legislative history of the enactment. But when viewed in its setting no doubt of the purpose of the statute remains.

The Act of 1867 was passed as the result of agitation in Congress for further legislation because of the use of federal troops to arrest persons who had escaped from a condition of peonage.[7] The first section abolished and prohibited peonage and made certain practices in connection therewith criminal. The second section imposed a duty on all in the military and civil service to aid in the enforcement of the first, and provided that if any officer or other person in the military service should offend against the Act's provisions he should, upon conviction by a court martial, be dishonorably dismissed from the service.[8] It is plain that arrest for the purpose of placing a person in or returning him to a condition of peonage was one of the evils to be suppressed.

The appellee invokes the rule that criminal laws are to be strictly construed and defendants are not to be convicted under statutes too vague to apprise the citizen of the nature of the offense. That principle, however,

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[6] *Clyatt* v. *United States, supra,* 218, 219.

[7] Cong. Globe, 39th Cong., 2d Sess., Vol. 74, Pt. 1, pp. 239–241. *Ibid.* Vol. 76, Pt. 3, p. 1571. Senate Report No. 156, 39th Cong., 2d Sess., pp. 325, 326.

[8] This section became § 5527 of the Revised Statutes and was repealed and reënacted in part by § 270 of the Criminal Code. See 18 U. S. C. § 445.

does not require distortion or nullification of the evident meaning and purpose of the legislation.[9]

The judgment is

Reversed.

MR. JUSTICE MURPHY, dissenting:

We are dealing here with a criminal statute, the penalties of which circumscribe personal freedom. Before we sanction the imposition of such penalties no doubts should exist as to the statutory proscription of the acts in question. Otherwise individuals are punished without having been adequately warned as to those actions which subjected them to liability.

It is doubtful whether an arrest not followed by actual peonage clearly and unmistakably falls within the prohibition of § 269 of the Criminal Code. The court below, at least, felt that the statute did not cover such a situation. Other judges have expressed similar doubts. *United States* v. *Eberhart*, 127 F. 252; dissenting opinion in *Taylor* v. *United States*, 244 F. 321, 332, 333. And in order to reach the opposite conclusion, this Court labels the statutory language as "inartistic" and as lacking in "strict grammatical construction." It then proceeds to rewrite the statute, in conformity with what it conceives to have been the original intention of Congress, so as to penalize "whoever . . . arrests . . . any person for the purpose of placing him in a condition of peonage." I cannot assent to this judicial revision of a criminal law. Congress alone has power to amend or clarify the criminal sanctions of a statute.

Apologia for inadequate legislative draftsmanship and reliance on the admitted evils of peonage cannot replace the right of each individual to a fair warning from Congress as to those actions for which penalties are inflicted.

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[9] *Gooch* v. *United States*, 297 U. S. 124, 128; *United States* v. *Giles*, 300 U. S. 41, 48; *United States* v. *Raynor*, 302 U. S. 540, 552.

Punishment without clear legislative authority might conceivably contain more potential seeds of oppression than the arrest of a person "to a condition of peonage."

UNITED STATES *v.* HARK ET AL., CO-PARTNERS, DOING BUSINESS AS LIBERTY BEEF CO.

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

No. 83. Argued December 8, 9, 1943.—Decided January 3, 1944.

1. Neither the District Court nor this Court has power to extend the time within which appeals may be taken under the Criminal Appeals Act. P. 533.
2. A formal judgment signed by the judge—rather than a statement in an opinion or a docket entry—is *prima facie* the decision or judgment in respect of which the time for appeal under the Criminal Appeals Act begins to run. P. 534.
3. In the circumstances of this case, *held* that the formal order signed by the judge and entered of record—rather than an earlier opinion or docket entry—was the judgment fixing the date from which the time for appeal under the Criminal Appeals Act ran, and the appeal here was timely. P. 535.
4. An order granting a defendant's motion to quash, the effect of which is to bar prosecution for the offense charged, is appealable under the Criminal Appeals Act as a judgment "sustaining a special plea in bar." P. 535.
5. Revocation of a price regulation issued pursuant to the Emergency Price Control Act of 1942, *held* not a bar to an indictment and prosecution for a violation committed when the regulation was in force. P. 536.

49 F. Supp. 95, reversed.

APPEAL under the Criminal Appeals Act from an order granting the defendants' motion to quash the indictment.

Mr. Paul A. Freund, with whom *Solicitor General Fahy, Assistant Attorney General Berge,* and *Messrs. Charles H.*

Weston and *David London* were on the brief, for the United States.

Mr. William H. Lewis, with whom *Messrs. Leonard Poretsky* and *John H. Backus* were on the brief, for appellees.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

This appeal, prosecuted under the Criminal Appeals Act,[1] presents questions touching the jurisdiction of this court and the merits of the controversy.

Appellees were indicted December 21, 1942, for sales of beef in violation of Maximum Price Regulation No. 169, as amended, issued pursuant to the Emergency Price Control Act of 1942.[2] They moved to quash. The District Court rendered an opinion March 5, 1943, holding that, since the pertinent provisions of the regulation which the appellees were charged to have violated had been revoked prior to the return of the indictment, they could not be held to answer the charge.[3] The last sentence of the opinion was: "The motion to quash is granted."

Under date of March 5 the clerk made an entry in the docket as follows: "Sweeney, J. Opinion—Motion to quash is granted." There seems to be no dispute that some days later an additional entry was placed upon the docket bearing the date March 5 and reading: "Sweeney, J. Indictment quashed." It further appears that, upon application of the United States Attorney, Judge Sweeney, on March 31, signed a formal order quashing the indictment.[4] On the same day the clerk struck from the

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[1] 18 U. S. C. § 682.

[2] 56 Stat. 23, 50 U. S. C. § 901, etc.

[3] 49 F. Supp. 95.

[4] "Sweeney, J.: This cause came on to be heard upon the defendant's motion to quash the indictment alleging that Maximum Price Regu-

docket the last mentioned entry dated March 5 and entered, under the date March 31, the following: "Sweeney, J. Order quashing indictment." On April 30 Judge Sweeney allowed a petition for appeal to this court.

The appellees moved to dismiss the appeal on the grounds that it was not seasonably taken for the reason that the decision upon the motion to quash made by Judge Sweeney in his opinion of March 5 constituted the judgment of the court; and that, as the appeal is not based upon the invalidity or construction of the statute upon which the indictment was founded, it was improperly taken to this court under the Criminal Appeals Act. We postponed consideration of the motion to the hearing on the merits.

First. The Criminal Appeals Act requires that any appeal to this court which it authorizes be taken "within thirty days after the decision or judgment[5] has been rendered." Neither the District Court nor this court has power to extend the period. If the opinion filed on March 5 constituted, within the meaning of the Act, the decision or judgment of the District Court, or if either of the docket entries bearing date March 5 constituted the final decision

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lation No. 169 has been revoked by the Price Administrator, effective December 16, 1942, before the indictment was returned. This allegation was not denied by the Government. After hearing arguments of counsel for the defendant and of the United States Attorney, it is

Ordered that the indictment be and it hereby is quashed on the ground that the Regulation alleged to have been violated was revoked prior to the return of the indictment.

By the Court:

ARTHUR M. BROWN,
Deputy Clerk.

March 31, 1943.
GEORGE C. SWEENEY,
U. S. D. J."

[5] The words "decision" and "judgment" as used in the Act are not intended to describe two judicial acts, but a single act described in alternative phrases. Cf. *Ex parte Tiffany*, 252 U. S. 32, 36.

or judgment, the appeal was untimely.[6] The circumstances disclosed require that we determine what constitutes the decision or judgment from which an appeal lies in this case. We are without the benefit of a rule such as Rule 58 of the Federal Rules of Civil Procedure which provides that "the notation of a judgment in the civil docket as provided by Rule 79 (a) constitutes the entry of the judgment; and the judgment is not effective before such entry."

The judgment of a court is the judicial determination or sentence of the court upon a matter within its jurisdiction. No form of words and no peculiar formal act is necessary to evince its rendition or to mature the right of appeal. And the modes of evidencing the character of the judgment and of attesting the fact and time of its rendition vary from state to state according to local statute or custom, from a simple docket entry or the statement of a conclusion in an opinion, to a formal adjudication, signed by the judge or the clerk, in a journal or order book, or filed as part of the record in the case. The practice in federal courts doubtless varies because of the natural tendency to follow local state practice. Unaided by statute or rule of court we must decide on the bare record before us what constitutes the decision or judgment of the court below from which appeal must be taken within thirty days after rendition.

In view of the diverse practice and custom in District Courts we cannot lay down any hard and fast rule. Where, as here, a formal judgment is signed by the judge, this is *prima facie* the decision or judgment rather than a state-

[6] There is no dispute that the entry of March 5, "Indictment quashed," was in fact not placed upon the docket for a number of days after March 5, but it was made before March 29. Even if the actual date when it was placed on the docket is to control, an appeal taken April 30 would be out of time.

ment in an opinion or a docket entry.[7] In recent cases we have so treated it.[8] But we are told by appellees that it is not the practice of the court below to require written orders, and that entry on the docket has always been considered as entry of judgment, and for this support is found in a letter from a deputy clerk of the court. On the other hand, the appellant calls our attention to five cases brought here under the Criminal Appeals Act from the District Court for Massachusetts in each of which the record contains a formal order quashing an indictment, and in four of which there was an opinion as well as the formal order.[9] In view of these facts, we think we should give weight to the action of the judge rather than to the opinion of counsel or of a ministerial officer of the court. The judge was conscious, as we are, that he was without power to extend the time for appeal. He entered a formal order of record. We are unwilling to assume that he deemed this an empty form or that he acted from a purpose indirectly to extend the appeal time, which he could not do overtly. In the absence of anything of record to lead to a contrary conclusion, we take the formal order of March 31 as in fact and in law the pronouncement of the court's judgment and as fixing the date from which the time for appeal ran.

Second. This appeal is authorized by the Criminal Appeals Act. That Act permits a direct appeal to this court, *inter alia,* from a judgment of a district court "sustaining

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[7] In the federal courts an opinion is not a part of the record proper, *England* v. *Gebhardt,* 112 U. S. 502, 506; and in some jurisdictions the docket entries are not.

[8] *United States* v. *Resnick,* 299 U. S. 207; *United States* v. *Midstate Horticultural Co.,* 306 U. S. 161. Compare *United States* v. *Swift & Co.,* 318 U. S. 442, 446.

[9] *United States* v. *Stevenson,* 215 U. S. 190; *United States* v. *Winslow,* 227 U. S. 202; *United States* v. *Foster,* 233 U. S. 515; *United States* v. *Farrar,* 281 U. S. 624; *United States* v. *Scharton,* 285 U. S. 518.

a special plea in bar." The material question is not how the defendant's pleading is styled but the effect of the ruling sought to be reviewed;[10] and we have, therefore, treated a motion to quash, the grant of which would bar prosecution for the offense charged, as a plea in bar within the purview of the statute.[11] The defense here was in bar of the prosecution; to sustain it was to end the cause and exculpate the defendants.

Third. We hold that revocation of the regulation did not prevent indictment and conviction for violation of its provisions at a time when it remained in force. The reason for the common law rule that the repeal of a statute ends the power to prosecute for prior violations[12] is absent in the case of a prosecution for violation of a regulation issued pursuant to an existing statute which expresses a continuing policy, to enforce which the regulation was authorized. Revocation of the regulation does not repeal the statute; and though the regulation calls the statutory penalties into play, the statute, not the regulation, creates the offense and imposes punishment for its violation.[13] *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, is authority for the view that an indictable offense was charged.

The judgment is

Reversed.

MR. JUSTICE MURPHY, dissenting:

I cannot agree that this appeal was "taken within thirty days after the decision or judgment has been rendered," as required by the Criminal Appeals Act, 18 U. S. C. § 682. This appeal was allowed by Judge Sweeney of the District

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[10] *United States* v. *Thompson*, 251 U. S. 407, 412; *United States* v. *Barber*, 219 U. S. 72, 78.

[11] *United States* v. *Oppenheimer*, 242 U. S. 85, 86.

[12] *United States* v. *Tynen*, 11 Wall. 88, 95; cf. *United States* v. *Chambers*, 291 U. S. 217 at 226.

[13] Cf. *United States* v. *Grimaud*, 220 U. S. 506, 522.

Court of Massachusetts on April 30, 1943, and is timely only if the formal order signed on March 31 constitutes the final decision or judgment. The particular circumstances of this case, however, forbid such a conclusion.

As the majority opinion states, the final decision or judgment from which the thirty-day appeal period runs requires no peculiar formal act or form of words. The effective act varies from court to court. But there is no doubt as to the practice in the District Court of Massachusetts. As stated by the deputy clerk of that court, whose duties and familiarity with the court's procedure lend great weight to his statements, "The practice in this District, on the receipt of an opinion granting a motion to quash, is to make an entry on the docket under the judge's name, 'Indictment quashed.' It is not the practice to have a written order." This statement, which appears to have had the approval of Judge Sweeney, clearly indicates that the final judgment in this case is to be found in the docket entry under the judge's name.

Judge Sweeney's opinion of March 5 granted the motion to quash the indictment. Pursuant to the District Court's practice, an entry on the docket under the judge's name, constituting the final judgment, would normally have been made on the same day, March 5. Because of inadvertence, however, the entry was not made until some time between March 25 and March 29. At that time the docket clerk made the following entry on the docket: "March 5. Sweeney, J. Indictment quashed." That entry thereby constituted the final and effective judgment. And assuming that this judgment was not entered until March 29, the allowance of this appeal on April 30 was out of time.

It is contended that the subsequent formal order signed on March 31 by Judge Sweeney is the effective judgment. But the procedure in this District Court makes clear that such formal written orders are unnecessary. It is the

simple docket entry which is the final decision or judgment of the court below.

Moreover, the circumstances surrounding the formal order of March 31 reveal no intention by Judge Sweeney to supersede the effect of the previous docket entry or to extend the time for appeal. The deputy clerk, in a letter written to the Department of Justice, has described the situation in these words:

"On or about March 31st, the Government presented a written order to me, and I accompanied the United States Attorney to Judge Sweeney's chambers. It was entirely new procedure for us to have a written order. I understand it was only because the United States represented that the Department of Justice wanted a written order in this case, so as to conform to the suggestion contained in Mr. Justice Jackson's concurring opinion in *United States* v. *Swift & Co.*, 318 U. S. 442, 446, that Judge Sweeney signed the order. I can recall that Judge Sweeney protested against the necessity of signing such an order when it was presented to him, but did sign it at the request of the United States Attorney. I also remember that Judge Sweeney said he was not going to adopt the practice of signing orders in all such future cases. When it came time to make an entry of this order in the books, I assumed that it was to take the place of the entry 'Sweeney, J. Indictment quashed', which was made between March 25th and March 29th, and I told the docket clerk making the entry to cross out the entry which had been made previously between March 25th and March 29th.

"When I wrote my letter to you, it seemed to me that I had told the Court that the entry of March 5 would necessarily be stricken out, but I find that the Court has no recollection of being so informed. There was no intention that the order of March 31 should extend the time for appeal, and it is the Court's recollection that he so stated to counsel.

"By direction of the Court, I am sending a copy of this letter to counsel for the defendant."

It thus clearly appears that the March 5 entry, which was actually made between March 25 and March 29, was intended to be the final decision or judgment of the District Court and that the appeal period began to run from the date of actual entry. The March 31 order was entered at the Government's insistence merely to conform to a suggestion of one Justice of this Court to the effect that "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." *United States* v. *Swift & Co.*, 318 U. S. 442, 446. That order was thus no more than a clarification and reiteration of the March 5 judgment. It cannot be considered as a vacation of the prior judgment or as a new or amended judgment.

The very fact that Judge Sweeney stated that the March 31 order did not extend the time for appeal demonstrates his belief and intention that a valid final order had theretofore been entered. Some time after March 31 the deputy clerk on his own initiative ordered the March 5 docket entry stricken in the mistaken belief that it had been superseded. In its place was inserted the entry: "March 31. Sweeney, J. Order quashing indictment." Such action was obviously insufficient to change either Judge Sweeney's intention or the finality and effect of the March 5 entry for purposes of appeal to this Court.

Varying and uncertain rules governing criminal appeals are to be avoided whenever possible. Yet the effect of holding this appeal to be timely is to inject into the procedure of the court below an element of confusion and doubt. Heretofore parties to a criminal proceeding in the District Court of Massachusetts were entitled to rely on the docket entry, following an opinion granting a motion to quash, as the final decision or judgment.

They could calculate appeal periods from the date of that entry. Now they must risk the possibility that at an undeterminable later date one of the parties will convince the court that a formal order should be entered and that the time for appeal will start from that date. No reason of law or policy suggests itself in support of such uncertainty.

Judged by the fixed and simple practice of the court below in entering its final judgments, this appeal cannot be considered timely.

MR. JUSTICE DOUGLAS and MR. JUSTICE RUTLEDGE join in this dissent.

WALTON, ADMINISTRATRIX, *v.* SOUTHERN PACKAGE CORPORATION.

CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI.

No. 159. Argued December 17, 1943.—Decided January 3, 1944.

A night watchman for a manufacturing plant which shipped a substantial portion of its product in interstate commerce, *held* covered by the Fair Labor Standards Act of 1938, as one engaged in an "occupation necessary to the production" of goods for interstate commerce. P. 542.

194 Miss. 573, 11 So. 2d 912, reversed.

CERTIORARI, *post*, p. 726, to review the reversal of a judgment for the petitioner in a suit to recover overtime compensation and liquidated damages under the Fair Labor Standards Act.

Mr. Chas. F. Engle submitted for petitioner.

Mrs. Elizabeth Hulen, with whom *Messrs. William H. Watkins* and *P. H. Eager, Jr.* were on the brief, for respondent.

By special leave of Court, *Mr. Robert L. Stern,* with whom *Solicitor General Fahy, Messrs. Douglas B. Maggs,*

Irving J. Levy, and *Joseph I. Nachman,* and *Miss Bessie Margolin* were on the brief, for the Administrator of the Wage and Hour Division, U. S. Department of Labor, as *amicus curiae,* urging reversal.

MR. JUSTICE BLACK delivered the opinion of the Court.

This is a suit brought against the respondent by an employee, Fred Walton, in a Mississippi state court to recover overtime compensation and liquidated damages as authorized by § 16 (b) of the Fair Labor Standards Act of 1938.[1] Walton died before the case was tried and the suit was revived by his administratrix, the petitioner here. A judgment for the petitioner rendered by the trial court was reversed by the Mississippi Supreme Court[2] on the ground that Walton had not been employed in the production of goods for interstate commerce or in "any process or occupation necessary to the production thereof,"[3] and therefore was not covered by the Act. We granted certiorari because this interpretation of the Act raised a federal question of importance and because of the claim by petitioner that the interpretation was in conflict with our decision in *A. B. Kirschbaum Co.* v. *Walling,* 316 U. S. 517.

The case was tried on an agreed statement of facts which in brief summary showed:

The respondent operated a plant in Mississippi in which veneer was manufactured from logs. A substantial portion of the manufactured product was destined for shipment in interstate commerce. Walton worked at the plant as a night watchman. His work week ex-

[1] 52 Stat. 1069; U. S. C. Title 29, § 216 (b).

[2] 194 Miss. 573, 11 So. 2d 912.

[3] Section 3 (j) of the Act provides that, "An employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing . . . such goods, or in any process or occupation necessary to the production thereof." 52 Stat. 1061; U. S. C. Title 29, § 203 (j).

ceeded the maximum hours prescribed by the Fair Labor Standards Act during the period in question. His duties were to make hourly rounds of the plant, punch the nightwatchman's clocks at various stations on the plant, and report any fires and trespassers. The fire insurance company which insured the plant's buildings, machinery, and fixtures required respondent to have a night watchman as a condition to granting reduced premium rates. Respondent's desire to obtain these reduced rates was the primary reason why Walton was employed. The plant was not operated at night while Walton was on duty and he did not physically assist in the manufacture or shipment of veneer.

In holding that these facts fell short of proving that Walton's work was "necessary to the production" of respondent's goods, the Mississippi Supreme Court particularly emphasized that Walton had no other duties to perform in addition to his regular duties as a night watchman; that he engaged in no manual activities connected with production; that he was not specially employed to protect goods assembled for manufacture or awaiting shipment in interstate commerce; and that no goods were manufactured during the hours he was on guard. Under our decision in the *Kirschbaum* case, *supra,* no one of these facts standing alone, nor all of them together, can support the Court's conclusion that the nature of Walton's employment left him without the Act's protection. His duty was to aid in protecting the building, machinery, and equipment from injury or destruction by fire or trespass. The very fact that a fire insurance company was willing to reduce its premiums upon conditions that a night watchman be kept on guard is evidence that a watchman would make a valuable contribution to the continuous production of respondent's goods. "The maintenance of a safe, habitable building is indispensable to that activity." *A. B. Kirschbaum Co.* v. *Walling, supra,* 524. The relationship of Walton's employment to production was therefore not "tenuous" but

had that "close and immediate tie with the process of production for commerce" which brought him within the coverage of the Act. *Ibid.*, 525.

The judgment is reversed and the cause is remanded to the Mississippi Supreme Court for further proceedings not inconsistent with this opinion.

Reversed.

MR. JUSTICE ROBERTS, considering himself bound by the decision in *Kirschbaum* v. *Walling*, 316 U. S. 517, concurs in the result.

UNITED STATES *v.* LAUDANI.

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

No. 71. Argued December 16, 1943.—Decided January 3, 1944.

The Kickback Act of June 13, 1934, which provides that "whoever" shall induce any person employed on any federally financed work "to give up any part of the compensation to which he is entitled under his contract of employment, by force, intimidation, threat of procuring dismissal from such employment, or by any other manner whatsoever," shall be subject to the penalty therein prescribed, *held* applicable to a company foreman who had authority to hire and discharge subordinates whom he, on his own behalf and for his own benefit, compelled to surrender a portion of their wages. P. 547.

134 F. 2d 847, reversed.

CERTIORARI, *post*, p. 720, to review the reversal of a conviction of violation of the federal Kickback Act.

Mr. Chester T. Lane, with whom *Solicitor General Fahy*, *Assistant Attorney General Tom C. Clark*, and *Messrs. Edward G. Jennings*, *W. Marvin Smith*, *Douglas B. Maggs*, and *Irving J. Levy* were on the brief, for the United States.

Mr. Harold Simandl submitted for respondent.

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MR. JUSTICE BLACK delivered the opinion of the Court.

Indictments returned in a United States District Court in New Jersey charged that the respondent Laudani, while acting as a company foreman with authority to employ and discharge workers on a public works project financed in part by the United States, had contrary to § 1 of an Act of June 13, 1934,[1] forced certain of his subordinates to give him part of their wages in order to keep their jobs. Laudani moved to quash, assigning as one ground that the indictments failed to charge conduct prohibited by this Act since they did not contain allegations that he was the employer of the coerced men or that he had acted as agent of the employer in forcing the payments. The gist of his contention was that the prohibition of the Act extends only to employers and persons who act in concert with them. The District Court concluded that the Act applied to a foreman such as Laudani, overruled his motion, and a jury convicted him. The Circuit Court of Appeals accepted Laudani's contention, reversed the judgment, and directed that the indictments be quashed. 134 F. 2d 847. The public importance of the question presented prompted us to grant certiorari.

Both the language and history of the Kickback Act argue against the conclusion that Congress intended its prohibition to apply only to employers and not to foremen who exercise many of the powers of employers. The Act

[1] This Act is commonly known as the "Kickback" Act. Section 1 provides that, "Whoever shall induce any person employed in the construction, prosecution, or completion of any public building, public work, or building or work financed in whole or in part by loans or grants from the United States, or in the repair thereof to give up any part of the compensation to which he is entitled under his contract of employment, by force, intimidation, threat of procuring dismissal from such employment, or by any other manner whatsoever, shall be fined not more than $5,000, or imprisoned not more than five years, or both." 48 Stat. 948; U. S. C. Title 40, § 276b.

punishes "whoever" shall induce any person employed on a federally financed work "to give up any part of the compensation to which he is entitled under his contract of employment" by "force, intimidation, threat of procuring dismissal from such employment, or by any other manner whatsoever." [2] The sweep of the word "whoever," if that word stood alone, would be wide enough to include not only an employer but any other person. And the coercive methods of inducement expressly prohibited by the Act are methods in which at least some persons other than employers could engage without legal cause or excuse.

The Circuit Court of Appeals pointed out, however, that if the word "whoever" be given its broadest scope the Act might include common blackmailers who have no relationship to their victims' employment. In an effort to avoid what it considered to be such an extreme application of the Act, the Court focused attention on the clause "to give up any part of the compensation to which he is entitled under his contract of employment." Viewing this clause as proof that the purpose of Congress was to protect the employees' contractual rights to receive wages from their employer, the Court reasoned that no one but the employer or one acting on his behalf possessed "the requisite privity of contract" with the employees to be capable of impairing these rights. Having thus emphasized the Congressional reference to a "contract of employment," the Court stated broadly that, "What happens to the compensation after the employee has received it in full, and wholly without relation to or effect upon his contract of employment, is a matter with which this statute does not purport to deal."

The Court's statement might have been pertinent had the indictments here been against a common blackmailer, extortioner, or some other person not alleged to have been

[2] *Ibid.*

vested by the employer with power to fix and terminate the employer-employee status. But we think that the coerced surrender of wages by employees at the instance of a company foreman given authority by his employer to hire and discharge them cannot properly be said to bear no relation to or have no effect upon their contracts of employment, especially where, as here alleged, the surrender of wages was induced by the foreman's express threat to dismiss all employees who did not comply with his demand. Execution of such a threat against employees unwilling to pay would immediately and completely have terminated their employment contracts. We find nothing in the Act which suggests that, under these circumstances, a foreman must be deemed incapable of violating its provisions merely because he may not stand in that relationship to employees which the Circuit Court characterized as "privity of contract."

The purpose of the Act under consideration is to extend protection not merely to the legal form of employment contracts but to the substantive rights of workers actually to receive the benefit of the wage schedules which Congress has provided for them. The evil aimed at was the wrongful deprivation of full work payments. The Act was adopted near the bottom of a great business depression as one part of a broad Congressional program the goal of which was to strengthen the domestic economy by increasing the purchasing power of the nation's consumers. To this end, Congress enacted legislation designed to relieve widespread unemployment and enable working people to earn just and reasonable wages. A large program for federal financing of public works was established,[3] and legislation was passed requiring gov-

[3] The grant of money for the work on which Laudani was employed was authorized by Title II of the National Industrial Recovery Act enacted June 16, 1933, near the bottom of the depression. Section 1 of this Act declared that the policy of Congress was ". . . to increase

ernment contractors to pay certain minimum wage rates.[4] It was the purpose of the Kickback Act to assure that the federal funds thus provided for workers should actually be received by them for their own use except where diverted under authority of law or a worker's voluntary agreement.[5]

In view of this background, we cannot hold that Congress intended to exclude from the Act's proscription a foreman with the authority Laudani is alleged to have possessed. Foremen vested with full power to employ and discharge subordinates could frustrate the objective of the Act just as effectively as could their employers, and foremen not given such broad powers might nevertheless be able to use their authority to accomplish the same result. That foremen not only could but might do this very thing was testified at Senate hearings when the

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the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources." 48 Stat. 195.

[4] Title II, § 206, of the National Industrial Recovery Act of June 16, 1933, provides in part that, "All contracts let for construction projects and all loans and grants pursuant to this title shall contain such provisions as are necessary to insure . . . that all employees shall be paid just and reasonable wages which shall be compensation sufficient to provide, for the hours of labor as limited, a standard of living in decency and comfort . . ." 48 Stat. 204–205; U. S. C. Title 40, § 406. See also an Act of March 3, 1931, as amended, commonly known as the Davis-Bacon Act, 46 Stat. 1494; 49 Stat. 1011; 54 Stat. 399; U. S. C. Title 40, §§ 276a–276a–5; *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 128.

[5] See Report of the House Committee on the Judiciary on Bill S. 3041, H. Rep. No. 1750, 73d Cong., 2d Sess. The report printed a letter from the Federal Emergency Administrator of Public Works, Harold L. Ickes, which urged immediate passage of the bill "to prevent a very prevalent evil in the construction industry which, to the extent that it exists on Public Works projects, defeats the purpose of Title II of the National Industrial Recovery Act and the success of our Public Works program."

problem of "kickbacks" was under study.[6] And the members of the Senate Committee on the Judiciary reporting the bill used language broad enough to include foremen among others when they said that hearings had revealed, "that large sums of money have been extracted from the pockets of American labor, to enrich contractors, subcontractors, and their officials." [7]

To hold that a company foreman vested with sufficient power substantially to affect his subordinates' contracts of employment is within the Act's proscription is not to hold that the Act applies to every extortioner, blackmailer, or other person who extracts money from one who has previously received it for labor on a federally financed project. We need not, at this time, attempt to delineate the outside scope of the Act's application. But the purpose of the legislation, no less than its language, shows that the power to employ and discharge brings an employing company's foreman within its prohibition.

The judgment of the Circuit Court of Appeals is reversed, and the cause is remanded to that court for consideration and disposition of other questions not here involved.

Reversed.

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[6] See, for example, Hearings, Subcommittee of Senate Committee on Commerce, S. Res. 74, 73d Cong., 2d Sess., Vol. I, pp. 790–792, 801, 826.

[7] S. Rep. No. 803, 73d Cong., 2d Sess.

FALBO *v.* UNITED STATES.

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

No. 73. Argued November 19, 1943.—Decided January 3, 1944.

1. In a criminal prosecution under the Selective Training and Service Act of 1940 for willful failure to obey a local board's order to report for assignment to work of national importance, it is no defense that the registrant's classification as a conscientious objector rather than as a minister was erroneous. P. 554.
2. Assuming a constitutional requirement that judicial review be available to test the validity of the board's classification, Congress was not required to provide for such review prior to final acceptance of the registrant for service. P. 554.

135 F. 2d 464, affirmed.

CERTIORARI, 320 U. S. 209, to review the affirmance of a conviction for violation of the Selective Training and Service Act of 1940.

Mr. Hayden C. Covington, with whom *Mr. Victor F. Schmidt* was on the brief, for petitioner.

Solicitor General Fahy, with whom *Assistant Attorney General Tom C. Clark,* and *Messrs. Robert S. Erdahl* and *Valentine Brookes* were on the brief, for the United States.

Messrs. Julien Cornell, Harold Evans, Ernest Angell, and *Osmond K. Fraenkel* filed a brief on behalf of the National Committee on Conscientious Objectors of the American Civil Liberties Union, as *amicus curiae,* urging reversal.

MR. JUSTICE BLACK delivered the opinion of the Court.

The petitioner was indicted on November 12, 1942, in a federal District Court in Pennsylvania for knowingly failing to perform a duty required of him under the Selec-

tive Training and Service Act of 1940.[1] The particular charge was that, after his local board had classified him as a conscientious objector, he wilfully failed to obey the board's order to report for assignment to work of national importance.[2] Admitting that his refusal to obey the order was wilful, petitioner defended his conduct on the ground that he was entitled to a statutory exemption from all forms of national service, since the facts he had presented to the board showed that he was a "regular or duly ordained" minister.[3] The Act, he argued, does not make it a crime to refuse to obey an order to report for service if that order is based upon an erroneous classification, because there is no "duty" to comply with a mistaken order. This defense was seasonably urged but the District Court declined to recognize it, expressing the view that, "the Board has the decision of whether or not this man is to be listed as he claims he should be"; and at the

[1] 54 Stat. 885; 50 U. S. C. Appendix §§ 301–318. Section 11 imposes criminal sanctions for wilful failure or neglect to perform any duty required by the Act or by rules or regulations made pursuant to the Act.

[2] Under § 5 (g) of the Act, a registrant who "by reason of religious training and belief" is conscientiously opposed to participation in war may be inducted into the land or naval forces but must be assigned to noncombatant service as defined by the President. If for similar reasons a registrant is conscientiously opposed even to participation in noncombatant service he is not to be inducted into the armed forces at all but "shall . . . be assigned to work of national importance under civilian direction." Regulations, not here challenged, impose on selectees a duty to obey board orders to report for induction or assignment.

[3] Section 5 (d) of the Act provides in part: "Regular or duly ordained ministers of religion . . . shall be exempt from training and service (but not from registration) under this Act." The local board refused to find that petitioner was a minister and further declined to classify him as a conscientious objector. Upon review a board of appeal, set up under § 10 (a) (2), sustained the local board's refusal to exempt petitioner as a minister, but directed that he be classified as a conscientious objector.

conclusion of the trial the jury was charged that, "if you find from the facts that he failed to report—and there is no evidence to the contrary . . .—it would be your duty to find him guilty." The result of the trial was a conviction and sentence to imprisonment for five years.

On appeal petitioner urged that the District Court had erred in refusing to permit a trial de novo on the merits of his claimed exemption. In the alternative, he argued that at least the Court should have reviewed the classification order to ascertain whether the local board had been "prejudicial, unfair, and arbitrary" in that it had failed to admit certain evidence which he offered, had acted on the basis of an antipathy to the religious sect of which he is a member, and had refused to classify him as a minister against the overwhelming weight of the evidence. The Circuit Court of Appeals affirmed the District Court per curiam, 135 F. 2d 464. We granted certiorari because of the importance of the problems involved relating to administration of the Selective Training and Service Act of 1940, upon which problems the Circuit Courts of Appeals have not expressed uniform views.[4]

When the Selective Training and Service Act was passed in September, 1940, most of the world was at war. The preamble of the Act declared it "imperative to increase and train the personnel of the armed forces of the United States." The danger of attack by our present enemies, if not imminent, was real, as subsequent events have grimly demonstrated. The Congress was faced with the urgent necessity of integrating all the nation's people and forces for national defense. That dire consequences might flow from apathy and delay was well understood. Accordingly the Act was passed to mobilize national manpower with

[4] See, for example, *Goff* v. *United States,* 135 F. 2d 610, 612 (C. C. A. 4); *Rase* v. *United States,* 129 F. 2d 204, 207 (C. C. A. 6); *Ex parte Catanzaro,* 138 F. 2d 100, 101 (C. C. A. 3); *United States* v. *Kauten,* 133 F. 2d 703, 706, 707 (C. C. A. 2); *United States* v. *Grieme,* 128 F. 2d 811, 814, 815 (C. C. A. 3).

the speed which that necessity and understanding required.

The mobilization system which Congress established by the Act is designed to operate as one continuous process for the selection of men for national service. Under the system, different agencies are entrusted with different functions but the work of each is integrated with that of the others. Selection of registrants for service, and deferments or exemptions from service, are to be effected within the framework of this machinery as implemented by rules and regulations prescribed by the President.[5] The selective service process begins with registration with a local board composed of local citizens. The registrant then supplies certain information on a questionnaire furnished by the board. On the basis of that information and, where appropriate, a physical examination, the board classifies him in accordance with standards contained in the Act and the Selective Service Regulations. It then notifies him of his classification. The registrant may contest his classification by a personal appearance before the local board, and if that board refuses to alter the classification, by carrying his case to a board of appeal,[6] and thence, in certain circumstances, to the President.

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[5] Section 10 (a) (2) of the Act provides in part that ". . . local boards, under rules and regulations prescribed by the President, shall have power within their respective jurisdictions to hear and determine, subject to the right of appeal to the appeal boards herein authorized, all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this Act of all individuals within the jurisdiction of such local boards. The decisions of such local boards shall be final except where an appeal is authorized in accordance with such rules and regulations as the President may prescribe." Pursuant to the grant of authority conferred by the Act the President, through appropriate executive agencies, has promulgated and from time to time amended comprehensive Selective Service Regulations.

[6] A registrant may not, however, appeal from the determination of his physical or mental condition. Selective Service Regulations, § 627.2 (a).

Only after he has exhausted this procedure is a protesting registrant ordered to report for service. If he has been classified for military service, his local board orders him to report for induction into the armed forces. If he has been classified a conscientious objector opposed to noncombatant military service, as was petitioner, he ultimately is ordered by the local board to report for work of national importance. In each case the registrant is under the same obligation to obey the order. But in neither case is the order to report the equivalent of acceptance for service. Completion of the functions of the local boards and appellate agencies, important as are these functions, is not the end of the selective service process. The selectee may still be rejected at the induction center and the conscientious objector who is opposed to noncombatant duty may be rejected at the civilian public service camp.[7] The connected series of steps into the national service which begins with registration with the local board does not end until the registrant is accepted by the army, navy, or civilian public service camp. Thus a board order to report is no more than a necessary intermediate step in a united and continuous process designed to raise an army speedily and efficiently.

In this process the local board is charged in the first instance with the duty to make the classification of registrants which Congress in its complete discretion[8] saw fit

[7] Section 3 (a) of the Act provides in part that ". . . no man shall be inducted for training and service under this Act unless and until he is acceptable to the land or naval forces for such training and service and his physical and mental fitness for such training and service has been satisfactorily determined: . . ." We are informed by the government that pursuant to this section approximately forty per cent of the selectees who report under orders of local boards for induction into the armed forces are rejected, and that, as of October 15, 1943, six hundred and ten of the eight thousand selectees who had reported for civilian work of national importance had been rejected.

[8] See *Hamilton* v. *Regents*, concurring opinion, 293 U. S. 245, 265, 266–268; see also *Jacobson* v. *Massachusetts*, 197 U. S. 11, 29; *Mac-*

to authorize. Even if there were, as the petitioner argues, a constitutional requirement that judicial review must be available to test the validity of the decision of the local board, it is certain that Congress was not required to provide for judicial intervention before final acceptance of an individual for national service. The narrow question therefore presented by this case is whether Congress has authorized judicial review of the propriety of a board's classification in a criminal prosecution for wilful violation of an order directing a registrant to report for the last step in the selective process.

We think it has not. The Act nowhere explicitly provides for such review and we have found nothing in its legislative history which indicates an intention to afford it. The circumstances under which the Act was adopted lend no support to a view which would allow litigious interruption of the process of selection which Congress created. To meet the need which it felt for mobilizing national manpower in the shortest practicable period, Congress established a machinery which it deemed efficient for inducting great numbers of men into the armed forces. Careful provision was made for fair administration of the Act's policies within the framework of the selective service process. But Congress apparently regarded "a prompt and unhesitating obedience to orders" issued in that process "indispensable to the complete attainment of the object" of national defense. *Martin* v. *Mott,* 12 Wheat. 19, 30. Surely if Congress had intended to authorize interference with that process by intermediate challenges of orders to report, it would have said so.

Against this background the complete absence of any provision for such challenges in the very section providing for prosecution of violations in the civil courts permits no

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intosh v. *United States,* 42 F. 2d 845, 847, 848; 283 U. S. 605, dissenting opinion, 627, 632; *United States* v. *Bethlehem Steel Corp.,* 315 U. S. 289, 305.

other inference than that Congress did not intend they could be made. The instant case offers a striking example of the consequences of any other view. Petitioner, 25 years of age, unmarried, and apparently in good health, registered with his local board on October 16, 1940. He claimed exemption August 23, 1941. Consideration of his claim by the local board and the board of appeal delayed his classification, so that his final order to report was not issued until September 2, 1942. Today, one year and four months after this order, he is still litigating the question.

Affirmed.

MR. JUSTICE RUTLEDGE, concurring:

I concur in the result and in the opinion of the Court except in one respect. Petitioner claims the local board's order of classification was invalid because that board refused to classify petitioner as a minister on the basis of an antipathy to the religious sect of which he is a member. And, if the question were open, the record discloses that some evidence tendered to sustain this charge was excluded in the trial court. But petitioner has made no such charge concerning the action of the appeal board which reviewed and affirmed the local board's order. And there is nothing to show that the appeal board acted otherwise than according to law. If therefore the local board's order was invalid originally for the reason claimed, as to which I express no opinion, whatever defect may have existed was cured by the appeal board's action. Apart from some challenge upon constitutional grounds, I have no doubt that Congress could and did exclude judicial review of Selective Service orders like that in question. Accordingly I agree that the conviction must be sustained.

MR. JUSTICE MURPHY, dissenting:

This case presents another aspect of the perplexing problem of reconciling basic principles of justice with mili-

tary needs in wartime. Individual rights have been recognized by our jurisprudence only after long and costly struggles. They should not be struck down by anything less than the gravest necessity. We assent to their temporary suspension only to the extent that they constitute a clear and present danger to the effective prosecution of the war and only as a means of preserving those rights undiminished for ourselves and future generations. Before giving such an assent, therefore, we should be convinced of the existence of a reasonable necessity and be satisfied that the suspension is in accordance with the legislative intention.

The immediate issue is whether the Selective Training and Service Act of 1940 must be interpreted so as to deprive alleged violators of the right to a full hearing and of the right to present every reasonable defense. Petitioner, a member of Jehovah's Witnesses, claimed to be a minister exempt from both military training and civilian work under the Act. After exhausting all the administrative remedies and appeals afforded by the Act, he was classified as a conscientious objector (Class IV–E) rather than as a minister (Class IV–D). Petitioner alleges that this classification was contrary to law and was the result of arbitrary action by his local board. On the assumption that these allegations are true, the subsequent order to report for assignment to work of national importance, which he disobeyed, must therefore be considered invalid. Our problem is simply whether petitioner can introduce evidence to that effect as a defense to a criminal prosecution for failure to obey the order.

Common sense and justice dictate that a citizen accused of a crime should have the fullest hearing possible, plus the opportunity to present every reasonable defense. Only an unenlightened jurisprudence condemns an individual without according him those rights. Such a denial is especially oppressive where a full hearing might dis-

close that the administrative action underlying the prosecution is the product of excess wartime emotions. Experience demonstrates that in time of war individual liberties cannot always be entrusted safely to uncontrolled administrative discretion. Illustrative of this proposition is the remark attributed to one of the members of petitioner's local board to the effect that "I do not have any damned use for Jehovah's Witnesses." The presumption against foreclosing the defense of illegal and arbitrary administrative action is therefore strong. Only the clearest statutory language or an unmistakable threat to the public safety can justify a court in shutting the door to such a defense. Because I am convinced that neither the Selective Training and Service Act of 1940 nor the war effort compels the result reached by the majority of this Court, I am forced to dissent.

It is evident that there is no explicit provision in the Act permitting the raising of this particular defense and that the legislative history is silent on the matter. Suffice it to say, however, that nothing in the statute or in its legislative record proscribes this defense or warrants the conviction of petitioner without benefit of a full hearing. Judicial protection of an individual against arbitrary and illegal administrative action does not depend upon the presence or absence of express statutory authorization. The power to administer complete justice and to consider all reasonable pleas and defenses must be presumed in the absence of legislation to the contrary.[1]

Moreover, the structure of the Act is entirely consistent with judicial review of induction orders in criminal proceedings. As the majority states, the Act is designed "to

[1] Otherwise the absence of clear statutory permission would preclude court review of induction orders in habeas corpus proceedings following actual induction, a result which this Court's opinion presumably does not intend to infer. Judicial review in such proceedings has become well settled in lower federal courts.

operate as one continuous process for the selection of men for national service," and it is desirable that this process be free from "litigious interruption." But we are faced here with a complete and permanent interruption springing not from any affirmative judicial intervention but from a failure to obey an order. A criminal proceeding before a court is therefore inevitable and the only problem is the availability of a particular defense in that proceeding. Hence judicial review at this stage has none of the elements of a "litigious interruption" of the administrative process.

No other barriers to judicial review of the induction order in a criminal proceeding are revealed by the structure of the Act. The "continuous process" of selection is unique, unlike any ordinary administrative proceeding. Normal concepts of administrative law are foreign to this setting. Thus rules preventing judicial review of interlocutory administrative orders and requiring exhaustion of the administrative process have no application here. Those rules are based upon the unnecessary inconvenience which the administrative agency would suffer if its proceedings were interrupted by premature judicial intervention. But since the administrative process has already come to a final ending, the reason for applying such rules no longer exists. And even if the order in this case were considered interlocutory rather than final, which is highly questionable, judicial review at this point is no less necessary. Criminal punishment for disobedience of an arbitrary and invalid order is objectionable regardless of whether the order be interlocutory or final.

Nor do familiar doctrines of the exclusiveness of statutory remedies have any relevance here. Had Congress created a statutory judicial review procedure prior to or following induction, the failure to take advantage of such a review or the judicial approval of the induction order upon appeal might bar a collateral attack on the order in

a criminal proceeding. But Congress has erected no such system of judicial review. Courts are left to their own devices in fashioning whatever review they deem just and necessary.

Thus there is no express or implied barrier to the raising of this defense or to the granting of a full judicial review of induction orders in criminal proceedings. Courts have not hesitated to make such review available in habeas corpus proceedings following induction despite the absence of express statutory authorization. Where, as here, induction will never occur and the habeas corpus procedure is unavailable, judicial review in a criminal proceeding becomes imperative if petitioner is to be given any protection against arbitrary and invalid administrative action.[2] It is significant that in analogous situations in the past, although without passing upon the precise issue, we have supplied such a necessary review in criminal proceedings. Cf. *Union Bridge Co.* v. *United States,* 204 U. S. 364; *Monongahela Bridge Co.* v. *United States,* 216 U. S. 177; McAllister, "Statutory Roads to Review of Federal Administrative Orders," 28 California L. Rev. 129, 165, 166. See also *Fire Department* v. *Gilmour,* 149 N. Y. 453, 44 N. E. 177; *People* v. *McCoy,* 125 Ill. 289, 17 N. E. 786.

Finally, the effective prosecution of the war in no way demands that petitioner be denied a full hearing in this case. We are concerned with a speedy and effective

[2] Judge Robert C. Bell of the federal district court in Minnesota, in his article "Selective Service and the Courts," 28 A. B. A. Journal 164, 167, states, "The courts are likely to be confronted with the question of what can be presented as a defense by a selectee in a criminal prosecution against him for a violation of the provisions of the Act of 1940. It appears that this question has not been decided. On principle, it would seem that the defendant should be permitted to offer as a defense the same questions that he could present in a habeas corpus proceeding, that is, the question of whether the board had jurisdiction, whether there was a fair hearing, or whether the action of the board was arbitrary or unlawful."

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mobilization of armed forces. But that mobilization is neither impeded nor augmented by the availability of judicial review of local board orders in criminal proceedings. In the rare case where the accused person can prove the arbitrary and illegal nature of the administrative action, the induction order should never have been issued and the armed forces are deprived of no one who should have been inducted. And where the defendant is unable to prove such a defense or where, pursuant to this Court's opinion, he is forbidden even to assert this defense, the prison rather than the Army or Navy is the recipient of his presence. Thus the military strength of this nation gains naught by the denial of judicial review in this instance.

To say that the availability of such a review would encourage disobedience of induction orders, or that denial of a review would have a deterrent effect, is neither demonstrable nor realistic. There is no evidence that petitioner failed to obey the local board order because of a belief that he could secure a judicial reversal of the order and thus escape the duty to defend his country. Those who seek such a review are invariably those whose conscientious or religious scruples would prevent them from reporting for induction regardless of the availability of this defense. And I am not aware that disobedience has multiplied in the Fourth Circuit, where this defense has been allowed. *Baxley* v. *United States,* 134 F. 2d 998; *Goff* v. *United States,* 135 F. 2d 610. Moreover, English courts under identical circumstances during the last war unhesitatingly provided a full hearing and reviewed orders to report for permanent service. *Offord* v. *Hiscock,* 86 L. J. K. B. 941; *Hawkes* v. *Moxey,* 86 L. J. K. B. 1530. Yet that did not noticeably impede the efficiency or speed of England's mustering of an adequate military force.

That an individual should languish in prison for five years without being accorded the opportunity of proving

that the prosecution was based upon arbitrary and illegal administrative action is not in keeping with the high standards of our judicial system. Especially is this so where neither public necessity nor rule of law or statute leads inexorably to such a harsh result. The law knows no finer hour than when it cuts through formal concepts and transitory emotions to protect unpopular citizens against discrimination and persecution. I can perceive no other course for the law to take in this case.

UNITED STATES v. MYERS.

NO. 142. CERTIORARI TO THE COURT OF CLAIMS.*

Argued December 16, 17, 1943.—Decided January 3, 1944.

1. Section 5 of the Act of February 13, 1911, as amended, creates an obligation on the part of the United States to pay customs officers the extra compensation therein prescribed. P. 567.
2. The extra compensation which § 5 of the Act of February 13, 1911, as amended, requires that customs inspectors be paid for overtime, Sundays and holidays, *held* payable, in respect of weekday service, only for service beyond the regular daily tour of duty, whether day or night; and for all service on Sundays and holidays. Pp. 573–574.
3. As the proviso of § 5 authorizes adjustments of hours but is silent as to Sundays and holidays, the section's earlier grant of extra compensation for Sundays and holidays remains unaffected by the proviso. P. 575.
4. The requirements of § 5 of the Act of February 13, 1911, as amended, in respect of extra compensation, apply to services of customs inspectors at bridges and tunnels. P. 575.
5. The extra compensation required by § 5 of the Act of February 13, 1911, as amended, to be paid for overtime, Sundays and holidays is exclusive of the base pay. P. 576.

99 Ct. Cls. 158, reversed in part, affirmed in part.

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*Together with No. 143, *United States* v. *Arble,* No. 144, *United States* v. *Martin,* No. 145, *United States* v. *Plitz,* and No. 146, *United States* v. *Spitz,* also on writs of certiorari to the Court of Claims.

CERTIORARI, *post*, p. 722, to review judgments of the Court of Claims in five suits to recover extra compensation for services rendered by the plaintiffs as customs inspectors.

Assistant Attorney General Shea, with whom *Solicitor General Fahy* and *Messrs. Chester T. Lane, J. Frank Staley*, and *Paul A. Sweeney* were on the brief, for the United States.

Mr. Robert M. Drysdale for respondents.

MR. JUSTICE REED delivered the opinion of the Court.

These five suits were filed in the Court of Claims by respondents, who are customs inspectors stationed at the Port of Detroit.[1] They have been selected as test cases from a larger number of similar suits. No significant difference in the claims as to services rendered or otherwise is pointed out to us, and we see none. Even the periods for which recovery is sought, September 1, 1931, through August 31, 1937, are identical. We shall therefore state the issues and explain our conclusion in terms of the *Myers* case only, and its determination requires a like result in the other cases.

The precise issue is whether or not the provisions of § 5 of the Act of February 13, 1911, as amended,[2] and §§ 401,

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[1] Federal Register, August 25, 1937; Code of Federal Regulations, Title 19, Customs Duties, Chap. 1, Bureau of Customs.

[2] 41 Stat. 402, c. 61; 19 U. S. C. 267:

"SEC. 5. That the Secretary of the Treasury shall fix a reasonable rate of extra compensation for overtime services of inspectors, storekeepers, weighers, and other customs officers and employees who may be required to remain on duty between the hours of five o'clock postmeridian and eight o'clock antemeridian, or on Sundays or holidays, to perform services in connection with the lading or unlading of cargo, or the lading of cargo or merchandise for transportation in bond or for exportation in bond or for exportation with benefit of drawback, or in connection with the receiving or delivery of cargo on or from the wharf, or in connection with the unlading, receiving, or examina-

450 and 451 of the Tariff Act of 1930,[3] entitle Mr. Myers to extra compensation over and above his regular salary as customs inspector for night, Sunday and holiday serv-

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tion of passengers' baggage, such rates to be fixed on the basis of one-half day's additional pay for each two hours or fraction thereof of at least one hour that the overtime extends beyond five o'clock postmeridian (but not to exceed two and one-half days' pay for the full period from five o'clock postmeridian to eight o'clock antemeridian), and two additional days' pay for Sunday or holiday duty. The said extra compensation shall be paid by the master, owner, agent, or consignee of such vessel or other conveyance whenever such special license or permit for immediate lading or unlading or for lading or unlading at night or on Sundays or holidays shall be granted to the collector of customs, who shall pay the same to the several customs officers and employees entitled thereto according to the rates fixed therefor by the Secretary of the Treasury: *Provided,* That such extra compensation shall be paid if such officers or employees have been ordered to report for duty and have so reported, whether the actual lading, unlading, receiving, delivery, or examination takes place or not. Customs officers acting as boarding officers and any customs officer who may be designated for that purpose by the collector of customs are hereby authorized to administer the oath or affirmation herein provided for, and such boarding officers shall be allowed extra compensation for services in boarding vessels at night or on Sundays or holidays at the rates prescribed by the Secretary of the Treasury as herein provided, the said extra compensation to be paid by the master, owner, agent, or consignee of such vessel: *Provided further,* That in those ports where customary working hours are other than those hereinabove mentioned, the Collector of Customs is vested with authority to regulate the hours of customs employees so as to agree with prevailing working hours in said ports, but nothing contained in this proviso shall be construed in any manner to affect or alter the length of a working day for customs employees or the overtime pay herein fixed."

[3] 46 Stat. 708, 715, c. 497, Title IV; 19 U. S. C. 1401, 1450, 1451:

"SEC. 401. MISCELLANEOUS.

"When used in this title or in Part I of Title III—

"(a) Vessel.—The word 'vessel' includes every description of water craft or other contrivance used, or capable of being used, as a means of transportation in water, but does not include aircraft.

"(b) Vehicle.—The word 'vehicle' includes every description of

ices performed during the stated period. Its solution depends upon whether or not, when § 5 speaks of "overtime services," it includes, first, any authorized service rendered

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carriage or other contrivance used, or capable of being used, as a means of transportation on land, but does not include aircraft.

. . . . . .

"(f) Day.—The word 'day' means the time from eight o'clock antemeridian to five o'clock postmeridian.

"(g) Night.—The word 'night' means the time from five o'clock postmeridian to eight o'clock antemeridian.

. . . . . .

"SEC. 450. UNLADING ON SUNDAYS, HOLIDAYS, OR AT NIGHT.

"No merchandise, baggage, or passengers arriving in the United States from any foreign port or place, and no bonded merchandise or baggage being transported from one port to another, shall be unladen from the carrying vessel or vehicle on Sunday, a holiday, or at night, except under special license granted by the collector under such regulations as the Secretary of the Treasury may prescribe.

"SEC. 451. SAME—EXTRA COMPENSATION.

"Before any such special license to unlade shall be granted, the master, owner, or agent, of such vessel or vehicle shall be required to give a bond in the penal sum to be fixed by the collector conditioned to indemnify the United States for any loss or liability which might occur or be occasioned by reason of the granting of such special license and to pay the compensation and expenses of the customs officers and employees assigned to duty in connection with such unlading at night or on Sunday or a holiday, in accordance with the provisions of section 5 of the Act entitled 'An Act to provide for the lading or unlading of vessels at night, the preliminary entry of vessels, and for other purposes,' approved February 13, 1911, as amended. . . . At the request of the master, owner, or agent of any vessel, the collector shall assign customs officers and employees to duty at night or on Sunday or a holiday in connection with the entering or clearing of such vessel, or the issuing and recording of its marine documents, bills of sale, mortgages, or other instruments of title, but only if the master, owner, or agent gives a bond in a penal sum to be fixed by the collector, conditioned to pay the compensation and expenses of such customs officers and employees, who shall be entitled to rates of compensation fixed on the same basis and payable in the same manner and upon the same terms and conditions as in the case of customs officers and employees assigned to duty in connection with lading or unlading at night or on Sunday or a holiday."

between 5 o'clock P. M. and 8 o'clock A. M., without regard to whether this service is within the regular hours of his assignment to duty, and, second, Sundays and holidays without regard to the time of day when the authorized services are performed. The Court of Claims entered judgment for claimant for both nighttime and Sunday and holiday services. 99 Ct. Cls. 158.

As the difficulties of applying the statute continually arise at any port where the normal working hours of the customs employees named in the section are not limited to 8 A. M. to 5 P. M. with Sundays and holidays off, we granted certiorari to review the judgment of the Court of Claims. We think the judgment should be reversed as to nighttime services and affirmed as to Sunday and holiday services.

The Port of Detroit possesses a wide variety of transportation facilities which connect it with Canada and which require customs inspection of merchandise, baggage and passengers.[4] Evidently a rotation of assignments of posts and hours among inspectors at Detroit was carried out by the collector. Mr. Myers had either night or Sunday and holiday service or both at all the various posts of duty which are listed in the note. He was paid his annual salary throughout the period. This was a base pay of $2,100, subject to additions and subtractions which were generally applicable to government employees.[5] The claim is for service performed at night-

[4] The facilities were listed by the Court of Claims as follows:

Detroit and Windsor Ferry,
Walkerville Ferry,
Detroit and Canada Tunnel,
Ambassador Bridge,
Michigan Central Tunnel,
Wabash Railway Ferries,
Pere Marquette Railway Ferries,
Grand Trunk Railway Slip Dock.

[5] E. g., Economy Act of 1932, 47 Stat. 382.

time [6] on weekdays, Sundays and holidays, and in daytime on Sundays and holidays.

At the threshold the Government urges that the statutes heretofore quoted do not create an obligation on the part of the United States to pay the extra compensation which is sought. A carrier may procure customs service at night only by special license, and the statutes say the extra compensation shall be paid "by the licensee" to the collector of customs who shall pay the same "to the inspectors." [7] As the extra compensation here sued for was not collected in whole or part from the carriers concerned, it is urged that the United States is not liable to the plaintiff.[8]

The legislative history shows that the proponents of extra compensation constantly made the point that the Government would not be out of pocket by the legislation.[9] Where the United States stood as a protector of Indians with statutory authority, carefully marked out by a series of enactments, to collect sums for the benefit of

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[6] Nighttime is defined as the hours between 5 P. M. and 8 A. M., Customs Regulations 1937, Art. 1462; 46 Stat. 708, *supra,* note 3.

[7] See note 3, *supra.* Customs Regulations 1931, Art. 1232, was as follows:

"Art.1232. Accounting for Overtime.—(a) Upon receipt of any payments for the services of officers and employees at night or on Sundays or holidays, collectors shall immediately deposit the same in their special deposit accounts and make payment therefrom by check to the officers and employees who rendered the services, and refund in the same manner any funds deposited in excess, these funds to be accounted for in the same manner as other moneys deposited in special deposit accounts."

[8] We doubt whether or not the Government presents this question in its petition for certiorari. As it is the basis of the litigation, however, we resolve that doubt in favor of an adjudicaton of this issue.

[9] Hearings on H. R. 9525, 61st Cong., 2d Sess., pp. 461, 463, 464–465; Hearings on H. R. 6577, 66th Cong., 1st Sess., 13. When the 1920 amendment was under consideration, its sponsor, Senator Calder, said: "the shipowner would pay the collector for it, and then, in turn, the men would be paid by the Government." 59 Cong. Rec. 640.

its dependents, we held that the Government's failure to collect did not give rise to a liability. *Creek Nation* v. *United States,* 318 U. S. 629, 637, 639. In that case we said that authorization to collect did not create a mandatory duty, particularly where the Indians also might have sued. Likewise, under similar circumstances, we have determined that over-collection did not create liability for reimbursement. *United States* v. *Algoma Lumber Co.,* 305 U. S. 415, 418–19, 423. But here the United States is neither protector nor agent. It is an employer who issues orders to the inspectors directing the performance of services. The work is done under the statutes. No inspector may "receive any salary in connection with his services as such an official or employee from any source other than the Government of the United States." Act of March 3, 1917, c. 163, 39 Stat. 1106. These payments are made by the licensees to the collector at rates fixed by the Secretary of the Treasury. This is extra compensation over and above the annual salary, not a payment from licensees. Section 451 requires a bond from the licensee to "pay the compensation and expenses of the customs officers," but the payment must be made to the collector under § 5. These facts lead us to the view that the statutes create an obligation on the part of the United States to pay to inspectors such sums as they may earn under their provisions.[10]

[10] The First Deficiency Appropriation Act, fiscal year 1936, 49 Stat. 1636, June 22, 1936, and so within the period covered by this suit, made the appropriation for the Bureau of Customs "available" for payment of these claims. This has been continued, 56 Stat. 150, 155. The Treasury and Post Office Departments Appropriation Act of 1944, Public Law 102, 78th Cong., 1st Sess., c. 179, slip law p. 7, 57 Stat. 250, 256, changed the form of the authorization from making the appropriations available for this payment to a direct appropriation for payment. But see Hearings, Subcommittee of the Committee on Ways and Means (House) on H. R. 6577, 66th Cong., 1st Sess., p. 13.

We come then to an examination of the extent of the obligation under the several sections heretofore quoted in notes 2 and 3. From the earliest days, customs inspections have normally proceeded in daylight. By special license, the work of the customs might be performed at night.[11] Inspectors were on duty continuously and at first were paid on a per diem basis.[12] By the Act of March 3, 1873, R. S. § 2871, the practice of licensees of paying extra compensation for nighttime service [13] (between sunset and sunrise) was formalized by authorizing the collector to fix reasonable extra compensation and to collect and distribute it among the inspectors. The provisions of that section gradually were extended to additional employees and to different circumstances. 23 Stat. 53, 59; 34 Stat. 633. In 1911 further changes were made by an Act for lading and unlading vessels. 36 Stat. 901. Section 5 under examination here emerges there in nearly its present form. Extra compensation for nighttime services was continued and was authorized for the first time for Sundays and holidays.[14] The latest changes were made in

[11] 1 Stat. 665, § 50.

[12] The Government brief furnishes us a convenient summary of the pay legislation: "The pay originally fixed at $2 per diem (Act of March 2, 1799, 1 Stat. 704, 706) was gradually increased to a maximum of $6 in 1909 and $7.80 in 1923 (Act of April 26, 1816, 3 Stat. 306; Rev. Stat. § 2733; Act of April 29, 1864, 13 Stat. 61; Act of March 4, 1909, 35 Stat. 1065, Sec. 2; Act of March 4, 1923, 42 Stat. 1453). By the Act of May 29, 1928, 45 Stat. 955 (19 U. S. C. 6 (a)), customs inspectors were given fixed salaries and paid on annual basis. Compensation of respondents is $2,100 per annum, which may be increased by promotion to a maximum of $3,300. Even prior to 1928, when compensation was changed to an annual basis, customs inspectors, regularly employed and paid on a per diem basis, were paid for 365 days . . . thus receiving the equivalent of an annual salary."

[13] S. Rep. No. 380, 41st Cong., 3d Sess., pp. 42, 139.

[14] Nighttime was apparently administratively determined to be between 6 P. M. and 7 A. M., 59 Cong. Rec. 2171; Hearings before the Committee on Ways and Means, House of Representatives (75th

§ 5 in 1920. "Night" services became "overtime" services. Sundays and holidays were placed at the beginning of the section in juxtaposition with "hours" which were fixed at from 8 A. M. to 5 P. M. The last proviso vesting authority in the Collector of Customs to regulate the hours of employees "so as to agree with prevailing working hours in the ports" was added.[15] The tariff Act of 1922, §§ 401, 450 and 451, extended the provisions of § 5 of the lading and unlading act so as to cover passengers and baggage arriving by vehicle. These sections as they now appear in the Tariff Act of 1930 are in note 3, *supra.*

The Collector of Customs at Detroit, during the years in question, assigned inspectors to tours of duty of eight hours each day, which tours might be at any time within a twenty-four hour period.[16] The length of the weekly tour varied with the post and with the state of the federal legislation. The findings of the Court of Claims as to the actual results are set out in the note below.[17] In the

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Cong., 1st Sess.), on H. R. 6738 (one of the bills which became the Customs Administration Act of 1938), amending § 451 of the Tariff Act of 1930 (Act of June 25, 1938, c. 679, § 9, 52 Stat. 1082), p. 185.

[15] See note 2 and for a graphic explanation of the changes, see *International Ry. Co.* v. *Davidson,* 257 U. S. 506, 510.

[16] This was settled practice. *International Ry. Co.* v. *Davidson,* 257 U. S. 506, 508.

[17] "4. As used in these findings the word 'nighttime' refers to the period 5 o'clock p. m. of any day to 8 o'clock a. m. of the next day, and the word 'daytime' to the period 8 o'clock a. m. of any day to 5 o'clock p. m. of the same day. 'Excess pay' refers to pay in excess of the inspector's annual salary. The word 'week-day' refers to any day of the week other than Sundays or whole holidays, and the word 'holiday' refers to a holiday of not less than 24 hours.

"5. Before the opening of the Ambassador Bridge November 15, 1929, all customs inspectors at the port of Detroit were regularly assigned to eight-hour tours of duty, which might be any period of that length within the 24 hours of any day of the week, including Sundays and holidays. They did not receive for nighttime services performed on such tours weekdays, Sundays, or holidays, any excess pay, but they did receive excess pay for daytime service so performed

administration of customs, regulations based on the sections of the Tariff Act of 1930 and § 5 of the Act of 1911 were issued by the Treasury Department. Customs Reg-

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on Sundays or holidays. The inspectors had an eight-hour day and a 56-hour week.

"This practice, however, did not wholly prevail at the Michigan Central Railway, where for certain periods prior to November 15, 1929, excess pay was not allowed for daytime service on Sundays or holidays.

"6. Upon the opening of the Ambassador Bridge November 15, 1929, there was a change in practice at the port of Detroit.

"At the Detroit and Windsor Ferry, the Walkerville Ferry, the Detroit and Canada Tunnel, the Ambassador Bridge, and the freight yard of the Michigan Central Railway, the customs inspectors were given an eight-hour day and a 48-hour week.

"Excess pay was discontinued for daytime service performed on Sundays or holidays, within the 48-hour week. No excess pay was given for nighttime service performed Sundays, holidays, or weekdays, within the 48-hour week.

"At the Michigan Central Railway passenger station and the Wabash Railway and Pere Marquette Railway ferries, and the Grand Trunk Railway Slip Dock the hours continued as before, with an eight-hour day and a 56-hour week. Excess pay was continued at these last four places for daytime service performed on Sundays and holidays, even though within the 56-hour limit, but no excess pay was given for nighttime service there on Sundays, holidays, or weekdays, performed within the 56-hour period.

"After March 3, 1931, the date of going into effect of the Saturday half-holiday for Federal employees, the hours of employment per week were reduced to 44 at the Detroit and Windsor Ferry, the Walkerville Ferry, the Detroit and Canada Tunnel, the Ambassador Bridge and the freight yard of the Michigan Central Railway, and to 52 hours per week at the passenger station of the Michigan Central Railway, at the Wabash Railway and Pere Marquette Railway ferries, and at the Grand Trunk Railway Slip Dock, with conditions of excess pay as before but within and based upon the new period of 44 hours. Pay in excess of their annual salaries was given to inspectors for time served in excess of 44 hours per week at the passenger station of the Michigan Central Railway, at the Wabash Railway and Pere Marquette Railway ferries and at the Grand Trunk Railway Slip Dock notwithstanding the 52-hour week."

ulations 1931 and 1937. So far as here pertinent they are substantially alike.[18]

The legislative history of the various acts makes clear the intention of Congress to allow extra compensation only when there are overtime services in the sense of work hours in addition to the regular daily tour of duty without regard to the period within the twenty-four hours when the regular daily tour is performed. Congressman Moore

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[18] The references are to the 1937 editions:

"Art. 1242. *Extra compensation.*—(*a*) Customs officers and employees performing services at night, or on Sundays and holidays, for lading or unlading of cargo or merchandise . . . shall receive extra compensation, to be paid by the master, owner, or agent of the vessel, or by the transportation company. . . ."

"(*e*) The extra compensation for overtime services is in addition to the regular compensation paid by the Government in the case of officers and employees whose compensation is fixed on the ordinary per diem basis and those receiving a compensation per month or per annum."

"Art. 1462. *Hours of service.*—(*a*) The official hours of officers, clerks, examiners, and employees, except those hereinafter specified, will be from 9 a. m. to 4:30 p. m., with a half hour for lunch.

"(*b*) The official hours of the following employees will be: Staff officers, station inspectors, and inspectors to whatever duty assigned, sugar samplers, samplers, laborers, storekeepers, and outside messengers, from 8 a. m. to 5 p. m., 1 hour for lunch; verifiers-openers-packers and openers and packers, 8 a. m. to 4:30 p. m., one-half hour for lunch; customs guards not less than 8 hours.

"(*c*) The above hours may be extended as the needs of the service demand, and such extension shall be without additional compensation, except as provided for in the act of February 13, 1911, as amended by the act of February 7, 1920.

"(*d*) The act of February 7, 1920, also provides that in those ports where customary working hours are other than those above mentioned, the collector of customs is vested with authority to regulate the hours of customs employees so as to agree with prevailing working hours in said port, but nothing contained in this proviso shall be construed in any manner to affect or alter the length of a working-day for customs employees or the overtime pay fixed for such employees. . . ."

explained the purpose as follows (Hearings on H. R. 9525, 61st Cong., 2d Sess., at p. 470): [19]

"Mr. Fordney. The compensation for night work would be more than twice the compensation for day work?

"Mr. Moore. I think not, but so long as a man works in the daytime and then continues his work through the night, if the expense does not come out of the Government he should be paid double."

At the hearings, just prior to the 1920 amendment to § 5, the understanding apparently was that extra compensation would begin only after a day's work of ten or eleven hours. The pay of an inspector was per diem and was paid for each day in the year. The Treasury Department wrote to the Chairman:

"The department has under consideration a plan whereby boarding officers and inspectors of customs will be assigned to duty in eight-hour shifts and will not, therefore, be called upon to work overtime and no extra compensation paid to officers assigned to the night shift. In order to carry out such plan it will be necessary to secure additional appropriations, and pending the adoption of the plan it will, of course, be necessary to detail inspectors and other employees for night work." [20]

There are other references in the hearings to the use of the "shift" system to secure twenty-four hour service without extra compensation. The legal basis for a collector's authority to assign inspectors in this way is the last proviso of § 5, note 2, *supra*. It gives the collector authority in those ports where customary working hours are other than 8 A. M. to 5 P. M. to regulate the hours

[19] This quotation is from hearings May 5, 1910, on a bill similar to the one which became the Act of February 13, 1911. Hearings before House Com. on Ways and Means, on H. R. 9525, 61st Cong., 2d Sess.

[20] Hearings before a subcommittee of the Committee on Ways and Means (House) on H. R. 6577, 66th Cong., 1st Sess., October 11, 1919, pp. 1–19, particularly p. 11.

of inspectors so as to agree with prevailing working hours in the ports. In speaking of the provision after its adoption, an official of the Customs Inspectors Association said at a hearing on an immigration inspectors bill (Hearings on S. 1504, S. 1774 and S. 2188, 67th Cong., 1st and 2d Sess., p. 130):

"To meet the condition at New Orleans, where the hours of labor are from 7 o'clock a. m. to 4 o'clock p. m., this proviso at the end of the bill was put in allowing collectors to adjust the inspectors' hours to the customary working hours at ports where the practices are different. This proviso also applies to the Canadian border at places where traffic is continuous during the 24 hours, such being the 'customary working hours'—and the inspectors work in 8–hour shifts without overtime." [21]

When we examine the language of § 5, either without extrinsic aid or with the benefit of the historical and legislative background, we find convincing authority to support the Government's view as to the meaning of overtime. "Overtime" as we pointed out above was substituted by the 1920 amendment of § 5 for "nighttime" services. The section requires employees to "remain" on duty. The usual instance of the payment of extra compensation would be for work after 5 P. M. by an inspector who had previously worked full time. The Government is correct in its interpretation of the last proviso of § 5 as permitting shifts in an inspector's regular hours of work. Night assignments are an old administrative practice. It is true that the proviso apparently was passed to meet a New Orleans situation but the language is general. It does not restrict the collector to minor variations in hours. We are led to the conclusion that overtime, as applied to week days, refers to hours longer than the daily limit of 8 A. M. to 5 P. M., nine hours with one

[21] See also Hearings, Senate Committee on Finance, 71st Cong., 1st Sess., on H. R. 2667, p. 494.

hour for food and rest. Furthermore, these tours of duty under the proviso are movable within the twenty-four hour period in accordance with prevailing working hours and the requirements of the service.

We do not see that *International Ry. Co.* v. *Davidson,* 257 U. S. 506, decides otherwise. That was a suit to enjoin the Collector from enforcing the license provisions of § 5, note 2, *supra,* as to passengers and baggage, against an international bridge. These were held inapplicable to bridges. In speaking of § 5, the opinion stated: "This substituted section defines what shall be deemed overtime, how the rate of extra pay shall be fixed, and what the work is, for which extra compensation shall be paid." It did not, however, interpret the statute or consider the proviso both of which we are called upon to do here. *Contra,* see *Ferguson* v. *Port Huron & Sarnia Ferry Co.,* 13 F. 2d 489, 492.

As to Sundays and holidays, we construe the statute to require extra compensation for inspectors without regard to the hours of the day or whether such services are additional to a regular weekly tour of duty. Before § 5 there was no authority to pay extra compensation for Sunday and holiday work. Revised Statutes, § 2871, allowed extra pay for nighttime work only. Somewhat indirectly the Act of February 13, 1911, gave Sunday and holiday pay and the 1920 amendment made the right to that extra compensation clear by saying extra compensation shall be paid inspectors "who may be required to remain on duty between the hours of five o'clock postmeridan and eight o'clock antemeridian, or on Sundays or holidays." This language and the Customs Regulations, note 18, *supra,* give an employee who works regular hours weekdays in daytime extra pay for Sunday and holiday work. The statute covers also those who work outside the statutory normal hours. Logically, if Sundays and holidays were not to receive extra compensation, without regard to whether services on those days were over-

time, there would have been no occasion to add Sundays and holidays to the overtime. Overtime would cover every situation.

The proviso of § 5 does not give the Collector of Customs authority to make assignments which deprive inspectors of this Sunday and holiday pay. It authorizes adjustments of hours but specifically forbids alteration of overtime pay. It is silent as to Sundays and holidays which leaves the earlier grant of extra compensation for those days in effect. Overtime pay is also applicable to Sundays and holidays when inspectors work longer than nine hours with one hour for food and rest. The rate of overtime extra compensation on Sundays and holidays is the same as the rate for week days. The administrative practice is uncertain. It does not support a contrary conclusion. The Government cites excerpts from testimony on amendatory bills, not here directly involved, which indicate the extra compensation is paid for Sundays and holidays.[22] Findings 5 and 6 of the Court of Claims, note 17, *supra,* show that extra compensation was paid at times for Sunday and holiday services.[23]

Two further contentions of the Government require consideration. It is said that § 5 of the 1911 Act as

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[22] Hearings on S. 1504, S. 1774 and S. 2188, Committee on Commerce (Senate), 67th Cong., 1st and 2d Sess., pp. 30, 31 and 130.

[23] See T. D. 49658, approved July 18, 1938, after the period here in question, where Art. 1242 (g) is amended to read as follows:

"(g) Extra compensation is not authorized for any service performed by a customs officer or employee pursuant to his assignment to a regular tour of duty at night or on a Sunday or holiday."

There are similar overtime acts in other services. They allow Sundays and holidays extra. Cf. 46 Stat. 1467, and U. S. Dept. of Labor, Bureau of Immigration General Order No. 175, April 27, 1931, (d); 49 Stat. 1380 and Dept. of Commerce Circular No. 307, December 17, 1938; Bureau of Marine Inspection and Navigation, II; 48 Stat. 1064, as amended, and Federal Communications Commission Rules and Regulations, Part 8, § 8.301 (i).

552826—44——41

amended does not apply to services rendered at a bridge or tunnel. This Court so held in 1922. *International Ry. Co.* v. *Davidson,* 257 U. S. 506, 512. At that time, the section's application was limited to "vessel or other conveyance." Since then §§ 401, 450 and 451 of the Tariff Act of 1922, 42 Stat. 858, 948, 954, and of the Tariff Act of 1930, note 3, *supra,* have expanded the instrumentalities to include every contrivance capable of being used as a means of transportation on land or water.[24] The difference in definition, we think, brings bridges and tunnels under the overtime pay requirements of § 5.

Finally the Government urges that in awarding compensation for "overtime" services credit should be allowed to it for that part of the base pay received for such services. We think the Congressional intention to give extra compensation precludes such a claim. The inspectors in addition to their regular salaries for week days are entitled to the statutory additional pay for overtime, Sundays and holidays.

The judgment of the Court of Claims is reversed and the proceeding remanded to that Court for determination of the claim of the inspectors in accordance with this opinion.

Reversed.

MR. CHIEF JUSTICE STONE is of the opinion that the judgment should be reversed in its entirety and the suits dismissed.

[The foregoing opinion of the Court is printed as amended by an order of February 28, 1944, *United States* v. *Myers,* 321 U. S.]

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[24] See also § 9 of the Customs Administration Act of 1938.

The change was deemed significant as to railroads. Compare *Mellon* v. *Minneapolis, St. P. & S. S. M. Ry. Co.,* 285 F. 980, with *Mellon* v. *Minneapolis, St. P. & S. S. M. Ry. Co.,* 11 F. 2d 332, 334.

CALIFORNIA ET AL. *v.* UNITED STATES ET AL.

NO. 20. APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.*

Argued December 6, 1943.—Decided January 3, 1944.

The Maritime Commission, upon finding that waterfront terminals in the San Francisco Bay area were engaged in preferential and unreasonable practices—resulting from excessive free time and non-compensatory demurrage charges—in violation of §§ 16 and 17 of the Shipping Act of 1916, as amended, prescribed schedules of maximum free time and minimum demurrage charges. The State and a municipality, which operated terminals but which were not common carriers by water, challenged the validity of the order as applied to them. *Held:*

1. The order was proper under § 17 which authorizes the Commission, when it finds unjust and unreasonable a regulation or practice relating to or connected with the receiving, handling, storing, or delivering of property, to "determine, prescribe, and order enforced a just and reasonable regulation or practice." P. 584.

2. It was proper to fix minimum demurrage charges which would reflect the cost of the service. P. 583.

3. The phrase "other person subject to this Act"—defined in § 1 as "any person not included in the term 'common carrier by water,' carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water"—includes the State and the municipality. P. 585.

4. Regulation of the activities and instrumentalities here involved—whether activities and instrumentalities of private or public agencies—was within the power of Congress under the Commerce Clause. P. 586.

46 F. Supp. 474, affirmed.

APPEALS from decrees of a District Court of three judges refusing to set aside an order of the Maritime Commission, 2 U. S. M. C. 588.

*Together with No. 22, *Oakland* v. *United States et al.*, also on appeal from the District Court of the United States for the Northern District of California.

Mr. Lucas E. Kilkenny, Deputy Attorney General of California, with whom *Mr. Robert W. Kenny,* Attorney General, was on the brief, for appellants in No. 20. *Mr. W. Reginald Jones* for appellant in No. 22.

Solicitor General Fahy, with whom *Assistant Attorney General Shea,* and *Messrs. Valentine Brookes* and *K. Norman Diamond* were on the brief, for the United States and the United States Maritime Commission, appellees.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

The United States Maritime Commission found that terminals along the commercial waterfront in the Port of San Francisco were engaged in preferential and unreasonable practices in that they allowed excessive free time and made non-compensatory charges for their services, all in violation of §§ 16 and 17 of the Shipping Act of 1916, as amended.[1] Accordingly, the Commission ordered the cessation of these proscribed practices, and in order to assure lawful practices it prescribed schedules of maximum

[1] Section 16, so far as here relevant, provides: "That it shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly—First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." c. 451, 39 Stat. 734, c. 581, 49 Stat. 1518, 46 U. S. C. § 815.

The pertinent portion of § 17 reads: "Every such carrier and every other person subject to this Act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the commission finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice." c. 451, 39 Stat. 734, Ex. Ord. No. 6166, c. 858, 49 Stat. 1987, 2016, 46 U. S. C. § 816.

free time periods and of minimum charges to reflect the actual cost of services. 2 U. S. M. C. 588. Two of the terminal operators in the San Francisco Bay area were the State of California and the City of Oakland. They brought these proceedings to set aside the Commission's order in so far as it applied to them. A district court of three judges denied relief. 46 F. Supp. 474. The case is here on direct appeal under § 31 of the Shipping Act (c. 451, 39 Stat. 738, Ex. Ord. No. 6166, c. 858, 49 Stat. 1987, 2016, 46 U. S. C. § 830) in connection with the Urgent Deficiencies Act of 1913 (c. 32, 38 Stat. 220, 28 U. S. C. §§ 47 and 47a) and the Judiciary Act of 1925 (c. 229, 43 Stat. 938, 28 U. S. C. § 345 (4)). California and Oakland denied the power of the Commission to issue the kind of order that it did, and in any event they urged that the authority under which the Commission acted does not or, if it does, cannot constitutionally cover their operations.

The legal issues depend for their solution upon an understanding of the situation to which the Commission addressed itself—the circumstances as the Commission found them and the appropriate way of dealing with them. What follows is a rapid summary of a voluminous record.

Through its Board of State Harbor Commissioners, California provides facilities for the handling of freight and passengers on the San Francisco waterfront, under a statute which prohibits the Board from making charges beyond the cost of furnishing such facilities and administering them. California Harbors and Navigation Code §§ 3080, 3084. Pier and office space is assigned by the Board to various steamship lines, and charges fixed by the Board are collected by these assignees for the Board. Except at two piers, the assignees handle the cargo, but the Board employs a staff of men to check all cargo and vessel movements and collect its charges. Oakland, through its Board of Port Commissioners, operates

piers and terminals which, like those of California, are designed to accommodate vessels in coastwise, intercoastal, offshore, and foreign trade. Whether the facilities are operated by the City directly or leased to another, the City prescribes and collects the charges.

In thus providing facilities for water-borne traffic, Oakland and California have for many years competed with privately-owned terminals in San Francisco Bay. Cutthroat competition ensued, with the inevitable chaos following abnormally low rates. In an attempt to remedy the situation, the California Railroad Commission investigated the operations of terminals in San Francisco Bay, and, more particularly pertinent for present purposes, the prevalent discrimination among users of the terminal services. The conclusions from this inquiry were embodied in an order issued by the Railroad Commission in 1936. 40 Calif. R. R. Comm. Decisions 107. But publicly-owned terminals, and therefore those of California and Oakland, are not subject to the jurisdiction of the Railroad Commission. Since these public bodies operated the major portion of the dock facilities in the area, the Railroad Commission naturally found it impossible to order adjustments in the practices of the private terminals unless the competing public bodies agreed to make similar adjustments. The order of the Commission was so conditioned. California and Oakland acceded to the recommendations in some respects but failed to do so as to practices now to be described.

When cargo is brought to a wharf for shipment or removed to a wharf from a ship, it is the custom to allow a period of "free time" during which the cargo may rest on the wharf without charge. The length of the free time is fixed, broadly speaking, by determining the period reasonably necessary for the shipper to assemble or to remove his goods and for the ship to load or to discharge. When cargo is left on the wharf beyond the free time

period, a charge called "wharf demurrage or storage" is assessed. The Railroad Commission recommended free time periods shorter than was the practice of California and Oakland, and wharf demurrage charges greater in many instances than those collected by them. These recommendations California and Oakland rejected. This impasse, due to the immunity of California and Oakland from state regulation, was followed by the proceedings before the United States Maritime Commission which resulted in the order now before us. Extended hearings were held before the Commission's examiner, at which the principal witnesses were officials of the Board and Oakland and an expert of the Railroad Commission. After full submission of the controversy, the examiner made his report and findings. On exceptions to some of his findings, the issues were again thoroughly canvassed before the Commission, and on September 11, 1941, it made its order.

The Commission found that there was a marked lack of uniformity in the free time periods allowed by the various terminals, and that to the extent that appellants' free time allowances were greater than those recommended by the Railroad Commission they were unreasonable and led to discrimination against those persons who did not and could not use extended free time. After consideration of the cost studies submitted by its experts as well as of the data introduced by appellants, the Commission further found that appellants' demurrage charges were less than the cost of the services and the carrying charges of the facilities which furnished them. It concluded that unless those who took advantage of wharf storage supplied revenue sufficient to meet the cost of the service, the burden would be shifted to those who paid appellants for other terminal services, such as docking of vessels, loading and unloading, and transportation privileges over and through the terminals. Accordingly,

the Commission ordered appellants to cease and desist from allowing greater periods of free time than those found reasonable by the Railroad Commission, and to abstain from collecting wharf demurrage and storage rates less than those prescribed by the California authority for private terminals.[2]

Having found violations of §§ 16 and 17, the Commission was charged by law with the duty of devising appropriate means for their correction. It could have issued an order generally prohibiting further preferential and unreasonable practices, leaving the parties to translate such a generality into concreteness and to devise their own remedies. The Commission chose to do otherwise. It can hardly be suggested that the protection of the national interest in interstate and foreign commerce or even the convenience of the parties would, as a matter of sensible and economic administration, limit the Commission to such negative means of dealing with the evils revealed on this record in one of our greatest ports. Cf. *Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177, 194. Explicit formulation of duties owed by a business subject to legal regulation is desirable if indeed not necessary. Only thus can it avoid the hazards of uncertainty whether its attempted compliance with an undefined requirement of law is in fact compliance. Neither industry nor the community which it serves is benefited by the explosion of intermittent lawsuits for determining the relative rights

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[2] The City of Oakland asks this Court to determine whether the Maritime Commission properly found that § 15 of the Shipping Act required Oakland to submit certain lease agreements for the Commission's approval. c. 451, 39 Stat. 733, Ex. Ord. No. 6166, c. 858, 49 Stat. 1987, 2016, 46 U. S. C. § 814. The Commission's order does not appear to require such filing. If this be an inadvertent or clerical omission, since Oakland's objection is founded on its basic contention that it is not subject to the Shipping Act, we need not further consider this subsidiary question.

of conflicting interests. What more natural for the Commission, having found disobedience of the law against discriminatory and unreasonable practices, than to define the outer bounds of practices that would not be unreasonable nor discriminatory.[3] And so the Commission fixed a schedule of maximum free time and another schedule for avoiding discrimination through non-compensatory charges. It acted on authoritative information and fully canvassed testimony in fixing the minimum charges that would reflect cost. It was proper to choose the cost standard, because just as unreasonably long free time tends to be parasitic on rates for other services, non-compensatory demurrage results in the same mischief. Cf. *Baltimore & Ohio R. Co.* v. *United States,* 305 U. S. 507, 524.

Appellants' objection is that while §§ 17 and 18 specifically give the Commission rate-making power over common carriers by water,[4] no such power is given over those

[3] *Booth S. S. Co.* v. *United States,* 29 F. Supp. 221, is an object lesson. In that case, the order of the Maritime Commission as to the charges to be imposed after free time was in general terms. Attempted compliance with that order led to conflict, and the Commission found it necessary to undertake new proceedings and to issue a new, more definite order.

[4] The following are the rate provisions in §§ 17 and 18. Section 17: "That no common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Whenever the commission finds that any such rate, fare, or charge is demanded, charged, or collected it may alter the same to the extent necessary to correct such unjust discrimination or prejudice and make an order that the carrier shall discontinue demanding, charging, or collecting any such unjustly discriminatory or prejudicial rate, fare, or charge." Section 18: "That every common carrier by water in interstate commerce shall establish, observe, and enforce just and reasonable rates, fares, charges, classifications, and tariffs, and just and reasonable regulations and practices relating thereto. . . . Whenever the commission finds that any rate, fare, charge, classification,

who, like California and Oakland, are not common carriers by water. We fully agree that no rate-making power such as the Commission has been given over water carriers is conferred over other persons subject to the Shipping Act. But the order of the Commission, though it pertains to demurrage charges, is not an exercise of conventional rate-making. By § 17 all those who are subject to the Act are under a duty to "establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property." When the Commission finds a breach of this duty, the same section authorizes it to "determine, prescribe, and order enforced a just and reasonable regulation or practice." The withholding of rate-making power for services other than water carriage does not qualify the unlimited grant to the Commission of the power to stop effectively all unjust and unreasonable practices in receiving, handling, storing or delivering property. Finding a wrong which it is duty-bound to remedy, the Maritime Commission, as the expert body established by Congress for safeguarding this specialized aspect of the national interest, may, within the general framework of the Shipping Act, fashion the tools for so doing. Cf. *United States Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474, 487; *Merchants Warehouse Co.* v. *United States*, 283 U. S. 501, 513. The only way to correct the preferential and unreasonable results of non-compensatory charges was to require compensatory charges. All that the Commission did was to translate that requirement from a generality into dollars and cents. That the phrase

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tariff, regulation, or practice, demanded, charged, collected, or observed by such carrier is unjust or unreasonable, it may determine, prescribe, and order enforced a just and reasonable maximum rate, fare, or charge, or a just and reasonable classification, tariff, regulation, or practice." c. 451, 39 Stat. 735, Ex. Ord. No. 6166, c. 858, 49 Stat. 1987, 2016, 46 U. S. C. § 817.

"regulation or practice" extends to such discrimination as that which resulted from non-compensatory demurrage charges is amply demonstrated by the application of the concept "practice" in comparable situations under the Interstate Commerce Act. *Adams* v. *Mills,* 286 U. S. 397, 409; *Baltimore & Ohio R. Co.* v. *United States,* 305 U. S. 507, 524.

We have disposed of the only serious question raised. The numerous other questions call for only summary treatment.

Since Oakland and California are not common carriers by water they are subject to the authority of the Commission only if they come within the designation "other person subject to this Act" as defined in § 1 of the Shipping Act. c. 451, 39 Stat. 728, c. 152, 40 Stat. 900, 46 U. S. C. § 801. The phrase covers "any person not included in the term 'common carrier by water,' carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water." And "person" "includes corporations, partnerships, and associations . . ." We need not waste time on useless generalities about statutory construction in order to conclude that entities other than technical corporations, partnerships and associations are "included" among the "persons" to whom the Shipping Act applies if its plain purposes preclude their exclusion. The crucial question is whether the statute, read in the light of the circumstances that gave rise to its enactment and for which it was designed, applies also to public owners of wharves and piers. California and Oakland furnished precisely the facilities subject to regulation under the Act, and with so large a portion of the nation's dock facilities, as Congress knew (53 Cong. Rec. 8276), owned or controlled by public instrumentalities, it would have defeated the very purpose for which Congress framed the scheme for regulating waterfront terminals to exempt

those operated by governmental agencies. We need not rest on inference to avoid a construction that would have such dislocating consequences. The manager of the bill which became the Shipping Act of 1916, speaking on the floor of the House, left no doubt that the legislation was designed to prevent discrimination no less by public than by private owners. 53 Cong. Rec. 8276. And whatever may be the limitations implied by the phrase "in connection with a common carrier by water" which modifies the grant of jurisdiction over those furnishing "wharfage, dock, warehouse, or other terminal facilities," there can be no doubt that wharf storage facilities provided at shipside for cargo which has been unloaded from water carriers are subject to regulation by the Commission. Finally, it is too late in the day to question the power of Congress under the Commerce Clause to regulate such an essential part of interstate and foreign trade as the activities and instrumentalities which were here authorized to be regulated by the Commission, whether they be the activities and instrumentalities of private persons or of public agencies. *United States* v. *California,* 297 U. S. 175, 184–5.

Due consideration has been given to other objections, referring to the sufficiency of the evidence before the Commission, the adequacy of its findings, and its competence, but they require no discussion.

Affirmed.

MR. JUSTICE ROBERTS:

I dissent. I pass the contentions of the appellants respecting the power of Congress to regulate the State's activities under consideration, the scope of the term "person" as used in the Shipping Act, and the alleged absence of any grant of power to the Commission to fix minimum rates for water carriers or others. This for the reason that, in my opinion, Congress has withheld from the Com-

mission authority to fix or regulate the rates or charges of those furnishing wharfage facilities.

The Shipping Act of 1916, in all parts here relevant, has remained as it was originally adopted, though amended in other respects by later legislation. In § 1,[1] after defining carriers by water, which are the primary subject of its regulatory provisions, the Act adds:

"The term 'other person subject to this Act' means any person not included in the term 'common carrier by water,' carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water."

Section 16[2] provides:

"That it shall be unlawful *for any common carrier by water, or other person subject to this Act,* either alone or in conjunction with any other person, directly or indirectly—

"First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." [Italics supplied.]

Section 17,[3] in pertinent part, provides:

"*No common carrier by water in foreign commerce* shall demand, charge, or collect *any rate, fare, or charge which is unjustly discriminatory between shippers or ports,* or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Whenever the commission finds that any such rate, fare, or charge is demanded, charged, or collected it may alter the same to the extent necessary to correct such unjust discrimination

[1] 46 U. S. C. 801.
[2] 46 U. S. C. 815.
[3] 46 U. S. C. 816.

or prejudice and make an order that the carrier shall discontinue demanding, charging, or collecting any such unjustly discriminatory or prejudicial *rate, fare, or charge.* [Italics supplied.]

"*Every such carrier and every other person subject to this Act* shall establish, observe, and enforce just and reasonable *regulations and practices* relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the commission finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice." [Italics supplied.]

Section 18,[4] so far as relevant, is:

"*Every common carrier by water in interstate commerce* shall establish, observe, and enforce just and reasonable *rates, fares, charges, classifications, and tariffs,* and *just and reasonable regulations and practices relating thereto* and to the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the carrying of personal, sample, and excess baggage, the facilities for transportation, and all other matters relating to or connected with the receiving, handling, transporting, storing, or delivering of property." [Italics supplied.]

The Commission concedes, as it must, that whereas the Act definitely deals with the rates of water carriers, and places those rates under the regulatory jurisdiction of the Commission, it contains no such specific mandate to the Commission concerning the rates or charges of wharfingers. It must equally be conceded that the order of the Commission under review does establish minimum rates and charges for services rendered by those maintaining and operating wharves used by water carriers. In the absence of specific authority in this behalf, the Commission turned to that portion of § 16 which prohibits not only water carriers but other persons subject to the Act from

[4] 46 U. S. C. 817.

granting preferences or practicing discrimination, and that portion of § 17 which comprehends both water carriers and other persons subject to the Act and enjoins just and reasonable regulations and practices respecting receiving, handling, storage or delivery of property.

The oversimplified argument in support of this position is that a rate or charge is, in a broad sense, a regulation or practice. The difficulty with the argument is that, in the Interstate Commerce Act, and elsewhere, Congress has always sharply distinguished, as it did in the present Act, between rates and charges on the one hand, and regulations and practices on the other. The legislative history of the Shipping Act indicates that Congress well understood that states and municipalities, in order to encourage the flow of commerce through their ports, had established public wharves and that Congress intended that, as respects such public facilities, preferences and discriminations should not be permitted. But there is nothing in the legislative history to indicate that, in the teeth of the plain words of the statute as enacted, Congress had in mind conferring power to regulate the rates and charges for such publicly owned facilities; much less that if a state or its agency deemed it advisable and in the public interest to operate such facilities at low rates, to encourage the flow of commerce through its ports, the Commission could put a floor under its rates and compel it in effect to aid competing private enterprise.

Little need be, or can be, added to the clearly expressed words of the statute. It speaks for itself, and I think the court ought not to permit the use of a prohibition against practices to be availed of to write additional provisions into the section dealing with rates and charges.

The attempt to bolster this process, on the part of the Commission, by reference to the decisions of this court seems to me futile. The Commission and the Government rely principally upon *Baltimore & Ohio R. Co.* v.

United States, 305 U. S. 507. That case obviously not only fails to support the order but seems to me to be an authority against it. The case arose under the Interstate Commerce Act. It dealt with a practice of carriers which was to maintain warehouses in respect of which low cost storage was afforded to persons who would ship over the carrier's lines. In essence the practice of warehousing at such low rates operated as a rebate or discrimination in the carrier's transportation rate favoring any shipper who would use the carrier's lines and disfavoring those who would not, or could not, do so. Here we are not concerned with water carriers' rates, fares or charges. The Commission's order is directed at services rendered by privately and publicly owned wharves, applicable to all seeking to avail themselves of the services which are proffered to all alike. If any discrimination by the appellants as between shippers were pointed out it may well be that the Commission might order the discontinuance of such discrimination. That is not this case. The Commission purports to order the discontinuance of a discrimination but, in reality, orders a rise in the level of rates applicable without discrimination to all those who can and do use the proffered services. Its order is a thinly veiled attempt to cloak a rate order under the guise of a regulation. I think it plain that Congress granted no such power.

I would reverse the judgment.

MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, and MR. JUSTICE MURPHY join in this dissent.

FEDERAL POWER COMMISSION ET AL. *v.* HOPE NATURAL GAS CO.

NO. 34. CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.*

Argued October 20, 21, 1943.—Decided January 3, 1944.

1. The validity of an order of the Federal Power Commission fixing rates under the Natural Gas Act is to be determined on judicial review by whether the impact or total effect of the order is just and reasonable rather than by the method of computing the rate base. P. 602.
2. One who seeks to have set aside an order of the Federal Power Commission fixing rates under the Natural Gas Act has the burden of showing convincingly that it is unjust and unreasonable in its consequences. P. 602.
3. An order of the Federal Power Commission reducing respondent's rates for sales of natural gas in interstate commerce, *held* valid under the Natural Gas Act. P. 603.

   The rate base determined by the Commission was found by it to be the "actual legitimate cost" of the company's interstate property, less depletion and depreciation, plus allowances for unoperated acreage, working capital, and future net capital additions. "Reproduction cost new" and "trended original cost" were given no weight. Accrued depletion and depreciation and the annual allowance for depletion and depreciation were determined by application of the "economic-service-life" method to "actual legitimate cost."
4. Considering the amount of the annual return which the company would be permitted to earn on its property in interstate service, and the various factors which that return reflects, this Court is unable to say that the rates fixed by the Commission are not "just and reasonable" under the Act. P. 604.
5. Rates which enable a natural gas company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed can not be condemned as unjust and unreasonable under the Natural Gas Act, even though

*Together with No. 35, *City of Cleveland* v. *Hope Natural Gas Co.*, also on writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit.

552826—44——42

they might produce only a meager return on a rate base computed on the "present fair value" method. P. 605.

6. The rationale of the decision renders it unnecessary to determine whether the Commission's exclusion from the rate base of well-drilling and other costs, previously charged to operating expenses, was consistent with the "prudent investment" theory as developed and applied in particular cases. P. 605.
7. *United Railways Co.* v. *West*, 280 U. S. 234, so far as it rejects cost as the basis of depreciation allowances, is disapproved. P. 606.
8. The requirements of the Constitution in respect of rates are not more exacting than the standards of the Act; and a rate order valid under the latter is consistent with the former. P. 607.
9. In fixing "just and reasonable" rates under §§ 4 and 5 of the Natural Gas Act, for natural gas sold in interstate commerce by a private operator through an established distribution system, the Commission was not required to take into consideration the indirect benefits—affecting the economy, conservation policies, and tax revenues—which the producing State might derive from higher valuations and rates. P. 609.
10. The suggestion that the Commission did not allow for gas production a return sufficient to induce private enterprise to perform completely and efficiently its functions for the public is unsupported. P. 615.
11. The Commission is not empowered by the provisions of §§ 4 and 5, which authorize it to fix "just and reasonable" rates, to fix rates calculated to discourage intrastate resales for industrial use. P. 616.
12. The question whether the rates charged by the company discriminate against domestic users and in favor of industrial users is not presented. P. 617.
13. Findings of the Commission as to the lawfulness of past rates, *held* not reviewable under § 19 (b) of the Act. P. 618.

134 F. 2d 287, reversed.

CERTIORARI, 319 U. S. 735, to review a decree setting aside an order of the Federal Power Commission, 44 P. U. R. (N. S.) 1, under the Natural Gas Act.

Assistant Attorney General Shea, with whom *Solicitor General Fahy* and *Messrs. Paul A. Freund, K. Norman*

Diamond, Melvin Richter, Charles V. Shannon, Milford Springer, A. F. O'Neil, Clyde B. MacDonald, Harold A. Scragg, and *Samuel Graff Miller* were on the brief, for petitioners in No. 34; and *Mr. Spencer W. Reeder,* with whom *Messrs. Robert E. May* and *Robert M. Morgan* were on the brief, for petitioner in No. 35.

Mr. William B. Cockley, with whom *Messrs. Walter J. Milde* and *William A. Dougherty* were on the brief, for respondent.

By Special leave of Court, *Mr. M. M. Neely,* Governor of West Virginia, with whom *Messrs. Ira J. Partlow,* Assistant Attorney General, and *W. W. Goldsmith* were on the brief, for the State of West Virginia, as *amicus curiae,* urging affirmance.

Briefs of *amici curiae* were filed by *Mr. Gay H. Brown,* on behalf of the Public Service Commission of New York, and *Messrs. John E. Benton* and *Frederick G. Hamley,* on behalf of the National Association of Railroad and Utilities Commissioners, in No. 34, urging reversal; and by *Messrs. Donald C. McCreery* and *Robert D. Garver,* on behalf of the Cities Service Gas Co., in Nos. 34 and 35, urging affirmance.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The primary issue in these cases concerns the validity under the Natural Gas Act of 1938 (52 Stat. 821, 15 U. S. C. § 717) of a rate order issued by the Federal Power Commission reducing the rates chargeable by Hope Natural Gas Co., 44 P. U. R. (N. S.) 1. On a petition for review of the order made pursuant to § 19 (b) of the Act, the

Circuit Court of Appeals set it aside, one judge dissenting. 134 F. 2d 287. The cases are here on petitions for writs of certiorari which we granted because of the public importance of the questions presented.

Hope is a West Virginia corporation organized in 1898. It is a wholly owned subsidiary of Standard Oil Co. (N. J.). Since the date of its organization, it has been in the business of producing, purchasing and marketing natural gas in that state.[1] It sells some of that gas to local consumers in West Virginia. But the great bulk of it goes to five customer companies which receive it at the West Virginia line and distribute it in Ohio and in Pennsylvania.[2] In July 1938 the cities of Cleveland and Akron filed complaints with the Commission charging that the rates collected by Hope from East Ohio Gas Co. (an affiliate of Hope which distributes gas in Ohio) were excessive and unreasonable. Later in 1938 the Commission on its own motion instituted an investigation to determine the reasonableness of all of Hope's interstate rates. In March

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[1] Hope produces about one-third of its annual gas requirements and purchases the rest under some 300 contracts.

[2] These five companies are the East Ohio Gas Co., the Peoples Natural Gas Co., the River Gas Co., the Fayette County Gas Co., and the Manufacturers Light & Heat Co. The first three of these companies are, like Hope, subsidiaries of Standard Oil Co. (N. J.). East Ohio and River distribute gas in Ohio, the other three in Pennsylvania. Hope's approximate sales in m. c. f. for 1940 may be classified as follows:

Local West Virginia sales	11,000,000
East Ohio	40,000,000
Peoples	10,000,000
River	400,000
Fayette	860,000
Manufacturers	2,000,000

Hope's natural gas is processed by Hope Construction & Refining Co., an affiliate, for the extraction of gasoline and butane. Domestic Coke Corp., another affiliate, sells coke-oven gas to Hope for boiler fuel.

1939 the Public Utility Commission of Pennsylvania filed a complaint with the Commission charging that the rates collected by Hope from Peoples Natural Gas. Co. (an affiliate of Hope distributing gas in Pennsylvania) and two non-affiliated companies were unreasonable. The City of Cleveland asked that the challenged rates be declared unlawful and that just and reasonable rates be determined from June 30, 1939 to the date of the Commission's order. The latter finding was requested in aid of state regulation and to afford the Public Utilities Commission of Ohio a proper basis for disposition of a fund collected by East Ohio under bond from Ohio consumers since June 30, 1939. The cases were consolidated and hearings were held.

On May 26, 1942, the Commission entered its order and made its findings. Its order required Hope to decrease its future interstate rates so as to reflect a reduction, on an annual basis, of not less than $3,609,857 in operating revenues. And it established "just and reasonable" average rates per m. c. f. for each of the five customer companies.[3] In response to the prayer of the City of Cleveland the Commission also made findings as to the lawfulness of past rates, although concededly it had no authority under the Act to fix past rates or to award reparations. 44 P. U. R. (N. S.) p. 34. It found that the rates collected by Hope from East Ohio were unjust, unreasonable, excessive and therefore unlawful, by $830,892 during 1939, $3,219,551 during 1940, and $2,815,789 on an annual basis since 1940. It further found that just, reasonable, and lawful rates for gas sold by Hope to East Ohio for resale for ultimate public consumption were those required

[3] These required minimum reductions of 7¢ per m. c. f. from the 36.5¢ and 35.5¢ rates previously charged East Ohio and Peoples, respectively, and 3¢ per m. c. f. from the 31.5¢ rate previously charged Fayette and Manufacturers.

to produce $11,528,608 for 1939, $11,507,185 for 1940 and $11,910,947 annually since 1940.

The Commission established an interstate rate base of $33,712,526 which, it found, represented the "actual legitimate cost" of the company's interstate property less depletion and depreciation and plus unoperated acreage, working capital and future net capital additions. The Commission, beginning with book cost, made certain adjustments not necessary to relate here and found the "actual legitimate cost" of the plant in interstate service to be $51,957,416, as of December 31, 1940. It deducted accrued depletion and depreciation, which it found to be $22,328,016 on an "economic-service-life" basis. And it added $1,392,021 for future net capital additions, $566,105 for useful unoperated acreage, and $2,125,000 for working capital. It used 1940 as a test year to estimate future revenues and expenses. It allowed over $16,000,000 as annual operating expenses—about $1,300,000 for taxes, $1,460,000 for depletion and depreciation, $600,000 for exploration and development costs, $8,500,000 for gas purchased. The Commission allowed a net increase of $421,160 over 1940 operating expenses, which amount was to take care of future increase in wages, in West Virginia property taxes, and in exploration and development costs. The total amount of deductions allowed from interstate revenues was $13,495,584.

Hope introduced evidence from which it estimated reproduction cost of the property at $97,000,000. It also presented a so-called trended "original cost" estimate which exceeded $105,000,000. The latter was designed "to indicate what the original cost of the property would have been if 1938 material and labor prices had prevailed throughout the whole period of the piecemeal construction of the company's property since 1898." 44 P. U. R. (N. S.), pp. 8–9. Hope estimated by the "per cent condition" method accrued depreciation at about 35% of

reproduction cost new. On that basis Hope contended for a rate base of $66,000,000. The Commission refused to place any reliance on reproduction cost new, saying that it was "not predicated upon facts" and was "too conjectural and illusory to be given any weight in these proceedings." *Id.*, p. 8. It likewise refused to give any "probative value" to trended "original cost" since it was "not founded in fact" but was "basically erroneous" and produced "irrational results." *Id.*, p. 9. In determining the amount of accrued depletion and depreciation the Commission, following *Lindheimer* v. *Illinois Bell Tel. Co.*, 292 U. S. 151, 167–169; *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U. S. 575, 592–593, based its computation on "actual legitimate cost." It found that Hope during the years when its business was not under regulation did not observe "sound depreciation and depletion practices" but "actually accumulated an excessive reserve" [4] of about $46,000,000. *Id.*, p. 18. One member of the Commission thought that the entire amount of the reserve should be deducted from "actual legitimate cost" in determining the rate base.[5] The majority of the

[4] The book reserve for interstate plant amounted at the end of 1938 to about $18,000,000 more than the amount determined by the Commission as the proper reserve requirement. The Commission also noted that "twice in the past the company has transferred amounts aggregating $7,500,000 from the depreciation and depletion reserve to surplus. When these latter adjustments are taken into account, the excess becomes $25,500,000, which has been exacted from the ratepayers over and above the amount required to cover the consumption of property in the service rendered and thus to keep the investment unimpaired." 44 P. U. R. (N. S.), p. 22.

[5] That contention was based on the fact that "every single dollar in the depreciation and depletion reserves" was taken "from gross operating revenues whose only source was the amounts charged customers in the past for natural gas. It is, therefore, a fact that the depreciation and depletion reserves have been contributed by the customers and do not represent any investment by Hope." *Id.*, p. 40. And see *Railroad Commission* v. *Cumberland Tel. & T. Co.*, 212 U. S. 414, 424–425; 2 Bonbright, Valuation of Property (1937), p. 1139.

Commission concluded, however, that where, as here, a business is brought under regulation for the first time and where incorrect depreciation and depletion practices have prevailed, the deduction of the reserve requirement (actual existing depreciation and depletion) rather than the excessive reserve should be made so as to lay "a sound basis for future regulation and control of rates." *Id.*, p. 18. As we have pointed out, it determined accrued depletion and depreciation to be $22,328,016; and it allowed approximately $1,460,000 as the annual operating expense for depletion and depreciation.[6]

Hope's estimate of original cost was about $69,735,000—approximately $17,000,000 more than the amount found by the Commission. The item of $17,000,000 was made up largely of expenditures which prior to December 31, 1938, were charged to operating expenses. Chief among those expenditures was some $12,600,000 expended

[6] The Commission noted that the case was "free from the usual complexities involved in the estimate of gas reserves because the geologists for the company and the Commission presented estimates of the remaining recoverable gas reserves which were about one per cent apart." 44 P. U. R. (N. S.), pp. 19–20.

The Commission utilized the "straight-line-basis" for determining the depreciation and depletion reserve requirements. It used estimates of the average service lives of the property by classes based in part on an inspection of the physical condition of the property. And studies were made of Hope's retirement experience and maintenance policies over the years. The average service lives of the various classes of property were converted into depreciation rates and then applied to the cost of the property to ascertain the portion of the cost which had expired in rendering the service.

The record in the present case shows that Hope is on the lookout for new sources of supply of natural gas and is contemplating an extension of its pipe line into Louisiana for that purpose. The Commission recognized in fixing the rates of depreciation that much material may be used again when various present sources of gas supply are exhausted, thus giving that property more than scrap value at the end of its present use.

in well-drilling prior to 1923. Most of that sum was expended by Hope for labor, use of drilling-rigs, hauling, and similar costs of well-drilling. Prior to 1923 Hope followed the general practice of the natural gas industry and charged the cost of drilling wells to operating expenses. Hope continued that practice until the Public Service Commission of West Virginia in 1923 required it to capitalize such expenditures, as does the Commission under its present Uniform System of Accounts.[7] The Commission refused to add such items to the rate base stating that "No greater injustice to consumers could be done than to allow items as operating expenses and at a later date include them in the rate base, thereby placing multiple charges upon the consumers." *Id.*, p. 12. For the same reason the Commission excluded from the rate base about $1,600,000 of expenditures on properties which Hope acquired from other utilities, the latter having charged those payments to operating expenses. The Commission disallowed certain other overhead items amounting to over $3,000,000 which also had been previously charged to operating expenses. And it refused to add some $632,000 as interest during construction since no interest was in fact paid.

Hope contended that it should be allowed a return of not less than 8%. The Commission found that an 8% return would be unreasonable but that 6½% was a fair rate of return. That rate of return, applied to the rate base of $33,712,526, would produce $2,191,314 annually, as compared with the present income of not less than $5,801,171.

The Circuit Court of Appeals set aside the order of the Commission for the following reasons. (1) It held that the rate base should reflect the "present fair value" of the

[7] See Uniform System of Accounts prescribed for Natural Gas Companies effective January 1, 1940, Account No. 332.1.

property, that the Commission in determining the "value" should have considered reproduction cost and trended original cost, and that "actual legitimate cost" (prudent investment) was not the proper measure of "fair value" where price levels had changed since the investment. (2) It concluded that the well-drilling costs and overhead items in the amount of some $17,000,000 should have been included in the rate base. (3) It held that accrued depletion and depreciation and the annual allowance for that expense should be computed on the basis of "present fair value" of the property, not on the basis of "actual legitimate cost."

The Circuit Court of Appeals also held that the Commission had no power to make findings as to past rates in aid of state regulation. But it concluded that those findings were proper as a step in the process of fixing future rates. Viewed in that light, however, the findings were deemed to be invalidated by the same errors which vitiated the findings on which the rate order was based.

Order Reducing Rates. Congress has provided in § 4 (a) of the Natural Gas Act that all natural gas rates subject to the jurisdiction of the Commission "shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful." Sec. 5 (a) gives the Commission the power, after hearing, to determine the "just and reasonable rate" to be thereafter observed and to fix the rate by order. Sec. 5 (a) also empowers the Commission to order a "decrease where existing rates are unjust, . . . unlawful, or are not the lowest reasonable rates." And Congress has provided in § 19 (b) that on review of these rate orders the "finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." Congress, however, has provided no formula by which the "just and reasonable" rate is to be determined. It has not filled in the

details of the general prescription [8] of § 4 (a) and § 5 (a). It has not expressed in a specific rule the fixed principle of "just and reasonable."

When we sustained the constitutionality of the Natural Gas Act in the *Natural Gas Pipeline Co.* case, we stated that the "authority of Congress to regulate the prices of commodities in interstate commerce is at least as great under the Fifth Amendment as is that of the States under the Fourteenth to regulate the prices of commodities in intrastate commerce." 315 U. S. p. 582. Rate-making is indeed but one species of price-fixing. *Munn* v. *Illinois,* 94 U. S. 113, 134. The fixing of prices, like other applications of the police power, may reduce the value of the property which is being regulated. But the fact that the value is reduced does not mean that the regulation is invalid. *Block* v. *Hirsh,* 256 U. S. 135, 155–157; *Nebbia* v. *New York,* 291 U. S. 502, 523–539 and cases cited. It does, however, indicate that "fair value" is the end product of the process of rate-making not the starting point as the Circuit Court of Appeals held. The heart of the matter is that rates cannot be made to depend upon "fair value" when the value of the going enterprise depends on earnings under whatever rates may be anticipated.[9]

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[8] Sec. 6 of the Act comes the closest to supplying any definite criteria for rate making. It provides in subsection (a) that, "The Commission may investigate and ascertain the actual legitimate cost of the property of every natural-gas company, the depreciation therein, and, when found necessary for rate-making purposes, other facts which bear on the determination of such cost or depreciation and the fair value of such property." Subsection (b) provides that every natural-gas company on request shall file with the Commission a statement of the "original cost" of its property and shall keep the Commission informed regarding the "cost" of all additions, etc.

[9] We recently stated that the meaning of the word "value" is to be gathered "from the purpose for which a valuation is being made. Thus the question in a valuation for rate making is how much a utility

We held in *Federal Power Commission* v. *Natural Gas Pipeline Co., supra,* that the Commission was not bound to the use of any single formula or combination of formulae in determining rates. Its rate-making function, moreover, involves the making of "pragmatic adjustments." *Id.,* p. 586. And when the Commission's order is challenged in the courts, the question is whether that order "viewed in its entirety" meets the requirements of the Act. *Id.,* p. 586. Under the statutory standard of "just and reasonable" it is the result reached not the method employed which is controlling. Cf. *Los Angeles Gas & Electric Corp.* v. *Railroad Commission,* 289 U. S. 287, 304–305, 314; *West Ohio Gas Co.* v. *Public Utilities Commission* (No. 1), 294 U. S. 63, 70; *West* v. *Chesapeake & Potomac Tel. Co.,* 295 U. S. 662, 692–693 (dissenting opinion). It is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end. The fact that the method employed to reach that result may contain infirmities is not then important. Moreover, the Commission's order does not become suspect by reason of the fact that it is challenged. It is the product of expert judgment which carries a presumption of validity. And he who would upset the rate order under the Act carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences. Cf. *Railroad Commission* v. *Cumberland Tel. & T. Co.,* 212 U. S. 414; *Lindheimer* v. *Illinois Bell Tel. Co., supra,* pp. 164, 169; *Railroad Commission* v. *Pacific Gas & Electric Co.,* 302 U. S. 388, 401.

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will be allowed to earn. The basic question in a valuation for reorganization purposes is how much the enterprise in all probability can earn." *Institutional Investors* v. *Chicago, M., St. P. & P. R. Co.,* 318 U. S. 523, 540.

The rate-making process under the Act, i. e., the fixing of "just and reasonable" rates, involves a balancing of the investor and the consumer interests. Thus we stated in the *Natural Gas Pipeline Co.* case that "regulation does not insure that the business shall produce net revenues." 315 U. S. p. 590. But such considerations aside, the investor interest has a legitimate concern with the financial integrity of the company whose rates are being regulated. From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. Cf. *Chicago & Grand Trunk Ry. Co.* v. *Wellman,* 143 U. S. 339, 345–346. By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital. See *Missouri ex rel. Southwestern Bell Tel. Co.* v. *Public Service Commission,* 262 U. S. 276, 291 (Mr. Justice Brandeis concurring). The conditions under which more or less might be allowed are not important here. Nor is it important to this case to determine the various permissible ways in which any rate base on which the return is computed might be arrived at. For we are of the view that the end result in this case cannot be condemned under the Act as unjust and unreasonable from the investor or company viewpoint.

We have already noted that Hope is a wholly owned subsidiary of the Standard Oil Co. (N. J.). It has no securities outstanding except stock. All of that stock has been owned by Standard since 1908. The par amount presently outstanding is approximately $28,000,000 as compared with the rate base of $33,712,526 established by

the Commission. Of the total outstanding stock $11,000,000 was issued in stock dividends. The balance, or about $17,000,000, was issued for cash or other assets. During the four decades of its operations Hope has paid over $97,000,000 in cash dividends. It had, moreover, accumulated by 1940 an earned surplus of about $8,000,000. It had thus earned the total investment in the company nearly seven times. Down to 1940 it earned over 20% per year on the average annual amount of its capital stock issued for cash or other assets. On an average invested capital of some $23,000,000 Hope's average earnings have been about 12% a year. And during this period it had accumulated in addition reserves for depletion and depreciation of about $46,000,000. Furthermore, during 1939, 1940 and 1941, Hope paid dividends of 10% on its stock. And in the year 1942, during about half of which the lower rates were in effect, it paid dividends of 7½%. From 1939–1942 its earned surplus increased from $5,250,000 to about $13,700,000, i. e., to almost half the par value of its outstanding stock.

As we have noted, the Commission fixed a rate of return which permits Hope to earn $2,191,314 annually. In determining that amount it stressed the importance of maintaining the financial integrity of the company. It considered the financial history of Hope and a vast array of data bearing on the natural gas industry, related businesses, and general economic conditions. It noted that the yields on better issues of bonds of natural gas companies sold in the last few years were "close to 3 per cent," 44 P. U. R. (N. S.), p. 33. It stated that the company was a "seasoned enterprise whose risks have been minimized" by adequate provisions for depletion and depreciation (past and present) with "concurrent high profits," by "protected established markets, through affiliated distribution companies, in populous and industrialized areas," and by a supply of gas locally to meet all require-

ments, "except on certain peak days in the winter, which it is feasible to supplement in the future with gas from other sources." *Id.*, p. 33. The Commission concluded, "The company's efficient management, established markets, financial record, affiliations, and its prospective business place it in a strong position to attract capital upon favorable terms when it is required." *Id.*, p. 33.

In view of these various considerations we cannot say that an annual return of $2,191,314 is not "just and reasonable" within the meaning of the Act. Rates which enable the company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed certainly cannot be condemned as invalid, even though they might produce only a meager return on the so-called "fair value" rate base. In that connection it will be recalled that Hope contended for a rate base of $66,000,000 computed on reproduction cost new. The Commission points out that if that rate base were accepted, Hope's average rate of return for the four-year period from 1937–1940 would amount to 3.27%. During that period Hope earned an annual average return of about 9% on the average investment. It asked for no rate increases. Its properties were well maintained and operated. As the Commission says, such a modest rate of 3.27% suggests an "inflation of the base on which the rate has been computed." *Dayton Power & Light Co.* v. *Public Utilities Commission*, 292 U. S. 290, 312. Cf. *Lindheimer* v. *Illinois Bell Tel. Co.*, *supra*, p. 164. The incongruity between the actual operations and the return computed on the basis of reproduction cost suggests that the Commission was wholly justified in rejecting the latter as the measure of the rate base.

In view of this disposition of the controversy we need not stop to inquire whether the failure of the Commission to add the $17,000,000 of well-drilling and other costs to

the rate base was consistent with the prudent investment theory as developed and applied in particular cases.

Only a word need be added respecting depletion and depreciation. We held in the *Natural Gas Pipeline Co.* case that there was no constitutional requirement "that the owner who embarks in a wasting-asset business of limited life shall receive at the end more than he has put into it." 315 U. S. p. 593. The Circuit Court of Appeals did not think that that rule was applicable here because Hope was a utility required to continue its service to the public and not scheduled to end its business on a day certain as was stipulated to be true of the Natural Gas Pipeline Co. But that distinction is quite immaterial. The ultimate exhaustion of the supply is inevitable in the case of all natural gas companies. Moreover, this Court recognized in *Lindheimer* v. *Illinois Bell Tel. Co., supra,* the propriety of basing annual depreciation on cost.[10] By such a procedure the utility is made whole and the integrity of its investment maintained.[11] No more is required.[12] We cannot approve the contrary holding

[10] Chief Justice Hughes said in that case (292 U. S. pp. 168–169): "If the predictions of service life were entirely accurate and retirements were made when and as these predictions were precisely fulfilled, the depreciation reserve would represent the consumption of capital, on a cost basis, according to the method which spreads that loss over the respective service periods. But if the amounts charged to operating expenses and credited to the account for depreciation reserve are excessive, to that extent subscribers for the telephone service are required to provide, in effect, capital contributions, not to make good losses incurred by the utility in the service rendered and thus to keep its investment unimpaired, but to secure additional plant and equipment upon which the utility expects a return."

[11] See Mr. Justice Brandeis (dissenting) in *United Railways Co.* v. *West,* 280 U. S. 234, 259–288, for an extended analysis of the problem.

[12] It should be noted that the Act provides no specific rule governing depletion and depreciation. Sec. 9 (a) merely states that the Commission "may from time to time ascertain and determine, and by order fix, the proper and adequate rates of depreciation and

of *United Railways Co.* v. *West,* 280 U. S. 234, 253–254. Since there are no constitutional requirements more exacting than the standards of the Act, a rate order which conforms to the latter does not run afoul of the former.

The Position of West Virginia. The State of West Virginia, as well as its Public Service Commission, intervened in the proceedings before the Commission and participated in the hearings before it. They have also filed a brief *amicus curiae* here and have participated in the argument at the bar. Their contention is that the result achieved by the rate order "brings consequences which are unjust to West Virginia and its citizens" and which "unfairly depress the value of gas, gas lands and gas leaseholds, unduly restrict development of their natural resources, and arbitrarily transfer their properties to the residents of other states without just compensation therefor."

West Virginia points out that the Hope Natural Gas Co. holds a large number of leases on both producing and unoperated properties. The owner or grantor receives from the operator or grantee delay rentals as compensation for postponed drilling. When a producing well is successfully brought in, the gas lease customarily continues indefinitely for the life of the field. In that case the operator pays a stipulated gas-well rental or in some cases a gas royalty equivalent to one-eighth of the gas marketed.[13] Both the owner and operator have valuable property interests in the gas which are separately taxable under West Virginia law. The contention is that the reversionary interests in the leaseholds should be represented in the rate proceedings since it is their gas which is being sold in interstate

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amortization of the several classes of property of each natural-gas company used or useful in the production, transportation, or sale of natural gas."

[13] See Simonton, The Nature of the Interest of the Grantee Under an Oil and Gas Lease (1918), 25 W. Va. L. Quar. 295.

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commerce. It is argued, moreover, that the owners of the reversionary interests should have the benefit of the "discovery value" of the gas leaseholds, not the interstate consumers. Furthermore, West Virginia contends that the Commission in fixing a rate for natural gas produced in that State should consider the effect of the rate order on the economy of West Virginia. It is pointed out that gas is a wasting asset with a rapidly diminishing supply. As a result West Virginia's gas deposits are becoming increasingly valuable. Nevertheless the rate fixed by the Commission reduces that value. And that reduction, it is said, has severe repercussions on the economy of the State. It is argued in the first place that as a result of this rate reduction Hope's West Virginia property taxes may be decreased in view of the relevance which earnings have under West Virginia law in the assessment of property for tax purposes.[14] Secondly, it is pointed out that West Virginia has a production tax [15] on the "value" of the gas exported from the State. And we are told that for purposes of that tax "value" becomes under West Virginia law "practically the substantial equivalent of market value." Thus West Virginia argues that undervaluation of Hope's gas leaseholds will cost the State many thousands of dollars in taxes. The effect, it is urged, is to impair West Virginia's tax structure for the benefit of Ohio and Pennsylvania consumers. West Virginia emphasizes, moreover, its deep interest in the conservation of its natural resources including its natural gas. It says that a reduction of the value of these leasehold values will jeopardize these conservation policies in three respects: (1) exploratory development of new fields will be discouraged; (2) abandonment of low-yield high-cost marginal wells will be hastened; and (3) secondary recovery of oil will be hampered.

[14] *West Penn Power Co.* v. *Board of Review,* 112 W. Va. 442, 164 S. E. 862.

[15] W. Va. Rev. Code of 1943, ch. 11, Art. 13, §§ 2a, 3a.

Furthermore, West Virginia contends that the reduced valuation will harm one of the great industries of the State and that harm to that industry must inevitably affect the welfare of the citizens of the State. It is also pointed out that West Virginia has a large interest in coal and oil as well as in gas and that these forms of fuel are competitive. When the price of gas is materially cheapened, consumers turn to that fuel in preference to the others. As a result this lowering of the price of natural gas will have the effect of depreciating the price of West Virginia coal and oil.

West Virginia insists that in neglecting this aspect of the problem the Commission failed to perform the function which Congress entrusted to it and that the case should be remanded to the Commission for a modification of its order.[16]

We have considered these contentions at length in view of the earnestness with which they have been urged upon us. We have searched the legislative history of the Natural Gas Act for any indication that Congress entrusted to the Commission the various considerations which West Virginia has advanced here. And our conclusion is that Congress did not.

We pointed out in *Illinois Natural Gas Co.* v. *Public Service Co.*, 314 U. S. 498, 506, that the purpose of the Natural Gas Act was to provide, "through the exercise of the national power over interstate commerce, an agency for regulating the wholesale distribution to public service companies of natural gas moving interstate, which this Court had declared to be interstate commerce not subject to certain types of state regulation." As stated in the House Report the "basic purpose" of this legislation was "to occupy" the field in which such cases as *Missouri* v.

[16] West Virginia suggests as a possible solution (1) that a "going concern value" of the company's tangible assets be included in the rate base and (2) that the fair market value of gas delivered to customers be added to the outlay for operating expenses and taxes.

Kansas Gas Co., 265 U. S. 298, and *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U. S. 83, had held the States might not act. H. Rep. No. 709, 75th Cong., 1st Sess., p. 2. In accomplishing that purpose the bill was designed to take "no authority from State commissions" and was "so drawn as to complement and in no manner usurp State regulatory authority." *Id.*, p. 2. And the Federal Power Commission was given no authority over the "production or gathering of natural gas." § 1 (b).

The primary aim of this legislation was to protect consumers against exploitation at the hands of natural gas companies. Due to the hiatus in regulation which resulted from the *Kansas Gas Co.* case and related decisions state commissions found it difficult or impossible to discover what it cost interstate pipe-line companies to deliver gas within the consuming states; and thus they were thwarted in local regulation. H. Rep. No. 709, *supra*, p. 3. Moreover, the investigations of the Federal Trade Commission had disclosed that the majority of the pipeline mileage in the country used to transport natural gas, together with an increasing percentage of the natural gas supply for pipe-line transportation, had been acquired by a handful of holding companies.[17] State commissions, independent producers, and communities having or seeking the service were growing quite helpless against these combinations.[18] These were the types of problems with which those participating in the hearings were preoccupied.[19] Congress addressed itself to those specific evils.

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[17] S. Doc. 92, Pt. 84–A, ch. XII, Final Report, Federal Trade Commission to the Senate pursuant to S. Res. No. 83, 70th Cong., 1st Sess.

[18] S. Doc. 92, Pt. 84–A, chs. XII, XIII, *op. cit.*, *supra*, note 17.

[19] See Hearings on H. R. 11662, Subcommittee of House Committee on Interstate & Foreign Commerce, 74th Cong., 2d Sess.; Hearings on H. R. 4008, House Committee on Interstate & Foreign Commerce, 75th Cong., 1st Sess.

The Federal Power Commission was given broad powers of regulation. The fixing of "just and reasonable" rates (§ 4) with the powers attendant thereto [20] was the heart of the new regulatory system. Moreover, the Commission was given certain authority by § 7 (a), on a finding that the action was necessary or desirable "in the public interest," to require natural gas companies to extend or improve their transportation facilities and to sell gas to any authorized local distributor. By § 7 (b) it was given control over the abandonment of facilities or of service. And by § 7 (c), as originally enacted, no natural gas company could undertake the construction or extension of any facilities for the transportation of natural gas to a market in which natural gas was already being served by another company, or sell any natural gas in such a market, without obtaining a certificate of public convenience and necessity from the Commission. In passing on such applications for certificates of convenience and necessity the Commission was told by § 7 (c), as originally enacted, that it was "the intention of Congress that natural gas shall be sold in interstate commerce for resale for ultimate public consumption for domestic, commercial, industrial, or any other use at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest." The latter provision was deleted from § 7 (c) when that subsection was amended by the Act of February 7, 1942, 56 Stat. 83. By that amendment limited grandfather rights were granted companies desiring to extend their facilities and services over the routes or within the area which they were already serving. Moreover, § 7 (c) was broadened so as to require certifi-

[20] The power to investigate and ascertain the "actual legitimate cost" of property (§ 6), the requirement as to books and records (§ 8), control over rates of depreciation (§ 9), the requirements for periodic and special reports (§ 10), the broad powers of investigation (§ 14) are among the chief powers supporting the rate-making function.

cates of public convenience and necessity not only where the extensions were being made to markets in which natural gas was already being sold by another company but in other situations as well.

These provisions were plainly designed to protect the consumer interests against exploitation at the hands of private natural gas companies. When it comes to cases of abandonment or of extensions of facilities or service, we may assume that, apart from the express exemptions [21] contained in § 7, considerations of conservation are material to the issuance of certificates of public convenience and necessity. But the Commission was not asked here for a certificate of public convenience and necessity under § 7 for any proposed construction or extension. It was faced with a determination of the amount which a private operator should be allowed to earn from the sale of natural gas across state lines through an established distribution system. Secs. 4 and 5, not § 7, provide the standards for that determination. We cannot find in the words of the Act or in its history the slightest intimation or suggestion that the exploitation of consumers by private operators through the maintenance of high rates should be allowed to continue provided the producing states obtain indirect benefits from it. That apparently was the Commission's view of the matter, for the same arguments advanced here were presented to the Commission and not adopted by it.

We do not mean to suggest that Congress was unmindful of the interests of the producing states in their natural gas supplies when it drafted the Natural Gas Act. As we have said, the Act does not intrude on the domain traditionally reserved for control by state commissions; and the Federal Power Commission was given no authority over

[21] Apart from the grandfather clause contained in § 7 (c), there is the provision of § 7 (f) that a natural gas company may enlarge or extend its facilities within the "service area" determined by the Commission without any further authorization.

"the production or gathering of natural gas." § 1 (b). In addition, Congress recognized the legitimate interests of the States in the conservation of natural gas. By § 11 Congress instructed the Commission to make reports on compacts between two or more States dealing with the conservation, production and transportation of natural gas.[22] The Commission was also directed to recommend further legislation appropriate or necessary to carry out any proposed compact and "to aid in the conservation of natural-gas resources within the United States and in the orderly, equitable, and economic production, transportation, and distribution of natural gas." § 11 (a). Thus Congress was quite aware of the interests of the producing states in their natural gas supplies.[23] But it left the protection of

[22] See Act of July 7, 1943, c. 194, 57 Stat. 383, containing an "Interstate Compact to Conserve Oil and Gas" between Oklahoma, Texas, New Mexico, Illinois, Colorado, and Kansas.

[23] As we have pointed out, § 7 (c) was amended by the Act of February 7, 1942 (56 Stat. 83) so as to require certificates of public convenience and necessity not only where the extensions were being made to markets in which natural gas was already being sold by another company but to other situations as well. Considerations of conservation entered into the proposal to give the Act that broader scope. H. Rep. No. 1290, 77th Cong., 1st Sess., pp. 2–3. And see Annual Report, Federal Power Commission (1940) pp. 79, 80; Baum, The Federal Power Commission and State Utility Regulation (1942), p. 261.

The bill amending § 7 (c) originally contained a subsection (h) reading as follows: "Nothing contained in this section shall be construed to affect the authority of a State within which natural gas is produced to authorize or require the construction or extension of facilities for the transportation and sale of such gas within such State: Provided, however, That the Commission, after a hearing upon complaint or upon its own motion, may by order forbid any intrastate construction or extension by any natural-gas company which it shall find will prevent such company from rendering adequate service to its customers in interstate or foreign commerce in territory already being served." See Hearings on H. R. 5249, House Committee on Interstate & Foreign Commerce, 77th Cong., 1st Sess., pp. 7, 11, 21, 29,

those interests to measures other than the maintenance of high rates to private companies. If the Commission is to be compelled to let the stockholders of natural gas companies have a feast so that the producing states may receive crumbs from that table, the present Act must be redesigned. Such a project raises questions of policy which go beyond our province.

It is hardly necessary to add that a limitation on the net earnings of a natural gas company from its interstate business is not a limitation on the power of the producing state either to safeguard its tax revenues from that industry [24] or to protect the interests of those who sell their gas to the interstate operator.[25] The return which the Com-

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32–33. In explanation of its deletion the House Committee Report stated, pp. 4–5: "The increasingly important problems raised by the desire of several States to regulate the use of the natural gas produced therein in the interest of consumers within such States, as against the Federal power to regulate interstate commerce in the interest of both interstate and intrastate consumers, are deemed by the committee to warrant further intensive study and probably a more detailed and comprehensive plan for the handling thereof than that which would have been provided by the stricken subsection."

[24] We have noted that in the annual operating expenses of some $16,000,000 the Commission included West Virginia and federal taxes. And in the net increase of $421,160 over 1940 operating expenses allowed by the Commission was some $80,000 for increased West Virginia property taxes. The adequacy of these amounts has not been challenged here.

[25] The Commission included in the aggregate annual operating expenses which it allowed some $8,500,000 for gas purchased. It also allowed about $1,400,000 for natural gas production and about $600,000 for exploration and development.

It is suggested, however, that the Commission in ascertaining the cost of Hope's natural gas production plant proceeded contrary to § 1 (b) which provides that the Act shall not apply to "the production or gathering of natural gas." But such valuation, like the provisions for operating expenses, is essential to the rate-making function as customarily performed in this country. Cf. Smith, The Control of Power Rates in the United States and England (1932), 159 The

mission allowed was the net return after all such charges.

It is suggested that the Commission has failed to perform its duty under the Act in that it has not allowed a return for gas production that will be enough to induce private enterprise to perform completely and efficiently its functions for the public. The Commission, however, was not oblivious of those matters. It considered them. It allowed, for example, delay rentals and exploration and development costs in operating expenses.[26] No serious attempt has been made here to show that they are inadequate. We certainly cannot say that they are, unless we are to substitute our opinions for the expert judgment of the administrators to whom Congress entrusted the decision. Moreover, if in light of experience they turn out to be inadequate for development of new sources of supply, the doors of the Commission are open for increased allowances. This is not an order for all time. The Act contains machinery for obtaining rate adjustments. § 4.

But it is said that the Commission placed too low a rate on gas for industrial purposes as compared with gas for domestic purposes and that industrial uses should be discouraged. It should be noted in the first place that the rates which the Commission has fixed are Hope's interstate wholesale rates to distributors, not interstate rates to industrial users [27] and domestic consumers. We hardly

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Annals 101. Indeed § 14 (b) of the Act gives the Commission the power to "determine the propriety and reasonableness of the inclusion in operating expenses, capital, or surplus of all delay rentals or other forms of rental or compensation for unoperated lands and leases."

[26] See note 25, *supra*.

[27] The Commission has expressed doubts over its power to fix rates on "direct sales to industries" from interstate pipelines as distinguished from "sales for resale to the industrial customers of distributing companies." Annual Report, Federal Power Commission (1940), p. 11.

can assume, in view of the history of the Act and its provisions, that the resales intrastate by the customer companies which distribute the gas to ultimate consumers in Ohio and Pennsylvania are subject to the rate-making powers of the Commission.[28] But in any event those rates are not in issue here. Moreover, we fail to find in the power to fix "just and reasonable" rates the power to fix rates which will disallow or discourage resales for industrial use. The Committee Report stated that the Act provided "for regulation along recognized and more or less standardized lines" and that there was "nothing novel in its provisions." H. Rep. No. 709, *supra*, p. 3. Yet if we are now to tell the Commission to fix the rates so as to discourage particular uses, we would indeed be injecting into a rate case a "novel" doctrine which has no express statutory sanction. The same would be true if we were to hold that the wasting-asset nature of the industry required the maintenance of the level of rates so that natural gas companies could make a greater profit on each unit of gas sold. Such theories of rate-making for this industry may or may not be desirable. The difficulty is that § 4 (a) and § 5 (a) contain only the conventional standards of rate-making for natural gas companies.[29] The

[28] Sec. 1 (b) of the Act provides: "The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas." And see § 2 (6), defining a "natural-gas company," and H. Rep. No. 709, *supra*, pp. 2, 3.

[29] The wasting-asset characteristic of the industry was recognized prior to the Act as requiring the inclusion of a depletion allowance among operating expenses. See *Columbus Gas & Fuel Co.* v. *Public Utilities Commission*, 292 U. S. 398, 404–405. But no such theory

Act of February 7, 1942, by broadening § 7 gave the Commission some additional authority to deal with the conservation aspects of the problem.[30] But § 4 (a) and § 5 (a) were not changed. If the standard of "just and reasonable" is to sanction the maintenance of high rates by a natural gas company because they restrict the use of natural gas for certain purposes, the Act must be further amended.

It is finally suggested that the rates charged by Hope are discriminatory as against domestic users and in favor of industrial users. That charge is apparently based on § 4 (b) of the Act which forbids natural gas companies from maintaining "any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service." The power of the Commission to eliminate any such unreasonable differences or discriminations is plain. § 5 (a). The Commission, however, made no findings under § 4 (b). Its failure in that regard was not challenged in the petition to review. And it has not been raised or argued here by any party. Hence the problem of discrimination has no proper place in the present decision. It will be time enough to pass on that issue when it is presented to us. Congress has entrusted the administration of the Act to the Commission, not to the courts. Apart from the requirements of judicial review it is not

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of rate-making for natural gas companies as is now suggested emerged from the cases arising during the earlier period of regulation.

[30] The Commission has been alert to the problems of conservation in its administration of the Act. It has indeed suggested that it might be wise to restrict the use of natural gas "by functions rather than by areas." Annual Report (1940) p. 79.

The Commission stated in that connection that natural gas was particularly adapted to certain industrial uses. But it added that the general use of such gas "under boilers for the production of steam" is "under most circumstances of very questionable social economy." *Ibid.*

for us to advise the Commission how to discharge its functions.

Findings as to the Lawfulness of Past Rates. As we have noted, the Commission made certain findings as to the lawfulness of past rates which Hope had charged its interstate customers. Those findings were made on the complaint of the City of Cleveland and in aid of state regulation. It is conceded that under the Act the Commission has no power to make reparation orders. And its power to fix rates admittedly is limited to those "to be thereafter observed and in force." § 5 (a). But the Commission maintains that it has the power to make findings as to the lawfulness of past rates even though it has no power to fix those rates.[31] However that may be, we do not think that these findings were reviewable under § 19 (b) of the Act. That section gives any party "aggrieved by an order" of the Commission a review "of such order" in the circuit court of appeals for the circuit where the natural gas company is located or has its principal place of business or in the United States Court of Appeals for the District of Columbia. We do not think that the findings in question fall within that category.

The Court recently summarized the various types of administrative action or determination reviewable as orders under the Urgent Deficiencies Act of October 22,

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[31] The argument is that § 4 (a) makes "unlawful" the charging of any rate that is not just and reasonable. And § 14 (a) gives the Commission power to investigate any matter "which it may find necessary or proper in order to determine whether any person has violated" any provision of the Act. Moreover, § 5 (b) gives the Commission power to investigate and determine the cost of production or transportation of natural gas in cases where it has "no authority to establish a rate governing the transportation or sale of such natural gas." And § 17 (c) directs the Commission to "make available to the several State commissions such information and reports as may be of assistance in State regulation of natural-gas companies." For a discussion of these points by the Commission see 44 P. U. R. (N. S.) pp. 34–35.

1913, 28 U. S. C. §§ 45, 47a, and kindred statutory provisions. *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125. It was there pointed out that where "the order sought to be reviewed does not of itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action," it is not reviewable. *Id.,* p. 130. The Court said, "In view of traditional conceptions of federal judicial power, resort to the courts in these situations is either premature or wholly beyond their province." *Id.,* p. 130. And see *United States* v. *Los Angeles & Salt Lake R. Co.,* 273 U. S. 299, 309, 310; *Shannahan* v. *United States,* 303 U. S. 596. These considerations are apposite here. The Commission has no authority to enforce these findings. They are "the exercise solely of the function of investigation." *United States* v. *Los Angeles & Salt Lake R. Co., supra,* p. 310. They are only a preliminary, interim step towards possible future action—action not by the Commission but by wholly independent agencies. The outcome of those proceedings may turn on factors other than these findings. These findings may never result in the respondent feeling the pinch of administrative action.

Reversed.

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

Opinion of MR. JUSTICE BLACK and MR. JUSTICE MURPHY:

We agree with the Court's opinion and would add nothing to what has been said but for what is patently a wholly gratuitous assertion as to Constitutional law in the dissent of MR. JUSTICE FRANKFURTER. We refer to the statement that "Congressional acquiescence to date in the doctrine of *Chicago, M. & St. P. Ry. Co.* v. *Minnesota, supra,* may fairly be claimed." That was the case in which a majority of this Court was finally induced to expand the meaning

of "due process" so as to give courts power to block efforts of the state and national governments to regulate economic affairs. The present case does not afford a proper occasion to discuss the soundness of that doctrine because, as stated in MR. JUSTICE FRANKFURTER'S dissent, "that issue is not here in controversy." The salutary practice whereby courts do not discuss issues in the abstract applies with peculiar force to Constitutional questions. Since, however, the dissent adverts to a highly controversial due process doctrine and implies its acceptance by Congress, we feel compelled to say that we do not understand that Congress voluntarily has acquiesced in a Constitutional principle of government that courts, rather than legislative bodies, possess final authority over regulation of economic affairs. Even this Court has not always fully embraced that principle, and we wish to repeat that we have never acquiesced in it, and do not now. See *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U. S. 575, 599–601.

MR. JUSTICE REED, dissenting:

This case involves the problem of rate making under the Natural Gas Act. Added importance arises from the obvious fact that the principles stated are generally applicable to all federal agencies which are entrusted with the determination of rates for utilities. Because my views differ somewhat from those of my brethren, it may be of some value to set them out in a summary form.

The Congress may fix utility rates in situations subject to federal control without regard to any standard except the constitutional standards of due process and for taking private property for public use without just compensation. *Wilson* v. *New*, 243 U. S. 332, 350. A Commission, however, does not have this freedom of action. Its powers are limited not only by the constitutional standards but also by the standards of the delegation. Here the standard added by the Natural Gas Act is that the rate be "just

and reasonable."[1] Section 6[2] throws additional light on the meaning of these words.

When the phrase was used by Congress to describe allowable rates, it had relation to something ascertainable. The rates were not left to the whim of the Commission. The rates fixed would produce an annual return and that annual return was to be compared with a theoretical just and reasonable return, all risks considered, on the fair value of the property used and useful in the public service at the time of the determination.

Such an abstract test is not precise. The agency charged with its determination has a wide range before it could properly be said by a court that the agency had disregarded statutory standards or had confiscated the property of the utility for public use. Cf. *Chicago, M. & St. P. Ry. Co.* v. *Minnesota,* 134 U. S. 418, 461–66, dissent. This is as Congress intends. Rates are left to an experienced agency particularly competent by training to appraise the amount required.

The decision as to a reasonable return had not been a source of great difficulty, for borrowers and lenders reached such agreements daily in a multitude of situations; and although the determination of fair value had been troublesome, its essentials had been worked out in fairness to investor and consumer by the time of the en-

[1] Natural Gas Act, § 4 (a), 52 Stat. 821, 822, 15 U. S. C. § 717 (a).

[2] 52 Stat. 821, 824, 15 U. S. C. § 717e:

"(a) The Commission may investigate and ascertain the actual legitimate cost of the property of every natural-gas company, the depreciation therein, and, when found necessary for rate-making purposes, other facts which bear on the determination of such cost or depreciation and the fair value of such property.

"(b) Every natural-gas company upon request shall file with the Commission an inventory of all or any part of its property and a statement of the original cost thereof, and shall keep the Commission informed regarding the cost of all additions, betterments, extensions, and new construction."

actment of this Act. Cf. *Los Angeles Gas & Electric Corp.* v. *Railroad Commission,* 289 U. S. 287, 304 *et seq.* The results were well known to Congress and had that body desired to depart from the traditional concepts of fair value and earnings, it would have stated its intention plainly. *Helvering* v. *Griffiths,* 318 U. S. 371.

It was already clear that when rates are in dispute, "earnings produced by rates do not afford a standard for decision." 289 U. S. at 305. Historical cost, prudent investment and reproduction cost [3] were all relevant factors in determining fair value. Indeed, disregarding the pioneer investor's risk, if prudent investment and reproduction cost were not distorted by changes in price levels or technology, each of them would produce the same result. The realization from the risk of an investment in a speculative field, such as natural gas utilities, should be reflected in the present fair value.[4] The amount of evidence to be admitted on any point was of course in the agency's reasonable discretion, and it was free to give its own weight to these or other factors and to determine from all the evidence its own judgment as to the necessary rates.

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[3] "Reproduction cost" has been variously defined, but for rate-making purposes the most useful sense seems to be, the minimum amount necessary to create at the time of the inquiry a modern plant capable of rendering equivalent service. See I Bonbright, Valuation of Property (1937) 152. Reproduction cost as the cost of building a replica of an obsolescent plant is not of real significance.

"Prudent investment" is not defined by the Court. It may mean the sum originally put in the enterprise, either with or without additional amounts from excess earnings reinvested in the business.

[4] It is of no more than bookkeeping significance whether the Commission allows a rate of return commensurate with the risk of the original investment or the lower rate based on current risk and a capitalization reflecting the established earning power of a successful company and the probable cost of duplicating its services. Cf. *A. T. & T. Co.* v. *United States,* 299 U. S. 232. But the latter is the traditional method.

I agree with the Court in not imposing a rule of prudent investment alone in determining the rate base. This leaves the Commission free, as I understand it, to use any available evidence for its finding of fair value, including both prudent investment and the cost of installing at the present time an efficient system for furnishing the needed utility service.

My disagreement with the Court arises primarily from its view that it makes no difference how the Commission reached the rate fixed so long as the result is fair and reasonable. For me the statutory command to the Commission is more explicit. Entirely aside from the constitutional problem of whether the Congress could validly delegate its rate-making power to the Commission, *in toto* and without standards, it did legislate in the light of the relation of fair and reasonable to fair value and reasonable return. The Commission must therefore make its findings in observance of that relationship.

The Federal Power Commission did not, as I construe their action, disregard its statutory duty. They heard the evidence relating to historical and reproduction cost and to the reasonable rate of return, and they appraised its weight. The evidence of reproduction cost was rejected as unpersuasive, but from the other evidence they found a rate base, which is to me a determination of fair value. On that base the earnings allowed seem fair and reasonable. So far as the Commission went in appraising the property employed in the service, I find nothing in the result which indicates confiscation, unfairness or unreasonableness. Good administration of rate-making agencies under this method would avoid undue delay and render revaluations unnecessary except after violent fluctuations of price levels. Rate making under this method has been subjected to criticism. But until Congress changes the standards for the agencies, these rate-making bodies should continue the conventional theory of rate

making. It will probably be simpler to improve present methods than to devise new ones.

But a major error, I think, was committed in the disregard by the Commission of the investment in exploratory operations and other recognized capital costs. These were not considered by the Commission because they were charged to operating expenses by the company at a time when it was unregulated. Congress did not direct the Commission in rate making to deduct from the rate base capital investment which had been recovered during the unregulated period through excess earnings. In my view this part of the investment should no more have been disregarded in the rate base than any other capital investment which previously had been recovered and paid out in dividends or placed to surplus. Even if prudent investment throughout the life of the property is accepted as the formula for figuring the rate base, it seems to me illogical to throw out the admittedly prudent cost of part of the property because the earnings in the unregulated period had been sufficient to return the prudent cost to the investors over and above a reasonable return. What would the answer be under the theory of the Commission and the Court, if the only prudent investment in this utility had been the seventeen million capital charges which are now disallowed?

For the reasons heretofore stated, I should affirm the action of the Circuit Court of Appeals in returning the proceeding to the Commission for further consideration and should direct the Commission to accept the disallowed capital investment in determining the fair value for rate-making purposes.

MR. JUSTICE FRANKFURTER, dissenting:

My brother JACKSON has analyzed with particularity the economic and social aspects of natural gas as well as

the difficulties which led to the enactment of the Natural Gas Act, especially those arising out of the abortive attempts of States to regulate natural gas utilities. The Natural Gas Act of 1938 should receive application in the light of this analysis, and MR. JUSTICE JACKSON has, I believe, drawn relevant inferences regarding the duty of the Federal Power Commission in fixing natural gas rates. His exposition seems to me unanswered, and I shall say only a few words to emphasize my basic agreement with him.

For our society the needs that are met by public utilities are as truly public services as the traditional governmental functions of police and justice. They are not less so when these services are rendered by private enterprise under governmental regulation. Who ultimately determines the ways of regulation, is the decisive aspect in the public supervision of privately-owned utilities. Foreshadowed nearly sixty years ago, *Railroad Commission Cases*, 116 U. S. 307, 331, it was decided more than fifty years ago that the final say under the Constitution lies with the judiciary and not the legislature. *Chicago, M. & St. P. Ry. Co.* v. *Minnesota*, 134 U. S. 418.

While legal issues touching the proper distribution of governmental powers under the Constitution may always be raised, Congressional acquiescence to date in the doctrine of *Chicago, M. & St. P. Ry. Co.* v. *Minnesota, supra*, may fairly be claimed. But in any event that issue is not here in controversy. As pointed out in the opinions of my brethren, Congress has given only limited authority to the Federal Power Commission and made the exercise of that authority subject to judicial review. The Commission is authorized to fix rates chargeable for natural gas. But the rates that it can fix must be "just and reasonable." § 5 of the Natural Gas Act, 15 U. S. C. § 717 (d). Instead of making the Commission's rate determinations final, Con-

gress specifically provided for court review of such orders. To be sure, "the finding of the Commission as to the facts, if supported by substantial evidence" was made "conclusive," § 19 of the Act, 15 U. S. C. § 717r. But obedience of the requirement of Congress that rates be "just and reasonable" is not an issue of fact of which the Commission's own determination is conclusive. Otherwise, there would be nothing for a court to review except questions of compliance with the procedural provisions of the Natural Gas Act. Congress might have seen fit so to cast its legislation. But it has not done so. It has committed to the administration of the Federal Power Commission the duty of applying standards of fair dealing and of reasonableness relevant to the purposes expressed by the Natural Gas Act. The requirement that rates must be "just and reasonable" means just and reasonable in relation to appropriate standards. Otherwise Congress would have directed the Commission to fix such rates as in the judgment of the Commission are just and reasonable; it would not have also provided that such determinations by the Commission are subject to court review.

To what sources then are the Commission and the courts to go for ascertaining the standards relevant to the regulation of natural gas rates? It is at this point that MR. JUSTICE JACKSON'S analysis seems to me pertinent. There appear to be two alternatives. Either the fixing of natural gas rates must be left to the unguided discretion of the Commission so long as the rates it fixes do not reveal a glaringly bad prophecy of the ability of a regulated utility to continue its service in the future. Or the Commission's rate orders must be founded on due consideration of all the elements of the public interest which the production and distribution of natural gas involve just because it is natural gas. These elements are reflected in the Natural Gas Act, if that Act be applied as an entirety. See, for

instance, §§ 4 (a) (b) (c) (d), 6, and 11, 15 U. S. C., §§ 717c (a) (b) (c) (d), 717c, and 717j. Of course the statute is not concerned with abstract theories of rate-making. But its very foundation is the "public interest," and the public interest is a texture of multiple strands. It includes more than contemporary investors and contemporary consumers. The needs to be served are not restricted to immediacy, and social as well as economic costs must be counted.

It will not do to say that it must all be left to the skill of experts. Expertise is a rational process and a rational process implies expressed reasons for judgment. It will little advance the public interest to substitute for the hodge-podge of the rule in *Smyth* v. *Ames,* 169 U. S. 466, an encouragement of conscious obscurity or confusion in reaching a result, on the assumption that so long as the result appears harmless its basis is irrelevant. That may be an appropriate attitude when state action is challenged as unconstitutional. Cf. *Driscoll* v. *Edison Co.,* 307 U. S. 104. But it is not to be assumed that it was the design of Congress to make the accommodation of the conflicting interests exposed in MR. JUSTICE JACKSON'S opinion the occasion for a blind clash of forces or a partial assessment of relevant factors, either before the Commission or here.

The objection to the Commission's action is not that the rates it granted were too low but that the range of its vision was too narrow. And since the issues before the Commission involved no less than the total public interest, the proceedings before it should not be judged by narrow conceptions of common law pleading. And so I conclude that the case should be returned to the Commission. In order to enable this Court to discharge its duty of reviewing the Commission's order, the Commission should set forth with explicitness the criteria by which it is guided

in determining that rates are "just and reasonable," and it should determine the public interest that is in its keeping in the perspective of the considerations set forth by MR. JUSTICE JACKSON.

By MR. JUSTICE JACKSON:

Certainly the theory of the court below that ties rate-making to the fair-value-reproduction-cost formula should be overruled as in conflict with *Federal Power Commission* v. *Natural Gas Pipeline Co.*[1] But the case should, I think, be the occasion for reconsideration of our rate-making doctrine as applied to natural gas and should be returned to the Commission, for further consideration in the light thereof.

The Commission appears to have understood the effect of the two opinions in the *Pipeline* case to be at least authority and perhaps direction to fix natural gas rates by exclusive application of the "prudent investment" rate base theory. This has no warrant in the opinion of the Chief Justice for the Court, however, which released the Commission from subservience to "any single formula or combination of formulas" provided its order, "viewed in its entirety, produces no arbitrary result." 315 U. S. at 586. The minority opinion I understood to advocate the "prudent investment" theory as a sufficient guide in a natural gas case. The view was expressed in the court below that since this opinion was not expressly controverted it must have been approved.[2] I disclaim this im-

[1] 315 U. S. 575.

[2] Judge Dobie, dissenting below, pointed out that the majority opinion in the *Pipeline* case "contains no express discussion of the Prudent Investment Theory" and that the concurring opinion contained a clear one, and said, "It is difficult for me to believe that the majority of the Supreme Court, believing otherwise, would leave such a statement unchallenged." The fact that two other Justices had as matter of record in our books long opposed the reproduction cost theory of rate bases and had commented favorably on the pru-

puted approval with some particularity, because I attach importance at the very beginning of federal regulation of the natural gas industry to approaching it as the performance of economic functions, not as the performance of legalistic rituals.

I.

Solutions of these cases must consider eccentricities of the industry which gives rise to them and also to the Act of Congress by which they are governed.

The heart of this problem is the elusive, exhaustible, and irreplaceable nature of natural gas itself. Given sufficient money, we can produce any desired amount of railroad, bus, or steamship transportation, or communications facilities, or capacity for generation of electric energy, or for the manufacture of gas of a kind. In the service of such utilities one customer has little concern with the amount taken by another, one's waste will not deprive another, a volume of service can be created equal to demand, and today's demands will not exhaust or lessen capacity to serve tomorrow. But the wealth of Midas and the wit of man cannot produce or reproduce a natural gas field. We cannot even reproduce the gas, for our manufactured product has only about half the heating value per unit of nature's own.[3]

Natural gas in some quantity is produced in twenty-four states. It is consumed in only thirty-five states, and is

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dent investment theory may have influenced that conclusion. See opinion of Mr. Justice Frankfurter in *Driscoll* v. *Edison Light & Power Co.*, 307 U. S. 104, 122, and my brief as Solicitor General in that case. It should be noted, however, that these statements were made, not in a natural gas case, but in an electric power case—a very important distinction, as I shall try to make plain.

[3] Natural gas from the Appalachian field averages about 1,050 to 1,150 B. T. U. content, while by-product manufactured gas is about 530 to 540. Moody's Manual of Public Utilities (1943) 1,350; Youngberg, Natural Gas (1930) 7.

available only to about 7,600,000 consumers.[4] Its availability has been more localized than that of any other utility service because it has depended more on the caprice of nature.

The supply of the Hope Company is drawn from that old and rich and vanishing field that flanks the Appalachian mountains. Its center of production is Pennsylvania and West Virginia, with a fringe of lesser production in New York, Ohio, Kentucky, Tennessee, and the north end of Alabama. Oil was discovered in commercial quantities at a depth of only 69½ feet near Titusville, Pennsylvania, in 1859. Its value then was about $16 per barrel.[5] The oil branch of the petroleum industry went forward at once, and with unprecedented speed. The area productive of oil and gas was roughed out by the drilling of over 19,000 "wildcat" wells, estimated to have cost over $222,000,000. Of these, over 18,000, or 94.9 per cent, were "dry holes." About five per cent, or 990 wells, made discoveries of commercial importance, 767 of them resulting chiefly in oil and 223 in gas only.[6] Prospecting for many years was a search for oil, and to strike gas was a misfortune. Waste during this period and even later is appalling. Gas was regarded as having no commercial value until about 1882, in which year the total yield was valued only at about $75,000.[7] Since then, contrary to oil, which has become cheaper, gas in this field has pretty steadily advanced in price.

While for many years natural gas had been distributed on a small scale for lighting,[8] its acceptance was slow,

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[4] Sen. Rep. No. 1162, 75th Cong., 1st Sess., 2.

[5] Arnold and Kemnitzer, Petroleum in the United States and Possessions (1931) 78.

[6] *Id.* at 62–63.

[7] *Id.*, at 61.

[8] At Fredonia, New York, in 1821, natural gas was conveyed from a shallow well to some thirty people. The lighthouse at Barcelona Harbor, near what is now Westfield, New York, was at about that

facilities for its utilization were primitive, and not until 1885 did it take on the appearance of a substantial industry.[9] Soon monopoly of production or markets developed.[10] To get gas from the mountain country, where it was largely found, to centers of population, where it was in demand, required very large investment. By ownership of such facilities a few corporate systems, each including several companies, controlled access to markets. Their purchases became the dominating factor in giving a market value to gas produced by many small operators. Hope is the market for over 300 such operators. By 1928 natural gas in the Appalachian field commanded an average price of 21.1 cents per m. c. f. at points of production and was bringing 45.7 cents at points of consumption.[11] The companies which controlled markets, however, did not rely on gas purchases alone. They acquired and held in fee or leasehold great acreage in territory proved by "wildcat" drilling. These large marketing system companies as well as many small independent owners and operators have carried on the commercial development of proved territory. The development risks appear from the estimate that up to 1928, 312,318 proved area wells had been sunk in the Appalachian field of which 48,962, or 15.7 per cent, failed to produce oil or gas in commercial quantity.[12]

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time and for many years afterward lighted by gas that issued from a crevice. Report on Utility Corporations by Federal Trade Commission, Sen. Doc. 92, Pt. 84–A, 70th Cong., 1st Sess., 8–9.

[9] In that year Pennsylvania enacted "An Act to provide for the incorporation and regulation of natural gas companies." Penn. Laws 1885, No. 32.

[10] See Steptoe and Hoffheimer's Memorandum for Governor Cornwell of West Virginia (1917) 25 West Virginia Law Quarterly 257; see also Report on Utility Corporations by Federal Trade Commssion, Sen. Doc. No. 92, Pt. 84–A, 70th Cong., 1st Sess.

[11] Arnold and Kemnitzer, Petroleum in the United States and Possessions (1931) 73.

[12] *Id.* at 63.

With the source of supply thus tapped to serve centers of large demand, like Pittsburgh, Buffalo, Cleveland, Youngstown, Akron, and other industrial communities, the distribution of natural gas fast became big business. Its advantages as a fuel and its price commended it, and the business yielded a handsome return. All was merry and the goose hung high for consumers and gas companies alike until about the time of the first World War. Almost unnoticed by the consuming public, the whole Appalachian field passed its peak of production and started to decline. Pennsylvania, which to 1928 had given off about 38 per cent of the natural gas from this field, had its peak in 1905; Ohio, which had produced 14 per cent, had its peak in 1915; and West Virginia, greatest producer of all, with 45 per cent to its credit, reached its peak in 1917.[13]

Western New York and Eastern Ohio, on the fringe of the field, had some production but relied heavily on imports from Pennsylvania and West Virginia. Pennsylvania, a producing and exporting state, was a heavy consumer and supplemented her production with imports from West Virginia. West Virginia was a consuming state, but the lion's share of her production was exported. Thus the interest of the states in the North Appalachian supply was in conflict.

Competition among localities to share in the failing supply and the helplessness of state and local authorities in the presence of state lines and corporate complexities is a part of the background of federal intervention in the industry.[14] West Virginia took the boldest measure. It legislated a priority in its entire production in favor of its own inhabitants. That was frustrated by an injunc-

[13] *Id.* at 64.

[14] See Report on Utility Corporations by Federal Trade Commission, Sen. Doc. No. 92, Pt. 84–A, 70th Cong., 1st Sess.

tion from this Court.[15] Throughout the region clashes in the courts and conflicting decisions evidenced public anxiety and confusion. It was held that the New York Public Service Commission did not have power to classify consumers and restrict their use of gas.[16] That Commission held that a company could not abandon a part of its territory and still serve the rest.[17] Some courts admonished the companies to take action to protect consumers.[18] Several courts held that companies, regardless of failing supply, must continue to take on customers, but such compulsory additions were finally held to be within the Public Service Commission's discretion.[19] There were attempts to throw up franchises and quit the service, and municipalities resorted to the courts with conflicting results.[20] Public service commissions of consuming states were handicapped, for they had no control of the supply.[21]

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[15] *Pennsylvania* v. *West Virginia,* 262 U. S. 553. For conditions there which provoked this legislation, see 25 West Virginia Law Quarterly 257.

[16] *People ex rel. Pavilion Gas Co.* v. *Public Service Commission,* 188 App. Div. 36, 176 N. Y. S. 163.

[17] Village of Falconer *v.* Pennsylvania Gas Co., 17 State Department Reports (N. Y.) 407.

[18] See, for example, *Public Service Commission* v. *Iroquois Natural Gas Co.,* 108 Misc. 696, 178 N. Y. S. 24; *Park Abbott Realty Co.* v. *Iroquois Gas Co.,* 102 Misc. 266, 168 N. Y. S. 673; *Public Service Commission* v. *Iroquois Natural Gas Co.,* 189 App. Div. 545, 179 N. Y. S. 230.

[19] *People ex rel. Pennsylvania Gas Co.* v. *Public Service Commission,* 196 App. Div. 514, 189 N. Y. S. 478.

[20] *East Ohio Gas Co.* v. *Akron,* 81 Ohio St. 33, 90 N. E. 40; *Newcomerstown* v. *Consolidated Gas Co.,* 100 Ohio St. 494, 127 N. E. 414; *Gress* v. *Village of Ft. Loramie,* 100 Ohio St. 35, 125 N. E. 112; *Jamestown* v. *Pennsylvania Gas Co.,* 263 F. 437, 264 F. 1009. See also *United Fuel Gas Co.* v. *Railroad Commission,* 278 U. S. 300, 308.

[21] The New York Public Service Commission said: "While the transportation of natural gas through pipe lines from one state to another

Shortages during World War I occasioned the first intervention in the natural gas industry by the Federal Government. Under Proclamation of President Wilson the United States Fuel Administrator took control, stopped extensions, classified consumers and established a priority for domestic over industrial use.[22] After the war federal control was abandoned. Some cities once served with natural gas became dependent upon a mixed gas of reduced heating value and relatively higher price.[23]

Utilization of natural gas of highest social as well as economic return is domestic use for cooking and water

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state is interstate commerce . . ., Congress has not taken over the regulation of that particular industry. Indeed, it has expressly excepted it from the operation of the Interstate Commerce Commissions Law (Interstate Commerce Commissions Law, section 1). It is quite clear, therefore, that this Commission can not require a Pennsylvania corporation producing gas in Pennsylvania to transport it and deliver it in the State of New York, and that the Interstate Commerce Commission is likewise powerless. If there exists such a power, and it seems that there does, it is a power vested in Congress and by it not yet exercised. There is no available source of supply for the Crystal City Company at present except through purchasing from the Potter Gas Company. It is possible that this Commission might fix a price at which the Potter Gas Company should sell if it sold at all, but as the Commission can not require it to supply gas in the State of New York, the exercise of such a power to fix the price, if such power exists, would merely say, sell at this price or keep out of the State." Lane *v.* Crystal City Gas Co., 8 New York Public Service Comm. Reports, Second District, 210, 212.

[22] Proclamation by the President of September 16, 1918; Rules and Regulations of H. A. Garfield, Fuel Administrator, September 24, 1918.

[23] For example, the Iroquois Gas Corporation which formerly served Buffalo, New York, with natural gas ranging from 1050 to 1150 b. t. u. per cu. ft., now mixes a by-product gas of between 530 and 540 b. t. u. in proportions to provide a mixed gas of about 900 b. t. u. per cu. ft. For space heating or water heating its charges range from 65 cents for the first 10 m. c. f. per month to 55 cents for all above 25 m. c. f. per month. Moody's Manual of Public Utilities (1943) 1350.

heating, followed closely by use for space heating in homes. This is the true public utility aspect of the enterprise, and its preservation should be the first concern of regulation. Gas does the family cooking cheaper than any other fuel.[24] But its advantages do not end with dollars and cents cost. It is delivered without interruption at the meter as needed and is paid for after it is used. No money is tied up in a supply, and no space is used for storage. It requires no handling, creates no dust, and leaves no ash. It responds to thermostatic control. It ignites easily and immediately develops its maximum heating capacity. These incidental advantages make domestic life more liveable.

Industrial use is induced less by these qualities than by low cost in competition with other fuels. Of the gas exported from West Virginia by the Hope Company a very substantial part is used by industries. This wholesale use speeds exhaustion of supply and displaces other fuels. Coal miners and the coal industry, a large part of whose costs are wages, have complained of unfair competition from low-priced industrial gas produced with relatively little labor cost.[25]

Gas rate structures generally have favored industrial users. In 1932, in Ohio, the average yield on gas for domestic consumption was 62.1 cents per m. c. f. and on in-

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[24] The United States Fuel Administration made the following cooking value comparisons, based on tests made in the Department of Home Economics of Ohio State University:

Natural gas at 1.12 per M. is equivalent to coal at $6.50 per ton.
Natural gas at 2.00 per M. is equivalent to gasoline at 27¢ per gal.
Natural gas at 2.20 per M. is equivalent to electricity at 3¢ per k. w. h.
Natural gas at 2.40 per M. is equivalent to coal oil at 15¢ per gal.

Use and Conservation of Natural Gas, issued by U. S. Fuel Administration (1918) 5.

[25] See Brief on Behalf of Legislation Imposing an Excise Tax on Natural Gas, submitted to N. R. A. by the United Mine Workers of America and the National Coal Association.

dustrial, 38.7. In Pennsylvania, the figures were 62.9 against 31.7. West Virginia showed the least spread, domestic consumers paying 36.6 cents; and industrial, 27.7.[26] Although this spread is less than in other parts of the United States,[27] it can hardly be said to be self-justifying. It certainly is a very great factor in hastening decline of the natural gas supply.

About the time of World War I there were occasional and short-lived efforts by some hard-pressed companies to reverse this discrimination and adopt graduated rates, giving a low rate to quantities adequate for domestic use and graduating it upward to discourage industrial use.[28]

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[26] Brief of National Gas Association and United Mine Workers, *supra* note 26, pp. 35, 36, compiled from Bureau of Mines Reports.

[27] From the source quoted in the preceding note the spread elsewhere is shown to be:

State	*Industrial*	*Domestic*
Illinois	29.2	1.678
Louisiana	10.4	59.7
Oklahoma	11.2	41.5
Texas	13.1	59.7
Alabama	17.8	1.227
Georgia	22.9	1.043

[28] In Corning, New York, rates were initiated by the Crystal City Gas Company as follows: 70¢ for the first 5,000 cu. ft. per month; 80¢ from 5,000 to 12,000; $1.00 for all over 12,000. The Public Service Commission rejected these rates and fixed a flat rate of 58¢ per m. c. f. Lane *v.* Crystal City Gas Co., 8 New York Public Service Comm. Reports, Second District, 210.

The Pennsylvania Gas Company (National Fuel Gas Company group) also attempted a sliding scale rate for New York consumers, net per month as follows: First 5,000 feet, 35¢; second 5,000 feet, 45¢; third 5,000 feet, 50¢; all above 15,000, 55¢. This was eventually abandoned, however. The company's present scale in Pennsylvania appears to be reversed to the following net monthly rate: first 3 m. c. f., 75¢; next 4 m. c. f., 60¢; next 8 m. c. f., 55¢; over 15 m. c. f., 50¢. Moody's Manual of Public Utilities (1943) 1350. In New York it now serves a mixed gas.

For a study of effect of sliding scale rates in reducing consumption see 11 Proceedings of Natural Gas Association of America (1919) 287.

These rates met opposition from industrial sources, of course, and since diminished revenues from industrial sources tended to increase the domestic price, they met little popular or commission favor. The fact is that neither the gas companies nor the consumers nor local regulatory bodies can be depended upon to conserve gas. Unless federal regulation will take account of conservation, its efforts seem, as in this case, actually to constitute a new threat to the life of the Appalachian supply.

II.

Congress in 1938 decided upon federal regulation of the industry. It did so after an exhaustive investigation of all aspects including failing supply and competition for the use of natural gas intensified by growing scarcity.[29] Pipelines from the Appalachian area to markets were in the control of a handful of holding company systems.[30] This created a highly concentrated control of the producers' market and of the consumers' supplies. While holding companies dominated both production and distribution they segregated those activities in separate

[29] See Report on Utility Corporations by Federal Trade Commission, Sen. Doc. 92, Pt. 84–A, 70th Cong., 1st Sess.

[30] Four holding company systems control over 55 per cent of all natural gas transmission lines in the United States. They are Columbia Gas and Electric Corporation, Cities Service Co., Electric Bond and Share Co., and Standard Oil Co. of New Jersey. Columbia alone controls nearly 25 per cent, and fifteen companies account for over 80 per cent of the total. Report on Utility Corporations by Federal Trade Commission, Sen. Doc. 92, Pt. 84–A, 70th Cong., 1st Sess., 28.

In 1915, so it was reported to the Governor of West Virginia, 87 per cent of the total gas production of that state was under control of eight companies. Steptoe and Hoffheimer, Legislative Regulation of Natural Gas Supply in West Virginia, 17 West Virginia Law Quarterly 257, 260. Of these, three were subsidiaries of the Columbia system and others were subsidiaries of larger systems. In view of intersystem sales and interlocking interests it may be doubted whether there is much real competition among these companies.

subsidiaries,[31] the effect of which, if not the purpose, was to isolate some end of the business from the reach of any one state commission. The cost of natural gas to consumers moved steadily upwards over the years, out of proportion to prices of oil, which, except for the element of competition, is produced under somewhat comparable conditions. The public came to feel that the companies were exploiting the growing scarcity of local gas. The problems of this region had much to do with creating the demand for federal regulation.

The Natural Gas Act declared the natural gas business to be "affected with a *public interest*," and its regulation "necessary in the *public interest*." [32] Originally, and at the time this proceeding was commenced and tried, it also declared "the intention of Congress that natural gas shall be sold in interstate commerce for resale for ultimate public consumption for domestic, commercial, industrial, or any other use at the lowest possible reasonable rate *consistent with the maintenance of adequate service in the public interest*." [33] While this was later dropped, there is nothing to indicate that it was not and is not still an accurate statement of purpose of the Act. Extension or improvement of facilities may be ordered when "necessary or desirable in the public interest," abandonment of facilities may be ordered when the supply is "depleted to the extent that the continuance of service is unwarranted, or that the *present or future public convenience or necessity*

[31] This pattern with its effects on local regulatory efforts will be observed in our decisions. See *United Fuel Gas Co.* v. *Railroad Commission*, 278 U. S. 300; *United Fuel Gas Co.* v. *Public Service Commission*, 278 U. S. 322; *Dayton Power & Light Co.* v. *Public Utilities Commission*, 292 U. S. 290; *Columbus Gas & Fuel Co.* v. *Public Utilities Commission*, 292 U. S. 398, and the present case.

[32] 15 U. S. C. § 717 (a). (Italics supplied throughout this paragraph.)

[33] § 7 (c), 52 Stat. 825.

permit" abandonment and certain extensions can only be made on finding of "the *present or future* convenience and necessity." [34] The Commission is required to take account of the ultimate use of the gas. Thus it is given power to suspend new schedules as to rates, charges, and classification of services except where the schedules are for the sale of gas "for resale for industrial use only," [35] which gives the companies greater freedom to increase rates on industrial gas than on domestic gas. More particularly, the Act expressly forbids any undue preference or advantage to any person or *"any unreasonable difference in rates . . .* either as between localities *or as between classes of service."* [36] And the power of the Commission expressly includes that to determine the "just and reasonable *rate, charge, classification, rule, regulation, practice, or contract* to be thereafter observed and in force." [37]

In view of the Court's opinion that the Commission in administering the Act may ignore discrimination, it is interesting that in reporting this Bill both the Senate and the House Committees on Interstate Commerce pointed out that in 1934, on a nation-wide average the price of natural gas per m. c. f. was 74.6 cents for domestic use, 49.6 cents for commercial use, and 16.9 for industrial use.[38] I am not ready to think that supporters of a bill called attention to the striking fact that householders were being charged five times as much for their gas as industrial users only as a situation which the Bill would do nothing to remedy. On the other hand the Act gave to the Commission what the Court aptly describes as "broad powers of regulation."

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[34] 15 U. S. C. § 717f.

[35] *Id.*, § 717c (e).

[36] *Id.*, § 717c (b).

[37] *Id.*, § 717d (a).

[38] Sen. Rep. No. 1162, 75th Cong., 1st Sess., 2.

III.

This proceeding was initiated by the Cities of Cleveland and Akron. They alleged that the price charged by Hope for natural gas "for resale to domestic, commercial and small industrial consumers in Cleveland and elsewhere is excessive, unjust, unreasonable, greatly in excess of the price charged by Hope to nonaffiliated companies at wholesale for resale to domestic, commercial, and small industrial consumers, and *greatly in excess of the price charged by Hope to East Ohio for resale to certain favored industrial consumers in Ohio, and therefore is further unduly discriminatory between customers and between classes of service*" (italics supplied). The company answered admitting differences in prices to affiliated and nonaffiliated companies and justifying them by differences in conditions of delivery. As to the allegation that the contract price is "greatly in excess of the price charged by Hope to East Ohio for resale to certain favored industrial consumers in Ohio," Hope did not deny a price differential, but alleged that industrial gas was not sold to "favored consumers" but was sold under contracts and schedules filed with and approved by the Public Utilities Commission of Ohio, and that certain conditions of delivery made it not "unduly discriminatory."

The record shows that in 1940 Hope delivered for industrial consumption 36,523,792 m. c. f. and for domestic and commercial consumption, 50,343,652 m. c. f. I find no separate figure for domestic consumption. It served 43,767 domestic consumers directly, 511,521 through the East Ohio Gas Company, and 154,043 through the Peoples Natural Gas Company, both affiliates owned by the same parent. Its special contracts for industrial consumption, so far as appear, are confined to about a dozen big industries.

Hope is responsible for such discrimination as exists in favor of these few industrial consumers. It controls both the resale price and use of industrial gas by virtue of the very interstate sales contracts over which the Commission is exercising its jurisdiction.

Hope's contract with East Ohio Company is an example. Hope agrees to deliver, and the Ohio Company to take, "(a) all natural gas requisite for the supply of the domestic consumers of the Ohio Company; (b) such amounts of natural gas as may be requisite to fulfill contracts made with the consent and approval of the Hope Company by the Ohio Company, or companies which it supplies with natural gas, for the sale of gas upon special terms and conditions for manufacturing purposes." The Ohio Company is required to read domestic customers' meters once a month and meters of industrial customers daily and to furnish all meter readings to Hope. The Hope Company is to have access to meters of all consumers and to all of the Ohio Company's accounts. The domestic consumers of the Ohio Company are to be fully supplied in preference to consumers purchasing for manufacturing purposes and "Hope Company can be required to supply gas to be used for manufacturing purposes only where the same is sold under special contracts which have first been submitted to and approved in writing by the Hope Company and which expressly provide that natural gas will be supplied thereunder only in so far as the same is not necessary to meet the requirements of domestic consumers supplied through pipe lines of the Ohio Company." This basic contract was supplemented from time to time, chiefly as to price. The last amendment was in a letter from Hope to East Ohio in 1937. It contained a special discount on industrial gas and a schedule of special industrial contracts, Hope reserving the right to make eliminations therefrom and agreeing that others might be added from time to

time with its approval in writing. It said, "It is believed that the price concessions contained in this letter, *while not based on our costs,* are, under certain conditions, to our mutual advantage in maintaining and building up the volumes of gas sold by us [italics supplied]." [39]

The Commission took no note of the charges of discrimination and made no disposition of the issue tendered on this point. It ordered a flat reduction in the price per m. c. f. of all gas delivered by Hope in interstate commerce. It made no limitation, condition, or provision as to what classes of consumers should get the benefit of the reduction. While the cities have accepted and are defending the reduction, it is my view that the discrimination of which they have complained is perpetuated and increased by the order of the Commission and that it violates the Act in so doing.

The Commission's opinion aptly characterizes its entire objective by saying that "bona fide investment figures now become all-important in the regulation of rates." It should be noted that the all-importance of this theory is not the result of any instruction from Congress. When the Bill to regulate gas was first before Congress it con-

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[39] The list of East Ohio Gas Company's special industrial contracts thus expressly under Hope's control and their demands are as follows:

Customer	*Ordinary Daily Requirements.*
Republic Steel Corporation	15,000,000 cu. ft.
Otis Steel Company	10,000,000
Timken Roller Bearing Co	7,500,000
Youngstown Sheet & Tube Co	7,000,000
U. S. Steel Corp.—Subsidiaries	6,500,000
General Electric Company	2,500,000
Pittsburgh Plate Glass Co	2,000,000
Niles Rolling Mill Company	1,500,000
Chase Brass & Copper Company	700,000
U. S. Aluminum Company	400,000
Mahoning Valley Steel Company	400,000
Babcock & Wilcox Company	400,000
Canton Stamping & Enameling Co	350,000

tained the following: "In determining just and reasonable rates the Commission shall fix such rate as will allow a fair return upon the actual legitimate prudent cost of the property used and useful for the service in question." H. R. 5423, 74th Cong., 1st Sess., Title III, § 312 (c). Congress rejected this language. See H. R. 5423, § 213 (211 (c)), and H. R. Rep. No. 1318, 74th Cong., 1st Sess., 30.

The Commission contends nevertheless that the "all important" formula for finding a rate base is that of prudent investment. But it excluded from the investment base an amount actually and admittedly invested of some $17,000,000. It did so because it says that the Company recouped these expenditures from customers before the days of regulation from earnings above a fair return. But it would not apply all of such "excess earnings" to reduce the rate base as one of the Commissioners suggested. The reason for applying excess earnings to reduce the investment base roughly from $69,000,000 to $52,000,000 but refusing to apply them to reduce it from that to some $18,000,000 is not found in a difference in the character of the earnings or in their reinvestment. The reason assigned is a difference in bookkeeping treatment many years before the Company was subject to regulation. The $17,000,000, reinvested chiefly in well drilling, was treated on the books as expense. (The Commission now requires that drilling costs be carried to capital account.) The allowed rate base thus actually was determined by the Company's bookkeeping, not its investment. This attributes a significance to formal classification in account keeping that seems inconsistent with rational rate regulation.[40] Of

[40] To make a fetish of mere accounting is to shield from examination the deeper causes, forces, movements, and conditions which should govern rates. Even as a recording of current transactions, bookkeeping is hardly an exact science. As a representation of the condition and trend of a business, it uses symbols of certainty to express values

course, the Commission would not and should not allow a rate base to be inflated by bookkeeping which had improperly capitalized expenses. I have doubts about resting public regulation upon any rule that is to be used or not depending on which side it favors.

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that actually are in constant flux. It may be said that in commercial or investment banking or any business extending credit success depends on knowing what not to believe in accounting. Few concerns go into bankruptcy or reorganization whose books do not show them solvent and often even profitable. If one cannot rely on accountancy accurately to disclose past or current conditions of a business, the fallacy of using it as a sole guide to future price policy ought to be apparent. However, our quest for certitude is so ardent that we pay an irrational reverence to a technique which uses symbols of certainty, even though experience again and again warns us that they are delusive. Few writers have ventured to challenge this American idolatry, but see Hamilton, Cost as a Standard for Price, 4 Law and Contemporary Problems 321, 323–25. He observes that "As the apostle would put it, accountancy is all things to all men. . . . Its purpose determines the character of a system of accounts." He analyzes the hypothetical character of accounting and says "It was no eternal mold for pecuniary verities handed down from on high. It was—like logic, or algebra, or the device of analogy in the law—an ingenious contrivance of the human mind to serve a limited and practical purpose." "Accountancy is far from being a pecuniary expression of all that is industrial reality. It is an instrument, highly selective in its application, in the service of the institution of money making." As to capital account he observes "In an enterprise in lusty competition with others of its kind, survival is the thing and the system of accounts has its focus in solvency. . . . Accordingly depreciation, obsolescence, and other factors which carry no immediate threat are matters of lesser concern and the capital account is likely to be regarded as a secondary phenomenon. . . . But in an enterprise, such as a public utility, where continued survival seems assured, solvency is likely to be taken for granted. . . . A persistent and ingenious attention is likely to be directed not so much to securing the upkeep of the physical property as to making it certain that capitalization fails in not one whit to give full recognition to every item that should go into the account."

The Company on the other hand, has not put its gas fields into its calculations on the present-value basis, although that, it contends, is the only lawful rule for finding a rate base. To do so would result in a rate higher than it has charged or proposes as a matter of good business to charge.

The case before us demonstrates the lack of rational relationship between conventional rate-base formulas and natural gas production and the extremities to which regulating bodies are brought by the effort to rationalize them. The Commission and the Company each stands on a different theory, and neither ventures to carry its theory to logical conclusion as applied to gas fields.

IV.

This order is under judicial review not because we interpose constitutional theories between a State and the business it seeks to regulate, but because Congress put upon the federal courts a duty toward administration of a new federal regulatory Act. If we are to hold that a given rate is reasonable just because the Commission has said it was reasonable, review becomes a costly, time-consuming pageant of no practical value to anyone. If on the other hand we are to bring judgment of our own to the task, we should for the guidance of the regulators and the regulated reveal something of the philosophy, be it legal or economic or social, which guides us. We need not be slaves to a formula but unless we can point out a rational way of reaching our conclusions they can only be accepted as resting on intuition or predilection. I must admit that I possess no instinct by which to know the "reasonable" from the "unreasonable" in prices and must seek some conscious design for decision.

The Court sustains this order as reasonable, but what makes it so or what could possibly make it otherwise,

I cannot learn. It holds that: "it is the result reached not the method employed which is controlling"; "the fact that the method employed to reach that result may contain infirmities is not then important" and it is not "important to this case to determine the various permissible ways in which any rate base on which the return is computed might be arrived at." The Court does lean somewhat on considerations of capitalization and dividend history and requirements for dividends on outstanding stock. But I can give no real weight to that for it is generally and I think deservedly in discredit as any guide in rate cases.[41]

Our books already contain so much talk of methods of rationalizing rates that we must appear ambiguous if we announce results without our working methods. We are confronted with regulation of a unique type of enterprise which I think requires considered rejection of much conventional utility doctrine and adoption of concepts of "just and reasonable" rates and practices and of the "public interest" that will take account of the peculiarities of the business.

The Court rejects the suggestions of this opinion. It says that the Committees in reporting the bill which became the Act said it provided "for regulation along recognized and more or less standardized lines" and that there was "nothing novel in its provisions." So saying it sustains a rate calculated on a novel variation of a rate base theory which itself had at the time of enactment of the legislation been recognized only in dissenting opinions. Our difference seems to be between unconscious innovation,[42] and the purposeful and deliberate innovation I

[41] See 2 Bonbright, Valuation of Property (1937) 1112.

[42] Bonbright says, ". . . the vice of traditional law lies, not in its adoption of excessively rigid concepts of value and rules of valuation, but rather in its tendency to permit shifts in meaning that are inept, or else that are ill-defined because the judges that make them will not openly admit that they are doing so." *Id.*, 1170.

would make to meet the necessities of regulating the industry before us.

Hope's business has two components of quite divergent character. One, while not a conventional common-carrier undertaking, is essentially a transportation enterprise consisting of conveying gas from where it is produced to point of delivery to the buyer. This is a relatively routine operation not differing substantially from many other utility operations. The service is produced by an investment in compression and transmission facilities. Its risks are those of investing in a tested means of conveying a discovered supply of gas to a known market. A rate base calculated on the prudent investment formula would seem a reasonably satisfactory measure for fixing a return from that branch of the business whose service is roughly proportionate to the capital invested. But it has other consequences which must not be overlooked. It gives marketability and hence "value" to gas owned by the company and gives the pipeline company a large power over the marketability and hence "value" of the production of others.

The other part of the business—to reduce to possession an adequate supply of natural gas—is of opposite character, being more erratic and irregular and unpredictable in relation to investment than any phase of any other utility business. A thousand feet of gas captured and severed from real estate for delivery to consumers is recognized under our law as property of much the same nature as a ton of coal, a barrel of oil, or a yard of sand. The value to be allowed for it is the real battleground between the investor and consumer. It is from this part of the business that the chief difference between the parties as to a proper rate base arises.

Is it necessary to a "reasonable" price for gas that it be anchored to a rate base of any kind? Why did courts in the first place begin valuing "rate bases" in order to "value" something else? The method came into vogue

in fixing rates for transportation service which the public obtained from common carriers. The public received none of the carriers' physical property but did make some use of it. The carriage was often a monopoly so there were no open market criteria as to reasonableness. The "value" or "cost" of what was put to use in the service by the carrier was not a remote or irrelevant consideration in making such rates. Moreover the difficulty of appraising an intangible service was thought to be simplified if it could be related to physical property which was visible and measurable and the items of which might have market value. The court hoped to reason from the known to the unknown. But gas fields turn this method topsy turvy. Gas itself is tangible, possessible, and does have a market and a price in the field. The value of the rate base is more elusive than that of gas. It consists of intangibles—leaseholds and freeholds—operated and unoperated—of little use in themselves except as rights to reach and capture gas. Their value lies almost wholly in predictions of discovery, and of price of gas when captured, and bears little relation to cost of tools and supplies and labor to develop it. Gas is what Hope sells and it can be directly priced more reasonably and easily and accurately than the components of a rate base can be valued. Hence the reason for resort to a roundabout way of rate base price fixing does not exist in the case of gas in the field.

But if found, and by whatever method found, a rate base is little help in determining reasonableness of the price of gas. Appraisal of present value of these intangible rights to pursue fugitive gas depends on the value assigned to the gas when captured. The "present fair value" rate base, generally in ill repute,[43] is not even urged by the gas company for valuing its fields.

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[43] "The attempt to regulate rates by reference to a periodic or occasional reappraisal of the properties has now been tested long enough

The prudent investment theory has relative merits in fixing rates for a utility which creates its service merely by its investment. The amount and quality of service rendered by the usual utility will, at least roughly, be measured by the amount of capital it puts into the enterprise. But it has no rational application where there is no such relationship between investment and capacity to serve. There is no such relationship between investment and amount of gas produced. Let us assume that Doe and Roe each produces in West Virginia for delivery to Cleveland the same quantity of natural gas per day. Doe, however, through luck or foresight or whatever it takes, gets his gas from investing $50,000 in leases and drilling. Roe drilled poorer territory, got smaller wells, and has invested $250,000. Does anybody imagine that Roe can get or ought to get for his gas five times as much as Doe because he has spent five times as much? The service one renders to society in the gas business is measured by what he gets out of the ground, not by what he puts into it, and there is little more relation between the investment and the results than in a game of poker.

Two-thirds of the gas Hope handles it buys from about 340 independent producers. It is obvious that the principle of rate-making applied to Hope's own gas cannot be applied, and has not been applied, to the bulk of the gas Hope delivers. It is not probable that the investment of any two of these producers will bear the same ratio to their investments. The gas, however, all goes to the same use, has the same utilization value and the same ultimate price.

To regulate such an enterprise by undiscriminatingly transplanting any body of rate doctrine conceived and

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to confirm the worst fears of its critics. Unless its place is taken by some more promising scheme of rate control, the days of private ownership under government regulation may be numbered." 2 Bonbright, Valuation of Property (1937) 1190.

adapted to the ordinary utility business can serve the "public interest" as the Natural Gas Act requires, if at all, only by accident. Mr. Justice Brandeis, the pioneer juristic advocate of the prudent investment theory for man-made utilities, never, so far as I am able to discover, proposed its application to a natural gas case. On the other hand, dissenting in *Pennsylvania* v. *West Virginia,* he reviewed the problems of gas supply and said, "In no other field of public service regulation is the controlling body confronted with factors so baffling as in the natural gas industry; and in none is continuous supervision and control required in so high a degree." 262 U. S. 553, 621. If natural gas rates are intelligently to be regulated we must fit our legal principles to the economy of the industry and not try to fit the industry to our books.

As our decisions stand the Commission was justified in believing that it was required to proceed by the rate base method even as to gas in the field. For this reason the Court may not merely wash its hands of the method and rationale of rate making. The fact is that this Court, with no discussion of its fitness, simply transferred the rate base method to the natural gas industry. It happened in *Newark Natural Gas & Fuel Co.* v. *City of Newark, Ohio,* 242 U. S. 405 (1917), in which the company wanted 25 cents per m. c. f., and under the Fourteenth Amendment challenged the reduction to 18 cents by ordinance. This Court sustained the reduction because the court below "gave careful consideration to the questions of the value of the property at the time of the inquiry," and whether the rate "would be sufficient to provide a fair return on the value of the property." The Court said this method was "based upon principles thoroughly established by repeated decisions of this court," citing many cases, not one of which involved natural gas or a comparable wasting natural resource. Then came issues as to state power to

regulate as affected by the commerce clause. *Public Utilities Commission* v. *Landon,* 249 U. S. 236 (1919); *Pennsylvania Gas Co.* v. *Public Service Commission,* 252 U. S. 23 (1920). These questions settled, the Court again was called upon in natural gas cases to consider state rate-making claimed to be invalid under the Fourteenth Amendment. *United Fuel Gas Co.* v. *Railroad Commission of Kentucky,* 278 U. S. 300 (1929); *United Fuel Gas Co.* v. *Public Service Commission of West Virginia,* 278 U. S. 322 (1929). Then, as now, the differences were "due chiefly to the difference in value ascribed by each to the gas rights and leaseholds." 278 U. S. 300, 311. No one seems to have questioned that the rate base method must be pursued and the controversy was as to what rate base must be used. Later the "value" of gas in the field was questioned in determining the amount a regulated company should be allowed to pay an affiliate therefor—a state determination also reviewed under the Fourteenth Amendment. *Dayton Power & Light Co.* v. *Public Utilities Commission of Ohio,* 292 U. S. 290 (1934); *Columbus Gas & Fuel Co.* v. *Public Utilities Commission of Ohio,* 292 U. S. 398 (1934). In both cases, one of which sustained and one of which struck down a fixed rate, the Court assumed the rate base method as the legal way of testing reasonableness of natural gas prices fixed by public authority, without examining its real relevancy to the inquiry.

Under the weight of such precedents we cannot expect the Commission to initiate economically intelligent methods of fixing gas prices. But the Court now faces a new plan of federal regulation based on the power to fix the price at which gas shall be allowed to move in interstate commerce. I should now consider whether these rules devised under the Fourteenth Amendment are the exclusive tests of a just and reasonable rate under the federal statute, inviting reargument directed to that point

if necessary. As I see it now I would be prepared to hold that these rules do not apply to a natural gas case arising under the Natural Gas Act.

Such a holding would leave the Commission to fix the price of gas in the field as one would fix maximum prices of oil or milk or coal, or any other commodity. Such a price is not calculated to produce a fair return on the synthetic value of a rate base of any individual producer, and would not undertake to assure a fair return to any producer. The emphasis would shift from the producer to the product, which would be regulated with an eye to average or typical producing conditions in the field.

Such a price fixing process on economic lines would offer little temptation to the judiciary to become back seat drivers of the price fixing machine. The unfortunate effect of judicial intervention in this field is to divert the attention of those engaged in the process from what is economically wise to what is legally permissible. It is probable that price reductions would reach economically unwise and self-defeating limits before they would reach constitutional ones. Any constitutional problems growing out of price fixing are quite different than those that have heretofore been considered to inhere in rate making. A producer would have difficulty showing the invalidity of such a fixed price so long as he voluntarily continued to sell his product in interstate commerce. Should he withdraw and other authority be invoked to compel him to part with his property, a different problem would be presented.

Allowance in a rate to compensate for gas removed from gas lands, whether fixed as of point of production or as of point of delivery, probably best can be measured by a functional test applied to the whole industry. For good or ill we depend upon private enterprise to exploit these natural resources for public consumption. The function which an allowance for gas in the field should perform

for society in such circumstances is to be enough and no more than enough to induce private enterprise completely and efficiently to utilize gas resources, to acquire for public service any available gas or gas rights and to deliver gas at a rate and for uses which will be in the future as well as in the present public interest.

The Court fears that "if we are now to tell the Commission to fix the rates so as to discourage particular uses, we would indeed be injecting into a rate case a 'novel' doctrine . . ." With due deference I suggest that there is nothing novel in the idea that any change in price of a service or commodity reacts to encourage or discourage its use. The question is not whether such consequences will or will not follow; the question is whether effects must be suffered blindly or may be intelligently selected, whether price control shall have targets at which it deliberately aims or shall be handled like a gun in the hands of one who does not know it is loaded.

We should recognize "price" for what it is—a tool, a means, an expedient. In public hands it has much the same economic effects as in private hands. Hope knew that a concession in industrial price would tend to build up its volume of sales. It used price as an expedient to that end. The Commission makes another cut in that same price but the Court thinks we should ignore the effect that it will have on exhaustion of supply. The fact is that in natural gas regulation price must be used to reconcile the private property right society has permitted to vest in an important natural resource with the claims of society upon it—price must draw a balance between wealth and welfare.

To carry this into techniques of inquiry is the task of the Commissioner rather than of the judge, and it certainly is no task to be solved by mere bookkeeping but requires the best economic talent available. There would doubtless be inquiry into the price gas is bringing in the

field, how far that price is established by arm's length bargaining and how far it may be influenced by agreements in restraint of trade or monopolistic influences. What must Hope really pay to get and to replace gas it delivers under this order? If it should get more or less than that for its own, how much and why? How far are such prices influenced by pipe line access to markets and if the consumers pay returns on the pipe lines how far should the increment they cause go to gas producers? East Ohio is itself a producer in Ohio.[44] What do Ohio authorities require Ohio consumers to pay for gas in the field? Perhaps these are reasons why the Federal Government should put West Virginia gas at lower or at higher rates. If so what are they? Should East Ohio be required to exploit its half million acres of unoperated reserve in Ohio before West Virginia resources shall be supplied on a devalued basis of which that State complains and for which she threatens measures of self keep? What is gas worth in terms of other fuels it displaces?

A price cannot be fixed without considering its effect on the production of gas. Is it an incentive to continue to exploit vast unoperated reserves? Is it conducive to deep drilling tests the result of which we may know only after trial? Will it induce bringing gas from afar to supplement or even to substitute for Appalachian gas? [45] Can it be had from distant fields as cheap or cheaper? If so, that competitive potentiality is certainly a relevant consideration. Wise regulation must also consider, as a private buyer would, what alternatives the producer has

[44] East Ohio itself owns natural gas rights in 550,600 acres, 518,526 of which are reserved and 32,074 operated, by 375 wells. Moody's Manual of Public Utilities (1943) 5.

[45] Hope has asked a certificate of convenience and necessity to lay 1,140 miles of 22-inch pipeline from Hugoton gas fields in southwest Kansas to West Virginia to carry 285 million cu. ft. of natural gas per day. The cost was estimated at $51,000,000. Moody's Manual of Public Utilities (1943) 1760.

if the price is not acceptable. Hope has intrastate business and domestic and industrial customers. What can it do by way of diverting its supply to intrastate sales? What can it do by way of disposing of its operated or reserve acreage to industrial concerns or other buyers? What can West Virginia do by way of conservation laws, severance or other taxation, if the regulated rate offends? It must be borne in mind that while West Virginia was prohibited from giving her own inhabitants a priority that discriminated against interstate commerce, we have never yet held that a good faith conservation act, applicable to her own, as well as to others, is not valid. In considering alternatives, it must be noted that federal regulation is very incomplete, expressly excluding regulation of "production or gathering of natural gas," and that the only present way to get the gas seems to be to call it forth by price inducements. It is plain that there is a downward economic limit on a safe and wise price.

But there is nothing in the law which compels a commission to fix a price at that "value" which a company might give to its product by taking advantage of scarcity, or monopoly of supply. The very purpose of fixing maximum prices is to take away from the seller his opportunity to get all that otherwise the market would award him for his goods. This is a constitutional use of the power to fix maximum prices, *Block* v. *Hirsh,* 256 U. S. 135; *Marcus Brown Holding Co.* v. *Feldman,* 256 U. S. 170; *International Harvester Co.* v. *Kentucky,* 234 U. S. 216; *Highland* v. *Russell Car & Snow Plow Co.,* 279 U. S. 253, just as the fixing of minimum prices of goods in interstate commerce is constitutional although it takes away from the buyer the advantage in bargaining which market conditions would give him. *United States* v. *Darby,* 312 U. S. 100; *Mulford* v. *Smith,* 307 U. S. 38; *United States* v. *Rock Royal Cooperative,* 307 U. S. 533; *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U. S. 381. The Commission has power to fix

552826—44——46

a price that will be both maximum and minimum and it has the incidental right, and I think the duty, to choose the economic consequences it will promote or retard in production and also more importantly in consumption, to which I now turn.

If we assume that the reduction in company revenues is warranted we then come to the question of translating the allowed return into rates for consumers or classes of consumers. Here the Commission fixed a single rate for all gas delivered irrespective of its use despite the fact that Hope has established what amounts to two rates—a high one for domestic use and a lower one for industrial contracts.[46] The Commission can fix two prices for interstate gas as readily as one—a price for resale to domestic users and another for resale to industrial users. This is the pattern Hope itself has established in the very contracts over which the Commission is expressly given jurisdiction. Certainly the Act is broad enough to permit two prices to be fixed instead of one, if the concept of the "public interest" is not unduly narrowed.

The Commission's concept of the public interest in natural gas cases which is carried today into the Court's opinion was first announced in the opinion of the minority in the *Pipeline* case. It enumerated only two "phases of the public interest: (1) the investor interest; (2) the consumer interest," which it emphasized to the exclusion of all others. 315 U. S. 575, 606. This will do well enough in dealing with railroads or utilities supplying manufactured gas, electric power, a communications service or transportation, where utilization of facilities does not impair their future usefulness. Limitation of supply, however, brings into a natural gas case another phase of the public interest that to my mind overrides both the owner

[46] I find little information as to the rates for industries in the record and none at all in such usual sources as Moody's Manual.

and the consumer of that interest. Both producers and industrial consumers have served their immediate private interests at the expense of the long-range public interest. The public interest, of course, requires stopping unjust enrichment of the owner. But it also requires stopping unjust impoverishment of future generations. The public interest in the use by Hope's half million domestic consumers is quite a different one from the public interest in use by a baker's dozen of industries.

Prudent price fixing it seems to me must at the very threshold determine whether any part of an allowed return shall be permitted to be realized from sales of gas for resale for industrial use. Such use does tend to level out daily and seasonal peaks of domestic demand and to some extent permits a lower charge for domestic service. But is that a wise way of making gas cheaper when, in comparison with any substitute, gas is already a cheap fuel? The interstate sales contracts provide that at times when demand is so great that there is not enough gas to go around domestic users shall first be served. Should the operation of this preference await the day of actual shortage? Since the propriety of a preference seems conceded, should it not operate to prevent the coming of a shortage as well as to mitigate its effects? Should industrial use jeopardize tomorrow's service to householders any more than today's? If, however, it is decided to cheapen domestic use by resort to industrial sales, should they be limited to the few uses for which gas has special values or extend also to those who use it only because it is cheaper than competitive fuels? [47] And how much cheaper should indus-

[47] The Federal Power Commission has touched upon the problem of conservation in connection with an application for a certificate permitting construction of a 1,500-mile pipeline from southern Texas to New York City and says: "The Natural Gas Act as presently drafted does not enable the Commission to treat fully the serious implications of such a problem. The question should be raised as to whether the

trial gas sell than domestic gas, and how much advantage should it have over competitive fuels? If industrial gas is to contribute at all to lowering domestic rates, should it not be made to contribute the very maximum of which it is capable, that is, should not its price be the highest at which the desired volume of sales can be realized?

If I were to answer I should say that the household rate should be the lowest that can be fixed under commercial conditions that will conserve the supply for that use. The lowest probable rate for that purpose is not likely to speed exhaustion much, for it still will be high enough to induce economy, and use for that purpose has more nearly reached the saturation point. On the other hand the demand for industrial gas at present rates already appears to be increasing. To lower further the industrial rate is merely further to subsidize industrial consumption and speed depletion. The impact of the flat reduction

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proposed use of natural gas would not result in displacing a less valuable fuel and create hardships in the industry already supplying the market, while at the same time rapidly depleting the country's natural-gas reserves. Although, for a period of perhaps 20 years, the natural gas could be so priced as to appear to offer an apparent saving in fuel costs, this would mean simply that social costs which must eventually be paid had been ignored.

"Careful study of the entire problem may lead to the conclusion that use of natural gas should be restricted by functions rather than by areas. Thus, it is especially adapted to space and water heating in urban homes and other buildings and to the various industrial heat processes which require concentration of heat, flexibility of control, and uniformity of results. Industrial uses to which it appears particularly adapted include the treating and annealing of metals, the operation of kilns in the ceramic, cement, and lime industries, the manufacture of glass in its various forms, and use as a raw material in the chemical industry. General use of natural gas under boilers for the production of steam is, however, under most circumstances of very questionable social economy." Twentieth Annual Report of the Federal Power Commission (1940) 79.

of rates ordered here admittedly will be to increase the industrial advantages of gas over competing fuels and to increase its use. I think this is not, and there is no finding by the Commission that it is, in the public interest.

There is no justification in this record for the present discrimination against domestic users of gas in favor of industrial users. It is one of the evils against which the Natural Gas Act was aimed by Congress and one of the evils complained of here by Cleveland and Akron. If Hope's revenues should be cut by some $3,600,000 the whole reduction is owing to domestic users. If it be considered wise to raise part of Hope's revenues by industrial purpose sales, the utmost possible revenue should be raised from the least consumption of gas. If competitive relationships to other fuels will permit, the industrial price should be substantially advanced, not for the benefit of the Company, but the increased revenues from the advance should be applied to reduce domestic rates. For in my opinion the "public interest" requires that the great volume of gas now being put to uneconomic industrial use should either be saved for its more important future domestic use or the present domestic user should have the full benefit of its exchange value in reducing his present rates.

Of course the Commission's power directly to regulate does not extend to the fixing of rates at which the local company shall sell to consumers. Nor is such power required to accomplish the purpose. As already pointed out, the very contract the Commission is altering classifies the gas according to the purposes for which it is to be resold and provides differentials between the two classifications. It would only be necessary for the Commission to order that all gas supplied under paragraph (a) of Hope's contract with the East Ohio Company shall be

at a stated price fixed to give to domestic service the entire reduction herein and any further reductions that may prove possible by increasing industrial rates. It might further provide that gas delivered under paragraph (b) of the contract for industrial purposes to those industrial customers Hope has approved in writing shall be at such other figure as might be found consistent with the public interest as herein defined. It is too late in the day to contend that the authority of a regulatory commission does not extend to a consideration of public interests which it may not directly regulate and a conditioning of its orders for their protection. *Interstate Commerce Commission* v. *Railway Labor Executives Assn.*, 315 U. S. 373; *United States* v. *Lowden*, 308 U. S. 225.

Whether the Commission will assert its apparently broad statutory authorization over prices and discriminations is, of course, its own affair, not ours. It is entitled to its own notion of the "public interest" and its judgment of policy must prevail. However, where there is ground for thinking that views of this Court may have constrained the Commission to accept the rate-base method of decision and a particular single formula as "all important" for a rate base, it is appropriate to make clear the reasons why I, at least, would not be so understood. The Commission is free to face up realistically to the nature and peculiarity of the resources in its control, to foster their duration in fixing price, and to consider future interests in addition to those of investors and present consumers. If we return this case it may accept or decline the proffered freedom. This problem presents the Commission an unprecedented opportunity if it will boldly make sound economic considerations, instead of legal and accounting theories, the foundation of federal policy. I would return the case to the Commission and thereby be clearly quit of what now may appear to be some responsibility for perpetrating a short-sighted pattern of natural gas regulation.

Counsel for Parties.

MERCOID CORPORATION *v.* MID-CONTINENT INVESTMENT CO. ET AL.

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

Nos. 54 and 55. Argued December 9, 1943.—Decided January 3, 1944.

1. The owner of a system patent may not use it to secure a limited monopoly of an unpatented device employed in practicing the invention, even though the unpatented device is itself an integral part of the patented system. P. 665.
2. In a suit for infringement of a combination patent, misuse of the patent to protect an unpatented element from competition is a defense available to a contributory infringer. *Leeds & Catlin Co.* v. *Victor Talking Machine Co.* (No. 2), 213 U. S. 325, limited. P. 668.
3. Exercise by an equity court of its discretion to withhold relief from a patentee who has misused his patent to secure a limited monopoly of unpatented material, can not be foreclosed by the failure of the defendant to interpose that defense in earlier litigation to which the alleged infringer was privy. P. 670.
4. A judgment in a suit for infringement of a patent does not bar a claim based on § 4 of the Clayton Act which could have been, but was not, asserted as a counterclaim in the prior suit. P. 671.

   Where the second cause of action between the parties is upon a different claim, the prior judgment is *res judicata* not as to issues which might have been tendered but only as to those upon the determination of which the finding or verdict was rendered. P. 671.
5. A counterclaim based on § 4 of the Clayton Act may, under the Rules of Civil Procedure, be asserted in a patent infringement suit. P. 671.

133 F. 2d 803, reversed.

CERTIORARI, 319 U. S. 737, to review a decree which affirmed in part and reversed in part a decree of the District Court, 43 F. Supp. 692, in a patent infringement suit.

Mr. George L. Wilkinson for petitioner.

Mr. Casper W. Ooms, with whom *Messrs. Richard Spencer, Richard L. Johnston,* and *Lloyd C. Root* were on the brief, for the Mid-Continent Investment Co.; and

Mr. W. P. Bair, with whom *Messrs. Will Freeman* and *George H. Fisher* were on the brief, for the Minneapolis-Honeywell Regulator Co.,—respondents.

Solicitor General Fahy, Assistant Attorney General Berge, and *Messrs. Elliott H. Moyer* and *Robert C. Barnard* filed a brief on behalf of the United States, as *amicus curiae,* urging reversal.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This suit was brought by respondent, Mid-Continent Investment Co., against petitioner, Mercoid Corporation, for contributory infringement of the Cross combination patent No. 1,758,146, issued May 13, 1930, for a domestic heating system. Mercoid in its answer denied contributory infringement and alleged that Mid-Continent should be barred from relief because it was seeking to extend the grant of the patent to unpatented devices. The alleged improper use of the patent was also the basis of a counterclaim filed by Mercoid in which it was averred that Mid-Continent and its exclusive licensee under the patent, respondent Minneapolis-Honeywell Regulator Co., who was brought in as a party plaintiff, had conspired to expand the monopoly of the patent in violation of the anti-trust laws. Mercoid asked not only for declaratory relief but for an accounting and treble damages as well. The District Court found that Mercoid did not contribute to the infringement of the Cross patent; that respondents had conspired to establish a monopoly in an unpatented appliance beyond the scope of the patent and in violation of the anti-trust laws; and that respondents were in no position to maintain the suit because of that conspiracy. Mercoid was granted an injunction but its prayer for damages was denied. The Circuit Court of Appeals affirmed the judgment of the District Court in disallowing dam-

ages under the counterclaim. In all other respects it reversed that judgment, holding that Mercoid was guilty of contributory infringement under the rule of *Leeds & Catlin Co.* v. *Victor Talking Machine Co.* (No. 2), 213 U. S. 325, and that *Carbice Corp.* v. *American Patents Corp.*, 283 U. S. 27 and *Leitch Mfg. Co.* v. *Barber Co.*, 302 U. S. 458, did not bar recovery as the District Court had thought. 133 F. 2d 803. The case is here on a petition for a writ of certiorari which we granted because of the public importance of the questions presented.

The controversy centers around the license agreement between Mid-Continent and Minneapolis-Honeywell. By that agreement Minneapolis-Honeywell received an exclusive license to make, use, sell, and to sub-license others to make, use, and sell the Cross combination patent No. 1,758,146. The royalty payments under the license, however, were to be based only upon sales of the combustion stoker switch which was an element of the combination patent embodied in the patented article but which was itself unpatented. The license agreement was construed by the Circuit Court of Appeals to mean that the royalty payments were to be made only on switches used for fire maintenance purposes under the Cross patent. And Minneapolis-Honeywell in advertising its stoker switches stated that the "right to use" the Cross system patent was "only granted to the user" when the stoker switches of Minneapolis-Honeywell were purchased from it and used in the system. Neither Mid-Continent nor Minneapolis-Honeywell manufactures or installs heating systems under the Cross combination patent. There was ample evidence to sustain the findings of the District Court that respondents endeavored to use the license agreement so as to prevent the sale or use of combustion stoker switches in these heating systems unless they were the switches made by Minneapolis-Honeywell and purchased from it or its sub-licensees.

The patent is a combination or system patent, covering a domestic heating system which comprises three main elements—a motor driven stoker for feeding fuel to the combustion chamber of a furnace, a room thermostat for controlling the feeding of fuel, and a combustion stoker switch to prevent extinguishment of the fire. The room thermostat functions to supply, or discontinue the supply of, heat by closing or then opening the circuit to the stoker motor at the required temperatures. The combustion stoker switch, or holdfire control, is responsive to a low temperature in the furnace causing the stoker to feed fuel so as to prevent the furnace fire from going out. The control of the combustion stoker switch is said to be effective in mild weather when the room thermostat may not call for heat for a considerable period.

Mercoid, like Mid-Continent and Minneapolis-Honeywell, does not sell or install the Cross heating system. But the Circuit Court of Appeals found that Mercoid manufactured and sold combustion stoker switches for use in the Cross combination patent. And we may assume that Mercoid did not act innocently. Indeed the Circuit Court of Appeals said that it could find no use for the accused devices other than in the Cross combination patent. And it assumed, as was held in *Smith* v. *Mid-Continent Investment Co.*, 106 F. 2d 622, that the Cross patent was valid. But though we assume the validity of the patent and accept fully the findings of the Circuit Court of Appeals, we think the judgment below should be reversed.

Ever since *Henry* v. *A. B. Dick Co.*, 224 U. S. 1, was overruled by *Motion Picture Co.* v. *Universal Film Co.*, 243 U. S. 502, this Court has consistently held that the owner of a patent may not employ it to secure a limited monopoly of an unpatented material used in applying the invention. *Carbice Corp.* v. *American Patents Corp.*, *supra; Leitch Mfg. Co.* v. *Barber Co., supra; Morton Salt*

Co. v. *G. S. Suppiger Co.,* 314 U. S. 488; *B. B. Chemical Co.* v. *Ellis,* 314 U. S. 495. In those cases both direct and contributory infringement suits were disallowed on a showing that the owner of the patent was using it "as the effective means of restraining competition with its sale of an unpatented article." *Morton Salt Co.* v. *G. S. Suppiger Co., supra,* p. 490. The Court has repeatedly held that to allow such suits would be to extend the aid of a court of equity in expanding the patent beyond the legitimate scope of its monopoly. It is true that those cases involved the use of the patent for a machine or process to secure a partial monopoly in supplies consumed in its operation or unpatented materials employed in it. But we can see no difference in principle where the unpatented material or device is itself an integral part of the structure embodying the patent.

The grant of a patent is the grant of a special privilege "to promote the Progress of Science and useful Arts." Const., Art. I, § 8. It carries, of course, a right to be free from competition in the practice of the invention. But the limits of the patent are narrowly and strictly confined to the precise terms of the grant. *Ethyl Gasoline Corp.* v. *United States,* 309 U. S. 436, 456; *United States* v. *Univis Lens Co.,* 316 U. S. 241, 251. It is the public interest which is dominant in the patent system. *Pennock* v. *Dialogue,* 2 Pet. 1; *Kendall* v. *Winsor,* 21 How. 322, 329; *Adams* v. *Burke,* 17 Wall. 453; *Motion Picture Co.* v. *Universal Film Co., supra,* pp. 510–511; *Morton Salt Co.* v. *G. S. Suppiger Co., supra; United States* v. *Masonite Corp.,* 316 U. S. 265, 278. It is the protection of the public in a system of free enterprise which alike nullifies a patent where any part of it is invalid (*Marconi Wireless Co.* v. *United States,* 320 U. S. 1, 58; and see *General Electric Co.* v. *Wabash Corp.,* 304 U. S. 364, 372) and denies to the patentee after issuance the power to use it in such a way as to acquire a monopoly which is not plainly within

the terms of the grant. The necessities or convenience of the patentee do not justify any use of the monopoly of the patent to create another monopoly. The fact that the patentee has the power to refuse a license does not enable him to enlarge the monopoly of the patent by the expedient of attaching conditions to its use. *United States* v. *Masonite Corp., supra,* p. 277. The method by which the monopoly is sought to be extended is immaterial. *United States* v. *Univis Lens Co., supra,* pp. 251–252. The patent is a privilege. But it is a privilege which is conditioned by a public purpose. It results from invention and is limited to the invention which it defines. When the patentee ties something else to his invention, he acts only by virtue of his right as the owner of property to make contracts concerning it and not otherwise. He then is subject to all the limitations upon that right which the general law imposes upon such contracts. The contract is not saved by anything in the patent laws because it relates to the invention. If it were, the mere act of the patentee could make the distinctive claim of the patent attach to something which does not possess the quality of invention. Then the patent would be diverted from its statutory purpose and become a ready instrument for economic control in domains where the anti-trust acts or other laws not the patent statutes define the public policy.

The instant case is a graphic illustration of the evils of an expansion of the patent monopoly by private engagements. The patent in question embraces furnace assemblies which neither the patentee nor the licensee makes or vends. The struggle is not over a combination patent and the right to make or vend it. The contest is solely over unpatented wares which go into the patented product. Respondents point out that the royalties under the license are measured by the number of unpatented controls which are sold and that no royalty is paid unless a furnace cov-

ered by the patent has been installed. But the fact remains that the competition which is sought to be controlled is not competition in the sale of the patented assembly but merely competition in the sale of the unpatented thermostatic controls. The patent is employed to protect the market for a device on which no patent has been granted. But for the patent such restraint on trade would plainly run afoul of the anti-trust laws. If the restraint is lawful because of the patent, the patent will have been expanded by contract. That on which no patent could be obtained would be as effectively protected as if a patent had been issued. Private business would function as its own patent office and impose its own law upon its licensees. It would obtain by contract what letters patent alone may grant. Such a vast power "to multiply monopolies" at the will of the patentee (Chief Justice White dissenting in *Henry* v. *A. B. Dick Co., supra,* p. 53) would carve out exceptions to the anti-trust laws which Congress has not sanctioned. Mr. Justice Brandeis, speaking for the Court, stated in the *Carbice* case that "Control over the supply of such unpatented material is beyond the scope of the patentee's monopoly; and this limitation, inherent in the patent grant, is not dependent upon the peculiar function or character of the unpatented material or on the way in which it is used." 283 U. S. p. 33. We now add that it makes no difference that the unpatented device is part of the patented whole.

That result may not be obviated in the present case by calling the combustion stoker switch the "heart of the invention" or the "advance in the art." The patent is for a combination only. Since none of the separate elements of the combination is claimed as the invention, none of them when dealt with separately is protected by the patent monopoly. *Leeds & Catlin Co.* v. *Victor Talking Machine Co.* (No. 1), 213 U. S. 301, 318. Whether the parts are new or old, the combination is the in-

vention and it is distinct from any of them. See *Schumacher* v. *Cornell,* 96 U. S. 549, 554; *Rowell* v. *Lindsay,* 113 U. S. 97, 101. If a limited monopoly over the combustion stoker switch were allowed, it would not be a monopoly accorded inventive genius by the patent laws but a monopoly born of a commercial desire to avoid the rigors of competition fostered by the anti-trust laws. If such an expansion of the patent monopoly could be effected by contract, the integrity of the patent system would be seriously compromised.

Leeds & Catlin Co. v. *Victor Talking Machine Co.* (No. 2), *supra,* is authority for the conclusion that he who sells an unpatented part of a combination patent for use in the assembled machine may be guilty of contributory infringement. The protection which the Court in that case extended to the phonograph record, which was an unpatented part of the patented phonograph, is in substance inconsistent with the view which we have expressed in this case. The rule of the *Leeds & Catlin* case (No. 2) accordingly must no longer prevail against the defense [1] that a combination patent is being used to protect an unpatented part from competition. That result obtains here though we assume for the purposes of this case that Mercoid was a contributory infringer and that respondents could have enjoined the infringement had they not misused the patent for the purpose of monopolizing unpatented material. Inasmuch as their misuse of the patent would have precluded them from enjoining a direct infringement (*Mor-*

[1] The Court in that case did not refer to the doctrine of misuse of a patent. That doctrine indeed was developed in this Court some years later as shown by the *Motion Picture* case. The record in the *Leeds & Catlin* case indicates that the point which we deem crucial in the instant case was adverted to only obliquely in the briefs. The Court was chiefly concerned with the proposition that a substitution or renewal of an unpatented element of a combination patent, as distinguished from its repair, is a "reconstruction" of the combination 213 U. S. pp. 333, 336.

ton Salt Co. v. *G. S. Suppiger Co., supra*) they cannot stand in any better position with respect to a contributory infringer. Where there is a collision between the principle of the *Carbice* case and the conventional rules governing either direct or contributory infringement, the former prevails.

The result of this decision, together with those which have preceded it, is to limit substantially the doctrine of contributory infringement. What residuum may be left we need not stop to consider. It is sufficient to say that in whatever posture the issue may be tendered courts of equity will withhold relief where the patentee and those claiming under him are using the patent privilege contrary to the public interest. *Morton Salt Co.* v. *G. S. Suppiger Co., supra,* p. 492.

There remain the questions of *res judicata* and Mercoid's right to relief under the counterclaim.

Respondents point out that Mercoid knew of Mid-Continent's actions and the license agreement prior to 1935 when the earlier suit involving the validity of the Cross patent (*Smith* v. *Mid-Continent Investment Co., supra*) was instituted. They state, and the District Court found, that although Mercoid was not made a party to the earlier suit it provided the defense. The contention therefore is that the doctrine of *res judicata* binds Mercoid as respects issues which were actually litigated and all issues which might have been raised in that earlier suit. And it is pointed out that among the defenses which might have been interposed were those relating to the misuse of the patent and the violations of the anti-trust laws. It is argued, moreover, that although Minneapolis-Honeywell was not a party to the earlier litigation, it is entitled to the benefit of the judgment since its title or claim derives from the patentee. We do not stop to examine the premises on which the argument is based; for though we assume that they are correct, it does not follow that the

doctrine of *res judicata* forecloses the defense which is tendered.

Respondents ask the equity court for an injunction against infringement by petitioner of the patent in question and for an accounting. Should such a decree be entered, the Court would be placing its imprimatur on a scheme which involves a misuse of the patent privilege and a violation of the anti-trust laws. It would aid in the consummation of a conspiracy to expand a patent beyond its legitimate scope. But patentees and licensees cannot secure aid from the court to bring such an event to pass, "unless it is in accordance with policy to grant that help." *Beasley* v. *Texas & Pacific Ry. Co.*, 191 U. S. 492, 497. And the determination of that policy is not "at the mercy" of the parties (*id.*, p. 498) nor dependent on the usual rules governing the settlement of private litigation. "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." *Virginian Ry. Co.* v. *System Federation,* 300 U. S. 515, 552. "Where an important public interest would be prejudiced," the reasons for denying injunctive relief "may be compelling." *Harrisonville* v. *Dickey Clay Co.*, 289 U. S. 334, 338. And see *United States* v. *Morgan,* 307 U. S. 183, 194. That is the principle which has led this Court in the past to withhold aid from a patentee in suits for either direct or indirect infringement where the patent was being misused. *Morton Salt Co.* v. *G. S. Suppiger Co., supra,* p. 492. That principle is controlling here. The parties cannot foreclose the courts from the exercise of that discretion by the failure to interpose the same defense in an earlier litigation. Cf. *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173.

What we have just said does not, of course, dispose of Mercoid's counterclaim for damages. That was based

on § 4 of the Clayton Act which provides: "Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 38 Stat. 731, 15 U. S. C. § 15. Though Mercoid were barred in the present case from asserting any defense which might have been interposed in the earlier litigation, it would not follow that its counterclaim for damages would likewise be barred. That claim for damages is more than a defense; it is a separate statutory cause of action. The fact that it might have been asserted as a counterclaim in the prior suit by reason of Rule 13 (b) of the Rules of Civil Procedure does not mean that the failure to do so renders the prior judgment *res judicata* as respects it. *Virginia-Carolina Chemical Co.* v. *Kirven,* 215 U. S. 252; *Larsen* v. *Northland Transportation Co.,* 292 U. S. 20. And see Scott, Collateral Estoppel by Judgment, 56 Harv. L. Rev. 1, 26–28; Restatement of the Law of Judgments, § 58. The case is then governed by the principle that where the second cause of action between the parties is upon a different claim the prior judgment is *res judicata* not as to issues which might have been tendered but "only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered." *Cromwell* v. *County of Sac,* 94 U. S. 351, 353. And see *Russell* v. *Place,* 94 U. S. 606. It was held in *Fleitmann* v. *Welsbach Street Lighting Co.,* 240 U. S. 27, that the statutory liability in question may be enforced only through the verdict of a jury in a court of common law. But there is no reason under the Rules of Civil Procedure why that may not be done under this counterclaim. Rules 12 (h), 13, 38, 42 (b). Whether the evi-

dence will show damages within the rule of *Story Parchment Co.* v. *Paterson Co.*, 282 U. S. 555, is of course a distinct question on which we intimate no opinion.

We have mentioned the statutory claim for damages because both the District Court and the Circuit Court of Appeals denied that relief. But since the cause must be remanded to the District Court, we think the question whether *res judicata* bars any other part of the relief sought by the counterclaim may appropriately be reserved for it.

Reversed.

Opinion of MR. JUSTICE BLACK:

Although I entirely agree with the Court's judgments and the grounds on which they rest, I find it necessary to add a few remarks in order that silence may not be understood as acquiescence in the views expressed in the dissenting opinion of MR. JUSTICE FRANKFURTER. There is no inclination on my part to challenge the wisdom of the established practice whereby we do not discuss issues in the abstract. As I see it, that salutary practice has no application to the Court's discussion of contributory infringement in the present case. The court below rested its decision on what it considered to be a doctrine of contributory infringement, and counsel for respondent have discussed and relied upon it here. The Court's opinion demonstrates that the subject cannot be ignored since at least one element of the "complicated idea" which is "compressed" in the judicially created "formula" of contributory infringement clashes head-on with elements of the *Carbice* doctrine.

But my disagreement with this dissenting opinion runs much deeper than the mere question of whether the Court has here discussed the so-called formula of contributory infringement at an improper or inopportune time. It seems to me that the judicial error of discussing abstract

questions is slight compared to the error of interpreting legislative enactments on the basis of a court's preconceived views on "morals" and "ethics."

If there is such a wrong as contributory infringement, it must have been created by the federal patent statutes. Since they make no direct mention of such a wrong, its existence could only be rested on inferences as to Congressional intent. In searching for Congressional intent we ordinarily look to such sources as statutory language and legislative history. The dissent in question mentions neither of these guides; in fact, it mentions no statute at all. Instead, the chief reliance appears to be upon the law of torts, a quotation from a decision of a lower federal court which held that no infringement was shown, and the writer's personal views on "morals" and "ethics." Not one of these references, unless it be the latter, throws enough light on the patent statutes to justify its use in construing these statutes as creating, in addition to a right of recovery for infringement, a more expansive right judicially characterized as a "formula" of "contributory infringement." And for judges to rest their interpretation of statutes on nothing but their own conceptions of "morals" and "ethics" is, to say the least, dangerous business.

If the present case compelled consideration of the morals and ethics of contributory infringement, I should be most reluctant to conclude that the scales of moral value are weighted against the right of producers to sell their unpatented goods in a free market. At least since Adam Smith wrote, unhampered competition has not generally been considered immoral. While there have been objections to the Sherman Anti-Trust Act, few if any of the objectors have questioned its morality.

It has long been recognized that a socially undesirable practice may seek acceptance under the guise of conventional moral symbols. And repeated judicial assertion

that a bad practice is hallowed by morals may, if unchallenged, help it to receive the acceptance which it seeks. With this in mind, I wish to make explicit my protest against talking about the judicial doctrine of "contributory infringement" as though it were entitled to the same respect as a universally recognized moral truth.

MR. JUSTICE MURPHY concurs in this opinion.

MR. JUSTICE ROBERTS:

First. I agree that the patentee may not extend his exclusive statutory right to make, use, and vend by forbidding one practicing the invention from using in such practice an unpatented article susceptible to such use. He may not obtain an injunction against such user for infringement. This is a pure question of the extent of the right of exclusion conferred by the patent statute.[1] It nowise involves the antitrust acts. A patent is property and it may, like other property, be so used as to violate those acts,[2] but that is not this case.

Second. I think the opinion may create confusion respecting contributory infringement. The court below, thinking the doctrine of the *Carbice* and *Leitch* cases inapplicable, necessarily concluded that the user of the system infringed the patent if he used any thermostat other than that manufactured by respondent's exclusive licensee. But those cases show that so to do would not constitute infringement of the patent. And if the purchaser and user could not be amerced as an infringer certainly one who sold to him with the purpose that he should use the thermostat cannot be amerced for contributing to a non-existent infringement. One may disagree with the

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[1] *Carbice Corp.* v. *American Patents Corp.*, 283 U. S. 27; *Leitch Mfg. Co.* v. *Barber Co.*, 302 U. S. 458.

[2] *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20; *United States* v. *Masonite Corp.*, 316 U. S. 265.

decision of this court in *Leeds & Catlin Co.* v. *Victor Talking Machine Co.* (No. 2), 213 U. S. 325, that the substitution by the user of the talking machine of a record not made by the licensor constituted an infringement of the patent, but, accepting the premise that such conduct was infringement, one who participated in it by knowingly and intentionally selling records to the user became an aider and participant in the infringement and, as such, liable to the owner of the patent. I cannot believe that the court's opinion is intended to lay down a different principle.

Third. I disagree with the application of the rule *res judicata* to one phase of the litigation. Mercoid defended an earlier suit brought by the respondent against a user of the patented combination who bought and installed as part of the system a Mercoid thermostat. Confessedly the defense now asserted under the *Carbice* doctrine was available, was not made, and judgment of validity and infringement was entered.

I fail to see what great question of public interest or public policy is violated by holding that one to whom a defense was available, in rebuttal of a claim broader than was warranted by the statute on which the plaintiff's right was founded, is bound by the judgment rendered. That judgment stands unreversed. The defense, if made, as it could have been, would have benefited the defendant in its pocketbook. We are now told that a misconstruction of the patent law by a licensor is so violent and flagrant a flouting of the public interest that a court of equity must hold its hand for the benefit of a defendant whenever he chooses to invoke that interest for his private benefit, though he has failed to make the defense in an earlier litigation and stands of record an infringer. If a wrong against the public has been perpetrated it may be redressed at the instance of the representatives of government.

I can only speculate as to the results of such a holding. If applicable here, I cannot see why the principle should not apply to every suit or action based upon, or arising out of, statutory provisions, and to every defense bottomed on public policy, whether expressed in statute or not. Surely the defendant in the earlier suit, after the decree against him became final, could not have defended a charge of contempt for disobeying the decree on the ground now asserted. And if the judgment concluded him thus directly, I cannot agree that he may now disregard it or collaterally attack it. And confessedly Mercoid stands in his shoes.[3]

I should affirm the judgment.

MR. JUSTICE REED joins in this opinion.

MR. JUSTICE FRANKFURTER, dissenting:

The Court holds in effect that the owner of a patent who exacts, as the condition of a license, that unpatented materials used in connection with the invention shall be purchased only from the licensor cannot obtain relief from equity against one who supplies such unpatented materials even though the unpatented appliance was not for common use but was designedly adapted for the practice of the invention, but when so used did not involve an infringement of the patent. The decision is thus merely an appropriate application of what has come to be known as the doctrine in the *Carbice* case, 283 U. S. 27. In this view I concur.

But in the series of cases in which that doctrine has heretofore been applied (*Motion Picture Co.* v. *Universal Film Co.*, 243 U. S. 502; *Carbice Corp.* v. *American Patents Corp., supra; Morton Salt Co.* v. *Suppiger Co.*, 314

[3] *Bryant Electric Co.* v. *Marshall*, 169 F. 426; affirmed 185 F. 499. Compare *Souffront* v. *La Compagnie*, 217 U. S. 475. And see cases collected 139 A. L. R. 41.

U. S. 488; *B. B. Chemical Co.* v. *Ellis,* 314 U. S. 495), not once has this Court found it relevant to reject, either explicitly or by indirection, another doctrine of the law, that of contributory infringement, nor has it seen fit to make animadversions upon it. This is so doubtless for the simple reason that appropriate occasions for relief against contributory infringement are unrelated to the circumstances which bring the *Carbice* doctrine into play. In a word, if there is no infringement of a patent there can be no contributory infringer.

Within its true limits the idea of contributory infringement was woven into the fabric of our law and has been part of it for now more than seventy years. See Roberts, *Contributory Infringement of Patent Rights,* 12 Harv. L. Rev. 35, and e. g. *Thomson-Houston Electric Co.* v. *Ohio Brass Co.,* 80 F. 712. The doctrine has been put perhaps most simply by Judge Shepley: "Different parties may all infringe, by respectively making or selling, each of them, one of the elements of a patented combination, provided those separate elements are made for the purpose, and with the intent, of their being combined by a party having no right to combine them. But the mere manufacture of a separate element of a patented combination, unless such manufacture be proved to have been conducted for the purpose, and with the intent of aiding infringement, is not, in and of itself, infringement." *Saxe* v. *Hammond,* Fed. Cas. No. 12,411, 1 Ban. & A. 629, 632. So understood, the doctrine of contributory infringement is an expression both of law and morals. It is but one phase of a more comprehending doctrine of legal liability enforced by this Court both in civil and criminal cases. See, for instance, *American Bank & Trust Co.* v. *Federal Reserve Bank,* 256 U. S. 350, and *Direct Sales Co.* v. *United States,* 319 U. S. 703. Indeed, the opinion in the *Carbice* case explicitly recognizes a proper scope for the doctrine of contributory infringement as a phase of the

law of torts: "Infringement, whether direct or contributory, is essentially a tort, and implies invasion of some right of the patentee." *Carbice Corp.* v. *American Patents Corp.*, 283 U. S. 27, 33.

To be sure, the doctrine of contributory infringement may be misconceived and has been misapplied. That is the fate of all shorthand statements of complicated ideas, whether in law or in the natural sciences. But the misapplication of a formula into which a complicated idea is compressed and thereby mutilated is a poor excuse for rejecting the idea. It will be time enough to define the appropriate limits of the doctrine of contributory infringement when we are required to deal with the problem. Until then litigants and lower courts ought not to be embarrassed by gratuitous innuendoes against a principle of the law which, within its proper bounds, is accredited by legal history as well as ethics. The long and on the whole not unworthy history of our judicial administration admonishes us against expressing views on matters not before us. The history of this Court especially admonishes us against the evils of giving opinions not called for. See *e. g.* Hughes, *The Supreme Court of the United States*, p. 50, and 49 Harv. L. Rev. 68, 98. The duty of not going beyond the necessities of a case is not a lifeless technicality. The experience of centuries is behind the wisdom of not deciding, whether explicitly or by atmospheric pressure, matters that do not come to the Court with the impact of necessity.

For the reasons set forth by my brother ROBERTS, *res judicata* calls for affirmance.

MR. JUSTICE JACKSON, in dissent:

"A patent," said Mr. Justice Holmes, "is property carried to the highest degree of abstraction—a right *in rem* to exclude, without a physical object or content." [1] Here the

[1] I Holmes-Pollock Letters, p. 53.

patent covers a combination—a system—a sequence—which is said to be new, although every element and factor in it is old and unpatentable. Thus we have an abstract right in an abstruse relationship between things in which individually there is no right—a legal concept which either is very profound or almost unintelligible, I cannot be quite sure which.

Undoubtedly the man who first devised a thermostat to control the flow of electric energy gave something to the world. But one who merely carried it to a new location, or used two instead of one, or three instead of two, or used it to control current for a stoker motor rather than for a damper, did not do much that I would not expect of a good mechanic familiar with the instrument. But that question of validity is not here. I assume that this patent confers some rights and ask what they are.

Of course the abstract right to the "sequence" has little economic importance unless its monopoly comprehends not only the arrangement but some, at least, of its components. If the patentee may not exclude competitors from making and vending strategic unpatented elements such as the thermostat, adapted to use in the combination, the patented system is so vulnerable to competition as to be almost worthless. On the other hand, if he may prohibit such competition, his system patent gathers up into its monopoly devices long known to the art and hence not themselves subject to any patent.

It is suggested that such a patent should protect the patentee at least against one who knowingly and intentionally builds a device for use in the combination and vends it for that purpose. That is what appears to have been done here. As to ethics, the parties seem to me as much on a parity as the pot and the kettle. But want of knowledge or innocent intent is not ordinarily available to diminish patent protection. I do not see how intent can

make infringement of what otherwise is not. The less legal rights depend on someone's state of mind, the better.

The practical issue is whether we will leave such a combination patent with little value indeed or whether we will give it value by projecting its economic effects to elements not by themselves a part of its legal monopoly. In these circumstances I think we should protect the patent owner in the enjoyment of just what he has been granted—an abstract right in an abstruse combination—worth whatever such a totality may be worth. I see no constitutional or statutory authority for giving it additional value by bringing into its monopoly all or any of the unpatentable parts.

For these reasons I agree with the Court that no case of infringement could have been made out had the issue been raised when it was timely. But I agree with the views of the doctrine of *res adjudicata* expressed by MR. JUSTICE ROBERTS and for that reason join the dissent.

MERCOID CORPORATION *v.* MINNEAPOLIS-HONEYWELL REGULATOR CO.

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

Nos. 58 and 59. Argued December 9, 10, 1943.—Decided January 3, 1944.

An owner of a combination patent may not so use it as to control competition in the sale of an unpatented device, even though the unpatented device may be the distinguishing part of the invention; and a court of equity will grant or withhold relief accordingly. *Mercoid Corp.* v. *Mid-Continent Investment Co., ante,* p. 661. P. 684.

133 F. 2d 811, reversed.

CERTIORARI, 319 U. S. 739, to review a decree which reversed in part and affirmed in part a decree of the District Court, 43 F. Supp. 878, in a patent infringment suit.

Mr. George L. Wilkinson for petitioner.

Mr. Will Freeman, with whom *Messrs. W. P. Bair* and *George H. Fisher* were on the brief, for respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

These are companion cases to *Mercoid Corp.* v. *Mid-Continent Investment Co., ante,* p. 661. One suit was instituted by petitioner, the other by respondent. Petitioner sought a declaratory judgment to the effect that the Freeman patent No. 1,813,732 was invalid and that petitioner did not infringe it, that respondent had used the Freeman patent in violation of the anti-trust laws, that respondent be restrained from threatening petitioner and its customers with infringement suits, that an accounting be had and treble damages awarded. Respondent in its bill sought a decree sustaining the validity of the Freeman patent and declaring that petitioner had infringed and contributed to the infringement of its claims. In the latter action petitioner filed a counterclaim praying for substantially the same relief as in its earlier bill. After issues were joined the causes were consolidated and tried together. The District Court said that the Freeman patent was valid and that Mercoid was guilty of contributory infringement. But it held that Minneapolis-Honeywell was using the patent as a means of controlling an unpatented device contrary to the rule of *Morton Salt Co.* v. *G. S. Suppiger Co.,* 314 U. S. 488. Accordingly, it dismissed both complaints. 43 F. Supp. 878. On appeal the Circuit Court of Appeals held that the patent claims in issue were valid and that Mercoid had infringed them. But it disagreed with the District Court that respondent had sought to extend the scope of the patent in violation of the anti-trust laws. Accordingly, it reversed the judgment of the District Court dismissing respondent's bill

and affirmed it as respects the relief claimed by petitioner. 133 F. 2d 811.

The Freeman patent, as found below, covers a system of hot air furnace control which requires three thermostats for its operation. A room thermostat starts the stoker. Another thermostat (or limit switch) breaks the stoker circuit when the air in the furnace reaches a predetermined temperature, irrespective of the fact that the room thermostat may still call for heat. This second thermostat operates to prevent unsafe conditions due to overheating. The third thermostat is also in the furnace. It controls a fan which forces hot air from the furnace to the rooms. It does not permit the fan to start until the air in the furnace reaches a specified degree of heat. But at that point it starts the fan which continues to run, even though the limit switch has stopped the stoker, so long as the furnace is hot and the room thermostat calls for heat. The District Court found that the Freeman patent was a combination patent on a system of furnace control which requires those three thermostats for its operation and that it was not a patent on "either the fan switch or the limit switch or both of them." That finding was not disturbed by the Circuit Court of Appeals, which held that Freeman's "advance in the art" was the arrangement of thermostatic switches, subject to furnace heat to secure in connection with other parts the "sequence of operations" which we have described.

Minneapolis-Honeywell has licensed five of its manufacturing competitors under the Freeman patent. The licensees are granted a non-exclusive right under the patent to make, use and sell a "combination furnace control" which is defined as a thermostatic switch usable for a Freeman installation and designed in one unit to control the fan and limit circuits. Royalty payments to Minneapolis-Honeywell are based on the sales of the combination furnace controls, although the Circuit Court of Appeals found that the only Minneapolis-Honeywell con-

trol "which gets protection as a result of the licenses is the control usable only for a Freeman type installation." Each licensee is required to insert in its catalogues or other sales literature and to attach to each combination furnace control sold a notice to the effect that the control includes a license for one installation of the Freeman heating system. The licenses establish minimum prices for the sale of the controls; and those prices must not be cut by the licensees through the inclusion of "extras" or through the reduction of charges for services. Price lists are attached governing sales to manufacturers, jobbers, wholesalers, and dealers. Equal terms to all licensees are provided. Minneapolis-Honeywell tried on several occasions to induce Mercoid to take a license. Being unsuccessful it brought its present suit.

Neither the petitioner nor the respondent sells or installs the Freeman system in furnaces; that is to say, they do not practice the invention. They are competitors in supplying the switch to control the fan and limit circuits employed in such systems. That switch or combustion furnace control is unpatented [1] and respondent concedes that it is "less than the complete claimed invention." But, as we have said, the Circuit Court of Appeals took the view that that control provides "the sequence of operations which is the precise essence of Freeman's advance in the art." And the accused device has, according to the Circuit Court of Appeals, "no other use than for accomplishing the sequence of operations of the Freeman patent." The Circuit Court of Appeals concluded that although the combustion furnace control was unpatented, it served "to distinguish the invention" and to mark the "advance in the art" achieved by the Freeman patent. It accordingly

[1] There is some suggestion that this device is patented. But according to the District Court any such patent "is owned by some person other than Minneapolis-Honeywell and Mercoid, so that as to them and so far as this case is concerned, it is an unpatented device."

held that the patent laws permit and the anti-trust laws do not forbid the control over the sale and use of the unpatented device which Minneapolis-Honeywell sought to achieve through its licensing agreements. We do not agree, even though we assume the patent to be valid.

The fact that an unpatented part of a combination patent may distinguish the invention does not draw to it the privileges of a patent. That may be done only in the manner provided by law. However worthy it may be, however essential to the patent, an unpatented part of a combination patent is no more entitled to monopolistic protection than any other unpatented device. For as we pointed out in *Mercoid* v. *Mid-Continent Investment Co., supra,* a patent on a combination is a patent on the assembled or functioning whole, not on the separate parts. The legality of any attempt to bring unpatented goods within the protection of the patent is measured by the anti-trust laws not by the patent law. For the reasons stated in *Mercoid* v. *Mid-Continent Investment Co., supra,* the effort here made to control competition in this unpatented device plainly violates the anti-trust laws, even apart from the price-fixing provisions of the license agreements. It follows that petitioner is entitled to be relieved against the consequences of those acts. It likewise follows that respondent may not obtain from a court of equity any decree which directly or indirectly helps it to subvert the public policy which underlies the grant of its patent. *Morton Salt Co.* v. *G. S. Suppiger Co.,* 314 U. S. 488, 494; *B. B. Chemical Co.* v. *Ellis,* 314 U. S. 495.

The judgment is reversed and the causes are remanded to the District Court for proceedings in conformity with this opinion.

Reversed.

MR. JUSTICE ROBERTS, MR. JUSTICE REED, MR. JUSTICE FRANKFURTER, and MR. JUSTICE JACKSON concur in the result on the authority of *Morton Salt Co.* v. *G. S. Suppiger Co.,* 314 U. S. 488.

CITY OF YONKERS ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 109. Argued December 13, 14, 1943.—Decided January 3, 1944.

1. In a proceeding before the Interstate Commerce Commission upon the application of a carrier, under § 1 (18)–(20) of the Interstate Commerce Act, for a certificate authorizing abandonment of part of its lines, the jurisdiction of the Commission being challenged under § 1 (22) of the Act—which provides that the authority of the Commission to permit abandonment of lines "shall not extend" to "street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation"—the Commission should make jurisdictional findings; and, in the absence of such findings, an order granting the certificate should, on review, be set aside. P. 689.
2. A proper regard for local interests in the management of local transportation facilities requires that federal power be exercised only where the statutory authority affirmatively appears. P. 691.

50 F. Supp. 497, reversed.

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

Mr. John J. Broderick, with whom *Mr. Leonard G. McAneny* was on the brief, for the City of Yonkers; and *Mr. Horace M. Gray* for John W. Tooley, Jr.,—appellants.

Mr. J. Stanley Payne, with whom *Solicitor General Fahy* and *Messrs. Walter J. Cummings, Jr.* and *Daniel W. Knowlton* were on the brief, for the United States et al.; and *Mr. Harold H. McLean,* with whom *Mr. Thomas P. Healy* was on the brief, for the New York Central Railroad Co.,—appellees.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The Interstate Commerce Act confers upon the Interstate Commerce Commission authority to issue certificates

of public convenience and necessity allowing any carrier subject to the Act to abandon "all or any portion" of its line of railroad. § 1 (18), (19), (20), 49 U. S. C. § 1 (18), (19), (20), 24 Stat. 379, 41 Stat. 477–478. But the Act also provides that that authority of the Commission "shall not extend" to the abandonment "of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation." § 1 (22), 49 U. S. C. § 1 (22).

The New York Central Railroad Co. filed an application with the Commission for a certificate under § 1 (18)–(20) of the Act authorizing it to abandon an electric branch line extending 3.1 miles from Van Cortlandt Park Junction, New York City, to Getty Square, Yonkers, New York. This line was constructed in 1888 by a predecessor company for the purpose of developing suburban business between Yonkers and New York City. The line was electrified in 1926 with the hope that the surburban business would increase. It is now a physical part of the New York Central's Putnam Division with which it connects at Van Cortlandt Park Junction. The Putnam Division in turn connects with the Hudson Division which is part of the main line of the New York Central from New York City to Chicago. The Hudson Division follows the east bank of the Hudson River through Yonkers to Albany. The Putnam Division extends north from Sedgwick Avenue and West 161st Street, New York City, through Yonkers to Brewster, New York. The Putnam Division lies east of, and is roughly parallel with, the Hudson Division. In the City of Yonkers the two divisions are about a mile apart. The electric line in question is between the Hudson and Putnam Divisions. Getty Square, its terminal in Yonkers, is .3 mile east of the Yonkers station on the Hudson Division. The New York Central system is for the most part operated by steam. Some portions of its lines are electrified, including the Hudson Division be-

tween New York City and Harmon, New York, and Harlem Division so far as White Plains, New York, the Putnam Division between Sedgwick Avenue and Van Cortlandt Park Junction, and the Yonkers line in question. With the exception noted, no part of the Putnam Division is electrified, its trains being operated by steam.

This Yonkers electric branch handles no freight, mail, express, or milk traffic and no industries are dependent on it for such service. Its traffic is exclusively passenger traffic, principally commuter travel between Getty Square and three other stations in Yonkers and Grand Central Station in New York City. The trains serving stations on this Yonkers electric branch do not go through to Grand Central Station on account of the congested condition of the main-line tracks funnelling into Grand Central Station. Accordingly, these trains run only from Getty Square to Van Cortlandt Park Junction and thence over the main line of the Putnam Division to the terminal at Sedgwick Avenue. Passengers from Yonkers to Grand Central Station must transfer to Hudson Division trains at either High Bridge or University Heights stations which are north of the Sedgwick Avenue Station. Tariffs of the New York Central provide for one-way, monthly-commutation, and other tickets usable between the stations in Yonkers and Grand Central Station. Time tables of the New York Central disclose the service on this electric branch. And its operating results are reflected in the accounts of the New York Central.

The trains running on this electric branch are composed of two, three or four cars. The trains are hauled not by a locomotive but by so-called multiple unit cars. The structure of the line is such that locomotives cannot be used on it. The trains on this electric branch proceed only to Getty Square, Yonkers, and not beyond.

The Commission though adverting to a number of the facts which we have mentioned did not address itself to

the question whether this electric branch line was or was not "operated as a part or parts of a general steam railroad system of transportation" within the meaning of § 1 (22). The Commission did not undertake to review the evidence relevant to that issue. It made no findings respecting it. It authorized the abandonment on the grounds that continued operation would impose "an undue and unnecessary burden" upon the New York Central and upon interstate commerce.[1] The Commission says that the question of its jurisdiction under § 1 (22) was neither presented *in limine* nor urged in the briefs, in the exceptions to the examiner's report, or in the oral arguments. It was, however, presented in petitions for reconsideration which the Commission denied without opinion.

This suit to enjoin the order of the Commission, brought before a District Court of three judges (38 Stat. 219, 220, 28 U. S. C. § 47) was initiated by the Public Service Commission of New York, the City of Yonkers, and a committee of Yonkers commuters.[2] The jurisdiction of the Commission was challenged before the District Court. And that objection which was overruled there (50 F. Supp. 497) has been renewed on the appeal which brings the case here. 28 U. S. C. § 47a, § 345.

The District Court in sustaining the order of the Commission, reviewed the evidence and concluded that the operation of this electric branch was "intertwined with the operation of the system as a whole." It relied especially on the fact that the bulk of the traffic on this electric branch transfers at High Bridge or University Heights

[1] The certificate authorizes a complete abandonment of the Yonkers branch, including dismantlement and salvaging.

[2] The Public Service Commission of New York, which took the lead in attacking the order of the Commission before the District Court but which has not appeared here, asserted in its complaint that authority to discontinue the four stations was required by New York law but had not been sought or obtained.

to the Hudson Division and that those transfers made it necessary for the New York Central to provide seats on the Hudson Division trains for all the transferred Yonkers passengers for the remaining short run to Grand Central Station.

The Commission itself has noted that in the "construction of these exclusion clauses great difficulty has been experienced, particularly in determining the roads properly classifiable as interurban electric railways." Annual Report (1928), p. 80. That difficulty is apparent here by the division of opinion which exists in the Court whether this Yonkers branch is an "interurban electric" railway which is "operated as a part" of the New York Central system.[3] § 1 (22). As stated by Mr. Justice Brandeis in *United States* v. *Idaho,* 298 U. S. 105, 109, the determination of what is included within the exemption of § 1 (22) involves a "mixed question of fact and law." Congress has not left that question exclusively to administrative determination; it has given the courts the final say. *Id.,* p. 109. It is settled that the aid of the Commission need not be sought before the jurisdiction of a court is invoked to enjoin violations of the provisions in question. *Texas & Pacific Ry. Co.* v. *Gulf, C. & S. F. Ry. Co.,* 270 U. S. 266. And the fact that the Commission fails to make a finding on this jurisdictional question obviously does not preclude the reviewing court from making that determination initially. But we deem it essential in cases involving a review of orders of the Commission for the courts to decline to make that determination without the basic jurisdictional findings first having been made by the Commission.

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[3] Cf. *Piedmont & Northern R. Co.* v. *Interstate Commerce Commission,* 286 U. S. 299, 307, and *United States* v. *Chicago North Shore & M. R. Co.,* 288 U. S. 1, 9–12, which emphasize in determining the status of independent electric roads the dominance of interurban passenger service and the preponderance of local traffic.

The power of the Commission to control the abandonment of intrastate branches of interstate carriers stems from the power of Congress to protect interstate commerce from undue burdens or discriminations. *Colorado* v. *United States,* 271 U. S. 153; *Transit Commission* v. *United States,* 284 U. S. 360; *Purcell* v. *United States,* 315 U. S. 381. And see *United States* v. *Hubbard,* 266 U. S. 474, for an application of the doctrine of the *Shreveport* case (*Houston, E. & W. T. R. Co.* v. *United States,* 234 U. S. 342) to the intrastate rates of interurban electric railroads. The exemptions contained in § 1 (22) do not necessarily reflect the lack of constitutional power to deal with the excepted phases of railroad enterprise. Underlying § 1 (22) is a Congressional policy of reserving exclusively to the States control over that group of essentially local activities. See H. Rep. No. 456, 66th Cong., 1st Sess., p. 18. We recently stated that the extension of federal control into these traditional local domains is a "delicate exercise of legislative policy in achieving a wise accommodation between the needs of central control and the lively maintenance of local institutions." *Palmer* v. *Massachusetts,* 308 U. S. 79, 84. In the application of the doctrine of the *Shreveport* case, this Court has required the Commission to show meticulous respect for the interests of the States. It has insisted on a "suitable regard to the principle that whenever the federal power is exerted within what would otherwise be the domain of state power, the justification of the exercise of the federal power must clearly appear." *Florida* v. *United States,* 282 U. S. 194, 211–212. In that case this Court set aside an intrastate rate order of the Commission because of the "lack of the basic or essential findings required to support the Commission's order." *Id.,* p. 215. The principle of the *Florida* case is applicable here. The question is not merely one of elaborating the grounds of decision and bringing into focus what is vague and obscure. See *United States*

v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499. Cf. *Securities & Exchange Commission* v. *Chenery Corp.*, 318 U. S. 80. Here as in the *Florida* case the problem is whether the courts should supply the requisite jurisdictional findings which the Commission did not make and to which it even failed to make any reference.[4]

Congress has withheld from the Commission any power to authorize abandonment of certain types of railroad lines. It is hardly enough to say that the Commission's orders may be set aside by the courts where the Commission exceeds its authority. The Commission has a special competence to deal with the transportation problems which are reflected in these questions. The Congress has entrusted to the Commission the initial responsibility for determining through application of the statutory standards the appropriate line between the federal and state domains. Proper regard for the rightful concern of local interests in the management of local transportation facilities makes desirable the requirement that federal power be exercised only where the statutory authority affirmatively appears. The sacrifice of these legitimate local interests may be as readily achieved through the Commission's oversight or neglect (*Illinois Commerce Commission* v. *Thomson*, 318 U. S. 675) as by improper findings. The insistence that the Commission make these jurisdictional

[4] For cases dealing with the exception of suburban or interurban electric railways where the Commission has passed on the jurisdictional question see In the Matter of Michigan United Rys. Co., 67 I. C. C. 452; Abandonment of Line by Boise Valley Traction Co., 79 I. C. C. 167; Proposed Abandonment by Lewiston & Youngstown Frontier Ry. Co., 124 I. C. C. 219; Proposed Construction by Piedmont & Northern Ry. Co., 138 I. C. C. 363, 372; Unified Operation at Los Angeles Harbor, 150 I. C. C. 649, 661; Glendale & Montrose Ry. Proposed Abandonment, 166 I. C. C. 625.

The requisite finding was made by the Commission in the Oregon Short Line case (193 I. C. C. 697, 705) in which the order of the Commission was set aside by *United States* v. *Idaho*, *supra*.

findings before it undertakes to act not only gives added assurance that the local interests for which Congress expressed its solicitude will be safeguarded. It also gives to the reviewing courts the assistance of an expert judgment on a knotty phase of a technical subject.

We are asked to presume that the Commission, knowing the limit of its authority, considered this jurisdictional question and decided to act because of its conviction that this branch line was not exempt by reason of § 1 (22). But that is to deal too cavalierly with the Congressional mandate and with the local interests which are pressing for recognition. Where a federal agency is authorized to invoke an overriding federal power except in certain prescribed situations and then to leave the problem to traditional state control, the existence of federal authority to act should appear affirmatively and not rest on inference alone.

This is not to insist on formalities and to burden the administrative process with ritualistic requirements. It entails a matter of great substance. It requires the Commission to heed the mandates of the Act and to make the expert determinations which are conditions precedent to its authority to act.

We intimate no opinion on the merits of the controversy. For in absence of the requisite jurisdictional findings we think the order of the Commission should have been set aside.

Reversed.

MR. JUSTICE FRANKFURTER, dissenting:

Congress has empowered the Interstate Commerce Commission to authorize a railroad, when public convenience permits, to abandon any portion of its line. But when such portion is a suburban or interurban electric railway, abandonment may be authorized only if it is part of a general steam railroad system of transportation.

§ 1 (18) and (22) of the Interstate Commerce Act, as amended, 49 U. S. C. § 1 (18) and (22). This Court has held that whether such a line is of a character to permit abandonment under federal authority need not be determined in the first instance by the Interstate Commerce Commission; and such determination when made does not foreclose an independent judicial judgment. *Texas & Pacific Ry. Co.* v. *Gulf, C. & S. F. Ry. Co.*, 270 U. S. 266, and *United States* v. *Idaho*, 298 U. S. 105. On such an independent examination of the issue the court below had no doubt that the Yonkers branch of the New York Central, the portion of the Central lines for which abandonment was here sought, was not "a suburban or interurban line unconnected with the rest of the Central's railroad system" but was in fact "intertwined with the operation of the [New York Central Railroad] system as a whole." 50 F. Supp. 497, 498. The record amply sustains this conclusion. If this Court, however, on its own estimate of the various elements in the financial, physical and transportation relations between the rest of the New York Central lines and this Yonkers branch, had struck a contrary balance and found that the Yonkers branch was not operated as a part of the general New York Central system, I should not have deemed the matter of sufficient importance to warrant expression of dissent.

But the Court does not decide on the merits. In effect, it remits the controversy to the Interstate Commerce Commission on the ground that the Commission did not make a formal finding, described as "jurisdictional," that the Yonkers branch was in fact "operated as a part . . . of a general steam railroad system of transportation." The Commission may very well now formally make such a finding of a connection between the Yonkers branch and the New York Central, which in fact is writ large in the Commission's report in granting the application for abandonment, and the weary round of litigation may be re-

peated to the futile end of having this Court then, forsooth, express an opinion on the merits opposed to that of the Commission and the District Court. This danger if not likelihood of thus marching the king's men up the hill and then marching them down again seems to me a mode of judicial administration to which I cannot yield concurrence. I think the case should be disposed of on the merits by affirming the judgment of the District Court.

This seems to me all the more called for since I find no defect in the foundation of the Commission's order. No doubt the Interstate Commerce Commission like other administrative agencies should keep within legal bounds and courts should keep them there, in so far as Congress has entrusted them with judicial review over administrative acts. Of course when a statute makes indispensable "an express finding," an express finding is imperative, see *Wichita Railroad & Light Co.* v. *Public Utilities Comm'n*, 260 U. S. 48, 59. But the history of the Interstate Commerce Act and its amendments illumine the different legal functions expressed by the term findings. When Congress exacts from the Commission formal findings there is an end to the matter. For certain duties of the Commission and at certain stages in the history of the Interstate Commerce Act, Congress did require formal findings, but experience led Congress later to dispense with such formal requirements. See *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 489–90. But courts have also spoken of the need of findings as the basis of validity of an order by the Interstate Commerce Commission in the absence of a Congressional direction for findings. The requirement of findings in such a context is merely part of the need for courts to know what it is that the Commission has really determined in order that they may know what to review. "We must know what a decision means before the duty becomes ours to say whether it is right or

wrong." See *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 509–511.

This is the real ground for the decisions which have found Interstate Commerce Commission orders wanting in necessary findings. They have all been cases where the determination of an issue is not open to independent judgment by this Court, and where the case as it came here rested on conflicting inferences of fact left unresolved by the Commission. Such were the circumstances, for instance, in *Florida* v. *United States*, 282 U. S. 194, particularly at 214–215, and *United States* v. *Baltimore & Ohio R. Co.*, 293 U. S. 454, 455, particularly at 463–464. Findings in this sense is a way of describing the duty of the Commission to decide issues actually in controversy before it. Analysis is not furthered by speaking of such findings as "jurisdictional" and not even when—to adapt a famous phrase—jurisdictional is softened by a *quasi*. "Jurisdiction" competes with "right" as one of the most deceptive of legal pitfalls. The opinions in *Crowell* v. *Benson*, 285 U. S. 22, and the casuistries to which they have given rise bear unedifying testimony of the morass into which one is led in working out problems of judicial review over administrative decisions by loose talk about jurisdiction.

The nub of the matter regarding the requirement of findings, where the formal making of them is not legislatively commanded, is indicated in *United States* v. *Louisiana*, 290 U. S. 70. Reviewing the validity of the Commission's order is the serious business of sitting in judgment upon a tribunal of great traditions and large responsibility. An order of the Commission should not be viewed in a hypercritical spirit nor even as though *elegantia juris* were our concern. We should judge a challenged order of the Commission by "the report, read as a whole," 290 U. S. *supra* at 80, and by the record as a whole out of which the report arose.

Viewing its order in this light makes plain enough why the Commission never formally stated that the line which it authorized to be abandoned was in fact operated as part of the New York Central system. It never formally made this statement because it was never questioned before it. On the face of the application, in the report proposed by the Commissioner's examiner, and in the report of the Commission, by Division 4, authorizing the issuance of a certificate of abandonment, the facts showing that the Yonkers branch was a part of the operating system of the New York Central are set forth in detail. Extensive exceptions were taken to the examiner's report by the City of Yonkers and a committee of Yonkers commuters but not even remotely did they take the point which is now made the ground for invalidating the Commission's order. Elaborate petitions for rehearing were filed by the protestants, including the Public Service Commission of New York, as the guardian of the local interests of New York,[1] but not one of these petitions raised the objection now raised. The jurisdiction of the Commission was questioned, but no claim was made that the Yonkers branch was not an operating part of the New York Central. The City of Yonkers enumerated four grounds in challenging

[1] Due concern for local interests in the administration of the Interstate Commerce Act hardly calls for an exaggerated concern for formal findings. The Interstate Commerce Act relies primarily on state authorities for the safeguarding of local interests. It is therefore relevant to note that the New York Public Service Commission, which is charged with the duty of protecting the local interests of New York against federal encroachments and which does not appear to have been unalert in doing so, has acquiesced in the decision below and is not here urging the local interest on which the decision of this Court seems to be based. That the state agency had best be looked to for the vindication of conflicting local interests within a state is well illustrated by the fact that while the City of Yonkers protested against the abandonment of the branch line, the City of New York urged it.

the jurisdiction of the Commission, but it did not specify the one now taken by the Court. The committee of commuters rested their claim of want of jurisdiction on the specific grounds that "(1) the line sought to be abandoned is an interurban electric passenger railway located wholly within the State of New York and (2) . . . the alleged annual operating deficit" of the Yonkers branch was too insignificant to burden the operation of the New York Central. Exercising the discretion which Congress explicitly conferred upon it, the full Commission denied the petition for rehearing. Interstate Commerce Act, § 17 (6). In any fair construction of the action of the Commission such a denial is an adverse finding of such claims as were made in the petitions for rehearing. The crucial fact is that only when the present bill was filed in the court below did the objection which the Court now sustains emerge in the specific claim that the Yonkers "branch is not operated as a part or parts of a general steam railroad system of transportation."

Can there be any doubt that this contention was not put to the Commission because it was an afterthought? This issue was never tendered to the Commission because the facts which deny it were never questioned in the proceedings conducted before it with vigor and ability by several protestants during the three successive stages that preceded a challenge in the courts.

The case is now sent back to the Commission. The facts regarding the relation of the Yonkers branch to the New York Central are spread at large upon the record and are not in controversy. In view of the three proceedings before the Commission it is reasonable to assume that the Commission will add to its report the formal finding now requested of it. If the case then returns here I find it too hard to believe that this Court would reject the conclusion of the Commission and of the lower court that the Yonkers branch is an operating part of the New York Central

within § 1 (22). Is not insistence on such an empty formalism a reversion to seventeenth century pleading which required talismanic phrases, as for instance that a seller could not be held to warrant that he sold what he purported to sell unless the buyer pleaded *warrantizando vendidit* or *barganizasset?* On the other hand, if the Court with all the facts before it does not think the Yonkers branch is a part of the railway operations of the New York Central, now is the time to say so.

MR. JUSTICE REED and MR. JUSTICE JACKSON join in this opinion.

DISTRICT OF COLUMBIA *v.* PACE.

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

No. 117. Argued December 13, 1943.—Decided January 10, 1944.

1. Under the Act creating the Board of Tax Appeals for the District of Columbia, the Court of Appeals for the District of Columbia has power to review decisions of the Board conformably to the equity practice, that is, on both the facts and the law, subject to the rule that findings of fact are treated as presumptively correct and are accepted unless clearly wrong. P. 702.
2. Upon review of a decision of the Board of Tax Appeals for the District of Columbia, the Court of Appeals for the District of Columbia had power to set aside a finding by the Board that the domicile of a decedent was in the District of Columbia, which the court found to be clearly wrong, and to find that the domicile was in Florida. P. 703.
3. The provisions for review in the Act creating the Board of Tax Appeals for the District of Columbia were not superseded by Rule 52 of the Rules of Civil Procedure. P. 702.

77 U. S. App. D. C. 332, 135 F. 2d 249, affirmed.

CERTIORARI, *post*, p. 726, to review the reversal of a decision of the Board of Tax Appeals for the District of Columbia sustaining an inheritance tax.

Mr. Glenn Simmon, with whom *Messrs. Richmond B. Keech* and *Vernon E. West* were on the brief, for petitioner.

Mr. Elmer E. Hazard, with whom *Messrs. George H. Happ* and *Martin F. O'Donoghue* were on the brief, for respondent.

MR. JUSTICE JACKSON delivered the opinion of the Court.

Charles F. Pace came to the District of Columbia in 1913 from Florida, where he had theretofore been domiciled. His only purpose in coming was to enter the federal service. He became Financial Clerk of the Senate and served continuously until his death in the District in 1940. During these twenty-seven years he lived in boarding houses and in rented apartments and owned no real property in the District. At all times he maintained his registration and qualification to vote in the State of Florida and exercised that right either in person or by absentee ballot. His will, made in 1937, recited that he was "of the City of Washington, D. C." It was probated in Florida, and ancillary letters were granted in the District to the respondent executrix. District authorities, upon the premise that Pace was domiciled in the District, assessed an inheritance tax upon the transfer of certain jointly owned bank deposits within the District. Respondents paid the tax under protest and then appealed the assessment to the Board of Tax Appeals of the District on the ground that decedent was domiciled in Florida at the time of his death. The Board of Tax Appeals after hearing argument determined that decedent was domiciled in Florida, and ordered refund of the tax paid. The District appealed to the Court of Appeals, but before hearing this Court decided *District of Columbia* v. *Murphy,* 314 U. S. 441. The District thereupon moved to remand the

case to the Board of Tax Appeals for reconsideration in the light of the intervening decision. The motion was granted. Upon reconsideration the Board re-adopted the findings theretofore made but concluded that the decedent had not overcome the presumption, arising from maintaining a home in the District, that he was domiciled therein, and reversed its former ruling.

The Court of Appeals for the District of Columbia reversed. It accepted and applied our decision in *District of Columbia* v. *Murphy* and, weighing the facts in the light of its principles, concluded that the decedent was domiciled in Florida at the time of his death. The evidence before the Board of Tax Appeals took a wide range, and we do not think it is necessary to recite it in detail. As is usual in cases of contested domicile, it gave rise to conflicting inferences, and a decision either way would be supported by substantial evidence. Whether the Board's determination or that of the Court of Appeals should be deemed correct would depend upon the weight to be given to many different items of evidence, the credibility to be given to testimony, and the inferences to be drawn from many admitted events. We did not take this case to determine where Mr. Pace was domiciled. But the scope of review of decisions by the Board of Tax Appeals of the District of Columbia is important to the administration of the District's tax laws, and since that question was not reached or decided in *District of Columbia* v. *Murphy,* we granted certiorari in this case.

Congress has seen fit in certain of the District's tax statutes to make liability dependent upon domicile. In the District, where a large proportion of the population owe their presence to Government service and have the strongest motives for retaining their political connections with and domicile in the enfranchised community from which they came, this test of taxability is bound to give rise to innumerable and difficult conflicts. These the

Board of Tax Appeals is authorized in the first instance to resolve.

The provisions for review of Board of Tax Appeals decisions present complexities almost as baffling as the test of taxability itself. Section 4 (a) of the Act creating the Board of Tax Appeals for the District of Columbia provides that its decisions may be reviewed by the Court of Appeals and that upon such review the court "shall have the power to affirm, or if the decision of the Board is not in accordance with law, to modify or reverse the decision of the Board, with or without remanding the case for hearing, as justice may require." 52 Stat. 371, D. C. Code (1940) § 47–2404 (a). Had this been all, a strong case would be made for applying the rule of finality applicable to the Federal Board of Tax Appeals, now the Tax Court of the United States. *Dobson* v. *Commissioner, ante,* p. 489. However, the same organic act contains another and qualifying provision that is not to be found in the acts creating the Tax Court: "The findings of fact by the Board shall have the same effect as a finding of fact by an equity court or a verdict of a jury." 52 Stat. 371, D. C. Code (1940) § 47–2404 (a). Since findings of fact by an equity court and the verdict of a jury have from time immemorial been subject to different rules of finality it is puzzling to know what the draftsmen of this section meant by including both in the one rule for reviewing Board of Tax Appeals findings.

This statute was enacted in May, 1938. The law at that time as to the review of findings of fact in equity was, as stated by Mr. Justice Brandeis for the Court, "in equity, matters of fact as well as of law are reviewable . . ." *Virginian Ry. Co.* v. *United States,* 272 U. S. 658, 675. Findings of fact by the trial judge of course were presumptively correct and were accepted by reviewing courts unless clearly wrong. *Butte & Superior Copper Co.* v. *Clark-Montana Realty Co.,* 249 U. S. 12, 30. This rule, however,

did not deny power to the Circuit Court of Appeals to review facts, but rather went to the weight to be accorded to the findings of a lower court and had special pertinence where credibility of witnesses was involved. This Court had a well-settled rule that "when two courts have reached the same conclusion on a question of fact, their finding will not be disturbed unless it is clear that their conclusion was erroneous." *Baker* v. *Schofield,* 243 U. S. 114, 118. Such a rule would have no support in reason if the second court could not make its findings as a result of its own judgment.

The statute therefore authorizes review of findings of fact of the Board of Tax Appeals of the District of Columbia, subject to the admonition that they are to be undisturbed unless clearly wrong, if the findings are given the effect of findings of fact by an equity court. If the effect of the jury verdict, provided for in the same sentence, is to prevail, the review is much more restricted. The question as to which of the inconsistent provisions shall govern arises in a local statute confined in its operation to the District of Columbia. "We will not ordinarily review decisions of the United States Court of Appeals, which are based upon statutes so limited or which declare the common law of the District." *Del Vecchio* v. *Bowers,* 296 U. S. 280, 285. Cf. *American Security & Trust Co.* v. *District of Columbia,* 224 U. S. 491; *United Surety Co.* v. *American Fruit Product Co.,* 238 U. S. 140. Where a local statute contains a conflict on its face as patent and as irreconcilable as this, where either choice seems equally supportable, we cannot say that the Court of Appeals commits error in assuming its review of the Board of Tax Appeals decision to be entitled to the scope of a review of an equity court.

After the Board of Tax Appeals statute, Federal Rule of Civil Procedure No. 52 was adopted, effective September 1, 1938. It provided as to all actions tried upon the

facts without a jury: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." This general rule, even if it were thought to modify the previous rule as to review of findings of fact in equity cases, would hardly supersede a special statutory measure of review applicable to a special and local tribunal.

We conclude, therefore, that the Court of Appeals has power to review decisions of the Board of Tax Appeals as under the equity practice in which the whole case, both facts and law, is open for consideration in the appellate court, subject to the long-standing rule that findings of fact are treated as presumptively correct and are accepted unless clearly wrong. The Court of Appeals therefore had power to set aside the determination of the Board of Tax Appeals if convinced, as it was, that the Board was clearly wrong. We are not called upon to separate factual from legal grounds of decision and to determine if reversal of the Board of Tax Appeals by the Court of Appeals could stand on questions of law alone. The judgment therefore is

Affirmed.

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

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DECISIONS PER CURIAM, ETC., FROM OCTOBER 4, 1943, THROUGH JANUARY 10, 1944.*

No. 95. MOODY BIBLE INSTITUTE *v.* CHICAGO. Appeal from the Supreme Court of Illinois. October 11, 1943. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of jurisdiction. § 237 (a) of the Judicial Code, as amended, 28 U. S. C., § 344 (a). Treating the papers whereon the appeal was allowed as an application for writ of certiorari as required by § 237 (c) of the Judicial Code, as amended, 28 U. S. C., § 344 (c), certiorari is denied. *Mr. Howard F. Bishop* for appellant. *Messrs. Barnet Hodes, Joseph F. Grossman,* and *J. Herzl Segal* for appellee. Reported below: 382 Ill. 70, 46 N. E. 2d 918.

No. 275. PARKER ET AL. *v.* MISSISSIPPI. Appeal from the Supreme Court of Mississippi. October 11, 1943. *Per Curiam:* The motion for leave to proceed in forma pauperis is granted. The appeal is dismissed for the want of jurisdiction. § 237 (a) of the Judicial Code, as amended, 28 U. S. C., § 344 (a). Treating the papers whereon the appeal was allowed as an application for writ of certiorari as required by § 237 (c) of the Judicial Code, as amended, 28 U. S. C., § 344 (c), certiorari is denied. MR. JUSTICE MURPHY is of opinion certiorari should be granted. *Mr. Forrest B. Jackson* for appellants. Reported below: 194 Miss. 895, 13 So. 2d 620.

No. 213. TWISP MINING & SMELTING CO. *v.* CHELAN MINING CO. ET AL. Appeal from and petition for writ of certiorari to the Supreme Court of Washington. October

*For decisions on applications for certiorari, see *post,* pp. 720, 735; rehearing, *post,* p. 807. For cases disposed of without consideration by the Court, *post,* p. 805.

11, 1943. *Per Curiam:* The appeal is dismissed for failure to comply with Rule 12, paragraph 1. The petition for writ of certiorari is denied. *Messrs. Clarence C. Dill* and *E. A. Cornelius* for appellant. Reported below: 16 Wash. 2d 264, 133 P. 2d 300.

No. 294. PAYNE *v.* KIRCHWEHM. Appeal from the Supreme Court of Ohio. October 11, 1943. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. (1) *Alaska Packers Assn.* v. *Industrial Commission,* 294 U. S. 532, 547; *Pacific Insurance Co.* v. *Industrial Commission,* 306 U. S. 493, 502; (2) *Michigan Insurance Bank* v. *Eldred,* 130 U. S. 693, 696; *Platt* v. *Wilmot,* 193 U. S. 602, 610; *Guaranty Trust Co.* v. *United States,* 304 U. S. 126, 136. *Messrs. Sigmund H. Steinberg* and *William K. Gardner* for appellant. *Mr. Wayland K. Sullivan* for appellee. Reported below: 141 Ohio St. 384, 48 N. E. 2d 224.

No. 308. HUGHES ET AL. *v.* GUST. Appeal from the Supreme Court of Arizona. October 11, 1943. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a properly presented federal question. *Mr. Thomas O. Marlar* for appellants. *Mr. J. L. Gust* for appellee.

No. —. BENTZ *v.* MICHIGAN. October 11, 1943. The petition for appeal 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.

No. 9, original. KANSAS *v.* MISSOURI. October 11, 1943. The report of the Special Master herein is received and ordered to be filed.

No. 61. ICKES, SECRETARY OF THE INTERIOR, ET AL. *v.* ASSOCIATED INDUSTRIES OF NEW YORK STATE, INC. Certiorari, 319 U. S. 739, to the Circuit Court of Appeals for the Second Circuit. October 18, 1943. *Per Curiam:* This is a proceeding brought by respondent pursuant to § 6 (b) of the Bituminous Coal Act of 1937, 50 Stat. 85, 15 U. S. C., § 836 (b), as amended, to review an order of the Bituminous Coal Commission prescribing minimum prices for Minimum Price Area No. 1. We granted certiorari June 14, 1943, to review an order of the Circuit Court of Appeals refusing to dismiss the proceeding for want of capacity of respondent to bring it. Both parties now suggest that the cause has become moot by reason of the expiration of the Bituminous Coal Act on August 24, 1943. They disagree as to the proper disposition to be made of the cause. The record does not disclose and we are not informed whether the order of the Commission, which by its terms became effective on October 1, 1942, remained in effect between that date and August 24, 1943, or to what extent rights arose and liabilities and obligations were incurred under the Commission's order during that period, which survive the expiration of the Act. Accordingly we vacate the order of the Circuit Court of Appeals and remand the cause to that court for such further proceedings as may be appropriate. *Solicitor General Fahy* and *Messrs. Warner W. Gardner* and *Arnold Levy* for petitioners. *Mr. Horace R. Lamb* for respondent. Reported below: 134 F. 2d 694.

No. 155. MATHEWS ET AL. *v.* WEST VIRGINIA EX REL. HAMILTON, PROSECUTING ATTORNEY. On petition for writ of certiorari to the Circuit Court of Calhoun County, West Virginia. October 18, 1943. *Per Curiam:* The petition for writ of certiorari is granted. Subsequent to the decision of the Supreme Court of Appeals of West Virginia, denying leave to appeal on the ground that the decree of

the Circuit Court of Calhoun County was "plainly right," this Court in *Taylor* v. *Mississippi*, 319 U. S. 583, *Benoit* v. *Mississippi*, 319 U. S. 583, *Cummings* v. *Mississippi*, 319 U. S. 583, and *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, considered questions having a bearing on the issues in the present case. Accordingly we vacate the judgment and remand the cause to the Circuit Court of Calhoun County for further consideration in the light of our decisions in those cases. *New York ex rel. Whitman* v. *Wilson*, 318 U. S. 688, 690–91, and cases cited. *Mr. Hayden C. Covington* for petitioners.

No. 278. GRACE *v.* BOARD OF COMMISSIONERS OF THE STATE BAR OF ALABAMA. Appeal from the Supreme Court of Alabama. October 18, 1943. *Per Curiam:* The appeal is dismissed for the want of a substantial federal question. *Ex parte Burr*, 9 Wheat. 528, 530; *Ex parte Secombe*, 19 How. 9, 13; *Ex parte Robinson*, 19 Wall. 505, 512; *Selling* v. *Radford*, 243 U. S. 46, 49. *Menza B. Grace, pro se.* *Mr. Richard T. Rives* for appellee. Reported below: 244 Ala. 267, 13 So. 2d 178.

No. 2. UNITED STATES *v.* ALUMINUM COMPANY OF AMERICA ET AL. Appeal from the District Court of the United States for the Southern District of New York; and

No. 6. NORTH AMERICAN COMPANY *v.* SECURITIES & EXCHANGE COMMISSION. Certiorari, 318 U. S. 750, to the Circuit Court of Appeals for the Second Circuit. October 18, 1943. As four Justices have disqualified themselves from participating in the decision in each of these cases, the Court is unable to make final disposition of them because of the absence of a quorum of six Justices as prescribed by 28 U. S. C., § 321. These cases will accordingly be transferred to a special docket and all further proceedings in them postponed in each case until such time as

there is a quorum of Justices qualified to sit in it, when it will be restored to the regular docket for such further proceedings as may be appropriate. Reported below: No. 2, 47 F. Supp. 647; No. 6, 133 F. 2d 148.

No. —. Ex parte Earle Golden; and

No. —. Ex parte Ralph Barton Butz. October 18, 1943. Applications denied.

No. —. Ex parte Daisy D. Wilson;

No. —. Ex parte Oliver Gobin;

No. —. Ex parte Robert L. Peyton; and

No. —. Ex parte Forrest Holiday. October 18, 1943. The motions for leave to file petitions for writs of mandamus are denied.

No. 11, original. Illinois *v.* Indiana et al. October 18, 1943. The motion for leave to file bill of complaint is granted.

No. 360. Callison *v.* Texas. Appeal from the Court of Civil Appeals, 8th Supreme Judicial District, of Texas. October 25, 1943. *Per Curiam:* The appeal is dismissed for the want of a substantial federal question. *Ah Sin* v. *Wittman,* 198 U. S. 500, 505; *Marvin* v. *Trout,* 199 U. S. 212, 224, cf. *Federal Trade Comm'n* v. *Keppel & Bro.,* 291 U. S. 304. *Mr. A. S. Baskett* for appellant. Reported below: 172 S. W. 2d 772.

No. 368. Riss & Company, Inc. *v.* United States et al. Appeal from the District Court of the United States for the Northern District of Oklahoma. October 25, 1943.

Per Curiam: The motion to affirm is granted and the judgment is affirmed on the authority of *Gregg Cartage Co.* v. *United States,* 316 U. S. 74. Dissenting: MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS. *Messrs. H. D. Driscoll* and *H. Russell Bishop* for appellant. *Solicitor General Fahy* and *Mr. Daniel W. Knowlton* for appellees.

No. —. EX PARTE ARTHUR DOYLE;

No. —. EX PARTE ORAL S. EVENSON;

No. —. EX PARTE LOUIS T. MCCONNELL; and

No. —. EX PARTE CHESTEEN MCCONNELL. October 25, 1943. The motions for leave to file petitions for writs of habeas corpus are denied.

No. —. EX PARTE MARS, INCORPORATED. October 25, 1943. The motion for leave to file the petition for writ of mandamus is denied without consideration of the merits and without prejudice to its presentation to the Circuit Court of Appeals for the Eighth Circuit, as is deemed to be the more appropriate procedure. *Ex parte Peru,* 318 U. S. 578, 584, and cases cited; *Ex parte Fred Benioff Co.,* 317 U. S. 594. Proceedings before the Special Master will be stayed for ten days to afford petitioner an opportunity to present its petition to the Circuit Court of Appeals.

No. —. JAMES *v.* FLORIDA. October 25, 1943. Petition for stay of execution denied.

No. 438. GILMORE *v.* NEW MEXICO. Appeal from the Supreme Court of New Mexico. November 8, 1943. *Per Curiam:* The appeal is dismissed for the want of a

substantial federal question. *Hoke* v. *United States,* 227 U. S. 308, 324; *Berger* v. *United States,* 295 U. S. 78, 82. *Mr. Edwin Mechem* for appellant. Reported below: 47 N. M. 59, 134 P. 2d 541.

No. 412. KRAMER *v.* OHIO. Appeal from and petition for writ of certiorari to the Supreme Court of Ohio. November 8, 1943. *Per Curiam:* The motion for leave to file statement as to jurisdiction is granted. The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *McNaughton* v. *Johnson,* 242 U. S. 344, 348–9; *Graves* v. *Minnesota,* 272 U. S. 425, 428; *Roschen* v. *Ward,* 279 U. S. 337, 339–40; *Semler* v. *Board of Dental Examiners,* 294 U. S. 608, 611. The petition for writ of certiorari is denied. *Mr. William J. Corrigan* for appellant-petitioner. *Mr. Frank T. Cullitan* for appellee-respondent. Reported below: 141 Ohio St. 667, 49 N. E. 2d 683.

No. 21. UNITED STATES EX REL. BRENSILBER ET AL. *v.* BAUSCH & LOMB OPTICAL CO. ET AL. Certiorari, 319 U. S. 733, to the Circuit Court of Appeals for the Second Circuit. Argued October 13, 14, 1943. Decided November 8, 1943. *Per Curiam:* Judgment affirmed by an equally divided Court. MR. JUSTICE JACKSON took no part in the consideration or decision of this case. *Mr. William Stanley,* with whom *Mr. Homer Cummings* was on the brief, for petitioners. *Mr. Whitney North Seymour* for Bausch & Lomb Optical Co. et al.; and *Mr. Raymond M. White* for Carl Zeiss, Inc.,—respondents. *Solicitor General Fahy, Assistant Attorney General Shea,* and *Messrs. K. Norman Diamond* and *Robert L. Stern* filed a brief on behalf of the United States, as *amicus curiae,* urging reversal. Reported below: 131 F. 2d 545.

No. —. Ex parte Albert O. Hegney;

No. —. Ex parte William Ira Jenkins; and

No. —. Ex parte John O. Story. November 8, 1943. Applications denied.

No. —. Ex parte Mary A. Ruthven; and

No. —. Ex parte Stanley B. Peplowski. November 8, 1943. The motions for leave to file petitions for writs of habeas corpus are denied.

No. —. Wilson *v.* Hinman. November 8, 1943. The motion for leave to file petition for writ of mandamus is denied.

No. 10, original. United States *v.* Louisiana et al. November 8, 1943. The transcript of testimony is received and ordered to be filed.

No. 452. Bennett *v.* City of Dalton. Appeal from the Court of Appeals of Georgia. November 15, 1943. *Per Curiam:* The appeal is dismissed for the want of a substantial federal question. *Cox* v. *New Hampshire,* 312 U. S. 569, 574; *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 571–2. *Messrs. Hayden C. Covington* and *Grover C. Powell* for appellant. Reported below: 69 Ga. App. 438, 25 S. E. 2d 726.

No. 60. Marvich *v.* California et al. Certiorari, 319 U. S. 739, to the Supreme Court of California. November 15, 1943. *Per Curiam:* The motion of respondent to remand is granted, the judgment is vacated and the cause is remanded to the Supreme Court of California for further proceedings. *Mr. Neil Burkinshaw* for petitioner.

Messrs. Robert W. Kenny, Attorney General of California, and *Eugene M. Elson,* Deputy Attorney General, for respondents. Reported below: 44 Cal. App. 2d 858, 113 P. 2d 223.

No. —. Ex parte Kenneth M. Ring;
No. —. Ex parte Paul S. Campbell;
No. —. Ex parte George Diehl;
No. —. Ex parte Jake Hinley; and
No. —. Ex parte Kenneth L. Hendrix. November 15, 1943. The motions for leave to file petitions for writs of habeas corpus are denied.

No. —. Ex parte Rex Bayless; and
No. —. Ex parte Frank E. Potts. November 15, 1943. The motions for leave to file petitions for writs of mandamus are denied.

No. 112. Davies Warehouse Co. *v.* Brown, Price Administrator;

No. 299. Mars, Inc. *v.* Brown, Price Administrator;

No. 305. Taylor *v.* Brown, Price Administrator;

No. 316. Hecht Company *v.* Brown, Price Administrator;

No. 396. Vinson, Director of Economic Stabilization, by Brown, Price Administrator, *v.* Washington Gas Light Co. et al.;

No. 464. Brown, Price Administrator, *v.* Willingham et al.; and

No. 481. Safeway Stores, Inc. *v.* Brown, Price Administrator. November 16, 1943. Bowles, present Administrator of the Office of Price Administration, substituted as a party in these cases in the place and stead of Brown, resigned.

No. 437. WILSON *v.* LOUISIANA. Appeal from the Supreme Court of Louisiana. November 22, 1943. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed, it appearing that the decision is based upon a nonfederal ground adequate to support it. *Mr. Max M. Schaumburger* for appellant. *Messrs. Eugene Stanley,* Attorney General of Louisiana, *Alex. W. Swords,* and *George J. Gulotta* for appellee. Reported below: 204 La. 24, 14 So. 2d 873.

No. —. EX PARTE C. E. PHILLIPS;

No. —. EX PARTE JOHN KEATING; and

No. —. EX PARTE WILLIAM A. YOUELL. November 22, 1943. The motions for leave to file petitions for writs of habeas corpus are denied.

Nos. 49 and 50. FORD MOTOR CO. *v.* GORDON FORM LATHE CO. Certiorari, 319 U. S. 738, to the Circuit Court of Appeals for the Sixth Circuit. Argued November 8, 9, 1943. Decided December 6, 1943. *Per Curiam:* The judgments are affirmed by an equally divided Court. MR. JUSTICE MURPHY took no part in the consideration or decision of these cases. *Mr. I. Joseph Farley,* with whom *Mr. Drury W. Cooper* was on the brief, for petitioner. *Messrs. F. O. Richey* and *George D. Spohn,* with whom *Messrs. John W. Michael* and *B. D. Watts* were on the brief, for respondent. Reported below: 133 F. 2d 487.

No. 421. SECOND NATIONAL BANK *v.* FINDLEY, COUNTY TREASURER, ET AL.; and

No. 422. FIRST NATIONAL BANK *v.* FINDLEY, COUNTY TREASURER, ET AL. Appeals from the Supreme Court of Ohio. December 6, 1943. *Per Curiam:* The judgments

are affirmed on the authority of *Aberdeen Bank* v. *Chehalis County,* 166 U. S. 440, 443–6; *Citizens National Bank* v. *Kentucky,* 217 U. S. 443, 451; *Des Moines National Bank* v. *Fairweather,* 263 U. S. 103, 110–12; and *Colorado National Bank* v. *Bedford,* 310 U. S. 41, 52–3. *Mr. George Thornburg* for appellants. *Messrs. Ross Michener, A. G. Lancione,* and *C. C. Sedgwick* for appellees. Reported below: 142 Ohio St. 6, 50 N. E. 2d 157.

No. 435. Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employees et al. *v.* United Transport Service Employees et al. On petition for writ of certiorari to the United States Court of Appeals for the District of Columbia. December 6, 1943. *Per Curiam:* The petition for writ of certiorari is granted and the judgment is reversed on the authority of *General Committee of Adjustment* v. *Missouri-Kansas-Texas R. Co.,* 320 U. S. 323; *General Committee of Adjustment* v. *Southern Pacific Co.,* 320 U. S. 338; *General Grievance Committee* v. *General Committee of Adjustment,* 320 U. S. 338; and *Switchmen's Union* v. *National Mediation Board,* 320 U. S. 297. *Messrs. Frank L. Mulholland, Clarence M. Mulholland,* and *Willard H. McEwen* for petitioners. Reported below: 137 F. 2d 817.

No. 487. Kelley *v.* California. Appeal from the Supreme Court of California. December 6, 1943. *Per Curiam:* The appeal is dismissed for want of jurisdiction. § 237 (a), Judicial Code, as amended, 28 U. S. C., § 344 (a). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari as required by § 237 (c) of the Judicial Code, as amended, 28 U. S. C., § 344 (c), certiorari is denied. *Mr. Morris Lavine* for appellant. Reported below: 22 Cal. 2d 169, 137 P. 2d 1.

No. 213. TWISP MINING & SMELTING CO. *v.* CHELAN MINING CO. ET AL. Appeal from and petition for writ of certiorari to the Supreme Court of Washington. December 6, 1943. *Per Curiam:* Appellant having filed a petition for rehearing and an amended jurisdictional statement which conforms to Rule 12, par. 1, the petition for rehearing is granted and the order of October 11, 1943, dismissing the appeal and denying the petition for writ of certiorari, *ante,* p. 705, is vacated. The appeal is dismissed for want of jurisdiction. § 237 (a) of the Judicial Code, as amended, 28 U. S. C., § 344 (a). The petition for a writ of certiorari is denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case. *Messrs. Clarence C. Dill* and *E. A. Cornelius* for appellant-petitioner. Reported below: 16 Wash. 2d 264, 133 P. 2d 300.

No. —. HUMES *v.* UNITED STATES. December 6, 1943. Application denied. MR. JUSTICE MURPHY took no part in the consideration or decision of this application.

No. —. BLAYDES *v.* RAGEN, WARDEN. December 6, 1943. Application denied.

No. —. REED *v.* HUFF, GENERAL SUPERINTENDENT. December 6, 1943. The motion for leave to file a petition for a writ of certiorari is denied.

No. —. EX PARTE RAYMOND PAUL HILE;
No. —. EX PARTE DEWEY GOOCH;
No. —. EX PARTE PAUL O'NEIL;
No. —. EX PARTE HARRY MILLER; and

No. —. Ex parte Harold Jackson. December 6, 1943. The motions for leave to file petitions for writs of habeas corpus are denied.

No. —. Ex parte United States ex rel. Tennessee Valley Authority. December 6, 1943. The motion for leave to file a petition for writ of mandamus or writ of prohibition is denied without prejudice to the filing of an application for a writ of certiorari. Mr. Justice Black, Mr. Justice Douglas, Mr. Justice Murphy, and Mr. Justice Rutledge think that a rule to show cause should issue. *Solicitor General Fahy* and *Mr. William C. Fitts, Jr.* for petitioner.

No. 502. Smith et al., Co-partners, Trading as Thomson & McKinnon, *v.* Lummus, Tax Assessor, et al. Appeal from the Supreme Court of Florida. December 13, 1943. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *Metropolitan Life Ins. Co.* v. *New Orleans,* 205 U. S. 395; *Liverpool Ins. Co.* v. *Board of Assessors,* 221 U. S. 346; *Curry* v. *McCanless,* 307 U. S. 357, 368. *Mr. George H. Salley* for appellants. *Messrs. J. Tom Watson,* Attorney General of Florida, and *Lawrence A. Truett,* Assistant Attorney General, for appellees. Reported below: 14 So. 2d 897.

No. —. Ex parte Edward Casebeer; and

No. —. Ex parte Frank J. Kane. December 13, 1943. The motions for leave to file petitions for writs of habeas corpus are denied.

No. —. Ex parte Wade H. Cooper. December 13, 1943. The motion for leave to file petition for writ of mandamus is denied.

No. 504. Chicago & North Western Railway Co. *v.* United States et al. Appeal from the District Court of the United States for the Northern District of Illinois. December 20, 1943. *Per Curiam:* The motions to affirm are granted and the judgment is affirmed. (1) § 77 (e) and (f) of the Bankruptcy Act; *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448, 471–475; *Group of Investors* v. *Chicago, M., St. P. & P. R. Co.*, 318 U. S. 523, 564. (2) *Great Northern Ry. Co.* v. *United States*, 277 U. S. 172, 180–183; *United States* v. *Griffin*, 303 U. S. 226, 234–237. *Mrs. Helen W. Munsert* and *Mr. Luther M. Walter* for appellant. *Solicitor General Fahy* and *Mr. Daniel W. Knowlton* for the United States et al.; and *Messrs. Kenneth F. Burgess, Fred N. Oliver,* and *Douglas F. Smith* for the Life Insurance Group Committee et al.,—appellees. Reported below: 52 F. Supp. 65.

No. 266. Harrison, Collector of Internal Revenue, *v.* Durkee Famous Foods, Inc. On petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit. December 20, 1943. *Per Curiam:* The petition for writ of certiorari in this case is granted. The judgment is reversed upon the authority of *Colgate-Palmolive-Peet Co.* v. *United States*, 320 U. S. 422. *Solicitor General Fahy* for petitioner. *Mr. Roger Hinds* for respondent. Reported below: 136 F. 2d 303.

No. —. Ex parte Percy Watts. December 20, 1943. The motion for leave to file petition for writ of habeas corpus is denied.

No. —. EX PARTE ANDREW BARNETT; and

No. —. EX PARTE JACK A. MCCOY. January 3, 1944. Applications denied.

No. —. EX PARTE ALLIANCE BRASS & BRONZE CO. January 3, 1944. The motion for leave to file petition for writ of prohibition or, in the alternative, mandamus, is denied.

No. —. EX PARTE RALPH O. LUCAS;

No. —. EX PARTE N. M. MAXWELL;

No. —. EX PARTE JAMES SPARKS;

No. —. EX PARTE BERNARD NELSON;

No. —. EX PARTE NORMAN MICHAUD; and

No. —. EX PARTE H. ELY GOLDSMITH. January 3, 1944. The motions for leave to file petitions for writs of habeas corpus are denied.

No. 966, October Term, 1941. JOBIN *v.* ARIZONA. January 3, 1944. Upon consideration of appellant's motion to compel payment of costs and appellee's reply, it is ordered that appellant's motion be denied without prejudice to its renewal in the event that the Attorney General of Arizona does not report the judgment to the Arizona Legislature at its next session and if so reported the Legislature does not make provision for payment. See 319 U. S. 103.

No. 159. WALTON, ADMINISTRATRIX, *v.* SOUTHERN PACKAGE CORP. January 3, 1944. The motion for additional attorney's fee is denied without prejudice to an appropriate application to the Supreme Court of Mississippi. See *ante*, p. 540.

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No. —. Ex parte Chesteen McConnell;
No. —. Ex parte Harrison Howard;
No. —. Ex parte Leonard Palmore; and
No. —. Ex parte Carl Jackson. January 10, 1944. The motions for leave to file petitions for writs of habeas corpus are denied.

DECISIONS GRANTING CERTIORARI, FROM OCTOBER 4, 1943, THROUGH JANUARY 10, 1944.

No. 71. United States *v.* Laudani. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Solicitor General Fahy* for the United States. *Mr. Harold Simandl* for respondent. Reported below: 134 F. 2d 847.

No. 75. United States *v.* Blair, individually and to the use of Roanoke Marble & Granite Co., Inc. October 11, 1943. Petition for writ of certiorari to the Court of Claims granted. *Solicitor General Fahy* for the United States. *Messrs. H. C. Kilpatrick* and *Richard S. Doyle* for respondent. Reported below: 99 Ct. Cls. 71.

No. 84. Dixie Pine Products Co. *v.* Commissioner of Internal Revenue. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Mr. T. J. Wills* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key* and *Samuel H. Levy,* and *Mrs. Maryhelen Wigle* for respondent. Reported below: 134 F. 2d 273.

No. 91. BAIN PEANUT CO. *v.* COMMISSIONER OF INTERNAL REVENUE. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Mr. B. L. Agerton* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key, Samuel H. Levy,* and *Joseph M. Jones* for respondent. *Mr. J. Sterling Halstead* filed a brief on behalf of the Insular Sugar Refining Corp., as *amicus curiae,* in support of petitioner. Reported below: 134 F. 2d 853.

No. 94. TENNANT, ADMINISTRATRIX, *v.* PEORIA & PEKIN UNION RAILWAY CO. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Messrs. Mark D. Eagleton* and *William H. Allen* for petitioner. *Mr. Eugene E. Horton* for respondent. Reported below: 134 F. 2d 860.

No. 99. ILLINOIS STEEL CO. *v.* BALTIMORE & OHIO RAILROAD CO. October 11, 1943. Petition for writ of certiorari to the Appellate Court, First District, of Illinois, granted. *Mr. Paul R. Conaghan* for petitioner. *Messrs. George E. Hamilton* and *Francis R. Cross* for respondent. Reported below: 316 Ill. App. 516, 46 N. E. 2d 144.

No. 112. DAVIES WAREHOUSE CO. *v.* BROWN, PRICE ADMINISTRATOR. October 11, 1943. Petition for writ of certiorari to the United States Emergency Court of Appeals granted. *Mr. Reginald L. Vaughan* for petitioner. *Assistant Solicitor General Cox* and *Messrs. Nathaniel L. Nathanson* and *William R. Ming, Jr.* for respondent. Reported below: 137 F. 2d 201.

No. 142. UNITED STATES *v.* MYERS;
No. 143. UNITED STATES *v.* ARBLE;
No. 144. UNITED STATES *v.* MARTIN;
No. 145. UNITED STATES *v.* PLITZ; and
No. 146. UNITED STATES *v.* SPITZ. October 11, 1943. Petition for writs of certiorari to the Court of Claims granted. *Solicitor General Fahy* for the United States. *Mr. Robert M. Drysdale* for respondents. Reported below: 99 Ct. Cls. 158.

No. 158. B. F. GOODRICH CO. *v.* UNITED STATES. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Messrs. E. Barrett Prettyman, F. G. Awalt,* and *Raymond Sparks* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key, J. Louis Monarch,* and *Warren F. Wattles* for the United States. Reported below: 135 F. 2d 456.

No. 183. BROWN ET AL. *v.* GERDES ET AL., TRUSTEES. October 11, 1943. Petition for writ of certiorari to the Court of Appeals of New York granted. *Messrs. David Paine* and *Lawrence Greenbaum* for petitioners. *Messrs. John Gerdes* and *James D. Carpenter, Jr.,* and *Mary-Chase Clark* for respondents. Reported below: 290 N. Y. 868, 50 N. E. 2d 249.

No. 195. NORTHWESTERN ELECTRIC CO. ET AL. *v.* FEDERAL POWER COMMISSION. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Messrs. John A. Laing, Henry S. Gray, A. J. G. Priest,* and *Sidman I. Barber* for petitioners. *Solicitor General Fahy, Assistant Attorney*

General Shea, and *Messrs. Paul A. Sweeney, Charles V. Shannon,* and *Reuben Goldberg* for respondent. Reported below: 134 F. 2d 740.

No. 209. UNITED STATES *v.* WATERHOUSE ET AL. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Solicitor General Fahy* for the United States. *Messrs. Herman Phleger* and *A. G. M. Robertson* for respondents. Reported below: 132 F. 2d 699.

No. 211. STARK ET AL. *v.* WICKARD, SECRETARY OF AGRICULTURE. October 11, 1943. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia granted. *Mr. Harry Polikoff* for petitioners. *Solicitor General Fahy, Assistant Attorney General Berge, Messrs. Kenneth L. Kimble, J. Stephen Doyle, Jr.,* and *Robert L. Stern,* and *Miss Margaret H. Brass* for respondent. Reported below: 136 F. 2d 786.

No. 265. MEDO PHOTO SUPPLY CORP. *v.* NATIONAL LABOR RELATIONS BOARD. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. Walter N. Seligsberg* and *William E. Friedman* for petitioner. *Solicitor General Fahy, Mr. Robert B. Watts,* and *Miss Ruth Weyand* for respondent. Reported below: 135 F. 2d 279.

No. 267. UNITED STATES *v.* SEATTLE-FIRST NATIONAL BANK. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit

granted. *Solicitor General Fahy* for the United States. *Mr. B. H. Kizer* for respondent. Reported below: 136 F. 2d 676.

No. 276. SECURITY FLOUR MILLS CO. *v.* COMMISSIONER OF INTERNAL REVENUE. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit granted. *Mr. Robert C. Foulston* for petitioner. *Solicitor General Fahy* for respondent. Reported below: 135 F. 2d 165.

No. 291. UNION BROKERAGE CO. *v.* JENSEN ET AL. October 11, 1943. Petition for writ of certiorari to the Supreme Court of Minnesota granted. *Mr. Leonard Eriksson* for petitioner. *Mr. Ordner T. Bundlie* for respondents. Reported below: 215 Minn. 207, 9 N. W. 2d 721.

No. 115. COMMISSIONER OF INTERNAL REVENUE *v.* LANE-WELLS COMPANY ET AL. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Solicitor General Fahy* for petitioner. *Mr. Raphael Dechter* for respondents. Reported below: 134 F. 2d 977.

No. 193. FELDMAN *v.* UNITED STATES. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted, limited to the question whether petitioner's testimony given in the New York supplementary proceedings was properly admitted in evidence at the trial. MR. JUSTICE MURPHY took no part in the consideration or decision of this application. *Messrs. James Marshall* and *Seymour M. Klein* for peti-

tioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Mr. Robert S. Erdahl* for the United States. Reported below: 136 F. 2d 394.

No. 200. MAHNICH *v.* SOUTHERN STEAMSHIP CO. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Mr. Abraham E. Freedman* for petitioner. *Mr. Joseph W. Henderson* for respondent. Reported below: 135 F. 2d 602.

No. 215. BILLINGS *v.* TRUESDELL, MAJOR GENERAL, U. S. A. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit granted. *Mr. Lee Bond* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Mr. Robert S. Erdahl* for respondent. Reported below: 135 F. 2d 505.

No. 217. ADDISON ET AL. *v.* HOLLY HILL FRUIT PRODUCTS, INC. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Mr. George Palmer Garrett* for petitioners. *Messrs. C. O. Andrews* and *G. L. Reeves* for respondent. *Solicitor General Fahy* and *Mr. Douglas B. Maggs* filed a memorandum on behalf of the Administrator of the Wage and Hour Division, U. S. Dept. of Labor, as *amicus curiae,* in support of the petition. Reported below: 136 F. 2d 323.

No. 226. POLISH NATIONAL ALLIANCE OF THE UNITED STATES OF NORTH AMERICA *v.* NATIONAL LABOR RELATIONS BOARD. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit

granted, limited to the first five questions presented by the petition for the writ. *Messrs. Casimir E. Midowicz* and *Ewart S. Harris* for petitioner. *Solicitor General Fahy, Mr. Robert B. Watts,* and *Miss Ruth Weyand* for respondent. Reported below: 136 F. 2d 175.

No. 235. GREAT NORTHERN LIFE INSURANCE CO. *v.* READ, INSURANCE COMMISSIONER. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit granted. *Mr. Herbert R. Tews* for petitioner. *Messrs. Mac Q. Williamson,* Attorney General of Oklahoma, and *Fred Hansen,* Assistant Attorney General, for respondent. Reported below: 136 F. 2d 44.

No. 117. DISTRICT OF COLUMBIA *v.* PACE. October 11, 1943. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia granted. MR. JUSTICE BLACK and MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application. *Messrs. Richmond B. Keech, Vernon E. West,* and *Glenn Simmon* for petitioner. *Mr. Martin F. O'Donoghue* for respondent. Reported below: 135 F. 2d 249.

No. 159. WALTON, ADMINISTRATRIX, *v.* SOUTHERN PACKAGE CORP. October 11, 1943. Petition for writ of certiorari to the Supreme Court of Mississippi granted. *Mr. Chas. F. Engle* for petitioner. *Messrs. William H. Watkins* and *P. H. Eager, Jr.* for respondent. *Solicitor General Fahy* and *Messrs. Douglas B. Maggs* and *Irving J. Levy* filed a brief on behalf of the Administrator of the Wage and Hour Division, U. S. Dept. of Labor, as *amicus curiae,* in support of the petition. Reported below: 194 Miss. 573, 11 So. 2d 912.

No. 155. MATHEWS ET AL. *v.* WEST VIRGINIA EX REL. HAMILTON, PROSECUTING ATTORNEY. See *ante*, p. 707.

No. 316. HECHT COMPANY *v.* BROWN, PRICE ADMINISTRATOR. October 18, 1943. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia granted. *Messrs. Charles A. Horsky* and *Spencer Gordon* for petitioner. *Solicitor General Fahy* and *Messrs. Paul A. Freund, Thomas I. Emerson,* and *David London* for respondent. Reported below: 137 F. 2d 689.

No. 232. SARTOR ET AL. *v.* ARKANSAS NATURAL GAS CORP. October 18, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Mr. Gilbert P. Bullis* for petitioners. Reported below: 134 F. 2d 433.

No. 262. GOODYEAR TIRE & RUBBER CO., INC. ET AL. *v.* RAY-O-VAC COMPANY. October 18, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Messrs. William E. Chilton* and *Albert R. Golrick* for petitioners. *Messrs. Bernard A. Schroeder, Russell Wiles,* and *George A. Chritton* for respondent. Reported below: 136 F. 2d 159.

No. 343. ORDER OF RAILROAD TELEGRAPHERS *v.* RAILWAY EXPRESS AGENCY, INC. October 18, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Messrs. William G. McRae* and *Leo J. Hassenauer* for petitioner. *Messrs. A. M. Hartung, Blair Foster,* and *H. S. Marx* for respondent. Reported below: 137 F. 2d 46.

Nos. 336 and 338. NATIONAL LABOR RELATIONS BOARD *v.* HEARST PUBLICATIONS, INC.;

No. 337. NATIONAL LABOR RELATIONS BOARD *v.* STOCKHOLDERS PUBLISHING CO., INC.; and

No. 339. NATIONAL LABOR RELATIONS BOARD *v.* TIMES-MIRROR COMPANY. October 25, 1943. Petition for writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Solicitor General Fahy* and *Mr. Robert B. Watts* for petitioner. *Mr. Oscar Lawler* for respondent in No. 336; *Messrs. Thomas S. Tobin* and *L. B. Binford* for respondent in No. 337; *Mr. Henry S. Mac Kay, Jr.* for respondent in No. 338; and *Messrs. T. B. Cosgrove* and *John N. Cramer* for respondent in No. 339. Reported below: 136 F. 2d 608.

No. 311. MCLEOD, COMMISSIONER OF REVENUES, *v.* J. E. DILWORTH CO. ET AL. October 25, 1943. Petition for writ of certiorari to the Supreme Court of Arkansas granted. *Mr. Leffel Gentry* for petitioner. *Mr. Allan Davis* for the J. E. Dilworth Co., and *Mr. W. H. Daggett* for the Reichman-Crosby Co.,—respondents. Reported below: 205 Ark. 780, 171 S. W. 2d 62.

No. 391. ASHCRAFT ET AL. *v.* TENNESSEE. October 25, 1943. The petition for writ of certiorari to the Supreme Court of Tennessee is granted. *Mr. Grover N. McCormick* for petitioners. *Mr. Nat Tipton,* Assistant Attorney General of Tennessee, for respondent.

No. 371. U. S. EX REL. MCCANN *v.* ADAMS, WARDEN, ET AL. See *ante,* p. 220.

No. 317. CRITES, INCORPORATED, *v.* PRUDENTIAL INSURANCE CO. ET AL. November 8, 1943. Petition for writ of

certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Mr. Isaac E. Ferguson* for petitioner. *Mr. Ralph G. Martin* for respondents. Reported below: 134 F. 2d 925.

No. 362. NORTON, DEPUTY COMMISSIONER, *v.* WARNER COMPANY. November 8, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Solicitor General Fahy* for petitioner. *Mr. Everett H. Brown, Jr.* for respondent. Reported below: 137 F. 2d 57.

No. 381. UNITED STATES *v.* AMERICAN SURETY CO. November 8, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Solicitor General Fahy* for the United States. *Messrs. Sterling M. Wood* and *Hugh H. Obear* for respondent. Reported below: 136 F. 2d 437.

No. 366. UNITED STATES *v.* WHITE. November 8, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Solicitor General Fahy* for the United States. *Mr. Robert J. Fitzsimmons* for respondent. Reported below: 137 F. 2d 24.

No. 388. CITY OF CORAL GABLES *v.* WRIGHT, DOING BUSINESS AS ED. C. WRIGHT & CO., ET AL. November 8, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Messrs. Ira C. Haycock* and *D. H. Redfearn* for petitioner. *Mr. Miller Walton* for Ed. C. Wright; and *Mr. F. A. Berry* for the American National Bank,—respondents. Reported below: 137 F. 2d 192.

No. 396. VINSON, DIRECTOR OF ECONOMIC STABILIZATION, ET AL. *v.* WASHINGTON GAS LIGHT CO. ET AL. November 8, 1943. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia granted. *Solicitor General Fahy* for petitioners. *Messrs. E. Barrett Prettyman, Stoddard M. Stevens, Jr., F. G. Awalt,* and *Raymond Sparks* for the Washington Gas Light Co.; and *Messrs. Richmond B. Keech, Vernon E. West,* and *Lloyd B. Harrison* for the Public Utilities Commission,—respondents. Reported below: 137 F. 2d 547.

No. 374. YAKUS *v.* UNITED STATES; and

No. 375. ROTTENBERG ET AL. *v.* UNITED STATES. November 8, 1943. Petitions for writs of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Messrs. Leonard Poretsky, Harold Widetzky,* and *Joseph Kruger* for petitioner in No. 374; and *Messrs. Leonard Poretsky, John H. Backus,* and *William H. Lewis* for petitioners in No. 375. *Solicitor General Fahy* for the United States. Reported below: 137 F. 2d 850.

No. 406. CRAMER *v.* UNITED STATES. November 8, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Harold R. Medina* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Messrs. Oscar A. Provost* and *Edward G. Jennings* for the United States. Reported below: 137 F. 2d 888.

No. 392. UNIVERSAL OIL PRODUCTS CO. *v.* GLOBE OIL & REFINING CO. November 15, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Messrs. Alexander F. Reichmann*

and *William F. Hall* for petitioner. *Messrs. J. Bernhard Thiess* and *Sidney Neuman* for respondent. Reported below: 137 F. 2d 3.

No. 409. TENNESSEE COAL, IRON & RAILROAD CO. ET AL. *v.* MUSCODA LOCAL NO. 123 ET AL. November 15, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Messrs. Borden Burr, E. L. All, R. T. Rives,* and *T. F. Patton* for petitioners. *Messrs. Crampton Harris, Lee Pressman,* and *J. Q. Smith* for Muscoda Local No. 123 et al.; and *Solicitor General Fahy, Messrs. Douglas B. Maggs* and *Irving J. Levy,* and *Miss Bessie Margolin* for the Administrator of the Wage and Hour Division, U. S. Dept. of Labor,— respondents. Reported below: 137 F. 2d 176.

No. 436. WALLING, ADMINISTRATOR, *v.* JAMES V. REUTER, INC. November 22, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Solicitor General Fahy* and *Mr. Douglas B. Maggs* for petitioner. *Mr. Frank S. Normann* for respondent. Reported below: 137 F. 2d 315.

No. 441. GENERAL TRADING CO., DOING BUSINESS AS MINNEAPOLIS IRON STORE, *v.* STATE TAX COMMISSION. November 22, 1943. Petition for writ of certiorari to the Supreme Court of Iowa granted. *Messrs. Edward S. Stringer* and *A. B. Howland* for petitioner. *Mr. Jens Grothe* for respondent. Reported below: 10 N. W. 2d 659.

No. 447. JOHNSON ET AL. *v.* YELLOW CAB TRANSIT CO. November 22, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit granted. *Messrs. Randell S. Cobb,* Attorney General of Oklahoma,

and *Sam H. Lattimore,* Assistant Attorney General, for petitioners. *Messrs. John B. Dudley* and *Duke Duvall* for respondent. Reported below: 137 F. 2d 274.

No. 433. LYONS *v.* OKLAHOMA. November 22, 1943. Petition for writ of certiorari to the Court of Criminal Appeals of Oklahoma granted. *Mr. Thurgood Marshall* for petitioner. Reported below: 140 P. 2d 248.

No. 435. BROTHERHOOD OF RAILWAY & STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS & STATION EMPLOYEES ET AL. *v.* UNITED TRANSPORT SERVICE EMPLOYEES ET AL. See *ante,* p. 715.

No. 119. MILLER *v.* UNITED STATES. December 6, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Mr. Gerhard A. Gesell* for petitioner. *Assistant Solicitor General Cox, Assistant Attorney General Berge, Mr. Oscar A. Provost,* and *Miss Melva M. Graney* for the United States. Reported below: 136 F. 2d 287.

No. 398. HAZEL-ATLAS GLASS CO. *v.* HARTFORD-EMPIRE CO.; and

No. 423. SHAWKEE MANUFACTURING CO. ET AL. *v.* HARTFORD-EMPIRE CO. December 13, 1943. Petitions for writs of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Messrs. Stephen H. Philbin* and *Henry R. Ashton* for petitioner in No. 398; and *Mr. William B. Jaspert* for petitioners in No. 423. *Messrs. Walter J. Blenko, Francis W. Cole, Edgar J. Goodrich,* and *James M. Carlisle* for respondent. Reported below: 137 F. 2d 764.

No. 483. CLIFFORD F. MACEVOY CO. ET AL. *v.* UNITED STATES FOR THE USE AND BENEFIT OF CALVIN TOMKINS CO. December 13, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Messrs. Elmer O. Goodwin* and *Edward F. Clark* for petitioners. *Mr. Benjamin P. DeWitt* for respondent. Reported below: 137 F. 2d 565.

No. 266. HARRISON, COLLECTOR OF INTERNAL REVENUE, *v.* DURKEE FAMOUS FOODS, INC. See *ante*, p. 718.

No. 463. ARENAS *v.* UNITED STATES. December 20, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. John W. Preston* for petitioner. *Solicitor General Fahy, Assistant Attorney General Littell,* and *Mr. Norman MacDonald* for the United States. Reported below: 137 F. 2d 199.

No. 492. EQUITABLE LIFE ASSURANCE SOCIETY *v.* COMMISSIONER OF INTERNAL REVENUE. December 20, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted, limited to the second question presented by the petition. *Mr. John L. Grant* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. L. W. Post* and *Alvin J. Rockwell* for respondent. Reported below: 137 F. 2d 623.

No. 472. UNITED STATES *v.* BALLARD ET AL. January 3, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Solicitor General Fahy* for the United States. *Mr. Roland Rich Woolley* for respondents. Reported below: 138 F. 2d 540.

Nos. 130 and 131. DOUGLAS *v.* COMMISSIONER OF INTERNAL REVENUE;

No. 132. ESTATE OF ROBINSON ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE; and

No. 133. DALRYMPLE *v.* COMMISSIONER OF INTERNAL REVENUE. January 10, 1944. Petition for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Mr. Thomas P. Helmey* for petitioners. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Mr. Sewall Key,* and *Misses Helen R. Carloss* and *Louise Foster* for respondent. Reported below: 134 F. 2d 762.

No. 531. HARTZEL *v.* UNITED STATES. January 10, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Mr. Ode L. Rankin* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Mr. Robert S. Erdahl,* and *Miss Beatrice Rosenberg* for the United States. Reported below: 138 F. 2d 169.

No. 521. FRANKS BROS. CO. *v.* NATIONAL LABOR RELATIONS BOARD. January 10, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Mr. Arthur V. Getchell* for petitioner. *Solicitor General Fahy, Mr. Alvin J. Rockwell,* and *Miss Ruth Weyand* for respondent. Reported below: 137 F. 2d 989.

DECISIONS DENYING CERTIORARI, FROM OCTOBER 4, 1943, THROUGH JANUARY 10, 1944.

No. 95. MOODY BIBLE INSTITUTE *v.* CHICAGO. See *ante*, p. 705.

No. 275. PARKER ET AL. *v.* MISSISSIPPI. See *ante*, p. 705.

No. 213. TWISP MINING & SMELTING CO. *v.* CHELAN MINING CO. ET AL. See *ante*, p. 705.

No. 72. COWAN *v.* FALLBROOK PUBLIC UTILITY DISTRICT. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Wm. G. Junge* for petitioner. *Mr. Albert J. Lee* for respondent. Reported below: 131 F. 2d 513.

No. 74. RAPHAEL *v.* COMMISSIONER OF INTERNAL REVENUE. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Byron C. Hanna* and *Harold C. Morton* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.*, and *Messrs. Sewall Key, Samuel H. Levy*, and *Warren F. Wattles* for respondent. Reported below: 133 F. 2d 442.

No. 76. DANT & RUSSELL, INC. *v.* BOARD OF SUPERVISORS OF THE COUNTY OF LOS ANGELES ET AL. October 11, 1943. Petition for writ of certiorari to the Supreme Court of California denied. *Mr. Henry C. Rohr* for petitioner. *Mr. J. H. O'Connor* for respondents. Reported below: 21 Cal. 2d 534, 133 P. 2d 817.

No. 77. McGREGOR ET AL. *v.* UNITED STATES. October 11, 1943. Petition for writ of certiorari to the Court of Claims denied. *Messrs. William E. Leahy, Nicholas J. Chase,* and *Eugene B. Sullivan,* and *M. Pearl McCall* for petitioners. *Assistant Solicitor General Cox* and *Assistant Attorney General Shea* for the United States. Reported below: 98 Ct. Cls. 638.

No. 78. FINCK CIGAR CO., INC. *v.* COMMISSIONER OF INTERNAL REVENUE. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Claude V. Birkhead* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key* and *F. E. Youngman,* and *Miss Helen R. Carloss* for respondent. Reported below: 134 F. 2d 261.

No. 79. CALDWELL *v.* TRAVELERS INSURANCE CO. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Thomas B. Pryor* and *Thomas B. Pryor, Jr.* for petitioner. *Messrs. Joseph M. Hill* and *Henry L. Fitzhugh* for respondent. Reported below: 133 F. 2d 649.

No. 80. LA SOCIETE FRANCAISE DE BIENFAISANCE MUTUELLE *v.* CALIFORNIA EMPLOYMENT COMMISSION. October 11, 1943. Petition for writ of certiorari to the District Court of Appeal, 1st Appellate District, of California denied. *Mr. Charles D. Hamel* for petitioner. *Messrs. Robert W. Kenny,* Attorney General of California, and *Clarence A. Linn,* Deputy Attorney General, for respondent. Reported below: 56 Cal. App. 2d 534, 133 P. 2d 47.

No. 81. MIDDLE WEST CONSTRUCTION, INC. *v.* METROPOLITAN DISTRICT. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. George H. Cohen* for petitioner. *Mr. W. Arthur Countryman, Jr.* for respondent. Reported below: 133 F. 2d 468.

No. 82. PARKER *v.* UNITED STATES ET AL. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Richard Wait* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Messrs. Kenneth L. Kimble* and *John S. L. Yost* for respondents. Reported below: 135 F. 2d 54.

No. 89. JACKSONVILLE PAPER CO. *v.* UNITED STATES. October 11, 1943. Petition for writ of certiorari to the United States Court of Customs & Patent Appeals denied. *Messrs. Louis Kurz* and *Thos. B. Adams* for petitioner. *Solicitor General Fahy, Assistant Attorney General Rao,* and *Messrs. John R. Benney* and *Robert L. Stern* for the United States. Reported below: 30 C. C. P. A. (Customs) 159.

No. 90. TRUST COMPANY OF CHICAGO, ADMINISTRATOR, ET AL. *v.* CHICAGO ET AL. October 11, 1943. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Messrs. Weightstill Woods* and *Horace Russell* for petitioners. *Messrs. Barnet Hodes* and *J. Herzl Segal* for respondents.

No. 93. MCCOLGAN, FRANCHISE TAX COMMISSIONER, *v.* MAIER BREWING CO. ET AL. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for

the Ninth Circuit denied. *Messrs. Robert W. Kenny,* Attorney General of California, and *Hartwell H. Linney,* Assistant Attorney General, for petitioner. *Mr. Norman A. Bailie* for respondents. Reported below. 134 F. 2d 385.

No. 96. PETTY *v.* MISSOURI & ARKANSAS RAILWAY CO. October 11, 1943. Petition for writ of certiorari to the Supreme Court of Arkansas denied. *Messrs. W. R. Donham* and *Sam M. Wassell* for petitioner. *Messrs. W. S. Walker* and *Virgil D. Willis* for respondent. Reported below: 205 Ark. 990, 167 S. W. 2d 895.

No. 97. WEST VIRGINIA GLASS SPECIALTY CO. *v.* NATIONAL LABOR RELATIONS BOARD. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Herbert M. Blair, Birk S. Stathers,* and *W. G. Stathers* for petitioner. *Assistant Solicitor General Cox, Messrs. Robert B. Watts* and *Ernest A. Gross,* and *Misses Ruth Weyand* and *Fannie M. Boyls* for respondent. Reported below: 134 F. 2d 551.

No. 101. KEESHIN MOTOR EXPRESS CO., INC. *v.* INTERSTATE COMMERCE COMMISSION. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Luther M. Walter* and *Floyd F. Shields,* and *Mrs. Helen W. Munsert* for petitioner. *Solicitor General Fahy* and *Messrs. Daniel W. Knowlton, Allen Crenshaw,* and *Gregory U. Harmon* for respondent. Reported below: 134 F. 2d 228.

No. 102. NORTH CAROLINA FINISHING CO. *v.* NATIONAL LABOR RELATIONS BOARD. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Ap-

peals for the Fourth Circuit denied. *Mr. Burton Craige* for petitioner. *Assistant Solicitor General Cox, Messrs. Robert B. Watts, Ernest A. Gross, Millard Cass,* and *Miss Ruth Weyand,* for respondent. Reported below: 133 F. 2d 714.

No. 104. PACIFIC STATES SAVINGS & LOAN CO. ET AL. *v.* TREDE ET AL. October 11, 1943. Petition for writ of certiorari to the Supreme Court of California denied. *Messrs. Byron C. Hanna* and *Harold C. Morton* for petitioners. *Mr. Robert W. Kenny,* Attorney General of California, and *Mrs. Lenore D. Underwood,* Deputy Attorney General, for respondents. Reported below: 21 Cal. 2d 630, 134 P. 2d 745.

No. 106. SEIDENBACH *v.* MARYLAND CASUALTY CO. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. William J. Dempsey* for petitioner. Reported below: 133 F. 2d 573.

No. 107. KEASBEY & MATTISON CO. *v.* ROTHENSIES, COLLECTOR OF INTERNAL REVENUE. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Charles Myers* for petitioner. *Assistant Solicitor General Cox, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key, Samuel H. Levy,* and *F. E. Youngman* for respondent. Reported below: 133 F. 2d 894.

No. 108. WALLACE, DOING BUSINESS AS WALLACE LABORATORIES, *v.* F. W. WOOLWORTH CO. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. W. B.*

Morton and *H. Stanley Mansfield* for petitioner. *Mr. Roberts B. Larson* for respondent. Reported below: 133 F. 2d 763.

No. 110. BARNETT, TRUSTEE IN BANKRUPTCY, *v.* MARYLAND CASUALTY CO. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. David Ralph Hertz* for petitioner. *Mr. C. M. Vrooman* for respondent. Reported below: 134 F. 2d 725.

No. 219. CONTINENTAL CASUALTY CO. *v.* BARNETT, TRUSTEE. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Lloyd F. Loux* for petitioner. *Mr. David Ralph Hertz* for respondent. Reported below: 134 F. 2d 725.

No. 111. PINE *v.* UNITED STATES. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. James M. Carson* and *Vincent C. Giblin* for petitioner. *Assistant Solicitor General Cox, Assistant Attorney General Berge,* and *Messrs. Oscar A. Provost, Edward G. Jennings,* and *W. Marvin Smith* for the United States. Reported below: 135 F. 2d 353.

No. 114. J. L. HUDSON CO. *v.* NATIONAL LABOR RELATIONS BOARD. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Hal H. Smith* and *Archibald Broomfield* for petitioner. *Assistant Solicitor General Cox, Messrs. Robert B. Watts, Ernest A. Gross, John E. Lawyer,* and *Miss Ruth Weyand* for respondent. Reported below: 135 F. 2d 380.

No. 116. LANE-WELLS COMPANY ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Raphael Dechter* for petitioners. *Assistant Solicitor General Cox, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key* and *F. E. Youngman,* and *Miss Helen R. Carloss* for respondent. Reported below: 134 F. 2d 977.

No. 118. KIKER *v.* PHILADELPHIA ET AL. October 11, 1943. Petition for writ of certiorari to the Supreme Court of Pennsylvania denied. *Messrs. Ralph W. Wescott, Louis B. LeDuc,* and *George P. Williams, Jr.* for petitioner. *Mr. Abraham Wernick* for respondents. Reported below: 346 Pa. 624, 31 A. 2d 289.

No. 120. OSWALD *v.* UNITED STATES. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. John K. Hagopian* for petitioner. *Assistant Solicitor General Cox, Assistant Attorney General Littell,* and *Messrs. Vernon L. Wilkinson* and *Roger P. Marquis* for the United States. Reported below: 133 F. 2d 82.

No. 121. BARNES *v.* PENNSYLVANIA EX REL. BARNES. October 11, 1943. Petition for writ of certiorari to the Superior Court of Pennsylvania denied. *Messrs. Charles S. Thompson* and *George W. Cupps, Jr.* for petitioner. *Mr. Samuel Kagle* for respondent. Reported below: 151 Pa. Super. 202, 30 A. 2d 437.

No. 122. MUSKEGON MOTOR SPECIALTIES CO. *v.* COMMISSIONER OF INTERNAL REVENUE. October 11, 1943.

Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Hal H. Smith* and *Archibald Broomfield* for petitioner. *Assistant Solicitor General Cox, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key, Samuel H. Levy,* and *Joseph M. Jones* for respondent. Reported below: 134 F. 2d 904.

No. 124. ROYER, ADMINISTRATRIX, *v.* GREINER. October 11, 1943. Petition for writ of certiorari to the Superior Court of Pennsylvania denied. *Anna Royer, pro se.* Reported below: 151 Pa. Super. 515, 30 A. 2d 621.

No. 126. THOMAS P. NICHOLS & SON CO. *v.* NATIONAL CITY BANK OF LYNN ET AL. October 11, 1943. Petition for writ of certiorari to the Superior Court, Essex County, Massachusetts, denied. *Mr. Arthur V. Getchell* for petitioner. *Solicitor General Fahy, Assistant Attorney General Shea,* and *Messrs. Paul A. Sweeney* and *Francis C. Brown* for the Federal Deposit Insurance Corporation, respondent.

No. 127. CREEKMORE, GENERAL CHAIRMAN OF THE BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, *v.* PUBLIC BELT RAILROAD COMMISSION ET AL. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. James J. Farnan* and *Martin F. O'Donoghue* for petitioner. *Mr. Alfred C. Kammer* for respondents. Reported below: 134 F. 2d 576.

No. 128. SKINNER *v.* DINGWELL. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Elmer McClain*

for petitioner. *Mr. Vincent Starzinger* for respondent. Reported below: 134 F. 2d 391.

No. 129. MORRIS INVESTMENT CORP. *v.* COMMISSIONER OF INTERNAL REVENUE. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Edward L. Blackman* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.*, and *Mr. Sewall Key* for respondent. Reported below: 134 F. 2d 774.

No. 136. LANGFIELD, DOING BUSINESS AS SOLVITE COMPANY, *v.* SOLVENTOL CHEMICAL PRODUCTS, INC. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Edward S. Rogers, William T. Woodson, Sherwin A. Hill,* and *Karl D. Loos* for petitioner. *Mr. Arthur W. Dickey* for respondent. Reported below: 134 F. 2d 899.

No. 138. MORRELL *v.* CITY OF NEW YORK ET AL. October 11, 1943. Petition for writ of certiorari to the Supreme Court of New York denied. *Mr. David V. Cahill* for petitioner. *Messrs. Paxton Blair* and *Charles F. Murphy* for respondents. Reported below: 290 N. Y. 606, 48 N. E. 2d 708.

No. 139. PERRY *v.* UNITED STATES. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Meyer J. Sawyer* for petitioner. *Solicitor General Fahy, Assistant Attorney General Berge, Mr. Oscar A. Provost,* and *Miss Melva M. Graney* for the United States. Reported below: 136 F. 2d 109.

No. 140. ATWOOD ET AL. *v.* KLEBERG, EXECUTRIX, ET AL. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Brady Cole* for petitioners. *Mr. Leroy G. Denman* for Alice G. K. Kleberg, Executrix, et al.; and *Messrs. R. E. Seagler* and *E. E. Townes* for the Humble Oil & Refining Co.,—respondents. Reported below: 135 F. 2d 452.

No. 147. MILLER *v.* MILLER. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Lloyd G. Owen, A. Flint Moss,* and *Villard Martin* for petitioner. *Mr. John Ladner* for respondent. Reported below: 134 F. 2d 583.

No. 148. MATCOVICH *v.* ANGLIM, COLLECTOR OF INTERNAL REVENUE. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Horace B. Wulff* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key* and *J. Louis Monarch* for respondent. Reported below: 134 F. 2d 834.

No. 149. CELANESE CORPORATION OF AMERICA *v.* LIBBEY-OWENS-FORD GLASS CO. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Drury W. Cooper* and *Clifton V. Edwards* for petitioner. *Messrs. Edwin J. Marshall* and *George I. Haight* for respondent. Reported below: 135 F. 2d 138.

No. 151. FIRST TRUST & DEPOSIT CO. ET AL., EXECUTORS, *v.* SHAUGHNESSY, COLLECTOR OF INTERNAL REVENUE. October 11, 1943. Petition for writ of certiorari

to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Henry S. Fraser* for petitioners. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key* and *Edward First,* and *Miss Helen R. Carloss* for respondent. Reported below: 134 F. 2d 940.

No. 152. BUCKEYE UNION CASUALTY CO. *v.* RANALLO ET AL. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Wm. M. Byrnes* for petitioner. *Mr. C. M. Horn* for respondents. Reported below: 135 F. 2d 921.

No. 153. FARRELL *v.* COMMISSIONER OF INTERNAL REVENUE. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Charles D. Hamel* and *John Enrietto* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Mr. Sewall Key,* and *Mrs. Maryhelen Wigle* for respondent. Reported below: 134 F. 2d 193.

No. 156. BURNS *v.* UNITED STATES. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Alex. Simpson* for petitioner. *Solicitor General Fahy, Assistant Attorney General Berge, Mr. Robert S. Erdahl,* and *Miss Beatrice Rosenberg* for the United States. Reported below: 135 F. 2d 867.

No. 160. REID, CIRCUIT JUDGE, *v.* SECOND NATIONAL BANK & TRUST CO. ET AL. October 11, 1943. Petition for writ of certiorari to the Supreme Court of Michigan denied. *Messrs. Nelson Hartson* and *William Alfred Luck-*

ing for petitioner. *Mr. Thomas G. Long* for respondents. Reported below: 304 Mich. 376, 8 N. W. 2d 104.

No. 162. KLINGER *v.* UNITED STATES. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Louis Halle* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Messrs. Robert L. Wright* and *Kenneth L. Kimble* for the United States. Reported below: 136 F. 2d 677.

No. 163. WESTERN CARTRIDGE CO. ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Thomas S. McPheeters* and *Henry Davis* for petitioners. *Solicitor General Fahy, Mr. Robert B. Watts,* and *Miss Ruth Weyand* for respondents. Reported below: 134 F. 2d 240.

No. 164. HOLLAND FURNACE CO. *v.* DEPARTMENT OF TREASURY ET AL. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Earl B. Barnes, Alan W. Boyd, Charles M. Wells,* and *Benj. F. J. Odell* for petitioner. *Messrs. James A. Emmert,* Attorney General of Indiana, *Joseph W. Hutchinson, David I. Day, Jr., Byron B. Emswiller,* and *Winslow Van Horne,* Deputy Attorneys General, for respondents. Reported below: 133 F. 2d 212.

No. 165. INTERSTATE ROOFING & SUPPLY CO. *v.* DEPARTMENT OF TREASURY ET AL. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Earl B. Barnes,*

Alan W. Boyd, Charles M. Wells, and *Benj. F. J. Odell* for petitioner. *Messrs. James A. Emmert,* Attorney General of Indiana, *Joseph W. Hutchinson, David I. Day, Jr., Byron B. Emswiller, John J. McShane,* and *Winslow Van Horne,* Deputy Attorneys General, for respondents. Reported below: 133 F. 2d 212.

No. 166. GREAT LAKES DREDGE & DOCK CO. ET AL. *v.* DEPARTMENT OF TREASURY ET AL. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Earl B. Barnes, Alan W. Boyd, Charles M. Wells,* and *Benj. F. J. Odell* for petitioners. *Messrs. James A. Emmert,* Attorney General of Indiana, *Joseph W. Hutchinson, David I. Day, Jr., Byron B. Emswiller,* and *John J. McShane,* Deputy Attorneys General, for respondents. Reported below: 133 F. 2d 212.

No. 168. DENNEY *v.* FORT RECOVERY BANKING CO. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Elmer McClain* for petitioner. *Mr. Orel J. Myers* for respondent. Reported below: 135 F. 2d 184.

No. 169. I. T. S. COMPANY *v.* SEIBERLING RUBBER CO. ET AL. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. F. O. Richey* and *H. F. McNenny* for petitioner. *Messrs. Arthur H. VanHorn* and *Harvey R. Hawgood* for respondents. Reported below: 134 F. 2d 871.

No. 172. WASHINGTON WATER POWER CO. ET AL. *v.* UNITED STATES. October 11, 1943. Petition for writ of

certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Henry E. T. Herman* and *Richard W. Nuzum,* Assistant Attorney General of the State of Washington, for petitioners. *Solicitor General Fahy, Assistant Attorney General Littell,* and *Messrs. Arnold Raum* and *Vernon L. Wilkinson* for the United States. Reported below: 135 F. 2d 541.

No. 173. RICH *v.* RICH. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Joseph Nemerov, Maurice J. Dix,* and *George Gussaroff* for petitioner. Reported below: 134 F. 2d 779.

No. 174. CITY OF YOUNGSTOWN *v.* ERIE RAILROAD CO. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Charles S. Rhyne* for petitioner. *Mr. James E. Bennett* for respondent. Reported below: 133 F. 2d 730.

No. 175. ANDREWS *v.* COMMISSIONER OF INTERNAL REVENUE;

No. 176. RAINEY ET AL., EXECUTORS, *v.* COMMISSIONER OF INTERNAL REVENUE;

No. 177. RAINEY *v.* COMMISSIONER OF INTERNAL REVENUE;

No. 178. STODDARD *v.* COMMISSIONER OF INTERNAL REVENUE; and

No. 179. ANDREWS *v.* COMMISSIONER OF INTERNAL REVENUE. October 11, 1943. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Alexander S. Andrews* for petitioners. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key, Samuel H.*

Levy, and *F. E. Youngman* for respondent. Reported below: 135 F. 2d 314.

No. 180. TRANSBAY CONSTRUCTION CO. *v.* CITY AND COUNTY OF SAN FRANCISCO. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Sidney M. Ehrman* and *H. Thomas Austern* for petitioner. *Messrs. Dion R. Holm, Henry Heidelberg,* and *Maurice E. Harrison* for respondent. Reported below: 134 F. 2d 468.

No. 181. LIPPARD ET AL. *v.* NORTH CAROLINA. October 11, 1943. Petition for writ of certiorari to the Supreme Court of North Carolina denied. *Mr. John M. Robinson* for petitioners. *Messrs. Harry McMullan,* Attorney General of North Carolina, and *Hughes J. Rhodes,* Assistant Attorney General, for respondent. Reported below: 223 N. C. 167, 25 S. E. 2d 594.

No. 182. SCHIAVONE-BONOMO CORPORATION *v.* BOUCHARD TRANSPORTATION CO., INC. ET AL. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Paul Speer* for petitioner. *Messrs. Frank C. Mason* and *Edward L. P. O'Connor* for the Bouchard Transportation Co.; and *Mr. John C. Crawley* for the Buffalo Barge Towing Corporation,—respondents. Reported below: 134 F. 2d 1022.

No. 184. COVER *v.* CHICAGO EYE SHIELD CO. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Joshua R. H. Potts* and *Eugene Vincent Clarke* for petitioner. *Mr. Franklin M. Warden* for respondent. Reported below: 136 F. 2d 374.

No. 185. SNYDER *v.* PROVIDENT TRUST CO. October 11, 1943. Petition for writ of certiorari to the Supreme Court of Pennsylvania denied. *Mr. Norman J. Griffin* for petitioner. Reported below: 346 Pa. 615, 31 A. 2d 132.

No. 186. PATCH *v.* STAHLY. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Lloyd W. Patch* for petitioner. Reported below: 135 F. 2d 269.

No. 188. BAUMER *v.* FRANKLIN COUNTY DISTILLING CO., INC. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Frank S. Ginocchio* for petitioner. *Mr. Leslie W. Morris* for respondent. Reported below: 135 F. 2d 384.

No. 192. EVANS *v.* SOUTH CAROLINA. October 11, 1943. Petition for writ of certiorari to the Supreme Court of South Carolina denied. *Mr. John F. Williams* for petitioner. Reported below: 202 S. C. 463, 25 S. E. 2d 492.

No. 194. WILLIAMS ET AL. *v.* UNITED STATES. October 11, 1943. Petition for writ of certiorari to the Court of Claims denied. *Mr. Carl J. Batter* for petitioners. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key* and *J. Louis Monarch,* and *Mrs. Elizabeth B. Davis* for the United States. Reported below: 99 Ct. Cls. 203.

No. 225. INSULAR SUGAR REFINING CORP. *v.* UNITED STATES. October 11, 1943. Petition for writ of certiorari to the Court of Claims denied. *Mr. J. Sterling Halstead*

for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key* and *Samuel H. Levy,* and *Mrs. Elizabeth B. Davis* for the United States. Reported below: 99 Ct. Cls. 345.

No. 196. GARRISON *v.* UNITED STATES. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Ben F. Cameron* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Mr. Robert S. Erdahl* for the United States. Reported below: 135 F. 2d 877.

No. 197. DELENDO CORPORATION (FORMERLY OLDE-TYME DISTILLERS CORPORATION) ET AL. *v.* SMOLOWE ET AL. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Jay Leo Rothschild* for petitioners. *Solicitor General Fahy* and *Mr. Chester T. Lane* for the United States, respondent. Reported below: 136 F. 2d 231.

No. 199. ALFRED I. DUPONT TESTAMENTARY TRUST ET AL. *v.* OKEECHOBEE COUNTY. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Giles J. Patterson* for petitioners. Reported below: 135 F. 2d 577.

No. 202. PAN AMERICAN AIRWAYS, INC. ET AL. *v.* UNITED STATES. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Henry J. Friendly* and *J. E. Yonge* for petitioners. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Mr. Robert S. Er-*

dahl for the United States. Reported below: 135 F. 2d 51.

No. 203. BARBER *v.* POWELL ET AL., RECEIVERS. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. K. R. Hoyle* for petitioner. *Messrs. L. R. Varser* and *O. L. Henry* for respondents. Reported below: 135 F. 2d 728.

No. 204. MEAD JOHNSON & CO. *v.* HILLMAN'S, INC. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Russell Wiles, George A. Chritton,* and *Jules L. Brady* for petitioner. *Messrs. S. Warwick Keegin* and *William A. McSwain* for respondent. Reported below: 135 F. 2d 955.

No. 205. CITIZENS & SOUTHERN NATIONAL BANK, CO-TRUSTEE, *v.* COMMISSIONER OF INTERNAL REVENUE. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. McKibben Lane* and *Charles J. Bloch* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key, Samuel H. Levy,* and *Joseph M. Jones* for respondent. Reported below: 136 F. 2d 406.

No. 206. MISSISSIPPI ROAD SUPPLY CO. *v.* WALLING, ADMINISTRATOR. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Pat H. Eager, Jr.* for petitioner. *Solicitor General Fahy* and *Messrs. Douglas B. Maggs* and *Irving J. Levy* for respondent. Reported below: 136 F. 2d 391.

No. 207. RARITAN COMPANY, INC. *v.* COMMISSIONER OF INTERNAL REVENUE. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Paul F. Myers* and *James Craig Peacock* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key* and *Samuel H. Levy,* and *Mrs. Maryhelen Wigle* for respondent. Reported below: 136 F. 2d 364.

No. 208. NATIONAL MINERAL CO. *v.* NATIONAL LABOR RELATIONS BOARD. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Lloyd L. Lanham* for petitioner. *Solicitor General Fahy, Mr. Robert B. Watts,* and *Miss Ruth Weyand* for respondent. Reported below: 134 F. 2d 424.

No. 210. WERNER *v.* HEIN-WERNER MOTOR PARTS CORP. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. S. L. Wheeler* for petitioner. *Mr. Arthur H. Boettcher* for respondent. Reported below: 135 F. 2d 187.

No. 216. PUERTO RICO, ON BEHALF OF THE ISABELA IRRIGATION SERVICE, *v.* UNITED STATES ET AL. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. William Cattron Rigby* for petitioner. *Solicitor General Fahy, Assistant Attorney General Littell,* and *Messrs. Vernon L. Wilkinson* and *Lawrence Vold* for respondents. Reported below: 134 F. 2d 267.

No. 220. GORMLY *v.* UNITED STATES. October 11, 1943. Petition for writ of certiorari to the Circuit Court

of Appeals for the Seventh Circuit denied. *Mr. Perry J. Stearns* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Messrs. Oscar A. Provost* and *Valentine Brookes* for the United States. Reported below: 136 F. 2d 227.

No. 221. DEAN, DOING BUSINESS AS RED RIVER BARGE LINE, *v.* BARGE TRANSPORT CO. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs L. J. Benckenstein, George W. Brown, Jr.,* and *Selim B. Lemle* for petitioner. *Mr. H. Cecil Kilpatrick* for respondent. Reported below: 135 F. 2d 731.

No. 224. VERTEX INVESTMENT CO. *v.* SCHWABACHER ET AL., EXECUTORS, ET AL. October 11, 1943. Petition for writ of certiorari to the District Court of Appeal, 1st Appellate District, of California denied. *Mr. Philip S. Ehrlich* for petitioner. *Mr. Maurice E. Harrison* for respondents. Reported below: 57 Cal. App. 2d 406, 134 P. 2d 891.

No. 228. MORRIS & ESSEX RAILROAD CO. ET AL. *v.* UNITED STATES. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Frederick M. Schlater* and *Samuel Hershenstein* for petitioners. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key, J. Louis Monarch,* and *Paul R. Russell* for the United States. Reported below: 135 F. 2d 711.

No. 229. COLLINS ET AL. *v.* O'CONNELL ET UX. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr.*

Thomas Owen Marlar for petitioners. *Mr. J. L. Gust* for respondents. Reported below: 136 F. 2d 141.

No. 230. WESTGATE *v.* TIMMER, RECEIVER, ET AL. October 11, 1943. Petition for writ of certiorari to the Supreme Court of Michigan denied. *Elmore L. Westgate, pro se. Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key* and *Homer R. Miller,* and *Miss Helen R. Carloss* for the United States; and *Bertha L. Westgate, pro se,*—respondents. Reported below: 305 Mich. 423, 9 N. W. 2d 661.

No. 231. UNITED STATES EX REL. PARKER *v.* CAREY, SHERIFF. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Wm. Scott Stewart* for petitioner. Reported below: 135 F. 2d 205.

No. 233. NYE *v.* UNITED STATES. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. L. R. Varser, Ozmer L. Henry,* and *R. A. McIntyre* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Mr. Oscar A. Provost* for the United States. Reported below: 137 F. 2d 73.

No. 236. UNITED STATES EX REL. GUTTERSON *v.* THOMPSON, WARDEN. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. David Saperstein* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Messrs. Robert S. Erdahl* and *W. Marvin Smith* for respondent. Reported below: 135 F. 2d 626.

No. 237. JAPHA *v.* PUBLIC SERVICE COMPANY OF NORTHERN ILLINOIS ET AL. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Irving L. Schanzer* for petitioner. *Mr. Howard D. Moses* for respondents. Reported below: 122 F. 2d 1023.

No. 238. NORRIS ET AL., EXECUTORS, *v.* COMMISSIONER OF INTERNAL REVENUE. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Perry J. Stearns* for petitioners. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key, J. Louis Monarch,* and *L. W. Post* for respondent. Reported below: 134 F. 2d 796.

Nos. 241 and 242. UNDERWRITERS' LABORATORIES, INC. *v.* COMMISSIONER OF INTERNAL REVENUE. October 11, 1943. Petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Louis Johnson, Jay C. Halls,* and *Samuel H. Horne* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Mr. Sewall Key,* and *Miss Helen R. Carloss* for respondent. Reported below: 135 F. 2d 371.

No. 243. SALOMON *v.* CITY OF NEW YORK ET AL. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Solomon G. Salomon* for petitioner. *Messrs. Paxton Blair, Leo Brown, Clifton Murphy, Edwin S. S. Sunderland,* and *Philip A. Carroll* for respondents. Reported below: 136 F. 2d 681.

No. 244. MORRISDALE COAL CO. *v.* UNITED STATES. October 11, 1943. Petition for writ of certiorari to the

Circuit Court of Appeals for the Third Circuit denied. *Messrs. Geo. E. H. Goodner* and *Scott P. Crampton* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.*, and *Messrs. Sewall Key, J. Louis Monarch,* and *F. E. Youngman* for the United States. Reported below: 135 F. 2d 921.

No. 245. STECKLER, ADMINISTRATOR, *v.* PENNROAD CORPORATION ET AL. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Emil Weitzner* for petitioner. *Messrs. C. B. Heiserman, R. Sturgis Ingersoll, Elder W. Marshall,* and *Thomas Stokes* for respondents. Reported below: 136 F. 2d 197.

No. 246. A. M. BYERS COMPANY *v.* PENNSYLVANIA. October 11, 1943. Petition for writ of certiorari to the Supreme Court of Pennsylvania denied. *Mr. William M. Young* for petitioner. Reported below: 346 Pa. 555, 31 A. 2d 530.

No. 248. GENERAL MANAGEMENT CORPORATION *v.* COMMISSIONER OF INTERNAL REVENUE. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Carl Meyer* and *Harry Thom* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.*, and *Messrs. Sewall Key* and *Samuel H. Levy* for respondent. Reported below: 135 F. 2d 882.

No. 249. EVANGELICAL LUTHERAN SYNOD *v.* FIRST ENGLISH LUTHERAN CHURCH ET AL. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. W. R. Bleakmore*

for petitioner. *Mr. J. D. Lydick* for respondents. Reported below: 135 F. 2d 701.

No. 253. TWINING ET AL., NATURAL GUARDIANS, ET AL. *v.* LAND TITLE BANK & TRUST CO., TRUSTEE. October 11, 1943. Petition for writ of certiorari to the Supreme Court of Pennsylvania denied. *Mr. Henry D. O'Connor* for petitioners. *Mr. Walter J. Brobyn* for respondent. Reported below: 347 Pa. 221, 32 A. 2d 23.

No. 254. EASTERN WINE CORP. *v.* WINSLOW-WARREN, LTD., INC. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Asher Blum* for petitioner. Reported below: 137 F. 2d 955.

No. 255. PRICE *v.* LOUISIANA RURAL REHABILITATION CORPORATION. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. G. P. Bullis* for petitioner. *Solicitor General Fahy* for respondent. Reported below: 134 F. 2d 548.

No. 256. WHITMORE ET AL. *v.* PENNSYLVANIA SOCIETY FOR PREVENTION OF CRUELTY TO ANIMALS. October 11, 1943. Petition for writ of certiorari to the Supreme Court of Pennsylvania denied. *Messrs. George I. Puhak, Carroll L. Beedy, Warren E. Magee,* and *Preston B. Kavanagh* for petitioners. *Messrs. Everett H. Brown, Jr.* and *Frederic L. Clark* for respondent. Reported below: 346 Pa. 610, 31 A. 2d 280.

No. 257. FEDERAL CRUDE OIL CO. *v.* TEXAS. October 11, 1943. Petition for writ of certiorari to the Court of

Civil Appeals, 3d Supreme Judicial District, of Texas denied. *Mr. Wm. D. Gordon* for petitioner. Reported below: 169 S. W. 2d 283.

No. 259. TILNEY ET AL. *v.* CHICAGO ET AL. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Weightstill Woods* for petitioners. *Messrs. Barnet Hodes, Joseph F. Grossman,* and *J. Herzl Segal* for respondents. Reported below: 134 F. 2d 682.

No. 260. HIRSCH *v.* UNITED STATES. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Loring M. Black* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Messrs. Robert S. Erdahl* and *Fred E. Strine* for the United States. Reported below: 136 F. 2d 976.

No. 263. HERNDON *v.* NORTH CAROLINA. October 11, 1943. Petition for writ of certiorari to the Supreme Court of North Carolina denied. *Messrs. Malcolm McQueen* and *Robert H. Dye* for petitioner. *Messrs. Harry McMullan,* Attorney General of North Carolina, and *Hughes J. Rhodes,* Assistant Attorney General, for respondent. Reported below: 223 N. C. 208, 25 S. E. 2d 611.

No. 268. BENNETT *v.* DE GEETER. October 11, 1943. Petition for writ of certiorari to the Court of Errors and Appeals of New Jersey denied. *Mr. Ellwood Thomas* for petitioner. *Mr. Milton T. Lasher* for respondent. Reported below: 133 N. J. Eq. 349, 32 A. 2d 335.

No. 269. GEOPHYSICAL DEVELOPMENT CORPORATION ET AL. *v.* COE, COMMISSIONER OF PATENTS. October 11, 1943. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. Lawrence Koenigsberger* for petitioners. *Solicitor General Fahy, Assistant Attorney General Shea,* and *Mr. Joseph Y. Houghton* for respondent. Reported below: 136 F. 2d 275.

No. 270. WALLACE *v.* DELAWARE RIVER FERRY CO. October 11, 1943. Petition for writ of certiorari to the Court of Errors and Appeals of New Jersey denied. *Mr. William C. Gotshalk* for petitioner. *Messrs. Samuel H. Richards* and *Floyd H. Bradley* for respondent. Reported below: 130 N. J. L. 216, 32 A. 2d 363.

No. 272. PARSHELSKY *v.* COMMISSIONER OF INTERNAL REVENUE. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Lawrence A. Baker* and *Henry Ravenel* 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. Reported below: 135 F. 2d 596.

No. 273. IN THE MATTER OF I. WALTER MECKLEY. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Wm. A. Gray* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Mr. Oscar A. Provost,* and *Miss Melva M. Graney* for the United States, in opposition. Reported below: 137 F. 2d 310.

No. 279. WITHROW, TRADING AS ROYAL BLUE CAB CO., ET AL. *v.* EDWARDS, ADMINISTRATRIX. October 11, 1943. Petition for writ of certiorari to the Supreme Court of Appeals of Virginia denied. *Mr. John S. Rixey* for petitioners. Reported below: 181 Va. 592, 25 S. E. 2d 899.

No. 281. THOMSON ET AL. *v.* BUTLER ET AL. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. W. H. H. Piatt* and *Ernest D. Martin* for petitioners. *Mr. Henry N. Ess* for respondents. Reported below: 136 F. 2d 644.

No. 290. AMERICAN ANODE, INC. *v.* DEWEY & ALMY CHEMICAL CO. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Harrison F. Lyman* for petitioner. *Mr. George P. Dike* for respondent. Reported below: 137 F. 2d 68.

Nos. 300 and 304. AXELRATH *v.* SPENCER KELLOGG & SONS, INC. October 11, 1943. Petition for writs of certiorari to the Court of Appeals of New York denied. *Messrs. Sydney J. Schwartz* and *Howard F. R. Mulligan* for petitioner. *Mr. Carver W. Wolfe* for respondent. Reported below: 290 N. Y. 767, 50 N. E. 2d 103.

No. 307. HOME ICE CO. *v.* CHAPMAN ET AL. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Julian C. Wilson* for petitioner. Reported below: 136 F. 2d 353.

No. 92. SWAN CARBURETOR CO. *v.* NASH MOTOR CO. October 11, 1943. The motion to supplement and amend the petition for writ of certiorari is granted. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. F. O. Richey, B. D. Watts,* and *Edwin F. Samuels* for petitioner. *Mr. William J. Barnes* for respondent. Reported below: 133 F. 2d 562.

No. 100. DOSS *v.* ILLINOIS. October 11, 1943. Petition for writ of certiorari to the Supreme Court of Illinois 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. *Mr. A. M. Fitzgerald* for petitioner. *Messrs. George F. Barrett,* Attorney General of Illinois, and *William C. Wines,* Assistant Attorney General, for respondent. Reported below: 382 Ill. 307, 46 N. E. 2d 984.

No. 170. STOIKE *v.* FIRST NATIONAL BANK OF THE CITY OF NEW YORK. October 11, 1943. Petition for writ of certiorari to the Supreme Court of New York denied. *Mr. Daniel William Leider* for petitioner. *Mr. Lowell Wadmond* for respondent. *Solicitor General Fahy* and *Mr. Douglas B. Maggs* filed a brief on behalf of the Administrator of the Wage and Hour Division, U. S. Dept. of Labor, as *amicus curiae,* in support of the petition. Reported below: 290 N. Y. 195, 48 N. E. 2d 482.

No. 191. COYLE *v.* NEW YORK. October 11, 1943. Petition for writ of certiorari to the Court of Appeals of New York denied. *Mr. David P. Siegel* for petitioner. *Mr. Stanley H. Fuld* for respondent. Reported below: 290 N. Y. 765, 50 N. E. 2d 102.

No. 212. OSBORNE *v.* SOUTH CAROLINA. October 11, 1943. Petition for writ of certiorari to the Supreme Court of South Carolina denied. MR. JUSTICE MURPHY is of the opinion that the petition should be granted. *Sammie Osborne, pro se.* Reported below: 202 S. C. 473, 25 S. E. 2d 561.

No. 218. SKIDMORE ET AL. *v.* SWIFT & Co. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. MR. JUSTICE BLACK is of the opinion that the petition should be granted. *Mr. Mack Taylor* for petitioners. Reported below: 136 F. 2d 112.

No. 271. STILWELL *v.* NORMENT ET AL. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit 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. *Mr. Clive L. Wright* for petitioner. *Mr. Edwin J. Culligan* for respondents. Reported below: 135 F. 2d 132.

No. 288. SWISS NATIONAL INSURANCE CO., LTD. *v.* CROWLEY, ALIEN PROPERTY CUSTODIAN, ET AL. October 11, 1943. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. The CHIEF JUSTICE, MR. JUSTICE MURPHY, and MR. JUSTICE JACKSON took no part in the consideration or decision of this application. *Messrs. Frederic R. Coudert* and *Alexis C. Coudert* for petitioner. *Solicitor General Fahy, Assistant Attorney General Cox,* and *Messrs. George A. McNulty, Harry Leroy Jones, Robert L. Stern,* and *Frederick L. Smith* for respondents. Reported below: 136 F. 2d 265.

No. 234. SNIDER *v.* KELLY ET AL.; and

No. 240. WAYNE *v.* ROBINSON ET AL. October 11, 1943. Petitions for writs 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 these applications. *Mr. Cornelius H. Doherty* for petitioner in No. 234; *Messrs. John H. Bruninga, John H. Sutherland,* and *Chas. E. Riordon* for petitioner in No. 240. *Messrs. Louis M. Denit, Thomas S. Jackson,* and *A. Leckie Cox* for respondents in No. 234; *Messrs. Raymond F. Adams* and *Lee B. Kemon* for respondents in No. 240. Reported below: No. 234, 135 F. 2d 817; No. 240, 136 F. 2d 767.

No. 125. DEATHERAGE *v.* PLUMMER, WARDEN. October 11, 1943. Petition for writ of certiorari to the Supreme Court of California denied. *Thaddeus Deatherage, pro se.*

No. 135. CANNES *v.* OKLAHOMA. October 11, 1943. Petition for writ of certiorari to the Criminal Court of Appeals of Oklahoma denied. *Bill Cannes, pro se.* Reported below: 138 P. 2d 561.

No. 137. POWELL *v.* SANFORD, WARDEN. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Joe T. Powell, pro se. Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. Oscar A. Provost* for respondent. Reported below: 136 F. 2d 58.

No. 141. BAILEY *v.* MISSOURI. October 11, 1943. Petition for writ of certiorari to the Supreme Court of

Missouri denied. *George William Bailey, pro se.* Reported below: 350 Mo. 1259, 169 S. W. 2d 380.

No. 157. ATWOOD *v.* HUNTER, WARDEN. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Ivy E. Atwood, pro se. Solicitor General Fahy, Assistant Attorney General Berge, Messrs. Oscar A. Provost* and *W. Marvin Smith,* and *Miss Melva M. Graney* for respondent.

No. 171. SWEARENGIN *v.* AMRINE, WARDEN, ET AL. October 11, 1943. Petition for writ of certiorari to the Supreme Court of Kansas denied. *R. B. Swearengin, pro se.* Reported below: 156 Kan. 660, 135 P. 2d 564.

No. 189. BURROUGHS *v.* SANFORD, WARDEN. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Laconia Chappelle Burroughs, pro se. Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Mr. Robert S. Erdahl,* and *Miss Melva M. Graney* for respondent. Reported below: 135 F. 2d 735.

No. 190. BISTANY *v.* BROPHY, WARDEN. October 11, 1943. Petition for writ of certiorari to the Supreme Court of New York denied. *Harvey Bistany, pro se.*

No. 264. CARR *v.* MARTIN, WARDEN. October 11, 1943. Petition for writ of certiorari to the County Court of Wyoming County, New York, denied. *Richard Carr, pro se.*

No. 277. SPRUILL *v.* NEWBY, CHAIRMAN. October 11, 1943. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Georgia M. Spruill, pro se.*

No. 289. STAMPHILL *v.* JOHNSTON, WARDEN. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Dale Stamphill, pro se. Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Messrs. Oscar A. Provost* and *W. Marvin Smith* for respondent. Reported below: 136 F. 2d 291.

No. 297. TATE *v.* EMPIRE BUILDING CORP. October 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. W. O. Lowe* for petitioner. Reported below: 135 F. 2d 743.

No. 303. COLLEY *v.* TENNESSEE. October 11, 1943. Petition for writ of certiorari to the Supreme Court of Tennessee denied. *Mr. Jordan Stokes, III,* for petitioner. *Mr. Ernest F. Smith,* Assistant Attorney General of Tennessee, for respondent. Reported below: 179 Tenn. 651, 169 S. W. 2d 848.

No. 332. LUMARE *v.* MISSOURI. October 11, 1943. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Pantaleona Lumare, pro se.*

No. 123. DEAR *v.* MAYO, STATE PRISON CUSTODIAN. October 11, 1943. Petition for writ of certiorari to the Supreme Court of Florida denied. The motion for leave to file petition for writ of habeas corpus is also denied. *Wilbur Dear, pro se.* Reported below: 14 So. 2d 267.

No. 167. FLOWERS *v.* FLORIDA. October 11, 1943. Petition for writ of certiorari to the Supreme Court of Florida denied. MR. JUSTICE MURPHY and MR. JUSTICE DOUGLAS are of the opinion that the petition should be granted. *Mr. William R. Ming, Jr.,* for petitioner. *Mr. J. Tom Watson,* Attorney General of Florida, for respondent. Reported below: 152 Fla. 649, 12 So. 2d 772.

No. 258. COLEMAN *v.* DUFFY, WARDEN. October 11, 1943. Petition for writ of certiorari to the Supreme Court of California denied on the ground that the case is moot. *John Lawrence Coleman, pro se.* Reported below: 20 Cal. 2d 399, 126 P. 2d 349.

No. 261. SHARPE *v.* KENTUCKY ET AL. October 11, 1943. Petition for writ of certiorari to the Court of Appeals of Kentucky denied for the reason that the 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. *Howard M. Sharpe, pro se.* Reported below: 292 Ky. 86, 165 S. W. 2d 993.

No. 187. NEW YORK EX REL. ROGALSKI *v.* MARTIN, WARDEN. October 11, 1943. It does not appear from the record that the federal question presented by the petition was necessarily decided by the Court of Appeals. The petition for writ of certiorari to the Court of Appeals of New York is denied. *Lynch* v. *New York ex rel. Pierson,* 293 U. S. 52; *Honeyman* v. *Hanan,* 300 U. S. 14, 18; *Bakery & Pastry Drivers Local 802* v. *Wohl,* 313 U. S. 572. *Stephen Rogalski, pro se. Messrs. Nathaniel L. Goldstein,* Attorney General of New York, *Orrin G. Judd,* Solicitor General, and *Wendell P. Brown,* First Assistant

Attorney General, for respondent. Reported below: 290 N. Y. 751, 50 N. E. 2d 98.

No. —, original, October Term, 1942. Ex parte Edward J. Borah. See *post*, p. 807.

No. 201. Trojan Powder Co. *v.* National Labor Relations Board. October 18, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. A. V. Cherbonnier* and *Robert A. Lilly* for petitioner. *Solicitor General Fahy, Mr. Robert B. Watts,* and *Miss Ruth Weyand* for respondent. Reported below: 135 F. 2d 337.

No. 334. National Labor Relations Board *v.* American Tube Bending Co., Inc. October 18, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Solicitor General Fahy* and *Mr. Robert B. Watts* for petitioner. *Mr. Luke H. Stapleton* for respondent. Reported below: 134 F. 2d 993.

No. 293. Brooks, doing business as East Side Ice & Fuel Co., et al. *v.* State Farm Mutual Automobile Insurance Co. October 18, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Loyd E. Roberts* for petitioners. *Mr. Clifford B. Kimberly* for respondent. Reported below: 136 F. 2d 807.

No. 298. Roberts *v.* United States. October 18, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Lester S.*

Parsons for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Messrs. Oscar A. Provost* and *Alvin J. Rockwell,* and *Miss Beatrice Rosenberg* for the United States. Reported below: 137 F. 2d 412.

No. 306. WATKINS ET AL., EXECUTORS, ET AL. *v.* FLY, COLLECTOR OF INTERNAL REVENUE. October 18, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Garner W. Green* for petitioners. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key* and *Newton K. Fox,* and *Miss Helen R. Carloss* for respondent. Reported below: 136 F. 2d 578.

No. 309. VON CLEMM *v.* UNITED STATES. October 18, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Harold H. Corbin* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Messrs. Arnold Raum* and *Oscar A. Provost* for the United States. Reported below: 136 F. 2d 968.

No. 313. GREEN ET AL. *v.* CITY OF STUART. October 18, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Thos. B. Adams* for petitioners. *Mr. Hewen A. Lasseter* for respondent. Reported below: 135 F. 2d 33.

No. 314. SELSER ET AL. *v.* CITY OF STUART ET AL. October 18, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Thomas B. Adams* for petitioners. *Messrs. Robert R.*

Milam and *E. T. McIlvaine* for respondents. Reported below: 135 F. 2d 211.

No. 315. ROGAN, COLLECTOR OF INTERNAL REVENUE, *v.* SAMSON TIRE & RUBBER CORP. October 18, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Solicitor General Fahy* for petitioner. *Mr. Paul H. Arthur* for respondent. Reported below: 136 F. 2d 345.

No. 319. WILLIAM DAVIES CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD. October 18, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Lewis F. Jacobson* and *David Silbert* for petitioner. *Solicitor General Fahy, Mr. Robert B. Watts,* and *Miss Ruth Weyand* for respondent. Reported below: 135 F. 2d 179.

No. 321. NORSTRAND CORPORATION ET AL. *v.* UNITED STATES. October 18, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Carl E. Ring* for petitioners. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Mr. Oscar A. Provost* for the United States.

Nos. 322, 323, and 324. SEMERIO ET AL. *v.* ROSENBERG ET AL. October 18, 1943. Petition for writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Milton D. Sapiro* for petitioners. *Mr. Herbert W. Erskine* for respondents. *Solicitor General Fahy* and *Mr. Douglas B. Maggs* filed a brief on behalf of the Administrator of the Wage and Hour Division, U. S. Dept. of Labor, as *amicus curiae,* in support of the petition. Reported below: 137 F. 2d 742.

No. 325. NEW ENGLAND FISH CO. ET AL. *v.* MEYER, ADMINISTRATRIX, ET AL. October 18, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Lawrence Boyle, Cassius E. Gates,* and *Edward G. Dobrin* for petitioners. Reported below: 136 F. 2d 315.

No. 327. REICHMAN *v.* COMPAGNIE GENERALE TRANSATLANTIQUE. October 18, 1943. Petition for writ of certiorari to the Court of Appeals of New York denied. *Mr. Harold R. Zeamans* for petitioner. *Mr. Edgar R. Kraetzer* for respondent. Reported below: 290 N. Y. 344, 49 N. E. 2d 474.

No. 330. G. T. FOGLE & CO. *v.* UNITED STATES. October 18, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mrs. Lillian S. Robertson* for petitioner. *Solicitor General Fahy* and *Assistant Attorney General Shea* for the United States. Reported below: 135 F. 2d 117.

No. 331. PENNINGTON ENGINEERING CO. *v.* HOUDE ENGINEERING CORP. October 18, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Luther Day* and *Max D. Farmer* for petitioner. *Mr. Charles W. Hills* for respondent. Reported below: 136 F. 2d 210.

No. 333. MOORE *v.* ILLINOIS CENTRAL RAILROAD CO. October 18, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Garner W. Green* for petitioner. *Messrs. James L. Byrd, Vernon W. Foster,* and *Chas. A. Helsell* for respondent. Reported below: 136 F. 2d 412.

No. 341. MARCHUS *v.* DRUGE ET AL., CO-PARTNERS. October 18, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Charles E. Townsend* for petitioner. *Mr. A. W. Boyken* for respondents. Reported below: 136 F. 2d 602.

No. 342. JACKSONVILLE PAPER CO. *v.* NATIONAL LABOR RELATIONS BOARD. October 18, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Thos. B. Adams* and *Louis Kurz* for petitioner. *Solicitor General Fahy, Mr. Robert B. Watts,* and *Miss Ruth Weyand* for respondent. Reported below: 137 F. 2d 148.

No. 88. SLADE ET AL. *v.* SHELL OIL CO., INC. ET AL. October 18, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Marcellus Green, P. Z. Jones,* and *Garner W. Green* for petitioners. *Messrs. William H. Watkins* and *Harry McCall* for respondents. Reported below: 133 F. 2d 518.

No. 214. GILCREASE OIL CO. *v.* COSBY ET AL. October 18, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. James V. Allred* for petitioner. *Messrs. U. M. Simon* and *C. J. Shaeffer* for respondents. Reported below: 132 F. 2d 790.

No. 222. SENECA COAL & COKE CO. *v.* LOFTIN. October 18, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Hunter L. Johnson* and *Karl H. Mueller* for petitioner. *Mr. Hayes McCoy* for respondent. *Mr. Joseph V. Lane, Jr.* (*Mr. Adrian C. Leiby* of counsel) filed a brief, as

amicus curiae, in support of the petition. Reported below: 136 F. 2d 359.

No. 250. LELAND STANFORD JUNIOR UNIVERSITY ET AL. *v.* NATIONAL SUPPLY CO. October 18, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. John T. Pigott* for petitioners. *Messrs. Allen L. Chickering, Walter C. Fox, Jr.,* and *Vincent I. Compagno* for respondent. Reported below: 134 F. 2d 689.

No. 282. LISS ET AL. *v.* UNITED STATES;
No. 283. LONDONER *v.* UNITED STATES;
No. 284. COHEN ET AL. *v.* UNITED STATES;
No. 285. MAINELLA *v.* UNITED STATES;
No. 286. FOX ET AL. *v.* UNITED STATES; and
No. 287. LOWENSTEIN *v.* UNITED STATES. October 18, 1943. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Charles V. Halley, Jr.* for petitioners in Nos. 282, 284, 285, and 287; *Mr. Abraham S. Robinson* for petitioner in No. 283; and *Mr. Max Schwartz* for petitioners in No. 286. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Mr. Oscar A. Provost* for the United States. Reported below: 137 F. 2d 995.

No. 296. MACH *v.* ABBOTT COMPANY. October 18, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Paul R. Stinson* for petitioner. *Mr. Fred A. Wright* for respondent. Reported below: 136 F. 2d 7.

No. 301. RADIANT POINT PEN CORP. *v.* C. HOWARD HUNT PEN CO. October 18, 1943. Petition for writ of

certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Asher Blum* for petitioner. *Mr. Harvey L. Lechner* for respondent. Reported below: 135 F. 2d 870.

No. 103. REA ET AL. *v.* DEVANNEY ET AL. October 18, 1943. Petition for writ of certiorari to the Supreme Court of Ohio denied. *Messrs. Ralph H. Henney, Matthew L. Bigger,* and *Benj. F. Levinson* for petitioners. *Messrs. Henry L. Scarlett* and *Marvin Harrison* for respondents. Reported below: 140 Ohio St. 546, 45 N. E. 2d 600.

No. 326. INLAND OVERSEAS STEAMSHIP CORP. *v.* POLAR STEAMSHIP CORP. October 18, 1943. The motion to proceed on the typewritten record is granted. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Isidor Enselman* for petitioner. *Messrs. Lewis F. Glaser* and *Aaron Frank* for respondent. Reported below: 136 F. 2d 835.

No. 113. EMMETT *v.* GEORGIA. October 18, 1943. Petition for writ of certiorari to the Supreme Court of Georgia denied. *Messrs. William Schley Howard* and *Lawrence S. Camp* for petitioner. *Mr. T. Grady Head,* Attorney General of Georgia, for respondent. Reported below: 195 Ga. 517, 25 S. E. 2d 9.

No. 347. SMITH *v.* SQUIER, WARDEN. October 18, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *George Wilbur Smith, pro se. Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Messrs. Oscar A. Provost* and *Alvin J. Rockwell* for respondent. Reported below: 136 F. 2d 536.

No. 348. REDUS *v.* WILLIAMS, WARDEN. October 18, 1943. Petition for writ of certiorari to the Supreme Court of Alabama denied. *Mr. Walter S. Smith* for petitioner. *Messrs. William N. McQueen,* Attorney General of Alabama, and *John O. Harris,* Assistant Attorney General, for respondent. Reported below: 244 Ala. 459, 13 So. 2d 561.

No. 161. CAMPBELL *v.* MISSOURI. October 18, 1943. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Paul S. Campbell, pro se. Mr. Roy McKittrick,* Attorney General of Missouri, for respondent.

No. 247. REID *v.* UNITED STATES. October 25, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Frank J. Looney* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Mr. Robert S. Erdahl* for the United States. Reported below: 136 F. 2d 476.

No. 320. UNITED STATES GYPSUM CO. *v.* BROWN, PRICE ADMINISTRATOR. October 25, 1943. Petition for writ of certiorari to the United States Emergency Court of Appeals denied. *Messrs. Leland K. Neeves* and *Charles M. Price* for petitioner. *Solicitor General Fahy* and *Mr. Nathaniel L. Nathanson* for respondent. Reported below: 137 F. 2d 360.

No. 344. MOODY *v.* WICKARD, SECRETARY OF AGRICULTURE, ET AL. October 25, 1943. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. G. Lyle Jones* and *John Wattawa* for petitioner. *Solicitor General Fahy, Assistant Attorney General Littell,* and *Messrs. Vernon*

L. Wilkinson and *Roger P. Marquis* for respondents. Reported below: 136 F. 2d 801.

No. 346. WASHINGTON BREWERS INSTITUTE ET AL. *v.* UNITED STATES. October 25, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. R. M. J. Armstrong, Stephen F. Chadwick, Cassius E. Gates, Gregory A. Harrison, J. A. Howell, Francis R. Kirkham, Marshall P. Madison, E. L. Skeel, Felix T. Smith, Edwin Snow,* and *Henry T. Ivers* for petitioners. *Solicitor General Fahy, Assistant Attorney General Berge,* and *Messrs. Robert L. Stern* and *Robert L. Wright* for the United States. *Mr. Smith Troy,* Attorney General of the State of Washington, filed a brief on behalf of that State, as *amicus curiae,* in support of the petition. Reported below: 137 F. 2d 964.

No. 350. PUBLIC SERVICE COMPANY OF OKLAHOMA *v.* PARKINSON, COUNTY TREASURER. October 25, 1943. Petition for writ of certiorari to the Supreme Court of Oklahoma denied. *Mr. Mastin E. Geschwind* for petitioner. *Mr. Claude H. Rosenstein* for respondent. Reported below: 141 P. 2d 586.

No. 351. RAYNO ET AL. *v.* UNITED STATES. October 25, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Robert W. Upton* for petitioners. *Solicitor General Fahy, Assistant Attorney General Littell,* and *Messrs. Vernon L. Wilkinson* and *Valentine Brookes* for the United States. Reported below: 136 F. 2d 376.

No. 353. CHRISTOFFEL ET AL. *v.* WISCONSIN EMPLOYMENT RELATIONS BOARD ET AL. October 25, 1943. Peti-

tion for writ of certiorari to the Supreme Court of Wisconsin denied. *Mr. A. W. Richter* for petitioners. *Mr. James Ward Rector,* Deputy Attorney General of Wisconsin, for the Wisconsin Employment Relations Board; and *Mr. Walter H. Bender* for Nicholas Imp et al.,—respondents. Reported below: 243 Wis. 332, 10 N. W. 2d 197.

No. 357. MARINE ENGINEERS' BENEFICIAL ASSN. LOCAL NO. 33 *v.* NATIONAL LABOR RELATIONS BOARD. October 25, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Arthur F. Driscoll* for petitioner. *Solicitor General Fahy, Mr. Robert B. Watts,* and *Miss Ruth Weyand* for respondent.

No. 358. COSGROVE-MEEHAN COAL CORP. ET AL. *v.* ANGLAND ET AL. October 25, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Wm. H. Foulk* for petitioners. *Solicitor General Fahy* and *Messrs. Alvin J. Rockwell, John F. Davis,* and *Louis Loss* for the Securities & Exchange Commission; and *Mr. Vincent P. McDevitt* for Maurice P. Angland,—respondents. Reported below: 136 F. 2d 3.

No. 364. RICHARDSON ET AL., EXECUTORS, ET AL. *v.* KING ET AL. October 25, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Lee McCanliss* and *B. S. Womble* for petitioners. *Mr. A. L. Brooks* for respondents. Reported below: 136 F. 2d 849.

No. 365. METROPOLITAN LIFE INSURANCE CO. *v.* ETTELSON ET AL. October 25, 1943. Petition for writ of

certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Conover English* for petitioner. *Mr. Arthur T. Vanderbilt* for respondents. Reported below: 137 F. 2d 62.

No. 370. BARBOUR *v.* COMMISSIONER OF INTERNAL REVENUE. October 25, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. John M. Hudson* 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: 136 F. 2d 486.

No. 373. LADOGA CANNING CO. *v.* UNITED STATES. October 25, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Harold K. Bachelder, William C. Bachelder,* and *Edwin H. Chaney* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Mr. Oscar A. Provost,* and *Miss Melva M. Graney* for the United States. Reported below: 136 F. 2d 523.

No. 378. GLEMBY CO., INC. ET AL. *v.* MONOGRAM MANUFACTURING CO. October 25, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Asher Blum* for petitioners. *Mr. Henry T. Hornidge* for respondent. Reported below: 136 F. 2d 961.

No. 379. DEGNAN *v.* COMMISSIONER OF INTERNAL REVENUE. October 25, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Raymond G. Wright, Clarence R. Innis,*

and *Arthur E. Simon* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key* and *Samuel H. Levy,* and *Mrs. Maryhelen Wigle* for respondent. Reported below: 136 F. 2d 891.

No. 383. LETOURNEAU ET AL. *v.* COMMERCIAL MERCHANTS NATIONAL BANK & TRUST CO. October 25, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Earl B. Barnes* and *Alan W. Boyd* for petitioners. Reported below: 137 F. 2d 87.

No. 312. MCLEOD, COMMISSIONER OF REVENUES, *v.* BINSWANGER & CO. October 25, 1943. Petition for writ of certiorari to the Supreme Court of Arkansas denied for want of a final judgment. *Mr. Leffel Gentry* for petitioner. *Mr. W. H. Daggett* for respondent. Reported below: 205 Ark. 787, 171 S. W. 2d 65.

No. 280. DEJORDAN *v.* HUNTER, WARDEN. October 25, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. The motion for leave to file petition for writ of habeas corpus is also denied. *Charles DeJordan, pro se. Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Mr. Oscar A. Provost* for respondent. Reported below: 137 F. 2d 943.

No. 382. VANOVER *v.* COX, WARDEN. October 25, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied on the ground that the cause is moot, it appearing that petitioner is no longer in the respondent's custody. *Andy Vanover, pro se. Solici-*

tor General Fahy for respondent. Reported below: 136 F. 2d 442.

No. 328. IRWIN *v.* LAWRENCE, WARDEN. October 25, 1943. Petition for writ of certiorari to the Supreme Court of Georgia denied. *Mr. Samuel A. Miller* for petitioner. Reported below: 196 Ga. 202, 26 S. E. 2d 251.

No. 335. LLOYD *v.* UNITED STATES FIDELITY & GUARANTY CO. October 25, 1943. Petition for writ of certiorari to the Municipal Court of Appeals for the District of Columbia denied. *Wildon Lloyd, pro se.* Reported below: 31 A. 2d 669.

No. 376. WIDMER *v.* JOHNSTON, WARDEN. October 25, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *James Widmer, pro se. Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Mr. Oscar A. Provost* for respondent. Reported below: 136 F. 2d 416.

No. 302. ANDREWS *v.* GEORGIA. October 25, 1943. Petition for writ of certiorari to the Supreme Court of Georgia denied. MR. JUSTICE MURPHY is of the opinion that certiorari should be granted. *Mr. John J. McCreary* for petitioner. *Mr. T. Grady Head,* Attorney General of Georgia, for respondent. Reported below: 196 Ga. 84, 26 S. E. 2d 263.

No. 412. KRAMER *v.* OHIO. See *ante,* p. 711.

No. 387. PRUDENTIAL INSURANCE CO. ET AL. *v.* CRITES, INCORPORATED. November 8, 1943. Petition for writ of

certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Ralph G. Martin* for petitioners. Reported below: 134 F. 2d 925.

No. 340. MURRAY *v.* NED ET AL. November 8, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. W. F. Semple* and *Villard Martin* for petitioner. *Solicitor General Fahy, Assistant Attorney General Littell,* and *Mr. Norman MacDonald* for the United States, respondent. Reported below: 135 F. 2d 407.

No. 352. CONSOLIDATED FREIGHTWAYS, INC. *v.* UNITED STATES. November 8, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Francis R. Kirkham* and *Donald A. Schafer* for petitioner. *Solicitor General Fahy, Assistant Attorney General Berge,* and *Messrs. Chester T. Lane, Robert L. Pierce, Edward Dumbauld,* and *George H. English* for the United States. Reported below: 136 F. 2d 921.

No. 377. GOLDSMITH ET AL. *v.* UNITED STATES. November 8, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. C. L. Dawson* for petitioners. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Mr. Oscar A. Provost* for the United States. Reported below: 137 F. 2d 393.

No. 390. NIKLAUS ET AL. *v.* LINCOLN JOINT STOCK LAND BANK. November 8, 1943. Petition for writ of certiorari to the Supreme Court of Nebraska denied. *Mr.*

Herbert W. Baird for petitioners. *Mr. C. A. Sorensen* for respondent. Reported below: 143 Neb. 58, 8 N. W. 2d 545.

No. 393. DURKEE FAMOUS FOODS, INC. *v.* HARRISON, COLLECTOR OF INTERNAL REVENUE. November 8, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. H. J. Crawford* and *Roger Hinds* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key* and *Alvin J. Rockwell* for respondent. Reported below: 136 F. 2d 303.

No. 401. BROWN *v.* SCHOOL DISTRICT OF THE CITY OF BETHLEHEM. November 8, 1943. Petition for writ of certiorari to the Supreme Court of Pennsylvania denied. *Mr. David Getz* for petitioner. *Mr. Herbert J. Hartzog* for respondent. Reported below: 347 Pa. 418, 32 A. 2d 565.

No. 405. SCHENLEY IMPORT CORP. *v.* UNITED STATES. November 8, 1943. Petition for writ of certiorari to the Court of Customs & Patent Appeals denied. *Mr. Norman J. Morrison* for petitioner. *Solicitor General Fahy, Assistant Attorney General Rao,* and *Mr. John R. Benney* for the United States. Reported below: 31 C. C. P. A. (Customs) 74.

No. 359. ATLANTA FLOORING & INSULATION CO., INC. ET AL. *v.* OBERDORFER INSURANCE AGENCY ET AL. November 8, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Oliver C. Hancock* for petitioners. *Mr. H. A. Alexander* for respondents. Reported below: 136 F. 2d 457.

No. 356. BYNUM ET AL. *v.* FIRESTONE TIRE & RUBBER CO. November 8, 1943. Petition for writ of certiorari to the Court of Appeals of Tennessee denied. *Mr. William M. Hall* for petitioners. *Messrs. Earl King* and *Luther Day* for respondent. See 177 S. W. 2d 20.

No. 361. SIKICH ET AL. *v.* SPRINGMANN, TRUSTEE. November 8, 1943. Petition for writ of certiorari to the Supreme Court of Indiana denied. *Mr. Oscar B. Thiel* for petitioners. *Messrs. George W. Hulbert* and *Oscar C. Strom* for respondent. Reported below: 48 N. E. 2d 808.

No. 386. ROWE *v.* COLPOYS, U. S. MARSHAL, ET AL. November 8, 1943. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. Rossa F. Downing* and *Walter E. McNamara* for petitioner. *Solicitor General Fahy, Assistant Attorney General Shea,* and *Messrs. Alvin J. Rockwell* and *Hubert H. Margolies* for John B. Colpoys, U. S. Marshal, respondent. Reported below: 137 F. 2d 249.

No. 389. NEAL ET AL. *v.* FLORIDA ET AL. November 8, 1943. Petition for writ of certiorari to the Supreme Court of Florida denied. *Mr. Hugh Akerman* for petitioners. *Messrs. J. Tom Watson,* Attorney General of Florida, and *Lewis W. Petteway,* Assistant Attorney General, for respondents. Reported below: 152 Fla. 582, 12 So. 2d 590.

No. 397. NEW YORK GREAT ATLANTIC & PACIFIC TEA CO. ET AL. *v.* UNITED STATES. November 8, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Caruthers Ewing* and *Geo. S. Wright* for petitioners. *Solicitor General*

Fahy, Assistant Attorney General Berge, and *Mr. Charles H. Weston* for the United States. Reported below: 137 F. 2d 459.

No. 399. TRIANGLE CONDUIT & CABLE CO., INC. *v.* NATIONAL ELECTRIC PRODUCTS CORP. November 8, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Samuel E. Darby, Jr.* and *Floyd H. Crews* for petitioner. *Mr. William H. Davis* for respondent. Reported below: 138 F. 2d 46.

No. 407. LASH *v.* ALABAMA. November 8, 1943. Petition for writ of certiorari to the Supreme Court of Alabama denied. *Messrs. Joseph A. Padway* and *Herbert S. Thatcher* for petitioner. *Messrs. William N. McQueen,* Attorney General of Alabama, and *John O. Harris,* Assistant Attorney General, for respondent. Reported below: 244 Ala. 568, 14 So. 2d 242.

No. 413. JERGENS *v.* COMMISSIONER OF INTERNAL REVENUE. November 8, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Carl M. Jacobs, Jr.* and *Murray Marion Flack* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key* and *J. Louis Monarch* for respondent. Reported below: 136 F. 2d 497.

No. 416. ALWORTH ET AL., TRUSTEES, *v.* COMMISSIONER OF INTERNAL REVENUE. November 8, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. E. W. MacPherran* for petitioners. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key* and *Warren*

F. Wattles, and *Miss Helen R. Carloss* for respondent. Reported below: 136 F. 2d 812.

No. 85. MISSOURI PACIFIC RAILROAD CO. ET AL. *v.* THOMPSON, TRUSTEE, ET AL. See *post,* p. 806.

No. 363. YOSHINUMA *v.* OBERDORFER REALTY AGENCY ET AL. November 8, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Young H. Fraser* for petitioner. Reported below: 136 F. 2d 460.

No. 426. ETTMAN *v.* FEDERAL LIFE INSURANCE CO. November 8, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. MR. JUSTICE BLACK is of the opinion that the petition for writ of certiorari should be granted. *Mr. J. L. London* for petitioner. *Mr. Wayne Ely* for respondent. Reported below: 137 F. 2d 121.

No. 295. DEMARCOS *v.* OVERHOLSER, SUPERINTENDENT. November 8, 1943. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *J. Ralph DeMarcos, pro se. Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Mr. Oscar A. Provost* for respondent. Reported below: 137 F. 2d 698.

No. 367. LONAS *v.* NATIONAL LINEN SERVICE CORP. November 8, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. W. O. Lowe* for petitioner. *Mr. Sol I. Golden* for respondent. *Messrs. Stanley I. Posner* and *Henry J. Fox*

filed a brief on behalf of the Linen Supply Assn., Inc., as *amicus curiae,* in opposition to the petition. Reported below: 136 F. 2d 433.

No. 394. FLAVIN *v.* FRANKLIN SOCIETY FOR HOME BUILDING AND SAVINGS. November 8, 1943. Petition for writ of certiorari to the Court of Appeals of New York denied. *Martin Kane Flavin, pro se. Messrs. James A. Davis* and *Leon Quat* for respondent. Reported below: 291 N. Y. 530, 50 N. E. 2d 653.

No. 408. KELLY *v.* DOWD, WARDEN. November 8, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Garfield J. Kelly, pro se.*

No. 369. BAKER ET AL. *v.* BELLOWS, EXECUTRIX. November 8, 1943. Petition for writ of certiorari to the Supreme Court of Arkansas denied. *Norman Baker, pro se.* Reported below: 205 Ark. 448, 170 S. W. 2d 75.

No. 395. UNITED STATES *v.* CUSHMAN, EXECUTRIX. November 15, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Solicitor General Fahy* for the United States. *Mr. Fred A. Steiner* for respondent. Reported below: 136 F. 2d 815.

No. 419. STALEY, EXECUTOR, *v.* COMMISSIONER OF INTERNAL REVENUE. November 15, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Charles C. LeForgee* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Mr. Sewall Key,* and *Misses Helen R.*

Carloss and *Louise Foster* for respondent. Reported below: 136 F. 2d 368.

No. 424. HARTFORD-EMPIRE CO. *v.* COMMISSIONER OF INTERNAL REVENUE. November 15, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Edgar J. Goodrich* and *Walter J. Brobyn* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Mr. Sewall Key,* and *Miss Helen R. Carloss* for respondent. Reported below: 137 F. 2d 540.

Nos. 427 and 428. INLAND STEEL CO. *v.* LEBOLD ET AL; and

Nos. 429 and 430. LEBOLD ET AL. *v.* INLAND STEEL CO. November 15, 1943. Petitions for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Carl Meyer, Paul M. Godehn,* and *J. F. Dammann* for the Inland Steel Co. *Messrs. Silas H. Strawn, Franklin M. Warden,* and *Arthur D. Welton, Jr.* for Lebold et al. Reported below: 136 F. 2d 876.

No. 305. TAYLOR *v.* BROWN, PRICE ADMINISTRATOR. November 15, 1943. Petition for writ of certiorari to the United States Emergency Court of Appeals denied. *Messrs. C. M. Walter* and *John C. Stirrat* for petitioner. *Solicitor General Fahy* for respondent. Reported below: 137 F. 2d 654.

No. 400. WILKEY ET AL. *v.* ALABAMA EX REL. SMITH ET AL. November 15, 1943. Petition for writ of certiorari to the Supreme Court of Alabama denied. MR. JUSTICE BLACK took no part in the consideration or decision of this application. *Mr. James A. Simpson* for petitioners.

Mr. Francis H. Hare for respondents. Reported below: 244 Ala. 568, 14 So. 2d 536.

No. 410. EGAN *v.* UNITED STATES; and

No. 414. UNION ELECTRIC CO. *v.* UNITED STATES. November 15, 1943. Petitions for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. The CHIEF JUSTICE, MR. JUSTICE DOUGLAS, and MR. JUSTICE JACKSON took no part in the consideration or decision of these applications. *Mr. Thomas Bond* for petitioner in No. 410; and *Mr. William L. Igoe* for petitioner in No. 414. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Messrs. Oscar A. Provost* and *Homer Kripke,* and *Miss Beatrice Rosenberg* for the United States. Reported below: 137 F. 2d 369.

No. 415. ABRAMS ET AL. *v.* CLEVELAND TERMINALS BUILDING CO. November 15, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Mr. Meyer Abrams* for petitioners. *Mr. J. Hall Kellogg* for respondent. Reported below: 136 F. 2d 537.

No. 251. COY *v.* JOHNSTON, WARDEN. November 15, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Bernard Paul Coy, pro se. Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Mr. Robert S. Erdahl,* and *Miss Melva M. Graney* for respondent. Reported below: 136 F. 2d 818.

No. 411. ILLINOIS EX REL. VIEAUX *v.* RAGEN, WARDEN, ET AL. November 15, 1943. Petition for writ of certiorari

to the Supreme Court of Illinois denied. *William Vieaux, pro se.*

No. 418. WADE *v.* NEW YORK. November 15, 1943. Petition for writ of certiorari to the County Court, Westchester County, New York, denied. *William Wade, pro se.* *Mr. Frank H. Myers* for respondent.

No. 442. MURPHY *v.* MISSOURI. November 15, 1943. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Mark C. Murphy, pro se.* Reported below: 341 Mo. 1229, 111 S. W. 2d 132.

No. 450. MAYNARD *v.* MICHIGAN. November 15, 1943. Petition for writ of certiorari to the Supreme Court of Michigan denied. *Lawrence Maynard, pro se.*

No. 274. BUTLER BROTHERS *v.* NATIONAL LABOR RELATIONS BOARD. November 22, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Leland K. Neeves* for petitioner. *Solicitor General Fahy, Messrs. Valentine Brookes* and *Robert B. Watts,* and *Miss Ruth Weyand* for respondent. Reported below: 134 F. 2d 981.

No. 380. WASLEFF, DOING BUSINESS AS ALEX WASLEFF BUILDING MAINTENANCE CO., *v.* NATIONAL LABOR RELATIONS BOARD. November 22, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Morris A. Haft* and *Ira L. Shapiro* for petitioner. *Solicitor General Fahy,*

Messrs. Alvin J. Rockwell, Robert B. Watts, and *Frank Donner,* and *Miss Ruth Weyand* for respondent. Reported below: 134 F. 2d 981.

No. 420. AMERICAN DISTILLING CO. *v.* LOS ANGELES WAREHOUSE CO. November 22, 1943. Petition for writ of certiorari to the Supreme Court of California denied. *Mr. Theodore H. Roche* for petitioner. *Mr. Allen W. Ashburn* for respondent. Reported below: 22 Cal. 2d 402, 139 P. 2d 641.

No. 425. JACOBS *v.* HOEY, EXECUTRIX. November 22, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. David L. Sprung* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key* and *J. Louis Monarch* for respondent. Reported below: 136 F. 2d 954.

No. 431. DUNNE ET AL. *v.* UNITED STATES. November 22, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Osmond K. Fraenkel* for petitioners. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Mr. Edward G. Jennings* for the United States. *Mr. Arthur Garfield Hays* filed a brief on behalf of the American Civil Liberties Union, as *amicus curiae,* in support of the petition. Reported below: 138 F. 2d 137.

No. 434. SCHAPPES *v.* NEW YORK. November 22, 1943. Petition for writ of certiorari to the Court of General Sessions of County of New York, New York, denied. *Mr. Joseph R. Brodsky* for petitioner. *Mr. Stanley H. Fuld* for respondent.

No. 443. HARDEN MORTGAGE LOAN CO. *v.* COMMISSIONER OF INTERNAL REVENUE. November 22, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Geo. E. H. Goodner* and *Scott P. Crampton* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key, Alvin J. Rockwell,* and *Warren F. Wattles* for respondent. Reported below: 137 F. 2d 282.

No. 446. BENSON ET AL., DOING BUSINESS AS PERKINS & CO., *v.* WALLING, ADMINISTRATOR. November 22, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Henry H. Oberschelp* for petitioners. *Solicitor General Fahy, Messrs. Douglas B. Maggs, Irving J. Levy,* and *Peter Seitz,* and *Miss Bessie Margolin* for respondent. Reported below: 137 F. 2d 501.

No. 465. WAYNE APARTMENTS, INC. ET AL. *v.* MICHIGAN UNEMPLOYMENT COMPENSATION COMMISSION. November 22, 1943. Petition for writ of certiorari to the Supreme Court of Michigan denied. *Mr. Alan J. Stone* for petitioners. *Messrs. Herbert J. Rushton,* Attorney General of Michigan, and *Daniel J. O'Hara,* Assistant Attorney General, for respondent. Reported below: 305 Mich. 714, 9 N. W. 2d 879.

No. 473. KRAUSS, TRADING AS AMERICAN CORD & WEBBING CO., *v.* GREENBARG ET AL., TRADING AS KING KARD OVERALL CO. November 22, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. B. D. Oliensis* for petitioner. Reported below: 137 F. 2d 569.

No. 402. ICKES, SECRETARY OF THE INTERIOR, *v.* FOX ET AL.;

No. 403. ICKES, SECRETARY OF THE INTERIOR, *v.* PARKS ET AL.; and

No. 404. ICKES, SECRETARY OF THE INTERIOR, *v.* EDER, EXECUTRIX. November 22, 1943. Petition for writs of certiorari to the United States Court of Appeals for the District of Columbia denied. MR. JUSTICE REED took no part in the consideration or decision of this application. *Solicitor General Fahy* and *Mr. J. Kennard Cheadle* for petitioner. *Messrs. Stephen E. Chaffee* and *Wm. G. Feely* for respondents. Reported below: 137 F. 2d 30.

No. 432. SABIN ET AL. *v.* LEVORSEN ET AL. November 22, 1943. Petition for writ of certiorari to the Supreme Court of Oklahoma 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. *Kathryn Van Leuven* for petitioners. Reported below: 192 Okla. 660.

No. 444. OSMENT *v.* PITCAIRN ET AL., RECEIVERS. November 22, 1943. Petition for writ of certiorari to the Supreme Court of Missouri denied for want of a reviewable judgment of the highest court of the State. *Mr. Joseph A. Padway* for petitioner. *Messrs. Carleton S. Hadley, Sam B. Sebree,* and *John S. Marley* for respondents. Reported below: 349 Mo. 137, 159 S. W. 2d 666.

No. 448. NIAGARA FALLS POWER CO. *v.* FEDERAL POWER COMMISSION. November 22, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. MR. JUSTICE JACKSON took no part in

the consideration or decision of this application. *Messrs. Joseph M. Proskauer* and *Randall J. LeBoeuf, Jr.* for petitioner. *Solicitor General Fahy, Assistant Attorney General Shea,* and *Messrs. Chester T. Lane, K. Norman Diamond, Charles V. Shannon,* and *Louis W. McKernan* for respondent. Reported below: 137 F. 2d 787.

No. 292. CARROLL *v.* SQUIER, WARDEN, ET AL. November 22, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Jack L. Carroll, pro se. Solicitor General Fahy* for respondents. Reported below: 136 F. 2d 571.

No. 459. PYLE *v.* JOHNSTON, WARDEN. November 22, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Raymond Pyle, pro se. Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Mr. Edward G. Jennings* for respondent. Reported below: 137 F. 2d 869.

No. 487. KELLEY *v.* CALIFORNIA. See *ante,* p. 715.

No. 213. TWISP MINING & SMELTING CO. *v.* CHELAN MINING CO. ET AL. See *ante,* p. 716.

No. 439. FRYBERGER *v.* CONSOLIDATED ELECTRIC & GAS CO. ET AL. December 6, 1943. Petition for writ of certiorari to the Supreme Court of New York, County of New York, denied. *Mr. Harrison E. Fryberger* for petitioner. *Mr. Arthur M. Boal* for respondents. Reported below: 291 N. Y. 551, 50 N. E. 2d 657.

No. 445. BONWIT TELLER, INC. *v.* COMMISSIONER OF INTERNAL REVENUE. December 6, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Arthur B. Hyman* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.*, and *Messrs. Sewall Key* and *J. Louis Monarch* for respondent. Reported below: 136 F. 2d 978.

No. 449. MERGER MINES CORP. ET AL. *v.* GRISMER ET AL. December 6, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. R. W. Nuzum* for petitioners. Reported below: 137 F. 2d 335.

No. 455. LEISHMAN *v.* ASSOCIATED WHOLESALE ELECTRIC CO. December 6, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. John Flam* for petitioner. *Messrs. Marston Allen* and *Leonard S. Lyon* for respondent. Reported below: 137 F. 2d 722.

No. 458. NATIONAL SECURITIES CORP. *v.* COMMISSIONER OF INTERNAL REVENUE. December 6, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. H. Cecil Kilpatrick* 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. *Mr. Irving M. Engel* filed a brief, as *amicus curiae*, in support of the petition. Reported below: 137 F. 2d 600.

No. 461. SALOMON *v.* CITY OF NEW YORK. December 6, 1943. Petition for writ of certiorari to the Circuit

Court of Appeals for the Second Circuit denied. *George F. Salomon, pro se. Mr. Leo Brown* for respondent. Reported below: 136 F. 2d 681.

No. 466. GILLMOR *v.* INDIANAPOLIS GAS CO. ET AL.; No. 467. ABRAMS *v.* INDIANAPOLIS GAS CO. ET AL.; and No. 468. PYRAMID COMMERCIAL CORP. *v.* INDIANAPOLIS GAS CO. ET AL. December 6, 1943. Petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Frank E. Karelsen, Jr.* for petitioners. *Mr. Louis B. Ewbank* for the Indianapolis Gas Co.; and *Messrs. William H. Thompson, Perry E. O'Neal,* and *Patrick J. Smith* for the City of Indianapolis,—respondents. Reported below: 136 F. 2d 925.

No. 485. WHITEFORD *v.* HECHT COMPANY. December 6, 1943. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. James C. Wilkes* and *James E. Artis* for petitioner. *Messrs. Lawrence Koenigsberger* and *Austin F. Canfield* for respondent. Reported below: 137 F. 2d 929.

No. 460. ROBINSON, ADMINISTRATOR, *v.* LINFIELD COLLEGE ET AL. December 6, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. O. C. Moore* and *John H. Pelletier* for petitioner. *Messrs. Jas. A. Williams* and *Ben H. Kizer* for respondents. Reported below: 136 F. 2d 805.

No. 440. O'HARA *v.* MURPHY, SPECIAL ADMINISTRATOR, ET AL. December 6, 1943. Motion for leave to proceed on the typewritten record granted. Petition for writ

of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. Walter I. Sundlin* and *William C. Crossley* for petitioner. *Maurice J. Murphy, pro se.* Reported below: 137 F. 2d 154.

No. 454. BILLINGSLEY *v.* HORRALL, CHIEF OF POLICE. December 6, 1943. Petition for writ of certiorari to the Supreme Court of California denied. The motion for leave to file a petition for writ of habeas corpus is also denied. *Mr. Morris Lavine* for petitioner. *Messrs. Ray L. Chesebro* and *John L. Bland* for respondent.

No. 451. BESS *v.* MAYO, CUSTODIAN OF THE FLORIDA STATE PRISON. December 6, 1943. Petition for writ of certiorari to the Supreme Court of Florida denied. Motion for leave to file petition for writ of habeas corpus also denied. *Roy Bess, pro se.*

No. 475. SPRUILL *v.* BALLARD ET AL. December 6, 1943. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied, *Georgia M. Spruill, pro se. Mr. Ross H. Snyder* for respondents.

No. 480. COHEN *v.* RANDALL, EXECUTOR. December 6, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Maurice P. Davidson* and *Gustave B. Garfield* for petitioner. *Mr. Robert D. Steefel* for respondent. Reported below: 137 F. 2d 441.

No. 456. LEYDECKER *v.* UNITED STATES. December 13, 1943. Petition for writ of certiorari to the Court of

Claims denied. *Mr. Fred W. Shields* for petitioner. *Solicitor General Fahy* and *Assistant Attorney General Shea* for the United States. Reported below: 97 Ct. Cls. 711.

No. 471. RATHJEN BROTHERS *v.* UNITED STATES. December 13, 1943. Petition for writ of certiorari to the United States Court of Customs and Patent Appeals denied. *Mr. George R. Tuttle* for petitioner. *Solicitor General Fahy, Assistant Attorney General Rao,* and *Mr. John R. Benney* for the United States. Reported below: 137 F. 2d 103.

No. 478. FIDES, A. G., *v.* COMMISSIONER OF INTERNAL REVENUE. December 13, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Lawrence R. Condon* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key, J. Louis Monarch,* and *Carlton Fox* for respondent. Reported below: 137 F. 2d 731.

No. 481. SAFEWAY STORES, INC. *v.* BOWLES, PRICE ADMINISTRATOR. December 13, 1943. Petition for writ of certiorari to the United States Emergency Court of Appeals denied. *Messrs. Elisha Hanson* and *Eliot C. Lovett* for petitioner. *Solicitor General Fahy* for respondent. Reported below: 138 F. 2d 278.

No. 484. STANZIALE *v.* PAULLIN, COMMANDING OFFICER. December 13, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. George R. Sommer* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Mr. Robert S. Erdahl,* and *Miss Beatrice Rosenberg* for respondent. Reported below: 138 F. 2d 312.

No. 462. KNIGHT *v.* BAR ASSOCIATION OF THE CITY OF NEW YORK. December 13, 1943. Petition for writ of certiorari to the Court of Appeals of New York denied. MR. JUSTICE MURPHY is of opinion that certiorari should be granted. *Richard A. Knight, pro se. Mr. John T. Cahill* for respondent. Reported below: 290 N. Y. 871, 50 N. E. 2d 250.

No. 479. GORDON ET AL. *v.* UNITED STATES. December 13, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Eugene Vincent Clarke* for petitioners. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Mr. Robert S. Erdahl,* and *Miss Beatrice Rosenberg* for the United States. Reported below: 138 F. 2d 174.

No. 299. MARS, INCORPORATED, *v.* BOWLES, PRICE ADMINISTRATOR. December 20, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Claude R. Miller* and *Robert B. Holland* for petitioner. *Solicitor General Fahy* and *Messrs. Paul A. Freund* and *Thomas I. Emerson* for respondent. Reported below: 135 F. 2d 843.

No. 469. OIL CITY REFINERS, INC. *v.* SOCONY-VACUUM OIL CO., INC.; and

No. 503. SOCONY-VACUUM OIL CO., INC. *v.* OIL CITY REFINERS, INC. December 20, 1943. Petitions for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Albert R. Teare* for Oil City Refiners, Inc. *Mr. John J. Manning* for Socony-Vacuum Oil Co., Inc. Reported below: No. 469, 136 F. 2d 470; No. 503, 137 F. 2d 569.

No. 474. ROBINSON *v.* MICHIGAN. December 20, 1943. Petition for writ of certiorari to the Supreme Court of Michigan denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application. *Mr. Edmund D. Campbell* for petitioner. *Messrs. Herbert J. Rushton,* Attorney General of Michigan, and *Daniel J. O'Hara,* Assistant Attorney General, for respondent. Reported below: 306 Mich. 167, 10 N. W. 2d 817.

No. 490. TRICO PRODUCTS CORP. *v.* COMMISSIONER OF INTERNAL REVENUE. December 20, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. MR. JUSTICE JACKSON took no part in the consideration or decision of this application. *Messrs. Arthur A. Ballantine* and *George E. Cleary* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key, J. Louis Monarch, Morton K. Rothschild,* and *Alvin J. Rockwell* for respondent. Reported below: 137 F. 2d 424.

No. 476. UNITED STATES GYPSUM CO. *v.* BOWLES, PRICE ADMINISTRATOR. January 3, 1944. Petition for writ of certiorari to the United States Emergency Court of Appeals denied. *Mr. Charles M. Price* for petitioner. *Solicitor General Fahy* and *Mr. Nathaniel L. Nathanson* for respondent. Reported below: 137 F. 2d 803.

No. 500. BAKER *v.* UNITED STATES. January 3, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. David Getz* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key* and *Homer R. Miller,* and *Miss Helen R. Carloss* for the United States. Reported below: 138 F. 2d 22.

552826—44——55

No. 510. WILSON MILLING CO. *v.* COMMISSIONER OF INTERNAL REVENUE. January 3, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Geo. E. H. Goodner* and *Scott P. Crampton* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key* and *Bernard Chertcoff* for respondent. Reported below: 138 F. 2d 249.

No. 517. PEN-KEN GAS & OIL CORP. *v.* WARFIELD NATURAL GAS CO. January 3, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. James A. Cosgrove* and *George F. Callaghan* for petitioner. *Mr. Harold A. Ritz* for respondent. Reported below: 137 F. 2d 871.

No. 494. WAYNE *v.* UNITED STATES. January 3, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Francis Murphy* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Messrs. Robert S. Erdahl* and *W. Marvin Smith* for the United States. Reported below: 138 F. 2d 1.

No. 495. LYMAN ET AL., EXECUTORS, *v.* UNITED STATES. January 3, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Amos L. Taylor* for petitioners. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Mr. Sewall Key,* and *Miss Melva M. Graney* for the United States. Reported below: 138 F. 2d 509.

No. 501. ZERNIT *v.* UNITED STATES. January 3, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Ernest Angell* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Mr. Robert S. Erdahl* for the United States. Reported below: 138 F. 2d 743.

No. 512. KAISER *v.* UNITED STATES. January 3, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Fred A. Gariepy* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Mr. Robert S. Erdahl* for the United States. Reported below: 138 F. 2d 219.

No. 513. GRANT LUNCH CORP. *v.* DRISCOLL, COMMISSIONER OF THE STATE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL. January 3, 1944. Petition for writ of certiorari to the Court of Errors and Appeals of New Jersey denied. *Mr. Morris M. Schnitzer* for petitioner. Reported below: 130 N. J. L. 554, 33 A. 2d 900.

No. 516. RAFERT *v.* EQUITABLE LIFE ASSURANCE SOCIETY. January 3, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. S. L. Winters* for petitioner. Reported below: 138 F. 2d 185.

No. 519. UNITED STATES EX REL. JORDAN *v.* ICKES, SECRETARY OF THE INTERIOR. January 3, 1944. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. James E. Watson* and *Orin de Motte Walker* for petitioner. *So-*

licitor General Fahy, Assistant Attorney General Littell, and *Mr. Norman MacDonald* for respondent.

No. 523. MIDDLETON & Co. (CANADA), LTD., ET AL. *v.* OCEAN DOMINION STEAMSHIP CORP. January 3, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Henry N. Longley* and *Ezra G. Benedict Fox* for petitioners. *Messrs. John W. Griffin* and *Wharton Poor* for respondent. Reported below: 137 F. 2d 619.

No. 537. KERSH LAKE DRAINAGE DISTRICT *v.* STATE BANK & TRUST CO. January 3, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Charles T. Coleman, Burk Mann, Richard B. McCulloch,* and *Shields M. Goodwin* for petitioner. *Messrs. J. W. Dickey, A. H. Rowell,* and *A. F. House* for respondent. Reported below: 138 F. 2d 486.

No. 488. NEBLETT ET AL. *v.* CAMINETTI, INSURANCE COMMISSIONER, ET AL.; and

No. 489. NEBLETT ET AL. *v.* PACIFIC MUTUAL LIFE INSURANCE CO. ET AL. January 3, 1944. Petition for writs of certiorari to the Supreme Court of California denied. MR. JUSTICE REED took no part in the consideration or decision of this application. *Mr. William Stanley* for petitioners. *Mr. Robert W. Kenny,* Attorney General of California, for the Insurance Commissioner; and *Messrs. T. B. Cosgrove, John N. Cramer, Allan P. Matthew, Eugene Overton,* and *Byron C. Hanna* for the Pacific Mutual Life Insurance Co. et al.,—respondents. Reported below: 22 Cal. 2d 344, 393, 139 P. 2d 908, 934.

No. 491. BENGUET CONSOLIDATED MINING CO. *v.* PERKINS ET AL. January 3, 1944. Petition for writ of certiorari to the District Court of Appeal, 1st Appellate District, of California denied. MR. JUSTICE MURPHY took no part in the consideration or decision of this application. *Messrs. W. H. Lawrence, Alfred Sutro,* and *Francis R. Kirkham* for petitioner. *Messrs. Theodore J. Roche, Hiram W. Johnson, James Farraher,* and *Theodore H. Roche* for respondents. Reported below: 60 Cal. App. 2d 845, 141 P. 2d 19.

No. 511. BECKHAM, CLERK, U. S. DISTRICT COURT, *v.* BROWN, PRICE ADMINISTRATOR. January 3, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Oldham Clarke* for petitioner. *Solicitor General Fahy* for respondent. Reported below: 137 F. 2d 644.

No. 470. BYERS ET UX. *v.* WARD ET AL. January 3, 1944. Petition for writ of certiorari to the Supreme Court of Tennessee denied. *Mr. Robert Burrow* for petitioners.

No. 496. MILLER *v.* UNITED STATES. January 3, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Jessie William Miller, pro se. Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Mr. Robert S. Erdahl,* and *Miss Beatrice Rosenberg* for the United States. Reported below: 138 F. 2d 258.

No. 498. DOBRY *v.* OLSON, WARDEN. January 3, 1944. Petition for writ of certiorari to the Supreme Court of Nebraska denied. *James Dobry, pro se.*

No. 477. McDONALD *v.* UNITED STATES. January 3, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. MR. JUSTICE MURPHY took no part in the consideration or decision of this application. *Cassius McDonald, pro se. Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Mr. Edward G. Jennings* for the United States. Reported below: 138 F. 2d 571.

No. 553. BRAZEL *v.* JACKSON, WARDEN. January 3, 1944. Petition for writ of certiorari to the Supreme Court of Michigan denied. The motion for leave to file petition for writ of habeas corpus is also denied. *Clyde Brazel, pro se.*

No. 520. UNGER *v.* OHIO STATE DENTAL BOARD. January 10, 1944. Petition for writ of certiorari to the Supreme Court of Ohio denied. *Mr. William J. Corrigan* for petitioner. *Mr. Thomas J. Herbert,* Attorney General of Ohio, for respondent. Reported below: 142 Ohio St. 67, 49 N. E. 2d 932.

No. 522. BALFOUR, GUTHRIE & CO., LTD. ET AL. *v.* THE ZAREMBO ET AL. January 10, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. D. Roger Englar, Martin Detels,* and *Erza G. Benedict Fox* for petitioners. *Mr. Geo. Whitefield Betts, Jr.* for respondents. Reported below: 136 F. 2d 320.

No. 526. CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD CO. ET AL. *v.* CHICAGO, ROCK ISLAND & PACIFIC RAILWAY CO. ET AL. January 10, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. M. L. Bluhm, John N. Hughes,*

and *A. N. Whitlock* for petitioners. *Messrs. Marcus L. Bell, W. F. Peter, J. G. Gamble,* and *A. B. Howland* for respondents. Reported below: 138 F. 2d 268.

No. 534. PITNEY ET AL., TRUSTEES, *v.* NEW JERSEY; and

No. 535. PITNEY ET AL., TRUSTEES, *v.* NEW JERSEY ET AL. January 10, 1944. Petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. John W. Davis, Montgomery B. Angell,* and *Marvin Lyons* for petitioners. *Messrs. Joseph Lanigan, Charles A. Rooney,* and *Charles Hershenstein* for respondents. Reported below: 136 F. 2d 633.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT, THROUGH JANUARY 10, 1944.

No. 69. GIBSON *v.* COMMISSIONER OF INTERNAL REVENUE. On petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit. August 30, 1943. Dismissed pursuant to Rule 35. *Mr. Daniel Gordon James Judge* for petitioner. Reported below: 133 F. 2d 308.

No. 239. MROZ *v.* UNITED STATES. On petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit. September 30, 1943. Dismissed pursuant to Rule 35. *Mr. Perry J. Stearns* for petitioner. Reported below: 136 F. 2d 221.

No. 150. PETERSIME INCUBATOR CO. *v.* BUNDY INCUBATOR CO. On petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit. October 4, 1943.

Dismissed on motion of counsel for the petitioner. *Messrs. H. A. Toulmin, Jr., John M. Mason,* and *Rowan A. Greer* for petitioner. *Mr. Albert L. Ely* for respondent. Reported below: 135 F. 2d 580.

No. 318. HILL *v.* TEXAS. On petition for writ of certiorari to the Court of Criminal Appeals of Texas. October 11, 1943. Dismissed on motion of counsel for the petitioner. *Mr. A. S. Baskett* for petitioner. Reported below: 171 S. W. 2d 880.

No. 85. MISSOURI PACIFIC RAILROAD CO. ET AL. *v.* THOMPSON, TRUSTEE, ET AL.;

No. 86. PROTECTIVE COMMITTEE FOR HOLDERS OF COMMON STOCK OF MISSOURI PACIFIC RAILROAD CO. *v.* THOMPSON, TRUSTEE, ET AL.; and

No. 87. ALLEGHANY CORPORATION *v.* THOMPSON, TRUSTEE, ET AL. On petition for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit. November 8, 1943. The petition for writs of certiorari in these cases is dismissed as to all petitioners other than the Protective Committee for Holders of First Mortgage Bonds of International-Great Northern Railroad Company on motion of counsel for those petitioners. The petition for a writ of certiorari of the Protective Committee for Holders of First Mortgage Bonds of International-Great Northern Railroad Company, one of the petitioners in No. 85, is denied. *Messrs. Edward F. Colladay, Everett Paul Griffin, Malcolm Fooshee, Marion B. Pierce, Harry Kirshbaum,* and *Luther M. Walter* for petitioners. Reported below: 134 F. 2d 139.

No. 372. IN RE AMOS GAYLE. On petition for writ of certiorari to the Circuit Court of Appeals for the Fifth

Circuit. November 8, 1943. Dismissed on motion of counsel for the petitioner. *Mr. John O. Collins* for petitioner. Reported below: 136 F. 2d 973.

No. 329. UNITED STATES *v.* BERKE CAKE CO., INC., ET AL. Appeal from the District Court of the United States for the Eastern District of New York. December 20, 1943. Dismissed on motion of counsel for the appellant. *Solicitor General Fahy, Assistant Solicitor General Cox, Assistant Attorney General Tom C. Clark, Messrs. Oscar A. Provost* and *Harold M. Kennedy,* and *Miss Beatrice Rosenberg* for the United States. *Messrs. Charles E. Scribner* and *Mark Hyman* for appellees. Reported below: 50 F. Supp. 311.

DECISIONS GRANTING REHEARING, FROM OCTOBER 4, 1943, THROUGH JANUARY 10, 1944.

No. 213. TWISP MINING & SMELTING CO. *v.* CHELAN MINING CO. ET AL. See *ante,* p. 716.

DECISIONS DENYING REHEARING, FROM OCTOBER 4, 1943, THROUGH JANUARY 10, 1944.*

No. —, original, October Term, 1942. EX PARTE EDWARD J. BORAH. October 11, 1943. The application for writ of certiorari is also denied. 318 U. S. 745.

No. 2, October Term, 1942. SCHNEIDERMAN *v.* UNITED STATES. October 11, 1943. MR. JUSTICE JACKSON took no part in the consideration or decision of this application.

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*See Table of Cases Reported in this volume for earlier decisions in these cases, unless otherwise indicated.

No. 4, October Term, 1942. UNITED STATES *v.* JOHNSON; and

No. 5, October Term, 1942. UNITED STATES *v.* SOMMERS ET AL. October 11, 1943. MR. JUSTICE MURPHY, MR. JUSTICE JACKSON, and MR. JUSTICE RUTLEDGE took no part in the consideration or decision of these applications. 319 U. S. 503.

No. 517, October Term, 1942. AJELLO *v.* PAN AMERICAN AIRWAYS CORP. ET AL. October 11, 1943. Fourth petition for rehearing denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application. 319 U. S. 784.

No. 940, October Term, 1942. POTTS, TRADING AS SOUTHERN PROGRESS PUBLISHING CO., *v.* DIES. October 11, 1943. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application. 319 U. S. 762.

No. 1003, October Term, 1942. LUBAR, TRUSTEE, *v.* HARTMAN. October 11, 1943. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application. 319 U. S. 767.

No. 1064, October Term, 1942. PREBYL *v.* PRUDENTIAL INSURANCE CO. ET AL. October 11, 1943. MR. JUSTICE ROBERTS and MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application.

No. 1069, October Term, 1942. KUSHNER *v.* UNITED STATES. October 11, 1943. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application.

No. 824, October Term, 1942. METROPOLITAN-COLUMBIA STOCKHOLDERS, INC., ET AL. *v.* CITY OF NEW YORK. October 11, 1943. The motion for leave to file a third petition for rehearing is denied.

No. 955, October Term, 1942. VALENTI *v.* UNITED STATES. October 11, 1943. The motion for leave to file petition for rehearing is denied. 319 U. S. 761.

No. 369, October Term, 1942. MARCONI WIRELESS TELEGRAPH CO. *v.* UNITED STATES. October 11, 1943.

No. 552, October Term, 1942. INTERSTATE TRANSIT LINES *v.* COMMISSIONER OF INTERNAL REVENUE. October 11, 1943. 319 U. S. 590.

No. 608, October Term, 1942. DAVIS *v.* ARIZONA. October 11, 1943. 319 U. S. 775.

No. 628, October Term, 1942. INTERSTATE COMMERCE COMMISSION ET AL. *v.* COLUMBUS & GREENVILLE RAILWAY CO. October 11, 1943. 319 U. S. 551.

No. 698, October Term, 1942. BOONE *v.* LIGHTNER ET AL. October 11, 1943. 319 U. S. 561.

No. 707, October Term, 1942. FREEMAN *v.* BEE MACHINE CO., INC. October 11, 1943. 319 U. S. 448.

No. 709, October Term, 1942. VIRGINIA ELECTRIC & POWER CO. *v.* NATIONAL LABOR RELATIONS BOARD. October 11, 1943. 319 U. S. 533.

No. 726, October Term, 1942. MAYO ET AL. *v.* UNITED STATES. October 11, 1943. 319 U. S. 441.

No. 766, October Term, 1942. VIRGINIAN HOTEL CORP. *v.* COMMISSIONER OF INTERNAL REVENUE. October 11, 1943. 319 U. S. 523.

No. 958, October Term, 1942. KENNEDY LAUNDRY CO. *v.* COMMISSIONER OF INTERNAL REVENUE. October 11, 1943. 319 U. S. 770.

No. 892, October Term, 1942. COLE *v.* VIOLETTE ET AL. October 11, 1943. 319 U. S. 581.

No. 895, October Term, 1942. RUMBERGER *v.* WELSH ET AL. October 11, 1943. 319 U. S. 759.

No. 964, October Term, 1942. STANDARD DREDGING CORP. *v.* WALLING, ADMINISTRATOR. October 11, 1943. 319 U. S. 761.

No. 967, October Term, 1942. ELLIOTT *v.* BUCHANAN, WARDEN. October 11, 1943. 319 U. S. 775.

No. 987, October Term, 1942. BURALL *v.* JOHNSTON, WARDEN. October 11, 1943. 319 U. S. 768.

No. 989, October Term, 1942. GORDON FORM LATHE CO. *v.* FORD MOTOR CO. October 11, 1943. 319 U. S. 765.

No. 996, October Term, 1942. ELLERBRAKE *v.* UNITED STATES. October 11, 1943. 319 U. S. 775.

No. 1001, October Term, 1942. BOWEN *v.* UNITED STATES. October 11, 1943. 319 U. S. 764.

No. 1024, October Term, 1942. BECKER *v.* LOEW'S, INCORPORATED. October 11, 1943. 319 U. S. 772.

No. 1031, October Term, 1942. TRAVELERS INSURANCE CO. *v.* MAGILL, CONSERVATOR. October 11, 1943. 319 U. S. 773.

No. 1038, October Term, 1942. TIEDEMANN ET AL. *v.* ESTODURAS STEAMSHIP CO., INC. October 11, 1943. 319 U. S. 774.

No. 1040, October Term, 1942. DAVIS *v.* MASSACHUSETTS. October 11, 1943.

No. 1041, October Term, 1942. DUBINA *v.* MICHIGAN. October 11, 1943. 319 U. S. 766.

No. 1042, October Term, 1942. DAVIS, TREASURER, ET AL. *v.* DINNY & ROBBINS, INC. October 11, 1943. 319 U. S. 774.

No. 1070, October Term, 1942. GUYTON *v.* UNITED STATES. October 11, 1943.

No. 1077, October Term, 1942. FARRELL *v.* LANAGAN, WARDEN. October 11, 1943. 319 U. S. 776.

No. 1034, October Term, 1942. ALLEN *v.* UNITED STATES. Second petition for rehearing and "for vacating of judgment" denied.

No. 167. FLOWERS *v.* FLORIDA. October 18, 1943.

No. —. BENTZ *v.* MICHIGAN. October 25, 1943.

No. 184. COVER *v.* CHICAGO EYE SHIELD CO. October 25, 1943.

No. 347, October Term, 1941. TASTY BAKING CO. *v.* UNITED STATES. November 8, 1943. The motion for leave to file petition for rehearing is denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application. 314 U. S. 654.

No. 987, October Term, 1942. BURALL *v.* JOHNSTON, WARDEN. November 8, 1943. Second petition for rehearing denied.

No. 240. WAYNE *v.* ROBINSON ET AL. November 8, 1943. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application.

No. 92. SWAN CARBURETOR CO. *v.* NASH MOTOR CO. November 8, 1943.

No. 96. PETTY *v.* MISSOURI & ARKANSAS RAILWAY CO. November 8, 1943.

No. 121. BARNES *v.* PENNSYLVANIA EX REL. BARNES. November 8, 1943.

No. 168. DENNEY *v.* FORT RECOVERY BANKING CO. November 8, 1943.

No. 185. SNYDER *v.* PROVIDENT TRUST CO. November 8, 1943.

No. 218. SKIDMORE ET AL. *v.* SWIFT & CO. November 8, 1943.

No. 247. REID *v.* UNITED STATES. November 8, 1943.

No. 268. BENNETT *v.* DEGEETER. November 8, 1943.

No. 277. SPRUILL *v.* NEWBY, CHAIRMAN. November 8, 1943.

No. 281. THOMSON ET AL. *v.* BUTLER ET AL. November 8, 1943.

No. 294. PAYNE *v.* KIRCHWEHM. November 8, 1943.

No. 313. GREEN ET AL. *v.* CITY OF STUART. November 8, 1943.

No. 100. DOSS *v.* ILLINOIS. November 15, 1943.

No. 124. ROYER, ADMINISTRATRIX, *v.* GREINER. November 15, 1943.

No. 201. TROJAN POWDER CO. *v.* NATIONAL LABOR RELATIONS BOARD. November 15, 1943.

No. 220. GORMLY *v.* UNITED STATES. November 15, 1943.

No. 238. NORRIS ET AL., EXECUTORS, *v.* COMMISSIONER OF INTERNAL REVENUE. November 15, 1943.

No. 330. G. T. FOGLE & CO. *v.* UNITED STATES. November 15, 1943.

No. 295. DEMARCOS *v.* OVERHOLSER, SUPERINTENDENT. November 22, 1943.

No. 335. LLOYD *v.* UNITED STATES FIDELITY & GUARANTY CO. November 22, 1943.

No. 18. CARTER *v.* KUBLER. December 6, 1943.

No. 137. POWELL *v.* SANFORD, WARDEN. December 6, 1943.

No. 187. NEW YORK EX REL. ROGALSKI *v.* MARTIN, WARDEN. December 6, 1943.

No. 214. GILCREASE OIL CO. *v.* COSBY ET AL. December 6, 1943.

No. 377. GOLDSMITH ET AL. *v.* UNITED STATES. December 6, 1943.

No. 389. NEAL ET AL. *v.* FLORIDA ET AL. December 6, 1943.

No. 390. NIKLAUS ET AL. *v.* LINCOLN JOINT STOCK LAND BANK. December 6, 1943.

No. 407. LASH *v.* ALABAMA. December 6, 1943.

No. 431. DUNNE ET AL. *v.* UNITED STATES. December 6, 1943.

No. 21. UNITED STATES EX REL. BRENSILBER ET AL. *v.* BAUSCH & LOMB OPTICAL CO. ET AL. December 6, 1943. MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, MR. JUSTICE MURPHY, and MR. JUSTICE RUTLEDGE think the petitions should be granted. MR. JUSTICE JACKSON took no part in the consideration or decision of these applications.

No. 448. NIAGARA FALLS POWER CO. *v.* FEDERAL POWER COMMISSION. December 6, 1943. MR. JUSTICE JACKSON took no part in the consideration or decision of this application.

No. 426. ETTMAN *v.* FEDERAL LIFE INSURANCE CO. December 13, 1943.

No. 5. UNITED STATES *v.* DOTTERWEICH. December 20, 1943.

No. 189. BURROUGHS *v.* SANFORD, WARDEN. December 20, 1943.

No. 432. SABIN ET AL. *v.* LEVORSEN ET AL. December 20, 1943.

No. 473. KRAUSS, TRADING AS AMERICAN CORD & WEBBING CO., *v.* GREENBARG ET AL., TRADING AS KING KARD OVERALL CO. December 20, 1943.

No. 968, October Term, 1942. BENGUET CONSOLIDATED MINING CO. *v.* PERKINS ET AL. January 3, 1944. MR. JUSTICE MURPHY took no part in the consideration or decision of this application. 319 U. S. 774.

No. 191. COYLE *v.* NEW YORK. January 3, 1944.

No. 418. WADE *v.* NEW YORK. January 3, 1944.

No. 431. DUNNE ET AL. *v.* UNITED STATES. January 3, 1944. Second petition for rehearing denied.

No. 251. COY *v.* JOHNSTON, WARDEN. January 3, 1944.

No. 435. BROTHERHOOD OF RAILWAY & STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS & STATION EMPLOYEES ET AL. *v.* UNITED TRANSPORT SERVICE EMPLOYEES ET AL. January 10, 1944. MR. JUSTICE RUTLEDGE is of opinion that the petition for rehearing should be granted, the case restored to the docket and set for argument.

Nos. 38 and 39. COLGATE-PALMOLIVE-PEET CO. *v.* UNITED STATES. January 10, 1944. MR. JUSTICE ROBERTS and MR. JUSTICE JACKSON took no part in the consideration or decision of this application.

Nos. 49 and 50. FORD MOTOR CO. *v.* GORDON FORM LATHE CO. January 10, 1944. MR. JUSTICE MURPHY took no part in the consideration or decision of this application.

No. 124. ROYER, ADMINISTRATRIX, *v.* GREINER. January 10, 1944. Second petition for rehearing denied.

No. 439. FRYBERGER *v.* CONSOLIDATED ELECTRIC & GAS CO. ET AL. January 10, 1944.

No. 455. LEISHMAN *v.* ASSOCIATED WHOLESALE ELECTRIC CO. January 10, 1944.

No. 478. FIDES, A. G., *v.* COMMISSIONER OF INTERNAL REVENUE. January 10, 1944.

No. 479. GORDON ET AL. *v.* UNITED STATES. January 10, 1944.

No. 485. WHITEFORD *v.* HECHT COMPANY. January 10, 1944.

INDEX

I. Miscellaneous.

1. *War Power.* Curfew order applicable to persons, though citizens, of Japanese ancestry, valid. *Hirabayashi* v. *U. S.*, 81; *Yasui* v. *U. S.*, 115.

2. *Id.* Congress and Executive together had constitutional authority to prescribe curfew order as emergency war measure. *Hirabayashi* v. *U. S.*, 81.

3. *Id.* Exercise of war power not invalid because it restricts liberty of citizens. *Id.*

4. *Delegation of Power.* Promulgation of curfew order by military commander not based on unconstitutional delegation of legislative power. *Id.*

5. *Id.* Authorization of curfew orders for protection of war resources from espionage and sabotage satisfied constitutional requirements. *Id.*

6. *Federal Regulation. Natural Gas.* Validity of rate order of Federal Power Commission under Natural Gas Act. *Federal Power Comm'n* v. *Hope Natural Gas Co.*, 591.

7. *Federal Statutory Rights.* Congress may determine how rights which it creates shall be enforced. *Switchmen's Union* v. *Mediation Board*, 297.

8. *Full Faith and Credit.* Effect of full faith and credit clause generally; "judicial proceedings" and "records" both embraced. *Magnolia Petroleum Co.* v. *Hunt*, 430.

9. *Id.* Award under Texas workmen's compensation law which was *res judicata* barred further recovery in Louisiana. *Id.*

II. Commerce Clause.

1. *Federal Regulation.* Validity of federal regulation as applied to publicly operated terminals. *California* v. *U. S.*, 577.

2. *Id.* Validity of rate order under Natural Gas Act. *Federal Power Comm'n* v. *Hope Natural Gas Co.*, 591.

III. Fifth Amendment.

1. *Due Process. Discrimination.* Fifth Amendment contains no equal protection clause and restrains only such discriminatory legislation as amounts to denial of due process. *Hirabayashi* v. *U. S.*, 81.

552826—44——57