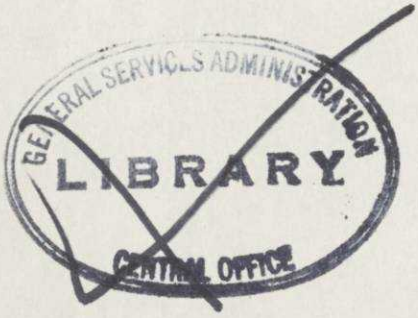
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UNITED STATES REPORTS

VOLUME 322

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1943

FROM APRIL 10, 1944 (CONCLUDED) TO AND INCLUDING JUNE 12, 1944
(END OF TERM)

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ERRATA.

1. 321 U. S. xxv. The proper title of the eighth case in the right-hand column is Anderson National Bank v. Luckett, 321 U. S. 233.

2. 321 U. S. 6, line 3, "and" should be "any".

3. 321 U. S. 158. The opinion of MR. JUSTICE JACKSON (p. 176), in which MR. JUSTICE ROBERTS and MR. JUSTICE FRANKFURTER joined, should precede the dissenting opinion of MR. JUSTICE MURPHY (p. 171).

4. 321 U. S. 369, last line of footnote, "individual" should be "individually".

5. 321 U. S. 552, the last line on the page should be footnote No. 7 and should read "[7] See Exec. Order No. 9410, December 23, 1943, 8 Fed. Reg. 17319."*

6. 321 U. S. 714, the last line should read "salers were told that the certificates were intended for".*

7. 320 U. S. 225, last line, "changeable" should be "chargeable".

8. 319 U. S. 395, note 32, line 8 should read "most strongly against him, and such conclusions as a jury might justi-".*

9. 319 U. S. 434, line 30 should read "orders of the court. He must obey the terms and con-".*

10. 319 U. S. 748, No. 883, line 3 should read "Court of Appeals for the Ninth Circuit denied. *Mr. A.*"*

11. 317 U. S. 558, line 19 should read "fendants named in the indictment entered pleas of *nolo*".*

*Correction has been made in some copies of the volume.

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.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1943.

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY CO. ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

No. 482. Argued March 8, 1944.—Decided April 10, 1944.

1. The findings upon which the Interstate Commerce Commission based its authorization of motor carrier operations in this case were supported by the evidence; and the court below properly declined to substitute its own inferences from the testimony for those of the Commission and to weigh the evidence anew. P. 2.
2. Upon application by a motor carrier under §§ 206 (a) and 207 (a) of Part II of the Interstate Commerce Act for authorization of operations over certain routes, the Commission, upon the facts found, had power under § 208 (a) to authorize the applicant to serve intermediate points on the routes, though the applicant had not sought authority in respect of the intermediate points. P. 3.
3. The record does not sustain the claim that the protestants were denied the opportunity for an adequate hearing before the Commission. P. 3.

50 F. Supp. 249, affirmed.

APPEAL from a decree of a district court of three judges dismissing a suit to set aside in part an order of the Interstate Commerce Commission.

Mr. Amos M. Mathews, with whom *Mr. Warren Newcome* was on the brief, for appellants.

Mr. Nelson Thomas, 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.; *Mr. Perry R. Moore,* with whom *Mr. Frederick H. Stinchfield* was on the brief, for Cornelius W. Styer; and *Mr. Fred W. Putnam* for the Glendenning Motorways, Inc.,— appellees.

MR. JUSTICE JACKSON delivered the opinion of the Court.

Appellants are five railroads operating in Minnesota and North Dakota. They claim to be aggrieved by an order of the Interstate Commerce Commission granting operating authority to a motor carrier of goods in that territory. Appellee Cornelius Styer, doing business as Northern Transportation Company, made application for two classes of common-carrier rights. As to certain routes he sought "grandfather rights" under § 206 (a) of Part II of the Interstate Commerce Act, 49 U. S. C. § 306 (a). As to certain others, he sought authority under §§ 206 (a) and 207 (a) of the Act, 49 U. S. C. §§ 306 (a), 307 (a), by showing that the proposed service "is or will be required by the present or future public convenience and necessity." After due hearings both classes of rights were granted. Styer later transferred them to the appellee Glendenning Motorways, Inc.

The railroads brought an action in the District Court for Minnesota against the Commission and the carriers to annul the Commission's certificate, pursuant to 28 U. S. C. § 41 (28). The cause came on before a court of three judges who dismissed the complaint on the merits. It was brought here by direct appeal.

It is contended that there is no evidence to support the findings on which the Commission granted operating rights. The court below examined the evidence as to each challenged finding and found each "not unsupported by

evidence." It declined, quite properly, to substitute inferences of its own for those drawn by the Commission from testimony and declined to weigh anew conflicts in it. This was no error, and we affirm the findings. *Gregg Cartage & Storage Co.* v. *United States,* 316 U. S. 74; *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125.

The question of law in the case is whether the Commission on its finding need for such service had power to authorize service of intermediate points not asked for by the applicant. The applicant has accepted and is defending the grant, but the competing rail carriers complain of it.

In the grandfather case Styer stated that he did not claim and was not applying for authority to carry goods in interstate commerce from any Minnesota point to any Minnesota point. But he had begun operations only two months prior to the "grandfather" date. The Commission found that he had held out service to such intermediate points and that there was public need for it.

In the convenience and necessity case, before hearing Styer filed an amendment to his application which withdrew request for authority as to "all service in interstate commerce between points in Minnesota." The Commission, however, found that he had served such intermediate points on the route as shippers had requested it, that such service was fulfilling a public need, and was required by the public convenience and necessity.

It is said that these actions withdrew the intermediate points from issue and threw the protesting parties off their guard and that they did not have opportunity for adequate hearing on the matters ultimately decided. However, after receiving the report of Division 5 recommending granting, as was done, the railroads filed a petition for reconsideration. It is not in evidence. Whether surprise was claimed and evidence was indicated that could

be added on rehearing, we do not know. The Court endeavors to protect the right of parties to fair hearings, but it will not presume that their rights have been substantially denied when they do not embrace the opportunity to prove their grievance in the court below.

It is clear that the Commission on the facts found had power to include in the authorization provision for service greater than the carrier had asked. Section 208 (a) of the Act provides that in any certificate issued under either § 206 or § 207 "there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier." 49 U. S. C. § 308 (a).

Judgment affirmed.

POLLOCK *v.* WILLIAMS, SHERIFF.

APPEAL FROM THE SUPREME COURT OF FLORIDA.

No. 345. Argued February 10, 1944.—Decided April 10, 1944.

1. A statute of Florida which makes guilty of a misdemeanor any person who, with intent to defraud, obtains an advance upon an agreement to render services, and which provides further that failure to perform the services for which an advance was obtained shall be prima facie evidence of intent to defraud, *held* violative of the Thirteenth Amendment and the federal Antipeonage Act. Pp. 5, 17.
2. In view of the history and operation of the Florida statute, it can not be said that a plea of guilty is uninfluenced by the statute's threat to convict by its prima facie evidence section; hence the entire statute is invalid, and a conviction under it, though based upon a plea of guilty, can not be sustained. P. 15.
3. That upon a trial of the defendant his testimony in respect of his intent would have been competent is immaterial. P. 25.

153 Fla. 338, 14 So. 2d 700, reversed.

APPEAL from the reversal of a judgment which, upon a writ of habeas corpus, discharged the prisoner, appellant here.

Mr. Raymer F. Maguire, with whom *Messrs. W. H. Poe* and *Thomas T. Purdom* were on the brief, for appellant.

Mr. John C. Wynn, Assistant Attorney General of Florida, with whom *Messrs. J. Tom Watson,* Attorney General, and *Woodrow M. Melvin,* Assistant Attorney General, were on the brief, for appellee.

MR. JUSTICE JACKSON delivered the opinion of the Court.

Appellant Pollock questions the validity of a statute of the State of Florida making it a misdemeanor to induce advances with intent to defraud by a promise to perform labor and further making failure to perform labor for which money has been obtained *prima facie* evidence of intent to defraud.[1] It conflicts, he says, with the Thirteenth Amendment to the Federal Constitution and with the antipeonage statute enacted by Congress thereunder. Claims also are made under the due process and equal

[1] The Florida statute under which Pollock is held was enacted as Chapter 7917 of the Acts of 1919. It was re-enacted as §§ 817.09 and 817.10, Statutes of 1941, in the revision and compilation of the general statute laws of the State. It reads:

"817.09 Obtaining property by fraudulent promise to perform labor or service.—Any person in this state who shall, with intent to injure and defraud, under and by reason of a contract or promise to perform labor or service, procure or obtain money or other thing of value as a credit, or as advances, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding five hundred dollars, or by imprisonment not exceeding six months.

"817.10 Same; prima facie evidence of fraudulent intent.—In all prosecutions for a violation of § 817.09 the failure or refusal, without just cause, to perform such labor or service or to pay for the money or other thing of value so obtained or procured shall be prima facie evidence of the intent to injure and defraud."

protection clauses of the Fourteenth Amendment which we find it unnecessary to consider.

Pollock was arrested January 5, 1943, on a warrant issued three days before which charged that on the 17th of October, 1942, he did "with intent to injure and defraud under and by reason of a contract and promise to perform labor and service, procure and obtain money, to-wit: the sum of $5.00, as advances from one J. V. O'Albora, a corporation, contrary to the statute in such cases made and provided, and against the peace and dignity of the State of Florida." He was taken before the county judge on the same day, entered a plea of guilty, and was sentenced to pay a fine of $100 and in default to serve sixty days in the county jail. He was immediately committed.

On January 11, 1943, a writ of habeas corpus was issued by the judge of the circuit court, directed to the jail keeper, who is appellee here. Petition for the writ challenged the constitutionality of the statutes under which Pollock was confined and set forth that "at the trial aforesaid, he was not told that he was entitled to counsel, and that counsel would be provided for him if he wished, and he did not know that he had such right. Petitioner was without funds and unable to employ counsel. He further avers that he did not understand the nature of the charge against him, but understood that if he owed any money to his prior employer and had quit his employment without paying the same, he was guilty, which facts he admitted." The Sheriff's return makes no denial of these allegations, but merely sets forth that he holds the prisoner by virtue of the commitment "based upon the judgment and conviction as set forth in the petition." The Supreme Court of Florida has said that "undenied allegations of the petition are taken as true." [2]

[2] *State ex rel. Libtz* v. *Coleman,* 149 Fla. 28, 5 So. 2d 60.

The Circuit Court held the statutes under which the case was prosecuted to be unconstitutional and discharged the prisoner. The Supreme Court of Florida reversed.[3] It read our decisions in *Bailey* v. *Alabama*[4] and *Taylor* v. *Georgia*[5] to hold that similar laws are not in conflict with the Constitution in so far as they denounce the crime, but only in declaring the *prima facie* evidence rule. It stated that its first impression was that the entire Florida act would fall, as did that of Georgia, but on reflection it concluded that our decisions were called forth by operation of the presumption, and did not condemn the substantive part of the statute where the presumption was not brought into play. As the prisoner had pleaded guilty, the Florida court thought the presumption had played no part in this case, and therefore remanded the prisoner to custody. An appeal to this Court was taken and probable jurisdiction noted.[6]

Florida advances no argument that the presumption section of this statute is constitutional, nor could it plausibly do so in view of our decisions. It contends, however, (1) that we can give no consideration to the presumption section because it was not in fact brought into play in the case, by reason of the plea of guilty; (2) that so severed the section denouncing the crime is constitutional.

I.

These issues emerge from an historical background against which the Florida legislation in question must be appraised.

The Thirteenth Amendment to the Federal Constitution, made in 1865, declares that involuntary servitude

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[3] *Williams* v. *Pollock*, 153 Fla. 338, 14 So. 2d 700.

[4] 219 U. S. 219.

[5] 315 U. S. 25.

[6] October 25, 1943.

shall not exist within the United States and gives Congress power to enforce the article by appropriate legislation.[7] Congress on March 2, 1867, enacted that all laws or usages of any state "by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise," are null and void, and denounced it as a crime to hold, arrest, or return a person to the condition of peonage.[8] Congress thus raised both a shield and a sword against forced labor because of debt.

Clyatt v. *United States* was a case from Florida in which the Federal Act was used as a sword and an employer

[7] "Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

"Section 2. Congress shall have power to enforce this article by appropriate legislation."

[8] The Act of March 2, 1867, 14 Stat. 546, reads:

"The holding of any person to service or labor under the system known as peonage is hereby declared to be unlawful, and the same is hereby abolished and forever prohibited in the Territory of New Mexico, or in any other Territory or State of the United States; and all acts, laws, resolutions, orders, regulations, or usages of the Territory of New Mexico, or of any other Territory or State of the United States, which have heretofore established, maintained, or enforced, or by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise, be, and the same are hereby, declared null and void; and any person or persons who shall hold, arrest, or return, or cause to be held, arrested, or returned, or in any manner aid in the arrest or return of any person or persons to a condition of peonage, shall, upon conviction, be punished by fine not less than one thousand nor more than five thousand dollars, or by imprisonment not less than one nor more than five years, or both, at the discretion of the court." The first part of the statute is now 8 U. S. C. § 56 (R. S. § 1990) and the criminal provision is § 269 of the Criminal Code, 18 U. S. C. § 444 (R. S. § 5526).

convicted under it. This Court sustained it as constitutional and said of peonage: "It may be defined as a status or condition of compulsory service, based upon the indebtedness of the peon to the master. The basal fact is indebtedness. . . . Peonage is sometimes classified as voluntary or involuntary, but this implies simply a difference in the mode of origin, but none in the character of the servitude. The one exists where the debtor voluntarily contracts to enter the service of his creditor. The other is forced upon the debtor by some provision of law. . . . A clear distinction exists between peonage and the voluntary performance of labor or rendering of services in payment of a debt. In the latter case the debtor, though contracting to pay his indebtedness by labor or service, and subject like any other contractor to an action for damages for breach of that contract, can elect at any time to break it, and no law or force compels performance or a continuance of the service." [9]

Then came the twice-considered case of *Bailey* v. *Alabama*,[10] in which the Act and the Constitution were raised as a shield against conviction of a laborer under an Alabama act substantially the same as the one before us now. Bailey, a Negro, had obtained $15 from a corporation on a written agreement to work for a year at $12 per month, $10.75 to be paid him and $1.25 per month to apply on his debt. In about a month he quit. He was convicted, fined $30, or in default sentenced to hard labor for 20 days in lieu of the fine and 116 days on account of costs. The Court considered that the portion of the state law defining the crime would require proof of intent to defraud, and so did not strike down that part; nor was it expressly sustained, nor was it necessarily reached, for the *prima facie* evidence provision had been used to obtain a conviction.

[9] 197 U. S. 207, 215–16 (1905).

[10] 211 U. S. 452 (1908), where held to be brought here prematurely, and 219 U. S. 219 (1911).

This Court held the presumption, in such a context, to be unconstitutional.

Later came *United States* v. *Reynolds* and *United States* v. *Broughton*[11] in which the Act of 1867 was sword again. Reynolds and Broughton were indicted under it. The Alabama Code authorized one under some circumstances to become surety for a convict, pay his fine, and be reimbursed by labor. Reynolds and Broughton each got himself a convict to work out fines and costs as a farm hand at $6.00 per month. After a time each convict refused to labor further and, under the statute, each was convicted for the refusal. This Court said, "Thus, under pain of recurring prosecutions, the convict may be kept at labor, to satisfy the demands of his employer." It held the Alabama statute unconstitutional and employers under it subject to prosecution.

In *Taylor* v. *Georgia*[12] the Federal Act was again applied as a shield, against conviction by resort to the presumption, of a Negro laborer, under a Georgia statute in effect like the one before us now. We made no effort to separate valid from invalid elements in the statute, although the substantive and procedural provisions were, as here, in separate, and separately numbered, sections. We said, "We think that the sections of the Georgia Code upon which this conviction rests are repugnant to the Thirteenth Amendment and to the Act of 1867, and that the conviction must therefore be reversed." Only recently in a case from Northern Florida a creditor-employer was indicted under the Federal Act for arresting a debtor to peonage, and we sustained the indictment. *United States* v. *Gaskin*.[13]

These cases decided by this Court under the Act of 1867 came either from Florida or one of the adjoining states.

[11] 235 U. S. 133 (1914).

[12] 315 U. S. 25 (1942).

[13] 320 U. S. 527.

And these were but a part of the stir caused by the Federal Antipeonage Act and its enforcement in this same region.[14] This is not to intimate that this section, more than others, was sympathetic with peonage, for this evil has never had general approval anywhere, and its sporadic appearances have been neither sectional nor racial. It is mentioned, however, to indicate that the Legislature of Florida acted with almost certain knowledge in designing its successive "labor fraud" acts in relation to our series of peonage decisions. The present Act is the latest of a lineage, in which its antecedents were obviously associated with the practice of peonage. This history throws some light on whether the present state act is one "by virtue of which any attempt shall hereafter be made" to "enforce involuntary servitude," in which event the Federal Act declares it void.

In 1891, the Legislature created an offense of two elements: obtaining money or property upon a false promise to perform service, and abandonment of service without just cause and without restitution of what had been obtained.[15] In 1905, this Court decided *Clyatt* v. *United States,* indicating that any person, including public officers,

[14] See *Peonage Cases,* 123 F. 671; *United States* v. *Eberhart,* 127 F. 252; *United States* v. *McClellan,* 127 F. 971; *In re Peonage Charge,* 138 F. 686; *Ex parte Drayton,* 153 F. 986; *Taylor* v. *United States,* 244 F. 321.

[15] "Any person in the State of Florida, who by false promises and with the intent to injure or defraud, obtains from another, any money or personal property, or any person who has entered into a written contract, with, at the time, the intent to defraud, to do or to perform any act or service, and in consideration thereof, obtains from the hirer, money or other personal property, and who abandons the service of said hirer without just cause, without first re-paying such money or paying for such personal property, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by a fine not less than five nor more than five hundred dollars, or by imprisonment in the county jail not less than thirty days, nor more than one year, or both fine and imprisonment." Florida Laws 1891, c. 4032.

even if acting under state law, might be guilty of violating the Federal Act. In 1907, the Florida Legislature enacted a new statute, nearly identical in terms with that of Alabama.[16] In 1911, in *Bailey* v. *Alabama,* this Court held such an act unconstitutional. In 1913, the Florida Legislature repealed the 1907 act, but re-enacted in substance the section denouncing the crime, omitting the presumption of intent from the failure to perform the service or make restitution.[17] In 1919, the Florida Supreme Court

[16] It provided:

"Section 1. That from and after the passage of this act any person in the State of Florida, who shall contract with another to perform for him services of any kind with intent to procure money, or other thing of value thereby, and not to perform the service contracted for, or whoever, after having so contracted, shall obtain or procure from the hirer money or other thing of value, with intent not to perform such service, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by fine of not more than one thousand dollars or by imprisonment in the county jail not more than one year, or by both fine and imprisonment.

"Sec. 2. That satisfactory proof of the contract, the procuring thereon of money or other thing of value, the failure to perform the services so contracted for, or failure to return the money so advanced with interest thereon at the time said labor or service was to be performed, without good and sufficient cause, shall be deemed prima facie evidence of the intent referred to in the preceding section." Florida Laws 1907, c. 5678.

[17] "Section 1. Any person in this State who shall contract with another to perform any labor or service and who shall, by reason of such contract and with the intent to injure and defraud, obtain or procure money or other thing of value as a credit or advances from the person so contracted with and who shall, without just cause, fail or refuse to perform such labor or service or fail or refuse to pay for the money or other thing of value so received upon demand, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding five hundred dollars or by imprisonment for a period not exceeding six months.

"Sec. 2. That Chapter 5678, Acts of 1907, be and the same is hereby repealed.

"Sec. 3. That all laws in conflict with the provisions of this Act are hereby repealed." Florida Laws 1913, c. 6528.

held this act, standing alone, void under the authority of *Bailey* v. *Alabama*.[18] Whereupon, at the session of 1919, the present statute was enacted, including the *prima facie* evidence provisions, notwithstanding these decisions by the Supreme Court of Florida and by this Court. The Supreme Court of Florida later upheld a conviction under this statute on a plea of guilty, but declined to pass on the presumption section, because, as in the present case, the plea of guilty was thought to make its consideration unnecessary.[19] The statute was re-enacted without substantial change in 1941. Again in 1943 it was re-enacted despite the fact that the year before we held a very similar Georgia statute unconstitutional in its entirety.[20]

II.

The State contends that we must exclude the *prima facie* evidence provision from consideration because in fact it played no part in producing this conviction. Such was the holding of the State Supreme Court. We are not concluded by that holding, however, but under the circumstances are authorized to make an independent determination.[21]

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[18] *Goode* v. *Nelson*, 73 Fla. 29, 74 So. 17. "As 'involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted,' is forbidden 'within the United States' by the Federal Constitution, a crime to be punished by imprisonment cannot lawfully be predicated upon the breach of a promise to perform labor or service." 73 Fla. at 32.

[19] *Phillips* v. *Bell*, 84 Fla. 225, 94 So. 699. In this case no reference was made to the prior decision of the Florida court in *Goode* v. *Nelson*, *supra* note 18.

[20] Florida Statutes (1941) §§ 817.09, 817.10; Florida Laws 1943, c. 22000, approved June 10, 1943. *Taylor* v. *Georgia* was decided January 12, 1942. 315 U. S. 25.

[21] "That the question is one of fact does not relieve us of the duty to determine whether in truth a federal right has been denied. When a federal right has been specially set up and claimed in a state court, it is our province to inquire not merely whether it was denied in

What the prisoner actually did that constituted the crime cannot be gleaned from the record. The charge is cast in the words of the statute and is largely a conclusion. It affords no information except that Pollock obtained $5 from a corporation in connection with a promise to work which he failed to perform, and that his doing so was fraudulent. If the conclusion that the prisoner acted with intent to defraud rests on facts and not on the *prima facie* evidence provisions of the statute, none are stated in the warrant or appear in the record. None were so set forth that he could deny them. He obtained the money on the 14th of October, 1942, and the warrant was not sought until January 2, 1943. Whether the original advancement was more or less than $5, what he represented or promised in obtaining it, whether he worked a time and quit, or whether he never began work at all are undisclosed. About all that appears is that he obtained an advancement of $5 from a corporation and failed to keep his agreement to work it out. He admitted those facts and the law purported to supply the element of intent. He admitted the conclusion of guilt which the statute

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express terms but also whether it was denied in substance and effect. If this requires an examination of evidence, that examination must be made. Otherwise, review by this Court would fail of its purpose in safeguarding constitutional rights. Thus, whenever a conclusion of law of a state court as to a federal right and findings of fact are so intermingled that the latter control the former, it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured." *Norris* v. *Alabama*, 294 U. S. 587, 589. See *Lisenba* v. *California*, 314 U. S. 219, 236; *Chambers* v. *Florida*, 309 U. S. 227. "Even though the constitutional protection invoked be denied on non-federal grounds, it is the province of this Court to inquire whether the decision of the state court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be thus evaded." *Broad River Power Co.* v. *South Carolina*, 281 U. S. 537, 540; *Demorest* v. *City Bank Farmers Trust Co.*, 321 U. S. 36.

made *prima facie* thereon. He was fined $20 for each dollar of his debt, and in default of payment was required to atone for it by serving time at the rate of less than 9¢ per day.

Especially in view of the undenied assertions in Pollock's petition we cannot doubt that the presumption provision had a coercive effect in producing the plea of guilty. The statute laid its undivided weight upon him. The legislature had not even included a separability clause.[22] Of course the function of the *prima facie* evidence section is to make it possible to convict where proof of guilt is lacking. No one questions that we clearly have held that such a presumption is prohibited by the Constitution and the federal statute. The Florida Legislature has enacted and twice re-enacted it since we so held. We cannot assume it was doing an idle thing. Since the presumption was known to be unconstitutional and of no use in a contested case, the only explanation we can find for its persistent appearance in the statute is its extra-legal coercive effect in suppressing defenses. It confronted this defendant. There was every probability that a law so recently and repeatedly enacted by the legislature would be followed by the trial court, whose judge was not required to be a lawyer. The possibility of obtaining relief by appeal was not bright, as the event proved, for Pollock had to come all the way to this Court and was required, and quite regularly, to post a supersedeas bond of $500, a hundred times the amount of his debt. He was an illiterate Negro laborer in the toils of the law for the want of $5. Such considerations bear importantly on the decision of a prisoner even if aided by counsel, as Pollock was not, whether to plead guilty and hope for leniency or to fight. It is plain that, had his plight after conviction

[22] The Florida Legislature has made use of separability clauses where separability was the desire. See Florida Laws 1919, cc. 7808, 7936.

not aroused outside help, Pollock himself would have been unheard in any appellate court.

In the light of its history, there is no reason to believe that the law was generally used or especially useful merely to punish deceit. Florida has a general and comprehensive statute making it a crime to obtain money or property by false pretenses [23] or commit "gross fraud or cheat at common law." [24] These appear to authorize prosecution for even the petty amount involved here.[25] We can conceive reasons, even if unconstitutional ones, which might lead well-intentioned persons to apply this Act as a means to make otherwise shiftless men work,[26] but if in addition to this general fraud protection employers as a class are so susceptible to imposition that they need extra legislation, or workmen so crafty and subtle as to constitute a special menace, we do not know it, nor are we advised of such facts.

We think that a state which maintains such a law in face of the court decisions we have recited may not be heard to say that a plea of guilty under the circumstances is not due to pressure of its statutory threat to convict him on the presumption.

As we have seen, Florida persisted in putting upon its statute books a provision creating a presumption of fraud

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[23] Florida Statutes (1941) § 817.01.

[24] Florida Statutes (1941) § 817.29.

[25] These statutes carry permissible maximum punishment such, however, that they may be prosecuted only in courts presided over by judges required to be lawyers and where presumably defendant's rights are more accurately observed. See Florida Constitution, Art. V, §§ 3, 17; Florida Statutes (1941) §§ 32.05, 33.03, 36.01.

[26] Dr. Albert Bushnell Hart in The Southern South, after reviewing and unsparingly condemning evidences of peonage in some regions, says, "Much of the peonage is simply a desperate attempt to make men earn their living. The trouble is that nobody is wise enough to invent a method of compelling specific performance of a labor contract which shall not carry with it the principle of bondage." P. 287.

from the mere nonperformance of a contract for labor service three times after the courts ruled that such a provision violates the prohibition against peonage. To attach no meaning to such action, to say that legally speaking there was no such legislation, is to be blind to fact. Since the Florida Legislature deemed these repeated enactments to be important, we take the Legislature at its own word. Such a provision is on the statute books for those who are arrested for the crime, and it is on the statute books for us in considering the practical meaning of what Florida has done.

In the view we take of the purpose and effect of this *prima facie* evidence provision it is not material whether as matter of state law it is regarded as an independent and severable provision.

III.

We are induced by the evident misunderstanding of our decisions by the Florida Supreme Court, in what we are convinced was a conscientious and painstaking study of them, to make more explicit the basis of constitutional invalidity of this type of statute.

The undoubted aim of the Thirteenth Amendment as implemented by the Antipeonage Act was not merely to end slavery but to maintain a system of completely free and voluntary labor throughout the United States. Forced labor in some special circumstances may be consistent with the general basic system of free labor. For example, forced labor has been sustained as a means of punishing crime,[27] and there are duties such as work on

[27] *United States* v. *Reynolds,* 235 U. S. 133, 149; *Loeb* v. *Jennings,* 133 Ga. 796, 67 S. E. 101, affirmed on other grounds, 219 U. S. 582; *Dunbar* v. *Atlanta,* 7 Ga. App. 434, 67 S. E. 107. Cf. *Chicago* v. *Williams,* 254 Ill. 360, 98 N. E. 666; *Chicago* v. *Coleman,* 254 Ill. 338, 98 N. E. 521.

highways[28] which society may compel. But in general the defense against oppressive hours, pay, working conditions, or treatment is the right to change employers. When the master can compel and the laborer cannot escape the obligation to go on, there is no power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of work. Resulting depression of working conditions and living standards affects not only the laborer under the system, but every other with whom his labor comes in competition. Whatever of social value there may be, and of course it is great, in enforcing contracts and collection of debts, Congress has put it beyond debate that no indebtedness warrants a suspension of the right to be free from compulsory service. This congressional policy means that no state can make the quitting of work any component of a crime, or make criminal sanctions available for holding unwilling persons to labor. The federal statutory test is a practical inquiry into the utilization of an act as well as its mere form and terms.

Where peonage has existed in the United States it has done so chiefly by virtue of laws like the statute in question. Whether the statute did or did not include the presumption seems to have made little difference in its practical effect. In 1910, in response to a resolution of the House of Representatives, the Immigration Commission reported the results of an investigation of peonage among immigrants in the United States.[29] It found that no general system of peonage existed, and that sentiment did not support it anywhere. On the other hand, it found sporadic cases of probable peonage in every state in the Union except Oklahoma and Connecticut. It pointed out that "there has probably existed in Maine the most com-

[28] *Butler* v. *Perry*, 240 U. S. 328.

[29] Report on Peonage, Abstracts of Reports of the Immigration Commission, Vol. II, p. 439, Sen. Doc. No. 747, 61st Cong., 3d Sess.

plete system of peonage in the entire country," in the lumber camps.[30] In 1907, Maine enacted a statute, applicable only to lumber operations but in its terms very like the section of the Florida statute we are asked to sep-

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[30] The operation of the system is described as follows:

"In late years the natives who formerly supplied the labor for the logging concerns in that State have been engaged in the paper mills, and the lumber companies have been compelled to import laborers, largely foreigners, from other States. Boston is the chief labor market for the Maine forests. The employment agents misrepresent conditions in the woods, and frequently tell the laborers that the camps will be but a few miles from some town where they can go from time to time for recreation and enjoyment. Arriving at the outskirts of civilization the laborers are driven in wagons a short distance into the forests and then have to walk sometimes 60 or 70 miles into the interior, the roads being impassable for vehicles. The men will then be kept in the heart of the forest for months throughout the winter, living in a most rugged fashion and with no recreation whatever. A great many of them have rebelled against this treatment, and they have left their employers by the score. The lumbermen having advanced transportation and supplies have appealed to the legislature for protection. In February, 1907, a bill became a law making it a crime for a person to—

> enter into an agreement to labor for any lumbering operation or in driving logs and in consideration thereof receive any advances of goods, money, or transportation, and unreasonably and with intent to defraud, fail to enter into said employment as agreed and labor a sufficient length of time to reimburse his employer for said advances and expenses.

Judges in municipal courts and trial justices were given jurisdiction to try cases under this law, and the act provided that it would take effect immediately upon approval. When this bill was before the legislature, requests were made by citizens interested in factories and other industries that the provisions of the statute be made to protect all employers of labor. The attorney who introduced the bill on behalf of the lumber interests which he represented, has stated that he had refused to accede to these requests, inasmuch as he believed the provision should not be extended. The protection granted by the statute, therefore, was restricted to a favored class, persons interested in 'lumbering operations and in driving logs.'" Peonage Report, *supra* note 29, p. 447.

arate and save. The law was enforcible in local courts not of record. The Commission pointed out that the Maine statute, unlike that of Minnesota [31] and the statutes of other states in the West and South, did not contain a *prima facie* evidence provision. But as a practical matter the statute led to the same result.[32]

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[31] Minnesota Stat. (1941) § 620.64.

[32] "There is no provision in the Maine statute that—

> the failure or refusal of any employee to perform such labor or render such services in accordance with his contract or to pay in money the amount for such transportation or such advancement shall be prima facie evidence of his intent to defraud;

as appears in the contract-labor law of Minnesota and in the statutes of other States in the West and the South. However, justices of the peace in Maine have decided indiscriminately that, in order to obtain a conviction under the law of that State, it is necessary to show only that the laborer obtained the 'advances' and failed 'to labor a sufficient length of time to reimburse his employer.'

"A justice at Houlton, Maine, who is a lawyer by profession, told the attorney representing the peonage committee that he decided in cases brought under the contract-labor law that 'the burden of proof is upon the defendant,' who must show to the court 'beyond a reasonable doubt that he had no intent to defraud.' This justice added that once in a while if a laborer has a really good excuse he will let him off, as he believes 'every man has some rights, although he may be poor.' Another justice of the peace at Patten, Maine, stated that if it was shown that a laborer had obtained the advances and had not worked sufficiently to settle for them he found the defendant guilty without considering the question of intent to defraud. This seems to be the general attitude of the rural justices of Maine toward the contract-labor law.

"Considerable peonage has resulted from this statute. The law has been vigorously enforced. Soon after its passage prosecutions were commenced in the lumber regions, and the jail at Dover, the county seat of one of the large lumber counties of Maine, was crowded with laborers convicted of defrauding their employers out of 'advances of goods, money, or transportation.'

"Involuntary servitude results in utilizing this statute to intimidate laborers to work against their will. On account of the vigorous methods pursued in enforcing the above-described law, it soon became

The fraud which such statutes purport to penalize is not the concealment or misrepresentation of existing facts, such as financial condition, ownership of assets, or data relevant to credit. They either penalize promissory representations which relate to future action and conduct or they penalize a misrepresentation of the present intent or state of mind of the laborer.[33] In these "a hair perhaps divides the false and true." Of course there might be provable fraud even in such matters. One might engage for the same period to several employers, collecting an advance from each, or he might work the same trick of hiring out and collecting in advance again and again, or otherwise provide proof that fraud was his

known throughout the lumber region of Maine that any laborer was liable to imprisonment who refused to work according to the provisions of his contract until he had settled for all advances, no matter what misrepresentations may have been made to induce him to enter into the agreement. The contract-labor law has become a club which the foremen and superintendents draw upon the laborers who refuse to go to work or to continue at work. If a man leaves his employer before settling for advances, he will be pursued and apprehended, or someone will telephone to the constable, who will arrest the laborer. He will then be brought before the justice, and 'sent down the river,' to prison; or if he consents to labor until he shall have reimbursed for all advances and the fine and cost of the prosecution, the employer will settle with the court and constable and will take the laborer back into the forest. No doubt many of the laborers never attempt to escape, although they may consider that they have been basely deceived about the conditions of labor." Peonage Report, *supra* note 29, pp. 448–49.

[33] The Court at one time said, "The law gives a different effect to a representation of existing facts, from that given to a representation of facts to come into existence. To make a false representation the subject of an indictment, or of an action, two things are generally necessary, viz., that it should be a statement likely to impose upon one exercising common prudence and caution, and that it should be the statement of an existing fact. A promissory statement is not, ordinarily, the subject either of an indictment or of an action." *Sawyer* v. *Prickett*, 19 Wall. 146, 160.

design and purpose. But in not one of the cases to come before this Court under the antipeonage statute has there been evidence of such subtlety or design. In each there was the same story, a necessitous and illiterate laborer, an agreement to work for a small wage, a trifling advance, a breach of contract to work. In not one has there been proof from which we fairly could say whether the Negro never intended to work out the advance, or quit because of some real or fancied grievance, or just got tired. If such statutes have ever on even one occasion been put to a worthier use in the records of any state court, it has not been called to our attention. If this is the visible record, it is hardly to be assumed that the off-the-record uses are more benign.

It is a mistake to believe that in dealing with statutes of this type we have held the presumption section to be the only source of invalidity. On the contrary, the substantive section has contributed largely to the conclusion of unconstitutionality of the presumption section. The latter in a different context might not be invalid. Indeed, we have sustained the power of the state to enact an almost identical presumption of fraud, but in transactions that did not involve involuntary labor to discharge a debt. *James-Dickinson Farm Mortgage Co.* v. *Harry.*[34] Absent this feature any objection to *prima facie* evidence or presumption statutes of the state can arise only under the Fourteenth Amendment, rather than under the Thirteenth. In deciding peonage cases under the latter this Court has been as careful to point out the broad power of the state to create presumptions as it has to point out its power to punish frauds. It "has frequently recognized the general power of every legislature to prescribe the evidence which shall be received, and the effect of that evidence in the courts of its own government. In the exercise of this

[34] 273 U. S. 119.

power numerous statutes have been enacted providing that proof of one fact shall be *prima facie* evidence of the main fact in issue; and where the inference is not purely arbitrary and there is a rational relation between the two facts, and the accused is not deprived of a proper opportunity to submit all the facts bearing upon the issue, it has been held that such statutes do not violate the requirements of due process of law." *Bailey* v. *Alabama*.[35] But the Court added that "the State may not in this way interfere with matters withdrawn from its authority by the Federal Constitution or subject an accused to conviction for conduct which it is powerless to proscribe." [36] And it proceeded to hold that the presumption, when coupled with the other section, transgressed those limits, for while it appeared to punish fraud the inevitable effect of the law was to punish failure to perform labor contracts.

In *Taylor* v. *Georgia* both sections of the Act were held unconstitutional. There the State relied on the presumption to convict. But it was not denied that a state has power reasonably to prescribe the *prima facie* inferences to be drawn from circumstantial evidence. It was the substance of the crime to establish which the presumption was invoked that gave a forbidden aspect to that method of short-cutting the road to conviction. The decision striking down both sections was not, as the Supreme Court of Florida thought, a casual and unconsidered use of the plural. Mr. Justice Byrnes knew whereof he spoke; unconstitutionality inhered in the substantive quite as much as in the procedural section and no part of the invalid statute could be separated to be salvaged. Where in the same substantive context the State threatens by statute to convict on a presumption, its inherent coercive power is such that we are constrained to hold that it is equally use-

[35] 219 U. S. 219, 238.

[36] 219 U. S. 219, 239.

ful in attempts to enforce involuntary service in discharge of a debt, and the whole is invalid.

It is true that in each opinion dealing with statutes of this type this Court has expressly recognized the right of the state to punish fraud, even in matters of this kind, by statutes which do not either in form or in operation lend themselves to sheltering the practice of peonage. Deceit is not put beyond the power of the state because the cheat is a laborer nor because the device for swindling is an agreement to labor. But when the state undertakes to deal with this specialized form of fraud, it must respect the constitutional and statutory command that it may not make failure to labor in discharge of a debt any part of a crime. It may not directly or indirectly command involuntary servitude, even if it was voluntarily contracted for.

From what we have said about the practical considerations which are relevant to the inquiry whether any particular state act conflicts with the Antipeonage Act of 1867 because it is one by which "any attempt shall hereafter be made to establish, maintain or enforce" the prohibited servitude, it is apparent that we should not pass on hypothetical acts. Reservation of the question of the validity of an act unassociated with a presumption now, as heretofore, does not denote approval. The Supreme Court of Florida has held such an act standing alone unconstitutional.[37] A considerable recorded experience would merit examination in relation to any specific labor fraud act.[38] We do not enter upon the inquiry further than the Act before us.

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[37] *Goode* v. *Nelson*, *supra* note 18.

[38] On the practical effect of such laws as amounting to the existence of involuntary servitude in the United States, see: Peonage, Encyclopedia of Social Sciences; Commons & Andrews, Principles of Labor Legislation, p. 37; Wilson, Forced Labor in the United States, Chapters VI and VII; "Report of Chas. W. Russell, Assistant Attorney General, Relative to Peonage Matters," in Report of Attorney General (1937) p. 207; and Report of Immigration Commission, *supra* note 29.

Another matter deserves notice. In *Bailey* v. *Alabama* it was observed that the law of that state did not permit the prisoner to testify to his uncommunicated intent, which handicapped him in meeting the presumption. In *Taylor* v. *Georgia* the prisoner could not be sworn, but could and did make a statement to the jury. In this Florida case appellee is under neither disability, but is at liberty to offer his sworn word as against presumptions. These distinctions we think are without consequence. As Mr. Justice Byrnes said in *Taylor* v. *Georgia,* the effect of this disability "was simply to accentuate the harshness of an otherwise invalid statute."

We impute to the Legislature no intention to oppress, but we are compelled to hold that the Florida Act of 1919 as brought forward on the statutes as §§ 817.09 and 817.10 of the Statutes of 1941 are, by virtue of the Thirteenth Amendment and the Antipeonage Act of the United States, null and void. The judgment of the court below is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

Reversed.

MR. JUSTICE REED, dissenting:

The Thirteenth Amendment to the Constitution of the United States reads as follows:

"Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

"Section 2. Congress shall have power to enforce this article by appropriate legislation."

To meet the problem of peonage, that is, "compulsory service in payment of a debt," [1] Congress enacted the legislation set out in note 8 of the Court's opinion which de-

[1] *Bailey* v. *Alabama,* 219 U. S. 219, 242.

cleared invalid laws of a state by virtue of which involuntary service is enforced or attempted to be enforced in liquidation of any debt. This Court reiterates today in accordance with its previous rulings that the second section of the Florida statute, § 817.10 set out in note 1 of today's opinion, is invalid under the Thirteenth Amendment and the Federal Act because this second section enforces labor by fear of conviction of the crime denounced in the first section. The second section provides that a refusal to perform labor for which one has contracted and been paid in advance is prima facie evidence of an intent to defraud under the first section which makes it a crime to obtain money with intent to defraud under a contract to perform labor. This conclusion is accepted as a proper interpretation of the Federal prohibitions. In the effort to obliterate compulsory labor to satisfy a debt, Congress may invalidate a state law which coerces that labor by fear of a conviction obtained by a presumption of law which may be false in fact. *Taylor* v. *Georgia,* 315 U. S. 25.

However much peonage may offend our susceptibilities, and however great our distaste for a statute which is capable of use as a means of imposing peonage on the working man, the present statute is, in this Court, no more immune than any other which a state may enact, from the salutary requirement that its constitutionality must be presumed, and that the burden rests on him who assails it, on constitutional grounds, to show that it is either unconstitutional on its face or that it has been or will be in fact so applied as to deny his constitutional rights.

This Court now holds, as it has held before, that when the presumption section is applied in the trial of a criminal charge under the substantive section, both are invalid and a conviction thus obtained by resort to a presumption of law which may be false in fact, cannot be sustained. But the Court's opinion fails to bridge the gap between

these earlier decisions of the Court and its present conclusion that the substantive provision, when resorted to alone as the basis for a sentence on an admission of guilt, is likewise invalid, because of the mere existence of the presumption section.

Whether this conclusion rests upon the ground that the State of Florida cannot constitutionally make it a penal offense for a laborer fraudulently to procure advances of wages for which he intends to render no service or upon the ground that the presumption section has in fact operated in this case to coerce petitioner's plea of guilty, the one is plainly without support in law and the other is without support in the record.

So far as the decision of the Court rests on the ground that the substantive section is unconstitutional on its face, the decision necessarily proceeds on the assumption that because of the Thirteenth Amendment a state is without power to punish a workman who fraudulently procures an advance of a wage when he intends not to work for it, or that the two sections in law and in fact are inseparable in their application so that the substantive section is tainted by the presumption section, although in this case it is not shown to have influenced the plea of guilty.

We are given no constitutional reason for saying that a state may not punish the fraudulent procurement of an advance of wages as well as the giving of a check drawn on a bank account in which there are no funds, or any other course of conduct which the common law has long recognized, as the procuring of money or property by fraud or deceit. There is of course no constitutional reason why Florida should not punish fraud in labor contracts differently from fraud in other classes of contracts. Legislation need not seek to correct every abuse by a single enactment. The state may select its objective. *Whitney* v. *California*, 274 U. S. 357, 370; *Tigner* v. *Texas*, 310 U. S.

141, 149. The Constitution does not require that all persons should be treated alike but only that those in the same class shall receive equal treatment.

Not only has the Supreme Court of Florida held as a matter of law that the two sections of the statute now before us are separable,[2] but it is obvious that as a matter of law the presumption section is not called into operation where, as here, the accused does not go to trial but pleads guilty to the substantive charge. In rejecting these conclusions as to the separability of the two sections, we take it that the Court is not rejecting the Supreme Court of Florida's interpretation of the Florida statute, but rather that it concludes as a matter of fact that the presumption section is so all-pervasive in its operation that we must

[2] The Supreme Court of Florida said: "This is not the first challenge of the act which has appeared in this court. The identical matter was considered in *Phillips* v. *Bell*, 84 Fla. 225, 94 So. 699, where the court concluded that the portion of the law defining the crime was harmonious with the Thirteenth Amendment, and observed, without deciding the point, that if the part referring to the prima facie character of certain evidence should be pronounced unconstitutional the ruling would not affect the remainder."

The court then took up *Bailey* v. *Alabama*, 211 U. S. 452, and noted as to it: "We think it very significant that the court remarked upon the lack of doubt that the offenses defined could be made a crime. Gist of the decision, as we understand it, was, summarizing, that the part of the law describing the crime and the one providing for the presumption were not interdependent and that if, in the prosecution, the state did not resort to the latter the validity of the former would be unaffected."

Later, speaking of our opinion in the *Taylor* case, the Florida court said: "The section anent presumptive evidence had been relied upon to secure a conviction, so the court again had for determination the question of the constitutionality of the first section when the second was brought into play. Not being faced with that problem here we conclude that the first Bailey decision and ours in *Phillips* v. *Bell* are in accord and that they in turn are not in conflict with the rulings in the second Bailey case and *Taylor* v. *Georgia, supra*."

conclude without further proof that it so operated in petitioner's case as to coerce his plea of guilty to the charge of violating the substantive section.

But neither the present record nor any facts of which we can take judicial notice lend support to that conclusion. For all that appears petitioner had no defense to the charge even though the substantive section had stood alone. Unless we are to presume that the statute can only be given an unconstitutional application, we cannot say that petitioner had any defense to the charge of fraud to which he pleaded guilty, and certainly we cannot treat the presumption section as depriving him of a defense which he did not have.

The Court apparently concludes that the enactment and maintenance of the presumption section, after a determination here of its invalidity, makes the entire statute invalid on its face. This result is reached by assuming that the existence of the presumption section coerces involuntary labor under the contract by fear of conviction for violation of the first or substantive section. We cannot properly take judicial notice of such an effect. If pleaded and proven a different situation would emerge.

The petition for habeas corpus in this case can hardly be said to go farther than object to conviction on the ground of the unconstitutionality of the Florida statute as a whole. No coercion to plead guilty is alleged. The statements in the petition as to lack of counsel and of knowledge of the elements of the offense are referred to in the Court's opinion but we do not understand that the Court relies upon them. No use was made of the presumption section at the trial. Petitioner pleaded guilty to the substantive crime. No allegations or proof appear in the record that the Florida statute was used or applied to promote peonage or involuntary servitude of petitioner or to coerce his plea of guilty. The decision is in effect that

because the two sections standing together are capable of being used in violation of the Thirteenth Amendment and the peonage act, each must be taken to be invalid on its face. The presumption of constitutionality of statutes is a safeguard wisely conceived to keep courts within constitutional bounds in the exercise of their extraordinary power of judicial review. It should not be disregarded here.

We cannot conclude that a statute which merely punishes a fraud in a contract, as the first section does if considered alone, violates the provision of the Thirteenth Amendment against involuntary servitude or is null and void under 8 U. S. C. § 56 because it is an attempt to enforce compulsory service for a debt. Conviction under the statute results not in peonage, work for a debt, but in punishment for crime, probably in the county workhouse. Cf. *United States* v. *Reynolds,* 235 U. S. 133, 149. The conception embodied in the Court's opinion that the fear of conviction for his fraud might compel the defendant to work as agreed is without basis in the record. At any rate, fear of punishment is supposed to be a deterrent to crime.

The conviction should be affirmed.

The CHIEF JUSTICE joins in this dissent.

Counsel for Parties.

UNITED STATES ET AL. *v.* MARSHALL TRANSPORT CO. ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

No. 589. Argued March 28, 1944.—Decided May 1, 1944.

On an application to the Interstate Commerce Commission of two carriers by motor vehicle for permission for one to purchase the property and operating rights of the other, the Commission found that the proposed vendee was controlled through stock ownership by a non-carrier. *Held* that by the proposed transaction the non-carrier would "acquire control of another carrier through ownership of its stock or otherwise," within the purview of § 5 (2) (a) of Part I of the Interstate Commerce Act, as amended by the Transportation Act of 1940; that § 5 (2) (b) required that application to the Commission for approval be made by the non-carrier; and that in the absence of an application from the non-carrier the Commission was without authority to approve the transaction. Pp. 37, 41.

52 F. Supp. 1010, reversed.

APPEAL from a decree of a district court of three judges which set aside an order of the Interstate Commerce Commission, 39 M. C. C. 271.

Mr. Daniel H. Kunkel, with whom *Solicitor General Fahy, Assistant Attorney General Berge,* and *Messrs. Robert L. Pierce, Walter J. Cummings, Jr.,* and *Daniel W. Knowlton* were on the brief, for the United States et al.; and *Mr. Charles E. Cotterill,* with whom *Mr. Harold G. Hernly* was on the brief, for the Coastal Tank Lines, Inc. et al.,—appellants.

Mr. Robert C. Winter, with whom *Messrs. George H. Klein, Bigham D. Eblen,* and *Harry S. Elkins* were on the brief (*Mr. Robert W. Williams* entered an appearance), for appellees.

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

On an application to the Interstate Commerce Commission of two carriers by motor vehicle, appellee Refiners Transport Terminal Corporation and appellee Marshall Transport Company, for permission for Refiners to purchase the property and operating rights of Marshall, the Commission found that Refiners, the vendee-carrier, was controlled through stock ownership by a non-carrier, Union Tank Car Company, and that the proposed purchase would result in the acquisition by Union of control of the property and business of Marshall. Construing §§ 5 (2) (a) and (b) of Part I of the Interstate Commerce Act, 24 Stat. 379, as amended by the Transportation Act of 1940, 54 Stat. 905, 49 U. S. C. §§ 5 (2) (a) and (b), as requiring the application to be made by Union, the non-carrier corporation controlling Refiners, the Commission denied the application of the carriers for lack of power in the Commission to approve the purchase.

The questions for our decision are (1) whether the acquisition of the property and franchises of one carrier by another, which is controlled by a non-carrier, involves the acquisition of control of the first or vendor-carrier by the non-carrier for which the Commission's approval is required by § 5 (2) (a) of the Interstate Commerce Act; and if so (2) whether the Commission rightly held that under § 5 (2) (b) of the Act it could not consider the propriety of the transaction in the absence of an application by the non-carrier for the Commission's authority to acquire control.

Appellee Refiners holds certificates of public convenience and necessity from the Interstate Commerce Commission to operate as a common carrier, by motor vehicle, of gasoline and petroleum products in Pennsylvania and eight of the central states. Refiners, as the Commission

found, is controlled through ownership of 82.6% of its outstanding common stock by Union Tank Car Company, a non-carrier corporation. Marshall, a corporation, holds a certificate of public convenience and necessity under the grandfather clause, § 206 of the Interstate Commerce Act, 49 U. S. C. § 306, authorizing carriage, as a common carrier, of petroleum products, in bulk in tank trucks, over irregular routes in Maryland, Delaware, Pennsylvania, Virginia, and Washington, D. C. By their joint application Refiners and Marshall sought authority of the Commission under § 5 (2) (a) for Refiners to acquire by purchase the operating property and rights of Marshall.

After a hearing on the application, in which nine motor carriers, co-appellants here, appeared as protestants, and the Antitrust Division of the Department of Justice intervened, Division 4 of the Commission issued its report finding that the proposed purchase was within the scope of § 5 (2) (a) and (b) and would be consistent with the public interest. It overruled contentions of the protestants that the proposed purchase would result in the acquisition of control of Marshall by Union, the non-carrier, through its control of Refiners, the purchaser, so as to require that Union join in the application. 39 M. C. C. 93. On petition for rehearing the Commission reversed the holding of Division 4. It concluded that as Union, the non-carrier, already controlled one carrier, Refiners, the purchase of the property and business of Marshall by Refiners would result in their control by Union, and that under §§ 5 (2) (a) and (b) and related sections this could not be done without an application by Union for the Commission's authority to do so. 39 M. C. C. 271.

Union having failed to apply for that authority within the twenty days allowed for that purpose by the Commission's order, the Commission dismissed the pending application of Refiners and Marshall. Upon the suit of appel-

lees the District Court for Maryland, three judges sitting, set aside the Commission's order, Circuit Judge Soper dissenting, 52 F. Supp. 1010, and the case comes here on appeal under 28 U. S. C. §§ 47 (a), 345.

Section 5 (2) (a) of the Act, makes it "lawful, with the approval and authorization of the Commission . . . for two or more carriers to consolidate or merge their properties or franchises . . . into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier . . . to purchase . . . the properties . . . of another; . . . or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise."

Section 5 (2) (b) provides that "Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission. . . ." And § 5 (3) provides that "Whenever a person which is not a carrier is authorized, by an order entered under paragraph (2), to acquire control of any carrier or of two or more carriers, such person thereafter shall, to the extent provided by the Commission in such order, be considered as a carrier subject to" specified provisions of the Act, relating mainly to the keeping of accounts, the making of reports, access to records, the issuance of securities and the assumption of liabilities.

Section 5 (4) makes it "unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of subparagraph (a) thereof, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of . . . a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. . . . As used in this paragraph and paragraph (5), the words

'control or management' shall be construed to include the power to exercise control or management."

In determining whether, under the non-carrier control clause of § 5 (2) (a), Union, the non-carrier here, is required to file an application with the Commission, the issue turns on the questions whether, within the meaning of the statute, Union is by the proposed transaction attempting to "acquire control" of Marshall and, if so, whether Union is within the requirement of § 5 (2) (b) that the person seeking the authority of the Commission to acquire such control shall present his application to the Commission. In answering these questions the District Court thought that the several instances specified by § 5 (2) (a), in which the Commission is authorized to permit acquisition of carrier control, are separate and independent of each other so that, the Commission having full authority to authorize Refiners to purchase Marshall under the merger and purchase provisions of § 5 (2) (a), its authority in that respect is not limited or superseded by the non-carrier control provision appearing later in the subparagraph and that provision is therefore inapplicable.

In any case, the District Court concluded that these provisions are permissive only, giving the Commission authority to act with respect to any one without regard to the restriction imposed by any other. Since Refiners' and Marshall's application to the Commission for approval of Refiners' purchase of Marshall's property and operating rights are within the permissive authority of the Commission under the purchase provision of § 5 (2) (a), the Court thought that it was not necessary for Union to comply with the non-carrier provision and with the requirement of § 5 (2) (b) by joining in the application even though the non-carrier provision would otherwise be applicable to the transaction.

But this overlooks the fact, which the Commission thought controlling, that the present transaction may fall

within both the purchase provision and the non-carrier control provision of the statute since it involves not only the purchase of Marshall by Refiners but also the acquisition of control of Marshall by Union, through its control of Refiners. The question then is not whether the non-carrier control provision limits or supersedes the purchase provision but whether, as the Commission thought, both apply, and if so the extent to which they restrict the Commission's authority to approve the acquisition of control by a non-carrier which has not filed an application pursuant to § 5 (2) (b).

As a matter of statutory construction it does not follow that such parts of the proposed transaction in this case as are subject to the requirement of the non-carrier control provision can escape that requirement because the transaction also involves a purchase which falls within and satisfies the requirement of the purchase provision of the statute. Section 5 (4) prohibits each of the transactions enumerated in § 5 (2) (a) unless approved by the Commission. And it is plain that if the proposed transaction involves Union's non-carrier control of Marshall within the meaning of § 5 (2) (a) appropriate application to the Commission for its approval must be made in conformity to § 5 (2) (b). Hence our inquiry must be directed to the nature of the requirement of the non-carrier control provision of the statute and to the question whether if applicable it is satisfied by appellees' application to the Commission in which Union did not join.

It is not doubted that if Union, having control of Refiners, sought to acquire stock control of Marshall, Union would be required by § 5 (2) (b) to apply for the Commission's authority to do so. But it is said that having control of Refiners, Union may, by procuring Refiners' compliance with the purchase provisions of the statute alone, extend its control indefinitely to other carriers merely by directing the purchase of their property and

business by Refiners, without subjecting itself to the jurisdiction of the Commission as provided in § 5 (3), so long as Union does not act directly as the purchaser of the property [1] or of a controlling stock interest in such other carriers.

We think that neither the language nor the legislative history of the statute admits of so narrow a construction. Section § 5 (4) makes it unlawful, without the approval of the Commission as provided by § 5 (2) (a), for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise. Not only is this language broad enough in terms to embrace the acquisition of control by a non-carrier through the purchase, by a controlled carrier, of the property and business of another carrier, but the legislative history indicates that such was its purpose.

Congress, by § 407 of the Transportation Act of 1920, 41 Stat. 480, amended the Interstate Commerce Act so as to provide in § 5 (2) that the Commission should have authority to permit a rail carrier or carriers to acquire control of another by lease or purchase of stock; by § 5 (8) the carriers affected were relieved from the operation of the antitrust laws, and by § 5 (6) the Commission was authorized upon special conditions to approve the actual consolidation of rail carriers. By the 1933 amendment of § 5 (2), 48 Stat. 217, the Commission was given further authority to permit unified control of two separate carriers "through ownership of their stock" and in 1940, § 5 (2) (a) was amended to read as at present by the addition

[1] Such an acquisition of operating property, whether or not within § 5 (2) (a), would render the acquiring corporation an operating carrier within §§ 203 (a) (14)–(16) subject as such to the jurisdiction of the Commission under Part II. Similarly the transfer of the carrier's operating franchises would be subject to the Commission's jurisdiction under § 212 (b).

of the words "or otherwise" to the phrase last quoted, and the section was made applicable to motor carriers, 54 Stat. 905. Section 1 (3) (b) of the Act as amended in 1940 declares that "control" "shall be construed to include actual as well as legal control, whether maintained or exercised through or by reason of the method of or circumstances surrounding organization or operation, through or by common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or through or by any other direct or indirect means; and to include the power to exercise control."

The Conference Committee Report on the Transportation Act of 1940, H. R. Rep. No. 2832, 76th Cong., 3d Sess., p. 63, points out that this definition of "control" was added in order to make applicable to specified sections of the Act, including § 5, the benefit of the interpretation of this Court in *Rochester Telephone Co.* v. *United States*, 307 U. S. 125, 145–6, of the similar definition of "control" in § 2 of the Communications Act of 1934, 48 Stat. 1065, 47 U. S. C. § 152 (b). In that case this Court had emphasized the breadth of the statutory language as embracing every type of control in fact. It had declared that the existence of control must be determined by a regard for the "actualities" of intercorporate relationships and that the Commission's determinations of fact, if warranted by the record, were conclusive.

Here the statute has declared that the non-carrier control to be approved by the Commission is control through stock ownership "or otherwise." § 5 (2) (a). It has in the broadest terms prohibited the effectuating of "control or management . . ., however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company . . ., or in any other manner whatsoever." § 5 (4). "Control or management" is defined to include "the power to exercise control or management." § 5 (4). The con-

trol or management whose acquisition is prohibited unless the approval of the Commission is secured is that which is obtained "in any . . . manner whatsoever" "however such result is attained, whether directly or indirectly," § 5 (4). It includes "actual as well as legal control," § 1 (3) (b), and "the power to exercise control or management," § 5 (4).

Appellees argue that the Commission, in finding that the proposed purchase of the property and franchises of Marshall would be an acquisition of "control" requiring the Commission's approval under §§ 5 (2) (a) and 5 (4), disregarded the words of the statute which speaks only of acquisition of control of another "carrier," defined in § 1 (3) (a) as a person, "natural or artificial," and not of acquisition of control of its property. But such a literal interpretation of the statute ignores its essential object. What § 5 (4) read with § 5 (2) (a) prohibits, unless authorized by the Commission, is the merger by two or more carriers of "their properties or franchises . . . into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership," and the acquisition by a non-carrier, having control of one carrier, of control of another, or the effectuating in any other manner of "the control or management in a common interest of any two or more carriers."

The statute is thus concerned, not merely with the acquisition of control of one corporation by another, but with the acquisition of control of a corporation which is doing the business of a carrier, because such control is in effect control of its carrier business. Control of that business, which may be effected by stock ownership, may also be "otherwise" effected through a contract of a controlled carrier to purchase the business of the other carrier, if the purchase receives the approval of the Commission. The power thus acquired over the vendor-carrier by the contract of purchase is the power "to exercise control or

management" over its carrier business which, under § 5 (4), can become effective only with the approval of the Commission. As the Commission pointed out in its report, there can be no more direct or positive manner of obtaining control than by outright purchase of another carrier's business and property and the purpose of the Act would be defeated if outright purchase, through the medium of a controlled subsidiary carrier, of another carrier's property and operating rights, were exempted, while control by purchase of stock of the other carrier through the same subsidiary remained within the Act.

The Commission also emphasized the fact that, as the motor carrier business is now organized, purchase of the assets and franchises of carriers would be the usual and in many cases the only feasible method of acquiring control of them. It pointed out that many of the businesses are owned by individuals or partnerships, often possessing extensive operating rights. In the case of corporations their stock is usually closely held and they are without outstanding long-term debt obligations. In all these cases a simple and usual method of acquiring control of other carriers is by the cash purchase of their assets and operating rights and the assumption of their liabilities followed by liquidation of the vendor. The Commission concluded, "Proceeding thus through a controlled subsidiary, a non-carrier holding company, or others, may expand at will without becoming subject to our jurisdiction under the construction adopted by the division. We cannot agree to that construction of 'control' as used in the act." 39 M. C. C. at 275. For the reasons which we have stated we think the Commission's construction of the Act in this respect is correct.

The question remains whether the Commission had authority to proceed in the absence of any application by Union. By § 5 (4) any transaction within the scope of

subparagraph (a) of paragraph (2) is unlawful except as provided by that paragraph, which includes subparagraph (b). Section 5 (2) (a), read with § 5 (4), requires the acquisition of control to be with the approval of the Commission. And § 5 (2) (b) requires the "person" seeking authority for a transaction covered by subparagraph (a), here the non-carrier control of Marshall, to present an application to the Commission. The Commission may approve the application "subject to such terms and conditions and such modifications as it shall find to be just and reasonable." The purpose of these provisions of §§ 5 (2) (b) and 5 (4) is apparent when they are read with § 5 (3), which authorizes the Commission, by its order permitting non-carrier control, to require such non-carrier to be considered a carrier subject to the Act to the extent provided in the order made in conformity to § 5 (3).

The control over the non-carrier contemplated by § 5 (3) can be acquired only if the non-carrier subjects itself to the jurisdiction of the Commission by filing its application with the Commission for its approval of such non-carrier control as is provided by § 5 (2) (b). The purpose of § 5 (3) to subject the non-carrier, thus acquiring control, to specified provisions of the Act would be defeated if the non-carrier were not to become subject to the Commission's order. That is avoided by making it unlawful to acquire non-carrier control save on the non-carrier's application to the Commission in conformity to § 5 (2) (b). As appellees' application to the Commission involved the acquisition of non-carrier control of Marshall by Union, Union was a person seeking authority for such control and as such was required by § 5 (2) (b) to make application to the Commission. To approve the transaction involving such non-carrier control without the application of the non-carrier would be to authorize

Union's non-carrier control of Marshall without subjecting the former to the Commission's jurisdiction as required by § 5 (3).

The Commission rightly concluded that it was without authority to approve such control unless Union, the non-carrier, filed its application with the Commission, and since Union failed to do so within the time allowed by the Commission's order, the Commission properly dismissed the pending application in which Union had failed to join. It was therefore error for the District Court to set aside the Commission's order and the judgment of the District Court is

Reversed.

MR. JUSTICE ROBERTS is of the opinion that the judgment should be affirmed for the reasons given by the District Court.

THE ANACONDA ET AL. *v.* AMERICAN SUGAR REFINING CO.

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

No. 649. Argued March 29, 1944.—Decided April 24, 1944.

The parties to an agreement for arbitration of disputes arising out of a charter party can not by stipulation make unavailable the right of the aggrieved party under § 8 of the United States Arbitration Act to begin his proceeding by "libel and seizure of the vessel . . . according to the usual course of admiralty proceedings." P. 46.
138 F. 2d 765, affirmed.

CERTIORARI, 321 U. S. 758, to review the reversal of a judgment, 48 F. Supp. 385, dismissing a libel in admiralty.

Mr. Cody Fowler for petitioners.

Mr. Henry N. Longley, with whom *Mr. John W. R. Zisgen* was on the brief, for respondent.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

We granted certiorari because this case poses an important question arising under the United States Arbitration Act.[1] The question arises in these circumstances. The petitioner Smith-Rowland Company, Inc., as owner, chartered to the respondent, American Sugar Refining Company, the barge "Anaconda" for a voyage from Havana, Cuba, to Port Everglades, Florida. After arrival at the latter port, the respondent filed in a federal district court a libel in personam against the petitioner with a prayer for process of foreign attachment, and in rem against the vessel, which was seized by the marshal.

Smith-Rowland Company, Inc., appearing specially, excepted to the jurisdiction of the court, relying on a provision of the charter party which was: "Any and all differences and disputes of whatsoever nature arising out of this charter shall be put to arbitration at the final place of discharge . . . pursuant to the provisions of the United States Arbitration Act . . . *except that the provisions of Section 8 thereof shall not apply to any arbitration hereunder.*" (Italics supplied.)

Section 8 of the Act is: "If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel . . . according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award."

The court treated the petitioner's exception as a motion to dismiss, and ordered dismissal[2] on the ground that it was competent to the parties, while availing themselves of the

[1] Act of February 12, 1925, c. 213, 43 Stat. 883; Title 9 U. S. C.

[2] 48 F. Supp. 385.

provisions of the Act rendering arbitration agreements enforceable in courts of admiralty, to preclude resort to the usual process of seizure as security for compliance with any arbitral award. The respondent appealed from the order, and the parties entered a stipulation for value pursuant to which the barge was released from the marshal's custody. The Circuit Court of Appeals reversed the judgment.[3] We hold its action was right.

Within the spheres of its operation,—maritime transactions and transactions in commerce, interstate and with foreign nations,—the Arbitration Act rendered a written provision in a contract by the parties to such a transaction, to arbitrate controversies arising thereout, specifically enforceable. Thereby Congress overturned the existing rule that performance of such agreements could not be compelled by resort to courts of equity or admiralty.[4]

After declaring (§ 2)[5] such agreements to be enforceable, Congress, in succeeding sections, implemented the declared policy. By § 3 it provided that "if any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court . . . shall on application of one of the parties stay the trial . . . until such arbitration has been had" if the applicant is not in default in proceeding with such arbitration. The section obviously envisages action in a court on a cause of action and does not oust the court's jurisdiction of the action, though the parties have agreed to arbitrate. And, it would seem there is nothing to prevent the plaintiff from commencing the action by attachment if such procedure is available

[3] 138 F. 2d 765.

[4] See *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109; 120–121, 123.

[5] The sections have the same section numbers in Title 9 of the United States Code.

under the applicable law. This section deals with suits at law or in equity. The concept seems to be that a power to grant a stay is enough without the power to order that the arbitration proceed, for, if a stay be granted, the plaintiff can never get relief unless he proceeds to arbitration.

Section 8, that with which we are especially concerned, deals with the admiralty jurisdiction. It has already been quoted. If the cause of action is one cognizable in admiralty, then, though the parties have agreed to arbitrate, "*notwithstanding anything herein* [i. e. in the Act] *to the contrary,*" the party claiming to be aggrieved may begin "his proceeding hereunder by libel and seizure," "according to the usual course of admiralty proceedings," and the court may direct the parties to proceed with arbitration and retain jurisdiction to enter its decree on the award. Here again the Act plainly contemplates that one who has agreed to arbitrate may, nevertheless, prosecute his cause of action in admiralty, and protects his opponent's right to arbitration by court order. Far from ousting or permitting the parties to the agreement to oust the court of jurisdiction of the cause of action the statute recognizes the jurisdiction and saves the right of an aggrieved party to invoke it.

Finally we turn to § 4, which permits "a party aggrieved by the alleged failure" of his opponent to arbitrate as agreed, to petition any federal court of appropriate jurisdiction at law, in equity or in admiralty, for an order directing that arbitration proceed. Provision is made for framing an issue and trying it as to whether the parties are bound to arbitrate and the entry of an order accordingly. From this provision it is clear that the parties may proceed in an admiralty case without the customary libel and seizure. And it has been so held.[6]

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[6] *The Aakre,* 21 F. Supp. 540.

Section 8 says the aggrieved party, "notwithstanding" the right granted by § 4, may begin a suit in admiralty by libel and seizure. Our question is whether the Act contemplates or permits consensual elimination of the procedure thus saved by the Act and contractual confinement of the aggrieved party's resort to a court to a petition for an order to arbitrate under § 4. We think the answer must be in the negative. Congress may have thought it wise not to raise doubts under the admiralty clause of the Constitution. It may have thought that in many causes in admiralty if the aggrieved party could not seize the ship of his opponent, an arbitral award would be wholly unenforceable as the vessel might seldom or never again be within the jurisdiction of our courts. But, whatever its reasons, Congress plainly and emphatically declared that although the parties had agreed to arbitrate, the traditional admiralty procedure with its concomitant security should be available to the aggrieved party without in any way lessening his obligation to arbitrate his grievance rather than litigate the merits in court.

It is enough that Congress has so declared. We think a party can not stipulate away such a jurisdiction which the legislation declares open as heretofore.

The judgment is

Affirmed.

Counsel for Parties.

GREAT NORTHERN LIFE INSURANCE CO. *v.* READ, INSURANCE COMMISSIONER.

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

No. 235. Argued January 31, 1944.—Decided April 24, 1944.

1. On review by certiorari of a judgment of the Circuit Court of Appeals, the respondent may urge in support of the judgment a contention which was sustained by the District Court. P. 49.
2. A foreign insurance company brought suit in the federal district court of Oklahoma against the Insurance Commissioner of Oklahoma, to recover payments made to him pursuant to a state statute which levied a tax of four per cent on premiums received by foreign insurance companies in the State. Section 12665, Oklahoma Statutes of 1931, prescribed a judicial procedure for recovery of money wrongfully collected as taxes. *Held:*

   (1) The suit was a suit against the State, and not maintainable without its consent. Eleventh Amendment; *Smith* v. *Reeves,* 178 U. S. 436. P. 53.

   (2) The State had consented to its being sued only in its own courts, and the suit was therefore not maintainable in the federal court. P. 55.
3. A State may limit to its own courts suits against it to recover taxes; and its intent in respect of such suits to submit to the jurisdiction of courts other than those of its own creation must clearly appear. P. 54.
4. *Smyth* v. *Ames,* 169 U. S. 466; *Reagan* v. *Farmers' Loan & Trust Co.,* 154 U. S. 362; and *Gunter* v. *Atlantic Coast Line,* 200 U. S. 273, distinguished. P. 55.

136 F. 2d 44, vacated.

CERTIORARI, 320 U. S. 726, to review the affirmance of a judgment dismissing on the merits a suit to recover sums alleged to have been illegally exacted as taxes.

Messrs. Charles R. Holton and *John A. Johnson,* with whom *Mr. Herbert R. Tews* was on the brief, for petitioner.

Mr. Fred Hansen, First Assistant Attorney General of Oklahoma, with whom *Mr. Randell S. Cobb,* Attorney General, was on the brief, for respondent.

Mr. John H. Miley filed a brief, as *amicus curiae,* in support of petitioner.

MR. JUSTICE REED delivered the opinion of the Court.

This writ brings here for review the action of petitioner, a foreign insurance company, to recover taxes paid to respondent, the Insurance Commissioner of Oklahoma, which were levied by § 10478, Oklahoma Statutes 1931, as amended by Chapter 1 (a), Title 36, Session Laws of Oklahoma 1941. This was an annual four per cent tax on premiums received by foreign insurance companies in Oklahoma, and it, together with certain specified fees, was in lieu of all other taxes and fees in Oklahoma. Petitioner paid the tax under protest and, alleging diversity of citizenship, 28 U. S. C. § 41, brought suit against the Insurance Commissioner in the District Court of the United States. The procedure for recovery is laid down by § 12665, Oklahoma Statutes 1931.[1]

[1] "12665. Payment Under Protest Where Relief by Appeal Not Provided—Action to Recover.

"In all cases where the illegality of the tax is alleged to arise by reason of some action from which the laws provide no appeal, the aggrieved person shall pay the full amount of the taxes at the time and in the manner provided by law, and shall give notice to the officer collecting the taxes showing the grounds of complaint and that suit will be brought against the officer for recovery of them. It shall be the duty of such collecting officer to hold such taxes separate and apart from all other taxes collected by him, for a period of thirty days and if within such time summons shall be served upon such officer in a suit for recovery of such taxes, the officer shall further hold such taxes until the final determination of such suit. All such suits shall be brought in the court having jurisdiction thereof, and they shall have precedence therein; if, upon final determination of any such suit, the court shall determine that the taxes were illegally collected, as not

The percentage of premiums due was increased from two to four per cent by the amendment of 1941, effective April 25th of that year. The District Court refused recovery. The Circuit Court of Appeals affirmed. *Great Northern Life Insurance Co.* v. *Read,* 136 F. 2d 44. Certiorari was granted on petitioner's assertion of error in requiring it to pay a tax allegedly discriminatory under the Fourteenth Amendment as compared with the taxation of domestic insurance companies, and also unconstitutional as levied after the company's admission to the state and on premiums collected during the business year for which a license was already in force. A conflict in principle was suggested with *Hanover Fire Insurance Co.* v. *Harding,* 272 U. S. 494. We granted certiorari, 320 U. S. 726, and asked discussion of the right of petitioner to maintain its suit in a federal court. As we conclude that this suit could not be maintained in the federal court, we do not reach the merits of the issue as to the validity of the tax.

The right of petitioner to maintain this suit in a federal court depends, first, upon whether the action is against an individual or against the State of Oklahoma. Secondly, if the action is determined to be against the state, the question arises as to whether or not the state has consented to suit against itself in the federal court.

Respondent challenged the right of petitioner to seek relief in the District Court by the defense in its answer that the complaint fails to state a claim upon which relief can be granted. R. C. P. 12 (b) and (e).[2] This challenge,

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being due the state, county or subdivision of the county, the court shall render judgment showing the correct and legal amount of taxes due by such person, and shall issue such order in accordance with the court's findings, and if such order shows that the taxes so paid are in excess of the legal and correct amount due, the collecting officer shall pay to such person the excess and shall take his receipt therefor."

[2] There is here no want of jurisdiction of the parties or subject matter. We are not passing upon a certification of an issue as to juris-

on the ground that the state had not consented to be sued, was sustained by the District Court. The contention is available here to sustain the judgment on appeal. *Le-Tulle* v. *Scofield,* 308 U. S. 415.

In *Smith* v. *Reeves,* 178 U. S. 436, an action was instituted in the federal trial court by railroad receivers against the defendant "as Treasurer of the State of California" to recover taxes assessed against and paid by the railroad. The proceeding was brought under § 3669 of the California Political Code, as amended by California Statutes (1891) 442, which authorized a suit against the State Treasurer for the recovery of taxes which were illegally exacted. The defendant could demand trial of the action in the Superior Court of the County of Sacramento, California. If the final judgment was against the Treasurer, the Comptroller of the state was directed to draw his warrant on state funds for its satisfaction.

As the suit was against a state official as such, through proceedings which were authorized by statute, to compel him to carry out with the state's funds the state's agreement to reimburse moneys illegally exacted under color of the tax power, this Court held, p. 439, it was a suit against the state. The state would be required to pay.[3] The case therefore is plainly distinguishable from those to recover personally from a tax collector money wrongfully exacted by him under color of state law, *Atchison, T. & S. F. Ry. Co.* v. *O'Connor,* 223 U. S. 280; cf. *Matthews* v. *Rodgers,* 284 U. S. 521, 528; to recover under general law possession of specific property likewise wrongfully obtained or held, *Tindal* v. *Wesley,* 167 U. S. 204, 221; *Virginia Coupon*

diction such as arose under the Act of March 3, 1891, § 5, 26 Stat. 827, in *Illinois Central R. Co.* v. *Adams,* 180 U. S. 28, 37. If this is a suit against the state, a failure to show the state's consent to be sued in the face of this answer would be fatal. Cf. *Berryessa Cattle Co.* v. *Sunset Pacific Oil Co.,* 87 F. 2d 972, 974.

[3] *Pennoyer* v. *McConnaughy,* 140 U. S. 1, 10. Compare *Louisiana* v. *Jumel,* 107 U. S. 711, 726.

Cases, 114 U. S. 269, 285; *United States* v. *Lee,* 106 U. S. 196; to perform a plain ministerial duty, *Board of Liquidation* v. *McComb,* 92 U. S. 531, 541; *Rolston* v. *Missouri Fund Comm'rs,* 120 U. S. 390, 411; or to enjoin an affirmative act to the injury of plaintiff, *Sterling* v. *Constantin,* 287 U. S. 378, 393; *Tomlinson* v. *Branch,* 15 Wall. 460; *Davis* v. *Gray,* 16 Wall. 203, 220; *In re Tyler,* 149 U. S. 164, 190. Only in *Smith* v. *Reeves* was the action authorized by statute against the officer in his official capacity. In the other instances relief was sought under general law from wrongful acts of officials. In such cases the immunity of the sovereign does not extend to wrongful individual action and the citizen is allowed a remedy against the wrongdoer personally.

This ruling that a state could not be controlled by courts in the performance of its political duties through suits against its officials has been consistently followed. *Chandler* v. *Dix,* 194 U. S. 590; *Fitts* v. *McGhee,* 172 U. S. 516, 529; *Murray* v. *Wilson Distilling Co.,* 213 U. S. 151, 167; *Lankford* v. *Platte Iron Works Co.,* 235 U. S. 461, 468 *et seq.; Ex parte State of New York, No. 1,* 256 U. S. 490, 500; *Worcester County Co.* v. *Riley,* 302 U. S. 292, 296, 299. Efforts to force, through suits against officials, performance of promises by a state collide directly with the necessity that a sovereign must be free from judicial compulsion in the carrying out of its policies within the limits of the Constitution. *Monaco* v. *Mississippi,* 292 U. S. 313, 320; *Louisiana* v. *Jumel,* 107 U. S. 711, 720. A state's freedom from litigation was established as a constitutional right through the Eleventh Amendment. The inherent nature of sovereignty prevents actions against a state by its own citizens without its consent. *Hans* v. *Louisiana,* 134 U. S. 1, 10, 16.

Oklahoma provides for recovery of unlawful exactions paid to its collectors under protest. § 12665 Oklahoma Statutes 1931. Note 1, *supra.* In our view of this case it

is unnecessary for us to pass upon whether this method of protecting taxpayers was intended to be exclusive of all other remedies, including actions against an individual who happened to be a tax collector, or whether if it were so intended it would surmount all constitutional objections. Compare *Burrill* v. *Locomobile Co.*, 258 U. S. 34, and *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337, 341–43. See also *Antrim Lumber Co.* v. *Sneed*, 175 Okla. 47, 49–51, 52 P. 2d 1040, 1043–45.

A suit against a state official under § 12665 to recover taxes is held to be a suit against the state by Oklahoma and the remedy exclusive of other state remedies. *Antrim Lumber Co.* v. *Sneed, supra*, 175 Okla. at 51, 52 P. 2d at 1045. This interpretation of an Oklahoma statute by the Supreme Court of the state accords with our view, as set out above, of the meaning of a suit against a state. Petitioner brought this action against the collector, the Insurance Commissioner, in strict accord with the requirements of § 12665. It alleged that there was no appeal provided by Oklahoma laws from defendant's action in collecting and gave notice of protest and suit to defendant at the time of payment in the language of the section. By so doing petitioner was relieved of the necessity of establishing that the payment was not voluntary [4] and obtained the advantage of a statutory lien *lis pendens* on the tax payment.

By § 12665, Oklahoma creates a judicial procedure for the prompt recovery by the citizen of money wrongfully collected as taxes. It is the sovereign's method of tax administration. Oklahoma designates the official to be sued, orders him to hold the tax, empowers its courts to

[4] *Board of Commissioners* v. *Ward*, 68 Okla. 287, 288, 173 P. 1050; *Broadwell* v. *Board of Commissioners*, 71 Okla. 162, 163, 175 P. 828; cf. *Ward* v. *Love County*, 253 U. S. 17, 22; *Broadwell* v. *Carter County*, 253 U. S. 25; *Carpenter* v. *Shaw*, 280 U. S. 363, 369; *Railroad Co.* v. *Commissioners*, 98 U. S. 541, 544; *Stratton* v. *St. Louis S. W. Ry. Co.*, 284 U. S. 530, 532.

do complete justice by determining the amount properly due and directs its collector to pay back any excess received to the taxpayer. The state provides this procedure in lieu of the common law right to claim reimbursement from the collector. The issue of coercion and duress was eliminated at the pre-trial conference without objection by the petitioner. The section makes sure the taxpayer's recovery of illegal payments. The section is like the California statute involved in *Smith* v. *Reeves, supra,* except for the immaterial difference that the money collected is directed to be held separate and apart by the collector instead of being held in the general funds of the State Treasurer. See § 3669, California Political Code, as amended by California Statutes (1891) 442. In the *Reeves* case, as here, the suit was against the official, not the individual. The Oklahoma section differs from the Colorado law, § 6, Chapter 211, Session Laws of Colorado 1907, considered in *Atchison, T. & S. F. Ry. Co.* v. *O'Connor, supra,* in that the Colorado statute left the taxpayer to his remedy against the collector and merely directed the refund of the tax by the Treasurer in accordance with any judgment or decree which might be obtained. In the *O'Connor* case, in accordance with the statute, the suit, as this Court's opinion shows, was against the individual, not the official. We are of the view that the present proceeding under § 12665 is like *Smith* v. *Reeves,* a suit against the state.

But it is urged that if this is a suit against the state, Oklahoma has consented to this action in the federal court. Cf. *Reagan* v. *Farmers' Loan & Trust Co.,* 154 U. S. 362, 391.

The principle of immunity from litigation assures the states and the nation from unanticipated intervention in the processes of government, while its rigors are mitigated by a sense of justice which has continually expanded by consent the suability of the sovereign. The history of

sovereign immunity and the practical necessity of unfettered freedom for government from crippling interferences require a restriction of suability to the terms of the consent, as to persons, courts and procedures. *Antrim Lumber Co.* v. *Sneed,* 175 Okla. 47, 52 P. 2d 1040; *Patterson* v. *City of Checotah,* 187 Okla. 587, 103 P. 2d 97; *Beers* v. *Arkansas,* 20 How. 527; *Kawananakoa* v. *Polyblank,* 205 U. S. 349; *Minnesota* v. *United States,* 305 U. S. 382, 388; *United States* v. *U. S. Fidelity & Guaranty Co.,* 309 U. S. 506, 512.[5] The immunity may, of course, be waived. *Clark* v. *Barnard,* 108 U. S. 436, 447. When a state authorizes a suit against itself to do justice to taxpayers who deem themselves injured by any exaction, it is not consonant with our dual system for the federal courts to be astute to read the consent to embrace federal as well as state courts. Federal courts, sitting within states, are for many purposes courts of that state, *Madisonville Traction Co.* v. *Mining Co.,* 196 U. S. 239, 255, but when we are dealing with the sovereign exemption from judicial interference in the vital field of financial administration a clear declaration of the state's intention to submit its fiscal problems to other courts than those of its own creation must be found.[6]

The Oklahoma section in question, 12665, was enacted in 1915 as a part of a general amendment to then existing tax laws. Session Laws 1915, p. 149, Chap. 107, Art. One, subdivision B, § 7.[7] This subdivision of the act of 1915 is

[5] *Keifer & Keifer* v. *R. F. C.,* 306 U. S. 381, is not to the contrary. When authority to sue is given, that authority is liberally construed to accomplish its purpose. *United States* v. *Shaw,* 309 U. S. 495, 501.

[6] Cf. *Matthews* v. *Rodgers,* 284 U. S. 521, 525. The Federal Government's consent to suit against itself, without more, in a field of federal power does not authorize a suit in a state court. *Stanley* v. *Schwalby,* 162 U. S. 255, 270; *Minnesota* v. *United States,* 305 U. S. 382, 384, 389.

[7] See also Session Laws 1913, Ch. 240, Art. 1, § 7.

concerned with administrative review of boards of equalization and provides a complete procedure including review by the district and Supreme Court of Oklahoma, as the case may be, which are given authority to affirm, modify or annul the action of the boards. §§ 2 and 3. Section 6 requires the payment of the taxes which fall due, pending administrative review, and provides for recovery of such taxes in accordance with the ultimate finding on review in language practically identical with that of § 7 (§ 12665) here involved. Furthermore, § 12665 gives directions to the Oklahoma officer as to his obligations, requires the court to give precedence to these cases and directs the kind of judgment to be returned, see note 1, *supra,* which is quite different in language, if not in effect, from the judgment a federal court would render. It is clear to us that the legislature of Oklahoma was consenting to suit in its own courts only. *Chandler* v. *Dix,* 194 U. S. 590.

Smith v. *Reeves, supra,* p. 445, holds that an act of a state is valid which limits to its own courts suits against it to recover taxes. There California's intention to so limit was made manifest by authorizing the state officer to demand trial in the Superior Court of Sacramento County. *Atchison, T. & S. F. Ry. Co.* v. *O'Connor,* considered above at p. 53, is not applicable since it was not a suit against the state.

Petitioner urges that *Smyth* v. *Ames,* 169 U. S. 466, 517, and *Reagan* v. *Farmers' Loan & Trust Co.,* 154 U. S. 362, 391, 392, are precedents which lead to a contrary conclusion on this issue of the suability of Oklahoma in the District Court of the United States. The former is clearly inapposite. That case involved proceedings to enjoin enforcement of an allegedly unconstitutional state statute providing for intrastate railroad rates. Since the state act provided a remedy, the state took the position

that federal equity jurisdiction was ousted. This Court held the federal equity jurisdiction continued to restrain unconstitutional acts by state officers which threatened irreparable damage. pp. 474, 477, 515–19.

In the *Reagan* case, a proceeding for injunction to restrain the members of the Texas Railroad Commission from enforcing rates which were alleged to be unconstitutional was allowed to be maintained in equity in a federal court. This Court said it was maintainable against the defendants both under the general equity jurisdiction of the federal courts and under the provisions of the state statute which allowed review "in a court of competent jurisdiction in Travis County, Texas. . . ." It was thought that the United States Circuit Court, sitting in Travis County, was covered by this language. As it was concluded, however, that this was not a suit against the state, page 392, we do not feel impelled to extend the ruling of the *Reagan* case on this alternative basis of jurisdiction to a suit, such as this, against a state for recovery of taxes.

Gunter v. *Atlantic Coast Line,* 200 U. S. 273, is also distinguishable. There the Attorney General of South Carolina appeared in a federal court to answer for the state in an injunction suit under the authority of a statute which read as follows:

"if the State be interested in the revenue in said action, the county auditor shall, immediately upon the commencement of said action, inform the Auditor of State of its commencement, of the alleged cause thereof, and the Auditor of State shall submit the same to the Attorney General, who shall defend said action for and on behalf of the State." p. 286.

This Court construed this to consent to an appearance in the federal court and held its decision res judicata against the state and added at p. 287:

"If there were doubt—which we think there is not—as to the construction which we give to the act of 1868, that doubt is entirely dispelled by a consideration of the contemporaneous interpretation given to the act by the officials charged with its execution, by the view which this court took as to the real party in interest on the record in the Pegues case, and by the action as well as non-action which followed the decision of that case by the state government in all its departments through a long period of years."

The administrative construction by a state of these statutes of consent have influence in determining our conclusions. Cf. *Farish* v. *State Banking Board,* 235 U. S. 498, 512; *Richardson* v. *Fajardo Sugar Co.,* 241 U. S. 44, 47; *Missouri* v. *Fiske,* 290 U. S. 18, 24.

It may be well to add that the construction given the Oklahoma statute leaves open the road to review in this Court on constitutional grounds after the issues have been passed upon by the state courts. *Chandler* v. *Dix,* 194 U. S. 590, 592; *Smith* v. *Reeves,* 178 U. S. 436, 445.

The judgment of the Circuit Court of Appeals is vacated and the cause is remanded to the District Court with directions to dismiss the complaint for want of jurisdiction.

MR. JUSTICE FRANKFURTER, with whom the CHIEF JUSTICE and MR. JUSTICE ROBERTS concur, dissenting:

To avoid the imposition of penalties and other serious hazards, the plaintiff paid money under claim of a tax which Oklahoma, we must assume, had no power to exact. Concededly, he could sue to recover the moneys so paid to the defendant, a tax collector, in a state court in Oklahoma. But to allow the suit to be brought in a federal court sitting in Oklahoma would derogate, this Court now holds, from the sovereignty of Oklahoma. Such a result, I believe, derives from an excessive regard for formalism

and from a disregard of the whole trend of legislation, adjudication and legal thought in subjecting the collective responsibility of society to those rules of law which govern as between man and man.

To repeat, this is a simple suit to get back money from a collector who for present purposes had no right to demand it. So far as the federal fiscal system is concerned, this common law remedy has been enforced throughout our history, barring only a brief interruption.[1] See *United States* v. *Nunnally Investment Co.*, 316 U. S. 258. And if, instead of avoiding the serious consequences of not paying this state tax, the plaintiff had resisted payment and sought an injunction against the tax collector for seeking to enforce the unconstitutional tax, under appropriate circumstances the federal courts would not have been without jurisdiction. See, *e. g.*, *Western Union Telegraph Co.* v. *Trapp*, 186 F. 114; *Ward* v. *Love County*, 253 U. S. 17; *Carpenter* v. *Shaw*, 280 U. S. 363. Finally, as I read the opinion of the Court, even a suit of this very nature for the recovery of money paid for a disputed tax will lie against the collector in what is called his individual capacity; that is, a suit against the same person on the same cause of action for the same remedy can be brought, if only differently entitled. In view of the history of such a suit as this and of the incongruous consequences of dis-

[1] The Swartwout scandal led to the Act of March 3, 1839 (§ 2, 5 Stat. 339, 348), which this Court construed as a withdrawal of the suability of the collector. *Cary* v. *Curtis*, 3 How. 236. That decision was rendered on January 21, 1845, and Congress promptly restored the old liability. Act of Feb. 26, 1845, c. XXII, 5 Stat. 727. See Brown, *A Dissenting Opinion of Mr. Justice Story* (1940) 26 Va. L. Rev. 759. Again, in view of the complicated administrative problems raised by the invalidation of the Agricultural Adjustment Act, Congress devised a special scheme for the recovery of the illegal exactions made under the Act. 49 Stat. 1747, 7 U. S. C. § 644 *et seq.*; *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337.

allowing it in the form in which it was a case in the federal court in Oklahoma, the claims of sovereignty which are sought to be respected must surely be attenuated and capricious.

The Eleventh Amendment has put state immunity from suit into the Constitution. Therefore, it is not in the power of individuals to bring any State into court—the State's or that of the United States—except with its consent. But consent does not depend on some ritualistic formula. Nor are any words needed to indicate submission to the law of the land. The readiness or reluctance with which courts find such consent has naturally been influenced by prevailing views regarding the moral sanction to be attributed to a State's freedom from suability. Whether this immunity is an absolute survival of the monarchial privilege, or is a manifestation merely of power, or rests on abstract logical grounds, see *Kawananakoa* v. *Polyblank,* 205 U. S. 349, it undoubtedly runs counter to modern democratic notions of the moral responsibility of the State. Accordingly, courts reflect a strong legislative momentum in their tendency to extend the legal responsibility of Government and to confirm Maitland's belief, expressed nearly fifty years ago, that "it is a wholesome sight to see 'the Crown' sued and answering for its torts." 3 Maitland, Collected Papers, 263.[2]

Assuming that the proceeding in this case to recover from the individual moneys demanded by him in defiance of the Constitution is a suit against the State, compare *Ex parte Young,* 209 U. S. 123, 155; *Atchison, T. & S. F.*

[2] "With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen." Doubtless this statement of Dicey's, *Law of the Constitution,* 8th ed., at p. 189, 9th ed. at p. 193, was an idealization of actuality. But in the perspective of our time its validity as an ideal has gained and not lost.

Ry. Co. v. *O'Connor*, 223 U. S. 280, Oklahoma has consented that he be sued. The only question therefore is as to the scope of the consent. Has she confined the right to sue to her own courts and excluded the federal courts within her boundaries? She has not said so. Is such restriction indicated by practical considerations in the administration of state affairs? If it makes any difference to Oklahoma whether this suit against a tax collector is pressed in an Oklahoma state court rather than in a federal court sitting in Oklahoma, the difference has not been revealed. There is here an entire absence of the considerations that led to the decision in *Burford* v. *Sun Oil Co.*, 319 U. S. 315. There it was deemed desirable, as a matter of discretion, that a federal equity court should step aside and leave a specialized system of state administration to function. Here the suit in a federal court would not supplant a specially adaptable state scheme of administration nor bring into play the expert knowledge of a state court regarding local conditions. The subject matter and the course of the litigation in the federal court would be precisely the same as in the state court. The case would merely be argued in a different building and before a different judge. Language restrictive of suit in a federal court is lacking, and intrinsic policy does not suggest restrictive interpretation to withdraw from a federal court questions of federal constitutional law.

Legislation giving consent to sue is not to be treated in the spirit in which seventeenth century criminal pleading was construed. Only by such overstrained rendering of the Oklahoma statute does the Court finally achieve exclusion of the right of the plaintiff to go to a federal court. To the language of that statute I now turn. By § 12665 Oklahoma Statutes, 1931, the State authorized an action to recover moneys illegally exacted as a tax, in a situation like the present, where the exaction is one "from which the laws provide no appeal." The relevant juris-

dictional provision is as follows: "All such suits shall be brought in the court having jurisdiction thereof, and they shall have precedence therein. . . ." The part that the federal courts play in the grant of such jurisdiction by the States is not a new problem. With his customary hard-headedness Chief Justice Waite, for this Court, stated the guiding consideration in ascertaining the relation of the federal court within a State to the judicial process recognized by that State: "While the Circuit Court may not be technically a court of the Commonwealth, it is a court within it; and that, as we think, is all the legislature intended to provide for." *Ex parte Schollenberger,* 96 U. S. 369, 377. This conception of a federal court as a court within the State of its location has ever since dominated our decisions. See, *e. g., Madisonville Traction Co.* v. *Mining Co.,* 196 U. S. 239, 255–56; *Neirbo Co.* v. *Bethlehem Corp.,* 308 U. S. 165, 171. It is a conception which has been acted upon by state legislatures. For jurisdictional purposes federal courts have been assimilated to the courts of the States in which they may sit. When we are dealing with jurisdictional matters legislation should be interpreted in the light of such professional history. Even if an ambiguity could be squeezed out of a grant of jurisdiction which applies so aptly to a federal court in Oklahoma as to an Oklahoma state court—"suits shall be brought in the court having jurisdiction thereof"—neither logic nor history nor reason counsels an interpretation that attributes to the State hostility against a suit in a federal court on an exclusively federal right as to which the last say in any event belongs to a federal court.[3]

[3] Of course the State can at any time withdraw its consent to be sued. See *Beers* v. *Arkansas,* 20 How. 527. But statutes have steadily enlarged the range of a State's suability and rarely has there been a recession. See, generally, Borchard, *State and Municipal Liability in Tort—Proposed Statutory Reform* (1934) 20 A. B. A. J. 747; Borchard, *Governmental Responsibility in Tort* (1926) 36 Yale L. J. 1, 17, (1927) 36 Yale L. J. 757, 1039, (1928) 28 Col. L. Rev. 577, 735.

In the past, even when the jurisdictional grant has been couched in language giving substantial ground for the argument of restriction of jurisdiction to the state court, this Court has not found denial by a State of the right to go to a federal court within that State when it in fact opened the door of its own courts. Thus, in *Madisonville Traction Co.* v. *Mining Co., supra,* a Kentucky statute required, among other things, appointment of commissioners in a condemnation proceeding by the county court, examination of the report at its first regular term, issuance of orders in conformity with the Kentucky Civil Code of Practice and allowance of appeals from the county courts. And yet this Court held, as a matter of construction, that it was "not to be implied from the statute in question that the State intended to exclude . . . the federal courts." 196 U. S. at 256. The section now under consideration is only one of several statutory provisions for challenging like tax assessments in courts. In all the other provisions, the jurisdiction is explicitly given only to state courts. See, *e. g.,* §§ 12651, 12660, 12661. If in § 12665 Oklahoma has seen fit to allow suits to be brought "in the court having jurisdiction thereof," which as a matter of federal jurisdictional law certainly includes the federal court in Oklahoma, and has not seen fit to designate the state courts for such jurisdiction, why should this Court interpolate a restriction which the Oklahoma Legislature has omitted? The fact that the Legislature has also provided that such suits "shall have precedence" is no more embarrassment to federal jurisdiction than to state jurisdiction. That is merely an admonition to courts of the importance of disposing of litigation affecting revenue with all convenient dispatch. Nor is there any other provision of the statute giving this right of action that remotely requires a procedure to be followed or relief to be given peculiar to state courts or different from established procedure and relief in the fed-

eral courts. Only on the assumption that federal courts are alien courts is there anything in § 12665 that is not as suited to a proceeding in a federal court as it is to one in a state court.

The situation thus presented by the Oklahoma legislation is very different from that which was here in *Chandler* v. *Dix,* 194 U. S. 590. There a suit was brought against state officials to remove a cloud on title to lands claimed by the State. The relief that was sought and the procedure for pursuing it plainly indicated "that the legislature had in mind only proceedings in the courts of the State. A copy of the complaint is to be served upon the prosecuting attorney, who is to send a copy thereof within five days to the Auditor General, and this is to be in lieu of service of process. It then is left to the discretion of the Auditor General to cause the Attorney General to represent him, and it is provided that in such suits no costs shall be taxed. These provisions with regard to procedure and costs show that the statute is dealing with a matter supposed to remain under state control. . . . [The] statute does not warrant the beginning of a suit in the federal court to set aside the title of the State." 194 U. S. at 591–592. The marked difference between the Michigan statute and this Oklahoma statute is further evidenced by the fact that § 12665 gives an action to recover not merely illegal state taxes but also taxes of the "county or sub-division of the county" that have been illegally collected. But counties or their subdivisions do not enjoy immunity from suit. *Lincoln County* v. *Luning,* 133 U. S. 529; *Seattle* v. *Oregon & Washington R. Co.,* 255 U. S. 56, 71. If the other jurisdictional requirements are present, they can be sued in a federal court without the leave of Oklahoma. It is not, I submit, a rational way to construe the Oklahoma statute, dealing with a particular type of illegal exaction raising the same kind of issue and involving the same procedure.

so as to recognize jurisdiction of federal courts over suits against the county and its sub-division but to find a purpose to exclude suits as to illegal state exactions.

I have proceeded on the assumption that the action below was under § 12665, and as such an action against the State. But the suit was not brought under § 12665. It was brought as an ordinary common law action for the recovery of money against an officer acting under an unconstitutional statute. The defendant answered the suit, but did not claim the State's immunity from suit and the court's resulting lack of jurisdiction. What is even more significant is that he did allege lack of jurisdiction on another ground not now relevant. In a word, the defendant did not claim, on behalf of the State, the immunity which this Court now affords him. He did not even make this claim at the pre-trial conference and the claim did not emerge as one of the issues defined by the pre-trial conference under Rule 16. In disposing of the case, the Judge interpreted the action as having been brought under § 12665, although the pleadings gave no warrant for such conclusion, and on such interpretation, he found that the defendant could claim and had not waived Oklahoma's immunity. Evidently, however, the District Court was not content with its own finding of want of "jurisdiction" for it proceeded to dispose of the constitutional issues on their merits. I think that the claim of the State's immunity was not in the case under *Illinois Central R. Co.* v. *Adams*, 180 U. S. 28, which held that in a suit nominally against an individual sovereign immunity is a defense that must be raised by appropriate pleading. Doubtless for this reason, the jurisdictional question on which the case is now made to turn was not even discussed by the Circuit Court of Appeals.

That court, I believe, properly passed on the constitutional merits, but since the case here goes off on jurisdiction, I intimate no views upon them.

UNITED STATES *v.* MITCHELL.

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

Nos. 514 and 515. Argued March 27, 1944.—Decided April 24, 1944.

1. Promptly and spontaneously after a housebreaking suspect had been taken into custody by police officers and had arrived at the police station, he admitted his guilt and consented to the officers' recovering stolen property from his home. *Held* that the admission of guilt and the property thus recovered were admissible in evidence in a criminal prosecution in a federal court, and that the admissibility of the evidence was not affected by the subsequent illegal detention of the suspect for eight days before arraignment. *McNabb* v. *United States,* 318 U. S. 332, distinguished. P. 69.
2. The power of this Court to establish rules governing the admissibility of evidence in the federal courts is not to be used to discipline law enforcement officers. P. 70.

138 F. 2d 426, reversed.

CERTIORARI, 321 U. S. 756, to review reversals, in two cases, of convictions of housebreaking and larceny.

Solicitor General Fahy, with whom *Assistant Attorney General Tom C. Clark,* and *Messrs. Robert S. Erdahl, Paul A. Freund,* and *Jesse Climenko* were on the brief, for the United States.

Mr. James J. Laughlin for respondent.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

Under each of two indictments for housebreaking and larceny, the defendant Mitchell was separately tried and convicted, but his convictions were reversed by the Court of Appeals, 138 F. 2d 426, solely on the ground that the admission of testimony of Mitchell's oral confessions and of stolen property secured from his home through his consent was barred by our decision in *McNabb* v. *United*

States, 318 U. S. 332. In view of the importance to federal criminal justice of proper application of the *McNabb* doctrine, we brought the case here.

Practically the whole body of the law of evidence governing criminal trials in the federal courts has been judge-made. See *United States* v. *Reid,* 12 How. 361, and *Funk* v. *United States,* 290 U. S. 371. Naturally these evidentiary rules have not remained unchanged. They have adapted themselves to progressive notions of relevance in the pursuit of truth through adversary litigation, and have reflected dominant conceptions of standards appropriate for the effective and civilized administration of law. As this Court when making a new departure in this field took occasion to say a decade ago, "The public policy of one generation may not, under changed conditions, be the public policy of another." *Funk* v. *United States, supra* at 381. The *McNabb* decision was merely another expression of this historic tradition, whereby rules of evidence for criminal trials in the federal courts are made a part of living law and not treated as a mere collection of wooden rules in a game.

That case respected the policy underlying enactments of Congress as well as that of a massive body of state legislation which, whatever may be the minor variations of language, require that arresting officers shall with reasonable promptness bring arrested persons before a committing authority. Such legislation, we said in the *McNabb* case, "constitutes an important safeguard—not only in assuring protection for the innocent but also in securing conviction of the guilty by methods that commend themselves to a progressive and self-confident society. For this procedural requirement checks resort to those reprehensible practices known as the 'third degree' which, though universally rejected as indefensible, still find their way into use. It aims to avoid all the evil im-

plications of secret interrogation of persons accused of crime. It reflects not a sentimental but a sturdy view of law enforcement. It outlaws easy but self-defeating ways in which brutality is substituted for brains as an instrument of crime detection. A statute carrying such purposes is expressive of a general legislative policy to which courts should not be heedless when appropriate situations call for its application." 318 U. S. at 344.

In the circumstances of the *McNabb* case we found such an appropriate situation, in that the defendants were illegally detained under aggravating circumstances: one of them was subjected to unremitting questioning by half a dozen police officers for five or six hours and the other two for two days. We held that "a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of law. Congress has not explicitly forbidden the use of evidence so procured. But to permit such evidence to be made the basis of a conviction in the federal courts would stultify the policy which Congress has enacted into law." 318 U. S. at 345. For like reasons it was held in the *Nardone* case that where wiretapping is prohibited by Congress the fruits of illegal wiretapping constitute illicit evidence and are therefore inadmissible. *Nardone* v. *United States,* 302 U. S. 379; 308 U. S. 338. Inexcusable detention for the purpose of illegally extracting evidence from an accused, and the successful extraction of such inculpatory statements by continuous questioning for many hours under psychological pressure, were the decisive features in the *McNabb* case which led us to rule that a conviction on such evidence could not stand.

We are dealing with the admissibility of evidence in criminal trials in the federal courts. Review by this

Court of state convictions presents a very different situation, confined as it is within very narrow limits. Our sole authority is to ascertain whether that which a state court permitted violated the basic safeguards of the Fourteenth Amendment. Therefore, in cases coming from the state courts in matters of this sort, we are concerned solely with determining whether a confession is the result of torture, physical or psychological, and not the offspring of reasoned choice. How difficult and often elusive an inquiry this implies, our decisions make manifest. And for the important relation between illegal incommunicado detention and "third-degree" practices, see IV, Report, National Commission on Law Observance and Enforcement (better known as the Wickersham Commission) (1931) pp. 4, 35 *et seq.*, 152; and the debates in the House of Commons on the Savidge case, 217 H. C. Deb. (5th ser. 1928) pp. 1216–1220,1303–1339, 1921–1931, and Inquiry in Regard to the Interrogation by the Police of Miss Savidge, Cmd. 3147 (1928); Report of the Royal Commission on Police Powers and Procedure, Cmd. 3297 (1929). But under the duty of formulating rules of evidence for federal prosecutions, we are not confined to the constitutional question of ascertaining when a confession comes of a free choice and when it is extorted by force, however subtly applied. See *United States* v. *Oppenheimer,* 242 U. S. 85, 88. The *McNabb* decision was an exercise of our duty to formulate policy appropriate for criminal trials in the federal courts. We adhere to that decision and to the views on which it was based. (For cases in which applications of the *McNabb* doctrine by circuit courts of appeals were left unchallenged by the Government, see *United States* v. *Haupt,* 136 F. 2d 661; *Gros* v. *United States,* 136 F. 2d 878; *Runnels* v. *United States,* 138 F. 2d 346.)

But the foundations for application of the *McNabb* doctrine are here totally lacking. Unlike the situation in other countries, see, for instance, §§ 25 and 26 of the Indian Evidence Act, 1872,[1] under the prevailing American criminal procedure, as was pointed out in the *McNabb* case, "The mere fact that a confession was made while in the custody of the police does not render it inadmissible." 318 U. S. at 346. Under the circumstances of this case, the trial courts were quite right in admitting, for the juries' judgment, the testimony relating to Mitchell's oral confessions as well as the property recovered as a result of his consent to a search of his home. As the issues come before us the facts are not in dispute and are quickly told.

In August and early October 1942, two houses in the District of Columbia were broken into and from each property was stolen. The trail of police investigation led to Mitchell who was taken into custody at his home at 7 o'clock in the evening on Monday, October 12, 1942, and driven by two police officers to the precinct station. Within a few minutes of his arrival at the police station, Mitchell admitted guilt, told the officers of various items of stolen property to be found in his home and consented to their going to his home to recover the property.[2] It is

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[1] § 25: "No confession made to a Police officer, shall be proved as against a person accused of any offence."

§ 26: "No confession made by any person whilst he is in the custody of a Police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person."

[2] In both cases Mitchell denied the testimony of the officers that he had in fact made prompt and spontaneous confession and consent to the search of his home, and on the basis of such denial motions were made to exclude the evidence. The trial judges ruled that whether these statements were in fact made in the circumstances narrated were questions of fact for the juries. As such they were left to the

these admissions and that property which supported the convictions, and which were deemed by the court below to have been inadmissible. Obviously the circumstances of disclosure by Mitchell are wholly different from those which brought about the disclosures by the McNabbs. Here there was no disclosure induced by illegal detention, no evidence was obtained in violation of any legal rights, but instead the consent to a search of his home, the prompt acknowledgement by an accused of his guilt, and the subsequent rueing apparently of such spontaneous cooperation and concession of guilt.

But the circumstances of legality attending the making of these oral statements are nullified, it is suggested, by what followed. For not until eight days after the statements were made was Mitchell arraigned before a committing magistrate. Undoubtedly his detention during this period was illegal. The police explanation of this illegality is that Mitchell was kept in such custody without protest through a desire to aid the police in clearing up thirty housebreakings, the booty from which was found in his home. Illegality is illegality, and officers of the law should deem themselves special guardians of the law. But in any event, the illegality of Mitchell's detention does not retroactively change the circumstances under which he made the disclosures. These, we have seen, were not elicited through illegality. Their admission, therefore, would not be use by the Government of the fruits of wrongdoing by its officers. Being relevant, they could be excluded only as a punitive measure against unrelated wrongdoing by the police. Our duty in shaping rules of evidence relates to the propriety of admitting evidence.

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juries, and we here accept their verdict as did the court below. Mitchell, it must be emphasized, merely denied that he made these statements and so did not contest the time of making them. While at the trial there was a claim by Mitchell that he was abused by the police officers, in the state of the record that issue is not here.

This power is not to be used as an indirect mode of disciplining misconduct.

Judgment reversed.

MR. JUSTICE DOUGLAS and MR. JUSTICE RUTLEDGE concur in the result.

MR. JUSTICE BLACK dissents.

MR. JUSTICE REED:

As I understand *McNabb* v. *United States,* 318 U. S. 332, as explained by the Court's opinion of today, the *McNabb* rule is that where there has been illegal detention of a prisoner, joined with other circumstances which are deemed by this Court to be contrary to proper conduct of federal prosecutions, the confession will not be admitted. Further, this refusal of admission is required even though the detention plus the conduct do not together amount to duress or coercion. If the above understanding is correct, it is for me a desirable modification of the *McNabb* case.

However, even as explained I do not agree that the rule works a wise change in federal procedure.

In my view detention without commitment is only one factor for consideration in reaching a conclusion as to whether or not a confession is voluntary. The juristic theory under which a confession should be admitted or barred is bottomed on the testimonial trustworthiness of the confession. If the confession is freely made without inducement or menace, it is admissible. If otherwise made, it is not, for if brought about by false promises or real threats, it has no weight as proper proof of guilt. *Wan* v. *United States,* 266 U. S. 1, 14; *Wilson* v. *United States,* 162 U. S. 613, 622; 3 Wigmore Evidence (1940 Ed.) § 882.

As the present record shows no evidence of such coercion, I concur in the result.

SOUTHERN RAILWAY CO. *v.* UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 578. Argued March 28, 29, 1944.—Decided April 24, 1944.

Under a land-grant equalization agreement whereby a non-land-grant carrier agreed to accept for the transportation of Government property "the lowest net rates lawfully available" over land-grant routes, the Government is entitled to the lowest rate which it could have obtained over any land-grant route, however circuitous, which could have been used. P. 76.

100 Ct. Cls. 175, affirmed.

CERTIORARI, 321 U. S. 758, to review a judgment denying recovery in a suit by the railroad company upon a land grant equalization agreement.

Mr. Sidney S. Alderman, with whom *Messrs. Seddon G. Boxley* and *S. R. Prince* were on the brief, for petitioner.

Assistant Attorney General Shea, with whom *Solicitor General Fahy* was on the brief, for the United States.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

In 1933 petitioner, a common carrier, entered into a "Freight-Land-Grant Equalization Agreement" with the Quartermaster General, acting for the United States. This agreement was made under the authority of § 22 of the Interstate Commerce Act. 24 Stat. 387, 49 U. S. C. § 22. So far as material here, petitioner agreed

"to accept for the transportation of property shipped for account of the Government of the United States and for which the Government of the United States is lawfully entitled to reduced rates over land-grant roads, *the lowest net rates lawfully available,* as derived through deductions account of land-grant distance from the lawful

rates filed with the Interstate Commerce Commission applying from point of origin to destination at time of movement." (Italics added.)

From the point of view of the carrier the purpose of the agreement was to give it a portion of government business which might have been routed over land-grant routes.[1] Land-grant roads were under an obligation to furnish transportation to the government free of charge or at reduced rates. See Public Aids to Transportation, Federal Coordinator of Transportation (1938), Vol. II, pp. 3–42 for a review of the various Acts of Congress. At the time when this agreement was made land-grant roads were required to allow the United States 50% deductions from the commercial rate for the transportation of property or troops of the United States.[2] 43 Stat. 477, 486, 10 U. S. C. § 1375. "Railroads which compete with the reduced-rate lines found themselves unable to participate, not only in the local transportation of federal troops and property between the termini of the reduced-rate lines, but also in through movements from and to points beyond such termini." Public Aids to Transportation, *supra,* p. 42. Accordingly most of those roads entered into land-

[1] The Court of Claims made the following finding in this case: "The purpose and effect of the freight equalization agreements of the defendant with plaintiff and with other common carriers was to equalize rates on Government property over various routes serving the same point of origin and destination, where one or more of those routes had been aided in whole or in part by grant of public lands, rates over all routes from point of origin to destination being brought down to the level of that over the route producing the lowest net rate on account of land-grant deduction. This arrangement was designed to give the equalizing carrier a portion of the Government business that was possible of routing over the governing land-grant route, and to give the Government a greater range in choice of routes where considerations of economy entered into the selection."

[2] But see § 321 of the Transportation Act of 1940, 54 Stat. 898, 954.

grant equalization agreements with the United States in order to get as large a share of the business as possible.[3] See *Southern Pacific Co.* v. *United States,* 307 U. S. 393, 394. The one involved in the present case is an example.

This suit involves 374 shipments of government property over petitioner's lines and its connections made between 1934 and 1938 while this agreement was in force.[4] There were available in case of each shipment several routes between the point of origin and the point of destination. Petitioner's route was in general the shortest. But there were other routes containing land grants of varying percentages which it was possible to use for these shipments. And the rates shown by tariffs on file with the Interstate Commerce Commission for freight shipments between the points in question were the same (with exceptions not important here) for each of the alternative routes regardless of the mileage. Petitioner computed its charges so as to allow the rate reductions to which the United States would have been entitled had it actually made the shipments by one of the available, alternative land-grant routes. The United States, however, claimed greater deductions. It showed a longer and more circuitous route which could have been used [5] and which contained more land-grant mileage than the alternative route chosen by

[3] Petitioner's road includes 145 miles of land-grants. But as pointed out in Public Aids to Transportation, *supra,* p. 42, "The land-grant railroads are parties to these agreements for the reason that, in many instances, a non-aided portion of a land-grant railroad competes with a reduced-rate portion of another land-grant railroad."

[4] These consisted of 147 shipments of livestock by the Federal Surplus Relief Corporation from midwestern points to southeastern points; and 227 shipments of property by the Tennessee Valley Authority.

[5] Thus in case of the shipments of livestock the routes on which the United States made its computation of rates were from 137 to almost 700 miles longer than the ones actually used.

petitioner. Since the tariff rates over either alternative route were the same, the greater land grants included in the route selected by the United States resulted in lower rates than those which were computed on the basis of the land-grant route selected by petitioner. The United States paid the lower rates. Petitioner brought suit in the Court of Claims for the difference between the amount paid and the rates computed on the basis of the tariffs for the route which it had selected. The Court of Claims denied recovery. 100 Ct. Cls. 175. The case is here on a petition for a writ of certiorari which we granted because of the public importance of the problem.

The Court of Claims found that the circuitous routes on which the United States based its computations could have been used for the shipments in question. But petitioner contends that such an interpretation of the word "available" is unreasonable in the present context and that it should be construed to mean "capable of being employed or made use of with advantage." In that connection, petitioner argues that it would have been improvident and uneconomical to ship livestock on such circuitous routes and that those routes would never in fact have been used by the United States. It is argued, moreover, that the equalization agreement properly construed requires petitioner to equalize rates computed by land-grant routes which are competitive for government traffic. Its purpose, according to that contention, was to secure for petitioner traffic which in its absence would be likely to move over competing land-grant routes, as distinguished from traffic which was possible of routing over the cheapest land-grant route.

We agree, however, with the Court of Claims. In this context the "lowest net rates lawfully available" mean to us the lowest net rates which could have been obtained on the basis of tariffs on file with the Interstate Commerce

Commission. Whether such circuitous routes as were employed in the present computation would have been actually used for these shipments in absence of the equalization agreement is of course unknown. But circuitous routing by the United States in order to obtain the benefits of its earlier land-grants to railroads was apparently a common practice. See Public Aids to Transportation, *supra*, p. 42. The records show that the privilege of obtaining the benefit of rates on land-grant routes is a valuable privilege indeed.[6] We cannot assume that the United States intended to surrender any of those benefits by granting the equalizing carriers more favorable rates than those to which it was lawfully entitled on the land-grant routes, unless the purpose to do so was plainly expressed. It must be remembered that the equalization agreement was a rate-making agreement. Its object was to divert shipments to the non-land-grant route. The land-grant route was chosen merely for the purpose of computing the rate. The fact that in a given case the shipment probably would not have moved over the land-grant route is immaterial. The United States was bargaining for low rates for the shipment of its property. It did not differentiate between the types of property shipped. It did not in terms state that land-grant routes, though actually available, would not be used in computing the rate unless they would in fact have been convenient or practicable to use for the particular shipment. The standard it prescribes is "the lowest net rates lawfully available." We may not resolve any ambiguities which may linger in that phrase against the United States. Cf. *Southern Pacific Co.* v. *United States*, *supra*, p. 401. We are not warranted in assuming that the United States was more generous to this carrier than the

[6] See Public Aids to Transportation, *supra*, pp. 43–45; Kenny, Land-Grant Railroads and the Government (1933), 9 Journal of Land & Public Utility Economics 368.

language of the contract requires. We must assume that the contracting officers for the United States drove as provident a bargain as a reading of the agreement fairly permits.

At times the United States has made equalization agreements which were more favorable to the equalizing carriers than the instant one appears to be. Thus in 1917 a passenger land-grant equalization agreement was made with petitioner and other carriers [7] whereby they agreed to accept the lowest net fare "lawfully available, as derived, through deductions account land-grant distance *via a usually traveled route for military traffic,* from a lawful fare filed with the Interstate Commerce Commission as applying from point of origin to destination via such route at time of movement." (Italics added.) That agreement suggests that when the United States desired to give equalizing carriers more favorable rates than the lowest rates to which it was lawfully entitled on land-grant routes, it chose apt words to express its purpose. It also gives added significance to the omission of any such qualification in the present agreement. It suggests that if we read into the agreement the qualification which the petitioner desires, we would remake the contract.

Much material bearing on administrative construction of various types of equalization agreements has been pressed upon us. But we have not relied on it as we found it inconclusive.

Affirmed.

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[7] See Manual for the Quartermaster Corps, 1916 (1917), vol. 2, pp. 223, 230.

UNITED STATES *v.* BALLARD ET AL.

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

No. 472. Argued March 3, 6, 1944.—Decided April 24, 1944.

Upon an indictment charging use of the mails to defraud, and conspiracy so to do, respondents were convicted in the District Court. The indictment charged a scheme to defraud through representations—involving respondents' religious doctrines or beliefs—which were alleged to be false and known by the respondents to be false. Holding that the District Court had restricted the jury to the issue of respondents' good faith and that this was error, the Circuit Court of Appeals reversed and granted a new trial. *Held:*

1. The only issue submitted to the jury by the District Court was whether respondents believed the representations to be true. P. 84.

2. Respondents did not acquiesce in the withdrawal from the jury of the issue of the truth of their religious doctrines or beliefs, and are not barred by the rule of *Johnson* v. *United States*, 318 U. S. 189, from reasserting here that no part of the indictment should have been submitted to the jury. P. 85.

3. The District Court properly withheld from the jury all questions concerning the truth or falsity of respondents' religious beliefs or doctrines. This course was required by the First Amendment's guarantee of religious freedom. P. 86.

The preferred position given freedom of religion by the First Amendment is not limited to any particular religious group or to any particular type of religion but applies to all. P. 87.

4. Respondents may urge in support of the judgment of the Circuit Court of Appeals points which that court reserved, but since these were not fully presented here either in the briefs or oral argument, they may more appropriately be considered by that court upon remand. P. 88.

138 F. 2d 540, reversed.

CERTIORARI, 320 U. S. 733, to review the reversal of convictions for using the mails to defraud and conspiracy.

Solicitor General Fahy, with whom *Assistant Attorney General Tom C. Clark, Mr. Robert S. Erdahl,* and *Miss*

Beatrice Rosenberg were on the brief, for the United States.

Messrs. Roland Rich Woolley and *Joseph F. Rank*, with whom *Mr. Ralph C. Curren* was on the brief, for respondents.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Respondents were indicted and convicted for using, and conspiring to use, the mails to defraud. § 215 Criminal Code, 18 U. S. C. § 338; § 37 Criminal Code, 18 U. S. C. § 88. The indictment was in twelve counts. It charged a scheme to defraud by organizing and promoting the I Am movement through the use of the mails. The charge was that certain designated corporations were formed, literature distributed and sold, funds solicited, and memberships in the I Am movement sought "by means of false and fraudulent representations, pretenses and promises." The false representations charged were eighteen in number. It is sufficient at this point to say that they covered respondents' alleged religious doctrines or beliefs. They were all set forth in the first count. The following are representative:

> that Guy W. Ballard, now deceased, alias Saint Germain, Jesus, George Washington, and Godfre Ray King, had been selected and thereby designated by the alleged "ascertained masters," Saint Germain, as a divine messenger; and that the words of "ascended masters" and the words of the alleged divine entity, Saint Germain, would be transmitted to mankind through the medium of the said Guy W. Ballard;
>
> that Guy W. Ballard, during his lifetime, and Edna W. Ballard, and Donald Ballard, by reason of their alleged high spiritual attainments and righteous conduct, had been selected as divine messengers through which the words of the alleged "ascended masters," in-

cluding the alleged Saint Germain, would be communicated to mankind under the teachings commonly known as the "I Am" movement;

that Guy W. Ballard, during his lifetime, and Edna W. Ballard and Donald Ballard had, by reason of supernatural attainments, the power to heal persons of ailments and diseases and to make well persons afflicted with any diseases, injuries, or ailments, and did falsely represent to persons intended to be defrauded that the three designated persons had the ability and power to cure persons of those diseases normally classified as curable and also of diseases which are ordinarily classified by the medical profession as being incurable diseases; and did further represent that the three designated persons had in fact cured either by the activity of one, either, or all of said persons, hundreds of persons afflicted with diseases and ailments;

Each of the representations enumerated in the indictment was followed by the charge that respondents "well knew" it was false. After enumerating the eighteen misrepresentations the indictment also alleged:

At the time of making all of the afore-alleged representations by the defendants, and each of them, the defendants, and each of them, well knew that all of said aforementioned representations were false and untrue and were made with the intention on the part of the defendants, and each of them, to cheat, wrong, and defraud persons intended to be defrauded, and to obtain from persons intended to be defrauded by the defendants, money, property, and other things of value and to convert the same to the use and the benefit of the defendants, and each of them;

The indictment contained twelve counts, one of which charged a conspiracy to defraud. The first count set forth all of the eighteen representations, as we have said. Each of the other counts incorporated and realleged all of them and added no additional ones. There was a demurrer and a motion to quash, each of which asserted, among other things, that the indictment attacked the religious beliefs

of respondents and sought to restrict the free exercise of their religion in violation of the Constitution of the United States. These motions were denied by the District Court. Early in the trial, however, objections were raised to the admission of certain evidence concerning respondents' religious beliefs. The court conferred with counsel in absence of the jury and with the acquiescence of counsel for the United States and for respondents confined the issues on this phase of the case to the question of the good faith of respondents. At the request of counsel for both sides the court advised the jury of that action in the following language:

> Now, gentlemen, here is the issue in this case:
>
> First, the defendants in this case made certain representations of belief in a divinity and in a supernatural power. Some of the teachings of the defendants, representations, might seem extremely improbable to a great many people. For instance, the appearance of Jesus to dictate some of the works that we have had introduced in evidence, as testified to here at the opening transcription, or shaking hands with Jesus, to some people that might seem highly improbable. I point that out as one of the many statements.
>
> Whether that is true or not is not the concern of this Court and is not the concern of the jury—and they are going to be told so in their instructions. As far as this Court sees the issue, it is immaterial what these defendants preached or wrote or taught in their classes. They are not going to be permitted to speculate on the actuality of the happening of those incidents. Now, I think I have made that as clear as I can. Therefore, the religious beliefs of these defendants cannot be an issue in this court.
>
> The issue is: Did these defendants honestly and in good faith believe those things? If they did, they should be acquitted. I cannot make it any clearer than that.
>
> If these defendants did not believe those things, they did not believe that Jesus came down and dic-

> tated, or that Saint Germain came down and dictated, did not believe the things that they wrote, the things that they preached, but used the mail for the purpose of getting money, the jury should find them guilty. Therefore, gentlemen, religion cannot come into this case.

The District Court reiterated that admonition in the charge to the jury and made it abundantly clear. The following portion of the charge is typical:

> The question of the defendants' good faith is the cardinal question in this case. You are not to be concerned with the religious belief of the defendants, or any of them. The jury will be called upon to pass on the question of whether or not the defendants honestly and in good faith believed the representations which are set forth in the indictment, and honestly and in good faith believed that the benefits which they represented would flow from their belief to those who embraced and followed their teachings, or whether these representations were mere pretenses without honest belief on the part of the defendants or any of them, and, were the representations made for the purpose of procuring money, and were the mails used for this purpose.

As we have said, counsel for the defense acquiesced in this treatment of the matter, made no objection to it during the trial, and indeed treated it without protest as the law of the case throughout the proceedings prior to the verdict. Respondents did not change their position before the District Court after verdict and contend that the truth or verity of their religious doctrines or beliefs should have been submitted to the jury. In their motion for new trial they did contend, however, that the withdrawal of these issues from the jury was error because it was in effect an amendment of the indictment. That was also one of their specifications of errors on appeal. And other errors urged on appeal included the overruling of the demurrer to the indictment and the motion to quash, and the

disallowance of proof of the truth of respondents' religious doctrines or beliefs.

The Circuit Court of Appeals reversed the judgment of conviction and granted a new trial, one judge dissenting. 138 F. 2d 540. In its view the restriction of the issue in question to that of good faith was error. Its reason was that the scheme to defraud alleged in the indictment was that respondents made the eighteen alleged false representations; and that to prove that defendants devised the scheme described in the indictment "it was necessary to prove that they schemed to make some, at least, of the (eighteen) representations . . . and that some, at least, of the representations which they schemed to make were false." 138 F. 2d 545. One judge thought that the ruling of the District Court was also error because it was "as prejudicial to the issue of honest belief as to the issue of purposeful misrepresentation." *Id.*, p. 546.

The case is here on a petition for a writ of certiorari which we granted because of the importance of the question presented.

The United States contends that the District Court withdrew from the jury's consideration only the truth or falsity of those representations which related to religious concepts or beliefs and that there were representations charged in the indictment which fell within a different category.[1] The argument is that this latter group of

[1] Petitioner has placed three representations in this group: (1) A portion of the scheme as to healing which we have already quoted and which alleged that respondents "had in fact cured either by the activity of one, either, or all of said persons, hundreds of persons afflicted with diseases and ailments"; (2) The portion of the scheme relating to certain religious experiences described in certain books (Unveiled Mysteries and The Magic Presence) and concerning which the indictment alleged "that the defendants represented that Guy W. Ballard, Edna W. Ballard, and Donald Ballard actually encountered the experiences pertaining to each of their said names as related and

representations was submitted to the jury, that they were adequate to constitute an offense under the Act, and that they were supported by the requisite evidence. It is thus sought to bring the case within the rule of *Hall* v. *United States,* 168 U. S. 632, 639–640, which held that where an indictment contained "all the necessary averments to constitute an offense created by the statute," a conviction would not be set aside because a "totally immaterial fact" was averred but not proved. We do not stop to ascertain the relevancy of that rule to this case, for we are of the view that all of the representations charged in the indictment which related at least in part to the religious doctrines or beliefs of respondents were withheld from the jury. The trial judge did not differentiate them. He referred in the charge to the "religious beliefs" and "doctrines taught by the defendants" as matters withheld from the jury. And in stating that the issue of good faith was the "cardinal question" in the case he charged, as already noted, that "The jury will be called upon to pass on the question of whether or not the defendants honestly and in good faith believed the representations which are set forth in the indictment." Nowhere in the charge were any of the separate representations submitted to the jury. A careful reading of the whole charge leads us to agree with the Circuit Court of Appeals on this phase of the case that the only issue submitted to the jury was the question as stated by the District Court, of respondents' "belief in their representations and promises."

The United States contends that respondents acquiesced in the withdrawal from the jury of the truth of their reli-

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set forth in said books, whereas in truth and in fact none of said persons did encounter the experiences"; (3) The part of the scheme concerning phonograph records sold by respondents on representations that they would bestow on purchasers "great blessings and rewards in their aim to achieve salvation" whereas respondents "well knew that said . . . records were man-made and had no ability to aid in achieving salvation."

gious doctrines or beliefs and that their consent bars them from insisting on a different course once that one turned out to be unsuccessful. Reliance for that position is sought in *Johnson* v. *United States,* 318 U. S. 189. That case stands for the proposition that, apart from situations involving an unfair trial, an appellate court will not grant a new trial to a defendant on the ground of improper introduction of evidence or improper comment by the prosecutor, where the defendant acquiesced in that course and made no objection to it. In fairness to respondents that principle cannot be applied here. The real objection of respondents is not that the truth of their religious doctrines or beliefs should have been submitted to the jury. Their demurrer and motion to quash made clear their position that that issue should be withheld from the jury on the basis of the First Amendment. Moreover, their position at all times was and still is that the court should have gone the whole way and withheld from the jury both that issue and the issue of their good faith. Their demurrer and motion to quash asked for dismissal of the entire indictment. Their argument that the truth of their religious doctrines or beliefs should have gone to the jury when the question of their good faith was submitted was and is merely an alternative argument. They never forsook their position that the indictment should have been dismissed and that none of it was good. Moreover, respondents' motion for new trial challenged the propriety of the action of the District Court in withdrawing from the jury the issue of the truth of their religious doctrines or beliefs without also withdrawing the question of their good faith. So we conclude that the rule of *Johnson* v. *United States, supra,* does not prevent respondents from reasserting now that no part of the indictment should have been submitted to the jury.

As we have noted, the Circuit Court of Appeals held that the question of the truth of the representations concerning

respondents' religious doctrines or beliefs should have been submitted to the jury. And it remanded the case for a new trial. It may be that the Circuit Court of Appeals took that action because it did not think that the indictment could be properly construed as charging a scheme to defraud by means other than misrepresentations of respondents' religious doctrines or beliefs. Or that court may have concluded that the withdrawal of the issue of the truth of those religious doctrines or beliefs was unwarranted because it resulted in a substantial change in the character of the crime charged. But on whichever basis that court rested its action, we do not agree that the truth or verity of respondents' religious doctrines or beliefs should have been submitted to the jury. Whatever this particular indictment might require, the First Amendment precludes such a course, as the United States seems to concede. "The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." *Watson* v. *Jones*, 13 Wall. 679, 728. The First Amendment has a dual aspect. It not only "forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship" but also "safeguards the free exercise of the chosen form of religion." *Cantwell* v. *Connecticut*, 310 U. S. 296, 303. "Thus the Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be." *Id.*, pp. 303–304. Freedom of thought, which includes freedom of religious belief, is basic in a society of free men. *Board of Education* v. *Barnette*, 319 U. S. 624. It embraces the right to maintain theories of life and of death and of the hereafter which are rank heresy to followers of the orthodox faiths. Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others.

Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law. Many take their gospel from the New Testament. But it would hardly be supposed that they could be tried before a jury charged with the duty of determining whether those teachings contained false representations. The miracles of the New Testament, the Divinity of Christ, life after death, the power of prayer are deep in the religious convictions of many. If one could be sent to jail because a jury in a hostile environment found those teachings false, little indeed would be left of religious freedom. The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views. Man's relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views. The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain. The First Amendment does not select any one group or any one type of religion for preferred treatment. It puts them all in that position. *Murdock* v. *Pennsylvania,* 319 U. S. 105. As stated in *Davis* v. *Beason,* 133 U. S. 333, 342, "With man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with." See *Prince*

v. *Massachusetts*, 321 U. S. 158. So we conclude that the District Court ruled properly when it withheld from the jury all questions concerning the truth or falsity of the religious beliefs or doctrines of respondents.

Respondents maintain that the reversal of the judgment of conviction was justified on other distinct grounds. The Circuit Court of Appeals did not reach those questions. Respondents may, of course, urge them here in support of the judgment of the Circuit Court of Appeals. *Langnes* v. *Green*, 282 U. S. 531, 538–539; *Story Parchment Co.* v. *Paterson Co.*, 282 U. S. 555, 560, 567–568. But since attention was centered on the issues which we have discussed, the remaining questions were not fully presented to this Court either in the briefs or oral argument. In view of these circumstances we deem it more appropriate to remand the cause to the Circuit Court of Appeals so that it may pass on the questions reserved. *Lutcher & Moore Lumber Co.* v. *Knight*, 217 U. S. 257, 267–268; *Brown* v. *Fletcher*, 237 U. S. 583. If any questions of importance survive and are presented here, we will then have the benefit of the views of the Circuit Court of Appeals. Until that additional consideration is had, we cannot be sure that it will be necessary to pass on any of the other constitutional issues which respondents claim to have reserved.

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

Reversed.

MR. CHIEF JUSTICE STONE, dissenting:

I am not prepared to say that the constitutional guaranty of freedom of religion affords immunity from criminal prosecution for the fraudulent procurement of money by false statements as to one's religious experiences,

more than it renders polygamy or libel immune from criminal prosecution. *Davis* v. *Beason,* 133 U. S. 333; see *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 572; cf. *Patterson* v. *Colorado,* 205 U. S. 454, 462; *Near* v. *Minnesota,* 283 U. S. 697, 715. I cannot say that freedom of thought and worship includes freedom to procure money by making knowingly false statements about one's religious experiences. To go no further, if it were shown that a defendant in this case had asserted as a part of the alleged fraudulent scheme, that he had physically shaken hands with St. Germain in San Francisco on a day named, or that, as the indictment here alleges, by the exertion of his spiritual power he "had in fact cured . . . hundreds of persons afflicted with diseases and ailments," I should not doubt that it would be open to the Government to submit to the jury proof that he had never been in San Francisco and that no such cures had ever been effected. In any event I see no occasion for making any pronouncement on this subject in the present case.

The indictment charges respondents' use of the mails to defraud and a conspiracy to commit that offense by false statements of their religious experiences which had not in fact occurred. But it also charged that the representations were "falsely and fraudulently" made, that respondents "well knew" that these representations were untrue, and that they were made by respondents with the intent to cheat and defraud those to whom they were made. With the assent of the prosecution and the defense the trial judge withdrew from the consideration of the jury the question whether the alleged religious experiences had in fact occurred, but submitted to the jury the single issue whether petitioners honestly believed that they had occurred, with the instruction that if the jury did not so find, then it should return a verdict of guilty. On this

issue the jury, on ample evidence that respondents were without belief in the statements which they had made to their victims, found a verdict of guilty. The state of one's mind is a fact as capable of fraudulent misrepresentation as is one's physical condition or the state of his bodily health. See *Seven Cases* v. *United States,* 239 U. S. 510, 517; cf. *Durland* v. *United States,* 161 U. S. 306, 313. There are no exceptions to the charge and no contention that the trial court rejected any relevant evidence which petitioners sought to offer. Since the indictment and the evidence support the conviction, it is irrelevant whether the religious experiences alleged did or did not in fact occur or whether that issue could or could not, for constitutional reasons, have been rightly submitted to the jury. Certainly none of respondents' constitutional rights are violated if they are prosecuted for the fraudulent procurement of money by false representations as to their beliefs, religious or otherwise.

Obviously if the question whether the religious experiences in fact occurred could not constitutionally have been submitted to the jury the court rightly withdrew it. If it could have been submitted I know of no reason why the parties could not, with the advice of counsel, assent to its withdrawal from the jury. And where, as here, the indictment charges two sets of false statements, each independently sufficient to sustain the conviction, I cannot accept respondents' contention that the withdrawal of one set and the submission of the other to the jury amounted to an amendment of the indictment.

An indictment is amended when it is so altered as to charge a different offense from that found by the grand jury. *Ex parte Bain,* 121 U. S. 1. But here there was no alteration of the indictment, *Salinger* v. *United States,* 272 U. S. 542, 549, nor did the court's action, in effect, add anything to it by submitting to the jury matters which

it did not charge. *United States* v. *Norris,* 281 U. S. 619, 622. In *Salinger* v. *United States, supra,* 548–9, we explicitly held that where an indictment charges several offenses, or the commission of one offense in several ways, the withdrawal from the jury's consideration of one offense or one alleged method of committing it does not constitute a forbidden amendment of the indictment. See also *Goto* v. *Lane,* 265 U. S. 393, 402–3; *Ford* v. *United States,* 273 U. S. 593, 602. Were the rule otherwise the common practice of withdrawing from the jury's consideration one count of an indictment while submitting others for its verdict, sustained in *Dealy* v. *United States,* 152 U. S. 539, 542, would be a fatal error.

We may assume that under some circumstances the submission to the jury of part only of the matters alleged in the indictment might result in such surprise to the defendant as to amount to the denial of a fair trial. But, as in the analogous case of a variance between pleading and proof, a conviction can be reversed only upon a showing of injury to the "substantial rights" of the accused. *Berger* v. *United States,* 295 U. S. 78, 82. Here no claim of surprise has been or could be made. The indictment plainly charged both falsity of, and lack of good faith belief in the representations made, and it was agreed at the outset of the trial, without objection from the defendants, that only the issue of respondents' good faith belief in the representations of religious experiences would be submitted to the jury. Respondents, who were represented by counsel, at no time in the course of the trial offered any objection to this limitation of the issues, or any contention that it would result in a prohibited amendment of the indictment. So far as appears from the record before us the point was raised for the first time in the specifications of errors in the Circuit Court of Appeals. It is asserted that it was argued to the District Court on

motions for new trial and in arrest of judgment. If so, there was still no surprise by a ruling to which, as we have said, respondents' counsel assented when it was made.

On the issue submitted to the jury in this case it properly rendered a verdict of guilty. As no legally sufficient reason for disturbing it appears, I think the judgment below should be reversed and that of the District Court reinstated.

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

MR. JUSTICE JACKSON, dissenting:

I should say the defendants have done just that for which they are indicted. If I might agree to their conviction without creating a precedent, I cheerfully would do so. I can see in their teachings nothing but humbug, untainted by any trace of truth. But that does not dispose of the constitutional question whether misrepresentation of religious experience or belief is prosecutable; it rather emphasizes the danger of such prosecutions.

The Ballard family claimed miraculous communication with the spirit world and supernatural power to heal the sick. They were brought to trial for mail fraud on an indictment which charged that their representations were false and that they "well knew" they were false. The trial judge, obviously troubled, ruled that the court could not try whether the statements were untrue, but could inquire whether the defendants knew them to be untrue; and, if so, they could be convicted.

I find it difficult to reconcile this conclusion with our traditional religious freedoms.

In the first place, as a matter of either practice or philosophy I do not see how we can separate an issue as to what is believed from considerations as to what is believable. The most convincing proof that one believes his statements is to show that they have been true in his expe-

rience. Likewise, that one knowingly falsified is best proved by showing that what he said happened never did happen. How can the Government prove these persons knew something to be false which it cannot prove to be false? If we try religious sincerity severed from religious verity, we isolate the dispute from the very considerations which in common experience provide its most reliable answer.

In the second place, any inquiry into intellectual honesty in religion raises profound psychological problems. William James, who wrote on these matters as a scientist, reminds us that it is not theology and ceremonies which keep religion going. Its vitality is in the religious experiences of many people. "If you ask what these experiences are, they are conversations with the unseen, voices and visions, responses to prayer, changes of heart, deliverances from fear, inflowings of help, assurances of support, whenever certain persons set their own internal attitude in certain appropriate ways." [1] If religious liberty includes, as it must, the right to communicate such experiences to others, it seems to me an impossible task for juries to separate fancied ones from real ones, dreams from happenings, and hallucinations from true clairvoyance. Such experiences, like some tones and colors, have existence for one, but none at all for another. They cannot be verified to the minds of those whose field of consciousness does not include religious insight. When one comes to trial which turns on any aspect of religious belief or representation, unbelievers among his judges are likely not to understand and are almost certain not to believe him.

And then I do not know what degree of skepticism or disbelief in a religious representation amounts to actionable fraud. James points out that "Faith means belief

[1] William James, Collected Essays and Reviews, pp. 427–8; see generally his Varieties of Religious Experience and The Will to Believe. See also Burton, Heyday of a Wizard.

in something concerning which doubt is still theoretically possible." [2] Belief in what one may demonstrate to the senses is not faith. All schools of religious thought make enormous assumptions, generally on the basis of revelations authenticated by some sign or miracle. The appeal in such matters is to a very different plane of credulity than is invoked by representations of secular fact in commerce. Some who profess belief in the Bible read literally what others read as allegory or metaphor, as they read Aesop's fables. Religious symbolism is even used by some with the same mental reservations one has in teaching of Santa Claus or Uncle Sam or Easter bunnies or dispassionate judges. It is hard in matters so mystical to say how literally one is bound to believe the doctrine he teaches and even more difficult to say how far it is reliance upon a teacher's literal belief which induces followers to give him money.

There appear to be persons—let us hope not many—who find refreshment and courage in the teachings of the "I Am" cult. If the members of the sect get comfort from the celestial guidance of their "Saint Germain," however doubtful it seems to me, it is hard to say that they do not get what they pay for. Scores of sects flourish in this country by teaching what to me are queer notions. It is plain that there is wide variety in American religious taste. The Ballards are not alone in catering to it with a pretty dubious product.

The chief wrong which false prophets do to their following is not financial. The collections aggregate a tempting total, but individual payments are not ruinous. I doubt if the vigilance of the law is equal to making money stick by over-credulous people. But the real harm is on the mental and spiritual plane. There are those who hunger and thirst after higher values which they feel wanting in

[2] William James, The Will to Believe, p. 90.

their humdrum lives. They live in mental confusion or moral anarchy and seek vaguely for truth and beauty and moral support. When they are deluded and then disillusioned, cynicism and confusion follow. The wrong of these things, as I see it, is not in the money the victims part with half so much as in the mental and spiritual poison they get. But that is precisely the thing the Constitution put beyond the reach of the prosecutor, for the price of freedom of religion or of speech or of the press is that we must put up with, and even pay for, a good deal of rubbish.

Prosecutions of this character easily could degenerate into religious persecution. I do not doubt that religious leaders may be convicted of fraud for making false representations on matters other than faith or experience, as for example if one represents that funds are being used to construct a church when in fact they are being used for personal purposes. But that is not this case, which reaches into wholly dangerous ground. When does less than full belief in a professed credo become actionable fraud if one is soliciting gifts or legacies? Such inquiries may discomfort orthodox as well as unconventional religious teachers, for even the most regular of them are sometimes accused of taking their orthodoxy with a grain of salt.

I would dismiss the indictment and have done with this business of judicially examining other people's faiths.

UNITED STATES *v.* AMERICAN SURETY CO.

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

No. 381. Argued March 27, 28, 1944.—Decided April 24, 1944.

1. Under the Government construction contract here involved, the Government was not entitled to recover liquidated damages for delay in completion, where, though subsequently to the specified completion date, the Government terminated the contractor's right to proceed. P. 100.
2. A Government construction contract may validly provide for liquidated damages in limited situations only. Act of June 6, 1902, § 21. P. 101.

136 F. 2d 437, affirmed.

CERTIORARI, 320 U. S. 729, to review a judgment which reversed in part a judgment for the United States in a suit upon a construction contract, 44 F. Supp. 871.

Mr. Robert L. Stern, with whom *Solicitor General Fahy, Assistant Attorney General Shea,* and *Messrs. W. Marvin Smith* and *Hubert H. Margolies* were on the brief, for the United States.

Mr. Homer Cummings, with whom *Messrs. Carl McFarland* and *Sterling M. Wood* were on the brief, for respondent.

MR. JUSTICE MURPHY delivered the opinion of the Court.

On June 24, 1931, one John V. Grogan entered into a contract [1] with the United States to construct certain public buildings at the United States Inspection Station at

[1] The form of contract used was U. S. Standard Form No. 23 construction contract, approved by the President on November 19, 1926, and used between 1926 and 1935.

Babb-Piegan, Montana. Respondent became the surety on Grogan's performance bond to the United States. The completion date of the contract was March 4, 1932, but this was extended to June 20, 1933. Grogan failed to complete the work by the extended date. The Government, however, allowed him to continue with the construction. On July 20, 1934, thirteen months later, the work was still uncompleted. Pursuant to its authority under Article 9 of the construction contract, the Government thereupon terminated Grogan's right to proceed with the work because of his continuing default. The Government finished the work through another contractor, expending $2,044.04 more than it would have been required to expend had Grogan completed the work.

The United States brought this suit in the District Court to recover the excess cost and also to recover liquidated damages of $9,875 for the delay occasioned by Grogan's default. The liquidated damages were computed on the basis of an agreed $25 per day for the 395 days between June 20, 1933, the extended date for completion, and July 20, 1934, when the contract right to proceed was terminated. Grogan was not served and never appeared. The District Court denied respondent's motion to strike from the complaint the paragraph alleging a right to liquidated damages. *United States* v. *Grogan*, 39 F. Supp. 819. The court subsequently rendered judgment, after trial without a jury, for the United States for $2,044.04 as excess cost of completion and $9,875 as liquidated damages for delay. See *United States* v. *Grogan*, 44 F. Supp. 871. On appeal, the court below affirmed the judgment as to the excess cost but reversed as to the liquidated damages. *American Surety Co.* v. *United States*, 136 F. 2d 437. The public importance of the issue of the Government's right to liquidated damages under these circumstances led us to grant certiorari. 320 U. S. 729.

Section 21 of the Act of June 6, 1902,[2] provides that all contracts for the construction of any public building under the control of the Treasury Department shall contain a stipulation calling for liquidated damages for delay in completion of the work and that such stipulation shall be conclusive and binding upon all parties. Proof of actual damages is rendered unnecessary. This statute, however, does not purport to require liquidated damages to be paid in amounts or under circumstances beyond those stipulated by the parties. *Robinson* v. *United States*, 261 U. S. 486, 488. It was pursuant to this statutory command that Article 9 of the construction contract in issue was inserted. Thus this article is determinative of the Government's right to liquidated damages under the circumstances of this case.

Article 9, set out in the margin,[3] provides in effect that: (1) if the contractor refuses or fails to prosecute the work

[2] C. 1036, 32 Stat. 310, 326; 40 U. S. C. § 269. This provides: "In all contracts entered into with the United States for the construction or repair of any public building or public work under the control of the Treasury Department, a stipulation shall be inserted for liquidated damages for delay; and the Secretary of the Treasury is authorized and empowered to remit the whole or any part of such damages as in his discretion may be just and equitable; and in all suits hereafter commenced on any such contracts or on any bond given in connection therewith it shall not be necessary for the United States, whether plaintiff or defendant, to prove actual or specific damages sustained by the Government by reason of delays, but such stipulation for liquidated damages shall be conclusive and binding upon all parties." See H. Rep. No. 1794, p. 8 (57th Cong., 1st Sess.); 35 Cong. Rec. 4935.

[3] "*Delays—Damages.*—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in Article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event, the Government may take over

with proper diligence or to complete his work within the specified time, the Government may at any time terminate his right to proceed and prosecute the same to completion by contract or otherwise, in which case the Government may recover from the contractor or his surety any excess cost occasioned thereby; (2) "if the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications." In this instance, paragraph 5 of the accompanying specifications provides that "the contractor shall pay to the government the amount of Twenty-Five Dollars ($25.00) as fixed, agreed, and liquidated damages for each calendar day's delay in the completion of the contract." This paragraph merely provides the agreed rate of the per diem liquidated damages to be paid in the situations contemplated by Article 9. It is obviously not intended to spell out the situations where liquidated damages are to be paid and cannot, con-

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the work and prosecute the same to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay, until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof. . . ."

trary to the Government's contention, control the language of Article 9.[4]

The impact of Article 9 on the facts of this case is clear. The contractor having failed to complete his work within the specified time, the Government exercised its option under the first part of Article 9 to terminate his right to proceed. This power to terminate could be exercised before or on the stipulated completion date or, as in this case, at any date thereafter. The Government then made other arrangements to complete the construction work and was entitled to, and did recover, the excess cost occasioned thereby. It thus waived its right to liquidated damages under the second part of Article 9. That right is conditioned upon the Government not terminating the contractor's right to proceed. Where there is such a termination, even though it be subsequent to the stipulated completion date, the right to liquidated damages disappears. Such has been the uniform and correct result heretofore reached in the application of this type of contract provision. See *United States* v. *Cunningham,* 125 F. 2d 28; *United States* v. *Maryland Casualty Co.,* 25 F. Supp. 778; *Maryland Casualty Co.* v. *United States,* 93 Ct. Cls. 247. See also *Fidelity & Casualty Co.* v. *United States,* 81 Ct. Cls. 495; *Commercial Casualty Insurance Co.* v. *United States,* 83 Ct. Cls. 367; *American Employer's Insurance Co.* v. *United States,* 91 Ct. Cls. 231.

The Government has urged us to read the second part of Article 9 as though the right to liquidated damages were

[4] The directions for the preparation of construction contracts upon the form here involved state that "The specifications should include a paragraph stating the amount of liquidated damages that will be paid by the contractor for each calendar day of delay, as indicated in Article 9 of the contract." It was pursuant to this direction that paragraph 5 of the specifications in the instant case was inserted. This instruction indicates that the specifications are to include no more than "the amount" or rate of per diem damages that are to be applied "as indicated in Article 9 of the contract."

based, not upon a condition precedent that the Government not terminate, but upon a continuing condition, under which liquidated damages would accrue "so long as the Government does not terminate" the contractor's right to proceed. This is said to be the only way to give full effect to the prime purpose of § 21 of the 1902 Act to eliminate the uncertainties and difficulties of establishing actual damages to the Government by delay in obtaining the use of a public building. Otherwise proof is required of actual damages for the delay where termination occurs before completion in the teeth of a statute which dispenses with such proof in suits on a construction contract containing a stipulation "for liquidated damages for delay." The Government also claims that failure to allow it liquidated damages under these circumstances leaves it entirely to the contractor whether liquidated damages will ever be paid since he can relieve himself of such liability at any time short of completion simply by abandoning the work or provoking the Government to terminate his right to proceed. The Government contracting officers in turn would be induced to allow the contractor to proceed to completion despite inexcusable delays so as not to forfeit mounting liquidated damages, thus precluding prompt completion and occupancy of needed structures.

But we are confronted here with an unambiguous contract that clearly limits the right to liquidated damages to situations where the Government does not at any time terminate the contractor's right to proceed. That it may be wiser to expand the right to such damages to every case of delay, regardless of whether there is a termination, is of course not relevant in interpreting and applying clear words of limitation in the contract. We find nothing, moreover, in § 21 of the 1902 Act that fills in interstices deliberately left open by the parties. No statutory language or policy forbids the Government and a contractor from stipulating for liquidated damages in

limited situations only. Indeed the statute makes any such stipulation "conclusive and binding upon all parties," thereby foreclosing the Government's right to object to its own failure to insist upon liquidated damages in other situations. Since we are not justified in rewriting the clear provisions of the contract to include what might well have been but was not inserted, the judgment below must be

Affirmed.

CLIFFORD F. MacEVOY CO. ET AL. *v.* UNITED STATES FOR THE USE AND BENEFIT OF CALVIN TOMKINS CO.

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

No. 483. Argued March 7, 1944.—Decided April 24, 1944.

1. Where A sold materials to B who merely sold them to a contractor for use on a Government project, A is not entitled to recover upon a payment bond furnished by the contractor pursuant to the Miller Act. P. 104.
2. The term "subcontractor" in the proviso of § 2 (a) of the Miller Act—"any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon said payment bond"—does not include a materialman who merely sells materials to the contractor. P. 108.
3. The salutary policy of the Miller Act to protect those whose labor and materials go into public projects does not warrant disregard of the plain words of limitation in the proviso of § 2 (a) of the Act. P. 107.

137 F. 2d 565, reversed.

CERTIORARI, 320 U. S. 733, to review the reversal of a judgment, 49 F. Supp. 81, dismissing the complaint in a suit against a Government contractor and surety upon a payment bond.

Mr. Edward F. Clark, with whom *Messrs. Elmer O. Goodwin* and *John A. Shorten* were on the brief, for petitioners.

Mr. Benjamin P. DeWitt for respondent.

Solicitor General Fahy, Assistant Attorney General Shea, and *Messrs. Valentine Brookes* and *Melvin Richter* filed a brief on behalf of the United States, as *amicus curiae,* urging affirmance.

MR. JUSTICE MURPHY delivered the opinion of the Court.

The United States entered into a contract with the petitioner Clifford F. MacEvoy Company whereby the latter agreed to furnish the materials and to perform the work necessary for the construction of dwelling units of a Defense Housing Project near Linden, New Jersey, on a cost-plus-fixed-fee basis. Pursuant to the Miller Act,[1] MacEvoy as principal and the petitioner Aetna Casualty and Surety Company as surety executed a payment bond in the amount of $1,000,000, conditioned on the prompt payment by MacEvoy "to all persons supplying labor and material in the prosecution of the work provided for in said contract." The bond was duly accepted by the United States.

MacEvoy thereupon purchased from James H. Miller & Company certain building materials for use in the prosecution of the work provided for in MacEvoy's contract with the Government. Miller in turn purchased these materials from the respondent, Calvin Tomkins Company. Miller failed to pay Tomkins a balance of $12,033.49. There is no allegation that Miller agreed to perform or did perform any part of the work on the construction project.

[1] Act of August 24, 1935, c. 642, 49 Stat. 793; 40 U. S. C. § 270a *et seq.*

Nor is it disputed that MacEvoy paid Miller in full for the materials.

Within ninety days from the date on which Tomkins furnished the last of the materials to Miller, Tomkins gave written notice to MacEvoy and the surety of the existence and amount of Tomkins' claim for materials furnished to Miller. Tomkins as use-plaintiff then instituted this action against MacEvoy and the surety on the payment bond. The District Court granted petitioners' motion to dismiss the complaint for failure to state a claim against them. 49 F. Supp. 81. The Circuit Court of Appeals reversed the judgment. 137 F. 2d 565. We granted certiorari because of a novel and important question presented under the Miller Act. 320 U. S. 733.

Specifically the issue is whether under the Miller Act a person supplying materials to a materialman of a Government contractor and to whom an unpaid balance is due from the materialman can recover on the payment bond executed by the contractor. We hold that he cannot.

The Heard Act,[2] which was the predecessor of the Miller Act, required Government contractors to execute penal bonds for the benefit of "all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract." We consistently applied a liberal construction to that statute, noting that it was remedial in nature and that it clearly evidenced "the intention of Congress to protect those whose labor or material has contributed to the prosecution of the work." *United States* v. *American Surety Co.*, 200 U. S. 197, 204. See also *Mankin* v. *United States*, 215 U. S. 533; *U. S. Fidelity & Guaranty Co.* v. *Bartlett*, 231 U. S. 237; *Brogan* v. *National Surety Co.*, 246 U. S. 257; *Fleischmann Construction Co.* v. *United States*, 270 U. S. 349; *Standard*

[2] Act of August 13, 1894, c. 280, 28 Stat. 278, as amended by Act of February 24, 1905, c. 778, 33 Stat. 811; 40 U. S. C. § 270.

Accident Insurance Co. v. *United States,* 302 U. S. 442. We accordingly held that the phrase "all persons supplying [the contractor] . . . with labor and materials" included not only those furnishing labor and materials directly to the prime contractor but also covered those who contributed labor and materials to subcontractors. *United States* v. *American Surety Co., supra,* 204; *Mankin* v. *United States, supra,* 539; *Illinois Surety Co.* v. *John Davis Co.,* 244 U. S. 376, 380. We had no occasion, however, to determine under that Act whether those who merely sold materials to materialmen, who in turn sold them to the prime contractors, were included within the phrase and hence entitled to recover on the penal bond.[3]

The Miller Act, while it repealed the Heard Act, reinstated its basic provisions and was designed primarily to eliminate certain procedural limitations on its beneficiaries.[4] There was no expressed purpose in the legis-

[3] In *United States* v. *American Surety Co.,* 200 U. S. 197, 204, we said, "There is no language in the statute nor in the bond which is therein authorized limiting the right of recovery to those who furnish material or labor directly to the contractor, but all persons supplying the contractor with labor or materials in the prosecution of the work provided for in the contract are to be protected. The source of the labor or material is not indicated or circumscribed. It is only required to be 'supplied' to the contractor in the prosecution of the work provided for." This broad language, which went beyond that required by the facts and the holding in that case, might seem to justify recovery by persons supplying materials to materialmen. Such was the holding in *Utah Construction Co.* v. *United States,* 15 F. 2d 21. Our denial of certiorari in that case, 273 U. S. 745, was not a determination by us of the issue, however. Compare *Continental Casualty Co.* v. *North American Cement Corp.,* 91 F. 2d 307, expressing the opposite opinion under an identical District of Columbia statute.

[4] Under the Heard Act, a single bond was required to protect both the Government and the suppliers of labor and materials. The Government was given the sole right to sue on the bond for six months after completion of the work and final settlement. Other claimants could sue only thereafter and had to join in a single action. Serious

lative history to restrict in any way the coverage of the Heard Act; the intent rather was to remove the procedural difficulties found to exist under the earlier measure and thereby make it easier for unpaid creditors to realize the benefits of the bond. Section 1 (a) (2) of the Miller Act requires every Government contractor, where the amount of the contract exceeds $2,000, to furnish to the United States a payment bond with a surety "for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person." Section 2 (a) further provides that "every person who has furnished labor or material in the prosecution of the work provided for in such contract" and who has not been paid in full therefor within ninety days after the last labor was performed or material supplied may bring suit on the payment bond for the unpaid balance. A proviso then states:

"*Provided, however,* That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor

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inconveniences and delays resulted. The claimants, often in need of immediate funds, were compelled to settle meritorious claims for less than the full amount. The Miller Act was designed to meet these difficulties by requiring that the prime contractor execute two bonds—a performance bond to protect the Government and a payment bond to protect the creditors. Creditors can sue on the latter bond without waiting for the Government and even without waiting for completion of the project. Each creditor may sue separately ninety days after the labor is completely performed or materials fully supplied. Hearings on H. R. 2068, et al., Bonds of Contractors on Public Works, House Committee on the Judiciary, 74th Cong., 1st Sess.; 79 Cong. Rec. 11702, 13382; H. Rep. No. 1263 and S. Rep. No. 1238 (74th Cong., 1st Sess.).

or furnished or supplied the last of the material for which such claim is made. . . ."

The Miller Act, like the Heard Act, is highly remedial in nature. It is entitled to a liberal construction and application in order properly to effectuate the Congressional intent to protect those whose labor and materials go into public projects. *Fleisher Engineering Co.* v. *United States,* 311 U. S. 15, 17, 18; cf. *United States* v. *Irwin,* 316 U. S. 23, 29, 30. But such a salutary policy does not justify ignoring plain words of limitation and imposing wholesale liability on payment bonds. Ostensibly the payment bond is for the protection of "all persons supplying labor and material in the prosecution of the work" and "every person who has furnished labor or material in the prosecution of the work" is given the right to sue on such payment bond. Whether this statutory language is broad enough to include persons supplying material to materialmen as well as those in more remote relationships we need not decide. Even if it did include such persons we cannot disregard the limitations on liability which Congress intended to impose and did impose in the proviso of § 2 (a). However inclusive may be the general language of a statute, it "will not be held to apply to a matter specifically dealt with in another part of the same enactment. . . . Specific terms prevail over the general in the same or another statute which otherwise might be controlling." *Ginsberg & Sons* v. *Popkin,* 285 U. S. 204, 208.

The proviso of § 2 (a), which had no counterpart in the Heard Act, makes clear that the right to bring suit on a payment bond is limited to (1) those materialmen, laborers and subcontractors who deal directly with the prime contractor and (2) those materialmen, laborers and sub-subcontractors who, lacking express or implied contractual relationship with the prime contractor, have direct contractual relationship with a subcontractor and who give

the statutory notice of their claims to the prime contractor. To allow those in more remote relationships to recover on the bond would be contrary to the clear language of the proviso and to the expressed will of the framers of the Act.[5] Moreover, it would lead to the absurd result of requiring notice from persons in direct contractual relationship with a subcontractor but not from more remote claimants.

The ultimate question in this case, therefore, is whether Miller, the materialman to whom Tomkins sold the goods and who in turn supplied them to MacEvoy, was a subcontractor within the meaning of the proviso. If he was, Tomkins' direct contractual relationship with him enables Tomkins to recover on MacEvoy's payment bond. If Miller was not a subcontractor, Tomkins stands in too remote a relationship to secure the benefits of the bond.

The Miller Act itself makes no attempt to define the word "subcontractor." We are thus forced to utilize ordinary judicial tools of definition. Whether the word includes laborers and materialmen is not subject to easy solution, for the word has no single exact meaning.[6] In a broad, generic sense a subcontractor includes anyone who has a contract to furnish labor or material to the prime contractor. In that sense Miller was a subcontractor. But under the more technical meaning, as established by usage

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[5] "A sub-subcontractor may avail himself of the protection of the bond by giving written notice to the contractor, but that is as far as the bill goes. It is not felt that more remote relationships ought to come within the purview of the bond." H. Rep. No. 1263 (74th Cong., 1st Sess.), p. 3.

[6] In analogous situations, state and lower federal courts have expressed divergent opinions as to whether the word "subcontractor" includes laborers and materialmen. See annotation in 141 A. L. R. 321 for a summary of the conflicting cases. We have not heretofore had occasion to define the word in this connection. Any loose, interchangeable use of "subcontractor" and "materialman" in any prior decision of ours is without significance.

in the building trades, a subcontractor is one who performs for and takes from the prime contractor a specific part of the labor or material requirements of the original contract, thus excluding ordinary laborers and materialmen. To determine which meaning Congress attached to the word in the Miller Act, we must look to the Congressional history of the statute as well as to the practical considerations underlying the Act.

It is apparent from the hearings before the subcommittee of the House Committee on the Judiciary leading to the adoption of the Miller Act that the participants had in mind a clear distinction between subcontractors and materialmen. In opening the hearings, Representative Miller, the sponsor of the bill that became the Miller Act, stated in connection with the various proposed bills that "we would like to have the reaction and opinion of members in reference to those bills that deal with the general subject of requiring a bond for the benefit of laborers and materialmen who deal with subcontractors on public works." [7] And the authoritative committee report [8] made numerous references to and distinguished among "laborers, materialmen and subcontractors." Similar uncontradicted statements were made in both houses of Congress when the Act was pending before them.[9] The fact that

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[7] Hearings on H. R. 2068, et al., Bonds of Contractors on Public Works, House Committee on the Judiciary, 74th Cong., 1st Sess., p. 1. See also statements by Rep. Miller, *id.*, pp. 18, 26, 60, 67, 74; Rep. Robsion, p. 30; Rep. McLaughlin, p. 73; Rep. Dockweiler, pp. 12–22; Rep. Celler, pp. 83, 84, 89; Edward H. Cushman, pp. 23–31, 85.

[8] H. Rep. No. 1263 (74th Cong., 1st Sess.), pp. 1, 2.

[9] Rep. Miller stated in the House that "This bill merely provides that in the construction of public buildings and other public works there shall be two bonds, one for the performance of the contract with the Government, and the other a payment bond for the protection of subcontractors and those furnishing the labor and material. Under the present law we have but one bond, with a dual obligation, but it is not satisfactory in that it does not afford protection to the

subcontractors were so consistently distinguished from materialmen and laborers in the course of the formation of the Act is persuasive evidence that the word "subcontractor" was used in the proviso of § 2 (a) in its technical sense so as to exclude materialmen and laborers.[10]

Practical considerations underlying the Act likewise support this conclusion. Congress cannot be presumed, in the absence of express statutory language, to have intended to impose liability on the payment bond in situations where it is difficult or impossible for the prime contractor to protect himself. The relatively few subcontractors who perform part of the original contract represent in a sense the prime contractor and are well known to him. It is easy for the prime contractor to secure himself against loss by requiring the subcontractors to give security by bond, or otherwise, for the payment of those who contract directly with the subcontractors. *United States* v. *American Surety Co., supra,* 204; *Mankin* v. *United States, supra,* 540. But this method of protection is generally inadequate to cope with remote and undeterminable liabilities incurred by an ordinary materialman, who may be a manufacturer, a wholesaler or a retailer.[11] Many such materialmen are usually involved in large

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subcontractors, materialmen, and laborers. This merely provides for two bonds, one for the protection of the Government's interests, and the other for the protection of the rights of labor, the subcontractors, and material furnishers." 79 Cong. Rec. 11702.

Sen. Burke said in the Senate that "This bill would amend that law by requiring an additional bond, a payment bond, for the protection of materialmen and laborers, subcontractors, and all who put forth their labor or furnish materials or incur expenditures in connection with the work." 79 Cong. Rec. 13382.

[10] See, in general, Campbell, "The Protection of Laborers and Materialmen Under Construction Bonds," 3 Univ. of Chicago L. Rev. 1; Annotation, 77 A. L. R. 21.

[11] See Note, "The Widening Scope of Protection of Statutory Construction Bonds," 45 Harvard L. Rev. 1236.

projects; they deal in turn with innumerable sub-materialmen and laborers. To impose unlimited liability under the payment bond to those sub-materialmen and laborers is to create a precarious and perilous risk on the prime contractor and his surety. To sanction such a risk requires clear language in the statute and in the bond so as to leave no alternative.[12] Here the proviso of § 2 (a) of the Act forbids the imposition of such a risk, thereby foreclosing Tomkins' right to sue on the payment bond.

The judgment of the court below is

Reversed.

NATIONAL LABOR RELATIONS BOARD v. HEARST PUBLICATIONS, INC.

NO. 336. CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.*

Argued February 8, 9, 1944.—Decided April 24, 1944.

1. The meaning of the term "employee" in the National Labor Relations Act is to be determined not exclusively by reference to common-law standards, local law, or legal classifications made for other purposes, but with regard also to the history, context and purposes

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[12] Congress has shown its ability in other statutes to make clear an intent to include materialmen within the meaning of the word "subcontractor." See § 301 (a) (3) of the Act of Dec. 2, 1942, 56 Stat. 1035, 42 U. S. C. Supp. II, § 1651 (a) (3), providing that the provisions of the Act shall not apply to employees of a "subcontractor who is engaged exclusively in furnishing materials or supplies." In other statutes, Congress has clearly used the term "subcontractor" in contrast to "materialman." See 40 U. S. C. § 407 (b); 41 U. S. C. § 10b (a) and (b); 41 U. S. C. § 28.

* Together with No. 337, *National Labor Relations Board* v. *Stockholders Publishing Co., Inc.*, No. 338, *National Labor Relations Board* v. *Hearst Publications, Inc.*, and No. 339, *National Labor Relations Board* v. *Times-Mirror Co.*, also on writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit.

of the Act and to the economic facts of the particular relationship. Pp. 120, 129.

2. The determination of the National Labor Relations Board that, in the circumstances of the case, a person is an "employee" under the National Labor Relations Act, may not be set aside on review if it has warrant in the record and a reasonable basis in law. P. 130.

3. The conclusion of the National Labor Relations Board that "newsboys" distributing respondents' papers on the streets of the city were employees under the National Labor Relations Act is supported by the findings and the evidence and has ample basis in the law. P. 131.

The Board found that the "newsboys" work continuously and regularly, rely upon their earnings for the support of themselves and their families, and have their total wages influenced in large measure by the publishers (respondents) who dictate their buying and selling prices, fix their markets and control their supply of papers; that their hours of work and their efforts on the job are supervised and to some extent prescribed by the publishers or the publishers' agents; and that a substantial part of their sales equipment and advertising materials is furnished by the publishers with the intention that it be used for the publishers' benefit.

4. The Board's designation of the collective bargaining units in this case—(1) full-time newsboys and "checkmen," engaged to sell papers within the city, and excluding bootjackers, temporary, casual, and part-time newsboys; and (2) newsboys selling at established spots in the city, four or more hours per day, five or more days per week, except temporary newsboys—was within its discretion and is sustained. P. 132.

(a) That the Board's selection of the collective bargaining units emphasizes difference in tenure rather than in function was, on the record in this case, not an abuse of discretion. P. 133.

(b) The Board's exclusion of suburban newsboys from the collective bargaining units, on the ground that they were not organized by the union, was, on the record in this case, not an abuse of discretion. P. 133.

136 F. 2d 608, reversed.

CERTIORARI, 320 U. S. 728, to review decrees denying enforcement of orders of the National Labor Relations Board (39 N. L. R. B. 1245, 1256) and setting aside the orders.

Mr. Alvin J. Rockwell, with whom *Solicitor General Fahy, Messrs. Robert L. Stern* and *Frank Donner,* and *Miss Ruth Weyand* were on the brief, for petitioner.

Mr. John M. Hall, with whom *Mr. Oscar Lawler* was on the brief; *Mr. Lewis B. Binford,* with whom *Mr. Thomas S. Tobin* was on the brief; *Mr. Edward L. Compton,* with whom *Mr. H. S. Mac Kay, Jr.,* was on the brief; and *Mr. T. B. Cosgrove,* with whom *Mr. John N. Cramer* was on the brief,—for respondents in Nos. 336, 337, 338, and 339, respectively.

Mr. Arthur W. A. Cowan filed a brief on behalf of the International Printing Pressmen & Assistants' Union, as *amicus curiae,* in support of petitioner.

Mr. Justice Rutledge delivered the opinion of the Court.

These cases arise from the refusal of respondents, publishers of four Los Angeles daily newspapers, to bargain collectively with a union representing newsboys who distribute their papers on the streets of that city. Respondents' contention that they were not required to bargain because the newsboys are not their "employees" within the meaning of that term in the National Labor Relations Act, 49 Stat. 450, 29 U. S. C. § 152,[1] presents the important question which we granted certiorari [2] to resolve.

[1] Section 2 (3) of the Act provides that "The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual

The proceedings before the National Labor Relations Board were begun with the filing of four petitions for investigation and certification [3] by Los Angeles Newsboys Local Industrial Union No. 75. Hearings were held in a consolidated proceeding [4] after which the Board made findings of fact and concluded that the regular full-time newsboys selling each paper were employees within the Act and that questions affecting commerce concerning the representation of employees had arisen. It designated appropriate units and ordered elections. 28 N. L. R. B. 1006.[5] At these the union was selected as their representative by majorities of the eligible newsboys. After the union was appropriately certified, 33 N. L. R. B. 941, 36 N. L. R. B. 285, the respondents refused to bargain with it. Thereupon proceedings under § 10, 49 Stat. 453–455, 29 U. S. C. § 160, were instituted, a hearing [6] was held and respondents were found to have violated §§ 8 (1) and 8 (5) of the Act, 49 Stat. 452–453, 29 U. S. C. § 158 (1), (5). They were ordered to cease and desist from such violations and to bargain collectively with the union upon request. 39 N. L. R. B. 1245, 1256.

Upon respondents' petitions for review and the Board's petitions for enforcement, the Circuit Court of Appeals, one judge dissenting, set aside the Board's orders. Re-

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employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse."

[2] 320 U. S. 728.

[3] Pursuant to § 9 (b) and (c) of the Act; 49 Stat. 453, 29 U. S. C. § 159 (b) and (c).

[4] Although it treated the four representation petitions in one consolidated proceeding and disposed of them in one opinion, the Board did not consider evidence with respect to one publisher as applicable to any of the others.

[5] Subsequently those orders were amended in various details. 29 N. L. R. B. 94, 95; 30 N. L. R. B. 696, 697; 31 N. L. R. B. 697.

[6] The record in the representation proceeding was in effect incorporated in the complaint proceeding.

jecting the Board's analysis, the court independently examined the question whether the newsboys are employees within the Act, decided that the statute imports common-law standards to determine that question, and held the newsboys are not employees. 136 F. 2d 608.

The findings of the Board disclose that the Los Angeles Times and the Los Angeles Examiner, published daily and Sunday,[7] are morning papers. Each publishes several editions which are distributed on the streets during the evening before their dateline, between about 6:00 or 6:30 p. m. and 1:00 a. m., and other editions distributed during the following morning until about 10:00 o'clock. The Los Angeles Evening Herald and Express, published every day but Sunday, is an evening paper, which has six editions on the presses between 9:00 a. m. and 5:30 p. m.[8] The News, also published every day but Sunday, is a twenty-four hour paper with ten editions.[9]

The papers are distributed to the ultimate consumer through a variety of channels, including independent dealers and newsstands often attached to drug, grocery or confectionery stores, carriers who make home deliveries, and newsboys who sell on the streets of the city and its suburbs. Only the last of these are involved in this case.

The newsboys work under varying terms and conditions. They may be "bootjackers," selling to the general public at places other than established corners, or they may sell

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[7] The Times' daily circulation is about 220,000 and its Sunday circulation is about 368,000. The Examiner's daily circulation is about 214,000 and its Sunday circulation is about 566,000.

[8] The Herald has a circulation of about 243,000. Both it and the Examiner are owned by Hearst Publications, Inc.

[9] The News has a circulation of about 195,000. Its first three and seventh editions are consigned for the most part to route delivery or suburban dealers. Its fourth edition, which goes to press at 2:45 a. m., is sold in the city during the mornings. The remaining editions, which go to press at regular intervals between 9:50 a. m. and 5:00 p. m., are sold in the city during the afternoons.

at fixed "spots." They may sell only casually or part-time, or full-time; and they may be employed regularly and continuously or only temporarily. The units which the Board determined to be appropriate are composed of those who sell full-time at established spots. Those vendors, misnamed boys, are generally mature men, dependent upon the proceeds of their sales for their sustenance, and frequently supporters of families. Working thus as news vendors on a regular basis, often for a number of years, they form a stable group with relatively little turnover, in contrast to schoolboys and others who sell as bootjackers, temporary and casual distributors.

Over-all circulation and distribution of the papers are under the general supervision of circulation managers. But for purposes of street distribution each paper has divided metropolitan Los Angeles into geographic districts. Each district is under the direct and close supervision of a district manager. His function in the mechanics of distribution is to supply the newsboys in his district with papers which he obtains from the publisher and to turn over to the publisher the receipts which he collects from their sales, either directly or with the assistance of "checkmen" or "main spot" boys.[10] The latter, stationed at the important corners or "spots" in the district, are newsboys who, among other things, receive delivery of the papers, redistribute them to other newsboys stationed at less important corners, and collect receipts from their sales.[11] For that service, which occupies a minor portion

[10] The Examiner, the Herald, and the News all employ "main spot" boys or checkmen; the Times does not.

[11] The Times district managers deliver the papers directly to the newsboys and collect directly from them. On the other papers district managers may deliver bundles of papers to the checkmen or directly to the newsboys themselves. The Times customarily transports its newsboys to their "spots" from the Times building, where they first report and pick up their papers. The other respondents offer similar transportation to those of their newsboys who desire it.

of their working day, the checkmen receive a small salary from the publisher.[12] The bulk of their day, however, they spend in hawking papers at their "spots" like other full-time newsboys. A large part of the appropriate units selected by the Board for the News and the Herald are checkmen who, in that capacity, clearly are employees of those papers.

The newsboys' compensation consists in the difference between the prices at which they sell the papers and the prices they pay for them. The former are fixed by the publishers and the latter are fixed either by the publishers or, in the case of the News, by the district manager.[13] In practice the newsboys receive their papers on credit. They pay for those sold either sometime during or after the close of their selling day, returning for credit all unsold papers.[14] Lost or otherwise unreturned papers, however, must be paid for as though sold. Not only is the "profit" per paper thus effectively fixed by the publisher, but substantial control of the newsboys' total "take home" can be effected through the ability to designate their sales areas and the power to determine the number of papers allocated to each. While as a practical matter this power is not exercised fully, the newsboys' "right" to decide how many papers they will take is also not absolute. In practice, the Board found, they cannot determine the size of their established order without the cooperation of the district manager. And often the number of papers they must take is determined unilaterally by the district managers.

In addition to effectively fixing the compensation, respondents in a variety of ways prescribe, if not the

[12] In the case of the Examiner these "main spot" boys, although performing services similar to those of checkmen, are less closely knit to the publisher and sometimes receive no compensation for their services.

[13] See *infra*, note 15.

[14] Newsboys selling the Herald in one residential area do not receive credit for *all* unsold papers.

minutiae of daily activities, at least the broad terms and conditions of work. This is accomplished largely through the supervisory efforts of the district managers, who serve as the nexus between the publishers and the newsboys.[15] The district managers assign "spots" or corners to which the newsboys are expected to confine their selling activities.[16] Transfers from one "spot" to another may be ordered by the district manager for reasons of discipline or efficiency or other cause. Transportation to the spots from the newspaper building is offered by each of respondents. Hours of work on the spots are determined not simply by the impersonal pressures of the market, but to a real extent by explicit instructions from the district managers. Adherence to the prescribed hours is observed closely by the district managers or other supervisory agents of the publishers. Sanctions, varying in severity

[15] Admittedly the Times, Examiner, and Herald district managers are employees of their respective papers. While the News urged earnestly that its managers are not its employees, the Board found otherwise. They do not operate on a formal salary basis but they receive guaranteed minimum payments which the Board found are "no more than a fixed salary bearing another label." And while they, rather than the publisher, fix the price of the paper to the newsboy, the Board found, on substantial evidence, that they function for the News in specified districts, distribute racks, aprons, advertising placards from the News to the newsboys, give instructions as to their use, supervise the redistributing activities of the checkmen (themselves clearly employees of the News), and hand out News checks to the checkmen for their services. On this and other evidence suggesting that however different may be their formal arrangements, News district managers bear substantially the same relation to the publisher on one hand and the newsboys on the other as do the other district managers, the Board concluded that they were employees of the paper.

[16] Although from time to time these "spots" are bought and sold among the vendors themselves, without objection by district managers and publishers, this in no way negates the need for the district managers' implicit approval of a spotholder or their authority to remove vendors from their "spots" for reasons of discipline or efficiency.

from reprimand to dismissal, are visited on the tardy and the delinquent. By similar supervisory controls minimum standards of diligence and good conduct while at work are sought to be enforced. However wide may be the latitude for individual initiative beyond those standards, district managers' instructions in what the publishers apparently regard as helpful sales technique are expected to be followed. Such varied items as the manner of displaying the paper, of emphasizing current features and headlines, and of placing advertising placards, or the advantages of soliciting customers at specific stores or in the traffic lanes are among the subjects of this instruction. Moreover, newsboys are furnished with sales equipment, such as racks, boxes and change aprons, and advertising placards by the publishers. In this pattern of employment the Board found that the newsboys are an integral part of the publishers' distribution system and circulation organization. And the record discloses that the newsboys and checkmen feel they are employees of the papers; and respondents' supervisory employees, if not respondents themselves, regard them as such.

In addition to questioning the sufficiency of the evidence to sustain these findings, respondents point to a number of other attributes characterizing their relationship with the newsboys [17] and urge that on the entire

[17] E. g., that there is either no evidence in the record to show, or the record explicitly negatives, that respondents carry the newsboys on their payrolls, pay "salaries" to them, keep records of their sales or locations, or register them as "employees" with the Social Security Board, or that the newsboys are covered by workmen's compensation insurance or the California Compensation Act. Furthermore, it is urged the record shows that the newsboys all sell newspapers, periodicals and other items not furnished to them by their respective publishers, assume the risk for papers lost, stolen or destroyed, purchase and sell their "spots," hire assistants and relief men and make arrangements among themselves for the sale of competing or left-over papers.

record the latter cannot be considered their employees. They base this conclusion on the argument that by common-law standards the extent of their control and direction of the newsboys' working activities creates no more than an "independent contractor" relationship and that common-law standards determine the "employee" relationship under the Act. They further urge that the Board's selection of a collective bargaining unit is neither appropriate nor supported by substantial evidence.[18]

I.

The principal question is whether the newsboys are "employees." Because Congress did not explicitly define the term, respondents say its meaning must be determined by reference to common-law standards. In their view "common-law standards" are those the courts have applied in distinguishing between "employees" and "independent contractors" when working out various problems unrelated to the Wagner Act's purposes and provisions.

The argument assumes that there is some simple, uniform and easily applicable test which the courts have used, in dealing with such problems, to determine whether persons doing work for others fall in one class or the other. Unfortunately this is not true. Only by a long and tortuous history was the simple formulation worked out which has been stated most frequently as "the test" for deciding whether one who hires another is responsible in tort for his wrongdoing.[19] But this formula has been by no means

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[18] They have abandoned here the contention, made in the circuit court, that the Act does not reach their controversies with the newsboys because they do not affect commerce.

[19] The so-called "control test" with which common-law judges have wrestled to secure precise and ready applications did not escape the difficulties encountered in borderland cases by its reformulation in the Restatement of the Law of Agency § 220. That even at the common law the control test and the complex of incidents evolved in

exclusively controlling in the solution of other problems. And its simplicity has been illusory because it is more largely simplicity of formulation than of application. Few problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent, entrepreneurial dealing.[20] This is true within the limited field of determining vicarious liability in tort. It becomes more so when the field is expanded to include all of the possible applications of the distinction.

It is hardly necessary to stress particular instances of these variations or to emphasize that they have arisen principally, first, in the struggle of the courts to work out common-law liabilities where the legislature has given no guides for judgment,[21] more recently also under statutes which have posed the same problem for solution in the light of the enactment's particular terms and purposes.[22]

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applying it to distinguish an "employee" from an "independent contractor," for purposes of vicarious liability in tort, did not necessarily have the same significance in other contexts, compare *Lumley* v. *Gye* [1853] El. & Bl. 216, and see also the cases collected in 21 A. L. R. 1229 *et seq.*; 23 A. L. R. 984 *et seq.*

[20] See, e. g., Stevens, The Test of the Employment Relation (1939) 38 Mich. L. Rev. 188; Steffen, Independent Contractor and the Good Life (1935) 2 U. of Chi. L. Rev. 501; Leidy, Salesmen as Independent Contractors (1938) 28 Mich. L. Rev. 365; N. Y. Law Revision Commission Report, 1939 (1939) Legislative Document No. 65 (K).

[21] See note 20 *supra*.

[22] Compare, e. g., *McKinley* v. *Payne Lumber Co.*, 200 Ark. 1114, 143 S. W. 2d 38; *Industrial Comm'n* v. *Northwestern Ins. Co.*, 103 Colo. 550, 88 P. 2d 560; *Schomp* v. *Fuller Brush Co.*, 124 N. J. L. 487, 12 A. 2d 702; 126 N. J. L. 368, 19 A. 2d 780; *Unemployment Compensation Comm'n* v. *Jefferson Ins. Co.*, 215 N. C. 479, 2 S. E. 2d 584; *Singer Sewing Machine Co.* v. *Unemployment Compensation Comm'n*, 167 Ore. 142, 103 P. 2d 708, with *McCain* v. *Crossett Lumber Co.*, 174 S. W. 2d 114 (Ark.); *Hill Hotel Co.* v. *Kinney*, 138 Neb. 760, 295

It is enough to point out that, with reference to an identical problem, results may be contrary over a very considerable region of doubt in applying the distinction, depending upon the state or jurisdiction where the determination is made;[23] and that within a single jurisdiction a person who, for instance, is held to be an "independent contractor" for the purpose of imposing vicarious liability in tort may be an "employee" for the purposes of particular legislation, such as unemployment compensation. See, *e. g., Globe Grain & Milling Co.* v. *Industrial Comm'n,* 98 Utah 36, 91 P. 2d 512. In short, the assumed simplicity and uniformity, resulting from application of "common-law standards," does not exist.

Mere reference to these possible variations as characterizing the application of the Wagner Act in the treatment of persons identically situated in the facts surrounding their employment and in the influences tending to disrupt it, would be enough to require pause before accepting a thesis which would introduce them into its administration. This would be true, even if the statute itself had indicated less clearly than it does the intent they should not apply.

Two possible consequences could follow. One would be to refer the decision of who are employees to local state law. The alternative would be to make it turn on a sort of pervading general essence distilled from state law. Congress obviously did not intend the former result. It

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N. W. 397; *Washington Recorder Co.* v. *Ernst,* 199 Wash. 176, 91 P. 2d 718; *Wisconsin Bridge Co.* v. *Industrial Comm'n,* 233 Wis. 467, 290 N. W. 199. See generally Wolfe, Determination of Employer-Employee Relationships in Social Legislation (1941) 41 Col. L. Rev. 1015. And see note 23 *infra.*

[23] Compare *Stockwell* v. *Morris,* 46 Wyo. 1, with *Auer* v. *Sinclair Refining Co.,* 103 N. J. L. 372; *Schomp* v. *Fuller Brush Co.,* 124 N. J. L. 487, 126 N. J. L. 368, with *Fuller Brush Co.* v. *Industrial Comm'n,* 99 Utah 97; *Stover Bedding Co.* v. *Industrial Comm'n,* 99 Utah 423, with *Maltz* v. *Jackoway-Katz Cap Co.,* 336 Mo. 1000.

would introduce variations into the statute's operation as wide as the differences the forty-eight states and other local jurisdictions make in applying the distinction for wholly different purposes. Persons who might be "employees" in one state would be "independent contractors" in another. They would be within or without the statute's protection depending not on whether their situation falls factually within the ambit Congress had in mind, but upon the accidents of the location of their work and the attitude of the particular local jurisdiction in casting doubtful cases one way or the other. Persons working across state lines might fall in one class or the other, possibly both, depending on whether the Board and the courts would be required to give effect to the law of one state or of the adjoining one, or to that of each in relation to the portion of the work done within its borders.

Both the terms and the purposes of the statute, as well as the legislative history, show that Congress had in mind no such patchwork plan for securing freedom of employees' organization and of collective bargaining. The Wagner Act is federal legislation, administered by a national agency, intended to solve a national problem on a national scale. Cf. *e. g.*, Sen. Rep. No. 573, 74th Cong., 1st Sess. 2–4. It is an Act, therefore, in reference to which it is not only proper but necessary for us to assume, "in the absence of a plain indication to the contrary, that Congress . . . is not making the application of the federal act dependent on state law." *Jerome* v. *United States*, 318 U. S. 101, 104. Nothing in the statute's background, history, terms or purposes indicates its scope is to be limited by such varying local conceptions, either statutory or judicial, or that it is to be administered in accordance with whatever different standards the respective states may see fit to adopt for the disposition of unrelated, local problems. Consequently, so far as the meaning of "employee" in this statute is concerned, "the federal law must prevail no matter what name is given to the interest or

right by state law." *Morgan* v. *Commissioner*, 309 U. S. 78, 81; cf. *Labor Board* v. *Blount*, 131 F. 2d 585 (C. C. A.).

II.

Whether, given the intended national uniformity, the term "employee" includes such workers as these newsboys must be answered primarily from the history, terms and purposes of the legislation. The word "is not treated by Congress as a word of art having a definite meaning. . . ." Rather "it takes color from its surroundings . . . [in] the statute where it appears," *United States* v. *American Trucking Assns.*, 310 U. S. 534, 545, and derives meaning from the context of that statute, which "must be read in the light of the mischief to be corrected and the end to be attained." *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251, 259; cf. *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U. S. 552; *Drivers' Union* v. *Lake Valley Co.*, 311 U. S. 91.

Congress, on the one hand, was not thinking solely of the immediate technical relation of employer and employee. It had in mind at least some other persons than those standing in the proximate legal relation of employee to the particular employer involved in the labor dispute.[24] It cannot be taken, however, that the purpose was to include all other persons who may perform service for another or was to ignore entirely legal classifications made for other purposes. Congress had in mind a wider field than the narrow technical legal relation of "master and servant," as the common law had worked this out in all its variations, and at the same time a narrower one than the entire area of rendering service to others. The question comes down therefore to how much was included of the inter-

[24] Cf. notes 28–30 *infra* and text.

mediate region between what is clearly and unequivocally "employment," by any appropriate test, and what is as clearly entrepreneurial enterprise and not employment.

It will not do, for deciding this question as one of uniform national application, to import wholesale the traditional common-law conceptions or some distilled essence of their local variations as exclusively controlling limitations upon the scope of the statute's effectiveness. To do this would be merely to select some of the local, hairline variations for nation-wide application and thus to reject others for coverage under the Act. That result hardly would be consistent with the statute's broad terms and purposes.

Congress was not seeking to solve the nationally harassing problems with which the statute deals by solutions only partially effective. It rather sought to find a broad solution, one that would bring industrial peace by substituting, so far as its power could reach, the rights of workers to self-organization and collective bargaining for the industrial strife which prevails where these rights are not effectively established. Yet only partial solutions would be provided if large segments of workers about whose technical legal position such local differences exist should be wholly excluded from coverage by reason of such differences. Yet that result could not be avoided, if choice must be made among them and controlled by them in deciding who are "employees" within the Act's meaning. Enmeshed in such distinctions, the administration of the statute soon might become encumbered by the same sort of technical legal refinement as has characterized the long evolution of the employee - independent contractor dichotomy in the courts for other purposes. The consequences would be ultimately to defeat, in part at least, the achievement of the statute's objectives. Congress no more intended to

import this mass of technicality as a controlling "standard" for uniform national application than to refer decision of the question outright to the local law.

The Act, as its first section states, was designed to avert the "substantial obstructions to the free flow of commerce" which result from "strikes and other forms of industrial strife or unrest" by eliminating the causes of that unrest. It is premised on explicit findings that strikes and industrial strife themselves result in large measure from the refusal of employers to bargain collectively and the inability of individual workers to bargain successfully for improvements in their "wages, hours or other working conditions" with employers who are "organized in the corporate or other forms of ownership association." Hence the avowed and interrelated purposes of the Act are to encourage collective bargaining and to remedy the individual worker's inequality of bargaining power by "protecting the exercise . . . of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." 49 Stat. 449, 450.

The mischief at which the Act is aimed and the remedies it offers are not confined exclusively to "employees" within the traditional legal distinctions separating them from "independent contractors." Myriad forms of service relationship, with infinite and subtle variations in the terms of employment, blanket the nation's economy. Some are within this Act, others beyond its coverage. Large numbers will fall clearly on one side or on the other, by whatever test may be applied. But intermediate there will be many, the incidents of whose employment partake in part of the one group, in part of the other, in varying proportions of weight. And consequently the legal pendulum, for purposes of applying the statute, may swing one way

or the other, depending upon the weight of this balance and its relation to the special purpose at hand.

Unless the common-law tests are to be imported and made exclusively controlling, without regard to the statute's purposes, it cannot be irrelevant that the particular workers in these cases are subject, as a matter of economic fact, to the evils the statute was designed to eradicate and that the remedies it affords are appropriate for preventing them or curing their harmful effects in the special situation. Interruption of commerce through strikes and unrest may stem as well from labor disputes between some who, for other purposes, are technically "independent contractors" and their employers as from disputes between persons who, for those purposes, are "employees" and their employers. Cf. *Drivers' Union* v. *Lake Valley Co.*, 311 U. S. 91. Inequality of bargaining power in controversies over wages, hours and working conditions may as well characterize the status of the one group as of the other. The former, when acting alone, may be as "helpless in dealing with an employer," as "dependent . . . on his daily wage" and as "unable to leave the employ and to resist arbitrary and unfair treatment" as the latter. For each, "union . . . [may be] essential to give . . . opportunity to deal on equality with their employer." [25] And for each, collective bargaining may be appropriate and effective for the "friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions." [26] 49 Stat. 449. In

[25] *American Steel Foundries Co.* v. *Tri-City Council,* 257 U. S. 184, 209, cited in H. R. Rep. No. 1147, 74th Cong., 1st Sess. 10; cf. *Bakery & Pastry Drivers* v. *Wohl,* 315 U. S. 769.

[26] The practice of self-organization and collective bargaining to resolve labor disputes has for some time been common among such varied types of "independent contractors" as musicians (How Collective Bargaining Works (20th Century Fund, 1942) 848–866; Proceedings of the 47th Annual Convention of the American Federation

short, when the particular situation of employment combines these characteristics, so that the economic facts of the relation make it more nearly one of employment than of independent business enterprise with respect to the ends sought to be accomplished by the legislation, those characteristics may outweigh technical legal classification for purposes unrelated to the statute's objectives and bring the relation within its protections.

To eliminate the causes of labor disputes and industrial strife, Congress thought it necessary to create a balance of forces in certain types of economic relationships. These do not embrace simply employment associations in which controversies could be limited to disputes over proper "physical conduct in the performance of the service." [27] On the contrary, Congress recognized those economic relationships cannot be fitted neatly into the containers designated "employee" and "employer" which an earlier law had shaped for different purposes. Its Reports on the bill disclose clearly the understanding that "employers and employees not in proximate relationship may be drawn into common controversies by economic forces," [28] and that the very disputes sought to be avoided might involve

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of Musicians (1942)), actors (see, e. g., Collective Bargaining by Actors (1926) Bureau of Labor Statistics, Bulletin No. 402; Harding, The Revolt of the Actors (1929); Ross, Stars and Strikes (1941)), and writers (see, e. g., Rosten, Hollywood (1941); Ross, Stars and Strikes (1941) 48–63), and such atypical "employees" as insurance agents, artists, architects and engineers (see, e. g., Proceedings of the 2d Convention of the UOPWA, C. I. O. (1938); Proceedings of the 3d Convention of the UOPWA, C. I. O. (1940); Handbook of American Trade Unions (1936), Bureau of Labor Statistics, Bull. No. 618, 291–293; Constitution and By-Laws of the IFTEAD of the A. F. L., 1942).

[27] Control of "physical conduct in the performance of the service" is the traditional test of the "employee relationship" at common law. Cf., e. g., Restatement of the Law of Agency § 220 (1).

[28] Sen. Rep. No. 573, 74th Cong., 1st Sess. 7.

"employees [who] are at times brought into an economic relationship with employers who are not their employers." [29] In this light, the broad language of the Act's definitions, which in terms reject conventional limitations on such conceptions as "employee," "employer," and "labor dispute," [30] leaves no doubt that its applicability is to be determined broadly, in doubtful situations, by underlying economic facts rather than technically and exclusively by previously established legal classifications. Cf. *Labor Board* v. *Blount, supra.*

Hence "technical concepts pertinent to an employer's legal responsibility to third persons for acts of his servants" have been rejected in various applications of this Act both here (*International Association of Machinists* v. *Labor Board,* 311 U. S. 72, 80–81; *H. J. Heinz Co.* v. *Labor Board,* 311 U. S. 514, 520–521) [31] and in other federal courts (*Labor Board* v. *Condenser Corp.,* 128 F. 2d 67 (C. C. A.); *North Whittier Heights Citrus Assn.* v. *Labor Board,* 109 F. 2d 76, 82 (C. C. A.); *Labor Board* v. *Blount, supra*). There is no good reason for invoking them to restrict the scope of the term "employee" sought to be done in this case. That term, like other provisions, must be understood with reference to the purpose of the Act and the facts involved in the economic relationship.[32] "Where all the conditions of the relation require protection, protection ought to be given." [33]

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[29] Sen. Rep. No. 573, 74th Cong., 1st Sess. 6.

[30] Cf. *Phelps-Dodge Corp.* v. *Labor Board,* 313 U. S. 177; and compare *Drivers' Union* v. *Lake Valley Co.,* 311 U. S. 91, with Sen. Rep. No. 573, 74th Cong., 1st Sess. 7.

[31] Compare *Labor Board* v. *Waterman S. S. Corp.,* 309 U. S. 206; *Phelps-Dodge Corp.* v. *Labor Board,* 313 U. S. 177.

[32] Cf. *South Chicago Coal & Dock Co.* v. *Bassett,* 309 U. S. 251; *Lehigh Valley Coal Co.* v. *Yensavage,* 218 F. 547, 552 (C. C. A.).

[33] *Lehigh Valley Coal Co.* v. *Yensavage,* 218 F. 547, 552 (C. C. A.).

It is not necessary in this case to make a completely definitive limitation around the term "employee." That task has been assigned primarily to the agency created by Congress to administer the Act. Determination of "where all the conditions of the relation require protection" involves inquiries for the Board charged with this duty. Everyday experience in the administration of the statute gives it familiarity with the circumstances and backgrounds of employment relationships in various industries, with the abilities and needs of the workers for self-organization and collective action, and with the adaptability of collective bargaining for the peaceful settlement of their disputes with their employers. The experience thus acquired must be brought frequently to bear on the question who is an employee under the Act. Resolving that question, like determining whether unfair labor practices have been committed, "belongs to the usual administrative routine" of the Board.[34] *Gray* v. *Powell*, 314 U. S. 402, 411. Cf. *Labor Board* v. *Standard Oil Co.*, 138 F. 2d 885, 887–888.

In making that body's determinations as to the facts in these matters conclusive, if supported by evidence, Congress entrusted to it primarily the decision whether the evidence establishes the material facts. Hence in reviewing the Board's ultimate conclusions, it is not the court's function to substitute its own inferences of fact for the Board's, when the latter have support in the record. *Labor Board* v. *Nevada Copper Corp.*, 316 U. S. 105; cf. *Walker* v. *Altmeyer*, 137 F. 2d 531 (C. C. A.). Undoubtedly questions of statutory interpretation, especially when arising in the first instance in judicial proceedings, are for

[34] E. g., Matter of Metro-Goldwyn-Mayer Studios, 7 N. L. R. B. 662, 686–690; Matter of KMOX Broadcasting Station, 10 N. L. R. B. 479; Matter of Interstate Granite Corp., 11 N. L. R. B. 1046; Matter of Sun Life Ins. Co., 15 N. L. R. B. 817; Matter of Kelly Co., 34 N. L. R. B. 325; Matter of John Yasek, 37 N. L. R. B. 156.

the courts to resolve, giving appropriate weight to the judgment of those whose special duty is to administer the questioned statute. *Norwegian Nitrogen Products Co.* v. *United States,* 288 U. S. 294; *United States* v. *American Trucking Assns.,* 310 U. S. 534. But where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited. Like the commissioner's determination under the Longshoremen's & Harbor Workers' Act,[35] that a man is not a "member of a crew" (*South Chicago Coal & Dock Co.* v. *Bassett,* 309 U. S. 251) or that he was injured "in the course of employment" (*Parker* v. *Motor Boat Sales,* 314 U. S. 244) and the Federal Communications Commission's determination [36] that one company is under the "control" of another (*Rochester Telephone Corp.* v. *United States,* 307 U. S. 125), the Board's determination that specified persons are "employees" under this Act is to be accepted if it has "warrant in the record" and a reasonable basis in law.

In this case the Board found that the designated newsboys work continuously and regularly, rely upon their earnings for the support of themselves and their families, and have their total wages influenced in large measure by the publishers, who dictate their buying and selling prices, fix their markets and control their supply of papers. Their hours of work and their efforts on the job are supervised and to some extent prescribed by the publishers or their agents. Much of their sales equipment and advertising materials is furnished by the publishers with the intention that it be used for the publisher's benefit. Stating that "the primary consideration in the determination of the applicability of the statutory definition is whether

[35] 44 Stat. 1424, 33 U. S. C. § 901 *et seq.*

[36] Under § 2 (b) of the Communications Act of 1934, 48 Stat. 1064, 1065, 47 U. S. C. § 152 (b).

effectuation of the declared policy and purposes of the Act comprehend securing to the individual the rights guaranteed and protection afforded by the Act," the Board concluded that the newsboys are employees. The record sustains the Board's findings and there is ample basis in the law for its conclusion.

III.

The Board's selection of the collective bargaining units also must be upheld. The units chosen for the News and the Herald consist of all full-time [37] newsboys and checkmen engaged to sell the papers in Los Angeles. Bootjackers, temporary, casual and part-time [38] newsboys are excluded. The units designated for the Times and the Examiner consist of newsboys selling at established spots [39] in Los Angeles [40] four or more hours per day five or more days per week, except temporary newsboys. [41]

The Board predicated its designations in part upon the finding that the units included, in general, men who were responsible workers, continuously and regularly employed as vendors and dependent upon their sales for their liveli-

[37] Full-time newsboys for the Herald includes those who regularly sell to the public five or more editions five or more days per week. Full-time newsboys for the News includes those who regularly sell to the general public the fifth, sixth, eighth, ninth and tenth, or the sixth, eighth, ninth and tenth editions five or more days per week, or the fourth and earlier editions for at least four hours daily between 4:00 a. m. and 10:00 a. m. five days per week.

[38] Part-time newsboys for the Herald means those selling less than five editions daily or for less than five days per week.

[39] Established spots are corners at which newsboys sold those papers for at least five or more days per week during at least six consecutive months.

[40] Glendale is included in the Times unit.

[41] Temporary newsboys are those selling for less than thirty-one consecutive days.

hood, while schoolboys and transient or casual workers were excluded. The discretion which Congress vested in the Board to determine an appropriate unit is hardly overstepped by the choice of a unit based on a distinction so clearly consistent with the need for responsible bargaining. That the Board's selection emphasizes difference in tenure rather than function is, on this record certainly, no abuse of discretion.

Nor is there substance in the objection that the Board's designations on the one hand fail to embrace *all* workers who in fact come within the responsible or stable full-time category generically stated, and on the other hand fail to exclude all who in fact come within the schoolboy or more volatile part-time category. The record does not suggest that the units designated, at least so far as Los Angeles newsboys are concerned, do not substantially effectuate the Board's theory or embrace a large portion of those who would make up a stable bargaining group based on responsible tenure and full-time work. In these matters the Board cannot be held to mathematical precision. If it chooses to couch its orders in terms which for good reasons it regards effective to accomplish its stated ends, peripheral or hypothetical deviations will not defeat an otherwise appropriate order.

Another objection urged by the Times, the Herald and the Examiner is to the Board's exclusion of suburban newsboys [42] from the units on the ground they were not organized by the union. The Board found that although all vendors in metropolitan Los Angeles were eligible for membership, the union had not been extended to the suburban groups generally and that no other labor organization was seeking to represent respondents' employees. There is no suggestion either that the union deliberately

[42] Except newsboys selling the Times in Glendale.

excluded suburban newsboys who sought admission or that suburban newsboys have displayed any interest in collective bargaining or self-organization.

Wide variations in the forms of employee self-organization and the complexities of modern industrial organization make difficult the use of inflexible rules as the test of an appropriate unit. Congress was informed of the need for flexibility in shaping the unit to the particular case [43] and accordingly gave the Board wide discretion in the matter. Its choice of a unit is limited specifically only by the requirement that it be an "employer unit, craft unit, plant unit, or subdivision thereof" and that the selection be made so as "to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of the Act." *Pittsburgh Plate Glass Co.* v. *Labor Board,* 313 U. S. 146. The flexibility which Congress thus permitted has characterized the Board's administration of the section and has led it to resort to a wide variety of factors in case-to-case determination of the appropriate unit.[44] Among the considerations to which it has given weight is the extent of organization of the union requesting certification or collective bargaining. This is done on the expressed theory that it is desirable in the determination of an appropriate unit to render collective bargaining of the company's employees an immediate possibility.[45] No

[43] Hearings before Committee on Education and Labor on S. 1958, 74th Cong., 1st Sess. 83.

[44] E. g., see First Annual Report of the National Labor Relations Board 112–120; Second Annual Report of the National Labor Relations Board 122–140; Third Annual Report of the National Labor Relations Board 156–197; Fourth Annual Report of the National Labor Relations Board 82–97; Fifth Annual Report of the National Labor Relations Board 63–72; Sixth Annual Report of the National Labor Relations Board 63–71.

[45] Matter of Gulf Oil Corp., 4 N. L. R. B. 133.

plausible reason is suggested for withholding the benefits of the Act from those here seeking it until a group of geographically separated employees becomes interested in collective bargaining. In the circumstances disclosed by this record we cannot say the Board's conclusions are lacking in a "rational basis."

The judgments are reversed and the causes are remanded for further proceedings not inconsistent with this opinion.

Reversed.

MR. JUSTICE REED concurs in the result. He is of the opinion that the test of coverage for employees is that announced by the Board in the matter of Stockholders Publishing Company, Inc., and Los Angeles Newsboys Local Industrial Union No. 75, C. I. O., and other similar cases, decided January 9, 1941, 28 N. L. R. B. 1006, 1022–23.

MR. JUSTICE ROBERTS:

I think the judgment of the Circuit Court of Appeals should be affirmed. The opinion of that court reported in 136 F. 2d 608, seems to me adequately to state the controlling facts and correctly to deal with the question of law presented for decision. I should not add anything were it not for certain arguments presented here and apparently accepted by the court.

I think it plain that newsboys are not "employees" of the respondents within the meaning and intent of the National Labor Relations Act. When Congress, in § 2 (3), said "The term 'employee' shall include any employee, . . ." it stated as clearly as language could do it that the provisions of the Act were to extend to those who, as a result of decades of tradition which had become part of the common understanding of our people, bear the named relationship. Clearly also Congress did not dele-

gate to the National Labor Relations Board the function of defining the relationship of employment so as to promote what the Board understood to be the underlying purpose of the statute. The question who is an employee, so as to make the statute applicable to him, is a question of the meaning of the Act and, therefore, is a judicial and not an administrative question.

I do not think that the court below suggested that the federal courts sitting in the various states must determine whether a given person is an employee by application of either the local statutes or local state decisions. Quite the contrary. As a result of common law development, many prescriptions of federal statutes take on meaning which is uniformly ascribed to them by the federal courts, irrespective of local variance. *Funk* v. *United States*, 290 U. S. 371. This court has repeatedly resorted to just such considerations in defining the very term "employee" as used in other federal statutes, as the opinion of the court below shows. There is a general and prevailing rule throughout the Union as to the indicia of employment and the criteria of one's status as employee. Unquestionably it was to this common, general, and prevailing understanding that Congress referred in the statute and, according to that understanding, the facts stated in the opinion below, and in that of this court, in my judgment, demonstrate that the newsboys were not employees of the newspapers.

It is urged that the Act uses the term in some loose and unusual sense such as justifies the Board's decision because Congress added to the definition of employee above quoted these further words: "and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, . . ." The suggestion seems to be that Congress intended that the term employee should mean those who were not in fact employees, but it

is perfectly evident, not only from the provisions of the Act as a whole but from the Senate Committee's Report, that this phrase was added to prevent any misconception of the provisions whereby employees were to be allowed freely to combine and to be represented in collective bargaining by the representatives of their union. Congress intended to make it clear that employee organizations did not have to be organizations of the employees of any single employer. But that qualifying phrase means no more than this and was never intended to permit the Board to designate as employees those who, in traditional understanding, have no such status.

ALLEN CALCULATORS, INC. *v.* NATIONAL CASH REGISTER CO. ET AL.

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

No. 592. Argued March 28, 1944.—Decided May 1, 1944.

Pursuant to the provisions of an earlier decree of injunction in a suit by the United States against a defendant under the antitrust laws, the defendant petitioned for and was granted leave on certain conditions to acquire stock of a competitor. The proceeding was adversary throughout and neither party appealed. The appellant here had sought but was denied leave to intervene. *Held:*

1. Under Rule 24 (a) of the Rules of Civil Procedure, appellant was not entitled to intervene as of right. P. 140.

(a) No statute of the United States conferred an "unconditional right" to intervene. Clayton Act, § 16; R. C. P. 24 (a) (1). P. 140.

(b) The appellant would not be bound by any judgment in the action. R. C. P. 24 (a) (2). P. 141.

(c) Appellant had no interest in "a distribution or other disposition of property in the custody of the court." R. C. P. 24 (a) (3). P. 141.

(d) *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U. S. 502, distinguished. P. 141.

2. Upon the entire record, it does not appear that the district court abused its discretion in denying the appellant leave to intervene. R. C. P. 24 (b) (2). P. 142.

Where examination of the entire record leading to the court's final order discloses that the issues were thoroughly explored and that the parties were adequately represented, the action of the court denying intervention should not be reviewed.

Appeal dismissed.

APPEAL under the Expediting Act from an order of the District Court denying leave to intervene in an antitrust proceeding.

Mr. Murray Seasongood, with whom *Mr. Frank R. Bruce* was on the brief, for appellant.

Mr. Hugh McD. Ritchey, with whom *Messrs. Joseph S. Graydon, Garrard Winston,* and *Chauncey B. Garver* were on the brief, for the National Cash Register Co., appellee. *Solicitor General Fahy, Assistant Attorney General Berge,* and *Messrs. Charles H. Weston, Elliott H. Moyer* and *Robert L. Stern* submitted for the United States, appellee.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

By a decree, entered February 1, 1916, in a suit by the United States against National Cash Register Company, the latter was restrained, pursuant to the antitrust statutes, from acquiring ownership or control of the business or plant of a competitor manufacturing or selling cash registers or other registering devices. The injunction, however, provided that, in case National should desire such acquisition,

"a petition may be presented to this Court stating the reasons therefor, and if the Court upon investigation into all the circumstances of the case and after notice of not less than sixty days to the Attorney General shall determine that such business or patents or plant so desired to be ac-

quired will supplement the plant, patents, machines, or facilities of the defendant corporation and that the acquisition thereof is desired for that purpose and will not substantially lessen competition, then jurisdiction is reserved to pass an order permitting the same upon such terms and conditions as may be right."

National, desiring to acquire stock of Allen-Wales Adding Machine Corporation, petitioned for leave and gave the required notice to the Attorney General. The Government filed an answer opposing the grant. The matter was set for hearing in the District Court November 15, 1943. On that day Allen Calculators, Inc., the appellant, presented a motion for leave to intervene. The United States consented to the proposed intervention; National opposed it. The District Judge granted intervention conditionally and allowed counsel for the appellant to make an opening statement and to take some part in the proceedings. Subsequently, but prior to the closing of the hearing, he ruled that the appellant would not be allowed to intervene. Before making his ruling, he was advised, in answer to his inquiry, that the president of the appellant would be called as a witness by the Government. November 16 he entered a formal order denying intervention.

The issues, which were tried upon evidence submitted by National and by the Government, were whether the purported acquisition would eliminate competition between certain products of National and Allen-Wales, would eliminate potential competition between other products of the two companies, and would, in other respects, be contrary to the purpose of the original decree. The proceeding was adversary throughout.

December 4 the appellant filed its petition for appeal from the order denying intervention. December 7 the District Judge entered findings of fact and an order granting National's petition upon certain conditions which he

deemed necessary to insure compliance with the original decree in the suit. Neither party has appealed from that order. December 10 the Judge allowed this appeal with a proviso that allowance should not operate as a stay of the order granting National's petition. The appeal is to this court under the Expediting Act.[1]

Rule 24 of the Rules of Civil Procedure[2] is:

"(a) *Intervention of Right.*—Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof.

"(b) *Permissive Intervention.*—Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

The appellant insists that it was entitled to intervene as of right, but we think that, in the light of the express provisions of clause (a) the contention must be rejected. No statute of the United States confers an unconditional

[1] Act of Feb. 11, 1903, c. 544, § 2, 32 Stat. 823, as amended March 3, 1911, c. 231, § 291, 36 Stat. 1167, 15 U. S. C. § 29. Cf. Act of Feb. 13, 1925, c. 229, § 1, 43 Stat. 938, 28 U. S. C. § 345.

[2] 28 U. S. C. A., following § 723c.

right of intervention, as required by (1). The appellant relies on § 16 of the Clayton Act,[3] but that section merely authorizes private parties to sue for relief against threatened damage consequent upon the violation of the antitrust laws. It grants no privilege, much less an unconditional right, to intervene in suits under the Sherman Act brought by the United States. The application did not fall under (2) for the appellant clearly would not be bound by any judgment in the action. Nor had it any interest in the distribution or disposition of property in the custody of the court so as to come under (3).

The appellant relies upon *Missouri-Kansas Pipe Line Co.* v. *United States,* 312 U. S. 502. That case, however, is to be distinguished. There the applicant on whose behalf intervention was asked was named in the original decree as one who should be heard in respect of its property rights in the event certain action was taken. Such action was taken and, despite the terms of the original decree, intervention was denied. Clearly, as to the intervenor, the action was final. We accordingly entertained the appeal.

The appellant had standing to invoke the discretion of the District Judge to permit it to intervene under (b) (2) on the ground that its "claim or defense and the main action have a question of law or fact in common." The rule provides that, in exercising discretion as to intervention of this character, the court shall consider whether intervention will unduly delay or prejudice the adjudication of the rights of the original parties. It is common knowledge that, where a suit is of large public interest, the members of the public often desire to present their views to the court in support of the claim or the defense. To permit a multitude of such interventions may result

[3] 15 U. S. C. § 26.

in accumulating proofs and arguments without assisting the court. The record here discloses that the parties produced all data they and the court thought was available upon the issues in the case. Moreover, the court invited the Government to call the appellant's president to testify as to his knowledge concerning the issues.

The challenged order is but an order in the cause and not the final judgment. The exercise of discretion in a matter of this sort is not reviewable by an appellate court unless clear abuse is shown; and it is not ordinarily possible to determine that question except in the light of the whole record. If, in this case, National's petition had ultimately been dismissed, a review of the court's denial of appellant's intervention would have been an idle gesture. Where, as here, examination of the entire record leading to the court's final order discloses that the issues were thoroughly explored and that the parties were adequately represented, the action of the court denying intervention should not be reviewed. It was, *inter alia,* to prevent the delay of unwarranted appeals by disappointed applicants to intervene, which would suspend the ultimate disposition of suits under the antitrust acts, that jurisdiction to review District Court decrees was not vested in the Circuit Courts of Appeals but solely in this court, and that the statute limited the right of appeal to final decrees.[4]

The record shows that the District Court had entered a final decree on the merits of National's petition prior to allowing the present appeal; and, if we treat the appeal as taken from that final decree, as we think is required by the Expediting Act,[5] and as attacking that decree because the appellant had been wrongfully denied intervention, we should have to affirm the judgment since

[4] *United States* v. *California Canneries,* 279 U. S. 553.

[5] *United States* v. *California Canneries, supra.*

it is not shown that the District Court abused its discretion in denying intervention.[6]

The appeal is

Dismissed.

The CHIEF JUSTICE took no part in the consideration or decision of this case.

MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS and MR. JUSTICE MURPHY dissent.

ASHCRAFT ET AL. *v.* TENNESSEE.

CERTIORARI TO THE SUPREME COURT OF TENNESSEE.

No. 391. Argued February 28, 1944.—Decided May 1, 1944.

1. Upon review here of a conviction of a defendant in a criminal case in a state court, it is the duty of this Court to make an independent examination of the defendant's claim that his conviction, alleged to have been obtained through the use in evidence of confessions coerced by law enforcement officers, was in violation of his rights under the Federal Constitution. P. 147.
2. An independent examination by this Court of the defendant's claim in such a case can not be foreclosed by the finding of the state court, or the verdict of a jury, or both. P. 148.
3. The treatment of the alleged confessions by the two state courts, and the trial court's instructions to the jury in respect of the alleged confessions, make more important in this case an independent examination by this Court of the defendants' claims. P. 147.
4. Upon undisputed evidence, this Court concludes that if the defendant Ashcraft made a confession it was not voluntary but compelled, and that his conviction, resting upon the alleged confession, must be set aside as in violation of the Federal Constitution. P. 153.

The uncontradicted evidence—*inter alia,* that Ashcraft had been held incommunicado for thirty-six hours, during which time with-

[6] *Id.,* cases cited p. 556.

out sleep or rest, he had been interrogated by relays of officers and investigators—showed a situation inherently coercive.

5. In making such disposition of cases as justice may require, this Court must consider any change, in fact or in law, which has supervened since the judgment was entered. P. 156.

6. The conviction of a codefendant having been sustained by the state court upon the assumption that Ashcraft's confession was properly admitted and his conviction valid, the judgment as to the codefendant is vacated and the case remanded for further proceedings. P. 155.

Reversed.

CERTIORARI, 320 U. S. 728, to review the affirmance of convictions of two defendants tried jointly in the state court.

Messrs. James F. Bickers and *Grover N. McCormick* for petitioners.

Mr. Nat Tipton, with whom *Mr. Roy H. Beeler,* Attorney General of Tennessee, was on the brief, for respondent.

MR. JUSTICE BLACK delivered the opinion of the Court.

About three o'clock on the morning of Thursday, June 5, 1941, Mrs. Zelma Ida Ashcraft got in her automobile at her home in Memphis, Tennessee, and set out on a trip to visit her mother's home in Kentucky. Late in the afternoon of the same day, her car was observed a few miles out of Memphis, standing on the wrong side of a road which she would likely have taken on her journey. Just off the road, in a slough, her lifeless body was found. On her head were cut places inflicted by blows sufficient to have caused her death. Petitioner Ware, age 20, a Negro, was indicted in a state court and found guilty of her murder. Petitioner Ashcraft, age 45, a white man, husband of the deceased, charged with having hired Ware to commit the murder, was tried jointly with Ware and convicted as an accessory before the fact. Both were sentenced to ninety-nine years in the state peniten-

tiary. The Supreme Court of Tennessee affirmed the convictions.

In applying to us for certiorari, Ware and Ashcraft urged that alleged confessions were used at their trial which had been extorted from them by state law enforcement officers in violation of the Fourteenth Amendment, and that "solely and alone" on the basis of these confessions they had been convicted. Their contentions raised a federal question which the record showed to be substantial and we brought both cases here for review. Upon oral argument before this Court Tennessee's legal representatives conceded that the convictions could not be sustained without the confessions but defended their use upon the ground that they were not compelled but were "freely and voluntarily made."

The record discloses that neither the trial court nor the Tennessee Supreme Court actually held as a matter of fact that petitioners' confessions were "freely and voluntarily made." The trial court heard evidence on the issue out of the jury's hearing, but did not itself determine from that evidence that the confessions were voluntary. Instead it overruled Ashcraft's objection to the use of his alleged confession with the statement that, "This Court is not able to hold, as a matter of law, that reasonable minds might not differ on the question of whether or not that alleged confession was voluntarily obtained." And it likewise overruled Ware's objection to use of his alleged confession, stating that "the reasonable minds of twelve men might . . . differ as to . . . whether Ware's confession was voluntary, and . . . therefore, that is a question of fact for the jury to pass on."[1] Nor did the

[1] The legal test applied by the trial court to determine the admissibility of the two confessions was stated thus:

"The Court has come to the conclusion . . . that the law in Tennessee with reference to confession is simply this: it is largely

State Supreme Court review the evidence pertaining to the confessions and affirmatively hold them voluntary. In sustaining the petitioners' convictions, one Justice dissenting, it went no further than to point out that, "The trial judge . . . held . . . he could not say that the confessions were not voluntarily made and, therefore, permitted them to go to the jury," and to declare that it, likewise, was "unable to say that the confessions were not freely and voluntarily made." [2]

If, therefore, the question of the voluntariness of the two confessions was actually decided at all it was by the jury. And the jury was charged generally on the subject of the two confessions as follows:

"I further charge you that if verbal or written statements made by the defendants freely and voluntarily and without fear of punishment or hope of reward, have been proven to you in this case, you may take them into consideration with all of the other facts and circumstances in the case. . . . In statements made at the time of the arrest, you may take into consideration the condition of the minds of the prisoners owing to their arrest and

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a question of fact as to whether or not a confession is voluntary, and is made without hope of reward or fear of punishment. It only becomes a question of law for the Court to decide when, from the facts surrounding the taking of the alleged confessions or statements, the Court, as a matter of law, can hold that the State has failed to carry its burden, which it has of showing that the confessions were free and voluntary, and that reasonable minds could not differ, and could come to but one conclusion that the confessions were involuntary and forced."

[2] Notwithstanding the apparent fact that neither the trial court nor the appellate court affirmatively held the confessions voluntary, the Tennessee Supreme Court, in its opinion, restated the rule it had announced in previous cases, that, "When confessions are offered as evidence, their competency becomes a preliminary question, to be determined by the court. . . . [If] the judge allow the jury to determine the preliminary fact, it is error, for which the judgment will be reversed." See *Self* v. *State*, 65 Tenn. 244, 253.

whether they were influenced by motives of hope or fear, to make the statements. Such a statement is competent evidence against the defendant who makes it and is not competent evidence against the other defendant . . . You cannot consider it for any purpose against the other defendant."

Concerning Ashcraft's alleged confession this general charge constituted the sole instruction to the jury.[3] But with regard to Ware's alleged confession the jury further was instructed:

"It is his [Ware's] further theory that he was induced by the fear of violence at the hands of a mob and by fear of the officers of the law to confess his guilt of the crime charged against him, but that such confession was false and that he had nothing whatsoever to do with, and no knowledge of the alleged crime. If you believe the theory of the defendant, Ware, . . . it is your duty to acquit him."

Having submitted the two alleged confessions to the jury in this manner, the trial court instructed the jury that: "What the proof may show you, if anything, that the defendants have said against themselves, the law presumes to be true, but anything the defendants have said in their own behalf, you are not obliged to believe. . . ."

This treatment of the confessions by the two state courts, the manner of the confessions' submission to the jury, and the emphasis upon the great weight to be given confessions make all the more important the kind of "independent examination" of petitioners' claims which, in

[3] On motion for new trial, Ashcraft's counsel urged error in that, "The court . . . in delivering his charge to the jury . . . in no place or at any time . . . presented the theory of the defendant Ashcraft to the jury. He wholly and completely in his charge ignored the contention and theory of the defendant Ashcraft that the alleged confession or admissions made by him . . . were not freely and voluntarily made. . . ."

any event, we are bound to make. *Lisenba* v. *California*, 314 U. S. 219, 237–238. Our duty to make that examination could not have been "foreclosed by the finding of a court, or the verdict of a jury, or both." *Id.* We proceed therefore to consider the evidence relating to the circumstances out of which the alleged confessions came.

First, as to Ashcraft. Ashcraft was born on an Arkansas farm. At the age of eleven he left the farm and became a farm hand working for others. Years later he gravitated into construction work, finally becoming a skilled dragline and steam-shovel operator. Uncontradicted evidence in the record was that he had acquired for himself "an excellent reputation." In 1929 he married the deceased Zelma Ida Ashcraft. Childless, they accumulated, apparently through Ashcraft's earnings, a very modest amount of jointly held property including bank accounts and an equity in the home in which they lived. The Supreme Court of Tennessee found "nothing to show but what the home life of Ashcraft and the deceased was pleasant and happy." Several of Mrs. Ashcraft's friends who were guests at the Ashcraft home on the night before her tragic death testified that both husband and wife appeared to be in a happy frame of mind.

The officers first talked to Ashcraft about 6 P. M. on the day of his wife's murder as he was returning home from work. Informed by them of the tragedy, he was taken to an undertaking establishment to identify her body which previously had been identified only by a driver's license. From there he was taken to the county jail where he conferred with the officers until about 2 A. M. No clues of ultimate value came from this conference, though it did result in the officers' holding and interrogating the Ashcrafts' maid and several of her friends. During the following week the officers made extensive investigations in Ashcraft's neighborhood and

elsewhere and further conferred with Ashcraft himself on several occasions, but none of these activities produced tangible evidence pointing to the identity of the murderer.

Then, early in the evening of Saturday, June 14, the officers came to Ashcraft's home and "took him into custody." In the words of the Tennessee Supreme Court,

"They took him to an office or room on the northwest corner of the fifth floor of the Shelby County jail. This office is equipped with all sorts of crime and detective devices such as a fingerprint outfit, cameras, high-powered lights, and such other devices as might be found in a homicide investigating office. . . . It appears that the officers placed Ashcraft at a table in this room on the fifth floor of the county jail with a light over his head and began to quiz him. They questioned him in relays until the following Monday morning, June 16, 1941, around nine-thirty or ten o'clock. It appears that Ashcraft from Saturday evening at seven o'clock until Monday morning at approximately nine-thirty never left this homicide room on the fifth floor." [4]

Testimony of the officers shows that the reason they questioned Ashcraft "in relays" was that they became so tired they were compelled to rest. But from 7:00 Saturday evening until 9:30 Monday morning Ashcraft had no rest. One officer did say that he gave the suspect a single five minutes' respite, but except for this five minutes the procedure consisted of one continuous stream of questions.

As to what happened in the fifth-floor jail room during this thirty-six hour secret examination the testimony

[4] From the testimony it appears that Ashcraft was taken from the jail about 11 o'clock Sunday night for a period of approximately an hour to help the officers hunt the place where Ware lived. On his return Ashcraft was, for a short time, kept in a jail room different from that in which he was kept the rest of the time.

follows the usual pattern and is in hopeless conflict.[5] Ashcraft swears that the first thing said to him when he was taken into custody was, "Why in hell did you kill your wife?"; that during the course of the examination he was threatened and abused in various ways; and that as the hours passed his eyes became blinded by a powerful electric light, his body became weary, and the strain on his nerves became unbearable.[6] The officers, on the other hand, swear that throughout the questioning they were kind and considerate. They say that they did not accuse Ashcraft of the murder until four hours after he was brought to the jail building, though they freely admit that from that time on their barrage of questions was constantly directed at him on the assumption that he was

[5] "As the report avers, 'The third degree is a secret and illegal practice.' Hence the difficulty of discovering the facts as to the extent and manner it is practiced." IV Reports of National Committee on Law Observance and Enforcement (Wickersham Commission), U. S. Government Printing Office, 1931, Lawlessness in Law Enforcement, p. 3. Station houses and jails are most frequently employed for third degree practices, "upstairs rooms or back rooms being sometimes picked out for their greater privacy." *Id.*, The Third Degree, p. 170. Cf. *Chambers* v. *Florida*, 309 U. S. 227, 238.

[6] " 'Work' is the term used to signify any form of what is commonly called the third degree, and may consist in nothing more than a severe cross-examination. Perhaps in most cases it is no more than that, but the prisoner knows that he is wholly at the mercy of his inquisitor and that the severe cross-examination may at any moment shift to a severe beating. . . . Powerful lights turned full on the prisoner's face, or switched on and off have been found effective. . . . The most commonly used method is persistent questioning, continuing hour after hour, sometimes by relays of officers. It has been known since 1500 at least that deprivation of sleep is the most effective torture and certain to produce any confession desired." Report of Committee on Lawless Enforcement of Law made to the Section of Criminal Law and Criminology of the American Bar Association (1930) 1 American Journal of Police Science 575, 579–580, also quoted in IV Wickersham Report, *supra*, p. 47.

the murderer. Together with other persons whom they brought in on Monday morning to witness the culmination of the thirty-six hour ordeal the officers declare that at that time Ashcraft was "cool," "calm," "collected," "normal"; that his vision was unimpaired and his eyes not bloodshot; and that he showed no outward signs of being tired or sleepy.

As to whether Ashcraft actually confessed, there is a similar conflict of testimony. Ashcraft maintains that although the officers incessantly attempted by various tactics of intimidation to entrap him into a confession, not once did he admit knowledge concerning or participation in the crime. And he specifically denies the officers' statements that he accused Ware of the crime, insisting that in response to their questions he merely gave them the name of Ware as one of several men who occasionally had ridden with him to work. The officers' version of what happened, however, is that about 11 P. M. on Sunday night, after twenty-eight hours' constant questioning, Ashcraft made a statement that Ware had overpowered him at his home and abducted the deceased, and was probably the killer. About midnight the officers found Ware and took him into custody, and, according to their testimony, Ware made a self-incriminating statement as of early Monday morning, and at 5:40 A. M. signed by mark a written confession in which appeared the statement that Ashcraft had hired him to commit the murder. This alleged confession of Ware was read to Ashcraft about six o'clock Monday morning, whereupon Ashcraft is said substantially to have admitted its truth in a detailed statement taken down by a reporter. About 9:30 Monday morning a transcript of Ashcraft's purported statement was read to him. The State's position is that he affirmed its truth but refused to sign the transcript, saying that he first wanted to consult his lawyer. As to

this latter 9:30 episode the officers' testimony is reinforced by testimony of the several persons whom they brought in to witness the end of the examination.

In reaching our conclusion as to the validity of Ashcraft's confession we do not resolve any of the disputed questions of fact relating to the details of what transpired within the confession chamber of the jail or whether Ashcraft actually did confess.[7] Such disputes, we may say, are an inescapable consequence of secret inquisitorial practices. And always evidence concerning the inner details of secret inquisitions[8] is weighted against an accused,

[7] The use in evidence of a defendant's coerced confession cannot be justified on the ground that the defendant has denied he ever gave the confession. *White* v. *Texas,* 310 U. S. 530, 531–532.

[8] State and federal courts, textbook writers, legal commentators, and governmental commissions consistently have applied the name of "inquisition" to prolonged examination of suspects conducted as was the examination of Ashcraft. See, e. g., cases cited in IV Wickersham Report, *supra,* and also pp. 44, 47, 48, and passim; Pound (Cuthbert W.), Inquisitorial Confessions, 1 Cornell L. Q. 77; *Chambers* v. *Florida,* 309 U. S. 227, 237; *Bram* v. *United States,* 168 U. S. 532, 544; *Brown* v. *Walker,* 161 U. S. 591, 596; *Counselman* v. *Hitchcock,* 142 U. S. 547, 573; cf. *Cooper* v. *State,* 86 Ala. 610, 611, 6 So. 110. In a case where no physical violence was inflicted or threatened, the Supreme Court of Virginia expressly approved the statement of the trial judge that the manner and methods used in obtaining the confession read "like a chapter from the history of the inquisition of the Middle Ages." *Enoch* v. *Commonwealth,* 141 Va. 411, 423, 126 S. E. 222, 225; and see *Cross* v. *State,* 142 Tenn. 510, 514, 221 S. W. 489. The analogy, of course, was in the fact that old inquisition practices included questioning suspects in secret places, away from friends and counsel, with notaries waiting to take down "confessions," and with arrangements to have the suspect later affirm the truth of his confession in the presence of witnesses who took no part in the inquisition. See Encyclopedia Britannica, Fourteenth Ed., "Inquisition"; Prescott, Ferdinand and Isabella, Sixth Ed., Part First, Chap. VII, The Inquisition; VIII Wigmore on Evidence, Third Ed., p. 307. "In the more serious offenses the party suspected is arrested, he is placed on his inquisition before the chief of police, and

particularly where, as here, he is charged with a brutal crime, or where, as in many other cases, his supposed offense bears relation to an unpopular economic, political, or religious cause.

Our conclusion is that if Ashcraft made a confession it was not voluntary but compelled. We reach this conclusion from facts which are not in dispute at all. Ashcraft, a citizen of excellent reputation, was taken into custody by police officers. Ten days' examination of the Ashcrafts' maid, and of several others, in jail where they were held, had revealed nothing whatever against Ashcraft. Inquiries among his neighbors and business associates likewise had failed to unearth one single tangible clue pointing to his guilt. For thirty-six hours after Ashcraft's seizure during which period he was held incommunicado, without sleep or rest, relays of officers, experienced investigators, and highly trained lawyers questioned him without respite. From the beginning of the questioning at 7 o'clock on Saturday evening until 6 o'clock on Monday morning Ashcraft denied that he had anything to do with the murder of his wife. And at a hearing

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a statement is obtained. . . . Where the office of the district attorney is in political harmony with the police system, the district attorney is generally invited to be present as an inquisitor." 2 Wharton on Criminal Evidence, Eleventh Ed., pp. 1021–1022; and see Notes 5 and 6, *supra*.

An admirable summary of the generally expressed judicial attitude toward these practices is set forth in the Report of The Committee on Lawless Enforcement of Law, 1 Amer. Journ. of Police Science, *supra*, p. 587: "Holding incommunicado is objectionable because arbitrary—at the mere will and unregulated pleasure of a police officer. . . . The use of the third degree is obnoxious because it is secret; because the prisoner is wholly unrepresented; because there is present no neutral, impartial authority to determine questions between the police and the prisoner; because there is no limit to the range of the inquisition, nor to the pressure that may be put upon the prisoner."

before a magistrate about 8:30 Monday morning Ashcraft pleaded not guilty to the charge of murder which the officers had sought to make him confess during the previous thirty-six hours.

We think a situation such as that here shown by uncontradicted evidence is so inherently coercive that its very existence is irreconcilable with the possession of mental freedom by a lone suspect against whom its full coercive force is brought to bear.[9] It is inconceivable that any court of justice in the land, conducted as our courts are, open to the public, would permit prosecutors serving in relays to keep a defendant witness under continuous cross-examination for thirty-six hours without rest or sleep in an effort to extract a "voluntary" confession. Nor can we, consistently with Constitutional due process of law, hold voluntary a confession where prosecutors do the same thing away from the restraining influences of a public trial in an open court room.[10]

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[9] *Bram* v. *United States*, 168 U. S. 532, 556, 562–563; see also *Wan* v. *United States*, 266 U. S. 1, 14–15; *Burdeau* v. *McDowell*, 256 U. S. 465, 475; *Counselman* v. *Hitchcock*, 142 U. S. 547, 573–574; 3 Elliot's Debates, pp. 445–449, 452; cf. *Chambers* v. *Florida*, 309 U. S. 227. The question in the *Bram* case was whether Bram had been compelled or coerced by a police officer to make a self-incriminatory statement, contrary to the Fifth Amendment; and the question here is whether Ashcraft similarly was coerced to make such a statement, contrary to the Fourteenth Amendment. *Lisenba* v. *California*, 314 U. S. 219, 236–238. Taken together, the *Bram* and *Lisenba* cases hold that a coerced or compelled confession cannot be used to convict a defendant in any state or federal court. And the decision in the *Bram* case makes it clear that the admitted circumstances under which Ashcraft is alleged to have confessed preclude a holding that he acted voluntarily.

[10] Compare the following allegation contained in Ashcraft's motion for new trial, "The Sheriff's deputies . . . set themselves up as a quasi judicial tribunal and tried . . . and convicted him there and in so doing rendered a trial . . . before the trial court . . . and the jury of peers . . . a mere formality," with *Lisenba* v. *California*, *supra*, p. 237. "The

The Constitution of the United States stands as a bar against the conviction of any individual in an American court by means of a coerced confession.[11] There have been, and are now, certain foreign nations with governments dedicated to an opposite policy: governments which convict individuals with testimony obtained by police organizations possessed of an unrestrained power to seize persons suspected of crimes against the state, hold them in secret custody, and wring from them confessions by physical or mental torture. So long as the Constitution remains the basic law of our Republic, America will not have that kind of government.

Second, as to Ware. Ashcraft and Ware were jointly tried, and were convicted on the theory that Ashcraft hired Ware to perform the murder. Ware's conviction was sustained by the Tennessee Supreme Court on the assumption that Ashcraft's confession was properly admitted and his conviction valid. Whether it would have been sustained had the court reached the conclusion we have reached as to Ashcraft we cannot know. Doubt as to what the state court would have done under the changed

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requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions . . ." Cooley's Constitutional Limitations, Sixth Ed. (1890) p. 379; see also *Keddington* v. *State,* 19 Ariz. 457, 459, 172 P. 273. "The aid of counsel in preparation would be farcical if the case could be foreclosed by a preliminary inquisition which would squeeze out conviction or prejudice by means unconstitutional if used at the trial." *Wood* v. *United States,* 128 F. 2d 265, 271. See also *Chambers* v. *Florida, supra,* p. 237, Note 10.

[11] *Chambers* v. *Florida,* 309 U. S. 227; *Canty* v. *Alabama,* 309 U. S. 629; *White* v. *Texas,* 310 U. S. 530; *Lomax* v. *Texas,* 313 U. S. 544; *Vernon* v. *Alabama,* 313 U. S. 547; *Lisenba* v. *California,* 314 U. S. 219, 236–238; *Ward* v. *Texas,* 316 U. S. 547, 555; and see *Bram* v. *United States,* 168 U. S. 532.

circumstances brought about by our reversal of its decision as to Ashcraft is emphasized by the position of the State's representatives in this Court. They have asked that if we reverse Ashcraft's conviction we also reverse Ware's.

In disposing of cases before us it is our responsibility to make such disposition as justice may require. "And in determining what justice does require, the Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered." *Patterson* v. *Alabama,* 294 U. S. 600, 607; *State Tax Commission* v. *Van Cott,* 306 U. S. 511, 515–516. Application of this guiding principle to the case at hand requires that we send Ware's case back to the Tennessee Supreme Court. Should that Court in passing on Ware's conviction in the light of our ruling as to Ashcraft adopt the State Attorney General's view and reverse the conviction there then would be no occasion for our passing on the federal question here raised by Ware. Under these circumstances we vacate the judgment of the Tennessee Supreme Court affirming Ware's conviction, and remand his case to that Court for further proceedings.

The judgment affirming Ashcraft's conviction is reversed and the cause is remanded to the Supreme Court of Tennessee for proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE JACKSON, dissenting:

A sovereign State is now before us, summoned on the charge that it has obtained convictions by methods so unfair that a federal court must set aside what the state courts have done. Heretofore the State has had the benefit of a presumption of regularity and legality. A confession made by one in custody heretofore has been

admissible in evidence unless it was proved and found that it was obtained by pressures so strong that it was *in fact* involuntarily made, that the individual will of the particular confessor had been overcome by torture, mob violence, fraud, trickery, threats, or promises. Even where there was excess and abuse of power on the part of officers, the State still was entitled to use the confession if upon examination of the whole evidence it was found to negative the view that the accused had "so lost his freedom of action that the statements made were not his but were the result of the deprivation of his free choice to admit, to deny, or to refuse to answer." *Lisenba* v. *California,* 314 U. S. 219, 241.

In determining these issues of fact, respect for the sovereign character of the several States always has constrained this Court to give great weight to findings of fact of state courts. While we have sometimes gone back of state court determinations to make sure whether the guaranties of the Fourteenth Amendment have or have not been violated, in close cases the decisions of state courts have often been sufficient to tip the scales in favor of affirmance. *Lisenba* v. *California, supra,* 238, 239; *Buchalter* v. *New York,* 319 U. S. 427, 431; cf. *Milk Wagon Drivers Union* v. *Meadowmoor Dairies,* 312 U. S. 287, 294.

As we read the present decision the Court in effect declines to apply these well-established principles. Instead, it: (1) substitutes for determination on conflicting evidence the question whether this confession was actually produced by coercion, a presumption that it was, on a new doctrine that examination in custody of this duration is "inherently coercive"; (2) it makes that presumption irrebuttable—i. e., a rule of law—because, while it goes back of the state decisions to find certain facts, it refuses to resolve conflicts in evidence to determine whether other of

the State's proof is sufficient to overcome such presumption; and, in so doing, (3) it sets aside the findings by the courts of Tennessee that on all the facts this confession did not result from coercion, either giving those findings no weight or regarding them as immaterial.

We must bear in mind that this case does not come here from a lower federal court over whose conduct we may assert a general supervisory power. If it did, we should be at liberty to apply rules as to the admissibility of confessions, based on our own conception of permissible procedure, and in which we may embody restrictions even greater than those imposed upon the States by the Fourteenth Amendment. See *Bram* v. *United States*, 168 U. S. 532; *Wan* v. *United States*, 266 U. S. 1; *McNabb* v. *United States*, 318 U. S. 332, 341; *United States* v. *Mitchell*, 322 U. S. 65. But we have no such supervisory power over state courts. We may not lay down rules of evidence for them nor revise their decisions merely because we feel more confidence in our own wisdom and rectitude. We have no power to discipline the police or law-enforcement officers of the State of Tennessee nor to reverse its convictions in retribution for conduct which we may personally disapprove.

The burden of protecting society from most crimes against persons and property falls upon the State. Different States have different crime problems and some freedom to vary procedures according to their own ideas. Here, a State was forced by an unwitnessed and baffling murder to vindicate its law and protect its society. To nullify its conviction in this particular case upon a consideration of all the facts would be a delicate exercise of federal judicial power. But to go beyond this, as the Court does today, and divine in the due process clause of the Fourteenth Amendment an exclusion of confessions on an irrebuttable presumption that custody and examination are "inherently coercive" if of some unspecified duration within

thirty-six hours, requires us to make more than a passing expression of our doubts and disagreements.

I.

The claim of a suspect to immunity from questioning creates one of the most vexing problems in criminal law—that branch of the law which does the courts and the legal profession least credit. The consequences upon society of limiting examination of persons out of court cannot fairly be appraised without recognition of the advantage criminals already enjoy in immunity from compulsory examination in court. Of this latter Mr. Justice Cardozo, for an all but unanimous Court, said: "This too might be lost, and justice still be done. Indeed, today as in the past there are students of our penal system who look upon the immunity as a mischief rather than a benefit, and who would limit its scope, or destroy it altogether. No doubt there would remain the need to give protection against torture, physical or mental." *Palko* v. *Connecticut,* 302 U. S. 319, 325–26.

This Court never yet has held that the Constitution denies a State the right to use a confession just because the confessor was questioned in custody where it did not also find other circumstances that deprived him of a "free choice to admit, to deny, or to refuse to answer." *Lisenba* v. *California,* 314 U. S. 219, 241. The Constitution requires that a conviction rest on a fair trial. Forced confessions are ruled out of a fair trial. They are ruled out because they have been wrung from a prisoner by measures which are offensive to concepts of fundamental fairness. Different courts have used different terms to express the test by which to judge the inadmissibility of a confession, such as "forced," "coerced," "involuntary," "extorted," "loss of freedom of will." But always where we have professed to speak with the voice of the due process clause, the test, in whatever words stated, has been

applied to the particular confessor at the time of confession.

It is for this reason that American courts hold almost universally and very properly that a confession obtained during or shortly after the confessor has been subjected to brutality, torture, beating, starvation, or physical pain of any kind is *prima facie* "involuntary." The effect of threats alone may depend more on individual susceptibility to fear. But men are so constituted that many will risk the postponed consequences of yielding to a demand for a confession in order to be rid of present or imminent physical suffering. Actual or threatened violence have no place in eliciting truth and it is fair to assume that no officer of the law will resort to cruelty if truth is what he is seeking. We need not be too exacting about proof of the effects of such violence on the individual involved, for their effect on the human personality is invariably and seriously demoralizing.

When, however, we consider a confession obtained by questioning, even if persistent and prolonged, we are in a different field. Interrogation *per se* is not, while violence *per se* is, an outlaw. Questioning is an indispensable instrumentality of justice. It may be abused, of course, as cross-examination in court may be abused, but the principles by which we may adjudge when it passes constitutional limits are quite different from those that condemn police brutality, and are far more difficult to apply. And they call for a more responsible and cautious exercise of our office. For we may err on the side of hostility to violence without doing injury to legitimate prosecution of crime; we cannot read an undiscriminating hostility to mere interrogation into the Constitution without unduly fettering the States in protecting society from the criminal.

It probably is the normal instinct to deny and conceal any shameful or guilty act. Even a "voluntary confes-

sion" is not likely to be the product of the same motives with which one may volunteer information that does not incriminate or concern him. The term "voluntary" confession does not mean voluntary in the sense of a confession to a priest merely to rid one's soul of a sense of guilt. "Voluntary confessions" in criminal law are the product of calculations of a different order, and usually proceed from a belief that further denial is useless and perhaps prejudicial. To speak of any confessions of crime made after arrest as being "voluntary" or "uncoerced" is somewhat inaccurate, although traditional.

A confession is wholly and incontestably voluntary only if a guilty person gives himself up to the law and becomes his own accuser. The Court bases its decision on the premise that custody and examination of a prisoner for thirty-six hours is "inherently coercive." Of course it is. And so is custody and examination for one hour. Arrest itself is inherently coercive, and so is detention. When not justified, infliction of such indignities upon the person is actionable as a tort. Of course such acts put pressure upon the prisoner to answer questions. to answer them truthfully, and to confess if guilty.

But does the Constitution prohibit use of all confessions made after arrest because questioning, while one is deprived of freedom, is "inherently coercive"? The Court does not quite say so, but it is moving far and fast in that direction. The step it now takes is to hold this confession inadmissible because of the time taken in getting it.

The duration and intensity of an examination or inquisition always have been regarded as one of the relevant and important considerations in estimating its effect on the will of the individual involved. Thirty-six hours is a long stretch of questioning. That the inquiry was prolonged and persistent is a factor that in any calculation

of its effect on Ashcraft would count heavily against the confession. But some men would withstand for days pressures that would destroy the will of another in hours. Always heretofore the ultimate question has been whether the confessor was in possession of his own will and self-control at the time of confession. For its bearing on this question the Court always has considered the confessor's strength or weakness, whether he was educated or illiterate, intelligent or moronic, well or ill, Negro or white.

But the Court refuses in this case to be guided by this test. It rejects the finding of the Tennessee courts and says it must make an "independent examination" of the circumstances. Then it says that it will not "resolve any of the disputed questions of fact" relating to the circumstances of the confession. Instead of finding as a fact that Ashcraft's freedom of will was impaired, it substitutes the doctrine that the situation was "inherently coercive." It thus reaches on a *part* of the evidence in the case a conclusion which I shall demonstrate it could not properly reach on *all* the evidence. And it refuses to resolve the conflicts in the other evidence to determine whether it rebuts the presumption thus reached that the confession is a coerced one.

If the constitutional admissibility of a confession is no longer to be measured by the mental state of the individual confessor but by a general doctrine dependent on the clock, it should be capable of statement in definite terms. If thirty-six hours is more than is permissible, what about 24? or 12? or 6? or 1? All are "inherently coercive." Of course questions of law like this often turn on matters of degree. But are not the States entitled to know, if this Court is able to state, what the considerations are which make any particular degree decisive? How else may state courts apply our tests?

The importance of defining these new constitutional standards of admissibility of confessions is emphasized by the decision to return the companion case of Ware to the Supreme Court of Tennessee for reconsideration "in the light of our ruling as to Ashcraft." Except for Ware's own testimony, all of the evidence is that when he confronted Ashcraft in custody Ware confessed immediately, voluntarily, and almost spontaneously. But he had been arrested, taken from bed into custody, and detained and questioned. Does the doctrine of inherent coerciveness condemn the Ware confession? Should the Tennessee court decide whether Ware, obviously a much weaker character than Ashcraft, was *actually* coerced into confessing? It already has decided that question and this Court does not hold the fact determined wrongly. Ware's case is properly in this Court. Why should not this Court decide Ware's case on the merits and thus test and expound its novel ruling as applied to a different set of circumstances?

No one can regard the rule of exclusion dependent on the state of the individual's will as an easy one to apply. It leads to controversy, speculation, and variations in application. To eliminate these evils by eliminating all confessions made after interrogation while in custody is a drastic alternative, but it is the logical consequence of today's ruling, as its application to the facts of Ashcraft's case will show.

II.

Apart from Ashcraft's uncorroborated testimony, which the Tennessee courts refused to believe, there is much evidence in this record from persons whom they did believe and were justified in believing. This evidence shows that despite the "inherent coerciveness" of the circumstances of his examination, the confession when made was delib-

erate, free, and voluntary in the sense in which that term is used in criminal law. This Court could not, in our opinion, hold this confession an involuntary one except by substituting its presumption in place of analysis of the evidence and refusing to weigh the evidence even in rebuttal of its presumption.

As in most such cases, we start with some admitted facts. In the early morning Mrs. Ashcraft left her home in an automobile to visit relatives. She was found murdered. She had not been robbed nor ravished, although an effort had been made to give the crime an appearance of robbery. The officers knew of no other motive for the killing and naturally turned to her husband for information.

On the afternoon of the crime, Thursday, June 5, 1941, they took Ashcraft to the morgue to identify the body, and to the county jail, where he was kept and interviewed until 2:00 a. m. He makes no complaint of his treatment at this time. In this and several later interviews he made a number of statements with reference to the condition of the car, and as to Mrs. Ashcraft's having taken a certain drug, and as to money which she was accustomed to carry on her person, which further investigation indicated to be untrue. Still Ashcraft was not arrested. He professed to be willing to assist in identifying the killer. At last, on Saturday evening, June 14, an officer brought Ashcraft to the jail for further questioning. He was taken to a room on the fifth floor and questioned intermittently by several officers over a period of about thirty-six hours.

There are two versions as to what happened during this period of questioning. According to the version of the officers, which was accepted by the court which saw the witnesses, what happened? On Saturday evening Ashcraft was taken to the jail, where he was questioned by Mr. Becker and Mr. Battle. Becker is in the Intelligence

Service of the United States Army at the present time and before that was in charge of the Homicide Bureau of the Sheriff's office of Shelby County, Tennessee. Battle has for eight years been an Assistant Attorney General of the County. They began questioning Ashcraft about 7:00 p. m. They recounted various statements of his which had proved untrue. About 11:00 o'clock Ashcraft said he realized the circumstances all pointed to him and that he could not explain the circumstances. They then accused him of the murder, but he denied it. About 3:00 a. m. Becker and Battle retired and left Ashcraft in charge of Ezzell, a special investigator connected with the Attorney General's office. He questioned Ashcraft and discussed the crime with him until about 7:00 on Sunday morning. Becker and Battle then returned and interviewed him intermittently until about noon, when Ezzell returned and remained until about 5:00. Becker then returned, and about 11:00 o'clock Sunday night Ashcraft expressed a desire to talk with Ezzell. Ezzell was sent for and Ashcraft told him he wanted to tell him the truth. He said, "Mr. Ezzell, a Negro killed my wife." Ezzell asked the Negro's name, and Ashcraft said, "Tom Ware." Up to this time Ware had not been suspected, nor had his name been mentioned. Ashcraft explained that he did not tell the officers before because "I was scared; the Negro said he would burn my house down if I told the law."

Thereupon Becker, Battle, Ezzell, and Mr. Jayroe, connected with the Sheriff's office, took Ashcraft in a car and found Ware. When questioned at the jail, Ware turned to Ashcraft and said in substance that he had told Ashcraft when this thing happened that he did not intend to take the entire blame. The officers thereupon turned their attention to Ware. He promptly admitted the killing and said Ashcraft hired him to do it. Waldauer, the court reporter, was called to take down this confession, and

completed his transcript at about 5:40 a. m. He read it to Ware and told him he did not have to sign it unless he so chose. Ware made his mark upon it and swore to it before Waldauer as a Notary Public. A copy was given to Ashcraft, and he then admitted that he had hired Ware to kill his wife. He was given breakfast and then in response to questions made a statement which was taken down by the court reporter, Waldauer. It was transcribed, but Ashcraft declined to sign it, saying that he wanted his lawyer to see it before he signed it. No effort was made to compel him to sign the confession. However, two business men of Memphis, Mr. Castle, vice president of a bank, and Mr. Pidgeon, president of the Coca-Cola Bottling Company, were called in. Both testified that Ashcraft in their presence asserted that the transcript was correct but that he declined to sign it. The officers also called Dr. McQuiston to the jail to make a physical examination of both Ashcraft and Ware. He had practiced medicine in Memphis for twenty-eight years and both Mr. and Mrs. Ashcraft had been his patients for something like five years. In the presence of this friendly doctor Ashcraft might have complained of his treatment and avowed his innocence. The doctor testified, however, that Ashcraft said he had been treated all right, that he made no complaint about his eyes, and that they were not bloodshot. The doctor made a physical examination, and says Ashcraft appeared normal. He further testified as to Ashcraft, "Well, sir, he said he had not been able to get along with his wife for some time; that her health had been bad; that he had offered her a property settlement, and that she might go her way and he his way; and he also stated that he offered this colored man, Ware, a sum of money to make away with his wife." [1] The doctor says

[1] The officers had been baffled as to any motive for Ashcraft to murder his wife (who was his third, two former ones having been

that that statement was entirely voluntary. No matter what pressure had been put on Ashcraft before, the courts below could reasonably believe that he made this statement voluntarily to a man of whom he had no fear and who knew his family relations.

Ashcraft's story of torture could only be accepted by disbelieving such credible and unimpeached contradiction. Ashcraft testified that he was refused food, and was not allowed to go to the lavatory, and was denied even a drink of water. Other testimony is that on Saturday night he was brought a sandwich and coffee about midnight; that he drank the coffee but refused the sandwich; that on Sunday morning he was given a breakfast and was fed again about noon a plate lunch consisting of meat and vegetables and coffee. Both Waldauer, the Reporter, and Dr. McQuiston testified that they saw breakfast served to Ashcraft the next morning before the statement taken down by Waldauer. Ashcraft claims he was threatened and that a cigarette was slapped out of his mouth. This is all denied.

This Court rejects the testimony of the officers and disinterested witnesses in this case that the confession was voluntary not because it lacked probative value in itself nor because the witnesses were self-contradictory or were impeached. On the contrary, it is impugned only on grounds such as that such disputes "are an inescapable consequence of secret inquisitorial practices." We infer from this that since a prisoner's unsupported word often conflicts with that of the officers, the officer's testimony for constitutional purposes is always *prima facie* false. We know that police standards often leave much to be desired, but we are not ready to believe that the democratic proc-

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separated from him by divorce). He disclosed in his confession to them that her sickness had resulted in a degree of irritability which had made them incompatible and resulted in his sexual frustration.

ess brings to office men generally less believable than the average of those accused of crime.

Reference also is made to the fact that when petitioner was questioned investigation had failed "to unearth one single tangible clue pointing to his guilt." We cannot see the relevance of such circumstances on the question of the voluntary or involuntary character of his statements to the officers. Is the suggestion that if they had probable clews to his guilt, their questioning of him would have been better justified?

This questioning is characterized as a "secret inquisition," invoking all of the horrendous historical associations of those words. Certainly the inquiry was participated in by a good many persons, and we do not see how it could have been much less "secret" unless the press should have been called in. Of course, any questioning may be characterized as an "inquisition," but the use of such characterizations is no substitute for the detached and judicial consideration that the court below gave to the case.

We conclude that even going behind the state court decisions into the facts, no independent judgment on the whole evidence that Ashcraft's confession was in fact coerced is possible. And against this background of facts the extreme character of the Court's ruling becomes apparent.

I am not sure whether the Court denies the State all right to arrest and question the husband of the slain woman. No investigation worthy of the name could fail to examine him. Of all persons, he was most likely to know whether she had enemies or rivals. Would not the State have a constitutional right, whether he was accused or not, to arrest and detain him as a material witness? If it has the right to detain one as a witness, presumably it has the right to examine him.

Could the State not confront Ashcraft with his false statements and ask his explanation? He did not throw himself at any time on his rights, refuse to answer, and demand counsel, even according to his own testimony. The strategy of the officers evidently was to keep him talking, to give him plenty of rope and see if he would not hang himself. He does not claim to have made objection to this. Instead he relied on his wits. The time came when it dawned on him that his own story brought him under suspicion, and that he could not meet it. Must the officers stop at this point because he was coming to appreciate the uselessness of deception?

Then he became desperate and accused the Negro. Certainly from this point the State was justified in holding and questioning him as a witness, for he claimed to know the killer. That accusation backfired and only turned up a witness against him. He had run out of expedients and inventions; he knew he had lost the battle of wits. After all, honesty seemed to be the best, even if the last, policy. He confessed in detail.

At what point in all this investigation does the Court hold that the Constitution commands these officers to send Ashcraft on his way and give up the murder as insoluble? If the State is denied the right to apply any pressure to him which is "inherently coercive" it could hardly deprive him of his freedom at all. I, too, dislike to think of any man, under the disadvantages and indignities of detention being questioned about his personal life for thirty-six hours or for one hour. In fact, there is much in our whole system of penology that seems archaic and vindictive and badly managed. Every person in the community, no matter how inconvenient or embarrassing, no matter what retaliation it exposes him to, may be called upon to take the witness stand and tell all he knows about a crime—except the person who knows most about it.

Efforts of prosecutors to compensate for this handicap by violent or brutal treatment or threats we condemn as passionately and sincerely as other members of the Court. But we are not ready to say that the pressure to disclose crime, involved in decent detention and lengthy examination, although we admit them to be "inherently coercive," are denied to a State by the Constitution, where they are not proved to have passed the individual's ability to resist and to admit, deny, or refuse to answer.

III.

The Court either gives no weight to the findings of the Tennessee courts or it regards their inquiry as to the effect on the individuals involved as immaterial. We think it was a material inquiry and that respect is due to their conclusion.

The Supreme Court of Tennessee, writing in this case, stated the law of that State by which it reviewed and affirmed the action of the trial court. It said, "When confessions are offered as evidence, their competency becomes a preliminary question to be determined by the court. This imposes upon the presiding judge the duty of deciding *the fact* whether the party making the confession was influenced by hope or fear. This rule is so well established, that if the judge allow the jury to determine the preliminary fact, it is error, for which the judgment will be reversed.

"In the instant case the trial judge heard the witnesses as to their confessions out of the presence of the jury, and he held that under the facts he could not say that the confessions were not voluntarily made and, therefore, permitted them to go to the jury." (Emphasis supplied.)

The rule of law thus laid down complied with the law as this Court had settled it at the time of trial.

The Tennessee Supreme Court made a painstaking examination of the evidence in the light of the claim that

the confessions were coerced. It concluded that it was "unable to say that the confessions were not freely and voluntarily made. Both of the plaintiffs in error have had a fair trial and we decline to disturb the conviction."

That court, it is clear, renders no mere lip service to the guaranties of the Constitution. In other cases it has set aside convictions because confessions used at trials were found to have been coerced.[2] There is not the least indication that the court was passionate or biased or that the result does not represent the honest judgment of a high-minded court, sensitive to these problems.

A trial judge out of hearing of the jury saw and heard Ashcraft and saw and heard those whom Ashcraft accused of coercing him. In determining a matter of this kind no one can deny the great advantage of a court which may see and hear a man who claims that his will succumbed and those who, it is claimed, were so overbearing. The real issue is strength of character, and a few minutes' observation of the parties in the courtroom is more informing than reams of cold record. There is not the slightest indication that the trial judge was prejudiced or indifferent to the prisoner's rights. Ashcraft's counsel moved to exclude his confession "for the reason that the statements contained therein were not freely and voluntarily made, nor were they free from duress and restraint, but were secured by compulsion. . . ." The court said, ". . . the sole proposition, as the Court sees it from this testimony, is that he was confined and questioned for a period of approximately thirty-six hours. I think counsel concedes that is practically the main ground upon which he rests his motion. There was no physical violence offered to the defendant Ashcraft, and none claimed." He overruled the motion and received the confession. This

[2] *Deathridge* v. *State,* 33 Tenn. 75; *Strady* v. *State,* 45 Tenn. 300; *Self* v. *State,* 65 Tenn. 244; *Cross* v. *State,* 142 Tenn. 510, 221 S. W. 489; *Rounds* v. *State,* 171 Tenn. 511, 106 S. W. 2d 212.

Court, not one of whose members ever saw Ashcraft or any one of the State's witnesses, overturns the decision by the trial judge.

Moreover, a jury held Ashcraft's statements incredible. After the trial judge, out of their presence, heard the evidence and decided the confession was admissible, the jury heard the evidence to decide whether the confession should be believed. Ashcraft again testified and so did all of the witnesses for the State. Conduct of the hearing both by the judge and the prosecutors was above criticism. The Court observes: "If, therefore, the question of the voluntariness of the two confessions was actually decided at all it was by the jury." Is it suggested that a State consistently with the Constitution may not leave this question to the sole determination of a jury? I had supposed that the constitutional duty of a State when such questions of fact arise is to furnish due process of law for deciding them. Does not jury trial meet this test? Here Tennessee, and I think very commendably, provided the double safeguards of a preliminary trial by the judge and a final determination by the jury.

The Court's opinion makes a critical reference to the charge of the trial judge. However, diligent counsel took no exception to the part of the charge quoted, made no request for further instruction on the subject, and assigned no error to the charge. Even if we think the charge inadequate, does the inadequacy of a charge constitute want of due process? And if so, do we review questions as to the charge although counsel for the petitioner made no objection during the trial when the judge could have corrected the error, but after the trial was over assigned it as one of twelve reasons for demanding a new trial?

No conclusion that this confession was actually coerced can be reached on this record except by reliance upon the utterly uncorroborated statements of defendant Ashcraft.

His testimony does not carry even ordinary guaranties of truthfulness, and the courts and jury were not bound to accept it. Perjury is a light offense compared to murder and they may well have believed that Ashcraft was ready to resort to a lesser crime to avoid conviction of a greater one. Furthermore, the very grounds on which this Court now upsets his conviction Ashcraft repudiated at the trial. He asserts that he was abused, but he does not testify as this Court holds that it had the effect of forcing an involuntary confession from him. On the contrary, he flatly insists that it had no such effect and that he never did confess at all.

Against Ashcraft's word the state courts and jury accepted the testimony of several apparently disinterested witnesses of high standing in their communities, in addition to that of the accused officers. One of the witnesses to Ashcraft's admission of guilt was his own family physician, two were disinterested businessmen of substance and standing, another was an experienced court reporter who had long held this position of considerable trust. Another was a member of the bar. Certainly, the state courts were not committing an offense against the Constitution of the United States in refusing to believe that this whole group of apparently reputable citizens entered into a conspiracy to swear a murder onto an innocent man, against whom not one of them is shown to have had a grievance or a grudge.

This is not the case of an ignorant and unrepresented defendant who has been the victim of prejudice. Ashcraft was a white man of good reputation, good position, and substantial property. For a week after this crime was discovered he was not detained, although his stories to the officers did not hang together, but was at large, free to consult his friends and counsel. There was no indecent haste, but on the contrary evident deliberation, in suspect-

ing and accusing him. He was not sentenced to death, but for a term that probably means life. He was defended by resourceful and diligent counsel.

The use of the due process clause to disable the States in protection of society from crime is quite as dangerous and delicate a use of federal judicial power as to use it to disable them from social or economic experimentation. The warning words of Mr. Justice Holmes in his dissenting opinion in *Baldwin* v. *Missouri*, 281 U. S. 586, 595, seem to us appropriate for rereading now.

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

UNITED STATES ET AL. *v.* COUNTY OF ALLEGHENY.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

No. 417. Argued March 1, 1944.—Decided May 1, 1944.

Pursuant to a contract with the United States for the production of ordnance, a contractor installed machinery in his mill. In the assessment of the mill for state taxes, the value of the machinery was included. *Held:*

1. Whether the machinery was property of the United States was a federal question. P. 182.

2. Title to the machinery was in the United States. P. 183.

3. The state tax law, so far as it purports to authorize taxation of the property interests of the United States in the machinery in the contractor's plant, or to use that interest to tax or to enhance the tax upon the Government's bailee, violates the Federal Constitution. P. 192.

4. The claim in this case that immunity from state taxation was waived is unsupported. P. 189.

(a) A provision of the contract requiring the contractor to abide by the "applicable" state law was inadequate to waive federal immunity. P. 189.

(b) A provision of the contract whereby the Government was obligated to pay certain taxes of the contractor did not operate to waive immunity. P. 189.

5. The invalidity of the tax was not dependent upon where its economic burden fell. P. 189.

6. Local governments may not impose either compensatory or retaliatory taxes on property interests of the Federal Government. P. 190.

7. The contractor, upon whom the tax was laid, and the Government, as intervenor, having made timely insistence in the proceeding below that the state tax law as applied violated the Federal Constitution, and the highest court of the State having rendered final judgment against the claim of federal right, this Court has jurisdiction on appeal. Jud. Code § 237 (a). P. 191.

347 Pa. 191, 32 A. 2d 236, reversed.

APPEAL from the reversal of a judgment which held a state tax invalid under the Federal Constitution.

Solicitor General Fahy, with whom *Assistant Attorney General Samuel O. Clark, Jr., Judge Advocate General Cramer,* and *Messrs. Sewall Key, J. Louis Monarch, Alvin J. Rockwell,* and *Paul F. Mickey* were on the brief, for the United States; and *Messrs. Elder W. Marshall* and *Carl E. Glock* submitted for the Mesta Machine Co.,—appellants.

Mr. Edward G. Bothwell, with whom *Mr. John J. O'Connell* was on the brief, for appellee.

By special leave of Court, *Miss Anne X. Alpern,* with whom *Messrs. Ray L. Chesebro, L. E. Latourette, William E. Kemp, Richmond B. Keech, J. H. O'Connor,* and *Charles S. Rhyne* were on the brief, for the member cities of the National Institute of Municipal Law Officers, as *amici curiae,* urging affirmance.

MR. JUSTICE JACKSON delivered the opinion of the Court.

We are called upon to solve another of the recurring conflicts between the power to tax and the right to be free from taxation which are inevitable where two governments function at the same time and in the same territory.

In arguing the case of *McCulloch* v. *Maryland*, Luther Martin, Attorney General of Maryland, himself a member of the Constitutional Convention, said, "The whole of this subject of taxation is full of difficulties, which the Convention found it impossible to solve, in a manner entirely satisfactory. The first attempt was to divide the subjects of taxation between the State and the national government. This being found impracticable, or inconvenient, the State governments surrendered altogether their right to tax imports and exports, and tonnage; giving the authority to tax all other subjects to Congress, but reserving to the States a concurrent right to tax the same subjects to an unlimited extent. This was one of the anomalies of the government, the evils of which must be endured, or mitigated by discretion and mutual forbearance." *McCulloch* v. *Maryland*, 4 Wheat. 316, 376. Where discretion and forbearance have failed, it often has fallen to this Court to determine specific cases for which the Convention was unable to agree upon a general rule. Looking backward it is easy to see that the line between the taxable and the immune has been drawn by an unsteady hand.

But since 1819, when Chief Justice Marshall in the *McCulloch* case expounded the principle that properties, functions, and instrumentalities of the Federated Government are immune from taxation by its constituent parts, this Court never has departed from that basic doctrine or wavered in its application. In the course of time it held that even without explicit congressional action immunities had become communicated to the income or property or transactions of others because they in some manner dealt with or acted for the Government.[1] In

[1] See *Dobbins* v. *Commissioners*, 16 Pet. 435; *Collector* v. *Day*, 11 Wall. 113; *New York ex rel. Rogers* v. *Graves*, 299 U. S. 401; *Osborn* v. *Bank of United States*, 9 Wheat. 738; *Owensboro National*

recent years this Court has curtailed sharply the doctrine of implied delegated immunity.[2] But unshaken, rarely questioned, and indeed not questioned in this case, is the principle that possessions, institutions, and activities of the Federal Government itself in the absence of express congressional consent are not subject to any form of state taxation. The real controversy here is whether, especially in view of recent decisions, taxing authorities of the Commonwealth of Pennsylvania have infringed this admitted immunity.

Mesta Machine Company, an appellant with the United States, exists as a corporation under the laws of Pennsylvania and has a manufacturing plant in the County of Allegheny, of that Commonwealth, the County being appellee herein. It is engaged in the manufacture of heavy machinery. In October 1940, the War Department desired to produce a quantity of large field guns. It could have assembled an organization, created a Government-owned corporation, and erected a plant which would have been wholly tax immune. *Clallam County* v. *United States,* 263 U. S. 341. But for reasons of time and policy it chose to utilize a going concern under private management and ownership. Mesta's plant was not equipped for the manufacture of ordnance. It was agreed that certain additional equipment specially required for

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Bank v. *Owensboro,* 173 U. S. 664; *Choctaw, O. & G. R. Co.* v. *Harrison,* 235 U. S. 292; *Gillespie* v. *Oklahoma,* 257 U. S. 501; *Jaybird Mining Co.* v. *Weir,* 271 U. S. 609; *Federal Land Bank* v. *Crosland,* 261 U. S. 374; *Telegraph Co.* v. *Texas,* 105 U. S. 460; *Leloup* v. *Port of Mobile,* 127 U. S. 640; *Indian Motocycle Co.* v. *United States,* 283 U. S. 570; *Panhandle Oil Co.* v. *Mississippi ex rel. Knox,* 277 U. S. 218; *Graves* v. *Texas Co.,* 298 U. S. 393.

[2] See *Alabama* v. *King & Boozer,* 314 U. S. 1; *Graves* v. *New York ex rel. O'Keefe,* 306 U. S. 466; *James* v. *Dravo Contracting Co.,* 302 U. S. 134; *Helvering* v. *Gerhardt,* 304 U. S. 405; *Helvering* v. *Mountain Producers Corp.,* 303 U. S. 376.

the work should be furnished at Government cost and should remain the property of the United States.

The basic arrangement between Mesta and the Government was provided for by three separate titles of a single contract, made in October 1940. A title was devoted to each feature of the arrangement, being generally: procurement of Government-owned equipment at Government cost; lease of such equipment by the Government to Mesta; and Mesta's undertaking to make and deliver the guns at a fixed price each. In February 1941 a supplemental contract was made.

Under the first title of the contract, machinery was to be procured in three possible ways: Mesta, as an independent contractor and not as agent of the Government, could purchase it; Mesta could manufacture it; or the Government at its option could furnish any part of it. In carrying out the agreement Mesta manufactured one machine, the Government furnished eight gun-boring lathes and two rifling machines from its Watervliet Arsenal, and the rest Mesta purchased from other machine-tool manufacturers. The machinery bought or built by Mesta was inspected and accepted on behalf of the United States, which thereupon compensated Mesta as agreed. The contract provided that title to all such property should vest in the Government upon delivery at the site of work and inspection and acceptance.

By the second title of the contract the Government leased this equipment to Mesta for the period during which guns are manufactured by it under this contract or later supplements. As rental Mesta agreed to pay the sum of one dollar. Mesta was permitted to use the equipment "for the purpose of expediting the manufacture of guns" and for no other, without consent, except that such machinery as was "purchased or furnished to supplement its existing facilities" might be used "for general purposes." Liability of Mesta for loss, damage, or destruction

of equipment was "that of a bailee under a mutual benefit bailment." Mesta could not remove any of it without permission, and at all times it was accessible to Government inspection. On termination of the gun-supply contract, unless a stand-by contract was made, Mesta agreed to remove and ship the equipment according to Government directions, in good condition subject to fair wear and tear and depreciation.

The leasing title of the contract made no mention of taxation. The equipment-procurement title provided for reimbursement of Mesta "in the performance of the work under this Title" for payments "under the Social Security Act, and any applicable State or local taxes, fees, or charges which the Contractor may be required on account of this contract to pay on or for any plant, equipment, process, organization, materials, supplies, or personnel." The gun-supply title recited that the contract price did not "include any tax imposed by any state, county, or municipality upon the transaction of this purchase of guns. The Government shall not be liable, directly or indirectly, for the payment of any such taxes, except that if the Contractor after using every effort short of litigation to procure exemption or refund, as the case may be, should be compelled to pay to any state, county or municipality, any tax upon the transaction of this procurement, an amount equal to the tax so paid shall be paid by the Government on demand of the Contractor, in addition to the prices herein stated." The Government admits liability to reimburse Mesta if it is obliged to pay tax by reason of the assessment in question here.

The machinery was bolted on concrete foundations in Mesta's plant on real property owned by it. It could be removed without damage to the building.

The present controversy flared when the assessing authorities of Allegheny County revised Mesta's previously determined assessment for ad valorem taxes. They added

thereto the value of the machinery in question, fixed at $618,000. This included property acquired from other tool manufacturers as above described, $444,000; that manufactured by Mesta, $14,000; lathes brought from the Watervliet Arsenal, $160,000. Mesta protested and exhausted administrative remedies without avail, and on July 30, 1942, paid under protest $5,137.12, the amount of the tax attributable to this increased assessment.

Mesta took a timely appeal allowed by statute to the Court of Common Pleas. The United States petitioned to intervene, reciting that it would be required to reimburse Mesta by force of its contract. Intervention was permitted against objection by the County, and the United States has participated in the litigation since. Mesta attacked the assessment under both state and federal law, claiming that under the State Tax Law property belonging to another was not to be considered a part of its mill and that if construed to authorize assessment and taxation of this machinery, the statute violated the Federal Constitution.

The Court of Common Pleas held that the State Act authorized the assessment, but that the machinery here involved was "owned by the United States" and so for constitutional reasons could not be included.

The Supreme Court of Pennsylvania, on appeal of the County, reversed, and reinstated the assessment. It held that under the state law regardless of who held the title to it the machinery constituted a part of the mill for purposes of assessment and was properly assessed as real estate. It acknowledged that property held by the United States is "beyond the pale of taxation" by a state, but this assessment, it said, is not against the United States but against Mesta, which is operating its mill for private purposes. If Mesta defaulted in tax payments, the Court held that "the paramount rights of the Government in the

machinery could not be divested or in any way affected," hence the Government could suffer no loss. Evidence that the machinery was not owned by Mesta it held to be irrelevant and improperly admitted. Two Justices dissented.

The United States and Mesta appealed and we postponed consideration of jurisdictional questions to the hearing on the merits.

I.

It is denied that the Government has valid title to the machinery. This contention is urged by the member cities of the National Institute of Municipal Law Officers, permitted to file a brief and to argue orally as *amici curiae*. Their position is that "the Government is subject to the legal rules applicable to private transactions." Under Pennsylvania law transfer of title to personal property to be good as against subsequent purchasers and lienors must be accompanied by delivery of possession. They say that inspection and acceptance by a contracting officer on behalf of the United States at the Mesta plant did not under decisional law of Pennsylvania amount to delivery of possession to the United States and hence that its title is defective. The position of the County is less extreme. It argued earlier in the litigation that the machinery became part of Mesta's real estate upon installation and that the United States had only "a reversionary interest after the termination of the contract." It later conceded that title to the property was not in Mesta "except for tax purposes." The Pennsylvania Supreme Court thought it immaterial whether title was in the Government, but said, ". . . this private arrangement between the Mesta Company, the owner of the land and buildings and operator of the mill, and the federal government, the owner of the machinery, which treats the equipment as personal property and per-

mits the latter to remove it at the termination of the contract, can in no way change the legal effect of the Act of Assembly which specifically designates machinery, under these circumstances, as real estate for tax purposes."

We do not determine whether, under Pennsylvania law, the retention of possession by Mesta would protect only good-faith purchasers or lienors who relied upon it or whether, as urged by the *amici*, it also makes the Government's title imperfect as against these taxing authorities, who were fully advised of the Government's claim before the assessment was made. Even if the latter were true, we do not think the state law would be decisive of the question of title.

The Constitution provides that "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . ." Art. IV, § 3, cl. 2. It also gives Congress the power "To make all Laws which shall be necessary and proper for carrying into Execution" all powers vested in the Government or in any department or officer thereof, Art. 1, § 8, cl. 18, and it makes the laws of the United States enacted pursuant thereto "the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Art. VI, cl. 2.

Every acquisition, holding, or disposition of property by the Federal Government depends upon proper exercise of a constitutional grant of power. In this case no contention is made that the contract with Mesta is not fully authorized by the congressional power to raise and support armies and by adequate congressional authorization to the contracting officers of the War Department. It must be accepted as an act of the Federal Government warranted by the Constitution and regular under statute.

Procurement policies so settled under federal authority may not be defeated or limited by state law. The purpose of the supremacy clause was to avoid the introduction of disparities, confusions and conflicts which would follow if the Government's general authority were subject to local controls. The validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any State. *Clearfield Trust Co.* v. *United States,* 318 U. S. 363; *Jackson County* v. *United States,* 308 U. S. 343; *Carpenter* v. *Shaw,* 280 U. S. 363; *Utah Power & Light Co.* v. *United States,* 243 U. S. 389; *United States* v. *Ansonia Brass & Copper Co.,* 218 U. S. 452; see *D'Oench, Duhme & Co.* v. *Federal Deposit Ins. Corp.,* 315 U. S. 447; *Deitrick* v. *Greaney,* 309 U. S. 190; *Federal Land Bank* v. *Bismarck Lumber Co.,* 314 U. S. 95. Federal statutes may declare liens in favor of the Government and establish their priority over subsequent purchasers or lienors irrespective of state recording acts. *Detroit Bank* v. *United States,* 317 U. S. 329; *United States* v. *Snyder,* 149 U. S. 210. Or the Government may avail itself, as any other lienor, of state recording facilities, in which case, while it has never been denied that it must pay nondiscriminatory fees for their use, the recording may not be made the occasion for taxing the Government's property. *Federal Land Bank* v. *Crosland,* 261 U. S. 374; *Pittman* v. *Home Owners' Loan Corp.,* 308 U. S. 21.

We hold that title to the property in question is in the United States and is effective for tax purposes.

II.

The County denies, however, that it is taxing property belonging to the United States. First, it says it taxes only the land, which the United States does not own; and the

machinery is not taxed, but is considered only as an enhancement of the value of the land to Mesta, its owner. Secondly, it says the lien of the tax does not encumber and the process of collection does not involve any sale or other interference with the machinery. The Pennsylvania Supreme Court has upheld the questioned tax because upon these grounds it concluded that no interference with the federal function resulted.

"Where a federal right is concerned we are not bound by the characterization given to a state tax by state courts or legislatures, or relieved by it from the duty of considering the real nature of the tax and its effect upon the federal right asserted." *Carpenter* v. *Shaw*, 280 U. S. 363, 367–68.

It is not contended that the scheme of taxation employed by Pennsylvania is anything other than the old and widely used ad valorem general property tax. This taxation plan involves the identification and valuation of the variable individual holdings to be taxed, commonly called the assessment, the application of a uniform rate calculated on the need for public revenues, and the collection, in default of payment, by distraint and sale of the property assessed and taxed. This form of taxation is not regarded primarily as a form of personal taxation but rather as a tax against the property as a thing. Its procedures are more nearly analogous to procedures *in rem* than to those *in personam*. While personal liability for the tax may be and sometimes is imposed, the power to tax is predicated upon jurisdiction of the property, not upon jurisdiction of the person of the owner, which often is lacking without impairment of the power to tax. In both theory and practice the property is the subject of the tax and stands as security for its payment.

The Pennsylvania statutes embody this scheme of taxation. They are a century old. The basic provision reads:

"The following *subjects and property* shall . . . be valued and assessed, and *subject to taxation.*" [3] Taxes are "declared to be a *first lien on said property.*" [4] (Emphasis supplied.) It is only under these legislative provisions that the tax in question is laid.

The procedure of the assessors is consistent with no other theory than that the machinery itself was being assessed and taxed exactly as land was being assessed and taxed. The Government-owned machinery was inspected and itemized by the assessor, each machine was then separately appraised by a machinery expert, and the aggregate full values of $618,000 were carried into the assessment. The assessment against Mesta was entered in the books of the assessors as follows: "Land, $293,795; Buildings, $1,123,124; Machinery, $2,489,085; Total assessment, $3,906,004." The machinery item included the value of the Government's property.

The assessors made no claim that the temporary presence of the Government's machinery actually enhanced the market value or the use value of Mesta's land. The assessors simply and forthrightly valued Mesta's land as land, and the Government's machines as machinery, and added the latter to the former. We discern little theoretical difference, and no practical difference at all, between what was done and what would be done if the machinery were taxed in form. Its full value was ascertained and added to the base to which the annual rates would apply for county, city, borough, town, township, school, and poor purposes.

We hold that the substance of this procedure is to lay an ad valorem general property tax on property owned by the United States.

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[3] Penn. Stat. Ann. (Purdon) tit. 72, § 5020–201.

[4] *Id.*, tit. 53, § 2022.

III.

It is contended, however, that Government title does not prevent such state taxation, because the incidence of the tax is borne by Mesta, not the Government, and the taxation creates no lien upon its property or interference with its function.

The Commonwealth certainly has broad powers and choices of methods to tax Mesta, a corporation created by it and domiciled and operating within its borders. The trend of recent decisions has been to withdraw private property and profits from the shelter of governmental immunity but without impairing the immunity of the State or the Nation itself. Benefits which a contractor receives from dealings with the Government are subject to state income taxation.[5] Salaries received from it may be taxed.[6] The fact that materials are destined to be furnished to the Government does not exempt them from sales taxes imposed on the contractor's vendor.[7] But in all of these cases what we have denied is immunity for the contractor's own property, profits, or purchases. We have not held either that the Government could be taxed or its contractors taxed because property of the Government was in their hands. The distinction between taxation of private interests and taxation of governmental interests, although sometimes difficult to define, is fundamental in application of the immunity doctrine as developed in this country.

Mesta has some legal and beneficial interest in this property. It is a bailee for mutual benefit. Whether such a right of possession and use in view of all the circumstances could be taxed by appropriate proceedings we do not decide. Its leasehold interest is subject to some

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[5] *James* v. *Dravo Contracting Co.*, 302 U. S. 134.

[6] *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466.

[7] *Alabama* v. *King & Boozer*, 314 U. S. 1.

qualification of the right to use the property except for gun manufacture, is limited to the period it engages in such work, and is perhaps burdened by other contractual conditions. We have held that where private interests in property were so preponderant that all the Government held was a naked title and a nominal interest, the whole value was taxable to the equitable owner. *Northern Pacific Ry. Co.* v. *Myers,* 172 U. S. 589; *New Brunswick* v. *United States,* 276 U. S. 547. But that is not the situation here, and the State has made no effort to segregate Mesta's interest and tax it. The full value of the property, including the whole ownership interest, as well as whatever value proper appraisal might attribute to the leasehold, was included in Mesta's assessment.

It is contended the whole value of the property may be reached since the impact of the tax is upon Mesta. In support of this we are reminded that the tax, so the Supreme Court of Pennsylvania held, falls upon the real estate alone, because the lien thereof does not touch the Government's property, which before or after tax default may be removed. But renunciation of any lien on Government property itself, which could not be sustained in any event, hardly establishes that it is not being taxed. The fact is that the lien on the underlying land is increased because of and in proportion to the assessment of the machinery. If the tax is collected by selling the land out from under the machinery, the effect on its usefulness to the Government would be almost as disastrous as to sell the machinery itself. The coercion of payment from compelling the Government to move its property and interrupt production at the Mesta plant would defeat the purpose of the Government in owning and leasing it.

We think, however, that the Government's property interests are not taxable either to it or to its bailee. The "Government" is an abstraction, and its possession of property largely constructive. Actual possession and cus-

tody of Government property nearly always are in someone who is not himself the Government but acts in its behalf and for its purposes. He may be an officer, an agent, or a contractor. His personal advantages from the relationship by way of salary, profit, or beneficial personal use of the property may be taxed as we have held. But neither he nor the Government can be taxed for the Government's property interest. Rarely does a state or municipality pursue the Federal Government itself. Most of the immunity cases we have been called upon to deal with involved assertion of a right to tax Government property against an individual. In *United States* v. *Rickert,* 188 U. S. 432, this Court decided that improvements made upon lands to which the United States held title but which were put in possession of Indians for their benefit remained immune from taxation and that cattle, horses, and chattels purchased with the money of the Government and "put into the hands of the Indians to be used in execution of the purpose of the Government in reference to them" were likewise immune from taxation. In *Van Brocklin* v. *Tennessee,* 117 U. S. 151, Tennessee attempted to sell for state taxes lands which the United States owned at the time the taxes were assessed and levied, but in which it had ceased to have any interest at the time of sale. There, as here, it was claimed the collection affected only private persons, whose equities in the matter were at least doubtful, and that the United States could suffer no harm. The Court held, however, that the immunity protected the private owner, for the tax had been laid against an interest of the Government which was beyond the reach of state taxing power. See also *Irwin* v. *Wright,* 258 U. S. 219; *Lee* v. *Osceola Improvement District,* 268 U. S. 643.

A State may tax personal property and might well tax it to one in whose possession it was found, but it could hardly tax one of its citizens because of moneys of the

United States which were in his possession as Collector of Internal Revenue, Postmaster, Clerk of the United States Court, or other federal officer, agent, or contractor. We hold that Government-owned property, to the full extent of the Government's interest therein, is immune from taxation, either as against the Government itself or as against one who holds it as a bailee.

IV.

We find no support for the claim that the immunity has been waived. Congress certainly has not done so. It is true that the contract requires Mesta to obey and abide by the "applicable" law of Pennsylvania. But such language does not require Mesta to submit to unconstitutional exactions. It clearly is inadequate to waive federal immunity, even if we assume a contracting officer had power to do so. Likewise any contractual obligation of the War Department to pay Mesta's taxes does not operate either to waive or to create an immunity. Nor is the validity of the tax dependent upon the ultimate resting place of the economic burden of the tax. We also think it immaterial what, if any, right of reimbursement the Pennsylvania law grants a lessee against a private lessor in similar circumstances. State law could not obligate the Central Government to reimburse for a valid tax, much less for an invalid one.

Each party urges equities in its favor. The Government points to the exigencies of war, points to numerous and increasing state efforts to tax such property, and urges against the decision below that it is a precedent for taxation of a substantial portion of property of the Government valued at 7½ billion dollars in the possession and use of private contractors engaged in war production. It owns property on private lands, under contracts similar to this, with a value approximating two billion dollars, over $257,000,000 of it located in Pennsylvania.

Appellees, and especially the *amici,* on the other hand, point for a different purpose to the amount of Government property in war production. It is said that increased municipal services, to serve and protect the influx of war workers, are required in all communities where large war contracts of this type are placed; that such local services rely heavily on real estate taxation; that to exclude property such as this, together with the large real estate holdings that have been and are being acquired by the Government, imposes this increased cost on others. While validation of assessments of this character will measurably increase the cost of waging the war, it is argued that the Federal Government may diffuse the cost throughout the country instead of putting a back-breaking burden on local governments where war plants are located. For these reasons we are urged to hold the position of the Government "unsound, as well as inequitable."

Such considerations remind us of our heavy responsibility in deciding the issues but hardly provide a guide or alter the usual principles for decision. The equities in this unfortunate conflict between the United States and one of its most important industrial communities are not capable of judicial ascertainment or equalization. Whether a county loses more than it gains by such federal activity and what other federal benefits ought to be considered if a balance were to be struck between advantages and disadvantages, we cannot say. The adjustment of benefits and burdens is for other departments, and studies to that end have been undertaken.[8] We can only say that our

[8] See Report on Federal Contributions to States and Local Governmental Units with Respect to Federally Owned Real Estate, House Doc. No. 216, 78th Cong., 1st Sess. (1943). This comprehensive report shows the impossibility of generalizing about the equities between the Federal Government and a community in cases dealing with isolated properties. Much federally owned property is held for the accommodation and service of the locality, such as the Post Office or

constitutional system as judicially interpreted from the beginning leaves no room for the localities to impose either compensatory or retaliatory taxation on Government property interests. Their remedy lies in petition to the Federal Congress, which also is their Congress.

V.

Our jurisdiction was questioned by appellee's motion to dismiss, and its consideration was postponed to hearing of the merits. The argument runs that the tax is laid only upon Mesta and therefore only Mesta can question its validity; that if Mesta does so, it can be only under the Fourteenth Amendment; that no question has been assigned under this Amendment and hence the appeal should be dismissed.

The questions in this case do not arise under the Fourteenth Amendment. They depend on provisions adopted and principles settled long before the Fourteenth Amendment and which exist independently of it.

The United States was admitted to the case as an intervenor. Both it and Mesta raised these questions of taxability, as either may do. The United States may question the taxation in order to protect its sovereignty over the property in question. Mesta as bailee is under a duty to protect the property and may protect itself from unlawful burdens put upon it because of its possession of the

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the courthouses. Other is held for general administrative purposes in which the locality has an interest or for the care of wards, such as veterans, in which local inhabitants share with others. The report considers all federally owned real estate and improvements, but not personalty. It shows that the United States had within Pennsylvania on June 30, 1937, property costing $278,519,000, with market value of $151,806,000. The estimated annual tax based on fair market value at local rates would be $3,152,000. But the average annual federal aid to that State is reported to be: 1928–30, $6,834,000; 1931–33, $10,791,000; 1934–37, all kinds, $190,071,000 (excluding FERA, CWA, and WPA: $23,118,000).

property. The tax is calculated and imposed on the land and machinery as a unit, the lien of the assessment on the machinery becomes a lien on the land which can be taken to pay the tax occasioned by the machinery. Since the tax must be paid out of Mesta's property it is in a position to challenge the validity of the tax, as was the case in *Van Brocklin* v. *Tennessee, supra.* Both Mesta and the Government made timely insistence that the Pennsylvania Tax Law as applied violates the Federal Constitution. The highest court of the State rendered final judgment against the claim of federal right. We have jurisdiction by appeal. Judicial Code § 237 (a). The motion to dismiss is denied.

The Tax Law of the Commonwealth of Pennsylvania as interpreted and applied in this case violates the Federal Constitution in so far as it purports to authorize taxation of the property interests of the United States in the machinery in Mesta's plant, or to use that interest to tax or to enhance the tax upon the Government's bailee. The judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS concur in the result.

MR. JUSTICE ROBERTS:

I think the judgment of the Supreme Court of Pennsylvania is right and should be affirmed for the reasons stated in its opinion.

If *James* v. *Dravo Contracting Co.*, 302 U. S. 134, were not upon our books, or had been decided the other way, I should agree to the opinion of the court. In that case, at the insistence of the United States, this court held that a state gross receipts tax upon payments by the United States to a contractor for erecting structures on United

States property was valid because the tax was not laid upon the contract, the Government, its property, its officers, or its instrumentality; was laid upon an independent contractor and was nondiscriminatory. Although admitting that the payment of the tax imposed a burden upon the activities of the United States because it inevitably increased the cost of exercise of its functions, the court nonetheless sustained the exaction. I then thought, as I still think, that the decision overruled a century of precedents in this court.

It was not long before the Government repented its generosity. Four years later, it insisted, in *Alabama* v. *King & Boozer,* 314 U. S. 1, that a state sales tax upon a purchase of building materials by a contractor who was to incorporate them into a Government project, and where, upon delivery, inspection, and acceptance, they became the property of the Government, was so direct a tax on the Government as to infringe its constitutional immunity. The court, however, followed to its logical conclusion the decision in *Dravo* and expressly overruled earlier decisions inconsistent with *Dravo* and *King & Boozer.*[1] I concurred in that decision, feeling myself bound by the *Dravo* case.

In this case, as I think, the court necessarily reverts to the test of burdensomeness by a form of words and, as a result, again plunges the applicable principle into confusion.

The truth is that the tax liability of Mesta in respect of its manufacturing plant has been increased by the presence in the plant of machinery bailed to the taxpayer by the federal Government. It is true too that, either as a result of the express terms of the Government's contract with Mesta, the Government's monetary obligation to

[1] *Panhandle Oil Co.* v. *Knox,* 277 U. S. 218; *Graves* v. *Texas Co.,* 298 U. S. 393.

Mesta will be increased by the imposition of increased tax or, as in the *Dravo* case, if the contractor is liable for an increase of tax by reason of the fact that he is such contractor, the Government, in the long run, will have to pay more for goods and services as a result of such increase.

In order to relieve the Government of this burden, the court is now obliged to say that the law of Pennsylvania is something different from what the Supreme Court of the Commonwealth has declared it, and that a century of State administrative and judicial construction is meaningless when the supposed necessity arises to unburden the Government from the result of state taxation upon privately owned property.

The law of Pennsylvania is, and always has been, that a tax imposed on real estate is enhanced in amount by buildings and machinery placed upon the land with the consent of the owner even though he does not own the improvements but is a mere bailee. The lien of the tax extends only to the land owned by the taxpayer and the bailed improvements are neither under the lien nor subject to seizure or sale for payment of the tax. But this settled law is brushed aside and it is said, notwithstanding these facts, that, in some indefinable way, Pennsylvania has in truth levied an *ad valorem* tax upon property of the United States which is in the possession of Mesta as bailee. This is nothing in substance but to say, in the teeth of the *Dravo* and *King & Boozer* cases, that if a tax levied upon a contractor of the Government imposes a burden upon the Government's activities it violates the constitutional immunity and must be stricken down. Whereas, in those cases, the court accepted the tax for what it was, viz., a tax upon the contractor and not upon the Government, here, although under state law the liability to the State is that of the contractor and his property, and can, in no event, be the liability of the Government or its property,—except as the Government either

contractually assumes the burden or bears it as an incident of the contractor's burden,—the court announces that the tax is laid on the Government's property.

I think the case was decided by the court below on a nonfederal ground. The decision is pitched solely upon the character and incidence of the real property tax of the Commonwealth. As that court, in the light of a hundred years of history, defined the tax and the tax lien neither was laid upon or collectable from the United States or its property. As a result of that decision Mesta became liable for an increased tax as a result of certain transactions with the Government. Unless the doctrine of immunity from consequent burden on the Government, as the other party to the contract, is to be reimported into our jurisprudence, the appeal should be dismissed because the decision below was based upon an adequate nonfederal ground.

MR. JUSTICE FRANKFURTER, dissenting:

I should like to add a few words to the opinion of my brother ROBERTS, with which, in the main, I agree.

This controversy is treated by the Court as though it presented a challenge by Pennsylvania to the authority of the United States. The case is not entitled, on the facts as I understand them, to have such importance attributed to it. We are all agreed that a State must subordinate its policies to the constitutional powers duly exercised by the United States. War of course evokes powers of government not available in times of peace, but it is no less true of the war powers of the Government than of the peace powers that the Constitution and the laws enacted in accordance with it are "the supreme Law of the Land." United States Constitution, Art. VI.

Implicit in our federal scheme is immunity of the Federal Government from taxation by the States. After having long been the subject of differences of opinion, the

extent of this implied immunity was greatly curtailed. The basis of the doctrine was shifted from that of an argumentative financial burden to the Federal Government to that of freedom from discrimination against transactions with the Government and freedom from direct impositions upon the property and the instrumentalities of the Government. The decisions in *James* v. *Dravo Contracting Co.*, 302 U. S. 134, and *Alabama* v. *King & Boozer*, 314 U. S. 1, mean nothing unless they mean that it is not enough that the Government may ultimately have to bear the cost of a part or even the whole of a tax which a State imposes on a third person who has business relations with the Government, when a State could impose such a tax upon such a third person but for the fact that the transaction which gave rise to it was not with a private person but with the Government. So much for the scope of the implied immunity of the Government from state taxation as I understand the decisions to date. But in carrying on effectively the task committed to it, the United States can, I believe, go beyond the judicial doctrine of implied immunity from taxation. I have no doubt that Congress, by appropriate legislation, could immunize those who deal with the Government from sales and property taxes which States otherwise are free to impose.

On the record before us, Pennsylvania has not challenged the implied immunity of the Federal Government from taxation nor has she sought to tax that which Congress has said should be free from taxation. Pennsylvania has not taxed property owned by the Government. Pennsylvania has not used her otherwise unquestioned power of taxation to discriminate against one dealing with the Government. Finally, Pennsylvania has not tried to impose a tax which Congress, in order to facilitate war production, has forbidden the States to levy.

Pennsylvania merely seeks to enforce a tax assessment against the owner of lands and buildings in the manner in which she has made such an assessment for one hundred years. She has assessed real property concededly owned by Mesta at a valuation increased by the value of the machinery made available to Mesta by various arrangements with the Government. But it is the realty that is being taxed, precisely as other realty is taxed, and by precisely the same method of determining the value of other realty. If the machinery which has here been affixed to the land through arrangements with the Government had been machinery that belonged to Remington Arms and Mesta had been operating through Remington as a sub-contractor for the Government, I suppose no one would doubt that Pennsylvania could assess the value of the land taxed against Mesta as it was here assessed, quite regardless of the retention of the title by Remington of the annexed fixtures, the value of which served to enhance the amount at which the land was assessed. It cannot alter the nature of the tax as a tax against Mesta's ownership of the land and buildings whether the enhancing fixtures belong to the Government or to Remington. Constitutional answers do at times turn on a nicety but not on a nicety without at least a nice significance.

The case thus appears to me one that was decided by the Pennsylvania Supreme Court on the settled construction of the Pennsylvania statute as a tax on realty, and not at all as a tax on the only thing that belongs to the United States, namely, machinery annexed to the realty. Here also "there can be no pretence that the Court adopted its view in order to evade a constitutional issue, and the case has been decided upon grounds that have no relation to any federal question." *Nickel* v. *Cole,* 256 U. S. 222, 225. The only interest which the State here taxed was an interest within the power of the State to tax; it was not a

federal interest. See *Elder* v. *Wood,* 208 U. S. 226, 232; *New Brunswick* v. *United States,* 276 U. S. 547. The rate at which that interest was taxed is equally a matter for Pennsylvania to determine. In view of the *Dravo* case, *supra,* and *Alabama* v. *King & Boozer, supra,* there is not before us a constitutionally immunized burden of the Government. Insofar as the financial burden has been directly assumed by the Government it has been so assumed by arrangements which the contracting officers of the Government saw fit to make with Mesta.

In respect to the problem we are considering, the constitutional relation of the Dominion of Canada to its constituent Provinces is the same as that of the United States to the States. A recent decision of the Supreme Court of Canada is therefore pertinent. In *City of Vancouver* v. *Attorney-General of Canada,* [1944] S. C. R. 23, that Court denied the Dominion's claim to immunity in a situation precisely like this, as I believe we should deny the claim of the Government.

UNITED STATES ET AL. *v.* WABASH RAILROAD CO. ET AL.

ON PETITION FOR REHEARING.

No. 453. Decided May 8, 1944.

Nothing in the record or in the petition for rehearing requires decision in the present proceeding of the contention that, as a result of changed conditions after the case was submitted to the Commission, the spotting service as now performed is not in excess of the carriers' obligation under their tariff rates, and that its performance by the carriers without charge is therefore not unlawful. The petition for rehearing is denied without prejudice to appellees' presentation of the question in any appropriate proceeding before the Commission and the courts. P. 201.

Rehearing denied.

PETITION for rehearing in the case of *United States* v. *Wabash R. Co.*, 321 U. S. 403.

Messrs. C. C. Le Forgee, Luther M. Walter, Nuel D. Belnap, and *John S. Burchmore* for the Staley Manufacturing Co., petitioner.

MR. CHIEF JUSTICE STONE:

In its petition for rehearing, appellee Staley Manufacturing Co. for the first time calls to our attention certain alleged changes in the location and arrangement of tracks on which are placed cars moving to and from the tracks of the line-haul carriers from and to Staley's industrial tracks. The changes are alleged to have occurred after the submission of the case to the Interstate Commerce Commission and are said to call for a different conclusion than that reached by the Commission as to whether the spotting service now performed by Staley is a part of the service covered by the line-haul tariffs.

The Commission's report considered in detail the circumstances attending the placing of cars at what are termed the Burwell tracks, which it found to be located within the Staley plant area and to have been leased by Staley to appellee Wabash Railroad Co. Its report states that, in general, cars delivered to Staley were initially placed by the carrier on the Burwell tracks and thence switched to appropriate unloading points at the Staley plant, while cars received from Staley were generally placed on the Wabash Railroad's general or storage tracks, but were also sometimes placed on the Burwell tracks. The Commission found, on sufficient evidence then before it, that "the movements between points of loading or unloading within the plant area of the Staley Company and the Burwell yard, the storage yard, or the general yard of the Wabash . . . in all instances are, and must be, co-

ordinated with the industrial operations of the Staley Company and conform to its convenience." And in its second conclusion of law it stated that "all services between the Burwell yard or the storage or general yard of the Wabash and points of loading or unloading within the plant area of the Staley Company are plant services for the Staley Company and not common-carrier services covered by the line-haul rates and charges of respondent carriers."

By their petitions for rehearing addressed to the Commission, appellees alleged that since March 1, 1941, three months after the case had been submitted to the Commission and about two months before it rendered its decision, the use of the Burwell tracks had been discontinued, and that those tracks had thereafter been disconnected and were being dismantled. They further alleged that appellee Wabash Railroad was in course of constructing new tracks on its own property "adjacent to its yard tracks north of the Staley plant" and "immediately north of the so-called Burwell yard" for use in the interchange of cars with Staley and other shippers, and that meanwhile the interchange was being performed from its general or storage yards. Appellees moved respectively that the Commission reconsider its decision "upon such further proceedings as may be appropriate and necessary," and that "the case be set down for a further hearing, and that . . . the Commission reconsider its order." No evidence was specified or tendered to prove before the Commission the allegations of the petitions for rehearing, and no opportunity to introduce evidence was in terms requested. The Commission denied the petitions for rehearing without opinion.

Before the District Court appellees set out the substance of their petitions to the Commission for rehearing and urged that the Commission erred in denying them. The

United States in its answer admitted only that appellees had alleged in those petitions for rehearing the matters set forth; the truth of the matters alleged was not admitted by either appellant. No new evidence was taken in the District Court. That court did not pass on this question, and made no findings as to the extent or effect of the alleged change of conditions.

Nothing in the petitions to the Commission for rehearing or in the petition here affords any basis for saying that the alleged changes in conditions are of a character which would require any modification of the Commission's order or that appellees could not, with due diligence, have brought the changes to the attention of the Commission before it made its report. They were not referred to in appellees' briefs in this Court. Compare rule 27, paragraphs 4 and 6; *I. T. S. Rubber Co.* v. *Essex Rubber Co.*, 272 U. S. 429, 431–2; *Flournoy* v. *Wiener*, 321 U. S. 253, 260–61. Neither the Commission nor the District Court have made findings with respect to them and they were not considered by this Court or referred to in its opinion.

We find nothing in the record or in the petition before us which calls on the Court in the present proceeding to pass on the question now sought to be raised. Our decision is accordingly without prejudice to appellees' presentation in any appropriate proceeding before the Commission and the courts, of their contention that as a result of changed conditions after the case was submitted to the Commission, the spotting service as now performed is not in excess of the carriers' obligation under their tariff rates, and that its performance by the carriers without charge is therefore not unlawful.

The petition for rehearing is denied.

UNION BROKERAGE CO. *v.* JENSEN ET AL.

CERTIORARI TO THE SUPREME COURT OF MINNESOTA.

No. 291. Argued February 1, 1944.—Decided May 8, 1944.

A statute of Minnesota denying to all foreign corporations the right to maintain any action in the courts of the State unless they have previously obtained a certificate of authority to do business within the State, for which a filing fee of $5.00 plus an initial license fee of $50.00 is exacted—*held* valid as applied to a federally licensed customhouse broker whose business was localized in the State; and not in conflict with existing federal laws and regulations relating to customhouse brokers or with the commerce clause of the Constitution. Pp. 207, 212.

215 Minn. 207, 9 N. W. 2d 721, affirmed.

CERTIORARI, 320 U. S. 724, to review a judgment which, reversing a judgment of the trial court, ordered dismissal of a suit brought by a foreign corporation.

Mr. Leonard Eriksson for petitioner.

Mr. Ordner T. Bundlie for respondents.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This is a suit brought in one of the lower courts of Minnesota by the Union Brokerage Company against Jensen and Rime for breach of fiduciary obligations in relation to Union's business, that of customhouse brokerage. The only defense to the suit with which we are concerned is the alleged disability of Union to resort to Minnesota's courts for want of compliance with her laws governing the transaction of business in the State as a foreign corporation. Minn. L. 1935, c. 200, Minn. Stat. 1941, c. 303. The Supreme Court of Minnesota sustained this defense, reversed the judgment in favor of the peti-

tioner, and ordered the suit dismissed. 215 Minn. 207, 9 N. W. 2d 721. We brought the case here to determine the important question whether enforcement of the Minnesota Foreign Corporation Act in this situation runs counter to federal law pertaining to customhouse brokers or is barred by the Commerce Clause. 320 U. S. 724.

Another claim that state authority must yield to controlling federal authority over interstate and foreign commerce is thus presented. It becomes necessary therefore to ascertain precisely what demand the State has here made, in relation to what transactions or activity it is making such demand, in what way federal authority has regulated such transactions or activity, and, finally, whether the Commerce Clause by its own force, in case federal law has not actually taken control, excludes the State from the exercise of the power it has here asserted.

For many years the petitioner, a North Dakota corporation, conducted a customhouse brokerage business at Portal, North Dakota, a port of entry from Canada by way of the Canadian Pacific Railway. In July, 1940, the Canadian Pacific re-routed most of its shipments whereby they no longer entered the United States through Portal but came through Noyes, Minnesota, with the result that more than 90% of Union's business was diverted from Portal. After November, 1940, at which time respondent Jensen resigned as officer of Union under circumstances giving rise to this suit, Union began to do business at Noyes and was doing business in Minnesota when it brought this suit. We shall outline the nature of this customhouse brokerage business only so far as is relevant to a consideration of our problem.

On goods shipped from Canada into this country the consignee of imported merchandise must "make entry" of

them at the office of the collector of customs at Noyes either in person or by an authorized agent, and this must be done within forty-eight hours of the report of the vehicle which carried the goods unless the collector extends the time. Tariff Act of 1930, 46 Stat. 590, 722, 52 Stat. 1083, 19 U. S. C. § 1484 (a). To make entry, the contents and value of the shipment must be declared and the tariff estimated, and the production of a certified invoice and a bill of lading is generally required. 19 U. S. C. § 1484 (b) (c) (e) (g). Speed in making entry is vital, because goods cannot proceed to their ultimate destination until its completion. Apart from the fact that importers cannot always or even often make entries in person, the procedure makes demands upon skill and experience. The specialist in these services is the customhouse broker. In addition, he advances the duty in order that the goods may be cleared. 19 U. S. C. § 1505. The competence of the broker also bears on the efficient collection of customs duties in that the likelihood of additional assessment or refund after final determination of the duty is greatly lessened by accuracy in the tentative computation. But since errors and differences of opinion are inevitable, to insure collection of deficiencies the Government requires a bond prior to release. 19 U. S. C. § 1499; 19 Code Fed. Reg. § 6.27.

The business of customhouse brokers, it is apparent, demands a sense of responsibility and skill. To protect importers as well as the Treasury, Congress has authorized the Secretary of the Treasury to "prescribe rules and regulations governing the licensing as customhouse brokers of citizens of the United States of good moral character, and of corporations, associations, and partnerships, and may require as a condition to the granting of any license, the showing of such facts as he may deem advisable as to the qualifications of the applicant to render valuable serv-

ice to importers and exporters." 46 Stat. 759, 19 U. S. C. § 1641 (a). Elaborate regulations define the investigation to be made of the character and reputation of the applicant and his experience in customs matters. 31A Code Fed. Reg. § 11.3 (b). The applicant is then directed to appear before an examining subcommittee which determines the "applicant's knowledge of customs law and procedure and his fitness to render valuable service to importers and exporters." 31A Code Fed. Reg. § 11.3 (e) (f). On approval of a favorable report of the subcommittee by the Committee on Enrollment and Disbarment of the Treasury Department, a license issues. 31A Code Fed. Reg. §§ 11.3 (f) (g), 11.4. "A licensed customhouse broker requires no further enrollment under the regulations in this part for the transaction, within the customs districts in which he is licensed, of any business relating specifically to the importation or exportation of merchandise under customs or internal-revenue laws." 31A Code Fed. Reg. § 11.5.

Union's license authorizes it to do business in District No. 34 which embraces both Portal, North Dakota, and Noyes, Minnesota. 19 Code Fed. Reg. § 1.2. The regulations require it to keep records of its financial transactions as customhouse broker, and its books and papers must be kept on file available for at least five years. 31A Code Fed. Reg. § 11.8. Business relations with those who have been denied a license because of moral turpitude or those whose license has been revoked are prohibited, and the licensee is under a duty not to promote evasion of obligations to the Government. Prompt payment and accounting of funds due to the Government or his client are required of the broker, and responsible and ethical conduct is generally enjoined. 31A Code Fed. Reg. § 11.9.

Does this scheme of federal regulation of the business of customhouse brokers preclude the requirement of Minne-

sota legislation which the Supreme Court of that State has enforced against Union? This brings us to a consideration of the precise demand against which Union protests. Minnesota has not singled out the customhouse brokerage business for legislation nor has she made requirements of foreign corporations doing customhouse brokerage business. What is in controversy is the applicability of a general law of Minnesota dealing with all foreign corporations. More specifically, § 20 of the Minnesota Foreign Corporation Act requires a certificate of any foreign corporation doing business in the State as a prerequisite for maintaining an action in a court of that State. In addition a filing fee of five dollars and initial license fee of fifty dollars is exacted on making application for a certificate of authority. §§ 21 (a) (1), 6. Such an application must contain the name of the corporation, its home state or country, the address of its principal office and that of its proposed registered office in Minnesota, the names and addresses of its directors and officers, a statement of its aggregate number of authorized shares and kindred information. § 5. The applicant must furthermore consent to the service of process upon it and appoint an agent upon whom service can be made, and in lieu of such appointment or if the agent cannot be found, service may be made upon the Secretary of State. §§ 5 (6), 13 (a) (2). A foreign corporation doing business in Minnesota without a certificate of authority is subject to a penalty not exceeding $1,000 and "an additional penalty not exceeding $100.00 for each month or fraction thereof during which it shall continue to transact business in this state without a certificate of authority therefor." § 20 (c). Having obtained such a certificate, the corporation is required to file annual reports on the basis of which an annual fee is assessed. The measure of the fee is substantially the same as that set for domestic corporations but in its computation the property

and gross receipts of a foreign corporation are allocated between those derived from within and those derived from without Minnesota and credit is given for the latter. § 15; cf. Minn. L. 1935, c. 230, § 2.

We have before us only one narrow aspect of this Minnesota legislation, namely the power of Minnesota to deny to Union access to its courts because it has not obtained a certificate required of all foreign corporations doing business in the State. We have not before us the taxing power of Minnesota over such a business as that of Union, for we do not know the extent or nature of the power to tax that Minnesota would claim against Union.

Of course Minnesota could not deny access to its courts to Union merely because it is engaged in the customs brokerage business. See *Second Employers' Liability Cases,* 223 U. S. 1, and *Douglas* v. *New York, N. H. & H. R. Co.,* 279 U. S. 377. But the limited and defined control which federal authority has thus far seen fit to assert over customhouse brokers does not deny to Minnesota the power to subject Union to the same demand which it makes of all other foreign corporations seeking the facilities of Minnesota's courts. The federal requirements and this state requirement can move freely within the orbits of their respective purposes without impinging upon one another. The federal regulations are concerned solely with the relations of the customhouse broker to the United States and to the importer and exporter. The limited federal supervision of the financial activities of Union is restricted to these federal interests. Such supervision does not touch the interest of the State in the protection of those who have other dealings with Union, and therefore does not preempt appropriate means for their protection.

In a situation like the present, where an enterprise touches different and not common interests between Na-

tion and State, our task is that of harmonizing these interests without sacrificing either. The proper attitude of mind for making such an accommodation is illustrated by *Federal Compress Co.* v. *McLean*, 291 U. S. 17. The Tariff Act of 1930 in this case, as the Warehousing Act in that case, confers upon licensees certain privileges, and secures to the Federal Government by means of these licensing provisions a measure of control over those engaged in the customhouse brokerage business. But such circumscribed control by the Federal Government does not imply immunity from control by the State within the sphere of its special interests. "The government exercises that control in the furtherance of a governmental purpose to secure fair and uniform business practices. But the appellant, in the enjoyment of the privilege, is engaged in its own behalf, not the government's, in the conduct of a private business for profit." *Federal Compress Co.* v. *McLean, supra* at 22–23. The state and federal regulations here applicable have their separate spheres of operation. The Federal Government has dealt with the manner in which customhouse brokerage is carried on. Minnesota, however, is legitimately concerned with safeguarding the interests of its own people in business dealings with corporations not of its own chartering but who do business within its borders. Union's business is localized in Minnesota, it buys materials and services from people in that State, it enters into business relationships, as this case, a suit against its former president, illustrates, wholly outside of the arrangements it makes with importers or exporters. To safeguard responsibility in all such dealings, dealings quite outside transactions immediately connected with import and export, Minnesota has made the same exactions of Union as of every other foreign corporation engaged in similar transactions. The Federal Government has recognized that there is such a

proper field for state regulation complementary to federal regulation, for the Treasury has provided that "a licensee having a license in force in one district may on application to the Committee be granted a license to transact business in another district without further examination, provided it appears on investigation that the licensee is authorized to do business in the State or States in which such other district is situated." 31A Code Fed. Reg. § 11.6. Those who are responsible for protecting the interests of the revenue as well as of commerce have thus given emphatic indication that a State has a legitimate interest in the regulation of those engaged in the brokerage business within its borders. Where the Government has provided for collaboration the courts should not find conflict. See *Savage* v. *Jones,* 225 U. S. 501, and *Kelly* v. *Washington,* 302 U. S. 1.

This brings us to the final question. Does the Minnesota legislation do that which the Commerce Clause was designed to prevent—does it express hostility toward those engaged in foreign commerce or practically obstruct its conduct? What we have said makes it abundantly clear that the business of Union is related to the process of foreign commerce. As the trial court found, the customhouse broker in clearing the shipments, "aids in the collection of customs duties and facilitates the free flow of commerce between a foreign country and the United States." The fees exacted by customhouse brokers "are charges upon the commerce itself"; they are charges for services afforded in the movement of goods beyond the boundaries of a State. See *Hopkins* v. *United States,* 171 U. S. 578, 591–2; *Wickard* v. *Filburn,* 317 U. S. 111, 122.

But the Commerce Clause does not cut the States off from all legislative relation to foreign and interstate commerce. *South Carolina Highway Dept.* v. *Barnwell Bros.,*

303 U. S. 177; *Western Live Stock* v. *Bureau,* 303 U. S. 250. Such commerce interpenetrates the States, and no undisputed generality about the freedom of commerce from state encroachment can delimit in advance the interacting areas of state and national power when Congress has not by legislation foreclosed state action. The incidence of the particular state enactment must determine whether it has transgressed the power left to the States to protect their special state interests although it is related to a phase of a more extensive commercial process.

The information here sought of all foreign corporations by Minnesota as a basis for granting them certificates to do business within her borders is a conventional means of assuring responsibility and fair dealing on the part of foreign corporations coming into a State. Apart from any question of interference with foreign commerce such a requirement is plainly within the regulatory power of a State. But, as we have noted, while the business of Union is that of a customhouse broker, its activities are not confined to its services at the port of entry. It has localized its business, and to function effectively it must have a wide variety of dealings with the people in the community. The same considerations that justify the particular regulatory measure alone before us, namely the requirement of a certificate of authority in the case of foreign corporations carrying on business other than customhouse brokerage, apply to the carrying on of Union's business in Minnesota. The burden, such as it is, falls on foreign businesses that commingle with Minnesota people, and the burden, a fee of fifty dollars, is sufficiently small fairly to represent the cost of governmental supervision of foreign business enterprises coming into Minnesota. In short, it is a supervisory and not a fiscal measure. As such it imposes costs upon the State which

those who are supervised must, as is often the case, themselves pay. See *Clyde Mallory Lines* v. *Alabama,* 296 U. S. 261, 267.

We have considered literally scores of cases in which the States have exerted authority over foreign corporations and in doing so have dealt with aspects of interstate and foreign commerce. Whatever may be the generalities to which these cases gave utterance and about which there has been, on the whole, relatively little disagreement, the fate of state legislation in these cases has not been determined by these generalities but by the weight of the circumstances and the practical and experienced judgment in applying these generalities to the particular instances. To review them to any extent would be writing the history of the adjudicatory process in relation to the Commerce Clause. Suffice it to say that we have not here a case of a foreign corporation merely coming into Minnesota to contribute to or to conclude a unitary interstate transaction, see *International Textbook Co.* v. *Pigg,* 217 U. S. 91; *Dahnke-Walker Co.* v. *Bondurant,* 257 U. S. 282, nor of the State's withholding "the right to sue even in a single instance until the corporation renders itself amenable to suit in all the courts of the State by whosoever chooses to sue it there." *Sioux Remedy Co.* v. *Cope,* 235 U. S. 197, 205. The business of Union, we have seen, is localized in Minnesota, and Minnesota, in the requirement before us, merely seeks to regularize its conduct. Nor is there here an attempt to tax property or gross receipts earned outside the State, as was the case in *Looney* v. *Crane Co.,* 245 U. S. 178. In the absence of applicable federal regulation, a State may impose non-discriminatory regulations on those engaged in foreign commerce "for the purpose of insuring the public safety and convenience; . . . a license fee no larger in amount than is reasonably

required to defray the expense of administering the regulations may be demanded." *Sprout* v. *South Bend*, 277 U. S. 163, 169.

The Commerce Clause does not deprive Minnesota of the power to protect the special interest that has been brought into play by Union's localized pursuit of its share in the comprehensive process of foreign commerce. To deny the States the power to protect such special interests when Congress has not seen fit to exert its own legislative power would be to give an immunity to detached aspects of commerce unrelated to the objectives of the Commerce Clause. By its own force that Clause does not imply relief to those engaged in interstate or foreign commerce from the duty of paying an appropriate share for the maintenance of the various state governments. Nor does it preclude a State from giving needful protection to its citizens in the course of their contacts with businesses conducted by outsiders when the legislation by which this is accomplished is general in its scope, is not aimed at interstate or foreign commerce, and involves merely burdens incident to effective administration. And so we conclude that in denying Union the right to go to her courts because Union did not obtain a certificate to carry on its business as required by the Foreign Corporation Act, Minnesota offended neither federal legislation nor the Commerce Clause.

Judgment affirmed.

MR. JUSTICE JACKSON and MR. JUSTICE RUTLEDGE dissent.

KANSAS *v.* MISSOURI.

BILL IN EQUITY.

No. 9, original. Argued January 31, 1944.—Decided May 8, 1944.

Upon the evidence in this case, in which Kansas claims title to certain land now lying on the Missouri side of the Missouri River in the Forbes Bend area, Kansas has failed to show that, at any time during the period in question, the main channel of the Missouri River shifted from a course such as the river now follows (or one slightly closer to the Kansas bluffs) to one following the course of the channel on the Missouri side when the flow was divided. Therefore the land in dispute must be awarded to Missouri, and the boundary will be fixed in accordance with the recommendations of the Special Master. Pp. 214, 232.

BILL OF COMPLAINT by Kansas against Missouri to determine and fix the boundary between the States. Leave to file the bill was granted by this Court, 310 U. S. 614.

Mr. Joseph E. Schroeder, with whom *Messrs. A. B. Mitchell,* Attorney General of Kansas, and *Clarence V. Beck* were on the brief, for complainant.

Messrs. Tyre W. Burton and *Frank W. Hayes,* Assistant Attorneys General of Missouri, with whom *Mr. Roy McKittrick,* Attorney General, was on the brief, for defendant.

MR. JUSTICE RUTLEDGE delivered the opinion of the Court.

Kansas brings this original suit against Missouri to have determined their common boundary from the mouth of the Kaw or Kansas River northwardly, over a distance of approximately 128 miles, along the channel of the Missouri River to its intersection with Kansas' north boundary line.

At the time of Kansas' admission to the Union, January 29, 1861, the western boundary of Missouri followed the

thread of the Missouri River, that is, the middle line of its main navigable channel, between these points.[1] This line then became the common boundary of the two states.[2] The bill of complaint was filed in 1940. It alleged that the thread of the stream had shifted frequently, sometimes suddenly, sometimes gradually, and that these changes had caused controversies concerning the true boundary. When the proceeding began it was in dispute at a number of places.[3] But during pendency of the suit the parties have settled all differences except one. This relates to the section of the boundary in the Forbes Bend region.[4]

After the filing of the suit a master was appointed. Extensive hearings were held. Both documentary and oral evidence was presented. The master has filed his report, which makes findings and conclusions in favor of Missouri. Kansas says these are contrary to the law and to the weight of the evidence.

The land in dispute consists of about 2,000 acres. This now lies on the Missouri side of the river toward the lower end of Forbes Bend. Kansas claims this land was at one time soil accreted to the Kansas bank, which an avulsive change in the course of the main channel has put back on the Missouri side; or, in the alternative, that the tract

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[1] Cf. *Missouri* v. *Kansas*, 213 U. S. 78; *Missouri* v. *Nebraska*, 196 U. S. 23.

[2] Act of Admission of Kansas, 12 Stat. 126; Kansas Constitution of 1859, Charters and Constitutions of the United States, Part I, 629, 630.

[3] The complaint alleged disputes over the line at points along the river between War Department Survey Stations 399 and 405, at other points in Atchison County, Kansas, and at points along the river between War Department Survey Stations 510 and 515 (Forbes Bend).

[4] Attempts at settlement by negotiation had been authorized by Kansas before this proceeding was begun (Laws of Kansas, 1939, c. 355). Apparently they were unavailing, and this suit was instituted. After it was begun, however, the parties agreed to a settlement with respect to all areas but this one and incorporated it in this record. It will be made part of the decree.

formed as an island on the Kansas side of the main channel and, as a result of a sudden shift in that channel to the other side of the island and the drying up of the old course, it has become physically attached to Missouri. In either event, Kansas urges, it follows that the boundary remains at the center of the river's former main channel. Missouri denies that the land accreted to Kansas, that there was avulsion, or that the island ever lay on the Kansas side of the main channel.

The States are not in dispute about the applicable law. They agree that when changes take place by the slow and gradual process of accretion the boundary moves with the shifting in the main channel's course.[5] Likewise, they agree that a sudden or avulsive change in that course does not move the boundary, but leaves it where the channel formerly had run.[6]

However, the parties are sharply at odds over the facts and the conclusions to be drawn from the evidence. In view of this and since we think the facts as presented by the evidence are conclusive of the controversy, it becomes necessary to sketch them and to refer to portions of the evidence in order to give an understanding of the issues and the basis for our conclusions.

I.

Forbes Bend lies between Doniphan County, Kansas, and Holt County, Missouri. The disputed boundary, according to the master's findings, extends along the main channel of the river as it now flows for a distance of about five miles bending southeasterly from Channel Mileage Station 515 to Station 510 (as measured and marked in

[5] *Jefferis* v. *East Omaha Land Co.*, 134 U. S. 178; *St. Clair County* v. *Lovingston*, 23 Wall. 46; *Nebraska* v. *Iowa*, 143 U. S. 359.

[6] *Nebraska* v. *Iowa*, 143 U. S. 359; *Missouri* v. *Nebraska*, 196 U. S. 23; *Oklahoma* v. *Texas*, 260 U. S. 606.

1890). As the river enters Forbes Bend from the north it flows east of south. Near the point of entrance it is joined by Wolf Creek. This comes into the river from the Kansas side in an easterly direction. The mouth of Wolf Creek is roughly adjacent to Station 515. From this point the Kansas bluffs swing in a gradual convex curve southeasterly until they reach a point above Station 510. On the Missouri side the bluffs run, as they do on the Kansas side, generally southeasterly. Throughout the Forbes Bend region the distance as the crow flies from the Kansas bluffs to the Missouri bluffs is four miles, more or less. Adjacent to and parallel with the Missouri bluffs, but between them and the river, lie tracks of the Burlington Railroad.

The Missouri River is a vagrant, turbulent stream. Its name reflects this character. The Big Muddy is said to carry more silt than any other river except the Yellow River in China. It is constantly changing its course within the region between its bluffs, shifting from side to side as natural forces work upon its flow. Expert testimony is that a change of conditions in one bend produces changes as great, or nearly so, in the next bend below.

The river flows around a big bend, known as Wolf Creek Bend, just before it reaches the mouth of Wolf Creek. Here it runs almost due south. It is conceded by all that in 1900 the river flowed southeasterly in a single channel from the mouth of Wolf Creek, hugging the Kansas bluffs throughout the entire course of flow to Station 510. As it presently flows, the river makes a wide arc, first to the left or Missouri bank in a course almost due east or north of east, before it turns sharply to the south again at a point midway between the bluffs, and follows this southerly course until it strikes the old main channel at the Kansas bluffs above Station 510. This bend now is in the form of a bow, with the river proper forming the bow and the old channel along the Kansas bank its string. Roughly,

therefore, the difference between the present flow through Forbes Bend and the flow in 1900 is the difference between the bow and the string. At the center of the bow the distance between the old channel and the present one appears to be at most one mile.

However, as will appear, the channel's present location results from more complex changes than merely a movement of the river north and east over the distance lying between these two channels. According to the greatly preponderant though not undisputed evidence, there was a division of channels in Forbes Bend from about 1914 or 1917 to 1927 or 1928. During this time the more westerly or Kansas channel lay slightly west of where the present channel runs. The Missouri or easterly channel lay on the other side of the area in dispute, which then formed part of a bar or island. At one time, probably about 1922 or 1923, during the period of greatest erosion of the Missouri bank, this channel came within half a mile or less of the Burlington tracks. The Missouri channel, with the river above it, then followed a course almost due east or slightly north of east from below the mouth of Wolf Creek to the point of its closest approach to the railroad. Then it swung sharply to the south and in a curving line came back to join the original channel near the Kansas bluffs above Station 510.

From the recital thus far it is clear that in 1900 the land which then lay where the disputed tract now lies was Missouri land. This is undisputed. Likewise, the tract now is attached to Missouri on the easterly bank of the river. This is because the Missouri channel dried up during some five to eight years beginning around 1927 or earlier. But, before that process began, for many years the land in question lay between the two channels. And it is from conflicting views concerning whether, how and when these major changes took place the parties derive their respective claims to sovereignty over this soil.

Kansas first claims that the land in dispute became hers by accretion. Her principal theory is that beginning in 1900 and during a period extending to 1917 or to 1927 the river channel, due to changes upstream, gradually moved out from the Kansas bluffs over a distance of some three to three and a half miles to the north and east.[7] As Missouri soil thus was being cut away, it is said the land in question was built up gradually on the Kansas side. In any event, if it was not connected firmly to the Kansas shore it was separated only by narrow and irregular chutes and sloughs, not by any sort of regular channel. Then either in 1917 [8] or in 1927 [9] ice jams forming in the river caused it suddenly to leave its channel near the Missouri bluffs and to open a new one near where the present channel runs. Relying upon accretion from 1900 to 1917 or 1927 for acquisition of the disputed area, Kansas relies upon avulsion in 1917 or 1927 to prevent losing the area again to Missouri. Her alternative theory of island formation is relied on in case that of accretion and avulsion fails on the proof. By this, the island formed on her side of the main channel and the subsequent shift of the main

[7] Since Kansas claims avulsive change both in 1917 and in 1927, and that the accretion began about 1900 or shortly thereafter, her claim necessarily implies that the period of accretion extended either from 1900 to 1917 or from 1900 to 1927.

[8] At that time, according to this claim, the main channel of the river flowed through the so-called Missouri channel to the north and east, but was suddenly changed by the ice jam back from that channel into a chute on the Kansas side. This chute previously had cut across the allegedly accreted land a little to the west of where the present channel now lies. The complaint alleges that the ice jam occurred "on or about February 1918." The scanty testimony in the record if completely accepted would establish the ice jam in 1917 rather than in 1918; cf. note 24 *infra*.

[9] The complaint alleges that the ice jam occurred "during the year 1927." The witnesses who testify to the jam at this time date it variously in 1927, 1928 and 1929; cf. note 25 *infra*.

flow to the Kansas channel and drying up of the Missouri channel did not affect her jurisdiction.

Missouri meets all of Kansas' claims with denial on the facts. She says first that the land in question has been at no time accreted soil of Kansas. On the contrary, she claims that the disputed area formed as an island in the river bed beginning about 1910 or 1912, and from then until 1927 or 1928 there was a divided flow around this island, a Missouri channel running north and east of it with a Kansas channel to the south and west. She insists that the Kansas channel always remained the main channel of the stream and only a minor one reached proximity to the railroad tracks. Accordingly, she says the island formed as Missouri land and always remained Missouri territory. Missouri thus opposes her view of island formation, both to Kansas' view of that process and to her claim of accretion and avulsion.

However, Missouri adds a further argument even if the Kansas theory of accretion is conceded. According to this, the effect of the accretion to the Kansas bank is counteracted by the fact that at no time was there an avulsive change, whether in 1917 or in 1927. On the contrary the river moved back gradually as it came. In this view the accretive process working against Missouri ended in 1923 or 1924, when the Missouri channel reached greatest proximity to the railroad tracks. Beginning in those years and continuing gradually until 1933 or 1934, the river moved slowly back to a point beyond the location of the present channel. Thus purporting to follow the accretion theory in both directions, Missouri claims the land in question.

It may be noted that crucial to Kansas' case, whether on her theory of accretion and avulsion or on that of island formation, is the need for showing that the main channel followed the course of the Missouri channel.

II.

Roughly the history of the Bend, for our purposes, may be divided into three periods, namely, from 1900 to 1917; from 1917 to 1928; and from 1928 to 1940, when this suit was begun. There is documentary evidence as well as oral testimony for the period prior to 1900. There is little or no documentary evidence in the form of maps, photographs, drawings or other materials from 1900 to 1923. There is a considerable amount of documentary material from 1923 on.

Perhaps the most important documentary item is a map of the Forbes Bend region compiled from the field in 1923 by the United States Engineer Office at Kansas City, designated as complainant's Exhibit 46 in this record. Another map of considerable assistance, with information penciled on it by two witnesses who testified at the hearings, is complainant's Exhibit 47. This purports to show in less detail than Exhibit 46 conditions in the Bend in 1926. The witnesses' penciled additions, placing channels and other landmarks, with their testimony, give considerable information about conditions in the Bend from 1921 or 1922 on to 1926 and later. Assistance also is derived from complainant's Exhibit 56. This is an aerial survey photograph of the Forbes Bend region made in 1941, showing conditions when this suit was begun. Reference to these exhibits will be made as the testimony of some of the witnesses is referred to.

It is clearly established that sometime around 1900, fixed by some older witnesses variously as beginning earlier and by others later, the river began a northerly and eastward movement, cutting away the Missouri bank and filling in on the Kansas bank.[10] Neighborhood testimony attributes the beginning of this movement to some change

[10] C. McWilliams (1892); P. Dyer (1898); C. Hudgins (1900); J. H. Simpson (1904); J. E. Simpson (1905).

in conditions upstream, taking place apparently around the mouth of Wolf Creek or in Wolf Creek Bend above.[11] Whatever this change may have been, it apparently threw the current of the stream against the solid rock formation on what is known as Lookout Mountain. This is a point on the Kansas bluffs about a mile or a mile and a half below the mouth of Wolf Creek. The current, striking this rock with force, was thrown over to the north or Missouri bank.

The soil composition of the north bank is a common formation in the Missouri River valley. Underneath the surface soil is sand or quicksand. This is covered by a layer of gumbo soil. Testimony in the record discloses there is no great erosion when the water is very high or very low. But when it is at an intermediate stage the water comes in contact with the underlying sand, washes it out, and the topsoil falls into the river in great chunks, often twenty feet long by ten feet wide. As the current was forced from the Kansas rock to the Missouri sand, it undercut more and more of the Missouri soil. Evidence in the record also shows that between 1900 and 1920, or a little later, from 4,000 to 5,000 acres of Missouri soil was washed into the river by this process. On this stood houses, barns, a school building known as the Baker schoolhouse, and other structures, which either went into the river as the soil was undermined or were moved to prevent their falling in. The Baker schoolhouse, which in 1900 was a mile or more northeast from the river bank, was moved about 1915 to prevent its going into the river.[12]

[11] Cf. testimony of L. F. Stalcup.

[12] Witnesses vary as to the exact time from 1910–11 to 1916 (J. H. Peret: 1910–12; Mrs. S. Jenkins: 1910–12; R. E. Simpson: 1913; C. McWilliams: 1912–13; C. Harper: 1915; C. Hudgins: 1915; B. Hudgins: 1916; E. McCoy: 1915). But most of them put this event in 1912 or later, and the most reliable testimony, by those who moved the building (C. Hudgins and B. Hudgins), places it in 1915 or 1916.

By that time the erosion was moving at great speed and this continued until the farthest point was reached, a half mile or less from the Burlington railroad, about 1923 to 1925.[13]

The clear weight of the evidence is that there was only a single channel of the river until about 1912 or 1914. Witnesses for both Kansas and Missouri substantiate this.[14] The evidence also clearly establishes that there was a divided flow from 1917 or earlier to 1927. This too is substantiated by both Kansas and Missouri witnesses.[15] The evidence, however, is conflicting concerning when the division first took place and whether, while it remained, the Kansas channel or the Missouri channel was the main one.

Witnesses for Missouri, and some for Kansas, testify that the division occurred before 1917 and that the two channels remained substantially equal or the Kansas channel was the larger in the volume of water carried between the time of the division and sometime between 1922 and 1927 or 1928.[16] The Missouri witnesses fairly uniformly agree that the flow in the two channels was at

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[13] C. McWilliams (1924–25); E. McCoy (1922); A. H. Murray (1922–23); Ralph Dyer (1923–24); W. Metcalf (1917); cf. E. A. Cole (1923, 1928).

[14] Varying dates are given for the time at which a divided flow was first noted.

Kansas witnesses: I. Muse: 1900; L. F. Stalcup: 1910–1911; J. E. Simpson: 1912–13, 1917; O. McKay: 1917; R. E. Simpson: 1918; C. Baskins: 1917; C. W. Ryan: 1917 or 1919; J. McKay: 1920.

Missouri witnesses: D. Barbour: 1903; B. Hudgins: 1914; C. Harrison: 1914; Ralph Dyer: 1913–14; C. Harper: 1915; A. H. Murray: 1915; H. H. Hall: 1916; W. Metcalf: 1916; J. Fitzgerald: 1917; Raymond Dyer: 1917–1918.

[15] See note 14 *supra.* A few Kansas witnesses maintain there was only one channel through this period.

[16] See note 14 *supra.* Kansas' witnesses testified variously that there always had been a channel on the Kansas side, that it was swifter than the Missouri channel (J. H. Simpson), that the Kansas channel

least "fifty–fifty" and some of them say the Kansas channel always carried the heavier volume of water.[17] They also generally agree that the Missouri channel began to decrease and the Kansas channel to increase in volume at some time before 1927. Some place the beginning of this process as early as 1921 or 1922.[18] The evidence is substantial that the decrease in the Missouri flow and the increase in the Kansas flow began before 1927; and it is almost unanimous that, from 1928 on, the Missouri channel contained no current or only the flow of Mill Creek Drainage Ditch, which by that time had been diverted into the Missouri channel. Witnesses for Missouri attribute a substantial portion of the filling up of the Missouri channel to deposits made by the Mill Creek Ditch.[19] They agree, and the evidence for Kansas hardly contradicts this,[20] that between 1928 and 1934 the Missouri channel

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was the "main river" (Mrs. J. Coufal), that the Kansas channel was much the larger in 1918 (R. E. Simpson), that most of the water was on the Kansas side in 1920 (P. Bottiger); cf. C. B. Caton, that the river was just about evenly divided in 1917 (C. Baskins). Missouri witnesses said that there was always a substantial flow in the Kansas channel and that it was about as large as or larger than the Missouri channel (e. g., Ralph Dyer, B. Hudgins, C. Dinwiddie, J. Fitzgerald, C. Harper, Raymond Dyer). They placed boats in the Kansas rather than the Missouri channel (E. McCoy); in 1918 (W. L. Moore); 1916 to 1929 (H. H. Hall); and in 1927 (C. Hudgins).

[17] See note 16 *supra*.

[18] W. Metcalf: 1917; W. L. Moore: 1918; C. Dinwiddie: 1920–22; C. Harrison: 1921; J. Fitzgerald: 1923–1925; cf. P. Bottiger: 1920.

[19] J. Fitzgerald, E. Wales, J. H. Peret (Kansas witness); cf. E. McCoy, C. Harper.

[20] E. g., J. H. Gray: 1928 *et seq.;* A. F. Hays: 1926 *et seq.;* J. B. Gray: 1927–30; G. Atkinson: 1929–after 1934; J. H. Peret: 1929–33; C. Coufal: 1929–33; C. W. Ryan: 1928–31; some Kansas witnesses claim the drying up of the Missouri channel was a sudden concomitant of an ice jam in 1929 but add that the Missouri channel contained water until 1933 or 1934 (e. g., C. Coufal, E. A. Cole), or 1935 or 1936 when it dried up as a result of government diking and revetment work upstream (e. g., J. Coufal).

almost completely dried up. The great preponderance of the evidence as a whole is that this occurred gradually over a period of years, varying according to different witnesses from two or three to eight or ten years.

On the other hand, Kansas witnesses are not in accord among themselves as to what occurred in the Bend between 1912 and 1928. Some of them say there was a divided flow.[21] Others deny this but qualify their denials by asserting that, although the main channel of the river ran over into Missouri close to the Burlington tracks until 1927, there were chutes on the island and particularly there was one chute running from about the mouth of Mill Creek Ditch as it was in 1917 (directly across northerly from the northern end of the bar or island) due south to the Kansas bluffs at about Station 510.[22] However, they maintain generally that this was a small chute, or smaller than the Missouri channel, at any rate up to 1922 or 1923. A few say it was small until 1927 when the alleged ice jam occurred.[23]

Some witnesses for Kansas maintain that there were big ice jams in 1917[24] and in 1927.[25] Different witnesses testify to the two alleged jams. Those who say one occurred in 1917 assert that it threw the main flow back from the Missouri channel into the Kansas channel. Likewise some of those who say there was a jam in 1927

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[21] See note 14 *supra*.

[22] E. g., A. F. Hays, C. Coufal, K. Brownlee, K. Robinson.

[23] E. A. Cole, J. Coufal. Cole is a Kansas claimant to ownership of part of the disputed land. Coufal once worked for him.

[24] C. Baskins: 1917; J. E. Simpson: 1917; P. Dyer: 1917; C. Dyer.

[25] E. A. Cole: 1929; C. Coufal: 1929; J. Coufal: 1929; Mrs. J. Coufal: 1929; E. L. Rockwell: 1927; I. Overstreet: 1927; H. W. Linville: 1927; P. Dyer: 1927 or 1928. Mrs. Coufal, however, testified the "main river" was on the Kansas side of the island at that time. In this respect her testimony flatly contradicts that of her husband and Cole.

accredit the same consequence to that jam. The two Kansas theories of avulsion therefore are entirely inconsistent, though each is supported by some evidence. If there was avulsion in 1917, there hardly could have been avulsion, on this record, in 1927. On the other hand, several Kansas witnesses, familiar with the territory during one or both of the two years in question, testify they saw no ice jams in those years.[26] Others say they saw ice but not in large or unusually large quantities or with unusual effects on the flow of the river.[27] Nearly all of the Missouri witnesses deny that there were ice jams either in those years or at other times, although some refer to ice in the river as not uncommon in winter or early spring. The Missouri witnesses are fairly unanimous in saying that at no time had ice conditions or others caused a sudden change in the river's course [28] and in this they are supported by a number of Kansas witnesses.[29]

When we turn to complainant's Exhibit 46 we find very substantial support for Missouri's view that during the controverted period the flow of the river was divided and that the Kansas channel equalled or exceeded the Missouri channel in the flow or volume of water carried. This map, compiled by the Corps of Engineers of the United States Army, who had charge of the river's development, shows conditions in 1923. Two channels appear, with a large sand bar or island between them. The map places the Missouri channel within less than a half mile of the Burlington tracks. It shows a width of about 1,250 feet at the narrowest point. Soundings, read from the

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[26] D. Baskins, J. Kotsch, R. E. Simpson, J. H. Simpson, W. Prusman, G. Atkinson.

[27] I. Muse, L. F. Stalcup; cf. A. P. Staver.

[28] C. Hudgins, V. Harrison, C. Dinwiddie, R. L. Greene, W. Metcalf, E. Wales; cf. E. McCoy, H. H. Hall, D. Barbour.

[29] Cf. note 20 *supra;* J. Kotsch, W. Prusman, C. McWilliams.

south end of the island around the curve to its north end, disclose that the deepest water ran from point to point as follows: 15 feet, 16 feet, 25 feet, 13 feet, 14 feet. On the westerly side of the island the Kansas channel was a little wider at its narrowest point. Its soundings from south to north at appropriate intervals were 31 feet, 12 feet, 12 feet and 13 feet. The Missouri channel meandered from the south to the east and north and then back around the north end of the island or bar in a due westerly direction. On the other hand, the Kansas channel was much shorter, running straight north from the south end of the island along its western shore to its northern end. The map shows that the higher portion of the island was covered with willows and a small part at the lower end was under cultivation. Furthermore, it is significant that at the north end of the island, just opposite the mouth of Mill Creek Ditch, the water in the Missouri channel was comparatively shallow.

Exhibit 46 furnishes the most reliable evidence in the record of conditions in Forbes Bend at a given time. If only this exhibit and the facts it discloses were considered, clearly it could not be ruled that the main navigable channel of the river was the Missouri channel. For purposes of navigation, the Kansas channel was much the shorter and more direct and, from the soundings as well as the shorter flow, it apparently carried at least an equal volume of water.

Exhibit 47, which is described as a revision from airplane photographs, shows in general a somewhat similar though less detailed picture for 1926. However, two witnesses for Kansas, Kenneth Robinson and Joseph H. Gray, who hunted in the region from 1920 to 1927 or 1928, testified concerning this exhibit and marked on it in penciled lines their recollections of the channels' respective courses in 1922. Their testimony gives perhaps the strongest support to Kansas' case that the main channel

during a portion of the disputed period was on the Missouri side. But, apart from its inconsistency as to the location and direction of the Kansas chute,[30] it does not accord with the more reliable evidence given concerning conditions in the Bend at the same time by complainant's Exhibit 46 and it is contradicted by numerous witnesses for Missouri as well as by some for Kansas in allocating a larger flow to the Missouri channel. It cannot therefore be accepted as controlling.

III.

The evidence need not be stated in further detail. In our opinion it fully supports the master's ultimate findings and conclusions. It was his view, first, that there was no avulsive change, whether in 1917, 1927, or at any time. He found there was some evidence of an ice jam in 1917 and more to substantiate such a claim for 1927. But he also found, and the evidence, though not undisputed, fully substantiates his conclusion, that neither of these jams was sufficient to cause a sudden change in the river's course.

There is very considerable doubt, on the record as a whole, whether the alleged jam in 1917 occurred at all.

[30] They agreed that the Missouri channel flowed around the island not far from the Burlington tracks, turning south at that point and flowing against the Kansas bluffs at Station 510. They also agreed that the Kansas channel was a chute. But they differed concerning its direction and location. Robinson placed it as running almost due south across the center of the island in a straight course. Gray placed the Kansas chute more to the west and with a curving course. Both testified that the Missouri channel was the main channel at that time. The inconsistency between Exhibit 46 and the testimony and drawings of Robinson and Gray may be accounted for in part, though not altogether, by the fact they were in the Bend for hunting and fishing purposes, chiefly in the fall, whereas Exhibit 46 was made from surveys in June and July. The difference in time, however, is hardly enough to account for the difference either in width or depth of the Kansas channel as shown by the exhibit and by their testimony.

In any event, the preponderant evidence is that it amounted to little, if anything, more than the normal piling of ice on the heads of bars and islands during the spring breakup.[31] There is evidence that this occurred each year. The proof therefore to sustain avulsion in 1917 is not sufficient and this phase of the case may be put aside.

We agree with the master that the evidence to show a more unusual piling up of ice at the head of the island in 1927 is somewhat stronger.[32] But we also agree with him that the evidence as a whole is clearly preponderating that this did not cause an avulsive change. As has been stated, there is some evidence that the alleged 1927 jam caused the main channel of the river to shift then and suddenly from the Missouri channel to the Kansas channel as the latter flowed from 1927 or 1928 until the Government's revetment work on the river forced the channel to its present location after 1935. But this is not enough to sustain Kansas' case.

Both by virtue of her position as complainant and on the facts, Kansas has the burden of proof in this case. Cf. *Oklahoma* v. *Texas,* 260 U. S. 606. The disputed location was in Missouri in 1900. It lies on the Missouri side now and has done so, by practically all the evidence, since at least 1927 or 1928. These facts put upon Kansas the burden of showing that in the meantime the land lay on the Kansas side of the main channel by virtue of natural changes which were effective to change the jurisdiction. Kansas has shown beyond doubt that one branch of the river eroded to a point or points north and east of this land, probably as early as 1920, possibly earlier. But beyond this fact, whether on her theory of accretion and avulsion or on that of island formation, the weight of the evidence is against her view of what occurred.

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[31] Cf. notes 27–29 *supra.*

[32] Cf. note 25 *supra.*

Kansas' main difficulty perhaps is that by attempting to prove one theory of what happened in Forbes Bend she divides the weight of her evidence and thus goes far to disprove her other theory. To show accretion and avulsion she was required to prove that the river's main channel moved gradually from the Kansas bluffs in 1900 to the farthest erosion point in Missouri in 1927, and then suddenly shifted back to a new channel cut then through the middle of the accreted soil, leaving the old one from that time on a minor or dry one. To show sovereignty by island formation it was necessary to prove that the island formed on the Kansas side of the main channel, in which event a subsequent shift in the main flow to the other side of the island would not affect her jurisdiction,[33] although Missouri's alternative contention seems to be to the contrary.[34] By proving the formation of the island, Kansas in effect disproves that the disputed area became accreted soil attached firmly to the Kansas bank. Her own evidence in this respect, added to that given by Missouri, far outweighs the evidence she presented to show accretion beyond where the present channel lies and creates an overwhelming preponderance that the flow was divided from 1912 or at any rate 1917 to 1927 or 1928; that the island formed in this period; and thus that the soil in question was not at any time attached firmly to the Kansas bank by accretion. If it was formed as island soil, it was not accreted soil.

Kansas' evidence concerning the division of flow and formation of the island, together with that concerning

[33] *Missouri* v. *Kentucky*, 11 Wall. 395; *Davis* v. *Anderson-Tully Co.*, 252 F. 681 (C. C. A.); *Commissioners* v. *United States*, 270 F. 110 (C. C. A.).

[34] Missouri apparently urges that even if the land formed as an island on the Kansas side, the process by which the main channel shifted from the eastern to the western channel and the former gradually filled with alluvial deposits thus connecting the island to the Missouri shore, entitles it to sovereignty over the disputed lands.

the drying up of the Missouri channel, also proves not that the river suddenly cut a new channel through accreted soil in 1927, but that it merely shifted the volume of flow from one channel to another preexisting one. In other words it goes to disprove both accretion and avulsion. Missouri and Kansas witnesses are agreed that the main flow was in the Kansas channel from 1927 on and there is substantial agreement that by 1933 or 1935 the Missouri channel had dried up, except for the flow of Mill Creek Ditch, and largely had filled up by deposits from that stream and other forces. Missouri witnesses say this drying up began before 1927, some as early as 1922 or 1923, and therefore continued for ten or twelve years. Kansas witnesses generally say it began in 1927 and continued for from three to seven or eight years. Only a few of them say the ice jam that year cut a new channel. More testify that the main flow then shifted from one channel to the other, and some join the witnesses for Missouri in saying that this shift began earlier. Except for the few witnesses who testify to the sudden cutting of a new channel, the great weight of the testimony is that whatever change occurred in reduction of the flow in the Missouri channel required several years to complete. It was a gradual process, and therefore not the sudden shift necessary to show avulsion. We need not decide what the effect would be if the evidence had shown this was a gradual cutting of a new channel. It was at most a gradual shifting from one to another. Kansas clearly has failed to prove that there was a single channel of the river which gradually moved over to the farthest erosion point, meanwhile accreting this land to her soil, then suddenly moved back, either in 1917 or in 1927, to a new channel cut through the accreted soil. Only by accepting the evidence given by the few witnesses who supported this theory, which was contradicted both by the weight of her own evidence concerning island for-

mation and by substantially all that was offered for Missouri, could a finding in Kansas' favor be made under the theory of accretion and avulsion.

Kansas' stronger case upon the proof is on the theory of island formation. On this, as under that of accretion and avulsion, it was necessary for her to show that the Missouri channel was the river's main channel and thus the island, which is now part of the disputed land, was formed on her side of the river's thread. On this crucial issue Kansas' case is stronger perhaps than in any other respect. She presented substantial evidence to show that while the river was divided or during some part of that period, more especially from 1921 or 1922 to 1927, the Missouri channel was the main one, both in volume of water carried and, less clearly, in availability for navigation. There is, however, at least an equal weight of evidence, given both by Missouri witnesses and by some for Kansas, that the Kansas channel remained the main navigable channel throughout the period of division.

The evidence on this controlling issue unfortunately is not as free from conflict or doubt as we might wish. But it cannot be said, when account is taken of all the evidence, both oral and documentary, that a preponderance sustains Kansas' view that the main channel ever changed to the Missouri side. Kansas' burden required preponderant proof. She has not made it.

As the case has been made, both the master and this Court have had to rely upon the inadequate and inconclusive documentary evidence and the conflicting and often vague recollections of neighborhood witnesses. The sum does not add up to the weight of proof Kansas was required to establish in order to prevail. The master saw and heard the witnesses. His conclusions in all respects were in favor of Missouri. We find no basis in the record for any conclusion that he performed his task with other than fair, disinterested, painstaking effort and attitude.

His judgment accords with the conclusions we make from our own independent examination of the record. It is not necessary for us to decide more than that Kansas has failed to show that the main channel of the river shifted at any time in question from a course such as the river now follows, or one slightly closer to the Kansas bluffs, to one following the course of the Missouri channel when the flow was divided.

It follows the land in dispute must be awarded to Missouri and the boundary will be fixed as the master has recommended in his report. A decree will be entered accordingly. [See *post*, p. 654.]

HUDDLESTON ET AL. *v.* DWYER ET AL.

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

No. 628. Argued April 25, 1944.—Decided May 15, 1944.

1. It is the duty of the federal appellate courts, as well as the trial court, to ascertain and apply the state law where that law controls the decision. P. 236.
2. A judgment of a federal court in a case ruled by state law, correctly applying that law as authoritatively declared by the state courts when the judgment was rendered, must be reversed on appellate review if in the meantime the state courts have disapproved their former rulings and adopted different ones. P. 236.
3. This Court ordinarily will not decide questions of state law which may conveniently be decided first by the court whose judgment is here on review. P. 237.
4. Upon review here of a judgment of the Circuit Court of Appeals in a case in which the decision is controlled by state law, it appears that a decision of the highest court of the State, rendered subsequently to those on which the Circuit Court of Appeals relied, has at least raised such doubt as to the applicable state law as to require its reexamination. The judgment therefore is vacated and the cause remanded to the Circuit Court of Appeals for reconsideration in the light of the subsequent state court decision. P. 236.

137 F. 2d 383, vacated.

CERTIORARI, 321 U. S. 759, to review the affirmance of an order directing a levy of taxes to provide funds for the payment of respondent bondholders.

Mr. William E. Davis, with whom *Messrs. Joseph R. Brown* and *Frank H. Moore* were on the brief, for petitioners.

Mr. William L. Curtis submitted for respondents.

PER CURIAM.

Respondents are owners of defaulted paving bonds issued by the City of Poteau in Le Flore County, Oklahoma, the bonds being secured by assessments for benefits, payable in ten annual installments, upon the property in two improvement districts established by the city, including certain lots owned by the county, and others belonging to the city, which it later conveyed to the county. Respondents brought suit in 1937 in the District Court for Eastern Oklahoma, against the county, its Board of Commissioners and other officers of the county and city, alleging diversity of citizenship, and seeking a judgment fixing the county's liability under state law for the assessments and asking mandamus to compel a tax levy by the county officials for the payment of the overdue assessments, and other relief.

The District Court dismissed the complaint. The Circuit Court of Appeals for the Tenth Circuit reversed and remanded the cause to the District Court with directions to determine the amounts due on the respective assessments against the lots in question, and in the event of failure to provide funds for the payment of the judgment, then to entertain jurisdiction in an ancillary proceeding in mandamus to compel the necessary tax levies. *Dwyer* v. *Le Flore County,* 97 F. 2d 823. The District Court entered judgment accordingly, retaining jurisdiction for such action as might be necessary to effectuate the judgment.

No funds having been provided for payment of the overdue assessments, respondents brought the present proceeding in the District Court for mandamus, to compel petitioners, County Commissioners and other county officers, to make the tax levies necessary for payment of the amounts adjudged to be due. The District Court gave judgment for mandamus, in effect directing petitioners, beginning with the fiscal year 1942–3, to make ten annual levies in connection with the county general fund levies, sufficient to pay successively the ten assessment installments which became due and payable in the years 1925 to 1934 inclusive, with interest at 12% from the due date of the annual installments until August 13, 1937, the date when the complaint was filed, and thereafter with interest at the rate of 6% per annum upon the aggregate of such installments and interest already accrued.

One of the defenses to the petition for mandamus in the District Court was that under Oklahoma law a county is without authority to levy and collect a tax in one year to pay improvement assessments which became due in an earlier year. This defense was urged on appeal to the Circuit Court of Appeals which overruled it and affirmed the judgment of the District Court, 137 F. 2d 383, after an examination of the Oklahoma authorities, including *Independent School District No. 39* v. *Exchange National Co.*, 164 Okla. 176, 23 P. 2d 210; *First National Bank* v. *Board of Education*, 174 Okla. 164, 49 P. 2d 1077; *Board of Education* v. *Johnston*, 189 Okla. 172, 115 P. 2d 132, and *Wilson* v. *City of Hollis*, decided by the Oklahoma Supreme Court on October 6, 1942 and not officially reported. The Court of Appeals found none of these cases to be precisely in point but concluded that the Supreme Court of Oklahoma had consistently and pointedly avoided the announcement of the rule contended for. It accordingly held that the District Court had correctly directed tax levies to provide for payment, from the

general tax fund, of the overdue installments of the improvement assessments, with interest as prescribed.

Petitioners filed a timely petition for rehearing which was denied on September 1, 1943. On December 17, 1943, petitioners moved for leave to file a second petition for rehearing which the Circuit Court of Appeals denied. In their second petition, petitioners brought to the attention of the court and relied upon an opinion of the Supreme Court of Oklahoma in *Wilson* v. *City of Hollis*, of October 19, 1943, — Okla. —, 142 P. 2d 633, which had superseded its earlier opinion on which the Circuit Court of Appeals had relied in its opinion in this case. Petitioners contended that by its later opinion the Supreme Court of Oklahoma had determined that Oklahoma law did not authorize the levy of a general fund tax to pay assessment installments which fell due in prior years, but that such installments could be paid only from a sinking fund levy, and that no statutory penalties or additional interest for delinquency could be collected.

In its second opinion the Supreme Court of Oklahoma reexamined in detail the mode of enforcing past due installments of improvement assessments against the property of municipalities and counties in Oklahoma. It differentiated between the liability of municipally owned and privately owned property located within improvement districts, and it appears to have held, with respect to the former, that under the applicable provisions of the Oklahoma statutes mandamus to enforce the levy of a general fund tax will lie only in the year in which the assessment installment falls due, that money from the general fund cannot be applied to the payment of obligations of a prior fiscal year, and that "no delinquency that will carry with it additional interest or penalty can accrue against public property." It said that judgment could be rendered against a county or municipality for past due installments which could be paid as are other judgments against a

county or municipality under Okla. Const. Art. 10, § 28, and 62 O. S. 1941, § 431, *et seq., i. e.,* in three annual installments out of sinking fund levies. In announcing these conclusions the Supreme Court of Oklahoma stated that it found confusion arising out of its decisions on this subject, and that it was forced to reexamine its earlier decisions, including some of those on which the Circuit Court of Appeals had relied in deciding this case, to differentiate some, and to bring others into conformity with its conclusions announced in the *Wilson* case. In particular it declared that *Independent School District No. 39* v. *Exchange National Co., supra,* and *First National Bank* v. *Board of Education, supra,* were in part overruled.

State law is the controlling rule of decision in this case as to both substantive and procedural rights of the parties. *Erie R. Co.* v. *Tompkins,* 304 U. S. 64; Federal Rules of Civil Procedure, Rules 69 (a), 81 (b), 28 U. S. C. following § 723 (c). It is the duty of the federal appellate courts, as well as the trial court, to ascertain and apply the state law where, as in this case, it controls decision. *Meredith* v. *Winter Haven,* 320 U. S. 228. And a judgment of a federal court ruled by state law and correctly applying that law as authoritatively declared by the state courts when the judgment was rendered, must be reversed on appellate review if in the meantime the state courts have disapproved of their former rulings and adopted different ones. "Until such time as a case is no longer *sub judice,* the duty rests upon federal courts to apply state law under the Rules of Decision statute in accordance with the then controlling decision of the highest state court." *Vandenbark* v. *Owens-Illinois Co.,* 311 U. S. 538, 543.

The second opinion of the Oklahoma Supreme Court in the *Wilson* case has at least raised such doubt as to the applicable Oklahoma law as to require its reexamination

in the light of that opinion and of later decisions of the Supreme Court of Oklahoma on which respondents rely, before pronouncement of a final judgment in the case by the federal courts. That doubt is not to be resolved in the first instance by this Court. We have often had occasion to point out the importance to the orderly judicial administration of state laws in the federal courts that questions of state law required to be decided here should first be considered and decided by the state or federal court from which the case is brought to this Court for review. *Dorchy* v. *Kansas,* 264 U. S. 286, 290–91; *Missouri ex rel. Wabash Ry. Co.* v. *Public Service Comm'n,* 273 U. S. 126, 131; *Ruhlin* v. *New York Life Ins. Co.,* 304 U. S. 202, 206–7; *New York ex rel. Whitman* v. *Wilson,* 318 U. S. 688, 690–91. The decision of the highest court of a state on matters of state law are in general conclusive upon us, and ordinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts, cf. *Ruhlin* v. *New York Life Ins. Co., supra.* When we are called upon to decide them, the expression of the views of the judges of those courts, who are familiar with the intricacies and trends of local law and practice, if not indispensable, is at least a highly desirable and important aid to our determination of state law questions. This Court will not ordinarily decide them without that aid where they may conveniently first be decided by the court whose judgment we are called upon to review. See, *e. g., Ruhlin* v. *New York Life Ins. Co., supra; Rosenthal* v. *New York Life Ins. Co.,* 304 U. S. 263, 264; *West* v. *A. T. & T. Co.,* 311 U. S. 223, 241; *Klaxon Co.* v. *Stentor Co.,* 313 U. S. 487, 497; *Meredith* v. *Winter Haven, supra.*

Accordingly, without passing on any of the other contentions of the parties, we vacate the judgment below and remand the cause to the Circuit Court of Appeals so that it may reconsider its decision in the light of the decisions

and opinions of the Supreme Court of Oklahoma in the *Wilson* and later cases.

So ordered.

HAZEL-ATLAS GLASS CO. *v.* HARTFORD-EMPIRE CO.

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

No. 398. Argued February 9, 10, 1944.—Decided May 15, 1944.

Upon appeal from a judgment of the District Court denying relief in a suit by Hartford against Hazel for infringement of a patent, the Circuit Court of Appeals in 1932 held Hartford's patent valid and infringed, and upon its mandate the District Court entered judgment accordingly. In 1941, Hazel commenced in the Circuit Court of Appeals this proceeding, wherein it conclusively appeared that Hartford, through publication of an article purporting to have been written by a disinterested person, had perpetrated a fraud on the Patent Office in obtaining the patent and on the Circuit Court of Appeals itself in the infringement suit. Upon review here of an order of the Circuit Court of Appeals denying relief, *held:*

1. Upon the record, the Circuit Court of Appeals had the power and the duty to vacate its 1932 judgment and to give the District Court appropriate directions. P. 247.

(a) Even if Hazel failed to exercise due diligence to uncover the fraud, relief may not be denied on that ground alone, since public interests are involved. P. 246.

(b) In the circumstances, Hartford may not be heard to dispute the effectiveness nor to assert the truth of the article. P. 247.

2. The Circuit Court of Appeals is directed to set aside its 1932 judgment, recall its 1932 mandate, dismiss Hartford's appeal, and to issue a mandate to the District Court directing it to set aside its judgment entered pursuant to the 1932 mandate, to reinstate its original judgment denying relief to Hartford, and to take such additional action as may be necessary and appropriate. P. 250.

137 F. 2d 764, reversed.

CERTIORARI, 320 U. S. 732, to review an order of the Circuit Court of Appeals denying relief in a bill of review proceeding commenced in that court.

Mr. Stephen H. Philbin, with whom *Mr. Henry R. Ashton* was on the brief, for petitioner.

Mr. Francis W. Cole, with whom *Messrs. Walter J. Blenko, Edgar J. Goodrich,* and *James M. Carlisle* were on the brief, for respondent.

Solicitor General Fahy, Assistant Attorney General Shea, and *Messrs. Robert L. Stern* and *Melvin Richter* filed a brief on behalf of the United States, as *amicus curiae,* urging reversal.

MR. JUSTICE BLACK delivered the opinion of the Court.

This case involves the power of a Circuit Court of Appeals, upon proof that fraud was perpetrated on it by a successful litigant, to vacate its own judgment entered at a prior term and direct vacation of a District Court's decree entered pursuant to the Circuit Court of Appeals' mandate.

Hazel-Atlas commenced the present suit in November, 1941, by filing in the Third Circuit Court of Appeals a petition for leave to file a bill of review in the District Court to set aside a judgment entered by that Court against Hazel in 1932 pursuant to the Third Circuit Court of Appeals' mandate. Hazel contended that the Circuit Court of Appeals' judgment had been obtained by fraud and supported this charge with affidavits and exhibits. Hartford-Empire, in whose favor the challenged judgment had been entered, did not question the appellate court's power to consider the petition, but filed counter affidavits and exhibits. After a hearing the Circuit Court concluded that since the alleged fraud had been practiced on it rather than the District Court it would pass on the

issues of fraud itself instead of sending the case to the District Court. An order was thereupon entered denying the petition as framed but granting Hazel leave to amend the prayer of the petition to ask that the Circuit Court itself hear and determine the issue of fraud. Hazel accordingly amended, praying that the 1932 judgments against it be vacated and for such other relief as might be just. Hartford then replied and filed additional exhibits and affidavits. The following facts were shown by the record without dispute.

In 1926 Hartford had pending an application for a patent on a machine which utilized a method of pouring glass into molds known as "gob feeding." The application, according to the Circuit Court, "was confronted with apparently insurmountable Patent Office opposition." To help along the application, certain officials and attorneys of Hartford determined to have published in a trade journal an article signed by an ostensibly disinterested expert which would describe the "gob feeding" device as a remarkable advance in the art of fashioning glass by machine. Accordingly these officials prepared an article entitled "Introduction of Automatic Glass Working Machinery; How Received by Organized Labor," which referred to "gob feeding" as one of the two "revolutionary devices" with which workmen skilled in bottle-blowing had been confronted since they had organized. After unsuccessfully attempting to persuade the President of the Bottle Blowers' Association to sign this article, the Hartford officials, together with other persons called to their aid, procured the signature of one William P. Clarke, widely known as National President of the Flint Glass Workers' Union. Subsequently, in July 1926, the article was published in the National Glass Budget, and in October 1926 it was introduced as part of the record in support of the pending application in the Patent Office.

January 3, 1928, the Patent Office granted the application as Patent No. 1,655,391.

On June 6, 1928, Hartford brought suit in the District Court for the Western District of Pennsylvania charging that Hazel was infringing this "gob feeding" patent, and praying for an injunction against further infringement and for an accounting for profits and damages. Without referring to the Clarke article, which was in the record only as part of the "file-wrapper" history, and which apparently was not then emphasized by counsel, the District Court dismissed the bill on the ground that no infringement had been proved. 39 F. 2d 111. Hartford appealed. In their brief filed with the Circuit Court of Appeals, the attorneys for Hartford, one of whom had played a part in getting the spurious article prepared for publication, directed the Court's attention to "The article by Mr. William Clarke, former President of the Glass Workers' Union." The reference was not without effect. Quoting copiously from the article to show that "labor organizations of practical workmen recognized" the "new and differentiating elements" of the "gob feeding" patent owned by Hartford, the Circuit Court on May 5, 1932, held the patent valid and infringed, reversed the District Court's judgment, and directed that court to enter a decree accordingly. 59 F. 2d 399, 403, 404.

At the time of the trial in the District Court in 1929, where the article seemingly played no important part, the attorneys of Hazel received information that both Clarke and one of Hartford's lawyers had several years previously admitted that the Hartford lawyer was the true author of the spurious publication. Hazel's attorneys did not at that time attempt to verify the truth of the hearsay story of the article's authorship, but relied upon other defenses which proved successful. After the opinion of the Circuit Court came down on May 5, 1932, quoting the spurious

article and reversing the decree of the District Court, Hazel hired investigators for the purpose of verifying the hearsay by admissible evidence. One of these investigators interviewed Clarke in Toledo, Ohio, on May 13 and again on May 24. In each interview Clarke insisted that he wrote the article and would so swear if summoned. In the second interview the investigator asked Clarke to sign a statement telling in detail how the article was prepared, and further asked to see Clarke's files. Clarke replied that he would not "stultify" himself by signing any "statement or affidavit"; and that he would show the records to no one unless compelled by a subpoena. At the same time, he reinforced his claim of authorship by asserting that he had spent seven weeks in preparing the article.

But unknown to Hazel's investigator, a representative of Hartford, secretly informed of the investigator's view that Hazel's only chance of reopening the case "was to get an affidavit from someone, to the effect that this article was written" by Hartford's attorney, also had traveled to Toledo. Hartford's representative first went to Toledo and talked to Clarke on May 10, three days before Hazel's investigator first interviewed Clarke; and he returned to Toledo again on May 22 for a five-day stay. Thus at the time of the investigator's second interview with Clarke on May 24, representatives of both companies were in touch with Clarke in Toledo. But though Hartford's representative knew the investigator was there, the latter was unaware of the presence of the Hartford representative. On May 24, Hazel's investigator reported failure; the same day, Hartford's man reported "very successful results." Four days later, on May 28, Hartford's representative reported his "success" more fully. Clarke, he said, had been of "great assistance" and Hartford was in a "most satisfactory position"; it did not "seem wise to distribute copies of all the papers" the representative then had or

to "go into much detail in correspondence"; and Hartford was "quite indebted to Mr. Clarke" who "might easily have caused us a lot of trouble. This should not be forgotten. . . ." Among the "papers" which the representative had procured from Clarke was an affidavit signed by Clarke stating that he, Clarke, had "signed the article and released it for publication." The affidavit was dated May 24—the very day that Clarke had told Hazel's investigator he would not "stultify" himself by signing any affidavit and would produce his papers for no one except upon subpoena.

Shortly afterward Hazel capitulated. It paid Hartford $1,000,000 and entered into certain licensing agreements. The day following the settlement, Hartford's representative traveled back to Toledo and talked to Clarke. At this meeting Clarke asked for $10,000. Hartford's representative told him that he wanted too much money and that Hartford would communicate with him further. A few days later the representative paid Clarke $500 in cash; and about a month later delivered to Clarke, at some place in Pittsburgh which he has sworn he cannot remember, an additional $7,500 in cash. The reason given for paying these sums was that Hartford felt a certain moral obligation to do so, although Hartford's affidavits deny any prior agreement to pay Clarke for his services in connection with the article.

Indisputable proof of the foregoing facts was, for the first time, fully brought to light in 1941 by correspondence files, expense accounts and testimony introduced at the trial of the *United States* v. *Hartford-Empire Company et al.*, 46 F. Supp. 541, an anti-trust prosecution begun December 11, 1939. On the basis of the disclosures at this trial Hazel commenced the present suit.

Upon consideration of what it properly termed this "sordid story," the Circuit Court, one Judge dissenting, held, first, that the fraud was not newly discovered; sec-

ond, that the spurious publication, though quoted in the 1932 opinion, was not the primary basis of the 1932 decision; and third, that in any event it lacked the power to set aside the decree of the District Court because of the expiration of the term during which the 1932 decision had been rendered. Accordingly the Court refused to grant the relief prayed by Hazel.

Federal courts, both trial and appellate, long ago established the general rule that they would not alter or set aside their judgments after the expiration of the term at which the judgments were finally entered. *Bronson* v. *Schulten,* 104 U. S. 410. This salutary general rule springs from the belief that in most instances society is best served by putting an end to litigation after a case has been tried and judgment entered. This has not meant, however, that a judgment finally entered has ever been regarded as completely immune from impeachment after the term. From the beginning there has existed alongside the term rule a rule of equity to the effect that under certain circumstances, one of which is after-discovered fraud, relief will be granted against judgments regardless of the term of their entry. *Marine Insurance Co.* v. *Hodgson,* 7 Cranch 332; *Marshall* v. *Holmes,* 141 U. S. 589. This equity rule, which was firmly established in English practice long before the foundation of our Republic, the courts have developed and fashioned to fulfill a universally recognized need for correcting injustices which, in certain instances, are deemed sufficiently gross to demand a departure from rigid adherence to the term rule. Out of deference to the deep-rooted policy in favor of the repose of judgments entered during past terms, courts of equity have been cautious in exercising their power over such judgments. *United States* v. *Throckmorton,* 98 U. S. 61. But where the occasion has demanded, where enforcement of the judgment is "mani-

festly unconscionable," *Pickford* v. *Talbott,* 225 U. S. 651, 657, they have wielded the power without hesitation.[1] Litigants who have sought to invoke this equity power customarily have done so by bills of review or bills in the nature of bills of review, or by original proceedings to enjoin enforcement of a judgment.[2] And in cases where courts have exercised the power, the relief granted has taken several forms: setting aside the judgment to permit a new trial, altering the terms of the judgment, or restraining the beneficiaries of the judgment from taking any benefit whatever from it.[3] But whatever form the relief has taken in particular cases, the net result in every case has been the same: where the situation has required, the court has, in some manner, devitalized the judgment even though the term at which it was entered had long since passed away.

Every element of the fraud here disclosed demands the exercise of the historic power of equity to set aside fraudulently begotten judgments. This is not simply a case of a judgment obtained with the aid of a witness who, on the basis of after-discovered evidence, is believed possibly to have been guilty of perjury. Here, even if we consider nothing but Hartford's sworn admissions, we find a deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Ap-

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[1] See, e. g., *Art Metal Works* v. *Abraham & Strauss,* 107 F. 2d 940 and 944; *Publicker* v. *Shallcross,* 106 F. 2d 949; *Chicago, R. I. & P. Ry. Co.* v. *Callicotte,* 267 F. 799; *Pickens* v. *Merriam,* 242 F. 363; *Lehman* v. *Graham,* 135 F. 39; *Bolden* v. *Sloss-Sheffield Steel & Iron Co.,* 215 Ala. 334, 110 So. 574, 49 A. L. R. 1206. For a collection of early cases see Note (1880) 20 Am. Dec. 160.

[2] See *Whiting* v. *Bank of the United States,* 13 Pet. 6, 13; *Dexter* v. *Arnold,* 5 Mason 303, 308–315. See, also, generally, 3 Ohlinger's Federal Practice pp. 814–818; 3 Freeman on Judgments (5th ed.) § 1191; Note (1880) 20 Am. Dec. 160, *supra.*

[3] See 3 Freeman on Judgments (5th ed.) §§ 1178, 1779.

peals. Cf. *Marshall* v. *Holmes, supra.* Proof of the scheme, and of its complete success up to date, is conclusive. Cf. *United States* v. *Throckmorton, supra.* And no equities have intervened through transfer of the fraudulently procured patent or judgment to an innocent purchaser. Cf. *Ibid.; Hopkins* v. *Hebard,* 235 U. S. 287.

The Circuit Court did not hold that Hartford's fraud fell short of that which prompts equitable intervention, but thought Hazel had not exercised proper diligence in uncovering the fraud and that this should stand in the way of its obtaining relief. We cannot easily understand how, under the admitted facts, Hazel should have been expected to do more than it did to uncover the fraud. But even if Hazel did not exercise the highest degree of diligence, Hartford's fraud cannot be condoned for that reason alone. This matter does not concern only private parties. There are issues of great moment to the public in a patent suit. *Mercoid Corporation* v. *Mid-Continent Investment Co.,* 320 U. S. 661; *Morton Salt Co.* v. *G. S. Suppiger Co.,* 314 U. S. 488. Furthermore, tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud.

The Circuit Court also rested denial of relief upon the conclusion that the Clarke article was not "basic" to the Court's 1932 decision. Whether or not it was the primary basis for that ruling, the article did impress the Court, as

shown by the Court's opinion. Doubtless it is wholly impossible accurately to appraise the influence that the article exerted on the judges. But we do not think the circumstances call for such an attempted appraisal. Hartford's officials and lawyers thought the article material. They conceived it in an effort to persuade a hostile Patent Office to grant their patent application, and went to considerable trouble and expense to get it published. Having lost their infringement suit based on the patent in the District Court wherein they did not specifically emphasize the article, they urged the article upon the Circuit Court and prevailed. They are in no position now to dispute its effectiveness. Neither should they now be permitted to escape the consequences of Hartford's deceptive attribution of authorship to Clarke on the ground that what the article stated was true. Truth needs no disguise. The article, even if true, should have stood or fallen under the only title it could honestly have been given—that of a brief in behalf of Hartford, prepared by Hartford's agents, attorneys, and collaborators.

We have, then, a case in which undisputed evidence filed with the Circuit Court of Appeals in a bill of review proceeding reveals such fraud on that Court as demands, under settled equitable principles, the interposition of equity to devitalize the 1932 judgment despite the expiration of the term at which that judgment was finally entered. Did the Circuit Court have the power to set aside its own 1932 judgment and to direct the District Court likewise to vacate the 1932 decree which it entered pursuant to the mandate based upon the Circuit Court's judgment? Counsel for Hartford contend not. They concede that the District Court has the power upon proper proof of fraud to set aside its 1932 decree in a bill of review proceeding, but nevertheless deny that the Circuit Court possesses a similar power for the reason that the term during

which its 1932 judgment was entered had expired. The question, then, is not whether relief can be granted, but which court can grant it.

Equitable relief against fraudulent judgments is not of statutory creation. It is a judicially devised remedy fashioned to relieve hardships which, from time to time, arise from a hard and fast adherence to another court-made rule, the general rule that judgments should not be disturbed after the term of their entry has expired. Created to avert the evils of archaic rigidity, this equitable procedure has always been characterized by flexibility which enables it to meet new situations which demand equitable intervention, and to accord all the relief necessary to correct the particular injustices involved in these situations. It was this flexibility which enabled courts to meet the problem raised when leave to file a bill of review was sought in a court of original jurisdiction for the purpose of impeaching a judgment which had been acted upon by an appellate court. Such a judgment, it was said, was not subject to impeachment in such a proceeding because a trial court lacks the power to deviate from the mandate of an appellate court. The solution evolved by the courts is a procedure whereby permission to file the bill is sought in the appellate court. The hearing conducted by the appellate court on the petition, which may be filed many years after the entry of the challenged judgment, is not just a ceremonial gesture. The petition must contain the necessary averments, supported by affidavits or other acceptable evidence; and the appellate court may in the exercise of a proper discretion reject the petition, in which case a bill of review cannot be filed in the lower court. *National Brake Co.* v. *Christensen,* 254 U. S. 425, 430–433.

We think that when this Court, a century ago, approved this practice and held that federal appellate courts have the power to pass upon, and hence to grant or deny, peti-

tions for bills of review even though the petitions be presented long after the term of the challenged judgment has expired, it settled the procedural question here involved. *Southard* v. *Russell,* 16 How. 547.[4] To reason otherwise would be to say that although the Circuit Court has the power to act after the term finally to deny relief, it has not the power to act after the term finally to grant relief. It would, moreover, be to say that even in a case where the alleged fraud was on the Circuit Court itself, the relevant facts as to the fraud were agreed upon by the litigants, and the Circuit Court concluded relief must be granted, that Court nevertheless must send the case to the District Court for decision. Nothing in reason or precedent requires such a cumbersome and dilatory procedure. Indeed the whole history of equitable procedure, with the traditional flexibility which has enabled the courts to grant all the relief against judgments which the equities require, argues against it. We hold, therefore, that the Circuit Court on the record here presented [5] had

[4] See also *Tyler* v. *Magwire,* 17 Wall. 253, 283: "Repeated decisions of this court have established the rule that a final judgment or decree of this court is conclusive upon the parties, and that it cannot be re-examined at a subsequent term, *except in cases of fraud,* as there is no act of Congress which confers any such authority." (Italics supplied.)

[5] We do not hold, and would not hold, that the material questions of fact raised by the charges of fraud against Hartford could, if in dispute, be finally determined on ex parte affidavits without examination and cross-examination of witnesses. It should again be emphasized that Hartford has never questioned the accuracy of the various documents which indisputably show fraud on the Patent Office and the Circuit Court, and has not claimed, either here or below, that a trial might bring forth evidence to disprove the facts as shown by these documents. And insofar as a trial would serve to bring forth additional evidence showing that Hazel was not diligent in uncovering these facts, we already have pointed out that such evidence would not in this case change the result.

Moreover, we need not decide whether, if the facts relating to the fraud were in dispute and difficult of ascertainment, the Circuit Court

both the duty and the power to vacate its own judgment and to give the District Court appropriate directions.

The question remains as to what disposition should be made of this case. Hartford's fraud, hidden for years but now admitted, had its genesis in the plan to publish an article for the deliberate purpose of deceiving the Patent Office. The plan was executed, and the article was put to fraudulent use in the Patent Office, contrary to law. U. S. C., Title 35, § 69; *United States* v. *American Bell Telephone Co.*, 128 U. S. 315. From there the trail of fraud continued without break through the District Court and up to the Circuit Court of Appeals. Had the District Court learned of the fraud on the Patent Office at the original infringement trial, it would have been warranted in dismissing Hartford's case. In a patent case where the fraud certainly was not more flagrant than here, this Court said: "Had the corruption of Clutter been disclosed at the trial . . ., the court undoubtedly would have been warranted in holding it sufficient to require dismissal of the cause of action there alleged for the infringement of the Downie patent." *Keystone Driller Co.* v. *Excavator Co.*, 290 U. S. 240, 246; cf. *Morton Salt Co.* v. *G. S. Suppiger Co., supra*, 493, 494. So, also, could the Circuit Court of Appeals have dismissed the appeal had it been aware of Hartford's corrupt activities in suppressing the truth concerning the authorship of the article. The total effect of all this fraud, practiced both on the Patent Office and the courts, calls for nothing less than a complete denial of relief to Hartford for the claimed infringement of the patent thereby procured and enforced.

Since the judgments of 1932 therefore must be vacated, the case now stands in the same position as though Hartford's corruption had been exposed at the original trial.

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here should have held hearings and decided the case or should have sent it to the District Court for decision. Cf. *Art Metal Works* v. *Abraham & Strauss, supra*, Note 1.

In this situation the doctrine of the *Keystone* case, *supra*, requires that Hartford be denied relief.

To grant full protection to the public against a patent obtained by fraud, that patent must be vacated. It has previously been decided that such a remedy is not available in infringement proceedings, but can only be accomplished in a direct proceeding brought by the Government. *United States* v. *American Bell Telephone Co., supra.*

The judgment is reversed with directions to set aside the 1932 judgment of the Circuit Court of Appeals, recall the 1932 mandate, dismiss Hartford's appeal, and issue mandate to the District Court directing it to set aside its judgment entered pursuant to the Circuit Court of Appeals' mandate, to reinstate its original judgment denying relief to Hartford, and to take such additional action as may be necessary and appropriate.

Reversed.

MR. JUSTICE ROBERTS:

No fraud is more odious than an attempt to subvert the administration of justice. The court is unanimous in condemning the transaction disclosed by this record. Our problem is how best the wrong should be righted and the wrongdoers pursued. Respect for orderly methods of procedure is especially important in a case of this sort. In simple terms, the situation is this. Some twelve years ago a fraud perpetrated in the Patent Office was relied on by Hartford in the Circuit Court of Appeals. The court reversed a judgment in favor of Hazel, decided that Hartford was the holder of a valid patent which Hazel had infringed and, by its mandate, directed the District Court to enter a judgment in favor of Hartford. This was done and, on the strength of the judgment, Hartford and Hazel entered into an agreement of which more hereafter. So long as that judgment stands unmodified, the agreement of the parties will be unaffected by anything involved in the suit under discussion. Hazel concededly now

desires to be in a position to disregard the agreement to its profit.

The resources of the law are ample to undo the wrong and to pursue the wrongdoer and to do both effectively with due regard to the established modes of procedure. Ever since this fraud was exposed, the United States has had standing to seek nullification of Hartford's patent.[1] The Government filed a brief as *amicus* below and one in this court. It has elected not to proceed for cancellation of the patent.[2]

It is complained that members of the bar have knowingly participated in the fraud. Remedies are available to purge recreant officers from the tribunals on whom the fraud was practiced.

Finally, as to the immediate aim of this proceeding, namely, to nullify the judgment if the fraud procured it, and if Hazel is equitably entitled to relief, an effective and orderly remedy is at hand. This is a suit in equity in the District Court to set aside or amend the judgment. Such a proceeding is required by settled federal law and would be tried, as it should be, in open court with living witnesses instead of through the unsatisfactory method of affidavits. We should not resort to a disorderly remedy, by disregarding the law as applied in federal courts ever since they were established, in order to reach one inequity at the risk of perpetrating another.

In a suit brought by Hartford against Hazel in the Western District of Pennsylvania charging infringement of Hartford's patent No. 1,655,391, a decree was entered against Hartford March 31, 1930, on the ground that Hazel had not infringed. On appeal, the Circuit Court

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[1] *United States* v. *American Bell Telephone Co.*, 128 U. S. 315; 167 U. S. 224, 238.

[2] The facts with respect to the fraud practiced on the Patent Office have been known for some years.

of Appeals filed an opinion, May 5, 1932, reversing the judgment of the District Court and holding the patent valid and infringed. On Hazel's application, the time for filing a petition for rehearing was extended five times. On July 21, 1932, Hazel entered into a general settlement and license agreement with Hartford respecting the patent in suit and other patents, which agreement was to be effective as of July 1, 1932. Hazel filed no petition for rehearing and, on July 30, 1932, the mandate of the Circuit Court of Appeals went to the District Court. Pursuant to the mandate, that court entered its final judgment against Hazel for an injunction and an accounting. No such accounting was ever had because Hazel and Hartford had settled their differences.

November 19, 1941, Hazel presented to the Circuit Court of Appeals its petition for leave to file in the District Court a bill of review. Attached was the proposed bill. Affidavits were filed by Hazel and Hartford. The Circuit Court of Appeals heard the matter and made an order denying the petition for leave to file, holding that any fraud practiced had been practiced on the Circuit Court of Appeals and, therefore, that court should itself pass upon the question whether the mandate should be recalled and the case reopened. Leave was granted to Hazel to amend its petition to seek relief from the Circuit Court of Appeals. The order provided for an answer by Hartford and for a hearing and determination by the Circuit Court of Appeals.

The Circuit Court of Appeals, on the basis of the amended petition, the answer, and the affidavits, denied relief on the grounds: (1) that the fraud had not been effective to influence its earlier decision; (2) that the court was without power to deal with the case as its mandate had gone down and the term had long since expired; (3) that Hazel had been negligent and guilty of inexcusable delay in presenting the matter to the court; and

(4) that the only permissible procedure was in the District Court, where the judgment rested, by bill in equity in the nature of a bill of review. One judge dissented, holding that the court had power (1) to recall the cause; (2) to enter upon a trial of the issues made by the petition and answer, and (3) itself to review and revise its earlier decision, enter a new judgment in the case on the corrected record and send a new mandate to the District Court.

As I understand the opinion of this court, while it reverses the decision below, it only partially adopts the view of the dissenting judge, for the holding is: (1) that the court below has power at this date to deal with the matter either as a new suit or as a continuation of the old one; (2) that it can recall the case from the District Court; (3) that it can grant relief; (4) that it can hear evidence and act as a court of first instance or a trial court; (5) that such a trial as it affords need not be according to the ordinary course of trial of facts in open court, by examination and cross-examination of witnesses, but that the proofs may consist merely of ex parte affidavits; and (6) that such a trial has already been afforded and it remains only, in effect, to cancel Hartford's patent.

I think the decision overrules principles settled by scores of decisions of this court which are vital to the equitable and orderly disposition of causes,—principles which, upon the soundest considerations of fairness and policy, have stood unquestioned since the federal judicial system was established. I shall first briefly state these principles. I shall then as briefly summarize the reasons for their adoption and enforcement and, finally, I shall show why it would not be in the interest of justice to abandon them in this case.

1. The final and only extant judgment in the litigation is that of the District Court entered pursuant to the mandate of the Circuit Court of Appeals. The term of the

District Court long ago expired and, with that expiration, all power of that court to reexamine the judgment or to alter it ceased, except for the correction of clerical errors. The principle is of universal application to judgments at law,[3] decrees in equity,[4] and convictions of crime, though, as respects the latter, its result may be great individual hardship.[5] The rule might, for that reason, have been relaxed in criminal cases, if it ever is to be, for there, in contrast to civil cases, no other judicial relief is available.

In the promulgation of the Federal Rules of Civil Procedure this court took notice of the fact that terms of the district court vary in length and that the expiration of

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[3] *Bank of United States* v. *Moss*, 6 How. 31, 38; *Roemer* v. *Simon*, 91 U. S. 149; *Phillips* v. *Negley*, 117 U. S. 665, 672, 678; *Hickman* v. *Fort Scott*, 141 U. S. 415; *Tubman* v. *Baltimore & Ohio R. Co.*, 190 U. S. 38; *Wetmore* v. *Karrick*, 205 U. S. 141, 151–2; *In re Metropolitan Trust Co.*, 218 U. S. 312, 320; *Delaware, L. & W. R. Co.* v. *Rellstab*, 276 U. S. 1, 5; *Realty Acceptance Corp.* v. *Montgomery*, 284 U. S. 547, 549.

[4] *Cameron* v. *McRoberts*, 3 Wheat. 591; *Sibbald* v. *United States*, 12 Pet. 488, 492; *Washington Bridge Co.* v. *Stewart*, 3 How. 413, 426; *Central Trust Co.* v. *Grant Locomotive Works*, 135 U. S. 207; *Wayne Gas Co.* v. *Owens-Illinois Co.*, 300 U. S. 131, 136; *Sprague* v. *Ticonic Bank*, 307 U. S. 161, 169.

[5] *United States* v. *Mayer*, 235 U. S. 55, 67. In this case one Freeman was convicted in the District Court. After he had taken an appeal to the Circuit Court of Appeals he filed, after the term had expired, a motion to set aside the judgment on the ground that a juror wilfully concealed bias against the defendant when examined on his *voir dire*. After hearing this motion the district judge found as a fact that the juror had been guilty of misconduct and that the defendant and his counsel neither had knowledge of the wrong nor could have discovered it earlier by due diligence. The district judge was in doubt whether, after the expiration of the term, he had power to deal with the judgment of conviction. The Circuit Court of Appeals certified the question to this court which, in a unanimous opinion, rendered after full argument by able counsel, held in accordance with all earlier precedents that, even in a case of such hardship, the District Court had no such power.

the term might occur very soon, or quite a long time, after the entry of a judgment. In order to make the practice uniform, Rule 60–B provides: "On motion the court, upon such terms as are just, may relieve a party or his legal representative from a judgment, order, or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. The motion shall be made within a reasonable time, *but in no case exceeding six months after such judgment, order, or proceeding was taken.* . . . This rule does not limit the power of a court (1) to entertain an action to relieve a party from a judgment, order, or proceeding. . . ." Thus there has been substituted for the term rule a definite time limitation within which a district court may correct or modify its judgments. But the salutary rule as to finality is retained and, after the expiration of six months, the party must apply, as heretofore, by bill of review,—now designated a civil action—to obtain relief from a judgment which itself is final so far as any further steps in the original action are concerned.

The term rule applies with equal force to an appellate court. Over the whole course of its history, this court has uniformly held that it was without power, after the going down of the mandate, and the expiration of the term, to rehear a case or to modify its decision on the merits.[6] And this is equally true of the circuit courts of appeal.[7]

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[6] *Hudson* v. *Guestier*, 7 Cr. 1; *Jackson* v. *Ashton*, 10 Pet. 480; *Sibbald* v. *United States*, *supra*, 492; *Washington Bridge Co.* v. *Stewart*, *supra*; *Brooks* v. *Railroad Co.*, 102 U. S. 107; *Barney* v. *Friedman*, 107 U. S. 629; *Hickman* v. *Fort Scott*, *supra*, 419; *Bushnell* v. *Crooke Mining Co.*, 150 U. S. 82.

[7] *Ex parte National Park Bank*, 256 U. S. 131. "That court was powerless to modify the decree after the expiration of the term at which it was entered. If the omission in the decree had been adequately called to the court's attention during the term it would doubt-

The court below, unless we are to overthrow a century-and-a-half of precedents, lacks *power* now to revise its judgment and lacks *power* also to send its process to the District Court and call up for review the judgment entered on its mandate twelve years ago.[8] No such power is inherent in an appellate court; none such is conferred by any statute.

2. The Circuit Court of Appeals is without authority either to try the issues posed by the petition and answer on the affidavits on file, or, to do as the dissenting judge below suggests, hold a full-dress trial.

The federal courts have only such powers as are expressly conferred on them. Certain original jurisdiction is vested in this court by the Constitution. Its powers as an appellate court are those only which are given by statute.[9]

The circuit courts of appeal are creatures of statute. No original jurisdiction has been conferred on them. They exercise only such appellate functions as Congress has granted. The grant is plain. "The circuit courts of appeal shall have *appellate jurisdiction* to review by appeal final decisions . . . in the district courts . . ."[10] Nowhere is there any grant of jurisdiction to try cases, to

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less have corrected the error complained of; or relief might have been sought in this court by a petition for a writ of certiorari. The bank failed to avail itself of remedies open to it." (p. 133.) The circuit courts of appeal have uniformly observed the rule thus announced. *Hart* v. *Wiltsee*, 25 F. 2d 863; *Nachod* v. *Engineering & Research Corp.*, 108 F. 2d 594; *Montgomery* v. *Realty Acceptance Corp.*, 51 F. 2d 642; *Foster Bros. Mfg. Co.* v. *Labor Board*, 90 F. 2d 948; *Wichita Royalty Co.* v. *City National Bank*, 97 F. 2d 249; *Hawkins* v. *Cleveland, C., C. & St. L. Ry. Co.*, 99 F. 322; *Walsh Construction Co.* v. *U. S. Guarantee Co.*, 76 F. 2d 240; *Waskey* v. *Hammer*, 179 F. 273.

[8] *Sibbald* v. *United States, supra*, 492; *Roemer* v. *Simon*, 91 U. S. 149; *In re Sanford Fork & Tool Co.*, 160 U. S. 247.

[9] *Ex parte Bollman*, 4 Cr. 75, 93.

[10] Judicial Code § 128 as amended; 28 U. S. C. 225.

enter judgments, or to issue executions or other final process.

". . . courts created by statute must look to the statute as the warrant for their authority; certainly they cannot go beyond the statute, and assert an authority with which they may not be invested by it, or which may be clearly denied to them." [11]

This court has never departed from the view that circuit courts of appeal are statutory courts having no original jurisdiction but only appellate jurisdiction.[12]

Neither this court [13] nor a circuit court [14] of appeals may hear new evidence in a cause appealable from a lower court. No suggestion seems ever before to have been made that they may constitute themselves trial courts, embark on the trial of what is essentially an independent cause and enter a judgment of first instance on the facts and the law. But this is what the opinion sanctions.

3. The temptation might be strong to break new ground in this case if Hazel were otherwise remediless. Such is

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[11] *Cary* v. *Curtis,* 3 How. 236, 245. See *Sheldon* v. *Sill,* 8 How. 441, 449; *Kentucky* v. *Powers,* 201 U. S. 1, 24.

[12] *Whitney* v. *Dick,* 202 U. S. 132, 137; *United States* v. *Mayer, supra,* 65; *Realty Acceptance Corp.* v. *Montgomery, supra,* 549.

[13] *Russell* v. *Southard,* 12 How. 139, 158, 159; *United States* v. *Knight's Adm'r,* 1 Black 488; *Roemer* v. *Simon, supra.* In the *Russell* case Chief Justice Taney said: "It is very clear that affidavits of newly-discovered testimony cannot be received for such a purpose. This court must affirm or reverse upon the case as it appears in the record. We cannot look out of it, for testimony to influence the judgment of this court sitting, as an appellate tribunal. And, according to the practice of the court of chancery from its earliest history to the present time, no paper not before the court below can be read on the hearing of an appeal. Eden *v.* Earl Bute, 1 Bro. Par. Cas. 465; 3 Bro. Par. Cas. 546; Studwell *v.* Palmer, 5 Paige, 166.

"Indeed, if the established chancery practice had been otherwise, the act of Congress of March 3d, 1803, expressly prohibits the introduction of new evidence, in this court, on the hearing of an appeal from a circuit court, except in admiralty and prize causes."

[14] *Realty Acceptance Corp.* v. *Montgomery, supra,* 550, 551.

not the fact. The reports abound in decisions pointing the way to relief if, in equity, Hazel is entitled to any.

Since Lord Bacon's day a decree in equity may be reversed or revised for error of law,[15] for new matter subsequently occurring, or for after-discovered evidence. And this head of equity jurisdiction has been exercised by the federal courts from the foundation of the nation.[16] Such a bill is an original bill in the nature of a bill of review. Equity also, on original bills, exercises a like jurisdiction to prevent unconscionable retention or enforcement of a judgment at law procured by fraud, or mistake unmixed with negligence attributable to the losing party, or rendered because he was precluded from making a defense which he had. Such a bill may be filed in the federal court which rendered the judgment or in a federal court other than the court, federal or state, which rendered it.[17]

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[15] A bill filed to correct error of law apparent on the record is called a strict bill of review and some rules as to time are peculiarly applicable to such bills. See *Whiting* v. *Bank of United States*, 13 Pet. 6, 13, 14, 15; *Shelton* v. *Van Kleeck*, 106 U. S. 532; *Central Trust Co.* v. *Grant Locomotive Works*, 135 U. S. 207. Street, Federal Equity Practice, § 2129 *et seq.* With this type of bill we are not here concerned.

[16] *Ocean Ins. Co.* v. *Fields*, 2 Story 59; *Whiting* v. *Bank of United States, supra; Southard* v. *Russell*, 16 How. 547; *Minnesota Co.* v. *St. Paul Co.*, 2 Wall. 609; *Purcell* v. *Miner*, 4 Wall. 519; *Rubber Co.* v. *Goodyear*, 9 Wall. 805; *Easley* v. *Kellom*, 14 Wall. 279; *Putnam* v. *Day*, 22 Wall. 60; *Buffington* v. *Harvey*, 95 U. S. 99; *Craig* v. *Smith*, 100 U. S. 226; *Shelton* v. *Van Kleeck, supra; Pacific Railroad* v. *Missouri Pacific Ry. Co.*, 111 U. S. 505; *Central Trust Co.* v. *Grant Locomotive Works, supra; Boone County* v. *Burlington & M. R. R. Co.*, 139 U. S. 684; *Hopkins* v. *Hebard*, 235 U. S. 287; *Scotten* v. *Littlefield*, 235 U. S. 407; *National Brake & Electric Co.* v. *Christensen*, 254 U. S. 425; *Simmons Co.* v. *Grier Bros. Co.*, 258 U. S. 82; *Jackson* v. *Irving Trust Co.*, 311 U. S. 494, 499.

[17] *Logan* v. *Patrick*, 5 Cr. 288; *Marine Ins. Co.* v. *Hodgson*, 7 Cr. 332; *Dunn* v. *Clarke*, 8 Pet. 1; *Truly* v. *Wanzer*, 5 How. 141; *Creath's Adm'r* v. *Sims*, 5 How. 192; *Humphreys* v. *Leggett*, 9 How. 297; *Walker* v. *Robbins*, 14 How. 584; *Hendrickson* v. *Hinckley*, 17 How.

Whether the suit concerns a decree in equity or a judgment at law, it is for relief granted by equity against an unjust and inequitable result, and is subject to all the customary doctrines governing the award of equitable relief.

New proof to justify a bill of review must be such as has come to light after judgment and such as could not have been obtained when the judgment was entered. The proffered evidence must not only have been unknown prior to judgment, but must be such as could not have been discovered by the exercise of reasonable diligence in time to permit its use in the trial. Unreasonable delay, or lack of diligence in timely searching for the evidence, is fatal to the right of a bill of review, and a party may not elect to forego inquiry and let the cause go to judgment in the hope of a favorable result and then change his position and attempt, by means of a bill of review, to get the benefit of evidence he neglected to produce. These principles are established by many of the cases cited in notes 16 and 17, and specific citation is unnecessary. The principles are well settled. And, in this class of cases as in others, although equity does not condone wrongdoing, it will not extend its aid to a wrongdoer; in

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443; *Leggett* v. *Humphreys,* 21 How. 66; *Gue* v. *Tide Water Canal Co.,* 24 How. 257; *Freeman* v. *Howe,* 24 How. 450; *Kibbe* v. *Benson,* 17 Wall. 624; *Crim* v. *Handley,* 94 U. S. 652; *Brown* v. *County of Buena Vista,* 95 U. S. 157; *United States* v. *Throckmorton,* 98 U. S. 61; *Bronson* v. *Schulten,* 104 U. S. 410; *Embry* v. *Palmer,* 107 U. S. 3; *White* v. *Crow,* 110 U. S. 183; *Krippendorf* v. *Hyde,* 110 U. S. 276; *Johnson* v. *Waters,* 111 U. S. 640; *Richards* v. *Mackall,* 124 U. S. 183; *Arrowsmith* v. *Gleason,* 129 U. S. 86; *Knox County* v. *Harshman,* 133 U. S. 152; *Marshall* v. *Holmes,* 141 U. S. 589; *North Chicago Rolling Mill Co.* v. *St. Louis Ore & Steel Co.,* 152 U. S. 596; *Robb* v. *Vos,* 155 U. S. 13; *Howard* v. *De Cordova,* 177 U. S. 609; *United States* v. *Beebe,* 180 U. S. 343; *Pickford* v. *Talbott,* 225 U. S. 651; *Simon* v. *Southern Ry. Co.,* 236 U. S. 115; *Wells Fargo & Co.* v. *Taylor,* 254 U. S. 175.

other words, the complainant must come into court with clean hands.

4. Confessedly the opinion repudiates the unbroken rule of decision with respect to the finality of a judgment at the expiration of the term; that with respect to jurisdiction of an appellate court to try issues of fact upon evidence, and that with respect to the necessity for resorting to a bill of review to modify or set aside a judgment once it has become final. Perusal of the authorities cited will sufficiently expose the reasons for these doctrines. It is obvious that parties ought not to be permitted indefinitely to litigate issues once tried and adjudicated.[18] There must be an end to litigation. If courts of first instance, or appellate courts, were at liberty, on application of a party, at any time to institute a summary inquiry for the purpose of modifying or nullifying

[18] It has frequently been said that where the ground for a bill of review is fraud, review will not be granted unless the fraud was extrinsic. See *United States* v. *Throckmorton*, 98 U. S. 61. The distinction between extrinsic and intrinsic fraud is not technical but substantial. The statement that only extrinsic fraud may be the basis of a bill of review is merely a corollary of the rule that review will not be granted to permit relitigation of matters which were in issue in the cause and are, therefore, concluded by the judgment or decree. The classical example of intrinsic as contrasted with extrinsic fraud is the commission of perjury by a witness. While perjury is a fraud upon the court, the credibility of witnesses is in issue, for it is one of the matters on which the trier of fact must pass in order to reach a final judgment. An allegation that a witness perjured himself is insufficient because the materiality of the testimony, and opportunity to attack it, was open at the trial. Where the authenticity of a document relied on as part of a litigant's case is material to adjudication, as was the grant in the *Throckmorton* case, and there was opportunity to investigate this matter, fraud in the preparation of the document is not extrinsic but intrinsic and will not support review. Any fraud connected with the preparation of the Clarke article in this case was extrinsic, and, subject to other relevant rules, would support a bill of review.

a considered judgment, no reliance could be placed on that which has been adjudicated and citizens could not, with any confidence, act in the light of what has apparently been finally decided.

If relief on equitable grounds is to be obtained, it is right that it should be sought by a formal suit upon adequate pleadings and should be granted only after a trial of issues according to the usual course of the trial of questions of fact. A court of first instance is the appropriate tribunal, and the only tribunal, equipped for such a trial. Appellate courts have neither the power nor the means to that end.

On the strongest grounds of public policy bills of review are disfavored, since to facilitate them would tend to encourage fraudulent practices, resort to perjury, and the building of fictitious reasons for setting aside judgments.

5. I think the facts in the instant case speak loudly for the observance, and against the repudiation, of all the rules to which I have referred. The court's opinion implies that the disposition here made is justified by uncontradicted facts, but the record demonstrates beyond question that serious controverted issues ought to be resolved before Hazel may have relief.

In 1926 Hartford brought a suit for infringement of the Peiler Patent against Nivison-Weiskopf Company in the Southern District of Ohio. Counsel for the defendants in that case were Messrs. William R. and Edmund P. Wood of Cincinnati. About the same time, Hartford brought a similar suit for infringement against Kearns-Gorsuch Bottle Company, a subsidiary of Hazel. Counsel for Kearns were the same who have represented Hazel throughout this case.

In 1928 Hartford brought suit against Hazel in the Western District of Pennsylvania for a like infringement. The same counsel represented Hazel. The Ohio suits

came to trial first. In them a decision was rendered adverse to Hartford. Appeals were taken to the Circuit Court of Appeals of the Sixth Circuit, were consolidated, and counsel for the defendants appeared together in that court, which decided adversely to Hartford (58 F. 2d 701).

In the preparation for the defense of the Nivison suit, William R. Wood called upon Clarke and interviewed him in the presence of a witness. Clarke admitted that Hatch of Hartford had prepared the article published under Clarke's name. In the light of this fact the Messrs. Wood notified Hartford that they would require the presence of Hatch at the trial of the suit and Hatch was in attendance during that trial. Repeatedly during the trial, Hatch admitted to the Messrs. Wood that he was in fact the author of the article. It was well understood that the defendant wanted him present so that if any reference to or reliance upon the article developed they could call Hatch and prove the facts. There was no such reference or reliance.

As counsel for the various defendants opposed to Hartford were acting in close cooperation, Messrs. Wood attended the trial of the Hartford-Hazel suit in Pittsburgh, which must have occurred in 1929 or early 1930. (See 39 F. 2d 111.) One or other of the Messrs. Wood was present throughout that trial and Edmund P. Wood was in frequent consultation with the Hazel representatives and counsel. Hazel's counsel was the same at that trial as in the present case. The Messrs. Wood told Hazel's counsel and representatives that Clarke had admitted Hatch was the author of the article and that Hatch had also freely admitted the same thing. Hazel's counsel and representatives discussed at length, in the presence of Mr. Wood, the advisability of attacking the authenticity of the article. Counsel for Hazel, in these conferences, took the position that "an attack on the article might be a

boomerang in that it might emphasize the truth of the only statements in the article" which he regarded as of any possible pertinence. Mr. Wood's affidavit giving in detail the discussions and the conclusion of Hazel's counsel is uncontradicted, and demonstrates that Hazel's counsel knew the facts with regard to the Clarke article and knew the names of witnesses who could prove those facts. After due deliberation, it was decided not to offer proof on the subject.

The District Court found in favor of Hazel, holding that Hazel had not infringed. Hartford appealed to the Third Circuit Court of Appeals. In that court Hartford's counsel referred in argument to the Clarke article and the court, in its decision, referred to the article as persuasive of certain facts in connection with the development of glass machinery. The Circuit Court of Appeals for the Sixth Circuit rendered its decision in the Nivison and Kearns cases on May 12, 1932, and the Third Circuit Court of Appeals rendered its decision in the Hartford-Hazel case on May 6, 1932.

Counsel for Hazel was then, nearly ten years prior to the filing of the instant petition, confronted with the fact that, in its opinion, the Circuit Court of Appeals had accredited the article. Naturally counsel was faced with the question whether he should bring to the court's attention the facts respecting that article. As I have said, he asked and was granted five extensions of time for filing a petition for rehearing. Meantime negotiations were begun with Hartford for a general settlement and for Hazel's joining in the combination and patent pool of which Hartford was the head and front. At the same time, however, evidently as a precaution against the breakdown of the negotiations, Hazel's counsel obtained affidavits to be signed by the Messrs. Wood setting forth the facts which they had gleaned concerning the author-

ship of the Clarke article. These affidavits were intended for use in the Third Circuit Court of Appeals case for they were captioned in that case. Being made by reputable counsel who are accredited by both parties to this proceeding, they were sufficient basis for a petition for rehearing while the case was still in the bosom of the Circuit Court of Appeals. It is idle to suggest that counsel would not have been justified in applying to the court on the strength of them.

Had counsel filed a petition and attached to it the affidavits of the Messrs. Wood, without more, he would have done his duty to the court in timely calling its attention to the fraud which had been perpetrated. But more, the court would undoubtedly have reopened the case, granted rehearing, and remanded the case to the District Court with permission to Hazel to summon and examine witnesses. It is to ignore realities to suggest, as the opinion does, that counsel for Hazel was helpless at that time and in the then existing situation.

But counsel did not rest there. He commissioned an investigator who interviewed a labor leader named Maloney in Philadelphia. This man refused to talk but the investigator's report would make it clear to anyone of average sense that he knew about the origin of the article, and any lawyer of experience would not have hesitated to summon him as a witness and put him under examination. Moreover, the investigator interviewed Clarke and his report of the evasive manner and answers of Clarke convince me, and I believe would convince any lawyer of normal perception, that the Woods' affidavits were true and that Clarke would have so admitted if called to the witness stand. Most extraordinary is the omission of Hazel's counsel, although then in negotiation with Hartford for a settlement, to make any inquiry concerning Hatch or to interview Hatch, or to have him interviewed

when counsel had been assured that Hatch had no inclination to prevaricate concerning his part in the preparation of the article.

The customary modes of eliciting truth in court may well establish that in the circumstances Hazel's counsel deliberately elected to forego any disclosure concerning the Clarke article and to procure instead the favorable settlement he obtained from Hartford.

In any event, we know that, on July 21, 1932, Hartford and Hazel entered into an agreement, which is now before this court in the record in Nos. 7–11 of the present term, on appeal from the District Court for Northern Ohio. Under the agreement Hazel paid Hartford $1,000,000. Hartford granted Hazel a license on all machines and methods embodying patented inventions for the manufacture of glass containers at Hartford's lowest royalty rates. Hartford agreed to pay Hazel one-third of its net royalty income to and including January 3, 1945, over and above $850,000 per annum. At the same time, Hazel entered into an agreement with the Owens-Illinois Glass Company, another party to the Hartford patent pool and the conspiracy to monopolize the glass manufacturing industry found by the District Court.

In the autumn of 1933 counsel for Shawkee Company, defendant in another suit by Hartford, obtained documents indicating Hatch's responsibility for the Clarke article, and wrote counsel for Hazel inquiring what he knew about the matter. Hazel's counsel, evidently reluctant to disturb the existing status, replied that, while he suspected Hartford might have been responsible for the article, he did not *at the time of trial,* know *of the papers* which counsel for Shawkee had unearthed, and added that his recollection was then "too indefinite to be positive and I would have to go through the voluminous mass of papers relating to the various Hartford-Empire

litigations, including correspondence, before I could be more definite."

The District Court for Northern Ohio has found that the 1932 agreement and coincident arrangements placed Hazel in a preferred position in the glass container industry and drove nearly everyone else in that field into taking licenses from Hartford, stifled competition, and gave Hazel, as a result of rebates paid to it, a great advantage over all competitors in the cost of its product. It is uncontested that, as a result of the agreement, Hazel has been repaid the $1,000,000 it paid Hartford and has received upwards of $800,000 additional.

In 1941 the United States instituted an equity suit in Northern Ohio against Hartford, Hazel, Owens-Illinois, and other corporations and individuals to restrain violation of the antitrust statutes. That court found that the defendants conspired to violate the antitrust laws and entered an injunction on October 8, 1942. (46 F. Supp. 541.) Hazel and other defendants appealed to this court. The same counsel represented Hazel in that suit, and in the appeal to this court, as represented the company in the District Court and in the Third Circuit Court of Appeals in this case. In its brief in this court Hazel strenuously contended that the license agreement executed in 1932, and still in force, was not violative of the antitrust laws and should be sustained.

Of course, in 1941 counsel for Hazel faced the possibility that the District Court in Ohio might find against Hazel, and that this court might affirm its decision. Considerations of prudence apparently dictated that Hazel should cast an anchor to windward. Accordingly, November 19, 1941, it presented its petition for leave to file a bill of review in the District Court for Western Pennsylvania and attached a copy of the proposed bill. In answer to questions at our bar as to the ultimate purpose of this proceed-

ing, counsel admitted that, if successful in it, Hazel proposed to obtain every resultant benefit it could.

In the light of the circumstances recited, it becomes highly important closely to scrutinize Hazel's allegations. It refers to the use by the Circuit Court of Appeals of the Clarke article in the opinion and then avers:

"That although prior to the decision of this Court your petitioner suspected and believed that the article had been written by one of plaintiff's employees, instead of by Clarke, and had been caused by plaintiff to be published in the National Glass Budget, petitioner did not know then or until this year *material and pertinent facts* which, if petitioner had then known and been able to present to this Court, should have resulted in a decision for petitioner. [Italics added.]

"That such facts were disclosed to petitioner for the first time in suit of *United States of America* v. *Hartford, et al.*, in the United States District Court for the Northern District of Ohio, and are specified in paragraphs 4, 5 and 6 of the annexed bill of review, which is made a part hereof.

"That your petitioner could not have ascertained by the use of proper and reasonable diligence the newly discovered facts prior to the said suit, and that the newly discovered evidence is true and material and should cause a decree in this cause different from that heretofore made."

In the proposed bill of review these allegations are repeated and it is added that the new facts ascertained consist of the testimony of Hatch in the antitrust suit and five letters written by various parties connected with the conspiracy and a memorandum prepared by Hatch which were in evidence in that suit. The bill then adds:

"The new matter specified in the preceding paragraphs 4, 5 and 6 is material, it only recently became known to plaintiff, which could not have previously obtained it with due diligence, and such new evidence if it had been previously known to this Court and to the Circuit Court

of Appeals would have caused a decision different from that reached."

Neither the petition nor the bill is under oath but there is attached an affidavit of counsel for Hazel in which he states that in or before 1929 Hazel "had suspected, and I believed," that the Clarke article had been written by Hatch and that Hartford had caused the article to be published, adding: "having been so told by the firm of Messrs. Wood and Wood, Cincinnati lawyers, who said they had so been told by Clarke and also by Hatch." The affidavit also attaches the reports of the investigator above referred to and refers to the exhibits and testimony in the antitrust suit in Northern Ohio.

In the light of the facts I have recited, it seems clear that if Hazel's conduct be weighed merely in the aspect of negligent failure to investigate, the decision of this court in *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U. S. 399, may well justify a holding, on all available evidence, that, at least, Hazel was guilty of inexcusable negligence in not seeking the evidence to support an attack upon the decree. But it is highly possible that, upon a full trial, it will be found that Hazel held back what it knew and, if so, is not entitled now to attack the original decree. In *Scotten* v. *Littlefield*, 235 U. S. 407, in affirming the denial of a bill of review, this court said that if the claim now made was "not presented to the Court of Appeals when there on appeal it could not be held back and made the subject of a bill of review, as is now attempted to be done." Repeatedly this court has held that one will not be permitted to litigate by bill of review a question which it had the opportunity to litigate in the main suit, whether the litigant purposely abstained from bringing forward the defense or negligently omitted to prosecute inquiries which would have made it available.[19]

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[19] *Hendrickson* v. *Hinckley*, *supra*, 446; *Rubber Co.* v. *Goodyear*, *supra*, 806; *Crim* v. *Handley*, *supra*, 660; *Bronson* v. *Schulten*, *supra*,

And certainly an issue of such importance affecting the validity of a judgment, should never be tried on affidavits.[20]

As I read the opinion of the court, it disregards the contents of many of the affidavits filed in the cause and holds that solely because of the fraud which was practiced on the Patent Office and in litigation on the patent, the owner of the patent is to be amerced and in effect fined for the benefit of the other party to the suit, although that other comes with unclean hands [21] and stands adjudged a party to a conspiracy to benefit over a period of twelve years under the aegis of the very patent it now attacks for fraud. To disregard these considerations, to preclude inquiry concerning these matters, is recklessly to punish one wrongdoer for the benefit of another, although punishment has no place in this proceeding.

Hazel well understood the course of decision in federal courts. It came into the Circuit Court of Appeals with a petition for leave to file a bill of review, a procedure required by long-settled principles. Inasmuch as the judgment it attacked had been entered as a result of the action of the Circuit Court of Appeals, Hazel properly applied to that court for leave to file its bill in the District Court.[22] The respondent did not object on procedural grounds to the Circuit Court of Appeals considering and acting on the petition. That court of its own motion denied the petition and permitted amendment to pray relief there.

417, 418; *Richards* v. *Mackall, supra,* 188, 189; *Boone County* v. *Burlington & M. R. R. Co., supra,* 693; *Pickford* v. *Talbott, supra,* 658.

[20] *Jackson* v. *Irving Trust Co., supra,* 499; *Sorenson* v. *Sutherland,* 109 F. 2d 714, 719.

[21] *Creath's Adm'r* v. *Sims, supra,* 204.

[22] *Southard* v. *Russell, supra,* 570, 571; *Purcell* v. *Miner, supra,* 519; *Rubber Co.* v. *Goodyear, supra; National Brake & Electric Co.* v. *Christensen, supra,* 431; *Simmons Co.* v. *Grier Bros. Co., supra,* 91.

On the question what amounts to a sufficient showing to move an appellate court to grant leave to file a bill of review in the trial court, the authorities are not uniform. Where the lack of merit is obvious, appellate courts have refused leave,[23] but where the facts are complicated it is often the better course to grant leave and to allow available defenses to be made in answer to the bill.[24] In the present instance, I think it would have been proper for the court to permit the filing of the bill in the District Court where the rights of the parties to summon, to examine, and to cross-examine witnesses, and to have a deliberate and orderly trial of the issues according to the established standards would be preserved.

I should reverse the order of the Circuit Court of Appeals with directions to permit the filing of the bill in the District Court.

MR. JUSTICE REED and MR. JUSTICE FRANKFURTER join in this opinion.

The CHIEF JUSTICE agrees with the result suggested in this dissent.

SHAWKEE MANUFACTURING CO. ET AL. *v.* HARTFORD-EMPIRE CO.

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

No. 423. Argued February 9, 10, 1944.—Decided May 15, 1944.

Decided upon the authority of *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co., ante,* p. 238.
137 F. 2d 764, reversed.

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[23] *Purcell* v. *Miner, supra; Rubber Co.* v. *Goodyear, supra.*

[24] *Ocean Insurance Co.* v. *Fields,* 2 Story 59; *In re Gamewell Fire-Alarm Tel. Co.,* 73 F. 908; *Raffold Process Corp.* v. *Castanea Paper Co.,* 105 F. 2d 126.

CERTIORARI, 320 U. S. 732, to review an order of the Circuit Court of Appeals denying relief in a bill of review proceeding commenced in that court.

Mr. William B. Jaspert for petitioners.

Mr. Francis W. Cole, with whom *Messrs. Walter J. Blenko, Edgar J. Goodrich,* and *James M. Carlisle* were on the brief, for respondent.

Solicitor General Fahy, Assistant Attorney General Shea, and *Messrs. Robert L. Stern* and *Melvin Richter* filed a brief on behalf of the United States, as *amicus curiae,* urging reversal.

MR. JUSTICE BLACK delivered the opinion of the Court.

Here as in *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co., ante,* p. 238, the Circuit Court of Appeals for the Third Circuit has declined to set aside judgments entered at a prior term. 137 F. 2d 764. Both this case and the *Hazel-Atlas* case involve the validity of judgments obtained by Hartford-Empire adjudicating infringement of the "gob feeding" patent No. 1,655,391 owned by Hartford. In the *Hazel-Atlas* case, *supra,* we have held Hartford's proven frauds in connection with obtaining and enforcing that patent were of such nature that the decree of infringement against Hazel-Atlas should be set aside, and have directed that appropriate orders be entered to accomplish that purpose. Nevertheless, it is argued that the decrees rendered against Shawkee and others should be allowed to stand because of certain differences between their situation and that of Hazel-Atlas. These are the differentiating facts:

Hartford's infringement suit against Shawkee and the other petitioners was not begun until 1933 after the decision of the Third Circuit Court of Appeals the previous year holding Hartford's "gob feeding" patent valid and

infringed by Hazel-Atlas. The District Court, having been reversed by that previous decision, held Shawkee and the others guilty of infringement. On appeal to the Third Circuit Court of Appeals, that court did not again quote from the spurious Clarke article but, like the District Court, simply held in favor of Hartford on the authority of the 1932 decision. 68 F. 2d 726. While the appeal was pending final disposition in the Circuit Court, Shawkee's counsel communicated with Judge Buffington charging that the Clarke article was spurious; but at that time Shawkee had no direct proof of its charge. That proof, as pointed out in our *Hazel-Atlas* opinion, *supra,* was available only after the United States offered its evidence in the anti-trust suit in 1941.

None of these facts, we think, should deprive Shawkee and the others of relief against Hartford's fraudulent conduct. To obtain its judgment against them, Hartford successfully used the judgment against Hazel-Atlas without disclosing its previous misconduct. *Keystone Driller Co.* v. *Excavator Co.,* 290 U. S. 240, 246–247. Hartford can derive no aid from the fact that Shawkee reported to the Circuit Court its belief as to the deceptive authorship of the Clarke article. With that charge on the record, honest dealing with the Court required that Hartford should make a full disclosure of its fraudulent conspiracy. Its failure to do so under these circumstances aggravated the previous deception it had practiced on the Patent Office and the courts.

The prayer for relief of Shawkee and the others was that the court adjudge that Hartford did not come into court with clean hands, and that they be fully freed from further obligations under the judgments against them. This relief should be granted. They further prayed that a master be appointed by the Circuit Court of Appeals to render an accounting of costs incurred in these and former proceedings, moneys paid by them to Hartford pursuant to the

challenged judgments, and damages sustained by them because of Hartford's unlawful use of its patent. Whether this type of relief will be granted must depend upon further proceedings in the District Court which entered the judgment of infringement.

The judgment of the Circuit Court of Appeals is reversed. The cause is remanded to it with directions to set aside its 1934 judgment, recall the mandate, and dismiss the appeal; and issue mandate to the District Court with directions to set aside its judgment finding Hartford's patent valid and infringed, deny Hartford all relief against infringement of this patent, and permit Shawkee and the others to bring such further proceedings as may be appropriate in accordance with their prayer for relief.

Reversed.

MR. JUSTICE ROBERTS:

For the reasons given in my dissent in *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co., ante,* p. 251, I think that the decree should be reversed and the cause remanded, with directions to the court below to grant the petitioners leave to file a bill of review in the District Court.

MR. JUSTICE REED and MR. JUSTICE FRANKFURTER join in this opinion.

The CHIEF JUSTICE agrees with the result suggested in this dissent.

Counsel for Parties.

DOUGLAS *v.* COMMISSIONER OF INTERNAL REVENUE.

NOS. 130 AND 131. CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.*

Argued March 7, 1944.—Decided May 15, 1944.

1. Article 23 (m)–10 (c) of Treasury Regulations 94, which, in the case of a lease of an iron ore mine terminated in 1937 without any ore having been extracted during the existence of the lease, requires that depletion deductions taken in prior years on receipt of advance royalties be restored to the lessor's capital account and that a corresponding amount be returned as income for the year in which the lease was terminated, *held* valid, as authorized by and consistent with § 23 (m) of the Revenue Act of 1936, and not inconsistent with §§ 113 (b) (1) (B) and 114 (b) (1) or §§ 41 and 42 of the Act. P. 280.
2. A judgment of the Circuit Court of Appeals reversing a decision of the Board of Tax Appeals which refused to treat as income of the taxpayer for the year in which the lease was terminated the amount of a depletion deduction which, in the year taken and allowed, resulted in no tax benefit, *affirmed* here by an equally divided court. P. 287.

134 F. 2d 762, affirmed.

CERTIORARI, 320 U. S. 734, to review a judgment which affirmed in part and reversed in part a decision of the Board of Tax Appeals upon review of determinations of deficiencies in income tax.

Mr. Kimball B. DeVoy, with whom *Messrs. James E. O'Brien* and *Thomas P. Helmey* were on the brief, for petitioners.

*Together with No. 132, *Estate of Robinson et al.* v. *Commissioner of Internal Revenue,* and No. 133, *Dalrymple* v. *Commissioner of Internal Revenue,* also on writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit.

Miss Helen R. Carloss, with whom *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key* and *Valentine Brookes* were on the brief, for respondent.

Messrs. F. G. Davidson, Jr., Theodore L. Harrison, J. Donald Rawlings, and *W. A. Sutherland* filed a brief on behalf of the Virginian Hotel and other taxpayers, as *amici curiae.*

MR. JUSTICE REED delivered the opinion of the Court.

The Commissioner of Internal Revenue assessed income tax deficiencies against the petitioners for the year 1937, because of their failure to include in income for that year sums required to be reported by the terms of Article 23 (m)–10 (c) of Treasury Regulations 94, issued pursuant to § 23 (m), Revenue Act of 1936. The facts were not in dispute. Bessie P. Douglas, the petitioner in Nos. 130 and 131, was in 1929 co-owner with Adeline R. Morse, Charles H. Robinson, and Irene B. Robinson Cirkler of an iron ore mine in St. Louis County, Minnesota, known as the Pettit mine. The petitioners in No. 132 are the executors of the estate of Charles H. Robinson, and the petitioner in No. 133 is the transferee of the assets of the estate of Irene B. Robinson Cirkler, deceased.[1] In 1929 its co-owners leased this mine to the Republic Steel Corporation. The lease, as amended in 1933, ran for a term of thirty years, but the lessee was given the power to cancel it at the end of eight years. The lessee undertook to pay a royalty of 40 cents a ton for the ore removed and guaranteed minimum royalties of $20,000 a year for the first five years and $40,000 a year thereafter, subject after

[1] Bessie P. Douglas owned a one-half interest; each of the other co-tenants owned a one-sixth interest. The executor of the estate of Adeline R. Morse did not appeal from an adverse decision of the Board of Tax Appeals.

five years to the payment of $60,000 a year as a minimum during the time it failed to remove certain water from the mine. In case the guarantee required the lessee to pay in any one year for more ore than it actually removed, it was entitled to have the excess payment applied against removals in later years. The lessee paid the minimum royalties each year, but it removed no ore at all, and as of July 1, 1937, at the end of the eight-year period, it surrendered the lease. Each lessor took a proper depletion deduction in the respective years the royalties were paid, 1929 to 1936, inclusive. In the year 1933, Bessie P. Douglas claimed a depletion deduction of $4,958.05, but since she had sustained a net loss of $13,947.51, this deduction did not affect her tax liability. The Commissioner required all of the deductions to be taxed as income in 1937. The Board of Tax Appeals affirmed his conclusion, except as to the 1933 deductions by Bessie P. Douglas, which was reversed. 46 B. T. A. 943. Upon appeals by the taxpayers and, in No. 131, by the Commissioner, the Circuit Court of Appeals upheld the original assessments. 134 F. 2d 762. We granted petitions for writs of certiorari to settle a question reserved by our decision in *Herring* v. *Commissioner,* 293 U. S. 322, 328, as to cost depletion, and to consider an issue similar to that involved in *Dobson* v. *Commissioner,* 320 U. S. 489.

The Revenue Act of 1913, § II (G) (b), granted a deduction for depletion based solely on actual production and "not to exceed 5 per centum of the gross value at the mine of the output for the year." Under this Act, advance royalties were taxed without deduction for depletion. In 1916 Congress removed the 5% ceiling, but the deduction was still limited to the year of actual extraction. Revenue Act of 1916, § 5 (a) Eighth (b). The relevant parts of the depletion section reached substantially their present form in the Revenue Act of 1918, which, like the 1916 Act, authorized "a reasonable allow-

ance for depletion . . . under rules and regulations to be prescribed" with the approval of the Secretary of the Treasury; but the 1918 Act no longer limited the allowance to the product actually mined and sold during the year. The section now reads as follows:

"SEC. 23. Deductions from Gross Income.

"In computing net income there shall be allowed as deductions:

. . . . . .

"(m) Depletion.—In the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case; such reasonable allowance in all cases to be made under rules and regulations to be prescribed by the Commissioner, with the approval of the Secretary. In any case in which it is ascertained as a result of operations or of development work that the recoverable units are greater or less than the prior estimate thereof, then such prior estimate (but not the basis for depletion) shall be revised and the allowance under this subsection for subsequent taxable years shall be based upon such revised estimate. . . ." Revenue Act of 1936, c. 690, 49 Stat. 1648, 1658–60.

From the beginning of income taxation, as now, the regulations covered the conventional situations of payments for ores as mined and made provision for depletion measured by the volume actually extracted. The 1918 Act permitted the new regulations, Regulations 45, Article 215 (c), to provide for the first time a deduction in the year of receipt of advance royalties of a depletion allowance calculated on the unit value of the mineral in place. This met a frequently recurring variation from the normal lease. As a corollary the regulations required that in case a lease was surrendered before the lessee had extracted all the ore for which advance royalties had been

paid, a sum equal to the depletion allowance previously granted on such ore should be taxed as income in the year of the surrender of the lease. The bonus or advanced royalty regulations have remained practically unchanged since 1919.[2] The subsections applicable to prepaid royalties are as follows:

"ART. 23 (m)–10. Depletion—Adjustments of accounts based on bonus or advanced royalty

. . . . . .

"(b) If the owner has leased a mineral property for a term of years with a requirement in the lease that the lessee shall extract and pay for, annually, a specified number of tons, or other agreed units of measurement, of such mineral, or shall pay, annually, a specified sum of money which shall be applied in payment of the purchase price or royalty per unit of such mineral whenever the same shall thereafter be extracted and removed from the leased premises, an amount equal to that part of the basis for depletion allocable to the number of units so paid for in advance of extraction will constitute an allowable deduction from the gross income of the year in which such payment or payments shall be made; but no deduction for depletion by the lessor shall be claimed or allowed in any subsequent year on account of the extraction or removal in such year of any mineral so paid for in advance and for which deduction has once been made.

"(c) If for any reason any such mineral lease expires or terminates or is abandoned before the mineral which

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[2] In addition to Regulations 45, Article 215, the provision appeared thereafter in Regulations 62, Article 215, issued under § 214 (a) of the Revenue Act of 1921; Regulations 65 and 69, Article 216, issued under § 214 (a) of the Revenue Acts of 1924 and 1926; Regulations 74, Article 236, issued under § 23 (l) of the Revenue Act of 1928; Regulations 77, Article 230, issued under § 23 (l) of the Revenue Act of 1932; Regulations 86 and 94, Article 23 (m)–10, issued under § 23 (m) of the Revenue Acts of 1934 and 1936. They have remained unchanged under the Code, Regulations 111, § 29.23 (m)–10.

has been paid for in advance has been extracted and removed, the lessor shall adjust his capital account by restoring thereto the depletion deductions made in prior years on account of royalties on mineral paid for but not removed, and a corresponding amount must be returned as income for the year in which the lease expires, terminates, or is abandoned." Treasury Regulations 94, promulgated under the Revenue Act of 1936.

The deficiency here assessed falls squarely under the subsections. Their validity is therefore the decisive issue. In our opinion the regulations are valid.

Since the revenue acts have not forbidden recognition of bonus or advanced royalties as a basis for the calculation of appropriate depletion, the provision of the regulations for a depletion offset against their receipt is within the broad rule-making delegation of § 23 (m). Royalty or bonus payments in advance of actual extraction of minerals are, like sales after severance or royalty payments on actual production, gross income and not a recovery of capital. *Stratton's Independence* v. *Howbert,* 231 U. S. 399, 418; *Stanton* v. *Baltic Mining Co.,* 240 U. S. 103, 114; *Burnet* v. *Harmel,* 287 U. S. 103; *Herring* v. *Commissioner,* 293 U. S. 322, 324. Cf. *Anderson* v. *Helvering,* 310 U. S. 404, 407–8. Any deduction from this income for depletion, of course, may be allowed upon such terms as Congress may deem advisable. *Helvering* v. *Bankline Oil Co.,* 303 U. S. 362, 366; *United States* v. *Ludey,* 274 U. S. 295, 302. Depletion based on cost is like depreciation. Congress has allowed a recovery of the capital invested in a mine but, except in discovery or percentage depletion in special instances which are not here involved, see § 114, allowed nothing beyond that investment. §§ 23 (m) and (n), 113, 114; 49 Stat. 1648, 1660, 1682–1687. Deduction is allowed for the exhaustion of the property—the ore mass. *Lynch* v. *Alworth-Stephens*

Co., 267 U. S. 364, 370. It may be in step with extraction, where extraction and sale synchronize with payments for the ore or the deduction may be allowed against advance payments of royalties or bonus. The theory of depletion is the same in both cases. In either situation, the depletion deduction is allowed in the ore extracted or expected to be extracted. Regulations 45, Art. 23 (m)–2 and –10 (a) and (b). Thus the mine owner under Article 23 (m)–10 is compensated for the use of his mineral reserves in the production of gross income.

By the 1919 Regulations, the plan of restoring the sum of depletion deductions to capital and carrying a corresponding amount to income in the year of the termination of a lease without production was adopted instead of a permanent reduction of basis or a restoration of the depletion deductions to income for the years in which they were deducted. The Act—§ 23 (m)—did not specifically authorize this handling of unrealized depletion. By the terms of the section a reasonable allowance for depletion was required, "according to the peculiar conditions in each case." As Congress obviously could not foresee the multifarious circumstances which would involve questions of depletion, it delegated to the Commissioner the duty of making the regulations. Article 23 (m)–10 (c) was developed to take care of the type of situation where because of a lease's cancellation without extraction, the reason for allowing depletion disappeared. As no diminution occurred in the ore mass, no depletion was appropriate. Congress has enacted numerous revenue acts since that time and has seen no occasion to change the statutory delegation of authority to the Commissioner of Internal Revenue which is the basis of this long-standing regulation. This evidences that subsections 23 (m)–10 (b) and (c) are within the rule-making authority which was intended to be granted the Commis-

sioner. *National Lead Co.* v. *United States,* 252 U. S. 140, 145–46; *Murphy Oil Co.* v. *Burnet,* 287 U. S. 299, 307.

As no depletion of the ore mass occurred or can occur under the lease which produced the gross income, the issue is not whether the regulation gives a reasonable allowance for depletion when prepaid royalties are involved. That issue has been decided in favor of the validity of such allowances in other cases. *Herring* v. *Commissioner,* 293 U. S. 322; *Murphy Oil Co.* v. *Burnet,* 287 U. S. 299. The problem here is the validity of Article 23 (m)–10 (c) when the depletion for which a deduction has been previously allowed fails in the manner anticipated as a possibility at the time of deduction.

A. Petitioners attack the validity of the regulation on the ground that the restoration of the accumulated deductions to capital, i. e., the depletion basis, with a corresponding increase of the taxpayers' annual income for the year of the restoration, is contrary to the requirements of certain sections of the 1936 Act. §§ 23 (m), 114 (b) (1) and 113 (b) (1) (B). It is unnecessary to appraise the effect in other years of the antecedents of these sections. Petitioners urge that the depletion deductions which were the untaxed portion of the royalties paid in prior years were capital recoveries in those prior years which resulted in a statutory, permanent reduction of basis which cannot be restored to basis and hence cannot be treated as income for 1937. Petitioners point to § 23 (m), *supra,* p. 278, as providing for the deduction for depletion on payment of advance royalties. It is contended that §§ 114 (b) (1) and 113 (b) (1) (B)[3] supplement the statutory direction

[3] "SEC. 114. BASIS FOR DEPRECIATION AND DEPLETION.

* * * * *

(b) Basis for depletion.—

(1) GENERAL RULE.—The basis upon which depletion is to be allowed in respect of any property shall be the adjusted basis provided

of 23 (m) for depletion by requiring the permanent lowering of the basis to reflect the depletion which § 23 offers.[4] This, of course, is a contention that depletion for advance royalties is, as a matter of statute, not necessarily and inevitably tied to extraction, actual or prospective. Summarily expressed, it is that the depletion was permanent, not conditional, and not subject to recovery when it became clear that no minerals were to be extracted.

To accept these arguments as a sound interpretation of the meaning of these provisions, however, would put into § 23 (m) of the Act of 1936 a requirement for depletion against advance royalties which the words of § 114 do not import. We think the Government is correct in its argument that the adjustment of basis authorized by § 113 (b) (1) (A) includes a restoration of depletion to capital account (basis) under the words "or other items,

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in section 113 (b) for the purpose of determining the gain upon the sale or other disposition of such property, except as provided in paragraphs (2), (3), and (4) of this subsection. . . ."

"SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

(b) Adjusted basis.—The adjusted basis for determining the gain or loss from the sale or other disposition of property, whenever acquired, shall be the basis determined under subsection (a), adjusted as hereinafter provided.

(1) GENERAL RULE.—Proper adjustment in respect of the property shall in all cases be made—

(A) for expenditures, receipts, losses, or other items, properly chargeable to capital account, including taxes and other carrying charges on unimproved and unproductive real property, but no such adjustment shall be made for taxes or other carrying charges for which deductions have been taken by the taxpayer in determining net income for the taxable year or prior taxable years;

(B) in respect of any period since February 28, 1913, for exhaustion, wear and tear, obsolescence, amortization, and depletion, to the extent allowed (but not less than the amount allowable) under this Act or prior income tax laws. . . ."

[4] The second sentence of § 23 (m), relating to a change of estimate as to recoverable mineral, is said to indicate a legislative intention that the basis, once reduced, is not to be restored.

properly chargeable to capital account," when the termination of the lease without extraction of ore forces the reconsideration of depletion. Consequently, we hold that §§ 23 (m), 114 (b) (1) and 113 (b) (1) (B) do not affect the power of the Commissioner under § 23 (m) to restore to the basis the amounts previously deducted in accordance with Article 23 (m)–10 (b) of Regulations 94. The taxpayer who receives advance royalties receives a gross income but has no statutory right to depletion apart from actual or prospective extraction. To grant irrecoverable depletion in circumstances where cancellation of the lease occurs prior to extraction would sever depletion from extraction and, if no later extraction followed, deflect income into the capital account without any corresponding capital loss.

B. Petitioners vigorously press another argument against the validity of the regulations. This is that the separate annual instalments of untaxed royalties (prior depletion deductions), since these untaxed portions of the royalties were income for the prior years, may not be accumulated and taxed for 1937 because such treatment is fictional, distorts the 1937 income to petitioners' detriment, is unreasonable and violates §§ 23 (m), 41 and 42 of the Act. The latter two sections require the computation of income, net and gross, upon the basis of an annual accounting period and the inclusion of gross income in the year received by the taxpayer. The applicability of all three sections depends upon whether a sum equal to depletion deductions allowed in prior years may be treated as income for 1937. Petitioners deny that this may be done and rely for the soundness of their position upon the familiar principle of annual computation of income, "as the net result of all transactions within the year." *Burnet* v. *Sanford & Brooks Co.*, 282 U. S. 359, 365.

It is true that the advanced royalties were income to the taxpayers for the respective years in which they were received. A certain portion of each of such payments was, however, properly deducted from this income for depletion under Article 23 (m)–10 (b). In accordance with our position and conclusion, as set out in the paragraphs under the preceding section A of this opinion, such deductions were not finally charged to basis but were tentatively so charged, subject to the contingency that there should occur under the lease an actual extraction of mineral units which would be allocable to the deduction. Under subsection (c) there was the further requirement that if the contingency failed, the suspended sums should fall into income in the year that the failure was manifested by the termination of the lease. It seems entirely proper for the Commissioner not only to provide for a reasonable allowance for depletion when advance royalties are paid but also to provide for the situation when the expected depletion did not take place. Annual deductions were made by the taxpayer from his income. These were allowed to compensate for the exhaustion of capital. An event occurred in 1937, the termination of the lease, which restored the deductions for depletion to income. This requirement is, we think, within the delegation of authority to the Commissioner. The power delegated to him to make regulations for depletion must necessarily include power to provide for situations where the anticipated depletion of the mineral mass does not occur.

The manner in which the Commissioner exercised that power by attributing the sums restored to basis to the 1937 income, rather than to the years 1929 to 1936, is not invalid as an arbitrary penalty or an improper attribution under the theory of an annual period for determination of income taxes. On the termination of the lease, the

lessee surrendered the right to extract without royalty the ore for which royalty had been prepaid. This surrender returned to the taxpayer in 1937 a legal right. Thereupon the taxpayer was in position to again sell the right to extract this ore or to mine that selfsame ore itself. The record does not show any valuation of this right which the lessee surrendered. The lessee paid for the right the amount attributed to the petitioners' income. Irrespective of the actual value of the right in 1937, it does not seem unfair for a general regulation to put this value on the right restored to the taxpayer in the year of its restoration. The decisions uphold the regulation. *Sneed* v. *Commissioner,* 119 F. 2d 767, 770–771; 121 F. 2d 725; *Lamont* v. *Commissioner,* 120 F. 2d 996; Grace M. Barnett, 39 B. T. A. 864.[5]

[5] Petitioner calls attention to Knapp *v.* Commissioner, 7 B. T. A. 790, and Cooper *v.* Commissioner, 7 B. T. A. 798, acquiesced in respectively by the Commission, Acq. VII–1 Cum. Bul. 17 and 7, June 30, 1928; Acquiescence withdrawn December 31, 1932, XI–2 Cum. Bul. 12, 14. Petitioners' point is that whatever may be the validity of the regulations, taxpayers should not have their depletion deductions, for the years when the Commissioner's acquiescence was in effect, carried to income in a later year. We agree that these decisions held invalid a regulation like Art. 23 (m)–10 (c) which includes in income for a taxable year deductions allowed in prior years. The effect of the Commissioner's acquiescence is uncertain. Cf. C. B. XIII–2–IV. During the period of acquiescence, the regulation continued in existence and was republished in the edition of December 1, 1931, approved February 15, 1929, of Regulations 74 under the Revenue Act of 1928, Art. 236 (c). This was prior to the decision in *Murphy Oil Co.* v. *Burnet,* 287 U. S. 299, 304, decided December 5, 1932, thought by petitioner to have brought about the withdrawal of the acquiescence. Acquiescence by the Commissioner in a Tax Court ruling followed by action which is inconsistent with the withdrawal of an affected regulation is not a sufficiently definite administrative practice to justify a judicial ruling against the regulation on the strength of the acquiescence. *Estate of Sanford* v. *Commissioner,* 308 U. S. 39, 49; *Higgins* v. *Smith,* 308 U. S. 473, 478.

The restoration of the right to petitioners in 1937 is analogous to the surrender of a leasehold, improved by the lessee, to the lessor. In such a case, the value of the improvements is income to the lessor at the time of the surrender. *Helvering* v. *Bruun,* 309 U. S. 461. Cf. *Maryland Casualty Co.* v. *United States,* 251 U. S. 342.

C. The last contention of petitioners for our consideration is that where depletion deductions were taken in years when no equivalent tax benefit resulted, the amount of the deduction which resulted in no tax benefit should not be attributed to the year of the surrender of the lease. This question arises only in No. 131. The Board of Tax Appeals refused to allow the addition to the 1937 income of the taxpayer of sums which represented the amount of deductions for depletion beyond amounts of deductions which offset income. The Circuit Court of Appeals reversed.

Upon this last point, the decision below in No. 131 is affirmed by an equally divided court. The members of this Court who join in the dissent do not reach this question but their position on other issues results in their voting for a reversal of the entire judgment of the Circuit Court of Appeals. Two other members of this Court are of the view that in No. 131 the judgment of the Circuit Court of Appeals should be reversed and that the decision of the Board of Tax Appeals should be affirmed.

In Nos. 130, 132 and 133, the foregoing leads us to the conclusion that the regulations are valid and the judgments of the Circuit Court of Appeals are

Affirmed.

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

MR. JUSTICE RUTLEDGE, dissenting:

In my opinion Article 23 (m)–10 (c) is not a reasonable exercise of the rule-making authority conferred by § 23.

By that section Congress provided: "In computing net income there *shall be* allowed as deductions . . . *a reasonable allowance* for depletion . . . according to the peculiar conditions in each case . . . under rules and regulations to be prescribed by the Commissioner, with the approval of the Secretary." Revenue Act of 1936, 49 Stat. 1648. (Emphasis added.) Since adoption of the Revenue Act of 1918 this authority has been executed in part by Regulations 45, Article 215 (c) and its successors, which permit the deduction in years when advance royalties are received. It is not urged, nor could it well be, that the deduction in such circumstances is not one comprehended by the statute. In making that mandate Congress clearly did not intend the privilege to be granted merely on terms which would defeat its operation. Yet this, in my judgment, is exactly the effect of Article 23 (m)–10 (c).

In requiring that "a corresponding amount must be returned as income for the year in which the lease expires, terminates, or is abandoned," the regulation piles up as "income" for a single year the sum of all the deductions taken in the previous ones. Wholly apart from whether in theory or in fact "income" can be said to be realized by thus piling up the deductions,[1] this requirement imposes risks and burdens upon taking the deduction heavier than any advantage to be gained from it and therefore prohibitive.

The consequences hardly could be illustrated better than by the case of Bessie P. Douglas. By taking the deduction during the eight years when she received advance royalties, 1929 to 1936 inclusive, she saved a total in taxes of about $7,000. Then her lease was canceled by the lessee. And in 1937, a year in which she received no cash return from the lease, her tax liability was increased by

[1] Compare, e. g., 26 U. S. C. §§ 11–23, and see also 4 Mertens, Law of Federal Income Taxation (1942) § 24.64.

about $26,500 for having taken the deduction in previous years. She was thus forced to pay approximately $19,500 more in taxes than if she had never taken it.

The regulation's destructive effect bears on all who receive advance royalties, not merely on those who actually must return accumulated prior deductions as "income" in a single year. The taxpayer must take the deduction, if at all, as his royalties accrue, not later as the ore is removed. The system of annual accounting is said to require this. Cf. *Burnet* v. *Thompson Oil & Gas Co.*, 283 U. S. 301, 306; *Burnet* v. *Sanford & Brooks Co.*, 282 U. S. 359. Yet it is said also to require that the deductions be telescoped into "income" for a single year in which the returns they represent are not received, and with an effect in tax burden, by the mere fact of the aggregation, far beyond any which would be imposed if the deductions never had been authorized or taken. Hence all who receive advance royalties are faced with the choice of taking the deductions and thus risking this pyramiding of "income," against the chance the lessee will some day deplete the property, or of foregoing the deductions altogether.

It is true the taxpayer may receive an economic benefit in the release of his ore from the right of another to remove it. And by the regulation's requirement that he restore to his capital account an amount equal to the sum of the accumulated deductions, he also receives a possible future tax benefit in larger deductions allowable if and when he sells or leases the minerals again. But these benefits are wholly uncertain. In fact, release of his ore from the right of removal gives him not income then realized in cash to the amount of accumulated deductions, but unsold ore in the ground which the lessee has found it unprofitable to remove although he has paid for it. The only contingency on which the taxpayer really benefits by the deductions is in the event the lessee ultimately does deplete the property. But it is difficult to

believe Congress deliberately extended the opportunity for deduction to lessors whose property is not in fact depleted by the lessee's operations [2] only to authorize the Commissioner to nullify and penalize that opportunity. This the regulation does, in effect, when it imposes on one who takes the deduction the risk, on a contingency beyond his control, of having to pay in taxes several times the amount of the deductions on the happening of the contingency.

Nor is the regulation reasonably adapted to recoupment of the losses in revenue, wholly proper when incurred but which later events require to be made up. On the contrary, it perverts recoupment by pyramiding income spread in receipt over many years into "income" received in a single, entirely different one. And in a day when the tax rate mounts more often than yearly the skyrocketing effect of the process operates with wholly incalculable effect on the taxpayer, who it will be noted has no control over the contingency which brings it into play.

A regulation which would require the taxpayer to pay the taxes deducted for the prior years together with the usual interest and penalties would be harsh enough in discouragement of taking the deduction. In effect it would penalize one who rightfully takes an allowance as much as one who wrongfully does so. But, even so, this would bear some semblance of reasonable relation to recouping the losses sustained by the revenue and to allocating income to the year in which it is received. However, to amalgamate the deductions into "income" for a single year, in which none of it is actually received, is an entirely different thing. It is to make of the so-called scheme of deductions a snare for the unwary who violate no law

[2] Compare Rev. Act of 1913 § II (G) (b); Rev. Act of 1916 § 5 (a) (Eighth) (b) with Rev. Act of 1918 § 234 (a) (9); Rev. Act of 1936 § 23 (m).

but comply with it fully; and at the same time to strain the theory of annual accounting beyond any reasonable application.

The regulation, therefore, both effectively nullifies a privilege which Congress provided the taxpayer shall have and reaches farther than any reasonable recouping provision should go. It is no answer to say deduction is a privilege which Congress need not have extended, or having extended can qualify out of existence. The question is whether Congress did, or authorized the Commissioner to do, the latter. Its language, its prior treatment of the problem [3] and its treatment of a related problem in the identical section of the Revenue Act all point to the conclusion it did neither.

Other questions are raised on the record. It is unnecessary to consider them. In my opinion Congress would not have nullified its grant of the privilege to take "a reasonable allowance for depletion" by enacting Article 23 (m)–10 (c) to make exercising it so hazardous, capricious, and unjust in consequence.[4] That being true, I do not think authority was delegated to the Commissioner to adopt or to the Secretary to approve it. I would reverse the judgment.

MR. JUSTICE MURPHY joins in this opinion.

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[3] Cf. note 2 *supra*.

[4] The uncertain career of Article 23 (m)–10 (c), adverted to in the Court's opinion, offers no support for Congressional acquiescence in the Commissioner's position before 1932 and only doubtfully suggests it after that date. In this case the nullifying effect of the limitation upon the privilege granted prevents removal of that doubt.

NORTHWEST AIRLINES, INC. *v.* MINNESOTA.

CERTIORARI TO THE SUPREME COURT OF MINNESOTA.

No. 33. Argued October 19, 20, 1944.—Decided May 15, 1944.

A corporation which was incorporated under the laws of Minnesota, and which had its principal place of business in that State, owned and operated in interstate commerce a fleet of airplanes; for all of the planes, a city within the State was the home port registered with the Civil Aeronautics Authority and the overhaul base; and none of the planes was continuously without the State during the whole tax year. *Held* that a general Minnesota personal property tax applied to all personal property within the State and without discrimination applied on the corporation's entire fleet of airplanes did not violate the commerce clause, nor the due process clause of the Fourteenth Amendment, of the Federal Constitution. Pp. 293, 300.

213 Minn. 395, 7 N. W. 2d 691, affirmed.

CERTIORARI, 319 U. S. 734, to review the affirmance of a judgment for the State in a suit against the company to recover delinquent personal property taxes.

Mr. Michael J. Doherty, with whom *Mr. W. E. Rumble* was on the brief, for petitioner.

Mr. Andrew R. Bratter and *Mr. George B. Sjoselius,* Assistant Attorney General of Minnesota, with whom *Messrs. J. A. A. Burnquist,* Attorney General, and *James F. Lynch* were on the brief, for respondent.

MR. JUSTICE FRANKFURTER announced the conclusion and judgment of the Court.

The question before us is whether the Commerce Clause or the Due Process Clause of the Fourteenth Amendment bars the State of Minnesota from enforcing the personal property tax it has laid on the entire fleet of airplanes owned by the petitioner and operated by it in interstate transportation. The answer involves the application of

settled legal principles to the precise circumstances of this case. To these, about which there is no dispute, we turn.

Northwest Airlines is a Minnesota corporation and its principal place of business is St. Paul. It is a commercial airline carrying persons, property and mail on regular fixed routes, with due allowance for weather, predominantly within the territory comprising Illinois, Minnesota, North Dakota, Montana, Oregon, Wisconsin and Washington. For all the planes St. Paul is the home port registered with the Civil Aeronautics Authority, under whose certificate of convenience and necessity Northwest operates. At six of its scheduled cities, Northwest operates maintenance bases, but the work of rebuilding and overhauling the planes is done in St. Paul. Details as to stopovers, other runs, the location of flying crew bases and of the usual facilities for aircraft, have no bearing on our problem.

The tax in controversy is for the year 1939. All of Northwest's planes were in Minnesota from time to time during that year. All were, however, continuously engaged in flying from State to State, except when laid up for repairs and overhauling for unidentified periods. On May 1, 1939, the time fixed by Minnesota for assessing personal property subject to its tax (Minn. Stat. 1941, § 273.01), Northwest's scheduled route mileage in Minnesota was 14% of its total scheduled route mileage, and the scheduled plane mileage was 16% of that scheduled. It based its personal property tax return for 1939 on the number of planes in Minnesota on May 1, 1939. Thereupon the appropriate taxing authority of Minnesota assessed a tax against Northwest on the basis of the entire fleet coming into Minnesota. For that additional assessment this suit was brought. The Supreme Court of Minnesota, with three judges dissenting, affirmed the judgment of a lower court in favor of the State. 213 Minn.

395, 7 N. W. 2d 691. A new phase of an old problem led us to bring the case here. 319 U. S. 734.

The tax here assessed by Minnesota is a tax assessed upon "all personal property of persons residing therein, including the property of corporations . . ." Minn. Stat. 1941, § 272.01. It is not a charge laid for engaging in interstate commerce or upon airlines specifically; it is not aimed by indirection against interstate commerce or measured by such commerce. Nor is the tax assessed against planes which were "continuously without the State during the whole tax year," *N. Y. Central & H. R. R. Co.* v. *Miller,* 202 U. S. 584, 594, and had thereby acquired "a permanent location elsewhere," *Southern Pacific Co.* v. *Kentucky,* 222 U. S. 63, 68; and see *Cream of Wheat Co.* v. *Grand Forks,* 253 U. S. 325, 328–330.

Minnesota is here taxing a corporation for all its property within the State during the tax year no part of which receives permanent protection from any other State. The benefits given to Northwest by Minnesota and for which Minnesota taxes—its corporate facilities and the governmental resources which Northwest enjoys in the conduct of its business in Minnesota—are concretely symbolized by the fact that Northwest's principal place of business is in St. Paul and that St. Paul is the "home port" of all its planes. The relation between Northwest and Minnesota—a relation existing between no other State and Northwest—and the benefits which this relation affords are the constitutional foundation for the taxing power which Minnesota has asserted. See *State Tax Comm'n* v. *Aldrich,* 316 U. S. 174, 180. No other State can claim to tax as the State of the legal domicile as well as the home State of the fleet, as a business fact. No other State is the State which gave Northwest the power to be as well as the power to function as Northwest functions in Minnesota; no other State could impose a tax that derives from the significant legal relation of creator and creature

and the practical consequences of that relation in this case. On the basis of rights which Minnesota alone originated and Minnesota continues to safeguard, she alone can tax the personalty which is permanently attributable to Minnesota and to no other State. It is too late to suggest that this taxing power of a State is less because the tax may be reflected in the cost of transportation. See *Delaware Railroad Tax*, 18 Wall. 206, 232.

Such being the case, it is clearly ruled by *N. Y. Central & H. R. R. Co.* v. *Miller, supra.* Here, as in that case, a corporation is taxed for all its property within the State during the tax year none of which was "continuously without the State during the whole tax year." Therefore the doctrine of *Union Transit Co.* v. *Kentucky,* 199 U. S. 194, does not come into play. The fact that Northwest paid personal property taxes for the year 1939 upon "some proportion of its full value" of its airplane fleet in some other States does not abridge the power of taxation of Minnesota as the home State of the fleet in the circumstances of the present case. The taxability of any part of this fleet by any other State than Minnesota, in view of the taxability of the entire fleet by that State, is not now before us. It was not shown in the *Miller* case and it is not shown here that a defined part of the domiciliary corpus has acquired a permanent location, *i. e.,* a taxing situs, elsewhere.[1] That

[1] In the *Miller* case, the New York Central Railroad introduced evidence that during the taxable years in question, a proportion of its cars, ranging from about 12% to 64%, was used outside of New York. This figure was arrived at by using the ratio between Central's mileage outside of New York and its total mileage. The comptroller nevertheless ruled that all of Central's cars were taxable in New York, the State of domicile. On review of this ruling as applied in the first tax year involved, the New York Court of Appeals remitted the proceedings to the comptroller to determine whether any of the rolling stock was used exclusively out of the State. 173 N. Y. 255, 65 N. E. 1102. No such evidence was introduced for any tax year, although there was evidence to show "that a certain proportion of cars, although

was the decisive feature of the *Miller* case, and it was deemed decisive as late as 1933 in *Johnson Oil Co.* v. *Oklahoma*, 290 U. S. 158, which was strongly pressed upon us by Northwest. In that case it was not the home State, Illinois, but a foreign State, Oklahoma, which was seeking to tax a whole fleet of tank cars used by the oil company. That case fell outside of the decision of the *Miller* case and ours falls precisely within it. "Appellant had its domicile in Illinois," as Mr. Chief Justice Hughes pointed out, "and that State had jurisdiction to tax appellant's personal property which had not acquired an actual situs elsewhere." 290 U. S. at 161.[2] This constitutional basis for what Minnesota did reflects practicalities in the relations between the States and air transportation. "It has been customary to tax operating airplanes at their overhaul

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not the same cars, was continuously without the State during the whole tax year." 202 U. S. 584, 594. The comptroller made no reduction in the tax, and this action was affirmed by the Appellate Division (89 App. Div. 127, 84 N. Y. S. 1088), the Court of Appeals (177 N. Y. 584, 69 N. E. 1129) and on review here.

[2] In the *Johnson Oil Co.* case, *supra*, this Court reaffirmed not less than three times that the State of domicile has jurisdiction to tax the personal property of its corporation unless such property has acquired an "actual situs" in another State. And by "actual situs" it meant, as its references to *Union Transit Co.* v. *Kentucky*, *supra*, and the *Miller* case indicate, what those cases required for "actual situs" before the constitutional power of the domiciliary State to tax could be curtailed, namely continuous presence in another State which thereby supplants the home State and acquires the taxing power over personalty that has become a permanent part of the foreign State. Surely the situs which personal property may acquire for tax purposes in a State other than that of the owner's domicile cannot be made to depend on some undefined concept of "permanence" short of a tax year, leaving the adequate size of the fraction of the tax year for judicial determination in each year. Such a doctrine would play havoc with the tax laws of the forty-eight States. It would multiply manifold the recognized difficulties of ascertaining the domicile of individuals. See *Texas* v. *Florida*, 306 U. S. 398; *District of Columbia* v. *Murphy*, 314 U. S. 441.

base." Thompson, *State and Local Taxation Affecting Air Transportation* (1933) 4 J. Air L. 479, 483.

The doctrine of tax apportionment for instrumentalities engaged in interstate commerce introduced by *Pullman's Car Co.* v. *Pennsylvania,* 141 U. S. 18, is here inapplicable. The principle of that case is that a nondomiciliary State may tax an interstate carrier "engaged in running railroad cars into, through and out of the State, and having at all times a large number of cars within the State . . . by taking as the basis of assessment such proportion of its capital stock as the number of miles of railroad over which its cars are run within the State bears to the whole number of miles in all the States over which its cars are run." *Union Transit Co.* v. *Kentucky, supra,* at 206. This principle was successively extended to the old means of transportation and communication, such as express companies and telegraph systems. But the doctrine of apportionment has neither in theory nor in practice been applied to tax units of interstate commerce visiting for fractional periods of the taxing year. (Thus, for instance, "The coaches of the company . . . are daily passing from one end of the State to the other," in *Pullman's Car Co.* v. *Pennsylvania, supra,* at 20, citing the opinion of the court below in 107 Pa. 156, 160.) The continuous protection by a State other than the domiciliary State—that is, protection throughout the tax year—has furnished the constitutional basis for tax apportionment in these interstate commerce situations, and it is on that basis that the tax laws have been framed and administered.

The taxing power of the domiciliary State has a very different basis. It has power to tax because it is the State of domicile and no other State is. For reasons within its own sphere of choice Congress at one time chartered interstate carriers and at other times has left the chartering and all that goes with it to the States. That is a practical fact of legislative choice and a practical fact

from which legal significance has always followed. That far-reaching fact was recognized, as a matter of course, by Mr. Justice Bradley in his dissent in the *Pullman's Car Co.* case, *supra*, at 32. Congress of course could exert its controlling authority over commerce by appropriate regulation and exclude a domiciliary State from authority which it otherwise would have because it is the domiciliary State. But no judicial restriction has been applied against the domiciliary State except when property (or a portion of fungible units) is permanently situated in a State other than the domiciliary State.[3] And permanently means continuously throughout the year, not a fraction thereof, whether days or weeks.

Such was the unanimous decision in the *Miller* case or the *Miller* case decided nothing. The present case is precisely the case which Mr. Justice Holmes assumed the *Miller* case to be. By substituting Minnesota for New York we have inescapably the facts of the present case: "Suppose, then, that the State of Minnesota had taxed the property directly, there was nothing to hinder its taxing the whole of it. It is true that it has been decided that property, even of a domestic corporation, cannot be taxed

[3] In the most recent apportionment case to come before this Court, *Nashville, C. & St. L. Ry.* v. *Browning*, 310 U. S. 362, we merely sustained the application by the Tennessee Railroad Commission and the Tennessee Supreme Court of a "familiar and frequently sanctioned formula" for apportionment on a mileage basis against the claim of the inapplicability of this formula in the circumstances of that case because of the disparity in the revenue-producing capacity between the lines in and out of Tennessee. Mathematical exactitude in making the apportionment has never been a constitutional requirement. That is the essence of the *Browning* holding. No suggestion can be found at any stage of that litigation in any wise touching the present problem, namely, whether the domiciliary State is constitutionally limited in taxing all the movables that come within it except by the *Union Transit* doctrine, that a proportion which had during the entire tax year been within another State cannot be taxed in the domiciliary State.

if it is permanently out of the State. . . . But it has not been decided, and it could not be decided, that a State may not tax its own corporations for all their property within the State during the tax year, even if every item of that property should be taken successively into another State for a day, a week, or six months, and then brought back. Using the language of domicil, which now so frequently is applied to inanimate things, the State of origin remains the permanent situs of the property, notwithstanding its occasional excursions to foreign parts." *N. Y. Central & H. R. R. Co.* v. *Miller, supra,* at 596–597.[4] Surely, the power of the State of origin to "tax its own corporations for all their property within the State during the tax year" cannot constitutionally be affected whether the property takes fixed trips or indeterminate trips so long as the property is not "continuously without the State during the whole tax year," *N. Y. Central & H. R. R. Co.* v. *Miller, supra,* at 594, even when, as in the *Miller* case, from 12% to 64% of the property was shown to have been used outside of New York during the tax year, but in no one visited State permanently, that is, for the whole year. And that is the decisive constitutional fact about the *Miller* case—that although from 12% to 64% of the rolling stock of the railroad was outside of New York throughout the tax year, New York was nevertheless allowed to tax it all because no part was in any other State throughout the year.

To introduce a new doctrine of tax apportionment as a limitation upon the hitherto established taxing power of the home State is not merely to indulge in constitutional

[4] In speaking of "occasional excursions to foreign parts" and "random excursions" (202 U. S. at 597), Mr. Justice Holmes merely put colloquially the legally significant fact that neither any specific cars nor any average of cars was so continuously in any other State as to have been withdrawn from the home State and to have established for tax purposes an adopted home State.

innovation. It is to introduce practical dislocation into the established taxing systems of the States. The doctrine of tax apportionment has been painfully evolved in working out the financial relations between the States and interstate transportation and communication conducted on land and thereby forming a part of the organic life of these States. Although a part of the taxing systems of this country, the rule of apportionment is beset with friction, waste and difficulties, but at all events it grew out of, and has established itself in regard to, land commerce.[5] To what extent it should be carried over to the totally new problems presented by the very different modes of transportation and communication that the airplane and the radio have already introduced, let alone the still more subtle and complicated technological facilities that are on the horizon, raises questions that we ought not to anticipate; certainly we ought not to embarrass the future by judicial answers which at best can deal only in a truncated way with problems sufficiently difficult even for legislative statesmanship.

The doctrine in the *Miller* case, which we here apply, does not subject property permanently located outside of the domiciliary State to double taxation. But not to subject property that has no locality other than the State of its owner's domicile to taxation there would free such floating property from taxation everywhere. And what the *Miller* case decided is that neither the Commerce Clause nor the Fourteenth Amendment affords such constitutional immunity.

Each new means of interstate transportation and communication has engendered controversy regarding the

[5] And that the constitutional power of the domiciliary State to tax vessels is precisely the same as its power to tax rolling stock is conclusively shown by the Court's reliance in the *Miller* case on a case decided a week before, namely, *Ayer & Lord Co.* v. *Kentucky*, 202 U. S. 409.

taxing powers of the States *inter se* and as between the States and the Federal Government. Such controversies and some conflict and confusion are inevitable under a federal system. They have long been the source of difficulty and dissatisfaction for us, see J. B. Moore, *Taxation of Movables and the Fourteenth Amendment* (1907) 7 Col. L. Rev. 309; Groves, *Intergovernmental Fiscal Relations,* Proceedings Thirty-fifth Annual Conference, National Tax Association, p. 105, and have equally plagued the British federal systems, see Report of the [Australian] Royal Commission on the Constitution, (1929) c. XII (p. 127), c. XIX (p. 187), c. XXIII (at p. 259); Report of the [Canadian] Royal Commission on Dominion-Provincial Relations, (1940) Bk. I, c. VIII, Bk. II, § B, c. III. In response to arguments addressed also to us about the dangers of harassing state taxation affecting national transportation, the concurring judge below adverts to the power of Congress to incorporate airlines and to control their taxation. But insofar as these are matters that go beyond the constitutional issues which dispose of this case, they are not our concern.

Affirmed.

MR. JUSTICE BLACK, concurring:

I concur in the judgment of the Court and in substantially all that is said in the opinion, but I would not in this case foreclose consideration of the taxing rights of States other than Minnesota.

I believe there is small support in reason or in the Constitution for the doctrine that the Commerce Clause in and of itself prohibits a state from applying its general tax laws to transactions and properties in interstate commerce unless it is able to make two correct prophecies as to what this Court ultimately may hold, namely, (1) The permissible total of taxes which might be imposed by an aggregate of states on the taxed properties or transactions; and (2) The proportion of this total which the state itself

fairly may claim. See dissenting opinions in *Adams Manufacturing Co.* v. *Storen*, 304 U. S. 307, 316; *Gwin, White & Prince* v. *Henneford*, 305 U. S. 434, 442. Extension of this dubious doctrine to the new problems of air transport gives promise of little but tax confusion.

The differing views of members of the Court in this and related cases illustrate the difficulties inherent in the judicial formulation of general rules to meet the national problems arising from state taxation which bears in incidence upon interstate commerce. These problems, it seems to me, call for Congressional investigation, consideration, and action. The Constitution gives that branch of government the power to regulate commerce among the states, and until it acts I think we should enter the field with extreme caution. See dissenting opinion, *McCarroll* v. *Dixie Greyhound Lines*, 309 U. S. 176, 183.

MR. JUSTICE JACKSON, concurring:

This case considers for the first time constitutional limitations upon state power to tax airplanes. Several principles of limitation have been judicially evolved in reference to ships and to railroad rolling stock. The question is which, if any, of these should be transferred to air transport.

We are at a stage in development of air commerce roughly comparable to that of steamship navigation in 1824 when *Gibbons* v. *Ogden*, 9 Wheat. 1, came before this Court. Any authorization of local burdens on our national air commerce will lead to their multiplication in this country. Moreover, such an example is not likely to be neglected by other revenue-needy nations as international air transport expands.

Aviation has added a new dimension to travel and to our ideas. The ancient idea that landlordism and sovereignty extend from the center of the world to the periph-

ery of the universe has been modified. Today the landowner no more possesses a vertical control of all the air above him than a shore owner possesses horizontal control of all the sea before him. The air is too precious as an open highway to permit it to be "owned" to the exclusion or embarrassment of air navigation by surface landlords who could put it to little real use.

Students of our legal evolution know how this Court interpreted the commerce clause of the Constitution to lift navigable waters of the United States out of local controls and into the domain of federal control. *Gibbons* v. *Ogden,* 9 Wheat. 1, to *United States* v. *Appalachian Power Co.,* 311 U. S. 377. Air as an element in which to navigate is even more inevitably federalized by the commerce clause than is navigable water. Local exactions and barriers to free transit in the air would neutralize its indifference to space and its conquest of time.

Congress has recognized the national responsibility for regulating air commerce. Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls. It takes off only by instruction from the control tower, it travels on prescribed beams, it may be diverted from its intended landing, and it obeys signals and orders. Its privileges, rights and protection, so far as transit is concerned, it owes to the Federal Government alone and not to any state government.

Congress has not extended its protection and control to the field of taxation, although I take it no one denies that constitutionally it may do so. It may exact a single uniform federal tax on the property or the business to

the exclusion of taxation by the states. It may subject the vehicles or other incidents to any type of state and local taxation, or it may declare them tax-free altogether. Our function is to determine what rule governs in the absence of such legislative enactment.

Certainly today flight over a state either casually or on regular routes and schedules confers no jurisdiction to tax. Earlier ideas of a state's sovereignty over the air above it might argue for such a right to tax, but it is one of those cases where legal philosophy has to take account of the fact that the world does move.

Does the act of landing within a state, even regularly and on schedule, confer jurisdiction to tax? Undoubtedly a plane, like any other article of personal property, could land or remain within a state in such a way as to become a part of the property within the state. But when a plane lands to receive and discharge passengers, to undergo servicing or repairs, or to await a convenient departing schedule, it does not in my opinion lose its character as a plane in transit. Long ago this Court held that the landing of a ship within the ports of a state for similar purposes did not confer jurisdiction to tax. *Hays* v. *Pacific Mail S. S. Co.*, 17 How. 596; *St. Louis* v. *Ferry Co.*, 11 Wall. 423; *Morgan* v. *Parham*, 16 Wall. 471; cf. *Ayer & Lord Tie Co.* v. *Kentucky*, 202 U. S. 409. I cannot consider that to alight out of the skies onto a landing field and take off again into the air confers any greater taxing jurisdiction on a state than for a ship for the same purposes to come alongside a wharf on the water and get under way again.

What, then, remains as a basis for Minnesota's claim to tax this entire fleet of planes at their full value as property of the State of Minnesota? They have been within the state only transiently and in the same manner in which they have been in many states: to serve the public and to be serviced. The planes have received no "protection"

or "benefit" from Minnesota that they have not received from many others. It might be difficult, in view of the complete control of this type of activity by the Federal Government, to find what benefits or protection any state extends. But no distinction whatever can be pointed out between those extended by Minnesota and those extended by any state where there is a terminal or a stopping place.

But it is said that Minnesota incorporated the company. Of course it is her right to tax the company she has created and the franchise she has granted. I suppose there are many ways that she might constitutionally measure the value of this privilege. If she chartered a corporation on condition that all property it might acquire, tangible or intangible, should be taxable under her laws, I do not think a company which accepted such a charter could appeal to the Constitution to give back what it voluntarily contracted away. But no such stipulation has been made in the charter in this case. The tax imposed here is a general *ad valorem* property tax on the full value of every plane of the fleet operated by this company. Domicile of an owner is a usual test of power to tax intangibles, but has not generally been a conclusive test of taxability of tangible property situated elsewhere. If we should suppose that this corporation had a Delaware charter instead of a Minnesota one, and had nothing in Delaware except its agent, but operated otherwise in Minnesota exactly as it has done, would we say that the entire right to tax the fleet moved to Delaware because it was the corporation's state of domicile? I do not think that domicile, in the facts of this case, is decisive of Minnesota's claim to tax the tangible property of the company wherever situate.

It is strongly and plausibly advocated that the theory of apportionment of the total value among the several states of operation, heretofore applied to state taxation

of railroad rolling stock, be transferred to air transportation. This would mean that each state of operation (no one ventures to say whether flight alone or both flight and landing would be required) could tax a proportion of the total value.

The apportionment theory is a mongrel one, a cross between desire not to interfere with state taxation and desire at the same time not utterly to crush out interstate commerce. It is a practical, but rather illogical, device to prevent duplication of tax burdens on vehicles in transit. It is established in our decisions and has been found more or less workable with more or less arbitrary formulae of apportionment. Nothing either in theory or in practice commends it for transfer to air commerce. A state has a different relation to rolling stock of railroads than it has to airplanes. Rolling stock is useless without surface rights and continuous structures on every inch of land over which it operates. Surface rights the railroad has acquired from the state or under its law. There is a physical basis within the state for the taxation of rolling stock which is lacking in the case of airplanes.

It seems more than likely that no solution of the competition among states to tax this transportation agency can be devised by the judicial process without legislative help. The best analogy that I find in existing decisions is the "home port" theory applied to ships. See *Hays* v. *Pacific Mail S. S. Co.*, *St. Louis* v. *Ferry Co.*, *Morgan* v. *Parham*, *supra*. There is difficulty in the application of this doctrine to air commerce, I grant. There is no statutory machinery for fixing the home port. If federal registration established statehood as it establishes nationality, the home port doctrine would be easy to apply. However, on the record before us it seems unquestioned that Minnesota is in an operational as well as in a domiciliary sense the home port of this fleet. On that doctrine Minnesota can tax the fleet, but its right to do so is exclusive,

for no other state can acquire jurisdiction to tax merely because it provides a port of call. I therefore concur in the conclusion reached by the opinion of MR. JUSTICE FRANKFURTER. I do not accept the opinion because it falls short of commitment that Minnesota's right is exclusive of any similar right elsewhere. It is, I know, difficult to judge and dangerous to foreclose claims of other states that are not before us. That is the weakness of the judicial process in these tax questions where the total problem that faces an industry reaches us only in installments. If the reasoning should hereafter be extended to support full taxation everywhere, it would offend the commerce clause, as I see it, even more seriously than apportioned taxation everywhere.

The evils of local taxation of goods or vehicles in transit are not measured by the exaction of one locality alone, but by the aggregation of them. I certainly do not favor exemption of interstate commerce from its "just share of taxation." But history shows that fair judgment as to what exactions are just to the passer-by cannot be left to local opinion. When local authority is taxing its own, the taxed ones may be assumed to be able to protect themselves at the polls. No such sanction enforces fair dealing to the transient. In all ages and climes those who are settled in strategic localities have made the moving world pay dearly. This the commerce clause was designed to end in the United States.

The rule I suggest seems most consonant with the purposes of the commerce clause among those found in our precedents. But the whole problem we deal with is unprecedented. I do not think we can derive from decisional law a satisfactory adjustment of the conflicting needs of the nation for free air commerce and the natural desire of localities to have revenue from the business that goes on about them.

I concur in the affirmance of the judgment below, but only because the record seems to me to establish Minnesota as a "home port" within the meaning of the old and somewhat neglected but to me wise authorities cited.

MR. CHIEF JUSTICE STONE, dissenting:

In my opinion the Minnesota levy imposed an unconstitutional tax on petitioner's vehicles of interstate transportation in violation of the commerce clause, and for that reason the judgment below should be reversed.

Petitioner, a Minnesota corporation, is owner of a large number of airplanes which it uses exclusively in interstate transportation moving on regular schedules and over fixed routes extending through eight states between Chicago, Illinois, and the Pacific coast, with the usual landing fields and maintenance bases at intermediate points, including Minneapolis and St. Paul, Minnesota. It is stipulated that on May 1, 1939, 14% of the total mileage of the prescribed interstate routes was in Minnesota and that 16% of the daily plane mileage of all petitioner's interstate planes was in that state.

Although the Minnesota statute taxing personal property directs that it shall be listed for taxation on May 1st of each year and assessed for taxation at its value on that date, Minn. Stat. 1941 § 273.01, the state taxing authorities have levied on petitioner, and the Minnesota Supreme Court and this Court have sustained, an annual tax on the full value of all its planes used in interstate commerce which have come into the state at any time during the year. It is evident that if, with the Minnesota tax now sustained, other states are left free to impose a further or comparable tax on the same property for the same tax period, a serious question is raised whether the tax is not a prohibited burden on interstate commerce.

It is no longer doubted that interstate business "must pay its way" by sustaining its fair share of the property

tax burden which the states in which the interstate business is done may lawfully impose generally on property located within them. See *Western Live Stock* v. *Bureau*, 303 U. S. 250, 254–5 and cases cited. Obviously interstate business bears no undue part of that burden if the personal property tax imposed on it by a given state is—like a tax on real estate located there—exclusive of all other property taxes imposed by other states, as is the case with the taxation of vessels, *Old Dominion S. S. Co.* v. *Virginia*, 198 U. S. 299; *Southern Pacific Ry.* v. *Kentucky*, 222 U. S. 63 and cases cited; cf. *N. Y. Central & H. R. R. Co.* v. *Miller*, 202 U. S. 584, or if the tax on its personal property regularly used over fixed routes in interstate commerce, both within and without the taxing state, is fairly apportioned to its use within the state, as has until now been the rule as to railroad cars. *Marye* v. *Baltimore & Ohio R. Co.*, 127 U. S. 117, 123–4; *Pullman's Car Co.* v. *Pennsylvania*, 141 U. S. 18; *American Refrigerator Transit Co.* v. *Hall*, 174 U. S. 70; *Union Transit Co.* v. *Lynch*, 177 U. S. 149; *Union Transit Co.* v. *Kentucky*, 199 U. S. 194; *Germania Refining Co.* v. *Fuller*, 245 U. S. 632; *Union Tank Line Co.* v. *Wright*, 249 U. S. 275; *Johnson Oil Co.* v. *Oklahoma*, 290 U. S. 158.

If the tax levied here were held to be exclusive of all property taxes imposed on petitioner's airplanes by other states there could be no serious question of an undue burden on interstate commerce. That question arises now only because the rationale found necessary to support the present tax leaves other states free to impose comparable taxes on the same property used in interstate commerce which Minnesota has already taxed for the entire taxable year and at its full value.

Such, I think, is the necessary consequence of the Court's decision and judgment now given. They do not sustain the tax on the ground that Minnesota, as the state of petitioner's domicile, has exclusive power to tax respondent's

planes which pass in and out of Minnesota in performance of their interstate functions. They do not deny that the planes are constitutionally subject, to some extent, to personal property taxes by the states through which they pass. Our decisions, as will presently appear, establish that they are, and that vehicles of interstate transportation moving from the state of the owner's domicile over regular routes within the jurisdiction of other states also acquire a tax situs there, so that, to an extent presently to be considered, they may be taxed by each of the states through which they pass. In fact the record discloses that petitioner's interstate planes, already taxed by Minnesota for their full value, are in addition subjected to personal property taxes in six of the seven other states through which they fly.

But if petitioner's airplanes, which are taxable for some portion of their value in each of the states in which they carry on interstate transportation over fixed routes and regular schedules, are also taxed for their full value by Minnesota, the state of the domicile, it is evident that merely because they are engaged in interstate commerce they may be subjected to multiple state taxation far in excess of their value, and far beyond any tax which any one of the states concerned could under its established system of taxation impose on vehicles whose movements are confined within its territorial limits. It is a scheme of property taxation on which, so far as the decision now rendered gives us any hint, the commerce clause sets no restriction, but which is so burdensome in its operation as compared with the taxes imposed on intrastate vehicles that few interstate carriers could support it and survive economically.

The case thus sharply presents in a new form the old question whether the commerce clause affords any protection against multiple state taxation of the physical

facilities used in interstate transportation which, because they move from state to state, are exposed to full taxation in each, save only as the due process and commerce clauses may prevent. Although the question is new in form it is old in substance and this Court has considered it so often in other but similar relationships that the answer here seems plain.

Of controlling significance in this case are certain elementary propositions, so long accepted and applied by this Court that they cannot be said to be debatable here, although they seem not to have been taken into account in deciding this case either here or in the Minnesota Supreme Court. The first is that the constitutional basis for the state taxation of the airplanes, which are chattels, is their physical presence within the taxing state, and not the domicile of the owner. *Union Transit Co.* v. *Kentucky, supra; Johnson Oil Co.* v. *Oklahoma, supra,* 161–2 and cases cited. In this respect, as this Court has often pointed out, the taxation of chattels rests on a different basis than does the taxation of intangibles, which have no physical situs and may be reached by the tax gatherer only through exertion of the power of the state over the person of those who have some legal interest in the intangibles. *Union Transit Co.* v. *Kentucky, supra,* 205–6; *Schwab* v. *Richardson,* 263 U. S. 88, 92; *Frick* v. *Pennsylvania,* 268 U. S. 473, 494; *Blodgett* v. *Silberman,* 277 U. S. 1, 16–18; *Wheeling Steel Corp.* v. *Fox,* 298 U. S. 193, 209–10; *Curry* v. *McCanless,* 307 U. S. 357, 363–6; *Graves* v. *Elliott,* 307 U. S. 383; *Graves* v. *Schmidlapp,* 315 U. S. 657; *State Tax Comm'n* v. *Aldrich,* 316 U. S. 174.

A state may, within the Fourteenth Amendment, tax a chattel located within its limits, although its owner is domiciled elsewhere. *Brown* v. *Houston,* 114 U. S. 622; *Coe* v. *Errol,* 116 U. S. 517; *Pullman's Car Co.* v. *Pennsylvania, supra; Old Dominion S. S. Co.* v. *Virginia, supra.*

But due process precludes the state of the domicile from taxing it unless it is brought within that state's boundaries. *Delaware, L. & W. R. Co.* v. *Pennsylvania,* 198 U. S. 341; *Union Transit Co.* v. *Kentucky, supra; Frick* v. *Pennsylvania, supra,* 489 *et seq.* It is plain then that for present purposes, and so far as the Fourteenth Amendment is concerned, respondent's airplanes, which are chattels regularly moving over fixed interstate routes, are subject in some measure to the taxing power of every state in which they regularly stop on their interstate mission.[1]

In some instances it may be that vehicles of transportation moving interstate are so sporadically and irregularly present in other states that they acquire no tax situs there, *Hays* v. *Pacific Mail S. S. Co.,* 17 How. 596; *St. Louis* v. *Ferry Co.,* 11 Wall. 423; *Morgan* v. *Parham,* 16 Wall. 471; *Ayer & Lord Tie Co.* v. *Kentucky,* 202 U. S. 409, and hence remain taxable to their full value by the state of the domicile because they are not taxable elsewhere, *N. Y. Central & H. R. R. Co.* v. *Miller, supra; Southern Pacific Co.* v. *Kentucky, supra.* But that is not the case as to any of the planes here involved. And our decisions establish that, except in the case of tangibles which have nowhere acquired a tax situs based on physical presence, and for that reason remain taxable at the domicile even if never present there, the state's power to tax chattels depends

[1] We need not consider here whether the jurisdiction of a state over air above it—as distinguished from the control of a private landowner over air above his land—affords a basis for taxation of planes which regularly fly over the state but do not regularly land within its borders. For in six of the seven states, other than Minnesota, over which petitioner's airplanes regularly fly, they also make regular scheduled landings. Plainly those states have jurisdiction to tax a proportionate part of their value and to that extent the judgment of the Minnesota Supreme Court, permitting taxation in full by the domicile, is erroneous, and the cause should be remanded for further proceedings.

on their physical presence and is neither added to nor subtracted from because the taxing state may or may not happen to be the state of the owner's domicile.

We need not consider to what extent the due process clause limits the taxing power of each state through which airplanes or other vehicles of interstate transportation pass, to the taxation of part only of their value, fairly related to their use within the state, or precluded the Minnesota Supreme Court from extending to tangible property moving in more than one state the rule of *Curry* v. *McCanless, supra,* and subsequent cases, permitting full taxation of intangibles by each state having a substantial relationship to the interest taxed. For we are dealing here with tangible instrumentalities of interstate commerce, entitled as such to the protection afforded by the commerce clause from unduly burdensome state taxation, even though the tax might otherwise be within the constitutional power of the state. And it is plain, as this Court has often held, that if one state may impose a personal property tax at full value on an interstate carrier's vehicles of transportation, and other states through which they pass may also tax them for the same tax period, the resulting tax would be destructive of the commerce by imposing on it a multiple tax burden to which intrastate carriers are not subjected.

This Court has never denied the power of the several states to impose a property tax on vehicles used in interstate transportation in the taxing state. It has recognized, as we have seen, that such instruments of interstate transportation, at least if moving over fixed routes on regular schedules, may thus acquire a tax situs in every state through which they pass. And it has met the problem of burdensome multiple taxation by the several states through which such vehicles pass by recognizing that the due process clause or the commerce clause or both pre-

clude each state from imposing on the interstate commerce involved an undue or inequitable share of the tax burden. In *Nashville, C. & St. L. Ry.* v. *Browning*, 310 U. S. 362, 365, we recently considered "the guiding principles for adjustment of the state's right to secure its revenues and the nation's duty to protect interstate transportation." We declared that "The problem to be solved is what portion of an interstate organism may appropriately be attributed to each of the various states in which it functions." And, in sustaining the tax, apportioned according to mileage, upon the entire property, including rolling stock, of an interstate railroad, imposed by Tennessee, the state of the owner's domicile, in which its principal business office and over 70% of its trackage was located, we said that the state could not "use a fiscal formula . . . to project the taxing power of the state plainly beyond its borders."

This Court has accordingly held invalid state taxation of vehicles of interstate transportation unless the tax is equitably apportioned to the use of the vehicles within the state compared to their use without, whether the tax is laid by the state of the domicile or another.[2] Such an

[2] The rule, generally applied, that vessels are taxable only by the domicile, *Hays* v. *Pacific Mail S. S. Co.*, 17 How. 596, 597; *St. Louis* v. *Ferry Co.*, 11 Wall. 423, 430, 431–2; *Morgan* v. *Parham*, 16 Wall. 471, 475; *Transportation Co.* v. *Wheeling*, 99 U. S. 273, 279–80; *Ayer & Lord Tie Co.* v. *Kentucky*, 202 U. S. 409, 421; *Southern Pacific Co.* v. *Kentucky*, 222 U. S. 63, 68, 69, 77, is no exception to these rules. For vessels ordinarily move on the high seas, outside the jurisdiction of any state, and merely touch briefly at ports within a state. Hence they acquire no tax situs in any of the states at which they touch port, and are taxable by the domicile or not at all. See *Pullman's Car Co.* v. *Pennsylvania*, 141 U. S. 18, 23; *Southern Pacific Co.* v. *Kentucky*, *supra*, 75. The suggestion in the earlier cases, see *Hays* v. *Pacific Mail S. S. Co.*, *supra*, 600; *St. Louis* v. *Ferry Co.*, *supra*; *Morgan* v. *Parham*, *supra*, that vessels were to be taxed exclusively at the home port, whether or not it was the domicile, was rejected in *Ayer & Lord Tie Co.* v. *Kentucky*, *supra*, and *Southern*

apportionment has been sustained when made according to the mileage traveled within and without the state, *Pullman's Car Co.* v. *Pennsylvania, supra,* 26, or the average number of vehicles within the taxing state during the tax period. *Marye* v. *Baltimore & Ohio R. Co., supra; American Refrigerator Transit Co.* v. *Hall, supra,* 82; *Union Transit Co.* v. *Lynch, supra.*[3]

But if the tax is laid without apportionment or if the apportionment, when made, is plainly inequitable so as to bear unfairly on the commerce by compelling the carrier to pay to the taxing state more than its fair share of the tax measured by the full value of the property, this Court has set aside the tax as an unconstitutional burden on interstate commerce, whether it be in form on the rolling

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Pacific Co. v. *Kentucky, supra,* and has never been revived. But where the vessels operate wholly on waters within one state, they have been held to be taxable there, *Old Dominion S. S. Co.* v. *Virginia,* 198 U. S. 299, and not at the domicile, *Southern Pacific Co.* v. *Kentucky, supra,* 67, 72, a result which, like the rule of apportionment in taxing railroad cars, avoids the burden of multiple taxation.

[3] Similarly taxes by the state of domicile or other states on the carrier's entire property including rolling stock have been sustained if apportioned according to mileage, *Pittsburgh, C., C. & St. L. Ry. Co.* v. *Backus,* 154 U. S. 421; *Adams Express Co.* v. *Ohio,* 165 U. S. 194, 166 U. S. 185; *American Express Co.* v. *Indiana,* 165 U. S. 255; *Adams Express Co.* v. *Kentucky,* 166 U. S. 171; *Wells, Fargo & Co.* v. *Nevada,* 248 U. S. 165; *St. Louis & E. St. L. Ry. Co.* v. *Hagerman,* 256 U. S. 314; *Southern Ry. Co.* v. *Watts,* 260 U. S. 519; *Nashville, C. & St. L. Ry.* v. *Browning,* 310 U. S. 362, or a combination of relevant factors, *Rowley* v. *Chicago & N. W. Ry. Co.,* 293 U. S. 102; *Great Northern Ry. Co.* v. *Weeks,* 297 U. S. 135. Likewise gross receipts taxes, if properly apportioned or otherwise limited to receipts from business done within the state, have been upheld, *Erie Ry. Co.* v. *Pennsylvania,* 21 Wall. 492; *Maine* v. *Grand Trunk Ry. Co.,* 142 U. S. 217, as explained in *Galveston, H. & S. A. Ry. Co.* v. *Texas,* 210 U. S. 217, 226; *United States Express Co.* v. *Minnesota,* 223 U. S. 335; *Cudahy Packing Co.* v. *Minnesota,* 246 U. S. 450; *Pullman Co.* v. *Richardson,* 261 U. S. 330; cf. *New York, L. E. & W. R. Co.* v. *Pennsylvania,* 158 U. S. 431.

stock, *Union Transit Co.* v. *Kentucky, supra; Union Tank Line Co.* v. *Wright, supra; Johnson Oil Co.* v. *Oklahoma, supra,* or on the carrier's entire property, *Fargo* v. *Hart,* 193 U. S. 490; or on a franchise or right to do business, *Allen* v. *Pullman's Car Co.,* 191 U. S. 171; *Wallace* v. *Hines,* 253 U. S. 66; *Southern Ry. Co.* v. *Kentucky,* 274 U. S. 76; cf. *Norfolk & Western R. Co.* v. *Pennsylvania,* 136 U. S. 114.

Upon like principles this Court has consistently held that a tax laid by a state on gross receipts from interstate commerce, which is comparable to a property tax at full value on vehicles of interstate transportation, violates the commerce clause unless equitably apportioned. *Galveston, H. & S. A. Ry. Co.* v. *Texas,* 210 U. S. 217; *Oklahoma* v. *Wells, Fargo & Co.,* 223 U. S. 298; see *Cudahy Packing Co.* v. *Minnesota,* 246 U. S. 450, 453–5; *Pullman Co.* v. *Richardson,* 261 U. S. 330, 338–9. To the same effect as to capital stock taxes, see *Atchison, T. & S. F. Ry. Co.* v. *O'Connor,* 223 U. S. 280, 285 and cases cited.

In many the tax was held invalid although imposed by the state of the domicile of the taxpayer. *Philadelphia & Southern S. S. Co.* v. *Pennsylvania,* 122 U. S. 326, 342, overruling *State Tax on Railway Gross Receipts,* 15 Wall. 284; *Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292; *New Jersey Telephone Co.* v. *Tax Board,* 280 U. S. 338; *Fisher's Blend Station* v. *Tax Commission,* 297 U. S. 650; *Puget Sound Co.* v. *Tax Commission,* 302 U. S. 90; *Adams Mfg. Co.* v. *Storen,* 304 U. S. 307; *Gwin, White & Prince* v. *Henneford,* 305 U. S. 434; see *Western Live Stock* v. *Bureau, supra.* The same rule is applied to the taxation by the domicile of goods carried interstate, *Case of the State Freight Tax,* 15 Wall. 232; *Eureka Pipe Line Co.* v. *Hallanan,* 257 U. S. 265; and the taxation of goods in transit generally, *Hughes Bros. Co.* v. *Minnesota,* 272 U. S. 469.

In *Galveston, H. & S. A. Ry. Co.* v. *Texas, supra,* 228, in which a tax on gross receipts of a railway engaged in interstate commerce was condemned because not apportioned, the Court declared, "Of course, it does not matter that the plaintiffs in error are domestic corporations." The like rule, applied to the taxation by the state of the owner's domicile of railroad property, including rolling stock, was approved in *Nashville, C. & St. L. Ry.* v. *Browning, supra.* And in *Bacon* v. *Illinois,* 227 U. S. 504, 511–12, the Court was at pains to point out that the power of a state to tax goods in transit is not affected by the fact that it is or is not the domicile of the owner. These cases clearly establish that, whatever relevance domicile may at times have to the power of a state under the due process clause to tax tangibles, it has none to the question whether the exercise of that power so burdens interstate commerce as to violate the commerce clause.

It cannot be said either in point of practicality or of legal theory that anything is added to Minnesota's power to tax by reason of the fact that all of petitioner's aircraft are registered with the Civil Aeronautics Authority with St. Paul, Minnesota, designated as their "home port." Section 501 of the Civil Aeronautics Act, 52 Stat. 1005, 49 U. S. C. § 521, requiring the registration with the Authority of aircraft, merely provides that a certificate of registration "shall be conclusive evidence of nationality for international purposes." Neither the statute nor the regulations adopted under it attach any other consequences to the registration of airplanes at a particular "home port." The much more detailed provisions of R. S. §§ 4141, 4178 as amended, requiring registration of vessels at a particular home port and the painting of the name of that port on the stern of the vessel, have been held irrelevant to state power to tax, even though the port of enrollment is also one at which the vessel regularly calls, *St.*

Louis v. *Ferry Co., supra; Ayer & Lord Tie Co.* v. *Kentucky, supra;* see *Southern Pacific Co.* v. *Kentucky, supra,* 68, 73.

Nor is it of any significance for tax purposes whether Minnesota is "as a business fact the home state of the fleet." While the existence of a business domicile has been thought to afford a basis for the state taxation of intangibles, on the theory that they have become localized there, *Wheeling Steel Corp.* v. *Fox, supra,* 211 *et seq.*, the constitutional bases for the taxation of tangibles and of intangibles are, as we have seen, quite different, and under our decisions, to which we have referred, the only basis for the taxation of tangibles is their physical presence in the taxing jurisdiction. And even the taxation of intangibles of interstate carriers is subject to the rule of apportionment wherever the tax without it would subject the commerce to the burden of multiple state taxation. The "unit rule" for the taxation of interstate carriers applies to tangibles and intangibles alike and requires an equitable apportionment of the tax on both. *Adams Express Co.* v. *Ohio,* 165 U. S. 194, 222, 226; 166 U. S. 185, 223–4, 225; *Fargo* v. *Hart, supra,* 499; *Oklahoma* v. *Wells Fargo & Co., supra,* 300; *Wallace* v. *Hines, supra,* 69–70; *Southern Ry. Co.* v. *Kentucky, supra,* 81.

Moreover, the difficulties of applying to aircraft a rule of taxation at a "home port" are essentially those which have led, long since, to the abandonment of the idea by this Court as applied to vessels. Compare *St. Louis* v. *Ferry Co., supra; Ayer & Lord Tie Co.* v. *Kentucky, supra.* While it appears from the present record that petitioner maintains at St. Paul, Minnesota, its airplane and engine overhauling base, at which the principal repairs to planes and engines are made, it also operates maintenance bases at Chicago, Illinois, Minneapolis, Minnesota, Fargo, North Dakota, Billings, Montana, and Spokane and Seattle,

Washington, at which points it maintains crews of mechanics and maintenance equipment. It owns and leases hangars and office space at all of its stopping points, each of which are manned by its employees. On the tax day, May 1, 1939, petitioner's planes made no scheduled stop in St. Paul. Thus a number of states have a physical relationship to petitioner's business—by reason of the movement of planes, over the fixed routes, the landing of planes, the maintenance and operation of repair and service equipment, landing fields, hangars, and office buildings, with their attendant employees—which, for practical purposes, is as substantial in nature as that claimed for Minnesota.

Even if we could say on this record that Minnesota and it alone can be regarded as the "home state," we have no assurance that in taxing planes operated by other and more complex business organizations, one state will have any greater claim to that designation than several others, and the Court's opinion furnishes no test to guide in the choice among them, if choice has any relevance. Nor does it say that the power to tax vehicles of interstate transportation at the domicile or the "home port" is exclusive. Obviously, unless it is deemed to be thus exclusive it does not foreclose any state within which the planes move on fixed routes from imposing a like tax burden. And if it is deemed to be exclusive the other states must be denied their just claims to collect an equitable tax on property regularly used within them in carrying on an interstate business. North Dakota, for instance, in taxing the planes regularly landing within its borders, is not taxing rights originating in and safeguarded by Minnesota, or exercising any rights attributable to Minnesota. No reason appears why North Dakota should be denied the right to tax the planes to the extent that they are within its borders, or why, to that extent, Minnesota

has any relationship to them sufficient either to enable it to tax them or to preclude North Dakota from taxing them.

The taxation of vehicles of interstate transportation in a business organized and conducted as is petitioner's is as capable of apportionment, and the insupportable multiple tax burden on interstate commerce is as readily avoided by apportionment of the tax, as in the case of the taxation of tangible and intangible property of railroads, railroad car supply companies, express companies, and the like which we have repeatedly held to be subject to the rule of apportionment. To refuse now to apply the rule of apportionment to petitioner's airplanes, after a half century of its application by this Court as the means of avoiding prohibited multiple state tax burdens on vehicles of interstate transportation; to extend to airplanes moving interstate over fixed routes on regular schedules, the rule that intangibles may be taxed at the business domicile whether or not taxed elsewhere; and to revive the abandoned doctrine that vessels may be taxed in full at their home port, while rejecting the correlative rule that they are exempt from taxation elsewhere, is to disregard the teachings of experience and of precedent. It subjects a new and important industry to state tax burdens, essentially discriminatory in their effect on interstate commerce, to which other interstate carriers are not subject and which it was the very purpose of the commerce clause to avoid.

Respondent places its reliance on *N. Y. Central & H. R. R. Co.* v. *Miller, supra.* There the Court sustained a franchise tax by the state of domicile including in its measure the full value of freight cars moving in and out of the state, often out of the taxpayer's possession for an indefinite time, and moving in the service of other roads on their independent business. The decision proceeded on the assumption, not tenable here but which the facts of that case were thought to support, that the cars were not

shown to have moved so regularly or continuously in any state or group of states outside the domicile as to gain a tax situs there. The Court in distinguishing the case from *Pullman's Car Co.* v. *Pennsylvania, supra,* which sustained a state tax on a foreign railroad corporation, measured by the intrastate mileage of cars passing in and out of the taxing state, said (pp. 597–8):

"But in that case it was found that the 'cars used in this State have, during all the time for which tax is charged, been running into, through and out of the State.' The same cars were continuously receiving the protection of the State and, therefore, it was just that the State should tax a proportion of them. Whether if the same amount of protection had been received in respect of constantly changing cars the same principle would have applied was not decided, and it is not necessary to decide now. In the present case, however, it does not appear that any specific cars or any average of cars was so continuously in any other State as to be taxable there. The absences relied on were not in the course of travel upon fixed routes but random excursions of casually chosen cars, determined by the varying orders of particular shippers and the arbitrary convenience of other roads. Therefore we need not consider either whether there is any necessary parallelism between liability elsewhere and immunity at home."

The present case raises the question which the *Miller* case found it unnecessary to decide but which this Court has consistently answered by requiring the apportionment of a tax on vehicles of interstate transportation according to their regular use within and without the taxing state. In the *Miller* case it appeared that the cars moved not only over the carrier's own tracks, but also were interchanged with other railroads, and thus, as the Court pointed out, moved about almost at random throughout the United States. No evidence was offered tending to show in what states the cars moved, or with what degree

of regularity they were present in any particular state or group of states other than New York. The Court was thus not called upon to consider whether New York could tax the cars if they moved between New York and other named states with such regularity that an "average of cars" could be said to be continuously so moving in those other states. Here, on the other hand, it is stipulated and found that all of petitioner's planes are "continuously engaged in flying from state to state in the course of [petitioner's] operations" and that those operations are on regular schedules along fixed routes through eight states. The total mileage of regular routes and the total daily mileage on those routes both in Minnesota and outside are definitely stipulated and found. Hence there is no warrant for saying that their presence in each of the states through which they pass is not as regular and continuous in nature as it is in Minnesota. These findings establish that, while no particular plane is permanently within any state, its planes are continuously flying in, and an average number or a percentage of the total is regularly, i. e., "permanently" within, each of the states through which they pass. Here, as was the case in *Pullman's Car Co.* v. *Pennsylvania, supra,* the same planes are "running into, through, and out of" each of the states along petitioner's routes and an "average" of planes is continuously within each of those states.[4]

[4] It is true that here there is no evidence of the average number of planes present within Minnesota or any other state during the tax year. But where the movement through the state is regular and continuous, as it is here and was not in the *Miller* case, apportionment may be made by showing the plane mileage or route mileage within and without the state. *Pullman's Car Co.* v. *Pennsylvania,* 141 U. S. 18; *Nashville, C. & St. L. Ry.* v. *Browning,* 310 U. S. 362, and cases cited. The Minnesota court here did not rest its decision on the ground that petitioner had sought to apportion by mileage instead of by average number of cars, and had introduced no evidence to support the latter type of apportionment. If it had it might well have

We are not now concerned with the proper apportionment of taxable values among the states outside the state of Minnesota. Since the movement of the planes, wherever they go, is over fixed routes and on regular schedules, they acquire a tax situs outside Minnesota to the extent that they do not move within it. Hence the extent to which they move in and are taxable by one state outside Minnesota rather than another is irrelevant. It is enough that the Minnesota tax is for full value and that Minnesota's fiscal formula imposes a prohibited burden on interstate commerce because it is used "to project the tax power of the state plainly beyond its borders," to reach instruments of interstate commerce which are taxable elsewhere, and that the extent of that projection may be measured by comparing either the plane or the

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remanded the cause to permit any deficiencies of proof to be remedied. It held rather that regardless of the nature of proof of apportionment Minnesota, as the state of the domicile, could tax the cars for their entire value.

In this respect also the case is unlike the *Miller* case. There, as the record reveals, the carrier's evidence showed only the car mileage within and without the state, and its owned track mileage within and without the state. But since the cars moved over irregular routes without fixed schedules, car mileage afforded no basis of apportionment, without proof also that the cars were present in particular states with sufficient regularity to acquire a tax situs there. Owned track mileage likewise failed to afford a basis of apportionment, in the absence of some proof that the tracks were regularly used by the cars in question. Nor did the carrier lack opportunity to make fuller proof. The cause as it came here involved five successive tax years, as to each of which the carrier was afforded a hearing with opportunity to introduce evidence. The carrier having failed despite this repeated opportunity to introduce evidence which would, on any theory of apportionment, support a conclusion that any particular proportion of cars had acquired a tax situs elsewhere, this Court, as it pointed out, was not called upon to apply the rule of *Pullman's Car Co.* v. *Pennsylvania, supra,* or to consider whether, consistently with the commerce clause, property used as an instrumentality of commerce may be subjected to the risk of double taxation.

route mileage over fixed routes in Minnesota with like mileage over fixed routes in the states outside Minnesota.

Both before and since the *Miller* case this Court has ruled that vehicles of interstate transportation regularly moving to and from the state of domicile from and to other states acquire a tax situs in the latter, and that the state of domicile cannot constitutionally levy on them an unapportioned property tax. *Union Transit Co.* v. *Kentucky, supra; Johnson Oil Co.* v. *Oklahoma, supra; Nashville, C. & St. L. Ry.* v. *Browning, supra.* In *Johnson Oil Co.* v. *Oklahoma, supra,* 161–2, where the cars moved from and to Oklahoma to and from various states including Illinois, the state of domicile, we declared that the cars had acquired a tax situs outside Illinois and were to that extent not taxable by Illinois. The court rested its decision on the rule, stated without qualification, that "When a fleet of cars is habitually employed in several States—the individual cars constantly running in and out of each State—it cannot be said that any one of the States is entitled to tax the entire number of cars regardless of their use in other States." [5] Those cases should control

[5] In *Union Transit Co.* v. *Kentucky,* 199 U. S. 194, it appeared that the cars of the Transit Company, the taxpayer, moved in and out of Kentucky, the state of domicile. The Transit Company disclaimed on the record any effort to prove that it had any cars which never came within the state, and sought to establish the number "permanently located" outside it only by proof of gross earnings within and without the state. In holding that the state of domicile could not tax tangible personal property "permanently located in other states" (p. 201), it is clear that the Court was limiting the taxing power of the state of domicile to the extent that the cars moving between Kentucky and other states had, under the rule of apportionment, gained a tax situs outside the state because they were "located and employed" there (p. 211). This is evident from its citation (p. 206) of *Pullman's Car Co.* v. *Pennslyvania,* 141 U. S. 18, and *American Refrigerator Transit Co.* v. *Hall,* 174 U. S. 70, as cases involving property "permanently located" in the taxing states. Both cases in-

now. For here we are confronted with a scheme of taxation imposed on vehicles of interstate transportation located within the taxing state for only a limited and specified part of their active life. For the rest, they are in other states, moving over fixed routes of travel where, under our decisions, they plainly have a tax situs, and where they are in fact taxed in six of the seven states other than Minnesota through which they pass.

The tax now sustained is so obviously disproportionate to the protection afforded to the taxed property by the taxing state as to place a constitutionally intolerable burden on interstate commerce. But it is a burden which is capable of equitable adjustment which would satisfy constitutional requirements by the application of the principles of apportionment which this Court has repeatedly sanctioned, and which it is the constitutional duty of the State of Minnesota to apply. The application of these principles does not call for mathematical exactness nor for the rigid application of a particular formula; only if the resulting valuation is palpably excessive will it be set aside. But a reasonable attempt must be made to tax only so much of the value as is fairly related to use within the taxing state. *Union Tank Line Co.* v. *Wright, supra,* 282; *Great Northern Ry.* v. *Weeks, supra,* 144; *Nashville, C. & St. L. Ry.* v. *Browning, supra,* 365.

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volved rolling stock continuously moving into and out of the taxing state and sustained taxes upon a proportion of the carrier's total rolling stock based respectively upon the track mileage or upon the average number of cars used within the taxing state. Had the Court intended to exempt, from the domicile's power to tax, only property which never came into the domicile it would have been necessary for it to discuss also the contention that the Union Transit Company had been denied the equal protection of the laws because railroads were taxed only upon the value of their rolling stock used within the state determined by the proportionate mileage within the state (pp. 202, 211).

It is no answer to suggest that the states other than Minnesota have not asserted their constitutional power to tax or that we do not know how or to what extent they have exercised it. The extent to which one state may constitutionally tax the instruments of interstate transportation does not depend on what other states may happen to do, but on what the taxing state has constitutional power to do. The jurisdiction of Minnesota to tax "must be determined on a basis which is consistent with the like jurisdiction of other States." *Johnson Oil Co.* v. *Oklahoma, supra,* 162. Minnesota cannot justify its imposition of an undue proportion of the total tax burden which can be imposed on an interstate carrier by saying that other states have taken or may take less than their share of the tax. It is enough that the tax exposes petitioner to "the risk of a multiple burden to which local commerce is not exposed," *Adams Mfg. Co.* v. *Storen, supra,* 311; *Gwin, White & Prince* v. *Henneford, supra,* 439, and cases cited. To hold otherwise would be to measure Minnesota's power to tax, not by constitutional standards, but by the action of other states over which neither Minnesota nor petitioner has any control and to leave petitioner's tax to be measured from year to year, not according to any legal standard, but by the unpredictable uncontrolled action of other states.

The judgment should be reversed and the case remanded for further proceedings in the course of which the state court would be free, if so advised, to inquire to what extent, if at all, the tax may, in harmony with state law, be apportioned in conformity to principles heretofore announced by this Court, and to that extent sustained.

MR. JUSTICE ROBERTS, MR. JUSTICE REED, and MR. JUSTICE RUTLEDGE join in this dissent.

McLEOD, COMMISSIONER OF REVENUES, *v.* J. E. DILWORTH CO. ET AL.

CERTIORARI TO THE SUPREME COURT OF ARKANSAS.

No. 311. Argued February 4, 1944.—Decided May 15, 1944.

A Tennessee corporation which was not qualified to do business in Arkansas, and which had no sales office nor any other place of business in Arkansas, made sales of goods in Tennessee for delivery by common carrier in Arkansas. Though some orders were solicited in Arkansas by traveling salesmen domiciled in Tennessee, all orders were taken subject to acceptance by the corporation in Tennessee; title to the goods passed upon delivery to the carrier in Tennessee; and no collections were made in Arkansas. *Held* that the imposition by Arkansas of a tax on such transactions, under a statute construed by the state court as levying a sales tax and not a use tax (which construction is accepted here), violated the commerce clause of the Federal Constitution. *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33, and *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, distinguished. Pp. 328, 330.

205 Ark. 780, 171 S. W. 2d 62, affirmed.

CERTIORARI, 320 U. S. 728, to review the affirmance of a judgment dismissing the complaint in two suits (consolidated for trial) to enforce a state tax.

Mr. Leffel Gentry for petitioner.

Mr. J. Fred Brown, with whom *Mr. Allan Davis* was on the brief, for the J. E. Dilworth Co.; and *Mr. William H. Daggett* for the Reichman-Crosby Co., respondents.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

We are asked to reverse a decision of the Supreme Court of Arkansas holding that the Commerce Clause precludes liability for the sales tax of that State upon the transactions to be set forth.

We take the descriptions of these transactions from the opinion under review. Respondents are Tennessee corporations with home offices and places of business in Memphis where they sell machinery and mill supplies. They are not qualified to do business in Arkansas and have neither sales office, branch plant nor any other place of business in that State. Orders for goods come to Tennessee through solicitation in Arkansas by traveling salesmen domiciled in Tennessee, by mail or telephone. But no matter how an order is placed it requires acceptance by the Memphis office, and on approval the goods are shipped from Tennessee. Title passes upon delivery to the carrier in Memphis, and collection of the sales price is not made in Arkansas. In short, we are here concerned with sales made by Tennessee vendors that are consummated in Tennessee for the delivery of goods in Arkansas.

For such sales, the Supreme Court of Arkansas had held, in 1939, the State had no power to exact a sales tax, *Mann* v. *McCarroll,* 198 Ark. 628, 130 S. W. 2d 721. The Arkansas legislation then in force was Act 154 of 1937. The transactions on which the Collector here seeks to tax extended over periods that bring into question Act 154 (extended by Act 364 of 1939) and a new Statute (Act 386 of 1941), known as the Gross Receipts Act. The Arkansas Supreme Court gave the Act of 1941 the same scope and significance as it attributed to the Act of 1937, that is, an act imposing a retail sales tax and not a use tax. In view of this construction, it has adhered to its earlier decision in *Mann* v. *McCarroll,* finding nothing in our intervening decision in *McGoldrick* v. *Berwind-White Co.,* 309 U. S. 33, requiring a change in its constitutional views. 205 Ark. 780, 171 S. W. 2d 62. To permit further examination of the complicated problems raised by the interplay of federal and state powers we brought the case here. 320 U. S. 728.

We agree with the Arkansas Supreme Court that the *Berwind-White* case presented a situation different from this case and that this case is on the other side of the line which marks off the limits of state power. A boundary line is none the worse for being narrow. Once it is recognized, as it long has been by this Court, that federal and state taxation do not move within wholly different orbits, that there are points of intersection between the powers of the two governments, and that there are transactions of what colloquially may be deemed a single process across state lines which may yet be taxed by the State of their occurrence, "nice distinctions are to be expected," *Galveston, H. & S. A. Ry. Co.* v. *Texas,* 210 U. S. 217, 225. The differentiations made by the court below between this case and the *Berwind-White* case are relevant and controlling. "The distinguishing point between the Berwind-White Coal case and the cases at bar is that in the Berwind-White Coal case the corporation maintained its sales office in New York City, took its contracts in New York City and made actual delivery in New York City. . . ." 205 Ark. at 786. This, according to practical notions of what constitutes a sale which is reflected by what the law deems a sale, constituted a sale in New York and accordingly we sustained a retail sales tax by New York. Here, as the Arkansas Supreme Court continued, "the offices are maintained in Tennessee, the sale is made in Tennessee, and the delivery is consummated either in Tennessee or in interstate commerce with no interruption from Tennessee until delivery to the consignee essential to complete the interstate journey." Because the relevant factors in the two cases decided together with the *Berwind-White* case were the same as those in *Berwind-White,* the decision in that case controlled the two other cases. "In both cases the tax was imposed on all the sales of merchandise for which orders were taken

within the city and possession of which was transferred to the purchaser there. Decision in both is controlled by our decision in the *Berwind-White Company* case." *McGoldrick* v. *Felt & Tarrant Co.*, 309 U. S. 70, 77. In *Berwind-White* the Pennsylvania seller completed his sales in New York; in this case the Tennessee seller was through selling in Tennessee. We would have to destroy both business and legal notions to deny that under these circumstances the sale—the transfer of ownership—was made in Tennessee. For Arkansas to impose a tax on such transaction would be to project its powers beyond its boundaries and to tax an interstate transaction.

It is suggested, however, that Arkansas could have levied a tax of the same amount on the use of these goods in Arkansas by the Arkansas buyers, and that such a use tax would not exceed the limits upon state power derived from the United States Constitution. Whatever might be the fate of such a tax were it before us, the not too short answer is that Arkansas has chosen not to impose such a use tax, as its Supreme Court so emphatically found. A sales tax and a use tax in many instances may bring about the same result. But they are different in conception, are assessments upon different transactions, and in the interlacings of the two legislative authorities within our federation may have to justify themselves on different constitutional grounds. A sales tax is a tax on the freedom of purchase—a freedom which wartime restrictions serve to emphasize. A use tax is a tax on the enjoyment of that which was purchased. In view of the differences in the basis of these two taxes and the differences in the relation of the taxing state to them, a tax on an interstate sale like the one before us and unlike the tax on the enjoyment of the goods sold, involves an assumption of power by a State which the Commerce Clause was meant to end. The very purpose of the Commerce Clause was to create an area of free trade among the several States.

That clause vested the power of taxing a transaction forming an unbroken process of interstate commerce in the Congress, not in the States.

The difference in substance between a sales and a use tax was adverted to in the leading case sustaining a tax on the use after a sale had spent its interstate character: "A tax upon a use so closely connected with delivery as to be in substance a part thereof might be subject to the same objections that would be applicable to a tax upon the sale itself." *Henneford* v. *Silas Mason Co.*, 300 U. S. 577, 583. Thus we are not dealing with matters of nomenclature even though they be matters of nicety. "The state court could not render valid, by misdescribing it, a tax law which in substance and effect was repugnant to the Federal Constitution; neither can it render unconstitutional a tax, that in its actual effect violates no constitutional provision, by inaccurately defining it." *Wagner* v. *City of Covington*, 251 U. S. 95, 102. Though sales and use taxes may secure the same revenues and serve complementary purposes, they are, as we have indicated, taxes on different transactions and for different opportunities afforded by a State.

A very different situation underlay *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435. The Wisconsin Supreme Court and this Court were concerned with an exaction on a transaction which the Wisconsin Court described one way and we another. We looked behind the labels to the thing described, and the thing—taxation of the distribution of income earned in Wisconsin—did not offend the Federal Constitution. That case affords no ground for rejecting the deliberate choice of a State to impose a tax on a transfer of ownership and sustaining it, where the transfer was made beyond the State limits, as a use tax on that property because the State might, so far as the Federal Constitution is concerned, have enacted a use tax and such a use tax might have been collected on the

enjoyment of the goods so sold. Such a mode of adjudication would imply a duty of excessive astuteness on our part to contract the area of free trade among the States.

Judgment affirmed.

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

The present decision marks a retreat from the philosophy of the *Berwind-White* case, 309 U. S. 33. It draws a distinction between the use tax (*Felt & Tarrant Co.* v. *Gallagher,* 306 U. S. 62) and the sales tax which on the facts of this case seems irrelevant to the power of Arkansas to tax. And it is squarely opposed to *McGoldrick* v. *Felt & Tarrant Co.,* 309 U. S. 70, which should be overruled if the present decision goes down.

Felt & Tarrant Co. v. *Gallagher* involved a use tax. The State of the buyer (California) was allowed to exact the tax from the Illinois seller for goods sold to California buyers though the seller's activities in California were not different in quality and hardly more numerous than the Arkansas activities of the Tennessee sellers in the present case. Though in some cases deliveries were made by the local agent for Felt & Tarrant, in others shipments were made by it from Illinois direct to the buyers in California. And in that case, as in the present case, the orders were accepted outside the State of the buyer and remittances were made direct to the out-of-state seller.

In *McGoldrick* v. *Felt & Tarrant Co.* we allowed New York City to collect its sales tax on sales which Felt & Tarrant made to New York purchasers under substantially the same course of dealing as obtained in case of the California use tax. Moreover, there were other transactions in *McGoldrick* v. *Felt & Tarrant* which were even closer to the sales in the present case. I refer to the sales to New York City buyers by a Massachusetts corporation

(Du Grenier, Inc.) which was not authorized to do business in New York and which had no employee there. Another company, Stewart & McGuire, Inc., acted as its exclusive agent and solicited orders in New York City. The orders were forwarded to Massachusetts where they were accepted. Shipments were made by rail or truck (F. O. B. Haverhill, Mass.) to the purchaser in New York City, who paid the freight. Yet we allowed New York City to collect its sales tax on those transactions.

If the federal Constitution does not prohibit New York City from levying its sales tax on the proceeds of those interstate transactions or California from exacting its use tax at the final stage of an interstate movement of goods, I fail to see why Arkansas should be prohibited from collecting the present tax.

It is not enough to say that the use tax and the sales tax are different. A use tax may of course have a wider range of application than a sales tax. *Henneford* v. *Silas Mason Co.*, 300 U. S. 577. But a use tax and a sales tax applied at the very end of an interstate transaction have precisely the same economic incidence. Their effect on interstate commerce is identical. We stated as much in the *Berwind-White* case where, in speaking of the sales tax, we said (309 U. S. p. 49): "It does not aim at or discriminate against interstate commerce. It is laid upon every purchaser, within the state, of goods for consumption, regardless of whether they have been transported in interstate commerce. Its only relation to the commerce arises from the fact that immediately preceding transfer of possession to the purchaser within the state, which is the taxable event regardless of the time and place of passing title, the merchandise has been transported in interstate commerce and brought to its journey's end. Such a tax has no different effect upon interstate commerce than a tax on the 'use' of property which has just been moved

in interstate commerce," citing use tax cases including *Henneford* v. *Silas Mason Co.* and *Felt & Tarrant Co.* v. *Gallagher.*

The sales tax and the use tax are, to be sure, taxes on different phases of the interstate transaction. We may agree that the use tax is a tax "on the enjoyment of that which was purchased." But realistically the sales tax is a tax on the receipt of that which was purchased. For as we said in the excerpt from the *Berwind-White* case quoted above, it is the "transfer of possession to the purchaser within the state" which is the "taxable event regardless of the time and place of passing title." And *McGoldrick* v. *Felt & Tarrant Co.* makes plain that the transfer of possession need not be by the seller, for in that case, as in the present one, deliveries were made by common carriers which accepted the goods F. O. B. at points outside the State. In terms of state power, receipt of goods within the State of the buyer is as adequate a basis for the exercise of the taxing power as use within the State. And there should be no difference in result under the Commerce Clause where, as here, the practical impact on the interstate transaction is the same.

It is no answer to say that the Arkansas sales tax may not be imposed because the out-of-state seller was "through selling" when the tax was incurred. That was likewise true of both the use tax cases, including *General Trading Co.* v. *State Tax Commission, post,* p. 335, and the sales tax decision in *McGoldrick* v. *Felt & Tarrant Co.* The question is whether there is a phase of the interstate transaction on which the State of the buyer can lay hold without placing interstate commerce at a disadvantage. There is no showing that Tennessee was exacting from these vendors a tax on these same transactions or that Arkansas discriminated against them. I can see no warrant for an interpretation of the Commerce Clause which

puts local industry at a competitive disadvantage with interstate business. If there is a taxable event within the State of the buyer, I would make the result under the Commerce Clause turn on practical considerations and business realities rather than on dialectics. If that is not done, I think we should retreat from the view that interstate commerce should carry its fair share of the costs of government in the localities where it finds its markets and adopt the views expressed in the dissent in the *Berwind-White* case.

MR. JUSTICE RUTLEDGE also dissents. For his opinion, see *post*, p. 349.

GENERAL TRADING CO., DOING BUSINESS AS MINNEAPOLIS IRON STORE, *v.* STATE TAX COMMISSION OF THE STATE OF IOWA.

CERTIORARI TO THE SUPREME COURT OF IOWA.

No. 441. Argued February 4, 1944.—Decided May 15, 1944.

A Minnesota corporation which had not qualified to do business in Iowa, and which maintained no office or other place of business in Iowa, made sales of goods in Minnesota which were sent by common carrier or by mail to purchasers in Iowa. Orders, solicited in Iowa by salesmen from headquarters in Minnesota, were taken subject to acceptance in Minnesota. *Held* that the tax imposed by the Iowa Use Tax Act upon the use of such goods in Iowa, and the requirement that the corporation collect the tax and pay it to the State, did not violate the Federal Constitution. Following *Felt & Tarrant Co.* v. *Gallagher*, 306 U. S. 62; *Nelson* v. *Sears, Roebuck & Co.*, 312 U. S. 359, and *Nelson* v. *Montgomery Ward & Co.*, 312 U. S. 373. Pp. 336, 338.

233 Iowa 877, 10 N. W. 2d 659, affirmed.

CERTIORARI, 320 U. S. 731, to review the affirmance of a judgment for the State Tax Commission in an action to recover use taxes.

Mr. Edward S. Stringer, with whom *Mr. A. B. Howland* was on the brief, for petitioner.

Mr. Jens Grothe, Special Assistant Attorney General of Iowa, with whom *Mr. John M. Rankin,* Attorney General, was on the brief, for respondent.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

The State Tax Commission of Iowa brought this suit under the authority of the Iowa Use Tax Law which was recently here in *Nelson* v. *Sears, Roebuck & Co.,* 312 U. S. 359, and *Nelson* v. *Montgomery Ward & Co.,* 312 U. S. 373. The question now presented is, in short, whether Iowa may collect, in the circumstances of this case, such a use tax from General Trading Company, a Minnesota corporation, on the basis of property bought from Trading Company and sent by it from Minnesota to purchasers in Iowa for use and enjoyment there.

By the Iowa Use Tax Law a tax is "imposed on the use in this state of tangible personal property purchased . . . for use in this state at the rate of two percent of the purchase price of such property. Said tax is . . . imposed upon every person using such property within this state until such tax has been paid directly to the county treasurer, to a retailer, or to the commission. . . ." § 6943.103, Code of Iowa 1939. The use of property the sale of which is subject to Iowa's sales tax is exempted from the use tax (§ 6943.104 (1)), but the sales tax can be laid only on sales at retail within the State. § 6943.075. The use tax constitutes a debt owed by the retailer to the State. § 6943.112. But "Every retailer maintaining a place of business" in Iowa must collect this tax from the purchaser (§ 6943.109), and may not advertise that he will himself absorb the tax. § 6943.111. Finally an offsetting credit

(see *Henneford* v. *Silas Mason Co.*, 300 U. S. 577, 584, 586–7) if another use or sales tax has been paid for the same thing elsewhere is allowed, and if the tax "imposed in such other state is two percent or more, then no tax shall be due on such articles." § 6943.125.

A judgment in favor of the Tax Commission by one of the lower courts was affirmed by the Supreme Court of Iowa, 233 Iowa 877; 10 N. W. 2d 659. The application by that Court of its local laws and the facts on which it founded its judgment are of course controlling here. From these it appears that General Trading Company had never qualified to do business as a foreign corporation in Iowa nor does it maintain there any office, branch or warehouse. The property on which the use tax was laid was sent to Iowa as a result of orders solicited by traveling salesmen sent into Iowa from their Minnesota headquarters. The orders were always subject to acceptance in Minnesota whence the goods were shipped into Iowa by common carriers or the post. Upon these facts and its holding that Trading Company was a "retailer maintaining a place of business in this state" within the meaning of the Iowa statute, the Iowa Supreme Court held that Iowa had not exceeded its powers in the imposition of this use tax on Iowa purchasers, and that collection could validly be made through the Trading Company.

We brought the case here, 320 U. S. 731, to meet the claim that there was need for further precision regarding the scope of our previous rulings on the power of States to levy use taxes. In view, however, of the clear understanding by the court below that the facts we have summarized bring the transaction within the taxing power of Iowa, there is little need for elaboration. We agree with the Iowa Supreme Court that *Felt & Tarrant Co.* v. *Gallagher*, 306 U. S. 62; *Nelson* v. *Sears, Roebuck & Co., supra;* and *Nelson* v. *Montgomery Ward & Co., supra,* are

controlling. The *Gallagher* case is indistinguishable—certainly nothing can turn on the more elaborate arrangements for soliciting orders for an intricate machine for shipment from without a State as in the *Gallagher* case, compared with the apparently simpler needs for soliciting business in this case. And the fact that in the *Sears Roebuck* and *Montgomery Ward* cases the interstate vendor also had retail stores in Iowa, whose sales were appropriately subjected to the sales tax, is constitutionally irrelevant to the right of Iowa sustained in those cases to exact a use tax from purchasers on mail order goods forwarded into Iowa from without the State. All these differentiations are without constitutional significance. Of course, no State can tax the privilege of doing interstate business. See *Western Live Stock* v. *Bureau,* 303 U. S. 250. That is within the protection of the Commerce Clause and subject to the power of Congress. On the other hand, the mere fact that property is used for interstate commerce or has come into an owner's possession as a result of interstate commerce does not diminish the protection which he may draw from a State to the upkeep of which he may be asked to bear his fair share. But a fair share precludes legislation obviously hostile or practically discriminatory toward interstate commerce. See *Best & Co.* v. *Maxwell,* 311 U. S. 454.

None of these infirmities affects the tax in this case any more than it did in the other cases with which it forms a group. The tax is what it professes to be—a non-discriminatory excise laid on all personal property consumed in Iowa. The property is enjoyed by an Iowa resident partly because the opportunity is given by Iowa to enjoy property no matter whence acquired. The exaction is made against the ultimate consumer—the Iowa resident who is paying taxes to sustain his own state government. To make the distributor the tax collector for the State is a familiar and sanctioned device. *Monamotor Oil Co.* v.

Johnson, 292 U. S. 86, 93–94; *Felt & Tarrant Co.* v. *Gallagher, supra.*

Affirmed.

MR. JUSTICE RUTLEDGE concurs. For his opinion, see *post,* p. 349.

MR. JUSTICE JACKSON, dissenting:

This decision authorizes in my opinion an unwarranted extension of the power of a state to subject persons to its taxing power who are not within its jurisdiction and have not in any manner submitted themselves to it. The General Trading Company is, in the language of the opinion, made "the tax collector for the State." We have heretofore held, and I think properly, that the state may make tax collectors of those who come in and do business within its jurisdiction, for thereby they submit themselves to its power. Such was the situation in both *Monamotor Oil Co.* v. *Johnson,* 292 U. S. 86, and *Felt & Tarrant Mfg. Co.* v. *Gallagher,* 306 U. S. 62. These are the only authorities cited by the Court on this point, and they clearly are not precedents to support this decision.

In this case, as the opinion points out, the General Trading Company never qualified in Iowa and has no office, branch, warehouse, or general agent in the State. From Minnesota it ships goods ordered from salesmen by purchasers in Iowa. Orders are accepted only in Minnesota. The transaction of sale is not taxed and, being clearly interstate commerce, is not taxable. *McLeod* v. *Dilworth Co., ante,* p. 327. So we are holding that a state has power to make a tax collector of one whom it has no power to tax. Certainly no state has a constitutional warrant for making a tax collector of one as the price of the privilege of doing interstate commerce. He does not get the right from the state, and the state cannot qualify it. I can imagine no principle of states' rights or state comity which can justify what is done here.

Nor does the practice seem conducive to good order in the federal system. The power of Iowa to enforce collection in other states is certainly very limited and the effort to do so on any wide scale is unlikely either to be systematically pursued or successfully executed.

I recognize the pressure to uphold all manner of efforts to collect tax moneys. But this decision, by which one may not ship goods from anywhere in the United States to a purchaser in Iowa without becoming a nonresident tax collector, exceeds everything so far done by this Court. In my opinion the statute is an effort to exert extraterritorial control beyond any which a state could exert if there were no Constitution at all. I can think of nothing in or out of the Constitution which warrants this effort to reach beyond the State's own border to make out-of-state merchants tax collectors because they engage in interstate commerce with the State's citizens.

MR. JUSTICE ROBERTS joins in this opinion.

INTERNATIONAL HARVESTER CO. ET AL. *v.* DEPARTMENT OF TREASURY ET AL.

APPEAL FROM THE SUPREME COURT OF INDIANA.

No. 355. Argued February 29, 1944.—Decided May 15, 1944.

1. An Indiana tax upon gross income, as applied to receipts from the following classes of sales by a foreign corporation authorized to do business in Indiana, was not precluded by the Commerce Clause or the Fourteenth Amendment: (1) sales by out-of-State branches to Indiana dealers and users, where delivery is taken at plants of the corporation in Indiana; (2) sales to out-of-State buyers who come to Indiana, take delivery there, and transport the goods to another State; (3) sales in Indiana to Indiana buyers, where the goods are shipped from out-of-State points to the buyer. Pp. 344–346.
2. Neither the Commerce Clause nor the Fourteenth Amendment precludes the imposition of a state tax on receipts from an intrastate transaction, even though the total activities from which

the local transaction derives may have incidental interstate attributes. P. 344.

3. A State constitutionally may tax gross receipts from interstate transactions consummated within its borders where it treats wholly local transactions similarly. P. 348.

221 Ind. 416, 47 N. E. 2d 150, affirmed.

APPEAL from a judgment sustaining as to certain transactions of the appellants a state tax on gross receipts.

Messrs. Edward R. Lewis and *Joseph J. Daniels* for appellants.

Messrs. Winslow Van Horne and *John J. McShane,* Deputy Attorneys General of Indiana, with whom *Mr. James A. Emmert,* Attorney General, and *Messrs. Joseph W. Hutchinson* and *Fred C. McClurg,* Deputy Attorneys General, were on the brief, for appellees.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This case raises questions concerning the constitutionality of the Indiana Gross Income Tax Act of 1933 (L. 1933, p. 388, Burns Ind. Stats. Ann. § 64–2601) as construed and applied to certain business transactions of appellant companies. The suit was brought by appellants to recover gross income taxes paid to Indiana during the years 1935 and 1936. The Indiana Supreme Court sustained objections to the imposition of the tax on certain sales but allowed the tax to be imposed on other types of transactions. 221 Ind. 416, 47 N. E. 2d 150. The correctness of the latter ruling is challenged by the appeal which brings the case here. Judicial Code § 237, 28 U. S. C. § 344 (a), 28 U. S. C. § 861 (a).

Appellants are corporations authorized to do business in Indiana but incorporated under the laws of other States. They manufacture farm implements and motor trucks and sell those articles both at wholesale and retail. During the period here in question they maintained manu-

facturing plants at Richmond and Fort Wayne, Indiana and selling branches at Indianapolis, Terre Haute, Fort Wayne, and Evansville, Indiana. They also had manufacturing plants and sales branches in adjoining States and elsewhere. Each branch had an assigned territory. In some instances parts of Indiana were within the exclusive jurisdiction of branch offices which were located outside the State. The transactions which Indiana says may be taxed without infringement of the federal Constitution are described by the Indiana Supreme Court as follows:

> *Class C:* Sales by branches located outside Indiana to dealers and users residing in Indiana. The orders were solicited in Indiana and the customers took delivery to themselves at the factories in Indiana to save time and expense of shipping.[1]
>
> *Class D:* Sales by branches located in Indiana to dealers and users residing outside of Indiana, in which the customers came to Indiana and accepted delivery to themselves in this state.[2]
>
> *Class E:* Sales by branches located in Indiana to dealers and users residing in Indiana, in which the

[1] The stipulation states that the "orders and contracts were accepted by branches outside Indiana" and payments "were received by branches outside Indiana." The Class C sales were principally sales of motor trucks manufactured at Fort Wayne and a small amount of goods manufactured at Richmond. In case of wholesale sales it is the custom for the dealer to notify the company at the time he desires delivery that he wants to take delivery of the goods himself at Fort Wayne or Richmond. In the case of retail sales in Class C, "if the user desires to undertake transportation of the goods to their destination and for that purpose to take delivery at the factory in Indiana, it is the business practice for the contract or order so to state."

[2] The stipulation states that the "orders or contracts were accepted and the sales proceeds were received by the Branch Managers at the branches located within Indiana." The business custom or practice respecting deliveries in the State to dealers or retail purchasers was the same as in case of the Class C sales.

goods were shipped from points outside Indiana to customers in Indiana, pursuant to contracts so providing.[3]

The gross income tax[4] collected on those transactions is the same one which was before this Court in *Depart-*

[3] The stipulation states that the goods in this class were shipped by the company from outside the State, the order or contract specifying that "shipment should be made from a point outside Indiana to the purchaser in Indiana." In these cases, moreover, the orders were "solicited from purchasers residing in Indiana by representatives of Indiana branches, or the orders or contracts were received by mail by Indiana branches. The orders and contracts were accepted by the Branch Manager at branches located within Indiana. Payments of the sales proceeds were received by branches in Indiana. The sales in this class were of goods manufactured outside the State of Indiana."

There was no showing, moreover, that goods in this class were of kind that could be obtained only outside Indiana. It seems to be admitted that Class E sales arose when an Indiana branch received orders for goods in quantities which could not be economically carried in stock or where a cheaper freight rate could be obtained by direct shipments from outside Indiana. Cf. *Bowman* v. *Continental Oil Co.*, 256 U. S. 642; *Sonneborn Bros.* v. *Cureton*, 262 U. S. 506.

[4] Sec. 2 of the Act provided in part: "There is hereby imposed a tax, measured by the amount or volume of gross income, and in the amount to be determined by the application of rates on such gross income as hereinafter provided. Such tax shall be levied upon the entire gross income of all residents of the state of Indiana, and upon the gross income derived from sources within the state of Indiana, of all persons and/or companies, including banks, who are not residents of the state of Indiana, but are engaged in business in this state, or who derive gross income from sources within this state, and shall be in addition to all other taxes now or hereafter imposed with respect to particular occupations and/or activities." The language of this section was recast by L. 1937, c. 117, § 2, p. 611.

Sec. 6 (a) of the Act exempted "so much of such gross income as is derived from business conducted in commerce between this state and other states of the United States, or between this state and foreign countries, to the extent to which the state of Indiana is prohibited from taxing under the Constitution of the United States of America." And see L. 1937, c. 117, § 6, p. 615.

ment of Treasury v. *Wood Preserving Corp.*, 313 U. S. 62, and *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307. The tax was described in the *Storen* case as "a privilege tax upon the receipt of gross income." 304 U. S. p. 311. In that case an Indiana corporation which manufactured products and maintained its home office, principal place of business, and factory in Indiana sold those products to customers in other States and foreign countries upon orders taken subject to approval at the home office. It was held that the Commerce Clause (Art. I, § 8 of the Constitution) was a barrier to the imposition of the tax on the gross receipts from such sales. But as we held in the *Wood Preserving Corp.* case, neither the Commerce Clause nor the Fourteenth Amendment prevents the imposition of the tax on receipts from an intrastate transaction even though the total activities from which the local transaction derives may have incidental interstate attributes.

The objections under the Commerce Clause and the Fourteenth Amendment to the tax on the receipts from the three classes of sales involved here are equally without merit.

In the *Wood Preserving Corp.* case contracts were made outside Indiana for the sale of railroad ties. The respondent-seller, a Delaware corporation with its principal place of business in Pennsylvania, obtained the ties from producers in Indiana and delivered them to the buyer (Baltimore & Ohio Railroad Co.) in Indiana who immediately loaded them on cars and shipped them out of the State. Payments for the ties were made to the seller in Pennsylvania. We held that Indiana did not exceed its constitutional authority when it laid the tax on the receipts from those sales.

We see no difference between the sales in the *Wood Preserving Corp.* case and the Class C sales in the present one which is translatable into a difference in Indiana's

power to tax. The fact that the sales in Class C are made by an out-of-state seller and that the contracts were made outside the State is not controlling. Here as in the *Wood Preserving Corp.* case, delivery of the goods in Indiana is an adequate taxable event. When Indiana lays hold of that transaction and levies a tax on the receipts which accrue from it, Indiana is asserting authority over the fruits of a transaction consummated within its borders. These sales, moreover, are sales of Indiana goods to Indiana purchasers. While the contracts were made outside the State, the goods were neither just completing nor just starting an interstate journey. It could hardly be maintained that Indiana could not impose a sales tax or a use tax on these transactions. But, as we shall see, if that is the case, there is no constitutional objection to the imposition of a gross receipts tax by the State of the buyer.

The Class D sales are sales by an Indiana seller of Indiana goods to an out-of-state buyer who comes to Indiana, takes delivery there and transports the goods to another State. The *Wood Preserving Corp.* case indicates that it is immaterial to the present issue that the goods are to be transported out of Indiana immediately on delivery. Moreover, both the agreement to sell and the delivery took place in Indiana. Those events would be adequate to sustain a sales tax by Indiana. In *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33, we had before us a question of the constitutionality of a New York City sales tax as applied to purchases from out-of-state sellers. The tax was "laid upon the buyer, for consumption, of tangible personal property, and measured by the sales price." *Id.*, p. 43. And it was "conditioned upon events occurring" within New York, i. e., the "transfer of title or possession of the purchased property." *Id.*, pp. 43–44. Under the principle of that case, a buyer who accepted delivery in New York would not be exempt from the sales tax because he came from without the State and intended to return to

his home with the goods. The present tax, to be sure, is on the seller. But in each a local transaction is made the taxable event and that event is separate and distinct from the transportation or intercourse which is interstate commerce. In neither does the tax aim at or discriminate against interstate commerce. The operation of the tax and its effect on interstate commerce seem no more severe in the one case than in the other. Indeed, if we are to remain concerned with the practical operation of these state taxes rather than with their descriptive labels (*Nelson* v. *Sears, Roebuck & Co.*, 312 U. S. 359, 363), we must acknowledge that the sales tax sustained in the *Berwind-White* case "was, in form, imposed upon the gross receipts from an interstate sale." Lockhart, Gross Receipts Taxes on Interstate Transportation and Communication, 57 Harv. L. Rev. 40, 87. But that case did no more than to hold that those in interstate trade could not complain if interstate commerce carried its share of the burdens of local government which helped sustain it. And there was no showing that more than that was being exacted.

The sales in Class E embrace those by an Indiana seller to an Indiana buyer where the goods are shipped from points outside the State to the buyer. The validity of the tax on receipts from such sales would seem to follow *a fortiori* from our recent affirmance *per curiam* (318 U. S. 740) of *Department of Treasury* v. *Allied Mills*, 220 Ind. 340, 42 N. E. 2d 34. In that case an Indiana corporation had one factory in Indiana and two in Illinois. Each factory was given a specified part of Indiana to service—a method of distribution adopted to take advantage of favorable freight rates, not to evade taxes. The issue in the case was whether the Indiana gross income tax could be applied to receipts from sales to resident customers in Indiana to whom deliveries were made from the plants in Illinois pursuant to orders taken in Indiana and accepted in Illinois. The Indiana Supreme Court sustained the

imposition of the tax. We affirmed that judgment on the authority of *Felt & Tarrant Co.* v. *Gallagher,* 306 U. S. 62, and *McGoldrick* v. *Felt & Tarrant Co.,* 309 U. S. 70.

In the latter cases the Felt & Tarrant Co. was an Illinois seller who had agents soliciting orders in California and New York. All orders were forwarded to the Illinois office for approval. If accepted, the orders were filled by shipping the products to the local agent who delivered to the purchaser. At times shipments would be made direct to the buyers. Remittances were made by the customers direct to the Illinois office. In the first of these cases the Court sustained the collection from the seller of the California use tax. In the second we upheld on the authority of *McGoldrick* v. *Berwind-White Co., supra,* the imposition by New York City of its sales tax on those purchases.

We do not see how these cases can stand if the Class E sales are to be exempt on constitutional grounds from the present tax. Indeed the transactions in Class E have fewer interstate attributes than those in the *Felt & Tarrant Co.* cases since the agreements to sell were made in Indiana, both buyer and seller were in Indiana, and payments were made in Indiana. It is of course true that in the *Felt & Tarrant Co.* cases taxes of different names were involved. But we are dealing in this field with matters of substance, not with dialectics. *Nelson* v. *Sears, Roebuck & Co., supra.* In this case as in the foregoing sales tax cases the taxable transaction is at the final stage of an interstate movement and the tax is on the gross receipts from an interstate transaction. In form the use tax is different since it is levied on intrastate use after the completion of an interstate sale. But we recognized in the *Berwind-White* case that in that setting the New York sales tax and the California use tax had "no different effect upon interstate commerce." 309 U. S. p. 49. And

see *Nelson* v. *Sears, Roebuck & Co., supra.* The same is true of this Indiana tax as applied to the Class E sales. There is the same practical equivalence whether the tax is on the selling or the buying phase of the transaction. See Powell, New Light On Gross Receipts Taxes, 53 Harv. L. Rev. 909, 929. Each is in substance an imposition of a tax on the transfer of property. In light of our recent decisions it could hardly be held that Indiana lacked constitutional authority to impose a sales tax or a use tax on these transactions. But if that is true, a constitutional difference is not apparent when a "gross receipts" tax is utilized instead.

Here as in case of the other classes of sales there is no discrimination against interstate commerce. The consummation of the transaction was an event within the borders of Indiana which gave it authority to levy the tax on the gross receipts from the sales. And that event was distinct from the interstate movement of the goods and took place after the interstate journey ended.

Much is said, however, of double taxation, particularly with reference to the Class D sales. It is argued that appellants will in all probability be subjected to the Illinois Retailers' Occupation Tax for some of those sales, since that tax is said to be exacted from those doing a retail business in Illinois even though orders for the sales are accepted outside of Illinois and the property is transferred in another State.[5] But it will be time to cross that bridge when we come to it. For example, in the *Wood Preserving Corp.* case the State to which the purchaser took the ties might also have sought to tax the transaction by levying a use tax. But we did not withhold the hand of Indiana's tax collector on that account. Nor is the problem like that of an attempted tax on the gross proceeds of an interstate sale by both the State of the buyer and the State of the seller. Cf. *Adams Mfg. Co.* v. *Storen, supra.*

[5] See L. Ill. 1943, p. 1121, § 1 b, amending L. Ill. 1933, p. 924.

We only hold that where a State seeks to tax gross receipts from interstate transactions consummated within its borders its power to do so cannot be withheld on constitutional grounds where it treats wholly local transactions the same way. Such "local activities or privileges" (*McGoldrick* v. *Berwind-White Co., supra,* p. 58) are as adequate to support this tax as they would be to support a sales tax. To deny Indiana this power would be to make local industry suffer a competitive disadvantage.

Affirmed.

MR. JUSTICE JACKSON dissents.

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

MR. JUSTICE RUTLEDGE, concurring in No. 355 (this case) and No. 441, *ante,* p. 335, and dissenting in No. 311, *ante,* p. 327:

These three cases present in various applications the question of the power of a state to tax transactions having a close connection with interstate commerce.

In No. 311, *McLeod* v. *J. E. Dilworth Co., ante,* p. 327, Arkansas has construed its tax to be a sales tax, but has held this cannot be applied where a Tennessee corporation, having its home office and place of business in Memphis, solicits orders in Arkansas, by mail, telephone or sending solicitors regularly from Tennessee, accepts the orders in Memphis, and delivers the goods there to the carrier for shipment to the purchaser in Arkansas. This Court holds the tax invalid, because "the sale—the transfer of ownership—was made in Tennessee. For Arkansas to impose a tax on such transaction would be to project its powers beyond its boundaries and to tax an interstate transaction." Though an Arkansas "use tax" might be sustained in the same situation, "we are not dealing with matters of nomenclature even though they be matters of nicety." And the case is thought to be different from the

Berwind-White case, 309 U. S. 33, where New York City levied the tax, because, in the Arkansas court's language, "the corporation maintained its sales office in New York City, took its contracts in New York City and made actual delivery in New York City. . . ."

On the other hand, in No. 441, *General Trading Co.* v. *State Tax Commission, ante,* p. 335, Iowa applies its "use tax" to a transaction in which a Minnesota corporation ships goods from Minnesota, its only place of business, to Iowa purchasers on orders solicited in Iowa by salesmen sent there regularly from Minnesota for that purpose, the orders being accepted in Minnesota. This tax the Court sustains. While "no State can tax the privilege of doing interstate business, . . . the mere fact that property is used for interstate commerce or has come into an owner's possession as a result of interstate commerce does not diminish the protection which it may draw from a State to the upkeep of which it may be asked to bear its fair share. But a fair share precludes legislation obviously hostile or practically discriminatory toward interstate commerce. . . . None of these infirmities affects the tax in this case. . . ." And the foreign or nonresident seller who does no more than solicit orders in Iowa, as the Tennessee seller does in Arkansas, may be made the state's tax collector.

In No. 355, *International Harvester Co.* v. *Dept. of Treasury, ante,* p. 340, the state applies its gross income tax, among other situations, to one (Class D) where a foreign corporation authorized to do and doing business in Indiana sells and delivers its product in Indiana to out-of-state customers who come into the state for the transaction. The Court sustains the tax as applied.

I.

For constitutional purposes, I see no difference but one of words and possibly one of the scope of coverage between the Arkansas tax in No. 311 and the Iowa tax in No. 441.

This is true whether the issue is one of due process or one of undue burden on interstate commerce. Each tax is imposed by the consuming state. On the records here, each has a due process connection with the transaction in that fact and in the regular, continuous solicitation there. Neither lays a greater burden on the interstate business involved than it does on wholly intrastate business of the same sort. Neither segregates the interstate transaction for separate or special treatment. In each instance therefore interstate and intrastate business reach these markets on identical terms, so far as the effects of the state taxes are concerned.

And in my opinion they do so under identical material circumstances. In both cases the sellers are "nonresidents" of the taxing state, foreign corporations. Neither seller maintains an office or a place of business there. Each has these facilities solely in the state of origin. In both cases the orders are taken by solicitors sent regularly to the taxing state for that purpose. In both the orders are accepted at the home office in the state of origin. And in both the goods are shipped by delivery to the carrier or the post in the state of origin for carriage across the state line and delivery by it to the purchaser in his taxing state.

In the face of such identities in connections and effects, it is hard to see how one tax can be upheld and the other voided. Surely the state's power to tax is not to turn on the technical legal effect, relevant for other purposes but not for this, that "title passes" on delivery to the carrier in Memphis and may or may not so pass, so far as the record shows, when the Minnesota shipment is made to Iowa. In the absence of other and more substantial difference, that irrelevant technical consideration should not control. However it may be determined for locating the incidence of loss in transit or other questions arising among buyer, seller and carrier, for purposes of taxation that

factor alone is a will-o'-the-wisp, insufficient to crux a due process connection from selling to consuming state and incapable of increasing or reducing any burden the tax may place upon the interstate transaction.

The only other difference is in the terms used by Iowa and Arkansas, respectively, to describe their taxes. For reasons of her own Arkansas describes her tax as a "sales tax." Iowa calls hers a "use tax." This court now is committed to the validity of "use" taxes: *Henneford* v. *Silas Mason Co.*, 300 U. S. 577; *Felt & Tarrant Manufacturing Co.* v. *Gallagher*, 306 U. S. 62; *Nelson* v. *Sears, Roebuck & Co.*, 312 U. S. 359; *Nelson* v. *Montgomery Ward & Co.*, 312 U. S. 373. Similarly, "sales taxes" on "interstate sales" have been sustained. In *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33, such a tax applied by the state of the market was upheld. Compare *Banker Brothers Co.* v. *Pennsylvania*, 222 U. S. 210; *Wiloil Corp.* v. *Pennsylvania*, 294 U. S. 169. Other things being the same, constitutionality should not turn on whether one name or the other is applied by the state. *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435. The difference may be important for the scope of the statute's application, that is, whether it is intended to apply to some transactions but not to others that are within reach of the state's taxing power. It hardly can determine whether the power exists.

II.

The Court's different treatment of the two taxes does not result from any substantial difference in the facts under which they are levied or the effects they may have on interstate trade. It arises rather from applying different constitutional provisions to the substantially identical taxes, in the one case to invalidate that of Arkansas, in the other to sustain that of Iowa. Due process destroys the former. Absence of undue burden upon interstate commerce sustains the latter.

It would seem obvious that neither tax of its own force can impose a greater burden upon the interstate transaction to which it applies than it places upon the wholly local trade of the same character with which that transaction competes. By paying the Arkansas tax the Tennessee seller will pay no more than an Arkansas seller of the same goods to the same Arkansas buyer; and the latter will pay no more to the Tennessee seller than to an Arkansas vendor, on account of the tax, in absorbing its burden. The same thing is true of the Iowa tax in its incidence upon the sale by the Minnesota vendor. The cases are not different in the burden the two taxes place upon the interstate transactions. Nor in my opinion are they different in the existence of due process to sustain the taxes.

"Due process" and "commerce clause" conceptions are not always sharply separable in dealing with these problems. Cf. *e. g., Western Union Telegraph Co.* v. *Kansas,* 216 U. S. 1. To some extent they overlap. If there is a want of due process to sustain the tax, by that fact alone any burden the tax imposes on the commerce among the states becomes "undue." But, though overlapping, the two conceptions are not identical. There may be more than sufficient factual connections, with economic and legal effects, between the transaction and the taxing state to sustain the tax as against due process objections. Yet it may fall because of its burdening effect upon the commerce. And, although the two notions cannot always be separated, clarity of consideration and of decision would be promoted if the two issues are approached, where they are presented, at least tentatively as if they were separate and distinct, not intermingled ones.

Thus, in the case from Arkansas no more than in that from Iowa should there be difficulty in finding due process connections with the taxing state sufficient to sustain the tax. As in the Iowa case, the goods are sold and shipped to Arkansas buyers. Arkansas is the consuming state,

the market these goods seek and find. They find it by virtue of a continuous course of solicitation there by the Tennessee seller. The old notion that "mere solicitation" is not "doing business" when it is regular, continuous and persistent is fast losing its force. In the *General Trading* case it loses force altogether, for the Iowa statute defines this process in terms as "a retailer maintaining a place of business in this state."[1] The Iowa Supreme Court sustains the definition and this Court gives effect to its decision in upholding the tax. Fiction the definition may be; but it is fiction with substance because, for every relevant constitutional consideration affecting taxation of transactions, regular, continuous, persistent solicitation has the same economic, and should have the same legal, consequences as does maintaining an office for soliciting and even contracting purposes or maintaining a place of business, where the goods actually are shipped into the state from without for delivery to the particular buyer. There is no difference between the Iowa and the Arkansas situations in this respect. Both involve continuous, regular, and not intermittent or casual courses of solicitation. Both involve the shipment of goods from without to a buyer within the state. Both involve taxation by the state of the market. And if these substantial connections are sufficient to underpin the tax with due process in the one case, they are also in the other.

That is true, if labels are not to control, unless something which happens or may happen outside the taxing state operates in the one case to defeat the jurisdiction, but does not defeat it in the other.

As I read the Court's opinion, though it does not explicitly so state, the Arkansas tax falls because Tennessee could tax the transaction and, as between the two states, has exclusive power to do so. This is because "the sale—the transfer of ownership—was made in Tennessee."

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[1] Cf. *Frene* v. *Louisville Cement Co.*, 134 F. 2d 511 (App. D. C.).

Arkansas' relation to the transaction is constitutionally different from that of New York in the *Berwind-White* case, though both are the state of the market, because the Berwind-White Company "maintained its sales office in New York City, took its contracts in New York City and made actual delivery in New York City." This "constituted a sale in New York and accordingly we sustained a retail sales tax by New York." So here the company's "offices are maintained in Tennessee, the sale is made in Tennessee, and the delivery is consummated either in Tennessee or in interstate commerce. . . ." The inevitable conclusion, it seems to me, is that the Court is deciding not only that Arkansas cannot tax the transaction, but that Tennessee can tax it and is the only state which can do so. To put the matter shortly, Arkansas cannot levy the tax because Tennessee can levy it. Hence "for Arkansas to impose a tax on such transaction would be to project its powers beyond its boundaries and to tax an interstate transaction."

This statement of the matter appears to be a composite of due process and commerce clause ideas. If so, it is hard to see why the same considerations do not nullify Iowa's power to levy her tax in the identical circumstances and vest exclusive jurisdiction in Minnesota to tax these transactions. For in the Iowa case the selling corporation maintains its office and place of business in Minnesota, accepts the orders there, and the delivery, which is to carrier or post, is consummated, so far as the record shows, exactly in the manner it is made in the Tennessee-Arkansas transaction. If these facts nullify Arkansas' power to tax the transaction by vesting exclusive jurisdiction in Tennessee, it would seem *a fortiori* they would nullify Iowa's power and give Minnesota exclusive jurisdiction to tax the transactions there involved. Unless the sheer difference in the terms "sale" and "use," and whatever difference these might make as a matter of legislative selec-

tion of the transactions which are to bear the tax, are to control upon the existence of the power to tax, the result should be the same in both cases.

Merely as a matter of due process, it is hard to see why any of the four states cannot tax the transactions these cases involve. Each has substantial relations and connections with the transaction, the state of market not less in either case than the state of origin. It "sounds better" for the state of origin to call its tax a "sales tax" and the state of market to name its tax a "use tax." But in the *Berwind-White* case the latter's "sales tax" was sustained, where it is true more of the incidents of sale conjoined with the location of the place of market than do in either No. 311 or No. 441. If this is the distinguishing factor, as it might be for selecting one of the two connected jurisdictions for exclusive taxing power, it is not one which applies to either of these transactions. The identity is not between the *Dilworth* case and *Berwind-White*. It is rather between *Dilworth* and *General Trading*, with *Berwind-White* differing from both. And, so far as due process alone is concerned, it should make no difference whether the tax in the one case is laid by Arkansas or Tennessee and in the other by Iowa or Minnesota. Each state has a sufficiently substantial and close connection with the transaction, whether by virtue of tax benefits conferred in general police protection and otherwise or on account of ideas of territorial sovereignty concerning occurrence of "taxable incidents" within its borders, to furnish the due process foundation necessary to sustain the exercise of its taxing power. Whether it exerts this by selecting for "impingement" of the tax some feature or incident of the transaction which it denominates "sale" or "use" is both illusory and unimportant in any bearing upon its constitutional authority as a matter of due process. If this has any substantive effect, it is merely one of legislative intent in selecting the transactions to bear the tax and thus

fixing the scope of its coverage, not one of constitutional power. "Use" may cover more transactions with which a state has due process connections than "sale." But whenever sale occurs and is taxed the tax bears equally, in final incidence of burden, upon the use which follows immediately upon it.

The great difficulty in allocating taxing power as a matter of due process between the state of origin and the state of market arises from the fact that each state, considered without reference to the other, always has a sufficiently substantial relation in fact and in tax benefit conferred to the interstate transaction to sustain an exertion of its taxing power, a fact not always recognized. And from this failure, as well as from the terms in which statutes not directed specifically to reaching these transactions are cast, comes the search for some "taxable incident taking place within the state's boundaries" as a hook for hanging constitutionality under due process ideas. "Taxable incident" there must be. But to take what is in essence and totality an interstate transaction between a state of origin and one of market and hang the taxing power of either state upon some segmented incident of the whole and declare that this does or does not "tax an interstate transaction" is to do two things. It is first to ignore that any tax hung on such an incident is levied on an interstate transaction. For the part cannot be separated from the whole. It is also to ignore the fact that each state, whether of origin or of market, has by that one fact alone a relation to the whole transaction so substantial as to nullify any due process prohibition. Whether the tax is levied on the "sale" or on the "use," by the one state or by the other, it is in fact and effect a tax levied on an interstate transaction. Nothing in due process requirements prohibits either state to levy either sort of tax on such transactions. That Tennessee therefore may tax this transaction by a sales tax does not, in any proper conception of due process, deprive Arkansas of the same power.

III.

When, however, the issue is turned from due process to the prohibitive effect of the commerce clause, more substantial considerations arise from the fact that both the state of origin and that of market exert or may exert their taxing powers upon the interstate transaction. The long history of this problem boils down in general statement to the formula that the states, by virtue of the force of the commerce clause, may not unduly burden interstate commerce. This resolves itself into various corollary formulations. One is that a state may not single out interstate commerce for special tax burden. *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33, 55–56. Nor may it discriminate against interstate commerce and in favor of its local trade. *Welton* v. *Missouri*, 91 U. S. at 275; *Guy* v. *Baltimore*, 100 U. S. 434; *Voight* v. *Wright*, 141 U. S. 62. Again, the state may not impose cumulative burdens upon interstate trade or commerce. *Gwin, White & Prince* v. *Henneford*, 305 U. S. 434; *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307. Thus, the state may not impose certain taxes on interstate commerce, its incidents or instrumentalities, which are no more in amount or burden than it places on its local business, not because this of itself is discriminatory, cumulative or special or would violate due process, but because other states also may have the right constitutionally, apart from the commerce clause, to tax the same thing and either the actuality or the risk of their doing so makes the total burden cumulative, discriminatory or special.[2]

In these interstate transactions cases involving taxation by the state of origin or that of market, the trouble arises, under the commerce clause, not from any danger that either tax taken alone, whether characterized as "sales" or

[2] Cf. the opinion of the Chief Justice in *Northwest Airlines* v. *Minnesota*, *ante*, p. 308.

"use" tax, will put interstate trade at a disadvantage which will burden unduly its competition with the local trade. So long as only one tax is applied and at the same rate as to wholly local transactions, no unduly discriminatory clog actually attaches to the interstate transaction of business.

The real danger arises most obviously when both states levy the tax. Thus, if in the instant cases it were shown that, on the one hand, Arkansas and Iowa actually were applying a "use" tax and Tennessee and Minnesota a "sales" tax, so that in each case the interstate transaction were taxed at both ends, the heavier cumulative burden thus borne by the interstate business in comparison with the local trade in either state would be obvious. If in each case the state of origin were shown to impose a sales tax of three per cent and the state of market a use tax of the same amount, interstate transactions between the two obviously would bear double the local tax burden borne by local trade in each state. This is a difference of substance, not merely one of names, relevant to the problem created by the commerce clause, though not to that of "jurisdiction" under due process conceptions. And the difference would be no less substantial if the taxes levied by both the state of origin and that of market were called "sales" taxes or if, indeed, both were called "use" taxes.

The Iowa tax in No. 441 avoids this problem by allowing credit for any sales tax shown to be levied upon the transaction whether in Iowa or elsewhere. Clearly therefore that tax cannot in fact put the interstate transaction at a tax disadvantage with local trade done in Iowa or elsewhere.[3]

However, the Arkansas tax in No. 311 provides for no such credit. But in that case there is no showing that Tennessee actually imposes any tax upon the transaction.

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[3] Cf. text *infra* at note 4 *et seq.*

If there is a burden or clog on commerce, therefore, it arises from the fact that Tennessee has power constitutionally to impose a tax, may exercise it, and when this occurs the cumulative effect of both taxes will be discriminatorily burdensome, though neither tax singles out the transaction or bears upon it more heavily than upon the local trade to which it applies. In short, the risk of multiple taxation creates the unconstitutional burden which actual taxation by both states would impose in fact.

In my opinion this is the real question and the only one presented in No. 311. And in my judgment it is determined the wrong way, not on commerce clause grounds but upon an unsustainable application of the due process prohibition.

Where the cumulative effect of two taxes, by whatever name called, one imposed by the state of origin, the other by the state of market, actually bears in practical effect upon such an interstate transaction, there is no escape under the doctrine of undue burden from one of two possible alternatives. Either one tax must fall or, what is the same thing, be required to give way to the other by allowing credit as the Iowa tax does, or there must be apportionment. Either solution presents an awkward alternative. But one or the other must be accepted unless that doctrine is to be discarded and one of two extreme positions taken, namely, that neither state can tax the interstate transaction or that both may do so until Congress intervenes to give its solution for the problem. It is too late to accept the former extreme, too early even if it were clearly desirable or permissible to follow the latter.

As between apportionment and requiring one tax to fall or allow credit, the latter perhaps would be the preferable solution. And in my opinion it is the one which the Court in effect, though not in specific statement, adopts.

That the decision is cast more largely in terms of due process than in those of the commerce clause does not nullify that effect.

If in this case it were necessary to choose between the state of origin and that of market for the exercise of exclusive power to tax, or for requiring allowance of credit in order to avoid the cumulative burden, in my opinion the choice should lie in favor of the state of market rather than the state of origin.[4] The former is the state where the goods must come in competition with those sold locally. It is the one where the burden of the tax necessarily will fall equally on both classes of trade. To choose the tax of the state of origin presents at least some possibilities that the burden it imposes on its local trade, with which the interstate traffic does not compete, at any rate directly, will be heavier than that placed by the consuming state on its local business of the same character. If therefore choice has to be made, whether as a matter of exclusive power to tax or as one of allowing credit, it should be in favor of the state of market or consumption as the one most certain to place the same tax load on both the interstate and competing local business. Hence, if the risk of taxation by both states may be said to have the same constitutional consequences, under the commerce clause, as taxation in actuality by both, the Arkansas tax, rather than the power of Tennessee to tax, should stand.

It may be that the mere risk of double taxation would not have the same consequences, given always of course a sufficient due process connection with the taxing states, that actual double taxation has, or may have, for applica-

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[4] Cf. Powell, New Light on Gross Receipts Taxes (1940) 53 Harv. L. Rev. 909; Lockhart, The Sales Tax in Interstate Commerce (1939) 52 Harv. L. Rev. 617; compare *Gwin, White & Prince* v. *Henneford,* 305 U. S. 434; *Adams Mfg. Co.* v. *Storen,* 304 U. S. 307.

tion of the commerce clause prohibition. Risk of course is not irrelevant to burden or to the clogging effect the rule against undue burden is intended to prevent. But in these situations it may be doubted, on entirely practical grounds, that the mere risk Tennessee may apply its taxing power to these transactions will have any substantial effect in restraining the commerce such as the actual application of that power would have. In any event, whether or not the choice must be made now or, as I think, has been made, it should go in favor of Arkansas, not Tennessee.

For all practical purposes Indiana's gross income tax in No. 355 may be regarded as either a sales tax or a use tax laid in the state of market, comparable in all respects (except in words) to the Arkansas tax laid in No. 311 and to the Iowa tax imposed in No. 441, except that here the seller as well as the buyer does business and concludes the transaction in Indiana, the state of the market. This is clearly true of Classes C and E. It is true also of Class D, in my opinion, although the buyer there resided in Illinois but went to Indiana to enter into the transaction and take delivery of the goods. That he at once removed them, on completion of the transaction there, to Illinois, intended to do this from the beginning and this fact may have been known to the seller, does not take from the transaction its character as one entered into and completed in Indiana. Whether or not Illinois, in these circumstances, could impose a use tax or some other as a property tax is not presented and need not be determined. If the Arkansas and Iowa taxes stand, or either does, *a fortiori* the Indiana tax stands in these applications.

Accordingly, I concur in the decisions in Nos. 441 and 355, but dissent from the decision in No. 311.

UNITED STATES *v.* HELLARD.

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

No. 648. Argued April 28, 1944.—Decided May 15, 1944.

Full-blood Indians of the Five Civilized Tribes may not be divested of title to restricted land by a sale pursuant to a judgment of a state court in a partition proceeding to which the United States was not a party. Construing Act of June 14, 1918; Act of April 12, 1926. P. 368.

138 F. 2d 985, reversed.

CERTIORARI, 321 U. S. 758, to review the affirmance of a judgment which, in a suit removed from a state court to the federal court and in which the United States intervened, quieted title to lands in the respondent here.

Mr. Marvin J. Sonosky, with whom *Solicitor General Fahy, Assistant Attorney General Littell,* and *Messrs. Valentine Brookes* and *Norman MacDonald* were on the brief, for the United States.

Mr. George H. Jennings for respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The question in this case is whether full-blood Indians of the Five Civilized Tribes may be divested of title to restricted land by a sale in partition proceedings to which the United States is not a party.

A full-blood Creek Indian died leaving heirs of the full blood. They inherited certain lands from her, lands which were subject to restrictions on alienation both in her hands and in the hands of the heirs.[1] By § 2 of the Act of June

[1] 35 Stat. 312; 44 Stat. 239; 45 Stat. 495; 47 Stat. 777. And see *Parker* v. *Richard,* 250 U. S. 235; *Harris* v. *Bell,* 254 U. S. 103; *Stewart* v. *Keyes,* 295 U. S. 403.

14, 1918 (25 U. S. C. § 355, 40 Stat. 606) Congress declared that such lands were "made subject to the laws of the State of Oklahoma, providing for the partition of real estate." [2] By § 3 of the Act of April 12, 1926 (44 Stat. 239) Congress provided for the service upon the Superintendent for the Five Civilized Tribes of a prescribed written notice of the pendency of any suit to which a restricted member of the Tribes in Oklahoma or the restricted heirs or grantees are parties and which involves claims to "lands allotted to a citizen of the Five Civilized Tribes or the proceeds, issues, rents, and profits derived from the same." By that Act the United States is given an opportunity to appear in the cause and is bound by the judgment which is entered.

The heirs instituted partition proceedings in the District Court for Creek County, Oklahoma in March 1940. The United States was not named as a party nor was notice of the suit served on the Superintendent. A judgment of partition was entered, pursuant to which the land was sold and a sheriff's deed in partition issued to respondent. In

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[2] "That the lands of full-blood members of any of the Five Civilized Tribes are hereby made subject to the laws of the State of Oklahoma, providing for the partition of real estate. Any land allotted in such proceedings to a full-blood Indian, or conveyed to him upon his election to take the same at the appraisement, shall remain subject to all restrictions upon alienation and taxation obtaining prior to such partition. In case of a sale under any decree, or partition, the conveyance thereunder shall operate to relieve the land described of all restrictions of every character."

Sec. 1 of this Act (25 U. S. C. § 375) provides in part: "That a determination of the question of fact as to who are the heirs of any deceased citizen allottee of the Five Civilized Tribes of Indians who may die or may have heretofore died, leaving restricted heirs, by the probate court of the State of Oklahoma having jurisdiction to settle the estate of said deceased, conducted in the manner provided by the laws of said State for the determination of heirship in closing up the estates of deceased persons, shall be conclusive of said question."

1941 respondent instituted in the same court the present action against the Indian heirs to quiet his title. Notice was served on the Superintendent. The heirs answered disclaiming any interest. At the instance of the United States the cause was removed to the federal District Court as authorized by § 3 of the Act of April 12, 1926. The United States then answered, alleging that the partition proceedings were void for lack of the United States as a party and for want of service on the Superintendent under § 3 of the Act of April 12, 1926. It prayed that the deed in partition be set aside and title quieted in the heirs. The District Court held that the partition proceedings were valid and quieted title in respondent. The Circuit Court of Appeals affirmed. 138 F. 2d 985. The case is here on a petition for a writ of certiorari which we granted because of the importance in the administration of Indian affairs of the question presented.

It seems clear from the language of the Act of June 14, 1918 and its legislative history (S. Rep. No. 330, 65th Cong., 2d Sess.) that Congress vested in the Oklahoma state courts jurisdiction to determine heirship in these restricted lands (§ 1) and jurisdiction to partition them. § 2. See *Salmon* v. *Johnson,* 78 Okla. 182, 189 P. 537; *United States* v. *Bond,* 108 F. 2d 504. The authority of Congress to select state tribunals to perform such functions is clear. *Parker* v. *Richard,* 250 U. S. 235; *Harris* v. *Bell,* 254 U. S. 103; *Stewart* v. *Keyes,* 295 U. S. 403. But a grant of jurisdiction to a particular court without more does not determine what parties are indispensable to the proceedings in question. Petitioner concedes that the United States is not a necessary party to proceedings to determine heirship under § 1 of the Act of June 14, 1918. Since restrictions on alienation do not prevent inheritance, no governmental interest is at least directly involved in such a determination. It may likewise be inferred from the

language, nature, and purpose of Acts of Congress which vest jurisdiction over specified Indian affairs in a designated court that Congress not only has made that tribunal the exclusive agency to effectuate the federal policy but also has dispensed with any requirement that the United States be a party to the proceedings. See *Hy-Yu-Tse-Mil-Kin* v. *Smith,* 194 U. S. 401, 413–414; *Winton* v. *Amos,* 255 U. S. 373, 392. But we do not think that Congress did more by those provisions of the Act of June 14, 1918 with which we are presently concerned than to grant the Oklahoma state courts jurisdiction over partition proceedings.

Restricted Indian land is property in which the United States has an interest. "This national interest is not to be expressed in terms of property, or to be limited to the assertion of rights incident to the ownership of a reversion or to the holding of a technical title in trust." *Heckman* v. *United States,* 224 U. S. 413, 437. Though the Indian's interest is alienated by judicial decree, the United States may sue to cancel the judgment and set the conveyance aside where it was not a party to the action. *Bowling & Miami Investment Co.* v. *United States,* 233 U. S. 528; *Privett* v. *United States,* 256 U. S. 201; *Sunderland* v. *United States,* 266 U. S. 226. Under § 2 of the Act of June 14, 1918 lands partitioned in kind to full-bloods remain restricted. Only if the land is sold at partition sale are the restrictions removed. The governmental interest throughout the partition proceedings is as clear as it would be if the fee were in the United States. *Minnesota* v. *United States,* 305 U. S. 382, 387–388; *Town of Okemah* v. *United States,* 140 F. 2d 963. The United States as guardian of the Indians is necessarily interested either in obtaining partition in kind where that course conforms to its policy of preserving restricted land for the Indians or in seeing that the best possible price is obtained where a sale is desirable. Where, as here, the lands are both tax-

exempt and restricted, the United States is concerned with the reinvestment of the proceeds in other lands likewise tax-exempt and restricted as provided in the Act of June 30, 1932, 47 Stat. 474, 25 U. S. C. § 409a.[3] The United States is also interested in protecting the preferential right of the Secretary of the Interior to purchase the land at the sale for another Indian, as provided in § 2 of the Act of June 26, 1936, 49 Stat. 1967.[4] These are important governmental interests. Since the power of Congress over Indian affairs is plenary, it may waive or withdraw these duties of guardianship or entrust them to such agency—state or federal—as it chooses. But we do not find any indication that when Congress came to deal with these partition proceedings it substituted the Oklahoma state court for the Secretary of the Interior in the performance of the

[3] "That whenever any nontaxable land of a restricted Indian of the Five Civilized Tribes or of any other Indian tribe is sold to any State, county, or municipality for public-improvement purposes, or is acquired, under existing law, by any State, county, or municipality by condemnation or other proceedings for such public purposes, or is sold under existing law to any other person or corporation for other purposes, the money received for said land may, in the discretion and with the approval of the Secretary of the Interior, be reinvested in other lands selected by said Indian, and such land so selected and purchased shall be restricted as to alienation, lease, or incumbrance, and nontaxable in the same quantity and upon the same terms and conditions as the nontaxable lands from which the reinvested funds were derived, and such restrictions shall appear in the conveyance."

[4] "Whenever any restricted Indian land or interests in land, other than sales or leases of oil, gas, or other minerals therein, are offered for sale, pursuant to the terms of this or any other Act of Congress, the Secretary of the Interior shall have a preference right, in his discretion, to purchase the same for or in behalf of any other Indian or Indians of the same or any other tribe, at a fair valuation to be fixed by the appraisement satisfactory to the Indian owner or owners, or if offered for sale at auction said Secretary shall have a preference right, in his discretion, to purchase the same for or in behalf of any other Indian or Indians by meeting the highest bid otherwise offered therefor."

functions which we have enumerated. That alone would not be fatal to respondent's position if it could be inferred that those governmental interests were to be protected by means other than making the United States a party. But, as we have said, the Act in question purports to be no more than a jurisdictional statute. It fails to say that the United States is not a necessary party; nor does it suggest that the United States or its officers are confined to a limited role in the proceedings. Cf. *United States* v. *Candelaria,* 271 U. S. 432, 444. We must read the Act in light of the history of restricted lands. That history shows that the United States has long been considered a necessary party to such proceedings in view of the large governmental interests which are at stake. We will not infer from a mere grant of jurisdiction to a state or federal court to adjudicate claims to restricted lands and to order their sale or other distribution that Congress dispensed with that long-standing requirement. The purpose to effectuate such a major change in policy must be clear.

Much stress is laid on the point that if § 2 of the Act of June 14, 1918 is so construed, it was meaningless until the Act of April 12, 1926 was passed which provided a statutory method for making the United States a party. The argument is that prior to the latter Act there was no way of joining the United States as a party to such an action. But as stated by Mr. Justice Brandeis speaking for the Court in *Minnesota* v. *United States, supra,* p. 388, authorization to bring an action involving restricted lands "confers by implication permission to sue the United States." [5] The suit in that case failed because no jurisdiction was granted to the state courts to condemn the lands in question.[6] But since the state court in the present case was given jurisdiction to partition, consent to be sued in the

[5] And see *United States* v. *Jones,* 109 U. S. 513, 519–521.

[6] See Cohen, Handbook of Federal Indian Law (1942), p. 381.

state court may be implied. Service of process therefore might be had in the usual way (see *Town of Okemah* v. *United States, supra,* p. 966) even in absence of the 1926 Act.

Reversed.

MORTENSEN ET UX. *v.* UNITED STATES.

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

No. 559. Argued March 9, 10, 1944.—Decided May 15, 1944.

1. In the exercise of its supervisory appellate power, this Court treats the transcript of the evidence in this case as part of the record before it and considers the case on its merits. P. 371.
2. Upon review of a conviction in a federal court, this Court may examine the record to determine whether there was any competent and substantial evidence fairly tending to support the verdict. P. 374.
3. Petitioners, man and wife, operated a house of prostitution in Nebraska. They took with them on a trip to Utah, which was planned and consummated purely as a vacation, two girls who had been living at their house as prostitutes. Upon their return, the girls resumed prostitution at petitioners' house. *Held* that a conviction of the petitioners for transporting the girls from Utah to Nebraska (the return trip) "for the purpose of prostitution or debauchery," in violation of § 2 of the Mann Act, was not supported by any relevant evidence. Pp. 372, 376.
4. To punish those who transport inmates of a house of prostitution on an innocent vacation trip in no way related to the practice of their commercial vice is consistent neither with the purpose nor the language of the Mann Act. P. 377.

139 F. 2d 967, reversed.

CERTIORARI, 321 U. S. 757, to review the affirmance of a conviction for violation of the Mann Act.

Mr. Eugene D. O'Sullivan, with whom *Mr. Thomas W. Lanigan* was on the brief, for petitioners.

Mr. Robert L. Stern, with whom *Solicitor General Fahy* and *Assistant Attorney General Tom C. Clark* were on the brief, for the United States.

MR. JUSTICE MURPHY delivered the opinion of the Court.

We granted certiorari in this case to review the judgment of the Circuit Court of Appeals affirming the conviction of petitioners under § 2 of the White Slave Traffic Act, popularly known as the Mann Act.[1] 139 F. 2d 967.

Following their conviction by the jury in the District Court, petitioners filed a notice of appeal to the Circuit Court of Appeals. However, they failed to file a timely bill of exceptions in the District Court. Thereafter they applied to the Circuit Court of Appeals for an order granting them "the right to have a Bill of Exceptions" and for additional time in which to settle and file it. This application was denied without opinion or explanation. When the case subsequently came before another division of judges of that court for argument on the merits, petitioners renewed their request for permission to file a bill. This was, in effect, a motion for rehearing of the decision of the first division of judges of the court. Counsel was then allowed by the court to leave with it, but not to file, a copy of the reporter's transcript of the evidence "in order that we might assure ourselves that no fundamental injustice had been done by the previous denial of an extension, and that we would not, because of the absence of a bill of exceptions, be affirming a conviction which was not properly an offense under the Act." 139 F. 2d at 969, note 1. The court then treated the case as though the transcript were properly before it and sustained petitioners' conviction on the merits. Having reached the conclusion that there was no merit in petitioners' conten-

[1] Act of June 25, 1910, § 2, 36 Stat. 825, 18 U. S. C. § 398.

tions and that the result would have been the same had a bill of exceptions been filed, the court refused to permit the "purported" transcript to be filed. No other reason was given for this refusal.

Petitioners have raised before us the propriety of the action of the court below, claiming that they thereby have been prevented from urging and arguing certain assignments of error which they wished to urge. It is clear from Rule IV of the Criminal Appeals Rules [2] that the Circuit Court of Appeals has the right to exercise sound judicial discretion in supervising and controlling the proceedings on appeal. *Ray* v. *United States,* 301 U. S. 158, 166–167; *Forte* v. *United States,* 302 U. S. 220, 223; *Kay* v. *United States,* 303 U. S. 1, 9–10; *Miller* v. *United States,* 317 U. S. 192, 199. This includes the right to grant or deny belated applications for permission to file bills of exceptions. And the court's action in the matter is not reviewable in this Court absent a clear abuse of discretion.

But under the peculiar circumstances of this case it is unnecessary to determine whether the court below abused its discretion in refusing to allow a bill to be filed. When that court examined the transcript of the evidence and conclusively adjudicated the merits, it accomplished in substance all that would have been achieved if the formality of filing the transcript had occurred and the court had then passed upon the merits. In order that petitioners shall not be unfairly deprived of the right to seek a review of that court's determination of the merits, we may consider the court's action as in effect having approved the filing of the transcript as a bill of exceptions. A copy of the transcript has been lodged with the Clerk of this Court and no question has been raised as to its correctness or completeness. In accordance with the Government's suggestion and in the exercise of our supervisory

[2] 292 U. S. 661, 663; 18 U. S. C. A. following § 688.

appellate power, we shall treat the transcript as a part of the record before us and consider the case on its merits.

The petitioners, man and wife, operated a house of prostitution in Grand Island, Nebraska. In 1940 they planned an automobile trip to Salt Lake City, Utah, in order to visit Mrs. Mortensen's parents. Two girls who were employed by petitioners as prostitutes asked to be taken along for a vacation and the Mortensens agreed to their request. They motored to Yellowstone National Park and then on to Salt Lake City, where they all stayed at a tourist camp for four or five days. They visited Mrs. Mortensen's parents and, in addition, the girls "went to shows and around in the parks" and saw various other parts of the city. The four then returned in petitioners' automobile to Grand Island; on arrival they drove immediately to petitioners' house of ill fame and retired to their respective rooms. The following day one of the girls resumed her activities as a prostitute in petitioners' employ, while the other did not resume such activities for a week or ten days because of illness. Both girls continued to act as prostitutes for petitioners for a year or more after their return from Salt Lake City.

It is undisputed that this was purely a vacation trip, with the two girls paying their own living expenses and petitioners bearing the expenses of transportation. One of the girls had offered to help pay for the transportation, but petitioners refused on the ground that the cost would remain the same even if the girls did not accompany them. No acts of prostitution or other immorality occurred during the two-week trip and there was no discussion of such acts during the course of the journey. Both girls testified that during the trip they gave no consideration to their work as prostitutes and made no plans to abandon such activities. There was also uncontradicted evidence that the two girls were under no obligation or compulsion of any kind to return to Grand Island to work for petition-

ers. They were free at any time before, during or after the vacation excursion to leave petitioners' employ and engage in their own pursuits. Both girls claimed that Grand Island was their residence, one of them testifying that she boarded her child with a family in that city.

Petitioners were charged in two counts with violating § 2 of the Mann Act in that they transported and caused to be transported, and aided and assisted in obtaining transportation for and in transporting, two girls in interstate commerce from Salt Lake City to Grand Island for the purpose of prostitution and debauchery, and with intent to induce, entice and compel the girls to give themselves up to debauchery and to engage in immoral practices. The jury was charged that purpose was an essential ingredient of the crime and that if the jury found that the transportation from Salt Lake City to Grand Island was planned with no immoral purpose, no crime was committed. The jury was also told that, to convict, it must find that the Government had proved beyond a reasonable doubt that petitioners transported the girls from Salt Lake City to Grand Island for the purpose of prostitution and debauchery. The jury returned a verdict of guilty on both counts. This conviction was affirmed by the Circuit Court of Appeals under circumstances previously described.

The primary issue before us is whether there was any evidence from which the jury could rightly find that petitioners transported the girls from Salt Lake City to Grand Island for an immoral purpose in violation of the Mann Act.

The penalties of § 2 of the Act are directed at those who knowingly transport in interstate commerce "any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery,

or to engage in any other immoral practice." The statute thus aims to penalize only those who use interstate commerce with a view toward accomplishing the unlawful purposes. To constitute a violation of the Act, it is essential that the interstate transportation have for its object or be the means of effecting or facilitating the proscribed activities. *Hansen* v. *Haff,* 291 U. S. 559, 563. An intention that the women or girls shall engage in the conduct outlawed by § 2 must be found to exist before the conclusion of the interstate journey and must be the dominant motive of such interstate movement. And the transportation must be designed to bring about such result. Without that necessary intention and motivation, immoral conduct during or following the journey is insufficient to subject the transporter to the penalties of the Act.

Since the issue as to whether petitioners intended that the two girls should resume their immoral conduct on their return to Grand Island and transported them in interstate commerce for that purpose was submitted to the jury with appropriate instructions we would normally be precluded from reviewing or disturbing the inferences of fact drawn from the evidence by the jury. But we have never hesitated to examine a record to determine whether there was any competent and substantial evidence fairly tending to support the verdict. Cf. *Abrams* v. *United States,* 250 U. S. 616, 619. Our examination of the record in this case convinces us that there was a complete lack of relevant evidence from which the jury could properly find or infer, beyond a reasonable doubt, that petitioners transported the girls in interstate commerce "for the purpose of prostitution or debauchery" within the meaning of the Mann Act.

It may be assumed that petitioners anticipated that the two girls would resume their activities as prostitutes upon their return to Grand Island. But we do not think it is

fair or permissible under the evidence adduced to infer that this interstate vacation trip, or any part of it, was undertaken by petitioners for the purpose of, or as a means of effecting or facilitating, such activities. The sole purpose of the journey from beginning to end was to provide innocent recreation and a holiday for petitioners and the two girls. It was a complete break or interlude in the operation of petitioners' house of ill fame and was entirely disassociated therefrom. There was no evidence that any immoral acts occurred on the journey or that petitioners forced the girls against their will to return to Grand Island for immoral purposes. What Congress has outlawed by the Mann Act, however, is the use of interstate commerce as a calculated means for effectuating sexual immorality. In ordinary speech an interstate trip undertaken for an innocent vacation purpose constitutes the use of interstate commerce for that innocent purpose. Such a trip does not lose that meaning when viewed in light of a criminal statute outlawing interstate trips for immoral purposes.

The fact that the two girls actually resumed their immoral practices after their return to Grand Island does not, standing alone, operate to inject a retroactive illegal purpose into the return trip to Grand Island. Nor does it justify an arbitrary splitting of the round trip into two parts so as to permit an inference that the purpose of the drive to Salt Lake City was innocent while the purpose of the homeward journey to Grand Island was criminal. The return journey under the circumstances of this case cannot be considered apart from its integral relation with the innocent round trip as a whole. There is no evidence of any change in the purpose of the trip during its course. If innocent when it began it remained so until it ended. Guilt or innocence does not turn merely on the direction of travel during part of a trip not undertaken for immoral ends. If the return journey was illegal, so was the out-

going one since all intended, from the beginning, to end the journey where it began, at Grand Island. The outward leg of the trip was interstate transportation. Yet it was not charged, and could not well be, that proof of this part of the trip was a violation of the Act. It differed in no respect from the other part, except in the direction of travel. That is not enough to make the first part innocent, the last part illegal. Criminal intent and purpose must be grounded on something less ingenious than that which is necessary to sustain a finding of such a purpose in making the return interstate journey to Grand Island. "People not of good moral character, like others, travel from place to place and change their residence. But to say that because they indulge in illegal or immoral acts, they travel for that purpose, is to emphasize that which is incidental and ignore what is of primary significance." *Hansen* v. *Haff, supra,* 562–563. Cf. *Ex parte Rocha,* 30 F. 2d 823.

An artificial and unrealistic view of the nature and purpose of the return journey to Grand Island is necessary to sustain this conviction. But we are unwilling to sanction the application of the Mann Act in a manner that is so manifestly unfair. Whatever their faults, petitioners are entitled to have just and fair treatment under the law and not to be punished for transporting girls in interstate commerce for a purpose wholly different from any of the purposes condemned by Congress.

We do not here question or reconsider any previous construction placed on the Act which may have led the federal government into areas of regulation not originally contemplated by Congress. But experience with the administration of the law admonishes us against adding another chapter of statutory construction and application which would have a similar effect and which would make possible even further justification of the fear expressed at the time of the adoption of the legislation that its broad provisions "are liable to furnish boundless opportunity to

hold up and blackmail and make unnecessary trouble, without any corresponding benefits to society." [3]

To punish those who transport inmates of a house of prostitution on an innocent vacation trip in no way related to the practice of their commercial vice is consistent neither with the purpose nor with the language of the Act. Congress was attempting primarily to eliminate the "white slave" business which uses interstate and foreign commerce as a means of procuring and distributing its victims and "to prevent panderers and procurers from compelling thousands of women and girls against their will and desire to enter and continue in a life of prostitution." [4] Such clearly was not the situation revealed by the facts of this case. To accomplish its purpose the statute enumerates the prohibited acts in broad language capable of application beyond that intended by the legislative framers. But even such broad language is conditioned upon the use of interstate transportation for the purpose of, or as a means of effecting or facilitating, the commission of the illegal acts. Here the interstate round trip had no such purpose and was in no way related to the subsequent immoralities in Grand Island. In short, we perceive no statutory purpose or language which prohibits petitioners under these circumstances from using interstate transportation for a vacation or for any other innocent purpose.

The judgment of the court below is

Reversed.

MR. CHIEF JUSTICE STONE:

MR. JUSTICE BLACK, MR. JUSTICE REED, MR. JUSTICE DOUGLAS and I think the judgment should be affirmed.

Courts have no more concern with the policy and wisdom of the Mann Act than of the Labor Relations Act or

[3] 45 Cong. Rec. 1033.

[4] H. Rep. No. 47, p. 10 (61st Cong., 2d Sess.). The same statement appears in S. Rep. No. 886, p. 10 (61st Cong., 2d Sess.). See also 45 Cong. Rec. 805, 821, 1035, 1037.

any other which Congress may constitutionally adopt. Those are matters for Congress to determine, not the courts. Congress, in enacting the Mann Act, declared in unmistakable terms that any person who should transport across state lines "any woman . . . for the purpose of prostitution . . . or with the intent and purpose to induce . . . such woman . . . to give herself up to debauchery, or to engage in any other immoral practice; . . . shall be deemed guilty of a felony."

The fact that petitioners, who were engaged in an established business of operating a house of prostitution in Nebraska, took some of its women inmates on a transient and innocent vacation trip to other states, is in no way incompatible with the conclusion that petitioners, in bringing them back to Nebraska, purposed and intended that they should resume there the practice of commercial vice, which in fact they did promptly resume in petitioners' establishment. The record is without evidence that they engaged or intended to engage in any other activities in Nebraska, or that anything other than the practice of their profession was the object of their return. For this reason the case is controlled by *Lapina* v. *Williams,* 232 U. S. 78, rather than by *Hansen* v. *Haff,* 291 U. S. 559. The jury was properly instructed, its verdict is supported by ample evidence, and the two courts below rightly sustained it.

COLUMBIA GAS & ELECTRIC CORP. *v.* AMERICAN FUEL & POWER CO. ET AL.

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

No. 814.—Decided May 22, 1944.

1. Though a court of bankruptcy possesses and may exercise equity powers in the disposition of suits in bankruptcy, a bankruptcy proceeding is not itself a suit in equity either by statutory definition or in common understanding. P. 383.
2. The present bankruptcy proceeding brought by private suitors was not one "wherein the United States is complainant"; it was not brought under the anti-trust laws of the United States; and the intervention of the United States did not so alter the proceeding as to make it a suit in equity within the meaning of § 2 of the Expediting Act. Consequently an appeal to this Court from an order of the District Court rejecting appellant's claims is not authorized by the Expediting Act, and the appeal is therefore dismissed. P. 383.
3. Since the appellant has taken an appeal also to the Circuit Court of Appeals, this Court need not exercise its supervisory power to vacate the judgment below in order to permit a proper appeal to be taken. P. 384.

Dismissed.

APPEAL from an order of the District Court rejecting appellant's claims in a bankruptcy proceeding in which the United States had intervened.

Messrs. Floyd C. Williams and *Frank W. Cottle* for appellant.

Mr. L. J. Obermeier for appellees.

Solicitor General Fahy for the United States, intervenor.

PER CURIAM:

This is an appeal from a judgment of the District Court directly to this Court, taken under § 2 of the Expediting

Act of February 11, 1903, 32 Stat. 823, as amended, 15 U. S. C. § 29. The United States, as an intervenor in the District Court and appellee here, has moved to dismiss the appeal as unauthorized by the Expediting Act.

Separate proceedings were brought in bankruptcy in the District Court under Chapter X of the Bankruptcy Act for the reorganization of the three appellee debtors, American Fuel and Power Company, and two of its subsidiaries, Inland Gas Corporation and Kentucky Fuel Gas Corporation. Appellant Columbia Gas & Electric Corporation filed its proofs of claim in the reorganization proceedings as the owner and holder of stock, and of notes and bonds and open accounts of the debtors.

The District Court, on application of the debtors' trustees, entered an order in the bankruptcy proceedings approving a proposed compromise settlement of all of appellant's claims against the debtors. On appeal by certain creditors the Circuit Court of Appeals for the Sixth Circuit reversed. 122 F. 2d 223. It held that the facts of record disclosed that appellant Columbia's stock and money claims against the debtors had been acquired and used by it to secure control of them in violation of the Sherman and Clayton Anti-Trust Acts and were consequently not provable or allowable claims in a bankruptcy reorganization. It accordingly remanded the cause to the District Court with instructions that all claims against the debtor, which Columbia had acquired in violation of the federal anti-trust laws, be rejected. But its opinion pointed out that appellant had not appeared in the proceeding in the District Court for the approval of the proposed compromise and it was consequently not bound by the appellate court's findings of fact in that proceeding.

After the remand the District Court granted the application of the United States to be allowed to intervene in the bankruptcy proceedings. The United States' petition for intervention asserted that it was concerned in arresting

any action of the bankruptcy court which might tend to defeat or curtail the relief to which it might be entitled in a pending equity suit which it had brought against appellant in the District Court for Delaware. The purpose of this latter suit was to restrain appellant from violations of the anti-trust laws by the control of the debtors through the acquisition and holding of the same stock and money obligations, as are the subjects of appellant's claims in this proceeding.

The United States, as intervenor, and certain creditors filed objections to the allowance of appellant's claims in bankruptcy. The proceedings on the claims were consolidated for hearing and after a trial in which appellant participated, the District Court found that appellant had acquired and used the subjects of its claims in the prosecution of a conspiracy to acquire control of the debtors in violation of the anti-trust laws. It gave judgment rejecting appellant's claims as not provable or allowable in bankruptcy. From this judgment appellant has taken the present appeal to this Court under § 2 of the Expediting Act. It has also appealed to the Court of Appeals for the Sixth Circuit.

Section 2 of the Expediting Act, as found in 15 U. S. C. § 29, provides, "In every suit in equity brought in any district court of the United States under sections 1–7 or 15 [1] of this title [provisions of the Sherman and Clayton

[1] Section 2 of the Expediting Act, as enacted in 1903, 32 Stat. 823, referred merely to suits in equity "under any of said Acts," the "said Acts" being those referred to in § 1 of the Act, i. e., the Sherman Act, the Interstate Commerce Act, and "any other Acts having a like purpose that hereafter may be enacted." The compilers of the United States Code, in place of "any of said Acts," refer only to §§ 1–7 and 15 of Title 15 of the Code. It is not apparent why § 15 is included, since it provides for the recovery of treble damages for violation of the anti-trust laws, and since the United States is not authorized by the section to maintain such a suit. See *United States* v. *Cooper Corp.*, 312 U. S. 600. It is probable that the compilers of the Code intended

Acts] wherein the United States is complainant, an appeal from the final decree of the district court will lie only to the Supreme Court. . . ." Accordingly, to be appealable to this Court under the provisions of this section, the present proceeding must be a "suit in equity" "brought" in a district court "wherein the United States is complainant."

The nature of the equity suit, referred to in § 2 of the Expediting Act, is defined and restricted by 15 U. S. C. § 4, which authorizes the United States to bring equity suits for enforcement of the Sherman Act. Section 4 invests the district courts with jurisdiction to "prevent and restrain violations of sections 1–7 and 15 of this title," and makes it the duty of the United States attorneys in their districts under direction of the Attorney General "to institute proceedings in equity to prevent and restrain such violations." Section 25 of 15 U. S. C. makes provision for like suits in equity to be brought under the direction of the Attorney General to "prevent and restrain violations" of provisions of the Clayton Act embodied in 15 U. S. C. §§ 12, 13, 14–21, and 22–27. Such a suit brought under § 14 was held to be appealable directly from the district court to this Court in *International Business Machines Corp.* v. *United States*, 298 U. S. 131.

By 15 U. S. C. § 28, derived from § 1 of the Expediting Act of 1903, it was provided that in any suit in equity brought in any district court of the United States under §§ 1–7 or § 15 of that title "wherein the United States is complainant," the Attorney General may file in court a certificate of public importance and that thereupon such case shall be given precedence over others, shall be in every way expedited, and shall be assigned for hearing before a court of three judges selected as provided in the section.[2]

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to refer to 15 U. S. C. § 25, which is § 15 of the Clayton Act and which is discussed in the text of this opinion.

[2] By Act of April 6, 1942, § 1, 56 Stat. 198, this section was amended so as to include "any civil action" brought in a district court under the

The present is a bankruptcy proceeding, and even though a court of bankruptcy possesses and may exercise equity powers in the disposition of suits in bankruptcy, see Bankruptcy Act § 2, 11 U. S. C. § 11; *Securities & Exchange Commission* v. *United States Realty Co.*, 310 U. S. 434, 455 and cases cited, a bankruptcy proceeding is not itself a suit in equity either by statutory definition or in common understanding. This bankruptcy proceeding is not one "wherein the United States is complainant," nor is it brought under the anti-trust laws of the United States and we cannot say that the intervention of the United States in this proceeding has so altered it as to make it a suit in equity within the meaning of § 2 of the Expediting Act.

By its petition and intervention the United States has aligned itself with the debtors' trustees, who are asking only to have appellant's claims rejected. The United States likewise, by its petition in intervention, asked that the District Court adjudge that appellant's claims against the debtors be rejected and that appellant take nothing by them. As an intervenor the United States was limited to the field of litigation open to the original parties. *Chandler & Price Co.* v. *Brandtjen, Inc.*, 296 U. S. 53, 57–60 and cases cited; *Vinson* v. *Washington Gas Light Co.*, 321 U. S. 489. The position of the trustees in the proceeding for allowance of appellant's claims, conducted in conformity to the mandate of the Circuit Court of Appeals, was not that of complainants in an equity suit. The trustees did not seek in that proceeding, nor were they authorized to seek, equitable relief for the prevention of future violations. They were rather in the position of

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anti-trust laws in which the United States "is plaintiff." Congress, insofar as it may have extended the procedure for a trial by a district court of three judges to proceedings other than suits in equity, has nevertheless left unamended § 2 of the Expediting Act, which restricted direct appeals to the Supreme Court to suits in equity wherein the United States is complainant.

defendants resisting the claims of appellant on the ground that its claims were tainted with illegality because of its past conduct in acquiring them. No more than the trustees, could the United States be said to be a complainant in a suit in equity, such as is defined by 15 U. S. C. § 4, "to prevent and restrain violations" of the anti-trust laws.

It is of some significance also that the suits in equity referred to by § 2 of the Expediting Act are the suits which under 15 U. S. C. § 28 are required, on certification of the Attorney General, to be expedited in the District Court and to be tried there by a court of three judges. But we find no intimation in § 28 that there is authority for convening a district court of three judges to sit as a bankruptcy court for the trial of an issue in bankruptcy because it involves the determination of questions arising under the anti-trust laws, and we think that the United States as intervenor in a bankruptcy proceeding limited to the allowance of claims or their rejection, if found to have been acquired in violation of the anti-trust laws, could not invoke the procedure for trial of that issue by a court of three judges.

We conclude that the order in intervention authorized the Government to urge the rejection of appellant's claims in the bankruptcy proceeding; that in so doing it was not acting as a complainant in an equity suit within the meaning of § 2 of the Expediting Act, and consequently no appeal lies to this Court from the order of the District Court rejecting appellant's claims. The appeal will therefore be dismissed for want of jurisdiction of this Court to entertain it. Since appellant has also taken an appeal to the Circuit Court of Appeals, we need not exercise our supervisory power to vacate the judgment below, in order to permit a proper appeal to be taken. *Wilentz* v. *Sovereign Camp,* 306 U. S. 573, 582; cf. *Gully* v. *Interstate Natural Gas Co.,* 292 U. S. 16; *Oklahoma Gas Co.* v. *Oklahoma Packing Co.,* 292 U. S. 386, 392; *Jameson & Co.* v.

Morgenthau, 307 U. S. 171, 174; *Phillips* v. *United States,* 312 U. S. 246, 254.

Dismissed.

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

UNITED STATES *v.* SAYLOR ET AL.

NO. 716. APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.*

Argued April 28, 1944.—Decided May 22, 1944.

Section 19 of the Criminal Code, which penalizes conspiracy "to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States," embraces the right of a voter in a Congressional election to have his vote honestly counted, and is violated by a conspiracy of election officials to stuff a ballot box in such an election. P. 389.

Reversed.

APPEALS under the Criminal Appeals Act from judgments in two cases sustaining demurrers to indictments for violation of § 19 of the Criminal Code.

Mr. Paul A. Freund argued the cause, and *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Messrs. Chester T. Lane* and *Edward G. Jennings* were on the brief, for the United States.

Mr. Harry B. Miller for respondents.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

These cases come here under the Criminal Appeals Act. The District Court sustained demurrers to indictments

*Together with No. 717, *United States* v. *Poer et al.,* also on appeal from the District Court of the United States for the Eastern District of Kentucky.

for conspiracies forbidden by § 19 of the Criminal Code.[1] The section provides: "If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, . . ." they shall be punished.

As the cases present identical questions it will suffice to state No. 716. The indictment charged that a general election was held November 3, 1942, in Harlan County, Kentucky, for the purpose of electing a Senator of the United States, at which election the defendants served as the duly qualified officers of election; that they conspired to injure and oppress divers citizens of the United States who were legally entitled to vote at the polling places where the defendants officiated, in the free exercise and enjoyment of the rights and privileges guaranteed to the citizens by the Constitution and laws of the United States, namely, the right and privilege to express by their votes their choice of a candidate for Senator and their right to have their expressions of choice given full value and effect by not having their votes impaired, lessened, diminished, diluted and destroyed by fictitious ballots fraudulently cast and counted, recorded, returned, and certified. The indictment charged that the defendants, pursuant to their plan, tore from the official ballot book and stub book furnished them, blank unvoted ballots and marked, forged, and voted the same for the candidate of a given party, opposing the candidate for whom the injured voters had voted, in order to deprive the latter of their rights to have their votes cast, counted, certified and recorded and given full value and effect; that the defendants inserted the false ballots they had so prepared into the ballot box, and returned them, together with the other ballots lawfully cast, so as to create a false and fictitious return respecting the votes lawfully cast.

[1] 18 U. S. C. § 51.

The appellees demurred to the indictment, as failing to state facts sufficient to constitute a crime against the United States. The demurrer attacked the indictment on other grounds raising questions which, if decided, would not be reviewable here under the Criminal Appeals Act. The District Court decided only that the indictment charged no offense against the laws of the United States. This ruling presents the question for decision.

The appellees do not deny the power of Congress to punish the conspiracy described in the indictment. In the light of our decisions, they could not well advance such a contention.[2] The inquiry is whether the provision of § 19 embraces a conspiracy by election officers to stuff a ballot box in an election at which a member of the Congress of the United States is to be elected.

In *United States* v. *Mosley*, 238 U. S. 383, this court reversed a judgment sustaining a demurrer to an indictment which charged a conspiracy of election officers to render false returns by disregarding certain precinct returns and thus falsifying the count of the vote cast. After stating that § 19 is constitutional and validly extends "some protection at least to the right to vote for Members of Congress," the court added: "We regard it as equally unquestionable that the right to have one's vote counted is as open to protection by Congress as the right to put a ballot in a box." The court then traced the history of § 19 from its origin as one section of the Enforcement Act of May 31, 1870,[3] which contained other sections more specifically aimed at election frauds, and the survival of § 19 as a statute of the United States notwithstanding the repeal of those other sections. The conclusion was that § 19 protected personal rights of a citizen including the right to cast his ballot, and held that to re-

[2] *Ex parte Yarbrough*, 110 U. S. 651, 657, 658, 661, 663; *United States* v. *Classic*, 313 U. S. 299, 314, 315.

[3] c. 114, 16 Stat. 140, as amended by c. 99, 16 Stat. 433.

fuse to count and return the vote as cast was as much an infringement of that personal right as to exclude the voter from the polling place. The case affirms that the elector's right intended to be protected is not only that to cast his ballot but that to have it honestly counted.

The decision was not reached without a strong dissent, which emphasized the probability that Congress did not intend to cover by § 6 of the Act (now § 19) the right to cast a ballot and to have it counted, but to deal with those rights in other sections of the act. And it was thought this view was strengthened by the repeal, February 8, 1894,[4] of the sections which dealt with bribery and other election frauds, including § 4, which, to some extent, overlapped § 6, if the latter were construed to comprehend the right to cast a ballot and to have it counted. Notwithstanding that dissent, the *Mosley* case has stood as authority to the present time.[5]

The court below thought the present cases controlled by *United States* v. *Bathgate,* 246 U. S. 220. That case involved an indictment charging persons with conspiring to deprive a candidate for office of rights secured to him by the Constitution and laws of the United States, in violation of § 19, and to deprive other voters of their rights, by the bribery of voters who participated in an election at which members of Congress were candidates. This court affirmed a decision of the district court sustaining a demurrer to the indictment, and distinguished the *Mosley* case on several grounds: first, that, in the Enforcement Act, bribery of voters had been specifically made a criminal offense but the section so providing had been repealed; secondly, that the ground on which the *Mosley* case went

[4] c. 25, 28 Stat. 36.

[5] *United States* v. *Gradwell,* 243 U. S. 476; *In re Roberts,* 244 U. S. 650; *Hague* v. *C. I. O.,* 307 U. S. 496, 527; *United States* v. *Classic, supra,* 321.

was that the conspiracy there was directed at the personal right of the elector to cast his own vote and to have it honestly counted, a right not involved in the *Bathgate* case.

If the voters' rights protected by § 19 are those defined by the *Mosley* case, the frustration charged to have been intended by the defendants in the present cases violates them. For election officers knowingly to prepare false ballots, place them in the box, and return them, is certainly to prevent an honest count by the return board of the votes lawfully cast. The mathematical result may not be the same as would ensue throwing out or frustrating the count of votes lawfully cast. But the action pursuant to the conspiracy here charged constitutes the rendering of a return which, to some extent, falsifies the count of votes legally cast. We are unable to distinguish a conspiracy so to act from that which was held a violation of § 19 in the *Mosley* case.

It is urged that any attempted distinction between the conduct described in the *Bathgate* case and that referred to in the *Mosley* case is illogical and insubstantial; that bribery of voters as badly distorts the result of an election and as effectively denies a free and fair choice by the voters as does ballot box stuffing or refusal to return or count the ballots. Much is to be said for this view. The legislative history does not clearly disclose the Congressional purpose in the repeal of the other sections of the Enforcement Act, while leaving § 6 (now § 19) in force. Section 19 can hardly have been inadvertently left on the statute books. Perhaps Congress thought it had an application other than that given it by this court in the *Mosley* case. On the other hand, Congress may have intended the result this court reached in the *Mosley* decision. We think it unprofitable to speculate upon the matter for Congress has not spoken since the decisions in question were an-

nounced, and the distinction taken by those decisions has stood for over a quarter of a century. Observance of that distinction places the instant case within the ruling in the *Mosley* case and outside that in the *Bathgate* case.

Our conclusion is contrary to that of the court below and requires that the judgments be reversed.

Reversed.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK and MR. JUSTICE REED concur, dissenting:

The question is not whether stuffing of the ballot box should be punished. Kentucky has made that reprehensible practice a crime. See Ky. Rev. Stat. 1942, § 124.220; *Commonwealth* v. *Anderson*, 151 Ky. 537, 152 S. W. 552; *Tackett* v. *Commonwealth*, 285 Ky. 83, 146 S. W. 2d 937. Cf. Ky. Rev. Stat. 1942, § 124.180 (8). And it is a crime under Kentucky law whether it occurs in an election for state officials or for United States Senator. *Id.*, § 124.280 (2). The question here is whether the general language of § 19 of the Criminal Code should be construed to superimpose a federal crime on this state crime.

Under § 19 of the Enforcement Act of May 31, 1870 (16 Stat. 144) the stuffing of this ballot box would have been a federal offense.[1] That provision was a part of the compre-

[1] That section provided:

"That if at any election for representative or delegate in the Congress of the United States any person shall knowingly personate and vote, or attempt to vote, in the name of any other person, whether living, dead, or fictitious; or vote more than once at the same election for any candidate for the same office; or vote at a place where he may not be lawfully entitled to vote; or vote without having a lawful right to vote; or do any unlawful act to secure a right or an opportunity to vote for himself or any other person; or by force, threat, menace, intimidation, bribery, reward, or offer, or promise thereof, or otherwise unlawfully prevent any qualified voter of any State of the United States of America, or of any Territory thereof, from

hensive "reconstruction" legislation passed after the Civil War. It was repealed by the Act of February 8, 1894, 28 Stat. 36—an Act which was designed to restore control of election frauds to the States. The Committee Report (H. Rep. No. 18, 53d Cong., 1st Sess., p. 7) which sponsored the repeal stated:

"Let every trace of the reconstruction measures be wiped from the statute books; let the States of this great Union understand that the elections are in their own hands, and if there be fraud, coercion, or force used they will be the first to feel it. Responding to a universal sentiment throughout the country for greater purity in elections many of our States have enacted laws to protect the voter and to purify the ballot. These, under the guidance of State officers, have worked efficiently, satisfactorily, and beneficently; and if these Federal statutes are repealed that sentiment will receive an impetus which, if the cause

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freely exercising the right of suffrage, or by any such means induce any voter to refuse to exercise such right; or compel or induce by any such means, or otherwise, any officer of an election in any such State or Territory to receive a vote from a person not legally qualified or entitled to vote; or interfere in any manner with any officer of said elections in the discharge of his duties; or by any of such means, or other unlawful means, induce any officer of an election, or officer whose duty it is to ascertain, announce, or declare the result of any such election, or give or make any certificate, document, or evidence in relation thereto, to violate or refuse to comply with his duty, or any law regulating the same; or knowingly and wilfully receive the vote of any person not entitled to vote, or refuse to receive the vote of any person entitled to vote; or aid, counsel, procure, or advise any such voter, person, or officer to do any act hereby made a crime, or to omit to do any duty the omission of which is hereby made a crime, or attempt to do so, every such person shall be deemed guilty of a crime, and shall for such crime be liable to prosecution in any court of the United States of competent jurisdiction, and, on conviction thereof, shall be punished by a fine not exceeding five hundred dollars, or by imprisonment for a term not exceeding three years, or both, in the discretion of the court, and shall pay the costs of prosecution."

still exists, will carry such enactments in every State in the Union."

This Court now writes into the law what Congress struck out 50 years ago. The Court now restores federal control in a domain where Congress decided the States should have exclusive jurisdiction. I think if such an intrusion on historic states' rights is to be made, it should be done by the legislative branch of government. I cannot believe that Congress intended to preserve by the general language of § 19 the same detailed federal controls over elections which were contained in the much despised "reconstruction" legislation.

The Court, of course, does not go quite that far. It recognizes that bribery of voters is not a federal offense. *United States* v. *Bathgate,* 246 U. S. 220. But he who bribes voters and purchases their votes corrupts the electoral process and dilutes my vote as much as he who stuffs the ballot box. If one is a federal crime under § 19, I fail to see why the other is not also.

Congress has ample power to legislate in this field and to protect the election of its members from fraud and corruption. *United States* v. *Classic,* 313 U. S. 299. I would leave to Congress any extension of federal control over elections. I would restrict § 19 to those cases where a voter is deprived of his right to cast a ballot or to have his ballot counted. *United States* v. *Mosley,* 238 U. S. 383. That is the "right or privilege" the "free exercise" of which is protected by § 19. If it is said that that distinction is not a logical one, my answer is that it is nevertheless a practical one. Once we go beyond that point, logic would require us to construe § 19 so as to make federal offenses out of all frauds which corrupt the electoral process, distort the count, or dilute the honest vote. The vast interests involved in that proposal emphasize the legislative quality of an expansive construction of § 19. We should leave that expansion to Congress.

That view is supported by another consideration. The double jeopardy provision of the Fifth Amendment does not bar a federal prosecution even though a conviction based on the same acts has been obtained under state law. *Jerome* v. *United States,* 318 U. S. 101, 105, and cases cited. Therefore when it is urged that Congress has created offenses which traditionally have been left for state action and which duplicate state crimes, we should be reluctant to expand the defined federal offenses "beyond the clear requirements of the terms of the statute." *Id.* I know of no situation where that principle could be more appropriately recognized than in the field of the elections where there is comprehensive state regulation.

KEEFE ET AL. *v.* CLARK, DRAIN COMMISSIONER OF OAKLAND COUNTY, ET AL.

APPEAL FROM THE SUPREME COURT OF MICHIGAN.

No. 634. Argued April 27, 28, 1944.—Decided May 22, 1944.

1. Where the contract is between a political subdivision of a State and private individuals, the obligation alleged to have been impaired in violation of the Federal Constitution must be clearly and unequivocally expressed. P. 396.
2. The foregoing rule of construction applies with special force in the present case, since the interpretation of the contract urged by appellants would result in a drastic limitation of the power of the State to remedy a situation obviously inimical to the interests of municipal creditors and the general public. P. 397.
3. The Michigan statute upon which the owners of special assessment drain bonds here rely, dealing with the levy of an additional assessment in the event that the bonds are not paid in full at maturity, did not secure to the bond owners any right which was impaired by later statutes providing for sale by the State, free of all encumbrances, of land for unpaid taxes; and the later statutes did not impair the obligation of their contracts in violation of the Federal Constitution. P. 397.

306 Mich. 503, 11 N. W. 2d 220, affirmed.

APPEAL from a judgment modifying and affirming a declaratory judgment which, in a suit by special assessment bond owners against county officials, determined the rights of the bond owners, appellants here.

Mr. Irvin Long, with whom *Mr. Paul W. Voorhies* was on the brief, for appellants.

Messrs. Harry J. Merritt and *William C. Hudson* for appellees.

Briefs of *amici curiae* were filed by *Messrs. Wilber M. Brucker* and *Robert C. Winter* on behalf of Andrew Jergens, urging reversal; and by *Messrs. Herbert J. Rushton,* Attorney General, and *Daniel J. O'Hara,* Assistant Attorney General, on behalf of the State of Michigan, urging affirmance.

MR. JUSTICE BLACK delivered the opinion of the Court.

In this case appellants argue that certain provisions of two Acts passed by the Michigan legislature in 1937 are void in that, contrary to Art. I, § 10 of the United States Constitution, they impair the obligation of special assessment drain bonds issued in 1927, some of which are owned by appellants. The case is here on appeal from the Supreme Court of Michigan. 28 U. S. C. 344 (a).[1]

So far as here relevant, the two Acts[2] said to be unconstitutional provide that parcels of land subject to special assessment for drain projects may be sold for unpaid taxes, and also provide that the purchaser at such a sale shall be

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[1] Appellees have moved to dismiss the appeal on the grounds that a federal question was not properly raised in the state courts. The record fails to sustain the motion and it is denied. See *Whitney* v. *California,* 274 U. S. 357, 360.

[2] Act 114, Mich. Pub. Acts of 1937, as amended by Act 282, Mich. Pub. Acts of 1939 and Act 234, Mich. Pub. Acts of 1941.

Act 155, Mich. Pub. Acts of 1937, as amended by Acts 29, 244, and 329 of Mich. Pub. Acts of 1939 and Act 363 of Mich. Pub. Acts of 1941.

granted a title free of all encumbrances, including all assessments for drain projects already constructed. The proceeds of each tax sale are applied towards payment of the unpaid drain assessment on the particular parcel of land, as well as towards payment of other delinquent taxes. Pursuant to these Acts, the State of Michigan has sold tax delinquent properties located in the drain district which issued appellants' bonds. The deeds of sale purport to release the properties from all encumbrances, including all assessments on account of the 1927 drain project.

Appellants do not contend that the challenged Acts impair any term of the contract printed on the face of their drain bonds. What they contend is that the Acts impair a right secured to them by a statutory provision which was the law of Michigan at the time their bonds were issued and which, they say, became a part of the bond contract. See *Von Hoffman* v. *City of Quincy,* 4 Wall. 535, 550. The statutory provision upon which they rely reads:

"If there is not sufficient money in the fund in a particular drain at the time of the maturity of the bonds last to mature to pay all outstanding bonds with interest, . . . it shall be the duty of the commissioner to at once levy an additional assessment as hereinbefore provided in such an amount as will make up the deficiency." Chapter X, § 18, Act 316, Mich. Pub. Acts of 1923, as amended by Act 331, Mich. Pub. Acts of 1927.

Appellants' argument is that this statute has given them an indefeasible right to have a deficiency assessment levied on each privately owned parcel of land in the drain district regardless of whether a particular parcel already has been sold at a tax sale and the proceeds applied toward payment of the drain bonds. In practical effect, they assert that by this statute lands subject to assessment for their drain bonds are subject to be sold not just once, but twice, for payment of the single benefit which the lands

received from the original drain project. Consequently, their argument runs, the Michigan legislature was powerless to provide that purchasers of tax-delinquent property in the drain district be exempt from a deficiency drain assessment.

This argument the Supreme Court of Michigan refused to accept. Emphasizing the serious consequences of such a hobbling of the State's powers to meet pressing problems, the Court pointed out that the power of the State to sell tax-delinquent lands free of the burden of assessments for completed drain projects was essential not only to protect the bondholders themselves but to protect the public interest. Without power in the State to offer an attractive title to prospective purchasers, the Court found, many of such lands would remain tax-delinquent and thereby be rendered valueless for all public revenue purposes, including drain assessments. The Court declined to read into the statute relied upon by appellants any purpose to permit drain districts to surrender the State's sovereign power to provide for the sale of tax-delinquent property free of encumbrances. It held that under the Michigan law in effect when appellants' special assessment drain bonds were issued the bondholders' "maximum security" for payment of assessments against drain district lands was the parcels of land themselves, and that when the bondholders received their fair share of the proceeds derived from the tax sale of any particular parcel they had received everything to which their bond contracts entitled them. *Keefe* v. *Oakland County Drain Comm'r*, 306 Mich. 503, 511–512, 11 N. W. 2d 220.

Before we can find impairment of a contract we must find an obligation of the contract which has been impaired. Since the contract here relied upon is one between a political subdivision of a state and private individuals, settled principles of construction require that the obligation alleged to have been impaired be clearly and unequivocally

expressed. This rule of construction applies with special force in the case at bar, for the interpretation of the bond contract urged by appellants would result in a drastic limitation upon the power of Michigan to enact legislation designed to remedy a situation obviously inimical to the interests of both municipal creditors and the general public.[3] "The continued existence of a government would be of no great value, if, by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation." *Charles River Bridge* v. *Warren Bridge,* 11 Pet. 420, 548; and see *Gilman* v. *Sheboygan,* 2 Black 510, 513; *Fisher* v. *New Orleans,* 218 U. S. 438.

We do not find in the provision of the drain statute relied upon by appellants a clear and unequivocal purpose of Michigan to permit drain districts to bargain away the State's power to sell tax-delinquent lands free of encumbrances. Long before the date when appellants' bonds were issued, the Michigan Supreme Court had held that, "The general rule is that a sale and a conveyance (by the

[3] The Michigan Supreme Court has described vividly the intimate relation between the power of the State to remove encumbrances from tax-delinquent lands and the welfare of the public. *Baker* v. *State Land Office Board,* 294 Mich. 587, 592–594, 293 N. W. 763. Land speculation ran riot in Michigan in the 1920's, bringing with it construction of subdivisions, paving and drainage projects, etc. Inflated land values produced their inevitable consequences. In the early 1930's a large part of Michigan lands had a market value far less than the unpaid property and improvement taxes accumulated upon them. Attempting to remedy the situation, the legislature tried tax collection moratoriums, and for six years no tax sales were held, but still unpaid taxes continued to amass. Property owners abandoned their heavily encumbered real estate; the state and local governments could get no revenue from the delinquent property; and municipal creditors could get neither principal nor interest. All suffered alike. Finally in 1937, upon the recommendation of legislative committees and planning commissions, Acts 114 and 155, *supra,* Note 1, together with Act 325, were passed by the legislature in an attempt to collect unpaid taxes and to free property of its accumulated tax burden.

State) in due form for taxes extinguishes all prior liens, whether for taxes or otherwise. This rule is one of necessity, growing out of the imperative nature of the demand of the government for its revenues." *Auditor General* v. *Clifford,* 143 Mich. 626, 630, 107 N. W. 287; and see *Municipal Investors Assn.* v. *Birmingham,* 298 Mich. 314, 325–326, 299 N. W. 90, and cases there cited. The provision of the drain statute upon which appellants rest their case does not expressly purport to alter this "rule of necessity." On its face it deals only with the levy of an additional assessment in the event that drain bonds are not paid in full at maturity, and does not assume to deal with the manner of selling tax-delinquent properties in drain districts or the kind of title that can be conveyed at such sales. "The language falls far short of subjecting lots which have been sold to pay tax or assessment liens to an additional assessment for the deficit. Such a construction would defeat the remedy of tax sales as a means of realizing the assessment lien." *Municipal Investors Assn.* v. *Birmingham,* 316 U. S. 153, 159.

Affirmed.

MR. JUSTICE ROBERTS concurs in the result.

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

L. P. STEUART & BRO., INC. *v.* BOWLES, PRICE ADMINISTRATOR, ET AL.

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

No. 793. Argued May 2, 1944.—Decided May 22, 1944.

The power of the President under § 2 (a) (2) of Title III of the Second War Powers Act to "allocate" materials includes the power to issue suspension orders against retailers and to with-

hold rationed materials from them where it is established that they have acquired and distributed the rationed materials in violation of the ration regulations. P. 403.
140 F. 2d 703, affirmed.

CERTIORARI, 321 U. S. 761, to review the affirmance of a decree dismissing the complaint in a suit to enjoin the enforcement of a suspension order issued against the company by the Office of Price Administration pursuant to powers delegated by the President under the Second War Powers Act.

Mr. Renah F. Camalier, with whom *Mr. Francis C. Brooke* was on the brief, for petitioner.

Mr. Thomas I. Emerson, with whom *Solicitor General Fahy* and *Mr. David London* were on the brief, for respondents.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Sec. 2 (a) (2) of Title III of the Second War Powers Act (56 Stat. 178, 50 U. S. C. App. (Supp. III), § 633) provides in part:

"Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense."

By § 2 (a) (8) of the Act the President is granted authority to exercise that power "through such department, agency, or officer of the Government as he may direct and in conformity with any rules or regulations which he may prescribe." That authority, so far as material here, was

delegated to the Office of Price Administration,[1] which promulgated Ration Order No. 11, effective October 22, 1942, providing for the rationing of fuel oil.[2] That order recited the now familiar facts concerning the then critical and acute shortage of fuel oil and other petroleum products in the eastern states due to the great war activity. It stated that it was "essential to guarantee the continued availability of adequate supplies of fuel oil for military and naval use and for industrial and agricultural operations" and that the "reduction of demand to the available supply is sought to be achieved largely by a curtailment of the use of fuel oil for heating premises and for hot water, virtually the only classes of uses which can be uniformly reduced without directly impeding the war effort."[3] The order inaugurated "a system of rationing control" deemed necessary in order "to provide for equitable distribution of fuel oil in the areas of shortage."[4] Fuel oil rations for heat and for hot water were provided. Machinery was established for the regulation of the flow of fuel oil from suppliers to consumers. Only a few of those regulations are relevant here. Transfers of fuel oil to consumers were allowed only in exchange for ration coupons.[5] A dealer obtaining fuel oil from his supplier was generally required to surrender ration coupons within five days after the transfer.[6] Dealers were required, with exceptions not material here, to keep records of sales to consumers showing their names and addresses, the date and amount of the

[1] Executive Order No. 9125, 7 Fed. Reg. 2719; War Production Board, Supplementary Directive 1–0, Oct. 16, 1942, 7 Fed. Reg. 8418.

[2] 7 Fed. Reg. 8480.

[3] *Id.*, p. 8480.

[4] *Id.*, p. 8480. Ration Order No. 11 initiated rationing of fuel oil in thirty eastern, southeastern, and midwestern states and in the District of Columbia.

[5] § 1394.5652.

[6] §§ 1394.5707, 1394.5708.

transfer, and the coupons detached.[7] Provision was also made for "suspension orders" as follows:[8]

"Any person who violates Ration Order No. 11 may, by administrative suspension order, be prohibited from receiving any transfers or deliveries of, or selling or using or otherwise disposing of, any fuel oil or other rationed product or facility. Such suspension order shall be issued for such period as in the judgment of the Administrator, or such person as he may designate for such purpose, is necessary or appropriate in the public interest and to promote the national security."

On December 31, 1943, a suspension order was issued against petitioner, a retail dealer in fuel oil in the District of Columbia. It was found that petitioner had obtained large quantities of fuel oil from its supplier without surrendering any ration coupons. It was found that petitioner had delivered many thousands of gallons of fuel oil to consumers without receiving ration coupons in exchange;[9] and that in some instances petitioner delivered fuel oil to consumers without receipt of valid ration coupons in exchange.[10] Petitioner was also found to have

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[7] § 1394.5656.

[8] § 1394.5803. And see 8 Fed. Reg. 2720.

The Office of Price Administration conferred on its Hearing Commissioners and Hearing Administrator the function of issuing suspension orders. General Order 46, 8 Fed. Reg. 1771. It also adopted, Feb. 6, 1943, Procedural Regulation No. 4, which prescribed the procedure to be used in the issuance of rationing suspension orders. 8 Fed. Reg. 1744. And see 9 Fed. Reg. 2558 for the revision of this regulation, issued Mar. 6, 1944.

[9] Some 328,000 gallons according to OPA, around 181,000 gallons on petitioner's computation.

[10] The OPA Hearing Administrator found "The record is replete with proof that respondent did commit, with reference to transfers to consumers, practically every sort of violation known to the regulations—making deliveries for expired coupons, unmatured coupons, no coupons at all and making emergency deliveries in excess of the quantities permitted."

failed to keep the required records showing its transfers of fuel oil to consumers. The suspension order prohibited petitioner from receiving fuel oil for resale or transfer to any consumer for the period from January 15, 1944 to December 31, 1944, the date when the Second War Powers Act expires. The order provided, however, that if petitioner furnished the Office of Price Administration with a list of consumers to whom it had sold fuel oil from October 21, 1941, to October 21, 1942, and if it surrendered all void ration coupons in its possession, it might transfer fuel oil to any consumer to whom it had transferred fuel oil during the year subsequent to October 21, 1941 [11] and receive fuel oil sufficient for that purpose. The order finally provided that if the Petroleum Administrator for War [12] should certify that the fuel oil needs of the District of Columbia could not be met by the supplies and the facilities of other suppliers and dealers in the area and that it was therefore essential to the welfare of the community that the provisions of the suspension order be modified, the restrictions might be wholly or partly removed [13] The suspension order was issued after notice and hearings as provided in the regulations which govern the procedure in such cases.[14]

The present suit was brought in the District Court for the District of Columbia to enjoin the enforcement of the suspension order. A temporary restraining order was issued. Respondents moved for summary judgment. That motion was granted and the complaint was dismissed. On the appeal that judgment was affirmed. 140 F. 2d 703. The case is here on a petition for a writ of certiorari

[11] Ration Order No. 11 became effective October 22, 1942.

[12] Established December 2, 1942, by Executive Order No. 9276. 7 Fed. Reg. 10091.

[13] The suspension order also provided for an accounting by petitioner of its fuel oil transactions since October 22, 1942.

[14] Procedural Regulation No. 4, *supra*, note 8.

which we granted because of the importance of the problem in the administration of the rationing regulations.

The sole question presented by this case is whether the power of the President under § 2 (a) (2) of Title III of the Second War Powers Act to "allocate" materials includes the power to issue suspension orders against retailers and to withhold rationed materials from them where it is established they have acquired and distributed the rationed materials in violation of the ration regulations.

We state the question that narrowly because of the posture of the case as it reaches us. The constitutional authority of Congress to authorize as a war emergency measure the allocation or rationing of materials is not challenged. No question of delegation of authority is present. It is assumed, on petitioner's concession, that the President has validly delegated to the Office of Price Administration whatever authority he has under § 2 (a) (2) of Title III of the Act. And no question is raised, like those involved in *Yakus* v. *United States,* 321 U. S. 414, and *Bowles* v. *Willingham,* 321 U. S. 503, concerning the authority of Congress to delegate to the President in this way the power to allocate materials. No contention is made that petitioner was deprived of fuel oil without a hearing and an opportunity to defend. Nor is it argued that, although the power to issue suspension orders exists, that power was abused in this instance, so as to give rise to judicial review, and the limits of the authority exceeded by the specific provisions of the order which is before us. And finally, no challenge is made of the findings which underlie this suspension order.[15]

The argument, rather, is that the authority to "allocate" materials does not include the power to issue suspension orders; and that no such power will be implied since sus-

[15] The Government has conceded that there may be judicial review of suspension orders.

pension orders are penalties to which persons will not be subjected unless the statute plainly imposes them. See *Tiffany* v. *National Bank,* 18 Wall. 409, 410; *Keppel* v. *Tiffin Savings Bank,* 197 U. S. 356, 362; *Wallace* v. *Cutten,* 298 U. S. 229, 237. In that connection it is pointed out that Congress provided criminal and civil sanctions for violations of Title III of the Act. By § 2 (a) (5) any person who wilfully violates those provisions of the Act or any rule, regulation or order promulgated thereunder is guilty of a misdemeanor and subject to fine and imprisonment. By § 2 (a) (6) federal courts have power, among others, to enjoin any violation of those provisions of the Act or any rule, regulation or order thereunder. It is therefore contended that when violations of regulations under the Act are used as the basis for withholding rationed materials from persons, sanctions for law enforcement are created by administrative fiat contrary to the Act in question and contrary to constitutional requirements.

We agree that it is for Congress to prescribe the penalties for the laws which it writes. It would transcend both the judicial and the administrative function to make additions to those which Congress has placed behind a statute. *United States* v. *Two Hundred Barrels of Whiskey,* 95 U. S. 571; *Campbell* v. *Galeno Chemical Co.,* 281 U. S. 599; *Wallace* v. *Cutten, supra.* Hence we would have no difficulty in agreeing with petitioner's contention if the issue were whether a suspension order could be used as a means of punishment of an offender. But that statement of the question is a distortion of the issue presented on this record.

The problem of the scarcity of materials is often acute and critical in a great war effort such as the present one. Whether the difficulty be transportation or production, there is apt to be an insufficient supply to meet essential civilian needs after military and industrial requirements

have been satisfied. Thus without rationing, the fuel tanks of a few would be full; the fuel tanks of many would be empty. Some localities would have plenty; communities less favorably situated would suffer. Allocation or rationing is designed to eliminate such inequalities and to treat all alike who are similarly situated. The burdens are thus shared equally and limited supplies are utilized for the benefit of the greatest number. But middlemen—wholesalers and retailers—bent on defying the rationing system could raise havoc with it. By disregarding quotas prescribed for each householder and by giving some more than the allotted share they would defeat the objectives of rationing and destroy any program of allocation. These middlemen are the chief if not the only conduits between the source of limited supplies and the consumers. From the viewpoint of a rationing system a middleman who distributes the product in violation and disregard of the prescribed quotas is an inefficient and wasteful conduit. If the needs of consumers are to be met and the consumer allocations are to be filled, prudence might well dictate the avoidance or discard of such inefficient and unreliable means of distribution of a scarce and vital commodity. Certainly we could not say that the President would lack the power under this Act to take away from a wasteful factory and route to an efficient one a precious supply of material needed for the manufacture of articles of war. That power of allocation or rationing might indeed be the only way of getting the right equipment to our armed forces in time. From the point of view of the factory owner from whom the materials were diverted the action would be harsh. He would be deprived of an expected profit. But in times of war the national interest cannot wait on individual claims to preference. The waging of war and the control of its attendant economic problems are urgent business. Yet if the President has the power to channel raw materials into the most efficient industrial

units and thus save scarce materials from wastage it is difficult to see why the same principle is not applicable to the distribution of fuel oil.

If petitioner established that he was eliminated as a dealer or that his quota was cut down for reasons not relevant to allocation or efficient distribution of fuel oil, quite different considerations would be presented. But we can make no such assumption here. The suspension order rests on findings of serious violations repeatedly made. These violations were obviously germane to the problem of allocation of fuel oil. For they indicated that a scarce and vital commodity was being distributed in an inefficient, inequitable and wasteful way. The character of the violations thus negatives the charge that the suspension order was designed to punish petitioner rather than to protect the distribution system and the interests of conservation. Moreover, there is the following finding in support of the limitation on the number of customers which petitioner may hereafter service:

"We have no way of knowing how many customers the respondent corporation can serve while at the same time faithfully observing the rationing regulations. But we do know from its clearly established violations from the very inception of fuel-oil rationing that the number it then served approached the upper limit of its capacity since the fact is clear that it did not (whether it would not or could not) thereafter both service this number and simultaneously comply with the rationing regulations. Additional customers, then, clearly impose a burden which the respondent cannot bear."

None of the findings is challenged here. Taken at their face value, as they must be, they refute the suggestion that the order was based on considerations not relevant to the problem of allocation. They sustain the conclusion that in restricting petitioner's quota the Office of Price Administration was doing no more than protecting a com-

munity against distribution which measured by rationing standards was inequitable, unfair, and inefficient. If the power to "allocate" did not embrace that power it would be feeble power indeed.

What we have said disposes of the argument that if petitioner has violated Ration Order No. 11 the only recourse of the Government is to proceed under § 2 (a) (5) or § 2 (a) (6) which provide criminal and civil sanctions. Those remedies are sanctions for the power to "allocate." They hardly subtract from that power. Yet they would be allowed to do just that if it were held that violations by middlemen of the ration orders and regulations could never be the basis of reallocation of fuel oil into more reliable channels of distribution.

It is finally pointed out that Congress has seldom used the licensing power[16] and that that power, when used, has been employed sparingly. Thus one of the sanctions of the Emergency Price Control Act of 1942 (56 Stat. 33, 50 U. S. C. App. (Supp. III) § 925) is the power to revoke licenses for violations of maximum prices or rents. § 205 (f). That power may be utilized only in judicial proceedings; and licenses may be suspended only for limited periods. § 205 (f) (2). That consideration would be germane to the present problem if Congress had implemented the allocation procedure with a licensing system. Then the question might arise whether revocation of the license rather than the reallocation of materials by administrative action was the appropriate procedure in case of violations. Congress, however, did not adopt the licensing system when it came to rationing. And the failure to do so is hardly a reason for saying that the power to "allocate" is less replete than a reading of the Act fairly permits.

Affirmed.

MR. JUSTICE ROBERTS dissents.

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[16] See § 5 of the Act of August 10, 1917, 40 Stat. 276, 277.

CRITES, INCORPORATED *v.* PRUDENTIAL INSURANCE CO. ET AL.

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

No. 317. Argued March 1, 1944.—Decided May 22, 1944.

1. A federal court receiver who, through a private agreement made prior to the foreclosure sale of the properties, derived a profit from their subsequent resale, *held* accountable to the receivership estate for such profit, notwithstanding that he had been appointed to collect rents and operate the properties and was without authority in respect of any sale thereof. P. 416.
2. The fee-splitting arrangement entered into by the receiver in this case, together with the fact that he engaged in other misconduct incompatible with his position as an officer of the court, require that he be denied all fees and compensation as receiver. P. 418.

134 F. 2d 925, reversed.

CERTIORARI, 320 U. S. 728, to review a judgment which modified and affirmed an order of the District Court approving and confirming receivers' accounts and overruling exceptions thereto.

Messrs. Isaac E. Ferguson and *Joseph Rosenbaum* for petitioner.

Messrs. Clarence D. Laylin and *Osmer C. Ingalls* for respondents.

MR. JUSTICE MURPHY delivered the opinion of the Court.

We granted certiorari in this case to determine certain important questions concerning the proper administration of federal receiverships.

Henry M. Crites and his wife, May R. Crites, executed mortgages in 1929 to the Prudential Insurance Company of America upon 22 parcels of adjoining farm property in

Madison and Pickaway Counties, Ohio. Each mortgage, being in default, was matured by acceleration on December 30, 1931. On February 17, 1932, Prudential began 22 separate foreclosure proceedings against the Criteses and Crites, Inc., the petitioner. Only the 11 proceedings relating to the 11 contiguous farms in Madison County, on which the mortgages aggregated $192,000, are now before us.

An involuntary petition in bankruptcy had been filed against Henry M. Crites. Petitioner is an Ohio corporation formed by Crites' creditors in an effort to salvage something from the farms. To it had been conveyed all the properties of the Criteses, including the equities of redemption. Prudential requested that a receiver be appointed to take charge of the mortgaged farms pending the termination of the foreclosure proceedings. The District Court accordingly appointed as co-receivers the respondents Simkins and Florence "to collect the rents and proceeds of the real estate . . . to operate and manage said real estate through tenants, lessees, or otherwise, to rent and lease said real estate, to pay delinquent taxes and assessments and insurance premiums, to make such repairs as may be necessary to preserve the value of the premises and to produce normal income therefrom, and to do such other acts as may be from time to time ordered by the court." Subsequent orders authorized them to borrow money from Prudential and from the local bank to pay necessary expenses relating to the farms and to execute leases of the farms upon a share or crop rental basis.

No answers to the foreclosure complaints were filed. In the hope that economic conditions would improve and bring about a higher sale value, the District Court allowed the receivers to operate the farms for a year before entering decrees *pro confesso* on May 2, 1933. By these decrees the mortgages and equities of redemption were declared foreclosed and the marshal was directed to sell each farm

individually on July 1, 1933, at a public sale for cash at not less than two-thirds of the appraised value. The appraisers set the value of the 11 Madison County farms at $244,080, making $162,720 the minimum price at which they could be sold. The decree indebtedness in the 11 cases was $223,742.32. Prudential made the sole bids at the public sale on July 1 and secured title to the 11 farms for $163,900, slightly more than the upset price. The District Court confirmed this sale on July 18.

Prudential subsequently objected to the allowance of the receivers' claims on the ground that they were excessive. Petitioner also filed objections. Hearings were held before a special master. The District Court overruled petitioner's exceptions to the special master's report and its counterclaim, amended and approved the receivers' accounts, and affirmed the special master's report. Petitioner alone appealed, the court below affirming the action of the District Court with a slight modification as to additional fees for the receivers' attorneys. 134 F. 2d 925.

I.

Petitioner's first contention is that Simkins' actions in connection with the foreclosure sales constituted a breach of his duty as a receiver and rendered him accountable for certain profits made by him and others.

The evidence indicates that a Col. Proctor of Cincinnati was interested in purchasing the entire 11 Madison County farms as a unit and that he employed a real estate agent, Edwin Jones,[1] to represent him in the matter. Several weeks before the foreclosure sales, Jones visited Simkins and told him that he understood that Simkins was one of the attorneys in the matter and that he was inter-

[1] Jones was familiar with the 11 Madison County farms, having made an offer of $500,000 for them "a year or more" prior to 1933 on behalf of a New York principal. Crites rejected this offer, however.

ested in buying the farms. Simkins, in addition to being one of the co-receivers, was an attorney who had represented Prudential in other foreclosure proceedings in Ohio and who had served Jones in a professional capacity on other matters. Simkins replied that "we are in no position to offer it right now, not in position until after the foreclosure proceedings and the Prudential Insurance Company acquires title for it, then they will be in position to offer it to anybody else trying to buy it." Simkins agreed, however, to intercede on Jones' behalf. They then drew up a contract whereby Simkins was to assist Jones in securing title to the 11 farms from Prudential after the latter had secured title by purchase at the public sale. The compensation of Simkins was dependent upon the success of the deal. Simkins did not know at this time the name of Jones' principal or how much the principal was willing to pay for the farms as a unit. Simkins then informed petitioner's counsel and the district judge that there "might be some parties interested" in the 11 farms as a unit, but was informed that they could not be sold as a group. It does not appear that he told counsel or the court that he had accepted employment from Jones.[2]

At Jones' request, Simkins conferred on June 25, 1933, with Prudential representatives concerning the possibility of purchasing the 11 farms from Prudential. No definite arrangements were then made, the representatives stating that they could not discuss terms until Prudential had bought the farms at the sale. On June 27 Jones submitted through Simkins a written offer of $249,106 to Prudential for the 11 farms, including "the company's undivided one-half interest in the growing corn crop thereon." The offer was witnessed by Simkins and another person and was

[2] Simkins testified that the fact of his employment by Jones "was no secret" and that "I may have told Judge Hough. I would not have hesitated in telling him."

enclosed in a letter which was addressed to one of Prudential's representatives and which was signed by Simkins. In this letter Simkins vouched for the responsibility of "Mr. Jones' buyer." Jones also enclosed a $3,000 certified check in support of his offer. Simkins by this time clearly was aware of the identity of Jones' principal and of the terms of the offer to Prudential. But he made no effort to inform either the district judge or petitioner of these facts prior to or at the sale.

At the public sale held by the marshal on July 1, Prudential made the sole bids and secured title to the 11 farms for a total sum of $163,900. Jones attended the sale but Col. Proctor had not authorized Jones to bid since he desired to buy only when he could be assured of securing all the 11 farms at once and when title to them was supported by a warranty deed from Prudential. Two days later, on July 3, Prudential accepted Jones' offer of $249,106.

Prudential then moved to confirm the public sales, giving due notice to petitioner of the hearing on the motion. At this hearing on July 18, objections to the motion "were suggested by reason of alleged commitments made by the plaintiff [Prudential] for the sale of certain of said properties, prior to public sale." It does not appear who made these objections or whether the petitioner's counsel was present. Harrison, one of the attorneys for the receivers, thereupon orally advised the judge of the terms and amount of Jones' offer and its acceptance by Prudential. At the judge's suggestion, Harrison set forth these facts in the form of an affidavit, which was later introduced at the hearing on the receivers' accounts. The court was not informed, however, as to Simkins' participation in the matter or as to the fact that Col. Proctor was the actual purchaser of the farms. Simkins was present in the court room at this time but said nothing. The judge confirmed the sales on the same day, July 18. Soon afterwards Prudential executed a warranty deed to Col. Proctor's nom-

inee, the deed reciting a consideration of $249,106 but bearing tax stamps apparently indicating a substantially greater price.[3]

Simkins received a total of $2,797 from Jones, nearly all of which was in payment for his aid in consummating the purchase of the farms from Prudential.

On the basis of these facts, petitioner seeks to have Simkins surcharged with (a) all payments received by him from Jones for his assistance in consummating the resale of the farms to Col. Proctor; (b) the commission or profit received by Jones; and (c) the amount received by Prudential in excess of the decree indebtedness or, in the alternative, the amount by which the appraised value of the farms exceeded the decree indebtedness. Petitioner claims that Simkins must be surcharged with these amounts because he breached his duty as co-receiver by accepting employment from Jones in advance of the foreclosure sales to help bring about a resale of the farms from Prudential to Col. Proctor. Respondents, on the other hand, resist this claim on the ground that Simkins was appointed co-receiver only to collect the rents and to operate the farms and had no fiduciary duty with respect to the foreclosure sales.

It is true that Simkins' official duties as co-receiver were limited to those conferred upon him by the court and that he had no authority to sell or to cause a sale of the farms in question. The foreclosure sales were conducted by the marshal under the direct supervision of the District Court and there was no evidence that Simkins unduly influenced the actual execution of the sales in any way. It

[3] Petitioner claims that the stamps indicate that Col. Proctor paid approximately $281,000, "presumably, $249,106 net to Prudential . . . and the difference of $31,894 to Jones." There was no proof, however, that Jones received that amount. He testified merely that he received $15,000 and an additional amount that he did not remember, from which amounts he paid Simkins.

is obvious, moreover, that Simkins was bound to perform his delegated duties with the high degree of care demanded of a trustee or other similar fiduciary. He was not free to deal with the property under his control as co-receiver in such a way as to benefit himself or his associates. Any profits that might have resulted from a breach of these high standards, including the profits of others who knowingly joined him in pursuing an illegal course of action, would have to be disgorged and applied to the estate. *Michoud* v. *Girod,* 4 How. 503; *Magruder* v. *Drury,* 235 U. S. 106; *Jackson* v. *Smith,* 254 U. S. 586.

But Simkins' conduct is not to be measured solely by the arbitrary dichotomy of functions relating to the conservation and liquidation of the farm properties. As a co-receiver in charge of collecting the rents and operating the farms, Simkins was also an officer or arm of the court. He was appointed to assist the court in protecting and preserving, for the benefit of all parties concerned, the properties in the court's custody pending the foreclosure proceedings. *Booth* v. *Clark,* 17 How. 322, 331; *Davis* v. *Gray,* 16 Wall. 203, 217–218; *Stuart* v. *Boulware,* 133 U. S. 78, 81; *Porter* v. *Sabin,* 149 U. S. 473, 479; *Atlantic Trust Co.* v. *Chapman,* 208 U. S. 360, 370–371. The court's authority and duties, however, covered all phases of the foreclosure proceedings. They included not only the conservation but the liquidation of the farm properties. The court had discretion to delegate these duties as it saw fit. But whatever the functional distribution, all the court officers were bound to act fairly and openly with respect to every aspect of the proceedings before the court. The mere fact that any one aspect did not fall within the delegated function of a particular court officer did not give that officer free rein to act in a secret, non-judicial manner as to that aspect. The court, as well as all the interested parties, had the right to expect that its officers would not make undisclosed private agreements, fail to reveal any

pertinent information or use their official position for their own profit or to further the interests of themselves or any associates.

It is impossible to reconcile the activities of Simkins relating to the foreclosure sales with the basic standard of conduct demanded of him as an officer of the court. One of the prime purposes of the foreclosure proceedings was to obtain enough money from the farm properties to pay in full the mortgage indebtedness, with any surplus going to the owner of the equities of redemption. All information to that end which came to Simkins or to any other court officer belonged to the court and to the parties interested in the foreclosure proceedings. Here Simkins had knowledge of a prospective purchaser of the farms who was willing to pay more than the mortgage indebtedness on the properties. Yet he made no effort to reveal this important information prior to the foreclosure sales other than to state that there "might be some parties interested" in buying the 11 farms as a unit. He was told that the court could not order a public sale of the farms as a unit. But it is clear that the court and petitioner might well have profited if Simkins had more fully revealed to them in advance of the sales that there was a prospect of selling all 11 farms to a responsible buyer at an advantageous price. Petitioner could well have been given the opportunity to bargain directly with Col. Proctor for a private sale of the farms as a unit.[4] This suppression of vital information was in no way mitigated by the partial revelation of the facts at the hearing on the motion to confirm the sales to

[4] The special master and the court below found that Col. Proctor was interested in purchasing the 11 farms as a unit only if he could obtain a warranty deed from Prudential. But there was no evidence that petitioner could not have furnished muniments of title equally satisfactory to Col. Proctor or that he would not have been satisfied with a warranty deed from petitioner. According to Jones, Col. Proctor "said a general warranty deed from the Prudential Insurance Company was good enough for him."

Prudential, after Prudential had accepted the resale offer, or by any subsequent knowledge obtained by petitioner. The information was most valuable prior to the foreclosure sales when the prospects were greater for successful bargaining, and it should have been divulged at that time.

Moreover it was inconsistent with his position as an officer of the court for Simkins to make a secret arrangement with Jones to bring about, by active intervention, a resale of the properties in the custody of the court. The fact that he was not a liquidating receiver did not absolve him of the duty to act openly at all times with respect to the subject matter of the proceedings. Due regard for his official position demanded that he at least notify and obtain the approval of the court and of the interested parties before entering into an employment contract with a third party wherein his compensation was dependent upon a particular bidder being successful at the foreclosure sales. This arrangement brought out in even bolder relief the reprehensibleness of Simkins' failure to disclose all the facts regarding Col. Proctor's interest in purchasing the farms. Had such facts been revealed prior to the public foreclosure sales, Prudential might not have obtained title to the farms and Simkins would not have earned any compensation under his contract with Jones. It was thus to Simkins' personal benefit not to disclose all the pertinent facts.

Since the course taken by Simkins was one which he as an officer of the court could not legally pursue and since profits resulted to him, the law makes him accountable to the trust estate for all such profits. Cf. *Magruder* v. *Drury, supra; Jackson* v. *Smith, supra.* We need not speculate as to whether his conduct operated to dampen the foreclosure sales to any appreciable degree or whether the estate was in any other way injured. It is enough that his activities had a tendency to dampen the sales. For that reason alone he may be held to forfeit all profits he derived

from his misconduct, regardless of whether it actually had an adverse effect or not. In this type of situation "the incidence of a particular conflict of interest can seldom be measured with any degree of certainty." *Woods* v. *City National Bank Co.*, 312 U. S. 262, 268. Proof of profits resulting from an irregular or conflicting course of conduct is sufficient. Simkins was thus accountable for the payments received by him from Jones for his assistance in consummating the resale of the farms from Prudential to Col. Proctor.[5]

Under the circumstances of this case, however, Simkins was not surchargeable with the commission received by Jones, with any amount received by Prudential or with the amount by which the appraised value of the farms exceeded the decree indebtedness. We perceive no basis in this record for holding Simkins responsible for any possible misconduct on the part of Jones or Prudential or for any profits that they may have obtained thereby. We do not, of course, determine in this proceeding whether petitioner could recover any such profits in a direct action against either Jones or Prudential.

II.

Petitioner also claims that Simkins should be surcharged with all his receivership fees because of a fee-splitting arrangement which he made with Harrison and Ingalls, the attorneys for the co-receivers as well as for Prudential. The three agreed to pool the fees allowed

[5] It is unnecessary to consider petitioner's argument relating to the sale to Prudential of the growing crops on the farm lands, inasmuch as petitioner seeks to surcharge Simkins with the same amounts as in connection with the sale of the lands and no different considerations are present. Respondents' claim that petitioner is barred from relief because of laches is without merit. Nothing in the record indicates that petitioner discovered the full facts concerning Simkins' activities until several years after the foreclosure sales. Petitioner then made timely exceptions to the receivers' accounts.

them by the District Court and to divide them equally, although this arrangement apparently was not completely carried out.

Petitioner excepted to all credits in the receivers' accounts for fees to either Simkins or Ingalls because of this arrangement. The Court below allowed credit to the receivers for the $250 fees received by Harrison and Ingalls from the court as preliminary compensation and for all out-of-pocket expenses incurred by the two attorneys on behalf of the estate. But all credits were denied for additional attorney fees paid to them. Petitioner objects to the failure to disallow the $250 fee allowed Simkins by the District Court and the additional $1,800 fee which he paid to himself on account of his services as co-receiver.

A fee-splitting arrangement of this nature is clearly unenforceable and void as against public policy. *Weil* v. *Neary,* 278 U. S. 160. But whether the parties to such a contract should be allowed any fees at all, and if so the amount thereof, are normally matters within the sound discretion of the District Court and are not reviewable except where a clear abuse of discretion is apparent. In this case, however, the fact that Simkins entered into a fee-splitting contract so patently illegal, plus the fact that he engaged in other misconduct and indiscretions incompatible with his position as an officer of the court, compel the conclusion that all fees and compensation as co-receiver should have been denied him. Cf. *Woods* v. *City National Bank Co., supra,* 268.

The judgment of the court below is reversed and the cause is remanded for further proceedings consistent with this opinion.

Reversed.

MR. JUSTICE ROBERTS:

I am of opinion that certiorari should not have been granted in this case and that the writ should be dismissed.

The Circuit Court of Appeals recognized established principles in determining to what extent the respondent Simkins should be denied compensation for services by reason of his acting in inconsistent relations. That court canvassed authorities which this court cites in its opinion and not only did not refuse to follow and apply them but, as I think, in perfect good faith, proceeded to examine and appraise the facts and circumstances in order to apply the relevant legal principles.

There is not a suggestion of any conflict amongst the federal courts respecting the law which should govern decision nor is there any suggestion that, on an identical set of facts, any federal court has reached a result contrary to that reached by the court below. In essence, the case presents the question whether the action taken by the Circuit Court of Appeals was sufficiently drastic in the circumstances disclosed.

I think it plain that this case falls within the category to which I referred in *Bailey* v. *Central Vermont Ry. Co.*, 319 U. S. 350, 354. All the considerations there mentioned apply equally here. If this court is to spend its time correcting mistakes in the appraisal of facts in individual cases by courts below, the performance of its essential functions necessarily will suffer.

ARENAS *v.* UNITED STATES.

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

No. 463. Argued March 6, 7, 1944.—Decided May 22, 1944.

Upon the record in this case, which was a suit brought against the United States under the Act of August 15, 1894, by an Indian claiming, under the Mission Indian Act of 1891, as amended by the Act of March 2, 1917, a right to a trust patent to an allotment of lands which had long been in his possession and which had been considerably improved by him, but which allotment had not been

finally approved by the Secretary of the Interior, the Government was not entitled to summary judgment but should be required to answer, and the cause should proceed to trial, findings and judgment. P. 433.

137 F. 2d 199, reversed.

CERTIORARI, 320 U. S. 733, to review the affirmance of a summary judgment for the United States in a suit against it under a special jurisdictional act.

Messrs. John W. Preston and *Oliver O. Clark* argued the cause, and *Mr. Preston* was on the brief, for petitioner.

Mr. Norman MacDonald, with whom *Assistant Attorney General Littell* was on the brief, for the United States.

MR. JUSTICE JACKSON delivered the opinion of the Court.

The petitioner Arenas is a full-blood Mission Indian, regularly enrolled in the Agua Caliente or Palm Springs Band. He sued in the United States District Court to be awarded a trust patent to certain lands on the Palm Springs Reservation. The Government was granted a summary judgment of dismissal on affidavits and on the record of the *St. Marie* litigation on like claims by similarly situated Indians.[1] No findings have been made in this case by the District Court. The Circuit Court of Appeals affirmed,[2] chiefly in reliance upon its previous decision in the *St. Marie* case, and we granted certiorari.[3]

For a long period Congress pursued the policy of imposing, as rapidly as possible, our system of individual land tenure on the Indian. To this end tribal or com-

[1] *St. Marie* v. *United States,* 24 F. Supp. 237, 108 F. 2d 876, cert. denied because petition out of time, 311 U. S. 652.

[2] 137 F. 2d 199.

[3] 320 U. S. 733.

munal land holdings of the Indians were superseded by allotment to individuals, who were protected against improvidence by restraints on alienation.[4] The Mission Indians had deserved well and had fared badly [5] and Congress passed the Mission Indian Act of 1891 [6] for their particular redress.

The first three sections of this Act set up a commission to settle these several bands on suitable reservations and directed that appropriate patents issue. The United States was to hold the titles in trust, however, for twenty-five years and then was to convey to the tribes any portions not previously patented in severalty to members. Several reservations were set apart, including one at Palm Springs, with which this and the *St. Marie* case were concerned.

The Act also provided in § 4 that whenever in the opinion of the Secretary of the Interior any of the Indians should "be so advanced in civilization as to be capable of owning and managing land in severalty, the Secretary of the Interior may cause allotments to be made to such Indians, out of the land of such reservation" and it specified the acreage to be allotted to each. Section 5 provided that on approval of the allotments the Secretary should cause patents to issue in the name of the allottees. For twenty-five years the lands were to remain in trust for their benefit and then were to be conveyed in fee free of the trust.[7]

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[4] General Allotment Act of 1887, 24 Stat. 388, 25 U. S. C. § 331; see Cohen, Handbook of Federal Indian Law, c. 11.

[5] See report on conditions and needs of the Mission Indians, Sen. Rep. No. 74, 50th Cong., 1st Sess.

[6] 26 Stat. 712.

[7] Sections 4 and 5 of the Act provide as follows:

"Sec. 4. That whenever any of the Indians residing upon any reservation patented under the provisions of this act shall, in the opinion of the Secretary of the Interior, be so advanced in civilization

Nevertheless, little was done toward allotment in severalty to Mission Indians for nearly twenty-five years. One reason, we gather, was that the Act authorized allotment on a more liberal basis than available lands would permit, although there may have been other reasons. In 1916, however, Secretary Lane called the neglect to the attention of Congress and asked that he be authorized to make allotments in quantities governed by the General Allotment Act of 1887 as amended by § 17 of the Act of June 25, 1910, 36 Stat. 859, instead of in those set out in

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as to be capable of owning and managing land in severalty, the Secretary of the Interior may cause allotments to be made to such Indians, out of the land of such reservation, in quantity as follows: To each head of a family not more than six hundred and forty acres nor less than one hundred and sixty acres of pasture or grazing land, and in addition thereto not exceeding twenty acres, as he shall deem for the best interest of the allottee, of arable land in some suitable locality; to each single person over twenty-one years of age not less than eighty nor more than six hundred and forty acres of pasture or grazing land and not exceeding ten acres of such arable land.

"SEC. 5. That upon the approval of the allotments provided for in the preceding section by the Secretary of the Interior he shall cause patents to issue therefor in the name of the allottees, which shall be of the legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State of California, and that at the expiration of said period the United States will convey the same by patent to the said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: *Provided,* That these patents, when issued, shall override the patent authorized to be issued to the band or village as aforesaid, and shall separate the individual allotment from the lands held in common, which proviso shall be incorporated in each of the village patents."

the Mission Indian Act of 1891. Thereupon Congress passed the Act of March 2, 1917 [8] by which it "authorized and directed" the Secretary to proceed under the Act of 1910.

The Secretary on June 7, 1921 appointed Harry E. Wadsworth as Special Allotting Agent at Large for the Mission Indian Reservations of California and instructed him to prepare schedules of selections for allotments thereon. In 1923, Wadsworth filed a schedule showing selections on the Palm Springs Reservation for fifty members of the Band. The Secretary expressly disapproved this schedule. Complaint had come from the Indians, many of whom did not want allotments and had not made the selections listed in their names. When they failed to choose, the allotment agent had made a choice for them. The Secretary instructed Wadsworth to prepare a new schedule listing only selections voluntarily made and to leave off those who did not desire allotments. In 1927, the Department received from Wadsworth a new schedule showing voluntary selections for twenty-four members of the Palm Springs Band.

Each Indian for whom a selection was listed received from Wadsworth a certificate of selection for allotment. Each was stamped "Not valid unless approved by the Secretary of the Interior."

On October 26, 1923, Wadsworth asked the Indian Department for instructions, reciting, "Allotments being completed and certificates issued. Many allottees anxious to immediately occupy their selections and prepare things for early crops instead waiting for receipt of patents." On the same day he received reply, "No objection to Indians preparing their respective allotment selections for crops if properly listed on schedule." Wadsworth also wrote to one, at least, of the allottees in the *St. Marie* case,

[8] 39 Stat. 969, 976.

saying among other things, "It is difficult to tell exactly when you may expect these patents from Washington but I believe they should be here within 6 weeks or so. They will come to the superintendent in Riverside, who will notify you that they are there and ready for delivery to you. In the meantime, the Commissioner of Indian Affairs in Washington authorizes me to say to you that from this date you are entitled to enter upon and take possession of these allotments, and these certificates will be your evidence of such authority until the trust patents are received by you."

Wadsworth filed the schedule with the Department of the Interior. He attached a certificate, among other things reciting "that the allotments shown hereon were made in accordance with the provisions of the act of Congress of February 8, 1887 as amended by the Act of June 25, 1910 and supplemented by the Act of March 2, 1917." The General Land Office recommended that the schedule be approved, with exceptions that appear to have no bearing on the case before us.

But the allotments appear never to have been approved by the Secretary. He refuses to issue patents to which these Indians claim to be entitled. The Government's moving papers contain an affidavit by counsel declaring that the Secretary disapproved the allotments. But it gives no reason, and no order or statement of disapproval by the Secretary is in the record. The Government filed no pleading averring reasons for disapproval or, if disapproval was formal, setting forth the document. On the contrary, counsel seems to have taken the position that as matter of law the Secretary's reasons and the form of his disapproval were not relevant to any question the Court is empowered to decide.

The power of the Secretary so to refuse patents and the powerlessness of the courts to review the refusal are here maintained on these contentions: "It rests in the

complete discretion of the Secretary of the Interior whether or not allotments shall be made on the Palm Springs Reservation. Sections 4 and 5 of the Act of January 12, 1891 contemplate three steps in the making of allotments on that reservation: (1) an opinion by the Secretary as to the capacity of the Indians to receive allotments; (2) a method or procedure for making such allotments; and (3) approval of the allotments by the Secretary. Each of these steps is under the control and rests in the discretion of the Secretary." Upon these grounds the trial court and the Circuit Court of Appeals held that the plaintiffs in the *St. Marie* cases were not entitled to patents and that this petitioner is not entitled to go to trial.

I.

The Secretary's discretion in determining the capacity of the Indians to receive allotments.

The Act of 1891 provides that "whenever any of the Indians residing upon any reservation patented under the provisions of this Act shall, *in the opinion of the Secretary of the Interior,* be so advanced in civilization as to be capable of owning and managing land in severalty, the Secretary of the Interior may cause allotments to be made to such Indians." (Emphasis supplied.) This undoubtedly conferred a very considerable discretion upon the Secretary.

The Act of 1917, however, drops the language of discretion and *directs* the Secretary to cause allotments to be made to the Indians on the Mission reservations.[9] The

[9] The Act of 1917 in relevant part provides that: ". . . the Secretary of the Interior be, and he is hereby, authorized and directed to cause allotments to be made to the Indians belonging to and having tribal rights on the Mission Indian reservations in the State of California, in areas as provided in section seventeen of the Act of June twenty-fifth, nineteen hundred and ten (Thirty-sixth Statutes at Large, page eight hundred and fifty-nine), instead of as provided

Act was prepared by the Secretary [10] and if it was intended to perpetuate his discretion as to whether the allotment policy was to be applied to these Indians at all, it might easily have so provided. Both the Secretary and Congress appear to have settled that point. The communication of the Secretary to the Chairman of the Senate Committee on Indian Affairs indicates no reservations about the Secretary's view that the Indians were qualified and that the Department should carry out the allotment policy. It points out certain evils and inequalities among the Indians under the tribal system of land holdings and says, "This is a condition that cannot be cured entirely until the lands have been allotted in severalty." And again it says, "The Department believes that the present conditions, while much better than they were some years ago, would be rapidly improved by allotment in severalty, provided authority to prorate the available land is given."

Following passage of the Act the Secretary set about executing its directions. Wadsworth was appointed General Allotment Agent and was sent to the Indians with instructions to permit them to select their own allotments. When he selected for those who did not choose for themselves, his schedule was disapproved, and only for that reason. He was returned to the task of compiling voluntary selections for those who desired allotments, it being thought that if that were done those who objected "would soon fall in line and request that they too be given their proportionate share of the allottable areas." [11] There is

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in section four of the Act of January twelfth, eighteen hundred and ninety-one (Twenty-sixth Statutes at Large, page seven hundred and thirteen): *Provided*, That this act shall not affect any allotments heretofore patented to these Indians." 39 Stat. 969, 976.

[10] See letter of Secretary of Interior to Chairman of Senate Committee on Indian Affairs, January 7, 1916.

[11] Letter of the Commissioner of Indian Affairs to the Secretary of the Interior, December 22, 1926.

no denial that Wadsworth was authorized to hold out to the Indians that their patents would be received in a few weeks and that meanwhile, if not already living on their selected lands, they might enter into possession.

To assume that the Act of 1917, while directing the Secretary to make allotments, only meant to give him uncontrolled discretion not to do so would be a doubtful construction, in view of its history. But even if it were so interpreted, it did not require the Secretary to manifest his exercise of discretion in any formal way. His opinion that the Indians had the capacity for individual responsibility for land ownership could be indicated by conduct as well as by words. We think his conduct and words amount both to an administrative construction of the 1917 Act as a direction and to the exercise of any discretion he may have had under it.

If the Indians were not ready for allotments, why send an agent to hold out to them that hope and promise? Why the elaborate procedure of allotment? The Department then sought not only to offer allotment but to proceed so as to make the Indians "fall in line." Despite the obvious inference from these acts the record does not counter them by any showing that the Secretary now considers these Indians to lack civilization and capacity, tested by the usual standards for allotment, nor does it show that they do not in fact possess it. History and common knowledge of these Indians would indicate that they are not wanting in whatever it is that makes up "civilization." Long ago the Franciscans converted them to Christianity, taught them to subsist by good husbandry and handicrafts. Under the Treaty of Guadalupe Hidalgo (1848) their ancestral lands and their governance passed from Mexico to the United States. During the gold discovery days they were too gentle to combat the ruthless pressures of the whites and came to lead a precarious and pitiable, but peaceful, existence. Eventually the country was

aroused by their plight and set up a commission to investigate their grievances and to make recommendations for their protection and relief. It reported in 1884 [12] and its recommendations were substantially embodied in the Mission Indian Act of 1891. By the standards of peacefulness, industry, and gentleness these Indians have long been "civilized." Even tested by the standard of acquisitiveness, they seem not to have failed. Improvements made by Arenas on the lands he occupied in reliance upon his certificate are valued at $15,000.

On the record as it now stands we do not think the Government has established the falsity of the allegations of the complaint that the Secretary had made the preliminary decision as to the allotments. We think the issue has been settled, in the absence of further proof to the contrary, by the Act of 1917 and the Secretary's action under it.

II.

The Secretary's discretion as to procedure for making such allotments.

We do not see that this is much in question nor is much in point, if true. Arenas does not question that the Secretary had discretion to adopt the method of allotment which was followed. He claims that both he and the Department have complied with it, that his choice has been ascertained, the lands have been identified and marked and reported to the Department, and that nothing remains for either to do to perfect the right to a patent. If there has been any irregularity in the procedure to lead to a patent, the Government has not pleaded or evidenced it in the case. We assume the Secretary's complete control of the method and, as the record stands, that his method has

[12] S. Ex. Doc. No. 49, 48th Cong., 1st Sess., reproduced in Sen. Rep. No. 74, 50th Cong., 1st Sess.

been executed to the point where a patent would issue but for the refusal of the Secretary.

III.

The Secretary's discretion as to final approval of the allotments.

This is the crux of the lawsuit. It is as to this final step that Congress has invested the courts with some responsibility.

The Act of August 15, 1894, 25 U. S. C. § 345, authorizes Indians to commence and prosecute actions "in relation to their right" to land under any allotment act or under any grant made by Congress "in the proper district court of the United States; and said district courts are given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty." It is further provided that "the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of Interior, as if such allotment had been allowed and approved by him." [13]

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[13] The statute in full is as follows:

"All persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment Act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper district court of the United States; and said district courts are given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty (and in said suit the parties thereto shall be the

Under this statute the courts have decided disputes between Indians and the Government as to the relative qualifications of two claimants to receive, as a member of a band, a patent, *Hy-Yu-Tse-Mil-Kin* v. *Smith,* 194 U. S. 401, and whether particular lands were appropriate for allotment, *United States* v. *Payne,* 264 U. S. 446.

But here we do not know from any information developed in the adversary proceedings what the dispute between the Secretary of the Interior and Arenas is about. The Government did not answer the complaint. It foreclosed evidence on the facts by its motion for summary judgment, in which it incorporated the evidence in another proceeding. In that other proceeding no representative of the Government except the local Mission Indian agent and Wadsworth, the former allotment agent, were sworn. There appears to have been no testimony as to what happened to the schedule of allotments after it reached Washington or as to whether it ever was approved or disapproved and, if so, how or by whom or why. The Government's affidavit filed in opposition to the motion recited that the Secretary's records "reveal that the Secretary of the Interior has disapproved the allotment schedule and certificates of selection." No entry order or memorandum of disapproval is produced, nor is the date thereof stated.

Certain facts do appear from which we know that this is no ordinary allotment problem. Each selection here

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claimant as plaintiff and the United States as party defendant); and the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him, but this provision shall not apply to any lands held August 15, 1894, by either of the Five Civilized Tribes, nor to any of the lands within the Quapaw Indian Agency: *Provided,* That the right of appeal shall be allowed to either party as in other cases."

included three kinds of land: a two-acre town lot, of considerable value; five acres of irrigable land of fair value; and forty acres of desert land. All of the town lots chosen are in Section 14, Township 4 South, Range 4 East. This section contains Palm Springs, a hot mineral spring, from which the reservation derives its name.

But the reservation itself is a checkerboard affair. At the time of its establishment the odd-numbered sections already had been granted to the Southern Pacific Railroad and hence the reservation consisted of only even-numbered sections. On the railroad sections the whites have established the settlement known as Palm Springs, a flourishing winter resort with large hotels and the usual business places and residences that characterize such a development. Out of this situation has grown conflict of interest between the Indians and the whites and between Indians themselves. The Indians, to the annoyance of the whites, seek to exploit their ownership of the springs, and the whites are accused, not without probable cause, of coveting the Indians' property rights therein. Those among both races who favor allotment allege that the denial of patents is designed to serve the white interests in Palm Springs by leasing or selling valuable tribal lands to those who are promoting the resort interests. Those who oppose issuance of patents allege that the allotment system is unfair to the tribe and will result eventually in the whites' getting possession and title to the lands. The outlines of the controversy are clear, but the summary disposition of the case has precluded the adversary trial which alone would give reliable foundation for determining it, if indeed the evidence will show that it should be the subject of judicial determination. The legal claims of this particular Indian to a patent for the lands he selected for allotment, which have long been in his possession and have been considerably improved with the knowl-

edge of the Government, are now entangled in larger questions of Indian land policy.

The jurisdictional Act of 1894, under which this suit is in the courts, requires them to adjudicate legal rights of the parties and to render a judgment which will stand in lieu of the Secretary's action if he has *unlawfully denied* a patent to an allotment to which the Indian is entitled. But courts are not to determine questions of Indian land policy, nor can the Secretary on grounds of policy deprive an allottee of any rights he may have acquired in his allotment. To separate questions of right from questions of policy requires judicial examination of any well pleaded allegation of the complaint and of any grounds advanced for refusal of the patent. Even in some discretionary matters, it has been held that if an official acts solely on grounds which misapprehend the legal rights of the parties, an otherwise unreviewable discretion may become subject to correction. *Perkins* v. *Elg*, 307 U. S. 325, 349.

Since the Government has not pleaded to the complaint nor offered evidence as to the Secretary's position we know it only as stated in argument. It appears that the sole reason for denying a patent is a departmental change of policy, by which the Secretary now disagrees with the allotment policy prescribed for these Indians by the Acts of 1891 and 1917. The Government brief says, "Meanwhile opposition to the making of allotments in severalty developed among the members of the Palm Springs Band of Indians, and as a result administrative action on the 1927 schedule was further delayed. During this period the conclusion was reached in the Department that in fairness to the Band as a whole and from the standpoint of their best interests the lands scheduled for allotment should be held in a tribal status and dealt with as a tribal asset." It says further, "The Secretary has determined

that it would be inequitable and detrimental to the Palm Springs Band of Indians as a whole to approve any allotments on their reservation." Again, "The Secretary should not be compelled to carry through a plan of allotment in severalty which in his judgment will operate contrary to the best interests of the Palm Springs Band of Indians, but he should be permitted to stay his hand and seek a time which would be more in the interest of that Band."

The Secretary has endeavored to persuade Congress that treatment other than the allotment policy embodied in its legislation would be more advantageous for the Indians. In 1935, he recommended to Congress a bill authorizing him to make a 99-year lease of the reservation lands.[14] This failed of enactment. In 1937, the Secretary recommended a bill to repeal the provisions of the Act of March 2, 1917, directing the making of allotments on the Mission Indian Reservations.[15] That bill failed. He also recommended a bill to authorize the sale of a part of the Palm Springs Reservation.[16] That likewise failed of enactment.

We think the grounds advanced by the Government by way of argument, although not by way of evidence, are inadequate to establish as matter of law that the petitioner has no legal right to a patent. Congress not only has failed to deny these allotment rights by legislation, but has rejected urgent and reiterated appeals from the Department to do so. Arenas is entitled to invoke the applicable legis-

[14] See H. R. Rep. No. 1521 and Sen. Rep. No. 1201, 74th Cong., 1st Sess.

[15] Sen. Rep. No. 1238, 75th Cong., 1st Sess. The Palm Springs Indians were among those which had voted against application to them of the Indian Reorganization Act of 1934, 48 Stat. 984, which would have terminated all future allotment in severalty.

[16] Hearings, House Committee on Indian Affairs, on H. R. 7450, 75th Cong., 3d Sess., pp. 5–6.

lation as it stands in determining whether he is entitled to have completed the all but fully executed policy of allotment.[17]

The petitioner made no counter motion in the District Court for summary judgment against the Government. Before us he asks only that his complaint be answered and that he be given a chance to establish his legal claim if he can by trial. The summary judgment against him should be reversed and the Government required to answer. We do not preclude motion by the Government to strike parts of the complaint if any are found to be improper pleading. But we think the duty of the Court under the jurisdictional act can be discharged in a case of this complexity only by trial, findings and judgment in regular course.

Reversed.

[17] The Solicitor of the Department of Interior has himself indicated that where the Indian has done all he could to get his patent and has failed because of the neglect of public officers the courts will generally protect him, and that this may be proper even where there has been a failure to approve the allotment. See 55 Decisions of the Department of the Interior 295, 303–304.

INTERNATIONAL HARVESTER CO. *v.* WISCONSIN DEPARTMENT OF TAXATION.

NO. 620. APPEAL FROM THE SUPREME COURT OF WISCONSIN.*

Argued April 27, 1944.—Decided May 29, 1944.

A statute of Wisconsin imposes a tax "for the privilege of declaring and receiving dividends" out of corporate income derived from property located and business transacted within the State, and requires corporations to deduct the tax from dividends distributed to both resident and nonresident stockholders. As assessed to the appellants (foreign corporations doing business within the State) the tax was measured by so much of their dividends as was derived from the portion of the corporate surplus attributed by the tax authorities to income earned in Wisconsin. Their dividends were declared at directors' meetings held outside the State, and the dividend checks were drawn on bank accounts outside the State. *Held:*

1. Appellants have standing to challenge the constitutionality of the statute. P. 440.

Appellants can avoid payment of the tax from their own funds only by deducting it from their stockholders' dividends. In the latter case, they would remain liable, at least to the preferred stockholders, for the amounts of the deductions if not lawfully taken. In either aspect, therefore, appellants are adversely affected by obedience to the statute, and may challenge its constitutionality.

2. The tax is within the power of the State under the Federal Constitution. P. 441.

(a) In determining whether a tax is within the State's constitutional power, this Court looks to the incidence of the tax and its practical operation, and not its characterization by the state courts. P. 441.

(b) So long as the earnings are actually derived from corporate activity within the State, and their withdrawal from the State and

*Together with No. 621, *Minnesota Mining & Manufacturing Co.* v. *Wisconsin Department of Taxation,* also on appeal from the Supreme Court of Wisconsin.

ultimate distribution, in whole or in part, to stockholders are subject to some state control, the conditions of state power to tax are satisfied. P. 443.

(c) There is no constitutional obstacle either to the State's distributing the burden of the tax ratably among the stockholders, as the ultimate beneficiaries of the corporation's activities within the State and of the State's relinquishment of control over the Wisconsin earnings, so as to render the tax *pro tanto* one on the stockholders' income; or to the State's imposing on the corporation the duty of acting as its agent for the collection of the tax, by requiring deduction of the tax from earnings distributed as dividends. P. 441.

(d) The power to tax the corporation's earnings within the State includes the power to postpone the tax until the distribution of those earnings, and to measure it by the amounts distributed. P. 441.

(e) Residence of stockholders within the State is not essential to the constitutional levy of a tax taken out of so much of the corporation's Wisconsin earnings as is distributed to them. P. 441.

(f) The constitutional validity of the tax is unaffected by the fact that the power of the corporation to declare dividends was created and exercised outside of the State. P. 443.

(g) Wisconsin's jurisdiction to impose the tax is unaffected by the fact that the stockholders are not represented in the Wisconsin legislature. P. 443.

(h) *Connecticut General Ins. Co.* v. *Johnson,* 303 U. S. 77, distinguished. P. 444.

(i) This Court is concerned not with the wisdom or fairness of the tax but only with the power of the State to lay it. P. 444.

3. Though the dividends were paid in part from corporate surplus earned prior to the enactment of the tax statute, the taxable event—distribution of dividends from Wisconsin earnings—occurred subsequently, and hence no question of retroactive application is involved. P. 445.

4. Whether the formula for assessing the tax was authorized by the statute is a question the decision of which by the state court is binding here. P. 445.

243 Wis. 198, 211, 10 N. W. 2d 169, 174, affirmed.

APPEALS from the affirmance of judgments sustaining assessments of state taxes.

Messrs. Ray M. Stroud and *Edward R. Lewis,* with whom *Mr. John A. Kratz* was on the brief, for appellant in No. 620; and *Mr. G. Burgess Ela,* with whom *Mr. John L. Connolly* was on the brief, for appellant in No. 621.

Mr. Harold H. Persons, Assistant Attorney General of Wisconsin, with whom *Mr. John E. Martin,* Attorney General, and *Mr. James Ward Rector,* Deputy Attorney General, were on the brief, for appellee.

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

These cases come here on appeal under § 237 (a) of the Judicial Code, 28 U. S. C. § 344 (a), from judgments of the Supreme Court of Wisconsin, reviewing and sustaining assessments by appellee, the Wisconsin Department of Taxation, of the Wisconsin Privilege Dividend Tax imposed with respect to appellants, which are foreign corporations doing business in Wisconsin. 243 Wis. 198, 211. The appellants present again, but in a new aspect, the substance of the question decided in *Wisconsin* v. *J. C. Penney Co.,* 311 U. S. 435. In that case we sustained the constitutionality, under the due process clause of the Fourteenth Amendment, of the Wisconsin Privilege Dividend Tax, § 3 of Ch. 505 of Wisconsin Laws of 1935 as amended by Ch. 552, Wisconsin Laws of 1935.[1] The tax is imposed with respect to both foreign and domestic corporations doing business within the state "for the privilege of declaring and receiving dividends" out of income derived from property located and business transacted in the state. The payor corporation is required to deduct the tax from the dividends payable to both resident and nonresident stockholders.

[1] The statute was re-enacted by § 3 of ch. 309 of Wis. Laws of 1937; § 1 of ch. 198 of Wis. Laws of 1939; § 3 of ch. 63 of Wis. Laws of 1941; and § 2 of ch. 367 of Wis. Laws of 1943.

Appellants are respectively a New Jersey and a Delaware corporation doing business in Wisconsin. Appellee has assessed the Privilege Dividend Tax with respect to dividends declared and paid by appellant Harvester Company to its stockholders, including non-residents, between December 2, 1935 and October 15, 1937, inclusive, and on dividends similarly declared and paid by appellant Minnesota Mining Company in the years 1936 to 1940, inclusive. In the case of each appellant the tax as assessed was measured by so much of the dividends as were derived from the portion of the corporate surplus attributed by the tax authorities to income earned by the corporation in Wisconsin. The dividends were declared at directors' meetings held outside the state, and the dividend checks were drawn on bank accounts outside the state.

In the *Penney* case we sustained the tax in the case of a Delaware corporation doing business in Wisconsin, but having its principal office in New York, holding its meetings and voting its dividends there, and drawing its dividend checks on New York bank accounts. In considering the incidence of the tax in Wisconsin, which could afford a basis for the taxation there although the declaration and payment of the dividend took place outside the state, this Court pointed out that the practical operation of the tax is to impose an additional tax on corporate earnings within Wisconsin, but to postpone the liability for payment of the tax until such earnings are paid out in dividends, and we added, 311 U. S. at p. 442: "In a word, by its general income tax Wisconsin taxes corporate income that is taken in; by the Privilege Dividend Tax of 1935 Wisconsin superimposed upon this income tax a tax on corporate income that is paid out."

Since our decision in the *Penney* case, the Wisconsin Supreme Court has said, in both the *Penney* case on remand, 238 Wis. 69, 72–73, and in the *International Harvester* case below, 243 Wis. 198, 204–206, that under the

Wisconsin constitution, the state has no power to lay an income tax on citizens of other states, who are not doing business in Wisconsin, and that the tax is not on the income of the corporation. And in *Wisconsin Gas Co.* v. *Department of Taxation,* 243 Wis. 216, 10 N. W. 2d 140; cf. *Blied* v. *Wisconsin Foundry Co.,* 243 Wis. 221, 10 N. W. 2d 142, the Court held that the burden of the tax is imposed upon the stockholders so that the corporation is not entitled to deduct the privilege tax from gross income as a business expense, in arriving at net taxable income under the state's income tax law. In the *Wisconsin Gas Company* case, *supra,* the Court said, at p. 220–1:

"We are certain of three things: (1) That the burden of the tax is specifically laid upon the stockholder; (2) that the corporation declaring the dividend must deduct the tax from the dividend and may not under any circumstances treat the tax as a necessary expense of doing business [for state income tax purposes]; (3) that the power to levy the tax so construed was authoritatively established in the *Penney* case."

From this, appellants argue that the state court has now conclusively declared that the tax is not on income of the corporation, but only on the stockholders' privilege of receiving dividends, and that it must be deducted from the dividends before their payment to the stockholders. Appellants renew the contentions urged in the *Penney* case that since the declarations of the dividends here in question were made outside the state and the non-resident stockholders received their dividends outside the state, the taxing statute as applied in these cases infringes due process by imposing the tax on stockholders and on activities and objects outside the territory of the State of Wisconsin, and consequently outside its legislative jurisdiction. Compare *Connecticut General Ins. Co.* v. *Johnson,* 303 U. S. 77. To this is added the further argument, not presented in the *Penney* case, that the tax violates the Four-

teenth Amendment because retroactively applied to and measured by Wisconsin income which was earned and carried to appellants' surplus accounts before the enactment of the statute.

For present purposes we assume that the statute, by directing deduction of the tax from declared dividends, distributes the tax burden among the stockholders differently than if the corporation had merely paid the tax from its treasury and that the tax is thus, in point of substance, laid upon and paid by the stockholders, some of whom might not bear the burden of the tax at all if, without more, it were paid out of the corporate treasury. This is obviously the case here with respect to the deductions from dividends on appellant Harvester's preferred stock, since normally the economic weight of taxes paid by the corporation would be borne by its common stockholders.

If such is the nature of the tax, a question preliminary to determining its validity is whether appellants have standing to urge here the constitutional objections of their stockholders, who are not parties to the present suits and who alone may be affected adversely by the tax. For appellants are permitted to reimburse themselves for the amounts, which they must pay to the state, by appropriate deductions from the dividends belonging to the stockholders. Appellants' failure in these cases to make the deductions was by their own choice and not by compulsion of the statute. But as the only way by which appellants can avoid the payment of the tax from their own funds is by collecting it from their stockholders' dividends and as appellants would remain liable to the stockholders, certainly to the preferred stockholders, for the amounts of the deductions if not lawfully taken, they are, in either aspect, adversely affected by obedience to the statute, if it is unconstitutional. We therefore conclude that appellants have standing to challenge the constitutionality of the statute. Cf. *Anderson National Bank* v. *Luckett,* 321 U. S. 233, 242–3.

For the reasons stated in the *Penney* case we do not doubt that a state has constitutional power to make a levy upon a corporation, measured by so much of its earnings from within the state as it distributes in dividends, and to make the taxable event the corporation's relinquishment of the earnings to its stockholders. That power is not diminished or altered by the fact that the state courts, for purposes of their own, denominate the levy a tax on the privilege of declaring and receiving dividends, or that they decline to call it an income tax. In determining whether a tax is within the state's constitutional power, we look to the incidence of the tax and its practical operation, and not its characterization by state courts. *Shaffer* v. *Carter,* 252 U. S. 37, 55 and cases cited; *Lawrence* v. *State Tax Commission,* 286 U. S. 276, 280 and cases cited.

Nor do we perceive any constitutional obstacle, either to the state's distributing the burden of the tax ratably among the stockholders, as the ultimate beneficiaries of the corporation's activities within the state, and of the state's relinquishment of control over the Wisconsin earnings, so as to render the tax *pro tanto* one on the stockholders' income, or to the state's imposing on the corporation the duty of acting as its agent for the collection of the tax, by requiring deduction of the tax from earnings distributed as dividends.

The power to tax the corporation's earnings includes the power to postpone the tax until the distribution of those earnings, and to measure it by the amounts distributed. Compare *Curry* v. *McCanless,* 307 U. S. 357, 370. In taxing such distributions, Wisconsin may impose the burden of the tax either upon the corporation or upon the stockholders who derive the ultimate benefit from the corporation's Wisconsin activities. Personal presence within the state of the stockholder-taxpayers is not essential to the constitutional levy of a tax taken out of so much of the corporation's Wisconsin earnings as is distributed to them. A state may tax such part of the income

of a non-resident as is fairly attributable either to property located in the state or to events or transactions which, occurring there, are subject to state regulation and which are within the protection of the state and entitled to the numerous other benefits which it confers. Compare *Shaffer* v. *Carter, supra,* and *Travis* v. *Yale & Towne Mfg. Co.,* 252 U. S. 60, with *Lawrence* v. *State Tax Commission, supra,* and *New York ex rel. Cohn* v. *Graves,* 300 U. S. 308. And the privilege of receiving dividends derived from corporate activities within the state can have no greater immunity than the privilege of receiving any other income from sources located there.

We think that Wisconsin may constitutionally tax the Wisconsin earnings distributed as dividends to the stockholders. It has afforded protection and benefits to appellants' corporate activities and transactions within the state. These activities have given rise to the dividend income of appellants' stockholders and this income fairly measures the benefits they have derived from these Wisconsin activities. There is no contention here that the formula of apportionment does not fairly reflect the proper proportion of appellants' earnings attributable to their Wisconsin activities and transactions. Wisconsin may impose a measure of control upon the corporation there with respect to its withdrawal of its earnings from the state, and also may, for the protection of the interests of the state and of its citizens, regulate to some extent the declaration and distribution of dividends by a foreign corporation, certainly with respect to its Wisconsin earnings. See, e. g., Judge Cardozo in *German-American Coffee Co.* v. *Diehl,* 216 N. Y. 57, 109 N. E. 875; New York Stock Corporation Law, § 114. The earnings in Wisconsin, their withdrawal from Wisconsin and their distribution in the form of dividends have resulted in the receipt of income by the stockholder-taxpayers and it is Wisconsin's relation to all which permits it to levy the tax. It may

condition the privilege of earning and disposing of the Wisconsin earnings upon the payment of a tax measured by and collected from the earnings to be distributed as dividends. *Wisconsin* v. *J. C. Penney Co., supra.*

The facts that Wisconsin cannot prevent the withdrawal of the earnings from the state or the declaration of the dividends, if they be the facts, have no bearing on its right to measure, in terms of taxes, both the benefits which it has conferred on the stockholders in their relations with the state, and the activities or transactions which are within the reach of its regulatory power. *Equitable Life Society* v. *Pennsylvania,* 238 U. S. 143, 147; cf. Mr. Justice Holmes dissenting in *Compañia de Tabacos* v. *Collector,* 275 U. S. 87, 99, 100.

That the distribution of Wisconsin earnings was effected by the exercise outside Wisconsin of the power to declare dividends does not deprive it of its power to take toll from the income earned there upon its distribution to the stockholders. See *Bullen* v. *Wisconsin,* 240 U. S. 625; *Curry* v. *McCanless, supra,* 366–370 and cases cited; *Graves* v. *Elliott,* 307 U. S. 383; *State Tax Commission* v. *Aldrich,* 316 U. S. 174, 180. And the fact that the stockholder-taxpayers never enter Wisconsin and are not represented in the Wisconsin legislature [2] cannot deprive it of its jurisdiction to tax. It has never been thought that residence within a state or county is a *sine qua non* of the power to tax. Cf. *Cook* v. *Tait,* 265 U. S. 47. So long as the earnings actually arise there, and their withdrawal from the state and ultimate distribution, in whole or in part, to stockholders are

[2] The Wisconsin Privilege Dividend Tax does not discriminate against non-residents or foreign corporations, or place an undue burden on them without a corresponding burden on residents or domestic corporations. Hence this is not a case where "legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state." See *South Carolina Highway Dept.* v. *Barnwell Bros.,* 303 U. S. 177, 184–5, n. 2 and cases cited.

subject to some state control, the conditions of state power to tax are satisfied, see *Shaffer* v. *Carter, supra,* 55; *State Tax Commission* v. *Aldrich, supra;* compare *McCulloch* v. *Maryland,* 4 Wheat. 316, 429, even though some practically effective device be necessary in order to enable the state to collect its tax—here by imposing on the corporation the duty to withhold the tax on so much of the earnings withdrawn from the state as may be distributed in dividends. Imposition of this requirement on the corporation transgresses no constitutional limitations. *Nelson* v. *Sears, Roebuck & Co.,* 312 U. S. 359, 364; *Nelson* v. *Montgomery Ward & Co.,* 312 U. S. 373.

Appellants press with vigor, as controlling decision here, the denial of the state's power to tax in *Connecticut General Ins. Co.* v. *Johnson, supra.* In that case California sought to levy a tax on gross receipts derived from contracts made and to be performed in Connecticut by a Connecticut corporation doing other business in California. But as we said of the *Johnson* case in the *Penney* case, *supra,* 446: "In the precise circumstances presented by the record it was found that the tax neither in its measure nor in its incidence was related to California transactions. Here, on the contrary, the incidence of the tax as well as its measure is tied to the earnings which the State of Wisconsin has made possible, . . ." and both the earnings and their disposition are subject to state control and hence its power to tax.

It should be emphasized once again that the Fourteenth Amendment does not in terms or in effect prohibit unwise taxes, merely because they are unwise, or unfair or burdensome taxes, merely because they are unfair or burdensome. The wisdom or fairness of the tax before us are not matters subject to our control or revision. We are only concerned with the power of the state to lay the tax. The power to tax "is an incident of sovereignty, and is coextensive with that to which it is an incident. All sub-

jects over which the sovereign power of a state extends, are objects of taxation; . . ." *McCulloch* v. *Maryland, supra,* 429; *Curry* v. *McCanless, supra,* 366.

We conclude that appellants' stockholders can have no constitutional objection to the withholding by Wisconsin of a tax measured by their dividends distributed from Wisconsin earnings.

Appellants do not deny that the dividends are derived from earnings from within the State of Wisconsin, but it is urged that some of them at least were paid from corporate surplus earned and set aside in years before the taxing statute was enacted. But since the taxable event, the distribution of dividends paid from earnings, and the deduction of the tax from them occurred subsequent to the enactment of the taxing statute, no question of its retroactive application is involved.

The contention of appellant, the Harvester Company, that the formula for assessing the tax is not one authorized by the statute is not open to consideration here. The State Supreme Court has construed and applied the statute and by its construction we are bound. *Meyer* v. *Wells, Fargo & Co.,* 223 U. S. 298 and *Davis* v. *Wallace,* 257 U. S. 478, on which appellant relies, were cases coming here from the lower federal courts, in which this Court was required to place its own construction on a state statute which had not been definitively construed by the state courts.

Affirmed.

MR. JUSTICE ROBERTS took no part in the consideration or decision of these cases.

MR. JUSTICE JACKSON, dissenting:

The facts of one of these cases will make clear the grounds upon which I dissent.

The International Harvester Company is incorporated under the laws of New Jersey. Its head business office

is in Chicago, Illinois. It has qualified and has been admitted to do business in Wisconsin and in every state in the Union except Nevada. It has sales branches and manufacturing plants in Wisconsin, and in many other states. Proceeds of sales and receipts from operations in Wisconsin and in every other state are sent to the corporation treasury in Chicago and commingled in general funds without segregation or earmarking as to state of origin.

More than 32,000 stockholders are owners of this enterprise. They are domiciled in every state of the Union, less than 2 per cent of them in Wisconsin. Under the corporation's charter and the applicable law of New Jersey the stockholders may be paid dividends only from its surplus or net profits. Every corporate act connected with payment of dividends takes place in Chicago. There the directors meet to declare them, there the checks are drawn and mailed. They are paid out of the corporation's general funds on deposit in Chicago or New York.

In 1935 Wisconsin enacted a "Privilege Dividend Tax." It provides, with exceptions not material:

"Section 3. Privilege Dividend Tax. (1) For the privilege of declaring and receiving dividends, out of income derived from property located and business transacted in this state, there is hereby imposed a tax equal to 3 per cent of the amount of such dividends declared and paid by all corporations (foreign and local). . . . Such tax shall be deducted and withheld from such dividends payable to residents and nonresidents by the payor corporation.

. . . . . .

"(3) Every such corporation hereby made liable for such tax, shall deduct the amount of such tax from the dividends so declared.

"(4) In the case of corporations doing business within and without the state of Wisconsin, such tax shall apply only to dividends declared and paid out of income derived

from business transacted and property located within the state of Wisconsin. . . ." Wis. Stat. (1941) § 71.60.

Under this last provision the State by formula not now important apportions among the states the surplus from which dividends may be paid and thus determines a proportion of the dividend attributable to earnings in Wisconsin. As applied and sustained in this case, the short of the matter is this: Wisconsin says it may tax 32,000 stockholders, 98 per cent of whom reside in other states. It taxes them when and because they receive a dividend from a corporation not in its internal affairs subject to its laws, by acts not one of which is performed within its borders.

After the Supreme Court of Wisconsin held this tax invalid it was reinstated by this Court. *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435. This was done on the theory that the tax was not what Wisconsin called it but was in substance an income tax on the corporation, deferred until the income was distributed and measured by the amount of the distribution. As so interpreted, it was the federal undistributed profits tax in reverse; it was a distributed profits tax. But the Wisconsin court has respectfully but firmly insisted that it knows whom Wisconsin is taxing and why. It says this is not an income tax, that it is no tax on the corporation, but is a tax on the stockholder when and because he receives a dividend.

I think the parties are entitled to have the constitutionality of this far-reaching tax decided on the assumption that it is just what the Wisconsin Legislature and Supreme Court say it is. If we do, the question is whether a state may tax nonresident stockholders for receiving from a foreign corporation a dividend from its surplus or undivided profits merely because some time in the past a portion of the surplus was earned in the state.

We must put out of consideration entirely reasoning by which we sustain state taxation of income of the corpora-

tion. These dividends are not and cannot be regarded as income of the corporation within any legal or accounting definition. These surplus funds constituted income once—at the moment of receipt—and may be counted as income for any period which includes time of receipt. But once received, they became capital funds in the sense that earned surplus becomes capital. When they were distributed they were not income of the corporation. They were its surplus capital funds. Not even the power of this Court can make income of outgo. To speak of "a tax on corporate income that is paid out" is as self-contradictory as to speak of round squares.

These dividends of course are income to the stockholder, and any state with jurisdiction to tax him may tax them as such. But I am unable to agree that having "afforded protection and benefits" to a corporation gives jurisdiction to tax the incomes of all its stockholders. Nor do I think that because the state has once permitted the corporation to do business and make earnings in the state its taxing power follows those earnings into the hands of third persons to whom they may be paid. A dividend when declared becomes a debt of the corporation, enforceable as any other debt. If there is power in Wisconsin, because funds were earned there, to tax the receipt of a dividend, there is no reason why it should not also have power to tax the recipients of corporate funds as wages, salaries, or as payment of any other obligation.

Moreover, the Court itself apparently feels obliged to abandon the income-tax-on-the-corporation theory in order to avoid the objection of retroactivity. In considering this aspect of the tax it shifts to a "taxable event" theory which places the event after the enactment of the statute.

I also find it difficult to accept the statement that there is no "constitutional obstacle either to the state's distributing the burden of the tax ratably among the stockhold-

ers . . . or to the state's imposing on the corporation the duty of acting as its agent for the collection of the tax. . . ." The relations between different classes of stockholders is fixed by the corporate charter. If this is a tax on the corporation, it is clear that its burden falls upon the equity stockholders and upon them alone. I do not think the State of Wisconsin would have the power to provide that the preferred stockholders of a New Jersey corporation, despite provisions of its charter, should assume a part of the equity burden.

As supporting this tax, the opinion of the Court says that Wisconsin may impose upon the corporation "a measure of control . . . with respect to its withdrawal" of these earnings, and that their "ultimate distribution . . . to stockholders" is "subject to some state control." I do not understand to what reference is made. These earnings lawfully had been added to surplus of a New Jersey corporation, they were represented by funds lawfully transferred to Chicago or New York. From them the corporation made the distribution. What control Wisconsin had over these funds in these circumstances I do not see.

The act in question does not purport to be one for the protection of local creditors against the corporation's illegal payment of dividends as was the act dealt with by Judge Cardozo in *German-American Coffee Co.* v. *Diehl*, 216 N. Y. 57, 109 N. E. 875. This act alters the purely internal relations of different classes of stockholders without in the least affecting their relation to creditors.

It is impossible to reconcile the taxable-event theory with the benefit theory for supporting this tax. The taxable event clearly is the payment of the dividend. The right to make such payment is not derived from Wisconsin law. The ability to do so does not depend on Wisconsin earnings. The existence of earnings for the period, or of an accumulated surplus, from Wisconsin earnings alone

would not authorize such a dividend. That would depend on net accumulations from all sources and surplus from Wisconsin might be neutralized by losses from operations elsewhere. In such a case it is clear this statute would not even purport to tax, although Wisconsin had extended exactly the same protection to the operations within the state as otherwise. Moreover, if earnings were had in Wisconsin and there were net earnings overall but the corporation should decide to accumulate them, the statute would not purport to lay the Wisconsin tax. These facts make clear that Wisconsin is doing what the Supreme Court of Wisconsin said it was doing. It lays a tax upon the stockholder's dividend. It does not tax the income of the corporation.

I do not see that the way to tax the dividends of nonresident stockholders can be bridged by "some practically effective device" necessary "in order to enable the state to collect its tax—here by imposing on the corporation the duty to withhold the tax." Do we mean that the state may empower or obligate a foreign corporation to collect for it taxes it is without power to collect itself? The physical power to get the money does not seem to me a test of the right to tax. Might does not make right even in taxation. To hold that what the use of official authority may get the state may keep, and that if it cannot get hold of a nonresident stockholder it may hold the company as hostage for him, is strange constitutional doctrine to me.

Whatever rights Wisconsin has to reach beyond its borders and tax nonresidents every other state has also. One who puts his savings to work in an enterprise of national scope may be subjected to any number of state taxes on his dividends up to forty-eight. Any number up to forty-seven of them may be levied by states in which he never lived, never went, did no individual business,

and has no vote. Representation is the ordinary guaranty of fairness in taxation.

I do not think any fact in this case shows jurisdiction in Wisconsin to lay a tax on a privilege she does not grant and could not deny, which is exercised wholly outside of her borders and by those who are not her citizens or her corporate creatures. I see no foundation for the tax Wisconsin has laid and no better foundation for the substitute tax this Court has laid. I would reverse the judgments below.

DE CASTRO *v.* BOARD OF COMMISSIONERS OF SAN JUAN.

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

No. 349. Argued April 24, 1944.—Decided May 29, 1944.

1. On review by the federal courts, a decision of the Supreme Court of Puerto Rico on a question of local law will be rejected only on a clear showing that the rule applied by the insular court does violence to recognized principles of local law or established practices of the local community. *Diaz* v. *Gonzalez*, 261 U. S. 102, followed. Pp. 455–456.
2. The ruling in *Bonet* v. *Texas Company*, 308 U. S. 463, that to justify reversal of a decision of the Supreme Court of Puerto Rico on a matter of local law, "the error must be clear or manifest; the interpretation must be inescapably wrong," does not warrant summary disposition of appeals from the insular court but imposes on the Circuit Court of Appeals and on this Court the duty to examine and appraise the local law in its setting, with the sympathetic disposition to safeguard in matters of local concern the adaptability of the law to local practices and needs. P. 458.
3. The deference due by the federal courts on review of decisions of the Supreme Court of Puerto Rico to that court's understanding of matters of local concern is due likewise by the federal district court for Puerto Rico in cases there pending and by the federal courts on appeals therefrom. P. 459.

4. The decision of the Supreme Court of Puerto Rico that, under the applicable local legislation properly construed, the term of office of the City Manager of San Juan is for "four years, provided that during the same he observe good behavior" was not clearly erroneous and must be sustained on review. P. 464.

136 F. 2d 419, affirmed.

CERTIORARI, 321 U. S. 757, to review the affirmance of a judgment of the Supreme Court of Puerto Rico staying execution of a prior judgment which ordered reinstatement of the petitioner in a local public office.

Mr. William Cattron Rigby, with whom *Messrs. Fred W. Llewellyn, Gabriel de la Haba,* and *Hugh R. Francis* were on the brief, for petitioner.

Mr. F. Fernandez Cuyar for respondent.

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

In this case the petition urged as a ground for certiorari, which moved us to grant it, that the decision of the Court of Appeals below, as in a companion case, *Mario Mercado E Hijos* v. *Commins, post,* p. 465, "practically closes the doors of the appellate court below" to appeals which the statutes of the United States allow to Puerto Rican litigants in the insular courts and "discriminates in favor of the fortunate persons" who, through diversity of citizenship, can take their cases to the United States District Court for Puerto Rico,[1] instead of to the insular courts.

Petitioner brought the present proceeding by petition for certiorari in the District Court of San Juan, Puerto Rico, to review the action of respondent, the Board of Commissioners governing the City of San Juan, in removing petitioner from the office of city manager to which the

[1] See 48 U. S. C. § 863.

Board had appointed him. The District Court of San Juan sustained the Board. On appeal the Supreme Court of Puerto Rico reversed the insular District Court and directed petitioner's reinstatement. 57 P. R. 149. On appeal to the Court of Appeals for the First Circuit under 28 U. S. C. § 225, that court affirmed, 116 F. 2d 806, and this Court denied certiorari, 314 U. S. 614.

On the remand the Supreme Court of Puerto Rico, on motion of respondent, entered judgment staying execution of its first judgment insofar as it ordered petitioner's reinstatement, on the ground that petitioner's term of office had expired in February, 1941, after the decision of the Court of Appeals on the first appeal. 59 D. P. R. 676 (Spanish Edition). Construing the applicable statutes of Puerto Rico in the light of the practical construction given to them by public officials and political parties of the island, and other matters of which it took judicial notice, the insular court came to the conclusion that "the tenure of office of the City Manager . . . is that of four years, provided that during the same he observe good behavior." On appeal from this judgment the Circuit Court of Appeals affirmed, 136 F. 2d 419. We granted certiorari, 321 U. S. 757, for the reason already stated and because some observations in the opinion of the Circuit Court of Appeals have raised serious questions with respect to the appropriate rule governing decision of cases involving local laws, brought from the insular courts of Puerto Rico for review by the Court of Appeals for the First Circuit and by this Court.

The Court of Appeals, in affirming the judgment of the Supreme Court of Puerto Rico, pointed out that § 21 of Act No. 99 of 1931, which established the government of the city of San Juan, the capital of Puerto Rico, provided that the city manager "shall be appointed by the Board of Commissioners created by this Act and shall hold office

during good conduct." It said, "If we were free to take a wholly independent view of the point at issue we would be inclined to conclude that the meaning of § 21 is clear, and that the court below went beyond the permissible limits of interpretation in reading the clause 'and shall hold office during good conduct' as meaning that 'the tenure of office of the city manager of the capital is that of four years, provided that during the same he observe good behavior.'" But it felt constrained to affirm the judgment of the Puerto Rican tribunal by our decision and opinion in *Bonet* v. *Texas Company,* 308 U. S. 463, 471.

In that case, in reversing a decree of the Circuit Court of Appeals which had reversed the Supreme Court of Puerto Rico on a point of local law, we said, "to justify reversal in such cases, the error must be clear or manifest; the interpretation must be inescapably wrong; the decision must be patently erroneous." And since the Court of Appeals in this case was not prepared to say that the judgment now under review is "inescapably wrong," and as it thought that this Court's statement in the *Bonet* case had reduced the duty of the Court of Appeals to the performance of a mere mechanical function, it felt compelled to affirm the judgment. It also suggested that, as the rule of decision applicable to appeals from the insular Supreme Court, as announced by the *Bonet* case, had not been applied in appeals from the United States District Court for Puerto Rico, different interpretations of local law might be established in the Court of Appeals, depending on whether the case was appealed from the insular court or from the United States District Court for Puerto Rico.

Our opinion in the *Bonet* case was the culmination of efforts by this Court, beginning with *Garcia* v. *Vela,* 216 U. S. 598, 602 (1910); *Lewers & Cooke* v. *Atcherly,* 222 U. S. 285, 294 (1911); and *Ker & Co.* v. *Couden,* 223 U. S. 268, 279 (1912), to insure a review by the federal courts of decisions of the local courts of our insular possessions in

matters of peculiarly local concern which should leave appropriate scope for the development by those courts of a system of law which, differing from our own in its origins and principles, would nevertheless be suitable to local customs and needs. In thus interpreting the function of the federal appellate courts in reviewing decisions of the insular tribunals we only followed a principle which had long been established for appeals to federal courts from the courts of our territories within the United States.[2]

From the beginning we have recognized that the appellate review of insular cases was not given to the federal courts for the purpose of superimposing upon the Spanish law our common law preconceptions, except so far as that law must yield to the expressed will of the United States. *Diaz* v. *Gonzalez,* 261 U. S. 102, 105–6. Hence we have emphasized as a cardinal principle of review in such cases that the mere fact that our own system of law and statutory construction would call for the application of one rule to a given set of facts, does not preclude the adoption of a different one by the insular courts. See *Waialua Co.* v. *Christian,* 305 U. S. 91, 109. If the rule thus announced by the insular court is one which is not plainly inconsistent with established principles of the local law, or in their absence is one accepted by the practice of the community, it will not be rejected here merely because it is not in logical harmony with the rules which we would apply to

[2] *Sweeney* v. *Lomme,* 22 Wall. 208, 213; *Northern Pacific R. Co.* v. *Hambly,* 154 U. S. 349, 361; *Fox* v. *Haarstick,* 156 U. S. 674, 679; *Armijo* v. *Armijo,* 181 U. S. 558, 561; *Copper Queen Mining Co.* v. *Board of Equalization,* 206 U. S. 474, 479; *Lewis* v. *Herrera,* 208 U. S. 309, 314; *English* v. *Arizona,* 214 U. S. 359, 361, 363; *Santa Fe County* v. *Coler,* 215 U. S. 296, 305, 307; *Albright* v. *Sandoval,* 216 U. S. 331, 339; *Treat* v. *Grand Canyon Ry. Co.,* 222 U. S. 448, 452; *Clason* v. *Matko,* 223 U. S. 646, 653; *Gray* v. *Taylor,* 227 U. S. 51, 56–57; *Phoenix Ry. Co.* v. *Landis,* 231 U. S. 578, 579–580; *Santa Fe Central Ry. Co.* v. *Friday,* 232 U. S. 694, 700.

a community within the United States. It will be rejected only on a clear showing that the rule applied by the local court does violence to recognized principles of local law or established practices of the local community.

The guiding principle, which is incapable of statement in a short formula, has been variously phrased in terms which in every case must be interpreted in the light of the particular situation to which they were applied.[3] But the principle which these phrases were intended to express has not been more accurately and comprehensively stated than by Mr. Justice Holmes in words which are completely applicable to the present case, in *Diaz* v. *Gonzalez, supra,* 105–6:

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[3] Given the conditions which, as we have pointed out, call for the acceptance here of the decision of the local court, this Court has said that its decree must be accepted here unless "we thought it clearly wrong," *Santa Fe Central Ry. Co.* v. *Friday,* 232 U. S. 694, 700, unless "constrained to the contrary by a sense of clear error committed," *Villanueva* v. *Villanueva,* 239 U. S. 293, 299, *Matos* v. *Alonso Hermanos,* 300 U. S. 429, unless "manifest error be disclosed," *Fox* v. *Haarstick,* 156 U. S. 674, 679; *English* v. *Arizona,* 214 U. S. 359, 363; *Santa Fe County* v. *Coler,* 215 U. S. 296, 305; *Treat* v. *Grand Canyon Ry. Co.,* 222 U. S. 448, 452; *Waialua Co.* v. *Christian,* 305 U. S. 91, 109, "except upon an inescapable conclusion that it was wrong," *Diaz* v. *Gonzalez,* 261 U. S. 102, 105, unless "plainly incorrect," *Puerto Rico* v. *Rubert Hermanos,* 315 U. S. 637, 646. In other cases, in affirming the decision of the local court, we have said that we will accord to its decision "great if not controlling weight," *Lewis* v. *Herrera,* 208 U. S. 309, 314; or "great weight," *Lewers & Cooke* v. *Atcherly,* 222 U. S. 285, 294; cf. *Cordova* v. *Folgueras,* 227 U. S. 375, 378–9; or that we would "lean toward the interpretation adopted by the local court," *Copper Queen Mining Co.* v. *Board of Equalization,* 206 U. S. 474, 479; *English* v. *Arizona, supra,* 361; *Clason* v. *Matke,* 223 U. S. 646, 653; *Gray* v. *Taylor,* 227 U. S. 51, 57; or that we were "not disposed to disturb" its construction, *Albright* v. *Sandoval,* 216 U. S. 331, 339; *Armijo* v. *Armijo,* 181 U. S. 558, 561; cf. *Phoenix Ry. Co.* v. *Landis,* 231 U. S. 578, 579–80; and have spoken of the "caution to be used before overruling" local decisions, *Fernandez & Bros.* v. *Ojeda,* 266 U. S. 144, 146.

"This Court has stated many times the deference due to the understanding of the local courts upon matters of purely local concern. It is enough to cite *Villanueva* v. *Villanueva,* 239 U. S. 293, 299; *Nadal* v. *May,* 233 U. S. 447, 454. This is especially true in dealing with the decisions of a Court inheriting and brought up in a different system from that which prevails here. When we contemplate such a system from the outside it seems like a wall of stone, every part even with all the others, except so far as our own local education may lead us to see subordinations to which we are accustomed. But to one brought up within it, varying emphasis, tacit assumptions, unwritten practices, a thousand influences gained only from life, may give to the different parts wholly new values that logic and grammar never could have got from the books. In this case a slight difference in the caution felt in dealing with the interest of minors (*Baerga* v. *Registrar of Humacao,* 29 P. R. 440, 442), and a slight change of emphasis in the reading of statutes, explain the divergence between the Supreme Court and the Circuit Court of Appeals."

Beyond the fact that common law judges in such cases are reviewing civil law decisions, it is of significance that considerations relevant for decision must be drawn from an environment unfamiliar to and far removed from that in which the reviewing court sits. That which is familiar and accepted in the island forum, in construing a statute or formulating a rule of law, may appear strange or unorthodox in a common law setting. In bridging gaps between legal systems having different origins and history, and governing two different polities, the rule we have announced has special importance.

Repeated admonitions that in cases coming from the Puerto Rican insular courts to the federal courts for review, where the Constitution or statutes of the United States were not involved, great deference must be paid to

local decisions, having failed of their purpose, see *Bonet* v. *Yabucoa Sugar Co.*, 306 U. S. 505,[4] we restated them in more emphatic form in *Bonet* v. *Texas Company, supra,* 470, in the sentence quoted in the opinion below which we have repeated here. In order that its true purport might not be misunderstood we accompanied the sentence by the statement of Mr. Justice Holmes in *Diaz* v. *Gonzalez, supra,* 105–6, which we have quoted, and in the light of that exposition we added: "Such judgment of reversal [by the Circuit Court of Appeals] would not be sustained here even though we felt that of several possible interpretations that of the Circuit Court of Appeals was the most reasonable one."

Thus interpreted and read in its context the principle, as restated in the *Bonet* case, that to justify reversal by the federal courts of a decision of an insular supreme court in a matter of local concern, "the error must be clear or manifest; the interpretation must be inescapably wrong," is not a mere mechanical device which requires or admits, save in exceptional cases, of the summary disposition of appeals from that court. Nor does it minimize the importance or dignity of the appellate function in such cases. On the contrary, we think that it imposes on the Court of Appeals and on this Court the peculiarly delicate task of examining and appraising the local law in its setting, with the sympathetic disposition to safeguard in matters of local concern the adaptability of the law to local practices and needs. It is one which ordinarily cannot be performed summarily or without full argument and examination of the legal questions involved. But if in the light of such an examination it is found that the rule adopted by the lo-

[4] See also *Diaz* v. *Gonzalez,* 261 U. S. 102; *Fernandez & Bros.* v. *Ojeda,* 266 U. S. 144; *Matos* v. *Alonso Hermanos,* 300 U. S. 429; *Puerto Rico* v. *Rubert Hermanos,* 315 U. S. 637; and similarly as to review of decisions of the Hawaiian Supreme Court, *Waialua Co.* v. *Christian,* 305 U. S. 91.

cal tribunal is an intelligible one, not shown to be out of harmony with local law or practice, it is not to be rejected because we think a better could have been devised or because we find it out of harmony with our own traditional system of law and statutory construction.

Nor does it follow that the deference due, on appeals from the local tribunals, to their understanding of matters of local concern will lead to the establishment of a local law differing from that developed in decisions in appeals from the federal district courts sitting in our insular possessions. It is not any the less the duty of the federal courts in cases pending in the federal district court or on appeal from it to defer to that understanding, when it has found expression in the judicial pronouncements of the insular courts, *Nadal* v. *May*, 233 U. S. 447, 454; *Diaz* v. *Gonzalez, supra*, 105; *Waialua Co.* v. *Christian, supra*, 109. Once understood what deference is to be paid, the problem is comparable to that presented when, upon appeals from federal district courts sitting in the states, the federal appellate courts are required to follow state law under the rule of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64. See *Wichita Company* v. *City Bank*, 306 U. S. 103; *Huddleston* v. *Dwyer*, 322 U. S. 232.

There remains for consideration the appropriate application of these principles to the facts of the present case. The Act of the Puerto Rican legislature of May 15, 1931, Act No. 99 of 1931, established a special form of city government for the capital city, San Juan.[5] Legislative powers are vested in a Board of five Commissioners; the first Commissioners were to be appointed by the Governor with the advice and consent of the Senate, for terms of one, two,

[5] The form of government for other municipalities in Puerto Rico is prescribed by Act No. 53 of 1928, which provides for a Mayor to be elected "in the same manner required by this Act for members of the municipal assembly" (§ 29), and hence presumably to serve a term of four years (cf. § 17).

three, four and five years, respectively (§ 9), but the Commissioners so appointed were to hold office only until the first Monday in January, 1937, (§ 50), and thereafter the "Board of Commissioners created by this Act" was to be elected at the general election held in 1936 and every fourth year thereafter (§ 50).[6] The Act provides that the City Manager, who is the chief executive of the city, "shall be appointed by the Board of Commissioners created by this Act and shall hold office during good conduct" (§ 21). He "may be removed by the Board of Commissioners, for just cause" after hearing, and causes for removal are enumerated (§ 22). Five other administrative officers are appointed by the City Manager (§ 26), and an Auditor is appointed by the Board of Commissioners (§ 36); the provisions as to their tenure of office and removal by the agency appointing them (§§ 27, 36) are identical with those for the City Manager,[7] save that only as to the City Manager does the Act specify a tenure of office "during good conduct." Other employees, appointed by the officers under whom they serve, "shall be appointed for the term for which each officer is appointed," and are also removable for cause after hearing, the causes not being specified, however (§ 39). No provision is made for bringing such employees within the Puerto Rican Civil Service Act, Act No. 88 of 1931, adopted four days before the adoption of Act No. 99.

The Puerto Rican Supreme Court refused to hold that the provision that the City Manager "shall hold office

[6] By Act No. 10 of 1937 the Board was increased to nine, beginning in 1941, four Commissioners to be appointed every four years by the Governor with the advice and consent of the Puerto Rican Senate, and five to be elected as previously provided.

[7] In the English text the City Manager is removable for "inexcusable *negligence* in the performance of his duties," the officers appointed by him for "inexcusable *ignorance* in the performance of their duties" (italics added). In the Spanish text the word is "negligencia" in both cases.

during good conduct" so conclusively established that he was to hold office for life as to preclude resort to extrinsic evidence of legislative intention. It held that his term was the same as that of the Board of Commissioners which appointed him, so that petitioner, who was appointed in 1937, by a Board of Commissioners elected for four years, held office for "four years provided that during the same he observe good behavior." [8] We cannot say that these holdings were so clearly wrong as to require a federal appellate court to refuse to pay deference to the insular court's decision.

While a provision that an office be held "during good behavior" is generally deemed indicative of an intention to create a life tenure unless cause for removal arises, see *Matter of Hennen,* 13 Pet. 230, 259; *Smith* v. *Bryan,* 100 Va. 199, 203, 40 S. E. 652, 653; *Chesley* v. *Council of Lunenburg,* 28 Dominion Law Rep. 571, 572, it has not been regarded, even where traditional notions of Anglo-American law prevail, as a rigid formula precluding any other construction.[9] And a tenure for a period of years

[8] We need not consider what, under this construction, was the term of office of the City Manager first appointed in May, 1931. An admissible construction would be that the Board of Commissioners appointed by the Governor to serve until January 1937 was regarded as a single body with a five-year term, despite the annual changes in its membership, and hence the City Manager, whose term of office was that of the body appointing him, also had a tenure of some six and one-half years. At least this conforms to what in fact occurred.

[9] State courts have held that a provision for tenure "during good behavior" does not preclude the termination of the tenure by good faith abolition of the office, *Shira* v. *State,* 187 Ind. 441, 119 N. E. 833; that such a provision is not necessarily inconsistent with a constitutional restriction on the number of years for which the office can be held but will be read as creating a tenure for a term of years during good behavior, *Callaghan* v. *Tobin,* 40 Tex. Civ. App. 441, 448, 90 S. W. 328, 331; *Callaghan* v. *Irvin,* 40 Tex. Civ. App. 453, 459, 90 S. W. 335, 338; *Callaghan* v. *McGown,* 90 S. W. 319, 322 (Tex. Civ. App.); *Neumeyer* v. *Krakel,* 110 Ky. 624, 640, 62 S. W. 518, 523;

during good behavior has not been regarded as a contradiction in terms by American courts.[10] In *Shurtleff* v. *United States,* 189 U. S. 311, 316, this Court recognized and applied the strong presumption against the creation of a life tenure in a public office under the federal government. To hold that the City Manager was appointed for life would, according to the terms of § 39, give to all employees appointed by him a tenure for his life. An intention to create such an *estate pur autre vie* in a public office would at least be somewhat unusual. On the other hand, if they are to be deemed appointed for their own lives, the result would be that on the death or resignation of one City Manager, his successor would be unable to select even his most immediate subordinates and a life tenure would be implied for a large group of municipal employees in disregard of the rule of *Shurtleff* v. *United States.*

Moreover there is no provision that the other municipal officers are to serve during good conduct, and § 39 seems to assume that they shall have defined terms of office. To hold that they could be appointed for life would be inconsistent with the rule of *Shurtleff* v. *United States, supra,* which the insular court accepted and approved. Since the Act is silent as to their terms of office, they can presumably

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but cf. *Stuart* v. *Ellsworth,* 105 Me. 523, 75 A. 59; *Roth* v. *State,* 158 Ind. 242, 266–8, 63 N. E. 460, 468–9; and that a provision that officers appointed by the Mayor and Council shall hold office "during good behavior or until they may be severally removed by the Mayor or by three-fourths vote of the Council . . ." authorizes removal at will by the Mayor or Council, *Smith* v. *Bryan,* 100 Va. 199, 40 S. E. 652; cf. *People ex rel. Maloney* v. *Douglas,* 195 N. Y. 145, 150, 87 N. E. 1070, 1072. *Contra, Chesley* v. *Council of Lunenburg,* 28 Dominion Law Rep. 571. And in construing such provisions the courts have attributed weight to the practical construction placed on them by the public officials concerned, *Klink* v. *State,* 207 Ind. 628, 633, 194 N. E. 352, 354; *Smith* v. *Bryan, supra,* and to supposed anomalies resulting from a contrary construction, *Smith* v. *Bryan, supra.*

[10] *Bruce* v. *Fox,* 1 Dana (Ky.) 447, 452 *et seq.;* see cases cited *supra* note 9.

be appointed for any term not exceeding that of the officer appointing them. The interpretation contended for by petitioner would seemingly produce the result that all of the other city officers, save the Auditor, and the employees in their respective offices, could be appointed for the life of the City Manager, unless he should, as the Puerto Rican court assumed he could, decide to appoint them for a shorter term (see §§ 26, 39). In the latter case appointees of other officials, themselves appointed for short terms, would necessarily have a like tenure of office (§ 39), while those of the City Manager would have a tenure for his life, and those of the Auditor a tenure of four years. Such incongruities the Puerto Rican court thought weighed heavily against the contention that petitioner's tenure was for life. This is the more so because the appointees of the City Manager and of officers appointed by him include most of the municipal officers and employees, none of whom are subject to the insular civil service laws, but who could be appointed for petitioner's life should petitioner's construction of the Act prevail.

In addition to considering the consequences of such a holding the Puerto Rican Supreme Court looked to the practical construction placed on the Act by the political parties of Puerto Rico, as shown by facts of which it could properly take judicial notice. It said that "the political parties of the Island have always construed this statute in the sense that the term of office of the City Manager of the capital is that of four years." It pointed out that at the general election held in 1936 and at that held in 1940 each of the political parties participating proposed a candidate for the office of City Manager, although that office did not appear on the ballot. It said that it was well known that petitioner was the candidate of the winning party at the 1936 election and was appointed City Manager by the newly elected Board of Commissioners to replace the then incumbent, and that another was the

candidate of petitioner's party at the 1940 election, and was appointed City Manager by the newly elected Board of Commissioners. This practical construction by the electorate and political parties, of which petitioner was himself the beneficiary,[11] strongly supports the interpretation of the Act as conferring on the City Manager a tenure no longer than that of the Board of Commissioners which appointed him.

In view of these considerations and of the principles long observed by this Court in reviewing decisions of the insular courts, which we have stated, we cannot say that we should not defer to the view of the Supreme Court of Puerto Rico that the meaning of § 21, when examined with the related provisions of Act No. 99, in the light of the prevailing practical construction of it, is not so plain and unambiguous as to preclude resort to extrinsic aids to interpretation. Nor can we say, that the practical construction given the Act, together with the strong presumption against life tenures, and the principle, accepted by the Supreme Court of Puerto Rico on the authority of numerous American decisions, that ambiguities should be resolved in favor of the shorter term of office,[12] were clearly insufficient to support the construction which it adopted.

Petitioner calls to our attention an opinion of the Attorney General of Puerto Rico, dated January 30, 1937, stating that "The administrative officers of the Capi-

[11] The courts below did not consider, and the facts before us do not enable us to decide, whether should petitioner have prevailed in his construction of the Act as providing a life tenure, he could also establish his right to the office over that of the first incumbent, whom he superseded.

[12] The Puerto Rican Supreme Court cited *Aggeler* v. *Dominguez*, 217 Cal. 429, 19 P. 2d 241; *Lowrie* v. *Brennan*, 283 Mich. 63, 276 N. W. 900; *Chamski* v. *Board of Auditors*, 288 Mich. 238, 284 N. W. 711; *Dobkins* v. *Reece*, 17 S. W. 2d 81 (Tex. Civ. App.); *Smith* v. *Bryan*, *supra*, n. 9; 135 A. L. R. 1173, 1175.

tal . . . were appointed during good behavior" and that the appointments "participate of the nature of a life tenure." He also refers to correspondence of the first City Manager which could be taken as supporting respondent's position as much as it does petitioner's. It does not appear that these were called to the attention of the Supreme Court of Puerto Rico, but in any event they do not, in our opinion, counterbalance the weight rightly to be given to the decision of the insular Supreme Court as the ultimate insular interpreter of the local law. We have considered but do not find it necessary to discuss other contentions of lesser moment, most of which were dealt with in the opinion of the Court of Appeals below, and none of which call for a conclusion different from that which it reached.

Affirmed.

MARIO MERCADO E HIJOS *v.* COMMINS ET AL.

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

No. 497. Argued April 24, 1944.—Decided May 29, 1944.

Although the duty of the Circuit Court of Appeals and of this Court to examine and appraise local law in cases brought for review from the insular courts can not ordinarily be discharged summarily, full argument in this case has not developed any issue of Puerto Rican law, or any question of the deference rightly to be paid to the decisions of the highest court of Puerto Rico, so substantial as to preclude the summary judgment of affirmance entered by the Circuit Court of Appeals. P. 471.

Affirmed.

CERTIORARI, 321 U. S. 758, to review the affirmance of a judgment of the Supreme Court of Puerto Rico.

Messrs. William Cattron Rigby and *Pedro M. Porrata*, with whom *Mr. Fred W. Llewellyn* was on the brief, for petitioner.

Mr. Celestino Dominguez Rubio submitted for respondents.

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

Rule 39 (b) of the Court of Appeals for the First Circuit, effective September 20, 1940, authorizes the summary dismissal or affirmance of judgments appealed from the Supreme Court of Puerto Rico involving only questions of local law, unless it appears from the record and appellant's required "statement on appeal" that the judgment appealed from "is 'inescapably wrong' or 'patently erroneous' (*Sancho Bonet* v. *Texas Co.*, 308 U. S. 463 (1940))." In this, as in the companion case, *DeCastro* v. *Board of Comm'rs of San Juan, ante,* p. 451, we granted certiorari on a petition raising important questions concerning the appellate review by federal courts of decisions of the Supreme Court of Puerto Rico in matters of local concern. The petition here presents for decision the question (1) whether the application of Rule 39 (b) involves an abdication of the duty of the Court of Appeals to hear and decide such appeals on the merits, on brief and argument, as are other appeals; and (2) whether the decision of the Insular Supreme Court of Puerto Rico is so manifestly correct as to make any appeal from it necessarily frivolous and thus warrant dismissal of the appeal without a hearing, on mere inspection of the face of the record.

Petitioner, an agricultural partnership, by petition in the insular District Court of Ponce, P. R., sought rescission of a sale of a plantation known as "Indios," made by respondent Commins to others of the respondents, as in violation and in fraud of an option to purchase the property given by respondent Commins to petitioner. After a trial, the District Court made findings of fact on the basis of which it gave judgment for respondents. The Supreme Court of Puerto Rico confirmed the findings of

the District Court and affirmed the judgment. 60 D. P. R. 877 (Spanish edition). On appeal to the Court of Appeals for the First Circuit, under 28 U. S. C. § 225 (a), that court, on consideration of the typewritten record and appellant's statement on appeal, and without hearing argument and without an opinion, affirmed under its Rule 39 (b).

The District Court and the Supreme Court both found the facts as follows: In 1932 respondent procured a loan from petitioner of more than $40,000, for which respondent Commins gave petitioner four promissory notes payable to "the holder by endorsement," secured by a mortgage, not specifically naming any mortgagee, on respondent Commins' undivided interest in two plantations, "Indios" and "Juanita," then owned jointly by her and her sister. At that time petitioner was a tenant of both plantations under lease, that of "Indios" expiring in 1937, that of "Juanita" in 1938. The mortgage contract stipulated that Mrs. Commins upon three months' written notice might at any time before maturity pay the mortgage credits. It also provided that "the debtor, as a part of the consideration of this contract, agrees with the partnership Mario Mercado e Hijos, so long as the mortgage credit herein constituted is not paid, to grant it priority to purchase and sell or lease her undivided joint interest in the estates 'Indios' and 'Juanita' upon the same price and terms" as those on which she should be willing to sell or lease to any other purchaser or lessee. It further provided "to this effect, the debtor shall advise, unless such mortgage credit is paid . . . of any offer of sale or lease made to her."

The following year, 1933, petitioner sold the promissory notes to the heirs of Jose Tous Soto, the transfer being effected by delivery of the notes and by a deed executed by petitioner which purported to assign to the heirs the "mortgage credits" and guaranteed payment in monthly

installments of the stipulated interest of 9% due on the notes less ¾ of 1%, which it was agreed petitioner should retain for itself. No mention was made in the deed of the option secured to petitioner by the mortgage contract but both of the insular courts made findings which petitioner contends establish that the option was not intended to be assigned, but that the rights under it were to be retained by petitioner. Three years later, in 1936, the interests of the owners in the two estates were partitioned between Mrs. Commins and her sister, Mrs. Commins receiving the plantation "Indios" by the partition deed in which petitioner joined for the purpose of consenting to the partition. The trial court made findings which can be interpreted as meaning that all the respondents were in fact aware that it was the understanding of petitioner and the transferees of the mortgage creditors that the option was to remain the property of petitioner.

In February, 1937, Mrs. Commins gave a new short term mortgage for $45,000 on "Indios" plantation to respondent Manuel Francisco Lluberas Passarell. The proceeds, to the extent of $41,000, were by her direction used to pay her mortgage indebtedness, with three months' interest in advance, to the heirs of Jose Tous Soto, the transferees of the mortgage credits, who, on receipt of the payment, cancelled the mortgage. Immediately following the cancellation Mrs. Commins sold and conveyed by deed the estate "Indios" to respondent Lluberas Passarell and his sisters, who are also respondents. It is this deed which petitioner seeks to cancel as in violation of the option.

In affirming the judgment of the Ponce District Court which denied the petition for cancellation of the conveyance, the Supreme Court of Puerto Rico rested its decision on two independent grounds, either one of which, if supportable, is sufficient to sustain it. Construing and applying the relevant provisions of Art. 152 of the Puerto

Rico mortgage law and §§ 1418 and 1759 of the Civil Code of Puerto Rico, 1930 edition,[1] it concluded that the transfer by petitioner of the mortgage credits to the heirs of Jose Tous Soto without reservation of the option to purchase, "conveyed" to the heirs, petitioner's rights under the option as an inseparable incident of the credits so that after the transfer petitioner was not entitled to exercise the option. It also concluded that since the option was for "so long as the mortgage credit here constituted is not paid" it became "extinguished" by virtue of the payment of the mortgage and could not thereafter be exercised. It further held that petitioner had failed to prove that the sale of "Indios" by respondent Commins, after the assignment by petitioner of the mortgage credits, and after the payment of the mortgage and the expiration of the option, was in fraud of petitioner's rights under the option.

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[1] Article 152 of the Puerto Rico Mortgage Law provides:

"A mortgage credit may be conveyed or assigned to a third person in whole or in part, provided it be effected by means of a public instrument, notice of which is given to the debtor, and that it be recorded in the registry.

"The debtor shall not be bound by said contract to any further extent than he was by his own.

"The assignee shall be subrogated to all the rights of the assignor."

Section 1418 of the Civil Code of Puerto Rico provides:

"The sale or assignment of a credit includes that of all the accessory rights, such as the security, mortgage, pledge, or privilege."

Section 1759 of the Civil Code of Puerto Rico provides in part:

"The pledge and the mortgage are indivisible, even if the debt should be divided among the legal representatives of the debtor or of the creditor.

"Therefore, an heir of the debtor who may have paid a part of the debt can not request that the pledge or mortgage be proportionately extinguished as long as the debt has not been paid in full.

"Neither can the heir of the creditor, who received his part of the debt, return the pledge nor cancel the mortgage to the prejudice of the other heirs who have not been paid."

The court did not pass upon the contention that the option to purchase was void as an agreement "enabling the mortgagee to adjudicate to itself the mortgage property" comparable to agreements for collateral advantage "clogging" the equity of redemption deemed unlawful in Anglo-American mortgage law. *Jennings* v. *Ward,* 2 Vern. 520; *Samuel* v. *Jarrah Timber & Wood Paving Corp.,* L. R. [1904] A. C. 323; 21 Harv. L. Rev. 459. But assuming the validity of the option, as did the Supreme Court of Puerto Rico, its view that rights acquired by a mortgagee as an incident to the mortgage debt passes to the transferee of the debt by assignment, whether mentioned in the assignment or not, is not unknown to our law. Cf. *Sheldon* v. *Sill,* 8 How. 441, 450; *Batesville Institute* v. *Kauffman,* 18 Wall. 151, 154; Jones on Mortgages, § 1033; and see *North British & Mercantile Ins. Co.* v. *Rose,* 228 F. 290, 292. And it is a familiar rule of our law that, save in exceptional circumstances not present here, an option can only be exercised in conformity to its terms and never after the time fixed for its expiration. *Waterman* v. *Banks,* 144 U. S. 394, 401–3; *Kelsey* v. *Crowther,* 162 U. S. 404, 409; *Lord Ranelagh* v. *Melton,* 2 Drewry & Smale 278.

Petitioner has furnished us with no persuasive evidence that the law is otherwise in Puerto Rico. On the contrary the Puerto Rican Supreme Court's decision that the option was necessarily assigned with the mortgage is not without support in the statutory provisions which it cited, and to which we have referred.[2] Whether the option was so transferred or not it is difficult to see upon what legal theory any system of law could in the circumstances of this case read into an option to purchase, a term prolong-

[2] As the Puerto Rican Supreme Court pointed out, the option here could properly be regarded as "an accessory right" or "privilege," within the meaning of § 1418 of the Civil Code, quoted *supra* note 1. See Manresa, Commentaries on the Civil Code, Vol. 10, pp. 402–9.

ing the period specified for its exercise. Petitioner has advanced no such theory and cites no authority which would support it.

As we have said in the *DeCastro* case, the duty of the Court of Appeals and of this Court to examine and appraise local law in cases brought for review from the insular courts cannot ordinarily be discharged summarily. But full argument in this case has not developed any issue of Puerto Rican law, or any question of the deference rightly to be paid to the decisions of the highest court of Puerto Rico, so substantial as to preclude the summary disposition made of this case by the Court of Appeals.

Affirmed.

UNIVERSAL OIL PRODUCTS CO. *v.* GLOBE OIL & REFINING CO.

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

No. 392. Argued March 3, 1944.—Decided May 29, 1944.

1. In resolving a conflict between Circuit Courts of Appeals which, as to the same patent and upon substantially the same facts, reached conflicting conclusions as to infringement, this Court will reexamine concurrent findings of the District Court and the Circuit Court of Appeals. P. 473.
2. Patent No. 1,392,629, to Dubbs, for a process for producing gasoline and other lighter oils from heavy crude oils, *held* not infringed by a process which, in the step corresponding to the B tubes of Dubbs, relies upon substantial vaporization. P. 484.

   "Without substantial vaporization" as used in the Dubbs patent means that the generation and release of vapors in the B tubes is to be avoided so that the charge will enter the C tubes for cracking as nearly as may be in the liquid phase. P. 482.
3. Egloff Patent No. 1,537,593, for an improvement on the Dubbs process for producing lighter from heavier oils, *held* invalid for want of invention. P. 486.

137 F. 2d 3, affirmed.

CERTIORARI, 320 U. S. 730, to review a judgment which, on appeal from a judgment of the District Court, 40 F. Supp. 575, in a suit for infringement of patents, held the patents not infringed.

Messrs. William Dwight Whitney and *Charles M. Thomas,* with whom *Messrs. William F. Hall* and *Frederick W. P. Lorenzen* were on the brief, for petitioner.

Messrs. Thorley von Holst and *J. Bernhard Thiess,* with whom *Messrs. Sidney Neuman* and *Robert W. Poore* were on the brief, for respondent.

MR. JUSTICE REED delivered the opinion of the Court.

The petitioner sued the respondent for infringement of United States Patents No. 1,392,629, dated October 4, 1921, and No. 1,537,593, dated May 12, 1925. The former was issued to Carbon P. Dubbs; the latter, to Gustav Egloff. These patents cover the Dubbs process for converting heavy crude oils to lighter oils, especially gasoline. The claimed infringement arises from the respondent's use for the purpose of such conversion of the "Winkler Koch process" in apparatus designed and installed by the Winkler Koch Engineering Company. The district court dismissed the bill on findings of fact to the effect that Patent No. 1,392,629 was valid but not infringed, and that Patent No. 1,537,593 was invalid, without findings on the issue of infringement.[1] The majority of the Circuit Court of Appeals found both patents not infringed and did not pass on their validity; Judge Lindley was of opinion that the Dubbs patent was infringed but that both patents were invalid.[2] The Court of Appeals for the Third Circuit

[1] *Universal Oil Products Co.* v. *Globe Oil & Refining Co.,* 40 F. Supp. 575.

[2] *Universal Oil Products Co.* v. *Globe Oil & Refining Co.,* 137 F. 2d 3.

found the same patents to be valid and infringed by the use of a process substantially similar to respondent's in *Root Refining Co.* v. *Universal Oil Products Co.*, 78 F. 2d 991. To resolve the conflict thus presented we granted certiorari, 320 U. S. 730.

Where the questions presented by the contested claims of infringement and validity are purely factual, this Court ordinarily accepts the concurrent conclusions of the district court and Circuit Court of Appeals in these cases. *Goodyear Co.* v. *Ray-O-Vac Co.*, 321 U. S. 275. But in resolving conflicting views of two Circuit Courts of Appeals as to a single patent, we are obliged to undertake an independent reexamination of the factual questions. *Sanitary Refrigerator Co.* v. *Winters*, 280 U. S. 30, 35–6.

The patents and the allegedly infringing process concern commercial methods for converting petroleum, as it is found in nature, into the gasoline in everyday use as motor fuel. The experts who testified in the district court have stated some of the theoretical background of the processes used, and a brief summary of this material may facilitate understanding of the process involved.

Layman and chemist alike are of course familiar with the conception of the atoms of "chemical elements" as the basic building blocks of ordinary chemical compounds.[3] The atoms of the "elements" have the capacity to combine with the atoms of other elements to form the molecules of "chemical compounds," whose properties seem to depend directly upon the nature of the molecule. In the field of oil chemistry, the outstanding fact is the extraordinary ability of carbon and hydrogen to combine with each other into molecules containing widely varying numbers of carbon atoms with different proportions of hydrogen atoms in an almost unlimited number of different

[3] This case does not require consideration of any theory as to the internal character of the atom.

structural arrangements. These combinations, generically termed hydrocarbons, are present in great variety in crude oil.

The hydrocarbons differ widely from one another in their physical properties, particularly in the property of volatility, which is of prime importance in motor fuels. As one might expect, the hydrocarbons composed of large molecules with many carbon atoms are heavy, sluggish liquids with relatively high boiling points; they are not suitable for use as gasoline. Those with smaller molecules are much more volatile—indeed, the very smallest are gases at ordinary temperatures.

The initial step in the preparation of gasoline from crude oil involves no molecular change; it consists merely in separating the light hydrocarbons in the natural mixture from the heavy hydrocarbons. This step is accomplished by heating the oil until it vaporizes and then carrying the vapors through a device familiar to industrial chemistry under the name of a fractionating tower. Such a tower is in effect a series of condensers in which the vapor mixture is cooled and the liquid condensate drawn off in separate steps. First the high boiling point constituents, reaching a liquid phase after relatively little cooling, are condensed and withdrawn; this process is repeated on the remaining constituents in successive steps as the vapors cool, until there remain only those low boiling point hydrocarbons suitable for use as gasoline.

By fractional distillation alone, a typical sample of Mid-Continent crude oil might yield approximately 25% gasoline, 5–7% kerosene, 30% gas oil, and a balance of 38–40% fuel oil. The fraction remaining after the distillation of gasoline or gasoline and kerosene is termed "topped crude."

For many years the commercial petroleum industry carried the production of gasoline from crude oil no farther than this initial step of separating it from the mixture.

But with the introduction of the automobile, the demand for gasoline increased rapidly, and it became necessary to develop commercial apparatus for the conversion of heavy hydrocarbon molecules to light hydrocarbon molecules by the chemical process known as "cracking." [4] Chemists had long known that by heating the heavier hydrocarbons to temperatures of the order of 750–900° Fahrenheit, it was possible to decompose the heavy molecules into lighter molecules with fewer carbon atoms, with the maximum decomposition resulting from fairly prolonged application of heat.[5] The breakdown of the heavy molecules into lighter ones was accompanied, however, by a concurrent phenomenon—namely, the formation of even heavier hydrocarbons and the deposit of solid matter called "coke" or "carbon." Likewise, at the temperatures used the oil boiled, and if the vapors were not released (and they could not be if heat was to be applied for a long period of time), high pressures developed in the still. And as the cracking operation yielded products of increasing volatility, this pressure would, apparently, rise as the reaction progressed.

The engineering problems involved in the reduction of the laboratory knowledge of cracking to commercial practice were formidable, since the pressures and temperatures employed carried severe risks of fire and explosion. The first commercial process was introduced about 1913—the so-called Burton process. Burton heated the charge—gas oil—in a simple tank, or shell still. The tank was not continuously fed; a charge of 8,250 gallons was pumped into it and brought to a temperature of 700–750° over a

[4] See *Standard Oil Co.* v. *United States,* 283 U. S. 163, 167.

[5] It has been stated, however, that cracking is an almost instantaneous reaction in the vapor phase processes carried out at temperatures above 950° F. See de Florez, Profits from Cracking in Vapor Phase, XIX National Petroleum News No. 49 (Dec. 7, 1927), pp. 32, 33.

period of some 12 hours under autogenous gas pressure of 75 pounds. The cracking operation was then continued for 24 hours. The vapors liberated in the still were conducted through an inclined line to an aerial condenser, where the heavier and less volatile vapors were liquefied and drained back into the still through the same vapor line, there to be mixed with the unvaporized residue and subjected to further cracking. This first fraction of the vapors was called "reflux condensate"; the unliquefied vapors were carried to a second condenser and liquefied as "pressure distillate," a liquid convertible by further refining operations, not here relevant, to commercial gasoline.

The coke deposited during cracking tended to cause uneven heating of the shell still, with resultant formation of weak spots and danger of explosion. Consequently, it was necessary to shut down the still after about 24 hours of cracking to permit the coke to be cleaned out. The cleaning and pre-heating processes consumed about half the operating time; the gasoline yield ranged only about 25–28% of the gas oil charge; and the menace of explosion was serious. The Burton process was modified and improved somewhat in 1915 by the introduction of the Burton-Clark process, which differed in that it did not apply heat directly to the shell still, but instead circulated the oil in the still by convection through a separate heating coil. This improvement increased the yield to some 30–32%. The Burton-Clark process constituted the general industrial practice at the time of Dubbs' patent.

Chemical engineers in the refining industry were engaged in continuous research looking to the solution of the coking problem and the development of a process which might operate continuously, without wasteful periodic shut-downs of expensive plant equipment. The processes in suit are among the results of their efforts.

Dubbs Patent No. 1,392,629, the alleged infringement of which forms the basis of this action, covers a process first

demonstrated in a pilot plant at Independence, Kansas, in 1919. The oil charge is fed through a nest of heated tubes—called "B tubes"—about four inches in diameter—a heating process not unlike that used in Burton-Clark. The heated oil is then delivered to tubes of about ten inches diameter—"C tubes"—which are only partly filled with liquid oil. The C tubes are insulated, but unheated or only lightly heated to prevent the escape of heat by radiation. Here the vapor generated as the result of heating and cracking passes from the liquid oil and is carried to vapor line condensers of the same general kind used in the Burton system. The first vapors to condense—that is, the reflux condensate—are returned to the B tubes for further heating and cracking; the lighter vapors are carried to a second condenser to become gasoline. The unvaporized residue of liquids and suspended solid particles in the C tubes is continuously withdrawn from the system; thus only the light oils of the reflux condensate, which have but a limited tendency to form coke, are recycled through the B tubes. Such deposit of coke in the lightly heated C tubes as occurs involves no marked danger of explosion, and it precludes clogging of the smaller superheated B tubes. Gas oil subjected to the Dubbs process has been made to yield 40–50% gasoline, and continuous runs of from ten to twenty days are usual.

In the commercial practice of the Dubbs patent, a simple vapor separation tank usually takes the place of the C tubes.

The points of similarity and dissimilarity to the Burton-Clark process are worth noting. Burton-Clark subjected to prolonged heating the unvaporized hydrocarbons as well as the light reflux condensate. Since these heavy hydrocarbons have the greatest tendency to form still heavier oils and to deposit carbon, their withdrawal from the apparatus was an important advance. The continuous feed system of the Dubbs apparatus was also regarded as an

improvement on Burton's batch process. Burton-Clark circulated through the heating tubes the heavy oils formed during cracking; Dubbs permitted only a mixture of fresh oil and reflux condensate to pass through his furnace coil.

The Egloff patent covers an improvement on the Dubbs process.

As we pointed out at p. 474, *supra,* the initial step in the separation of gasoline from crude oil is fractional distillation; then gas oil, the fraction next below gasoline and kerosene, is subjected to cracking in a special apparatus. The fuel oil fraction has such a strong tendency to form very heavy hydrocarbons and coke that it is undesirable as a charge for the high-temperature heating coil in the cracking systems.[6] What Egloff proposed was a relatively mild heating of the heavy oils in a separate furnace—thus fuel oil or topped crude might be used as a charge. The temperature and pressure would be sufficient to occasion a mild cracking; the vapors might then be delivered to the same vapor separation tank used with the high-temperature heating tubes, and the reflux condensate from these vapors might be used as the charge for the high-temperature tubes. The substantial effect is to subject fuel oil or topped crude, from which the charge for a Dubbs plant was often separated by separate distillation, to a distillation and mild cracking operation, using the vapor separating tank and the condenser apparatus of the Dubbs plant instead of using separate apparatus to prepare the Dubbs charge.

The apparatus of respondent's Winkler-Koch process closely resembles the apparatus of the Dubbs-Egloff system. Oil is heated in either the high-temperature or low-temperature furnace, depending on the kind of oil used;

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[6] Fuel oil can be directly charged to a Dubbs system, but the run must be greatly shortened.

the heated oil is delivered to a vapor separation tank; the reflux condensate flows back to the high-temperature coil for further cracking.

The differences between the processes, as distinguished from the apparatus, are more marked. Dubbs taught the heating of the oil charge in the B tubes "without substantial vaporization." Thus the illustrative run in the patent suggests the heating of oil to a temperature of 750° to 860° F., with a pressure of about 100 pounds to the square inch, resulting from vaporization, maintained in both B and C tubes. In the respondent's process, oil enters the heating coils at a temperature of 590° and leaves at a temperature of 940°; a pressure of 500 pounds to the square inch is maintained in the heating coil. Some 85% of the oil by weight and 95% by volume reaches a vapor phase in the heating coils. The oil in mixed liquid and vapor phase enters the vapor separation tank through a pressure reduction valve, so that the pressure in the tank is 26 pounds as compared to the 500 pounds of the heating coil.

The courts below believed that these differences were sufficient to prevent the respondent's process from infringing the claims of the Dubbs patent. A typical claim is Claim 5, as follows:

"5. A continuous process for cracking hydrocarbons consisting in passing the same in a stream in an advancing direction from an inlet point to a discharge point separated and entirely disassociated from the inlet point, subjecting the material in the first stage of its travel to a cracking temperature while preventing substantial vaporization, affording a vaporization space above the stream during the second stage of the travel thereof to said discharge point, taking off the vapors from said vapor space and subjecting them to a condensing action, discharging into the stream at a point remote from that where vaporization occurs a portion of the condensates and maintain-

ing a vapor pressure on the material under treatment during distillation and condensation."

It is apparent that the issue of infringement of the Dubbs patent turns on the construction to be given the words, "without substantial vaporization," as they are used in the claim. The petitioner argues that what is claimed is that there is no release of vapors from the liquid in the B tubes; the respondent argues that it is meant that no liquid oil passes into a vapor phase in the B tubes, that is, that there is no vapor generation in the B tubes.

Either construction would be consistent with the operation of a cracking process. By applying sufficient pressure, it is possible to prevent the generation of vapor from oil even at the relatively high cracking temperatures. The gasoline yielded by cracking oil in liquid phase is chemically different from that yielded by vapor phase cracking, and at the date of the patent, the liquid phase product was preferred. The yield of vapor cracking was a malodorous yellow mixture requiring additional refining operations to make it marketable; however, since 1919 gasoline formed by vapor cracking has become more highly regarded because of its superior antiknock characteristics.

The parties are wholly at odds as to the nature of the process taught by Dubbs in his patent specifications. The petitioner contends that cracking takes place in the B tubes with resultant generation of vapor, and that in the C tubes the vapor is merely set free from the liquid oil. The respondent argues that the only function of the B tubes is to furnish enough heat to cause cracking, and that the oil actually cracks while it is in the C tubes. The cracking process, it will be remembered, requires that the oil be kept at a high temperature for some time if substantial gasoline is to be formed, and the respondent compares the process taught by Dubbs to the familiar fireless cooker, in which a vessel with heat-keeping qualities is

first heated and then removed from the flame while cooking goes on with the heat first supplied.

The patent several times refers to the B tubes as "cracking tubes" or as the "cracking zone." In its relevant parts, the patent describes the process in the following terms:

"Describing the operation of the process, the material to be treated is drawn from any suitable source by means of the pump J and discharged therefrom through line J^1 into and through tubes B and during the time they (*sic*) are passing through said tubes, they (*sic*) are subjected to sufficient heat to cause the desired amount of cracking. Said oil is then passed into the tubes C which are only partially filled with the oil and as the oil passes through these tubes, there is a liberation of vapors from same and which vapors pass up through the vapor tubes D, E. . . .

"A light fire may be maintained under the tubes C as shown in the drawings or said tubes may be heavily insulated . . . to prevent loss of heat by radiation and thereby dispense with the fire under the tubes C. . . . The per cent. of vapors generated from the oil as it passes through the tubes C will depend on the amount of heat acquired by said oil while passing through the 4″ coils."

The petitioner refers, also, to Claim 5, which specifies "a vaporization space above the stream" in the C tubes. These words, we are told, must necessarily refer to a space in which vapors are released, not generated. This does not advance petitioner's argument, however, as the space referred to, as shown by the subsequent words of Claim 5, is simply space to hold released vapor, that is, "vapor space." Neither vapor separation nor vapor generation takes place in the space above the stream.

Respondent too supports its argument that not even generation of vapors was envisaged by the Dubbs patent limitation against "substantial vaporization" by reference to the patent. It points out that as the patent does not define "vaporization," the word is used in the accepted

sense of chemical nomenclature. The use of the word "vaporization" in the patent to show what takes place in the C coils is stressed by respondent as indicative of the meaning with which the word was used by Dubbs.[7] The respondent says this means generation as well as release of vapors because the patent says, "The per cent of vapors generated from the oil as it passes through the tubes C will depend on the amount of heat acquired by said oil while passing through the 4″ [B] coils." It is said that the patent consistently describes the charge in the B tubes as "oil," and never as vapor or mixed oil and vapor or foam.

The petitioner argues that the reading of the patent which respondent asks would result in an inoperative process under the conditions of the illustrative run. It seems to be conceded that oil heated to 750° at 100 pounds pressure would not vaporize, but in order for cracking to take place in the C tubes, it would be necessary to furnish some additional heat to replace that consumed in the cracking reaction. At the higher temperatures suggested in the illustrative run, much higher pressures than the 100 pounds called for become necessary to preclude vaporization, although the heated oil would, in cooling from the higher temperatures, provide the heat necessary for the cracking reaction in the C tubes. But even though experimentation at low pressures would show generation of vapor in the B tubes, this will not control the language of the claim.

We agree with respondent's position as to the teaching of the patent. We are of the view that "without substantial vaporization" as used in the patent means that the generation and release of vapors in the B tubes is to be avoided so that the charge will enter the C tubes for

[7] "The heated oil then passes to the 10 inch C coils which are maintained about half full of oil and wherein vaporization takes place."

cracking as nearly as may be in the liquid phase. It clearly appears from the history of Dubbs' application in the Patent Office that the use of the phrase was purposeful. It was inserted after the Patent Office had disallowed claims without the phrase and it was evidently added to clarify the description of the steps of the process and the claims of novelty. Cf. *Exhibit Supply Co.* v. *Ace Corp.*, 315 U. S. 126, 136. The importance is evident from the history of the trade since, as pointed out above, at the time of Dubbs' application gasoline obtained by cracking the charge in liquid phase was more desirable than the gasoline obtained from vapor phase cracking.[8]

The distinction made by the controverted phrase is of practical importance. Dubbs patented a process for converting hydrocarbons through cracking. The difficulty in the prior art was carbon deposit or coking. If in this process the cracking operation is pressed to substantial completion in the B tubes, the patent seems to fail to teach a method of preventing coking in those tubes. Coke there will certainly be as a result of the cracking; what would prevent its deposit? It may be possible to prevent the deposit of carbon by maintaining a rapid turbulent flow; indeed, we are told that this is the device used in the commercial application of both parties' processes, and Behimer, another engineer working in the cracking field, attributed the failure of a similar apparatus (see Patent No. 1,883,850) to the want of a pump of sufficiently high pressure to maintain the necessary velocity of flow. But the patent, while it calls for a pump to inject the charge into the B tubes, does not point out the need of using rapid flow for this purpose; the pressure within the apparatus is expressly referred solely to vaporization. One building a device according to Dubbs' teaching might, if he read

[8] But see *Universal Oil Products Co.* v. *Globe Oil & Refining Co.*, 40 F. Supp. 575; 137 F. 2d 3.

the patent as teaching that cracking was to occur in the B tubes, content himself with using relatively short B tubes and a correspondingly slow flow to furnish cracking time. That procedure would presumably lead to coking; the patent, however, does not describe how that result may be avoided.

There is a reason of controlling importance why the protection of the Dubbs patent must be limited to a process in which cracking takes place largely in the C tubes.

As a reward for inventions and to encourage their disclosure, the United States offers a seventeen-year monopoly to an inventor who refrains from keeping his invention a trade secret. But the *quid pro quo* is disclosure of a process or device in sufficient detail to enable one skilled in the art to practice the invention once the period of the monopoly has expired; and the same precision of disclosure is likewise essential to warn the industry concerned of the precise scope of the monopoly asserted. *Béné* v. *Jeantet,* 129 U. S. 683, 685–86; *General Electric Co.* v. *Wabash Corp.,* 304 U. S. 364, 368.

In a process patent in the refining of oil, preciseness of description is essential. It is a crowded art. Hope for success for new patented processes with slight variations from those in use caused large expenditures in testing their efficiency by important companies with staffs of specialists who were skilled in the art. Among the processes cited to us as prior art advances on Burton-Clark, those of Hall Patent No. 1,175,910, Alexander Patent No. 1,407,619, and Behimer Patent No. 1,883,850 were embodied in experimental plants, and the testimony is replete with references to such other contemporary experimental or working cracking systems as the Holmes-Manley, Fleming, and Cross processes. The claim is the measure of the grant. *Smith* v. *Snow,* 294 U. S. 1, 11. The claim is required to be specific for the very purpose

of protecting the public against extension of the scope of the patent. *White* v. *Dunbar,* 119 U. S. 47, 52; *Minerals Separation* v. *Butte Mining Co.,* 250 U. S. 336, 347; *Knick* v. *Bowes "Seal Fast" Corp.,* 25 F. 2d 442, 443. The applicants for the patent thought the phrase "without substantial vaporization" in the B tubes important. While varying the details of a process does not avoid infringement, *Tilghman* v. *Proctor,* 102 U. S. 707, when the accused process does not substantially follow the mode taught in the patent, there is no infringment. In view of the importance of the direction as to the non-generation of vapors in the B tubes, as hereinbefore pointed out, we do not think a process which relies on vaporization in the B tubes can be said to infringe the patented process.

The Egloff patent does not require extended consideration. It may fairly be said that the Egloff patent, described above at p. 478, was an improvement on the Dubbs system. The improvement consisted in providing a clean charging stock for the B tubes by heating crude or fuel oil in coils which are contained in a separate heating apparatus from the one used to heat the cleaned stock, and discharging it in a liquid phase into an expansion chamber. The unvaporized oil is withdrawn from the expansion chamber and does not reenter the system. The vapor is liquefied in a partial condenser or dephlegmator, and the reflux condensate is pumped as a charge into the B tubes or apparatus substantially similar in form and operation to the Dubbs patent. The reflux condensate after passing through the B coils reenters the same expansion chamber that is used for its preparation.[9] Noth-

[9] A typical claim (5) reads as follows:

"5. A process of oil conversion, consisting in maintaining a body of heated hydrocarbons in an enlarged zone where substantial vaporization occurs, in subjecting the vapors to reflux condensation to condense the heavier vapors, in passing the reflux condensate in an advancing stream through a heating zone where it is subjected to

ing is said in the Egloff patent as to vaporization in the B tubes.

It seems obvious that the Dubbs patent anticipated all the steps of the process except the separate treatment of the heavy oil. The clean charge of the reflux condensate was brought about by the withdrawal of the residue of unvaporized oil, and this withdrawal was old in the art.[10] As there is nothing in the claims or specification to show any reliance upon where vaporization, whether by generation or liberation, takes place, such difference as there may be between this patent and Dubbs as to that phenomenon is not significant. But we see nothing in the addition of the extra still that involves invention. In retrospect, it appears almost inevitable that, once a satisfactory continuous feed cracking apparatus was developed, chemical engineers would promptly design equipment for integrating the initial distillation of crude or fuel oil, with whatever cracking might be practicable, with the gas oil cracking process to form a continuous operation. Retrospective simplicity is often a misleading test of invention where it appears that the patentee's conception in fact solved a recognized problem that had baffled the contemporary art; but in this case Egloff advanced his improvement shortly after Dubbs disclosed the underlying process and before Dubbs' system had had wide commercial use; hence contemporary workers had no occasion to deal with what-

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cracking conditions of temperature and pressure, in delivering heated condensate to said enlarged zone, and simultaneously heating an independent stream of charging oil for delivery to said enlarged zone to a temperature sufficient to cause a substantial vaporization thereof in said zone, in introducing said heated charging oil to the enlarged zone, and in withdrawing unvaporized oil from said enlarged zone without permitting the same to again enter either of said oil streams."

[10] Egloff was not the first patentee to realize the advisability of withdrawing the heavier oils; Dubbs certainly anticipated him, as did Behimer, No. 1,883,850; Greenstreet, No. 1,740,691; Alexander, No. 1,407,619; and Hall, No. 1,175,910.

ever engineering problems might have been involved. We have, therefore, a conception which is on its face too obvious to constitute patentable invention, and which was advanced shortly after any need of it arose. We think the district court was right in finding the Egloff patent invalid.

Affirmed.

FELDMAN *v.* UNITED STATES.

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

No. 193. Argued December 17, 1943.—Decided May 29, 1944.

The Fifth Amendment does not forbid the use in evidence against a defendant in a criminal case in a federal court of self-incriminating testimony theretofore compelled—under a state immunity statute and without participation by federal officers—in proceedings in a state court. P. 492.

136 F. 2d 394, affirmed.

CERTIORARI, 320 U. S. 724, to review the affirmance of a conviction, under § 215 of the Criminal Code, for using the mails to defraud.

Mr. Seymour M. Klein, with whom *Mr. James Marshall* was on the brief, for petitioner.

Mr. Chester T. Lane, with whom *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Mr. Edward G. Jennings* were on the brief, for the United States.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This is an indictment under Section 215 of the Criminal Code, 18 U. S. C. § 338, for using the mails to further a fraudulent scheme. Petitioner's conviction was affirmed

by the Circuit Court of Appeals, one judge dissenting. 136 F. 2d 394. We brought the case here, 320 U. S. 724, to consider the single question whether the admission of testimony previously given by petitioner in supplementary proceedings in a state court deprived him of the protection of the Fifth Amendment against being "compelled in any criminal case to be a witness against himself."

In accordance with New York procedure, known as supplementary proceedings, designed to aid in the discovery of assets of a debtor, N. Y. Civil Practice Act, art. 45, Feldman, a judgment debtor, was called as a witness in such proceedings on several occasions between March 31, 1936, and September 29, 1939. Up to March 14, 1938, the New York immunity statute merely provided that a debtor might not be excused from testifying because of self-crimination but that his testimony could not be used in evidence in a subsequent criminal proceeding against him. N. Y. Laws, 1935, c. 630, § 789. By an Act of March 14, 1938, New York broadened the debtor's immunity so as to free him from prosecution on account of any matter revealed in his testimony. N. Y. Laws, 1938, c. 108, § 17; N. Y. Civil Practice Act, § 789. While the earlier provision was in effect, Feldman testified that he was unemployed, paid rent of $250 a month from funds supplied by his family, owed about $340,000 and contemplated immediate bankruptcy. He further testified that about once a month his father sent him a book of signed checks, he sent large sums of money to his father by Western Union and destroyed whatever evidence the receipts might offer—in short, that he was "kiting" his father's checks by sending the proceeds of the later checks to cover those cashed earlier. After March 14, 1938, and down through September, 1939, Feldman again testified in New York supplementary proceedings, giving further details of his bizarre "kiting" practices.

The federal charge was the use of the mails in a scheme to defraud executed by "kiting" checks. In the trial, the Government introduced Feldman's testimony in the New York supplementary proceedings. He did not take the stand. The Government contends that it is unnecessary to decide whether the claim of privilege duly made bars the admission of this testimony. It suggests that testimony given prior to the Act of March 14, 1938, was not compellable and therefore Feldman waived any privilege, in that the New York statute prior to March 14, 1938, did not grant an immunity coextensive with the privilege available under New York law. *People ex rel. Lewisohn* v. *O'Brien,* 176 N. Y. 253, 68 N. E. 353. As to testimony under the later New York statute, the Government suggests that it either was not incriminating or was merely repetitive of the earlier voluntary testimony, making its admission in any event not prejudicial.

We put to one side all these subtler issues because we think they cannot dispose of the case. And so we come directly to the main question, namely whether the Fifth Amendment prohibited the admission against Feldman upon his trial in a federal court of the earlier testimony given by him in the state courts. While the point has not been formally decided, we deem the answer to be controlled by a long series of decisions expressing basic principles of our federation.

The effective enforcement of a well-designed penal code is of course indispensable for social security. But the Bill of Rights was added to the original Constitution in the conviction that too high a price may be paid even for the unhampered enforcement of the criminal law and that, in its attainment, other social objects of a free society should not be sacrificed. We are immediately concerned with the Fourth and Fifth Amendments, intertwined as they are, and expressing as they do supplementing phases of the

same constitutional purpose—to maintain inviolate large areas of personal privacy. See *Boyd* v. *United States,* 116 U. S. 616, 630. "The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles [of the Fourth and Fifth Amendments] established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land." *Weeks* v. *United States,* 232 U. S. 383, 393. "We have already noticed the intimate relation between the two amendments. They throw great light on each other. For the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the Fourth Amendment. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself." *Boyd* v. *United States, supra,* at 633.

But for more than one hundred years, ever since *Barron* v. *Baltimore,* 7 Pet. 243, one of the settled principles of our Constitution has been that these Amendments protect only against invasion of civil liberties by the Government whose conduct they alone limit. *Brown* v. *Walker,* 161 U. S. 591, 606; *Jack* v. *Kansas,* 199 U. S. 372, 380; *Twining* v. *New Jersey,* 211 U. S. 78. Conversely, a State cannot by operating within its constitutional powers restrict the operations of the National Government within its sphere. The distinctive operations of the two governments within their respective spheres is basic to our federal constitutional system, howsoever complicated and

difficult the practical accommodations to it may be. The matter was put in classic terms in what Chief Justice Taft called "the great judgment," *Ponzi* v. *Fessenden,* 258 U. S. 254, 261, of Chief Justice Taney in *Ableman* v. *Booth,* 21 How. 506, 516: "the powers of the General Government, and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. And the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a State judge of a State court, as if the line of division was traced by landmarks and monuments visible to the eye."

This principle has governed a series of decisions which for all practical purposes rule the present case. When this Court for the first time sustained an immunity statute as adequate, it rejected the argument that because federal immunity could not bar use in a state prosecution of testimony compelled in a federal court, the immunity falls short of the constitutional requirement. *Brown* v. *Walker, supra,* at 606. And when the reverse claim was made as to a state immunity statute, that a disclosure compelled in a state court could not assure immunity in a federal court, the argument was again rejected because "The state [anti-trust] statute could not, of course, prevent a prosecution of the same party under the United States [anti-trust] statute, and it could not prevent the testimony given by the party in the State proceeding from being used against the same person in a Federal court for a violation of the Federal statute, if it could be imagined that such prosecution would be instituted under such circumstances." *Jack* v. *Kansas, supra,* at 380. When the matter was here last it was thus summarized: "This court has held that immunity against state prosecution is not essential to the validity of federal statutes declaring that a witness shall not be excused from giving evidence on the

ground that it will incriminate him, and also that the lack of state power to give witnesses protection against federal prosecution does not defeat a state immunity statute. The principle established is that full and complete immunity against prosecution by the government compelling the witness to answer is equivalent to the protection furnished by the rule against compulsory self-incrimination." *United States* v. *Murdock,* 284 U. S. 141, 149.

And so, while evidence secured through unreasonable search and seizure by federal officials is inadmissible in a federal prosecution, *Weeks* v. *United States, supra; Gouled* v. *United States,* 255 U. S. 298; *Agnello* v. *United States,* 269 U. S. 20, incriminating documents so secured by state officials without participation by federal officials but turned over for their use are admissible in a federal prosecution. *Burdeau* v. *McDowell,* 256 U. S. 465. Relevant testimony is not barred from use in a criminal trial in a federal court unless wrongfully acquired by federal officials. "If knowledge of them [the facts] is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it . . ." *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385, 392. This Court has refused to draw nice distinctions as to when wrongful acquisition of evidence by state agencies was also a federal enterprise. When a representative of the United States is a participant in the extortion of evidence or in its illicit acquisition, he is charged with exercising the authority of the United States. Evidence so secured may be regained, *Go-Bart Co.* v. *United States,* 282 U. S. 344, and its admission, after timely motion for its suppression, vitiates a conviction. *Byars* v. *United States,* 273 U. S. 28.

The Constitution prohibits an invasion of privacy only in proceedings over which the Government has control. There is no suggestion of complicity between Feldman's creditors and federal law-enforcing officers. The Govern-

ment here is not seeking to benefit by evidence which it extorted. It had no power either to compel testimony in the state court or to forestall such disclosure as a means of avoiding possible interference with the enforcement of the federal penal code. Whether testimony in a New York court should be compelled in exchange for immunity from prosecution under the penal laws of New York is for New York to say. For what purposes the United States may deem the disclosure of testimony more important than prosecution for federal crimes is for Congress to say. It has seen fit to make the exchange very sparingly. See *United States* v. *Monia,* 317 U. S. 424. Certainly it is not for New York to determine when, because it suits its local policy to employ testimonial compulsion, it will relieve from federal prosecution "for or on account of any transaction, matter or thing concerning which" a New York court may have seen fit to require testimony. Such would be the practical result of sustaining petitioner's claim. The immunity from prosecution, like the privilege against testifying which it supplants, pertains to a prosecution in the same jurisdiction. Otherwise the criminal law of the United States would be at the hazard of carelessness or connivance in some petty civil litigation in any state court, quite beyond the reach even of the most alert watchfulness by law officers of the Government. See *Nardone* v. *United States,* 308 U. S. 338.

Only a word need be said about the phrase of scepticism in *Jack* v. *Kansas, supra,* at 380, that it could hardly be imagined "that such prosecution would be instituted under such circumstances." The "prosecution" and the "circumstances" there referred to were a prosecution on the same facts for violation of the state and the federal anti-trust laws. But see *Fox* v. *Ohio,* 5 How. 410, 435; *United States* v. *Lanza,* 260 U. S. 377. The cautionary words in *Jack* v. *Kansas* in nowise qualified the principle of that and later cases as to the separateness in the operation of state and

federal criminal laws and state and federal immunity provisions. There are, as we have already seen, ample safeguards. If a federal agency were to use a state court as an instrument for compelling disclosures for federal purposes, the doctrine of the *Byars* case, *supra*, as well as that of *McNabb* v. *United States*, 318 U. S. 332, afford adequate resources against such an evasive disregard of the privilege against self-crimination. See *United States* v. *Saline Bank*, 1 Pet. 100; *United States* v. *McRae*, L. R. 3 Ch. App. 79. Nothing in this record brings either doctrine into play.

Judgment affirmed.

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

MR. JUSTICE BLACK, dissenting:

In *Boyd* v. *United States*, this Court said that "any compulsory discovery by extorting the party's oath . . . is contrary to the principles of a free government. It is abhorrent . . . to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom." 116 U. S. 616, 631–632.[1] Unless the Court now is disavowing this belief, the use of testimony obtained by compulsory discovery to convict an accused must be con-

[1] And see *Jack* v. *Kansas*, 199 U. S. 372, where this Court disposed of an argument that a Kansas statute unconstitutionally compelled Jack to confess his violations of a federal criminal statute with the assertion that, "We do not believe . . . such evidence would be availed of by the Government for such purpose." *Id.*, 381–382. In an earlier case, *Brown* v. *Walker*, 161 U. S. 591, this Court thought that the likelihood that state prosecutors would use testimony compelled by the federal government was "so improbable that no reasonable man would suffer it to influence his conduct." *Id.*, 606–608. But see *Ensign* v. *Pennsylvania*, 227 U. S. 592.

sidered "shocking to the universal sense of justice" and "offensive to the common and fundamental ideas of fairness and right," and therefore, under past decisions of the Court, incompatible with Constitutional due process of law. *Betts* v. *Brady,* 316 U. S. 455, 462, 473. Or at least, even if the use of testimony extracted by compulsory discovery be held consistent with due process, adherence to the belief expressed by the *Boyd* case should require the Court to hold that, absent a conflicting Act of Congress, "a decent regard for the duty of courts as agencies of justice and custodians of liberty forbids that men should be convicted upon evidence" so obtained. *McNabb* v. *United States,* 318 U. S. 332, 347. But I do not base my dissent upon judicially defined concepts of procedural due process or upon judge-made rules of evidence. The Bill of Rights, proposed in 1789 by the First Congress convened under our Constitution, and quickly ratified by the States in 1791, declares in part that, "No person . . . shall be compelled in any Criminal Case to be a witness against himself." Amend. V, Constitution of the United States. Never since the Bill of Rights was adopted, until today, has this Court sustained a single conviction for a federal offense which rested on self-incriminatory testimony forced from the accused. I cannot agree to do so now.

Feldman was compelled to testify under oath in a creditors' compulsory discovery proceeding in a New York court conducted pursuant to a state statute which granted him immunity from state prosecution for any state crime he might be forced to confess. Had he refused to testify he could have been imprisoned. Over his objection, a transcript of his compelled testimony was used in the United States District Court to convict him of a federal crime. As the Fifth Amendment heretofore has been interpreted, Feldman's testimony could not have been used for this purpose had it been compelled by a federal

court rather than the state court.[2] This would have been true whether the federal court proceeding had been non-criminal or criminal,[3] and whether Feldman had testified as a mere witness or as a defendant.[4] Nor could his forced testimony have been used had it been compelled by federal officers outside of a court room; [5] by foreign detectives in a foreign country inquiring into commission of an offense against the United States committed on the high seas;[6] or by state officers interrogating a suspect for the purpose of enforcing a federal law.[7] There is, then, no sanction in the precedents of this Court for viewing the Fifth Amendment's prohibition against compelled testimony with grudging eyes and reducing its scope to the narrowest plausible limits. As the decisions reflect, the previously declared attitude of the Court toward this prohibition has been that it "must have a broad construction in favor of the right which it was intended to secure." *Counselman* v. *Hitchcock,* 142 U. S. 547, 562; *McCarthy* v. *Arndstein,* 266 U. S. 34.

Today, however, the Court adopts a different approach to the task of construing the Fifth Amendment. We are now told that under certain circumstances compelled testimony is purged of the fatal taint which the Fifth Amendment places upon it, and that an accused can be convicted

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[2] *McCarthy* v. *Arndstein,* 266 U. S. 34; and see *Bram* v. *United States,* 168 U. S. 532; *Wan* v. *United States,* 266 U. S. 1; cf. *Boyd* v. *United States,* 116 U. S. 616.

[3] *McCarthy* v. *Arndstein, supra,* Note 2, pp. 40–41; *Counselman* v. *Hitchcock,* 142 U. S. 547, 562. See also *United States ex rel. Bilokumsky* v. *Tod,* 263 U. S. 149; *United States ex rel. Vajtauer* v. *Commissioner of Immigration,* 273 U. S. 103.

[4] *Counselman* v. *Hitchcock,* 142 U. S. 547.

[5] *Wan* v. *United States, supra,* Note 2; *Anderson* v. *United States,* 318 U. S. 350, 356.

[6] *Bram* v. *United States, supra,* Note 2.

[7] *Anderson* v. *United States, supra,* Note 5; and see *Bram* v. *United States, supra,* Note 2.

in a federal court on words he was forced to speak. The circumstances under which it is now held that men can be forced to convict themselves by their own testimony are, (1) that the testimony was compelled by state officers, and (2) that the state officers were not acting to enforce federal law. These slight variations in the techniques of compulsion are considered a sufficient excuse to escape the Fifth Amendment's command against the use of compelled testimony by federal courts. Surely such a holding is not to be justified by the language of that Amendment. Within its sweeping prohibition are found no exceptions based upon the persons who compel, their purpose in compelling, or their method of compelling, whether by threats of imprisonment, physical torture, or other means. Testimony is no less compelled because a state rather than a federal officer compels it, or because the state officer appears to be primarily interested at the moment in enforcing a state rather than a federal law.

Nor is the holding in this case to be defended as one which our federal system requires. This case presents no conflict between federal and state spheres of power such as that presented by cases involving the validity of federal and state immunity statutes, wherein it has been contended, unsuccessfully, that neither the United States nor a State can compel a witness to testify against himself unless it grant him complete immunity from prosecution in both jurisdictions.[8] Feldman's objection to the use of

[8] See *Hale* v. *Henkel*, 201 U. S. 43, and *United States* v. *Murdock*, 284 U. S. 141, holding it enough that the United States grant immunity from prosecution for federal crimes; but see, *contra*, *United States* v. *Saline Bank*, 1 Pet. 100; *Ballmann* v. *Fagin*, 200 U. S. 186. Had the Court in the *Murdock* case, *supra*, accepted the contention that the federal government must grant an immunity from state as well as federal prosecution, it would inevitably have been faced with the problem of the federal power to interfere with enforcement of state laws through the device of granting immunity from state prosecution to witnesses in federal proceedings—a problem replete with both prac-

his compelled testimony is not based on a claim that New York must grant him, or has granted him, immunity from prosecution for the federal crime it has forced him to confess. He does not question the power of the United States to prosecute him for that crime on proper evidence. Nor, for that matter, does he contend that the Fifth Amendment prevented New York from compelling him to confess a federal crime.[9] He claims only that the Fifth Amendment's prohibition against self-incrimination prevents the use of his compelled testimony against him in the present proceeding. The very narrow problem thus presented, and upon which this Court never before has passed, is whether federal courts can convict a defendant of a federal crime by use of self-incriminatory testimony which someone in some manner has extracted from him against his will. The Court's holding that a defendant can be so convicted cuts into the very substance of the Fifth Amendment. And it justifies this result not by the language or history of the Constitution itself, but by a process of syllogistic reasoning based upon broad premises of "dual sovereignty" stated in previous opinions of the Court relating to immunity statutes. Even were there here a "dual

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tical and legal difficulties. See J. A. C. Grant, Immunity From Compulsory Self-Incrimination in a Federal System of Government, 9 Temple L. Q. 57 and 194, 207–211.

Compare *Jack* v. *Kansas, supra,* Note 1, holding that Kansas could compel a witness to testify to his past crimes upon a grant of immunity from state prosecution, though he still be subject to federal prosecution. In reaching this result the Court took specific notice of the fact that, were the rule otherwise, state immunity statutes must all be stricken down. "The state statute could not, of course, prevent a prosecution of the same party under the United States statute." 199 U. S. 372, 380.

[9] See *Twining* v. *New Jersey,* 211 U. S. 78, and *Ensign* v. *Pennsylvania, supra,* Note 1, holding respectively that despite the Fourteenth Amendment a state may compel a defendant to incriminate himself, and may use against him schedules he filed in an involuntary federal bankruptcy proceeding. But see *Ashcraft* v. *Tennessee,* 322 U. S. 143.

sovereignty" problem, which there is not, such a method of decision would be questionable. Constitutional interpretation should involve more than dialectics. The great principles of liberty written in the Bill of Rights cannot safely be treated as imprisoned in walls of formal logic built upon vague abstractions found in the United States Reports. "The ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it." *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, concurring opinion, 487, 491–492.[10]

Putting aside the Court's dialectical method of interpretation, and examining the history and purpose of the Fifth Amendment, there appears to be no justification for reducing its scope as the Court is now doing. Compulsion of self-incriminatory testimony by court oaths and by the less refined methods of torture were equally detested by the Fifth Amendment's liberty-loving advocates and their forbears.[11] Their abhorrence of these practices did not spring alone from a predilection for personal privacy. They had other reasons to despise and fear them. They still remembered the hated practices of the Court of Star Chamber, the Court of High Commission, and other inquisitorial agencies which had brought religious and political non-conformists within the penalties of the law by means of their own testimony. And history supports no argument that the framers of the Fifth Amendment were interested only in forbidding the *extraction* of an accused's testimony, as distinguished from the *use* of his extracted testimony. The extraction of testimony is, of course, but a means to the end of its use to punish. Few persons

[10] For a critical analysis of the conflict between the legal concept of "dual sovereignty" and preservation of the Constitutional prohibition against self-incrimination, see J. A. C. Grant, *op. cit., supra,* Note 8.

[11] See Pittman, The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America, 21 Va. L. Rev. 763, 775–783.

would seriously object to testifying unless their testimony would subject them to future punishment. The real evil aimed at by the Fifth Amendment's flat prohibition against the compulsion of self-incriminatory testimony was that thought to inhere in using a man's compelled testimony to punish him. By broadly outlawing the practice of compelling such testimony the Fifth Amendment struck at this evil at its source, seeking to eliminate the possibility that compelled testimony would ever be available for use to punish a defendant.[12]

Perhaps, as some have argued, the men who framed this Amendment were mistaken or their fears have lost foundation and the unqualified prohibition against the extraction and use of compelled testimony which they put into the Fifth Amendment should be repealed or modified.[13] This view of the desirability of constricting the Fifth Amendment I am not ready to accept, but were it otherwise I would not consider such a view should play any part in the process of interpretation. I am unwilling to see any constriction of the liberties and the procedural safeguards of these liberties specifically enumerated in the Bill of Rights unless it be by Constitutional amendment.[14]

The prohibition against compelled testimony which the Court today has seen fit to restrict cannot be dissociated

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[12] See *United States* v. *Burr*, 25 Fed. Cas. 38–41; *Counselman* v. *Hitchcock*, 142 U. S. 547, 564–566; *Brown* v. *Walker*, 161 U. S. 591, 594, 600, 605–606; cf. *Ex parte Lange*, 18 Wall. 163, 173. And see Pittman, *op. cit., supra*, Note 11; and cases cited Notes 5, 6, and 7, *supra*.

[13] Compare Knox, Self-Incrimination, 74 Univ. Pa. L. Rev. 139 with VIII Wigmore on Evidence, Third Ed., pp. 304–313; and see Editorial, 16 Journ. Crim. Law and Crim. 165–166.

[14] See dissenting opinion of Circuit Judge Frank in *United States* v. *St. Pierre*, 132 F. 2d 837, 840, pp. 847–848. "Strangely enough, those who are most opposed to any changes in judicial constructions of those designedly elastic clauses of the Constitution are often the most vigorous in their demands that the courts should eviscerate the specific and relatively inelastic self-incrimination clause." *Id.*, 848.

from the other specific protections afforded the individual by the Bill of Rights. The founders of our federal government were too close to oppressions and persecutions of the unorthodox, the unpopular, and the less influential to trust even elected representatives with unlimited powers of control over the individual. From their distrust were derived the first ten amendments, designed as a whole to "limit and qualify the powers of Government," to define "cases in which the Government ought not to act, or to act only in a particular mode," and to protect unpopular minorities from oppressive majorities. 1 Annals 437. The first of the ten amendments erected a Constitutional shelter for the people's liberties of religion, speech, press, and assembly. This amendment reflects the faith that a good society is not static but advancing, and that the fullest possible interchange of ideas and beliefs is essential to attainment of this goal. The proponents of the First Amendment, committed to this faith, were determined that every American should possess an unrestrained freedom to express his views, however odious they might be to vested interests whose power they might challenge.

But these men were not satisfied that the First Amendment would make this right sufficiently secure. As they well knew, history teaches that attempted exercises of the freedoms of religion, speech, press, and assembly have been the commonest occasions for oppression and persecution. Inevitably such persecutions have involved secret arrests, unlawful detentions, forced confessions, secret trials, and arbitrary punishments under oppressive laws. Therefore it is not surprising that the men behind the First Amendment also insisted upon the Fifth, Sixth, and Eighth Amendments, designed to protect all individuals against arbitrary punishment by definite procedural provisions guaranteeing fair public trials by juries. They sought by these provisions to assure that no individual could be punished except according to "due process," by

which they certainly intended that no person could be punished except for a violation of definite and validly enacted laws of the land, and after a trial conducted in accordance with the specific procedural safeguards written in the Bill of Rights.[15] If occasionally these safeguards worked to the advantage of an ordinary criminal, that was a price they were willing to pay for the freedom they cherished. And one of the specific procedural safeguards which they inserted to shield the individual was the prohibition against compulsion of self-incriminatory testimony.

It is impossible for me to reconcile today's restrictive interpretation of the prohibition against compelled self-incrimination with the principle of broad construction which this Court heretofore has deemed essential to full preservation of the basic safeguards of liberty specifically enumerated in the Bill of Rights. The protections explicitly afforded the individual by the Bill of Rights represent a large part of the characteristics which distinguish free from totalitarian government. Under our Constitutional system the privileges it embodies and the rights it secures were intended to be above and beyond the power of any branch of government to mutilate or destroy. We have no assurance that the fears of those who drafted and adopted our Bill of Rights were groundless, nor that the reasons for those fears no longer exist. Ancient evils historically associated with the possession of unqualified power to impose criminal punishment on individuals have a dangerous habit of reappearing when tried safeguards are removed.

This case involves the Fifth, not the Fourth, Amendment. Decisions which have read the Fourth and Fifth Amendments together for the purpose of broadening the Fourth Amendment should not now be employed to narrow the Fifth Amendment. To do so ignores the particu-

[15] See *Chambers* v. *Florida*, 309 U. S. 227, 235–238; *Tot* v. *United States*, 319 U. S. 463, 473.

lar reasoning of these decisions as well as the separate language and history of the two Amendments. See *Boyd* v. *United States, supra; Counselman* v. *Hitchcock, supra; Brown* v. *Walker,* 161 U. S. 591; VIII Wigmore on Evidence, Third Ed. pp. 276–304, 368. Nothing this Court has said with regard to the Fourth Amendment requires that we now open the door which the Fifth Amendment in 1791 closed to compelled self-incrimination.

I would reverse the judgment.

MR. JUSTICE DOUGLAS and MR. JUSTICE RUTLEDGE join in this opinion.

INTERSTATE COMMERCE COMMISSION ET AL. *v.* CITY OF JERSEY CITY ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

No. 767. Argued May 2, 3, 1944.—Decided May 29, 1944.

An order of the Interstate Commerce Commission authorized a fare increase from 8 cents to 9 cents. Upon finding that collection of the 9-cent fare was impracticable, the Commission modified its order so as to authorize a fare of 11 tokens for $1.00 or a cash fare of 10 cents. The Commission later reopened the proceeding, but only to consider the propriety and lawfulness of the modification of its original order. Upon further findings, the Commission authorized a fare of 11 tokens for $1.00 or a cash fare of 10 cents. A petition of the Price Administrator for modification of the reopening order "in order that the said record be brought up to date" was denied. Upon review of a decree setting aside the Commission's orders, *held:*

1. The Commission's findings of fact were supported by substantial evidence. P. 512.

2. Findings of the Commission so supported are conclusive. P. 512.

3. The Commission's denial of a rehearing of the whole case was not an abuse of its discretion and did not amount to unfairness such as would vitiate its orders. Pp. 514, 519.

4. It was the duty of the Commission to give full effect to wartime conditions and the stabilization legislation. P. 519.

5. Upon the record, it can not be concluded that the Commission failed to give proper weight to stabilization considerations or that it ignored the Price Administrator's contentions as to inflationary tendencies of rate increases. P. 520.

6. The determination of the weight to be given to stabilization considerations in relation to other factors was for the Commission, not the courts. P. 522.

7. The Stabilization Act of 1942 did not give the Price Administrator standing superior to that of other litigants to ask the courts to override the normal discretion of the Commission in granting or refusing rehearings. Following *Vinson* v. *Washington Gas Light Co.*, 321 U. S. 489. P. 523.

54 F. Supp. 315, reversed.

APPEAL from a decree of a district court of three judges which enjoined enforcement of 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. John F. Finerty,* with whom *Messrs. John E. Buck* and *Thomas A. Halleran* were on the brief, for the Hudson & Manhattan Railroad Co., appellants.

Mr. Charles Hershenstein, with whom *Mr. Charles A. Rooney* was on the brief, for Jersey City; and *Mr. David F. Cavers,* with whom *Messrs. Richard H. Field, Harry R. Booth, Robert S. Keebler,* and *Herbert Sharfman* were on the brief, for the Economic Stabilization Director, appellees.

Solicitor General Fahy and *Mr. Chester T. Lane* filed a memorandum on behalf of the United States, urging affirmance.

MR. JUSTICE JACKSON delivered the opinion of the Court.

This is a direct appeal by the Interstate Commerce Commission, whose orders the District Court of New Jersey has set aside, and by the Hudson & Manhattan Railroad

Company, whose rates are subject to the enjoined orders. Respondents are the City of Jersey City and the Price Administrator, who intervened under powers duly delegated to him pursuant to the Emergency Price Control Act of 1942[1] and the Inflation Control or Stabilization Act of 1942.[2]

The Hudson & Manhattan Railroad Company owns about 8.5 miles of electric railway, of which all but 0.63 mile is underground. It has two double-track lines, one of which, known as the "uptown line," connects Hoboken, New Jersey, with Christopher Street, New York, by two parallel tunnels under the Hudson River, and runs uptown under Sixth Avenue from Christopher Street to a terminal at 33rd Street. The other line, known as the "downtown line," crosses under the river by two parallel tunnels between Exchange Place, Jersey City, and Hudson Terminal, New York. It also extends westwardly in Jersey City to Journal Square, where connection is made with the Pennsylvania Railroad. The uptown and downtown lines are connected on the New Jersey side by means of a line paralleling the Hudson River. In conjunction with the Pennsylvania Railroad the Hudson & Manhattan operates a joint rapid-transit service between Hudson Terminal and Newark. It carries only passengers.

The present controversy has its roots in a rate case precipitated by the Company's effort to establish a 10-cent fare on its downtown line in 1937.[3] After full hear-

[1] Act of January 30, 1942, c. 26, 56 Stat. 23, 50 U. S. C. App., Supp. II, § 901 *et seq.*

[2] Act of October 2, 1942, c. 578, 56 Stat. 765, 50 U. S. C. App., Supp. II, § 961 *et seq.*

[3] Prior to 1920, the Hudson & Manhattan's rates had been 5 cents on the downtown line and 7 cents on the uptown line. In that year the railroad proposed a flat fare of 8 cents, but the Commission fixed the fares at 10 cents for the uptown line and 6 cents for the downtown line. Local Fares of Hudson & Manhattan Railroad Co., 58 I. C. C. 270. Those fares continued in effect until the 1937 proceedings began, when the railroad sought to make the fare 10 cents on both lines.

ings the Interstate Commerce Commission fixed an 8-cent fare effective July 25, 1938.[4] The 10-cent fare was denied chiefly on the ground that, while the Company might be entitled to the revenue, such a fare would decrease its patronage, and the Commission believed that an 8-cent fare would produce more revenue. Commissioners Miller and Mahaffie dissented from denial of the 10-cent fare on such grounds, holding it had been "amply justified" as "reasonable and lawful for the services performed." This Court held such grounds of denial to be sustained by evidence and to be within the Commission's discretion. *Hudson & Manhattan R. Co.* v. *United States,* 313 U. S. 98. The 8-cent fare remained in effect until the carrier on June 27, 1942 filed a petition in the same proceeding for further hearing, alleging changed conditions and increased costs in support of a 10-cent fare on the downtown line. Protests were filed by the City of Jersey City and the Hudson Bus Corporation. The Commission opened the proceeding and extensive hearings were held in September of 1942. Counsel for the Price Administrator appeared, stating that it was not his intention to offer evidence but that he reserved the right to make any motions and to file appropriate briefs. The hearings were concluded on September 19, 1942.

The Inflation Control Act of 1942, passed on October 2d, contained a proviso that "no common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State or municipal authority having jurisdiction to consider such increase." § 1. Thereafter the Price Admin-

[4] 227 I. C. C. 741. The 10-cent fare on the uptown line continued in effect.

istrator [5] asked permission to and did file a brief opposing any increase in the rates. On January 25, 1943, the hearing examiner recommended that the Commission find the rate of 10 cents on the downtown lines to be just and reasonable. Exceptions were filed by Jersey City and the Price Administrator and argued by counsel for each, and on June 8, 1943 the Commission made its decision.[6] It reviewed the increases in operating costs since the 8-cent rate had been fixed and the need of the railroad for additional revenue "in order to meet increased operating expenses and the interest on its bonds." It increased the downtown fare from 8 cents to 9 cents, effective for duration of the war and six months thereafter, with permission to any of the parties to bring to the attention of the Commission additional facts if the revenue results should prove materially different from the Commission's estimate. The Commission's opinion considered the arguments of the Price Administrator against any increase, but said, "It seems to us that an increase of 1 cent in respondent's downtown fare is unlikely to have any inflationary effect, and that the effect thereof upon the cost of living, while a factor to be given consideration, will be so slight, a maximum of about 12 cents a week and 52 cents a month per passenger, as to be negligible. We believe, therefore, that the increased fare herein approved will not be in conflict with the Emergency Price Control Act of 1942, as amended." Three Commissioners dissented, holding that the Company had established its right to a 10-cent fare.

A month later the railroad filed a petition for reconsideration. Among other things, it alleged that it could

[5] By Executive Order No. 9250, 7 Fed. Reg. 7871, the President designated the Director of Economic Stabilization to receive notice of proposed rate increases pursuant to the statute. In the ensuing proceedings in this case the Director was represented by the Price Administrator.

[6] 255 I. C. C. 649.

not avail itself of the 9-cent rate because its fare collection boxes could not handle the volume of coins necessitated by the 9-cent rate and under war conditions could not be replaced. It asked to charge a 10-cent fare until it could secure tokens. Jersey City answered, asking that the petition be denied and the 9-cent fare suspended. The Price Administrator also answered. He advocated what he called a feasible scheme to collect the 9-cent fare through the use of paper tickets. The Price Administrator also asked that the fares go back to 8 cents in view of alleged increased earnings and asked that in any event before the fares were increased on the basis suggested by the Company a further hearing be held. On August 3, 1943 the Commission issued a report and order.[7] It found that it would be impossible to collect a 9-cent cash fare, and it authorized an alternative basis of eleven tokens for $1.00 or a cash fare of 10 cents, provided the same alternative basis be put into effect on the uptown line. This resulted, of course, in a rate of $9\frac{1}{11}$ cents to token purchasers on both lines.

Thereupon Jersey City filed a complaint in the District Court, asking that the Commission's order be enjoined "in so far as such order permits the establishment of any local interstate fare in excess of nine cents for transportation on the downtown line." It alleged that in authorizing downtown fares "in excess of the nine cent fare" fixed in the order of June 8, the Commission had deprived Jersey City of its full day in court by refusing it opportunity to cross-examine witnesses and present counter-evidence.

The Commission then reopened the proceeding on its own motion, but only "to permit any party hereto to present evidence directed solely to the propriety and lawfulness of the modifications made by the Commission in its report of August 3, 1943, on further consideration of its prior findings and orders of July 11, 1938 and June 8,

[7] 256 I. C. C. 269.

1943" and to afford the right to cross-examine adverse witnesses. The Commission in its later report of November 2, 1943 referred to this reopening as being "out of an abundance of caution." At the reopened proceeding the Company offered testimony about the impracticability of collecting a 9-cent fare, and as to the earnings that would be derived from the proposed token and cash combination fares upon the assumption, supported by testimony, that 90 per cent of the passengers probably would purchase tokens. The examiner ruled that the basis of the 9-cent fare fixed by the order of June 8, 1943 was not in issue and confined evidence to the issues specified in the Commission's order. The Price Administrator offered a condensed income statement for the Hudson & Manhattan for the first seven months of 1943. The examiner declined to receive it, because it went only to the Company's need for revenue, an inquiry which was not reopened. The Price Administrator previously had submitted to the Commission a similar statement for five months of 1943, as part of its reply to the railroad's petition for modification of the 9-cent fare. The Commission in its report of August 3d rejected this statement as being without probative value. Neither of the statements showed the income of appellant from its railroad operations, but included income of the corporation from all operations, including the Hudson Terminal buildings in New York City and other real estate owned by it. The Price Administrator also petitioned the Commission for modificaton of the reopening order "in order that the said record be brought up to date." The purpose of this was stated to be to show that as a result of the war the earnings of the Company at an 8-cent fare for the full year 1943 would exceed the amount the Commission found adequate and reasonable in its 1938 order or in the order of June 8, 1943.

On November 2, 1943 the Commission issued its report and order, allowing a 10-cent cash fare or eleven tokens

for $1.00 as the rate on both the downtown and uptown lines. The Commission considered in its opinion the request of Jersey City and the Price Administrator that the limitations on the hearings should be removed and the whole rate case thrown open again. It pointed out that the complaint of Jersey City pending in the District Court did not question the propriety of the Commission's authorization of an increase in the downtown fare from 8 cents to 9 cents but challenged only the increase from 9 cents to 9 1/11 cents with tokens and 10 cents in cash. It considered the offer of proof made in the hearings and said: "Considering the contents of the motion now before us, and the offers of additional evidence made at the recent further hearing, we have no reason to believe that, if the additional hearing sought were held, we would feel warranted in modifying our findings as made in the second report. As will later appear, the alternative-fare basis herein approved can not be expected to yield materially better revenue results to respondent than we anticipated at the time of the second report. Accordingly, we see no sufficient reason for further reopening this proceeding at this time, and the motion will therefore be overruled." On the merits the Commission said:

"Upon the amplified record now before us, we find that the following basic facts, as underscored, have been established:

1. *It is impracticable for respondent to collect a cash fare of 9 cents.*

. . . . .

2. *There is available to respondent no practicable method of collecting a fare of, or approximating, 9 cents except by the use of tokens.*

. . . . .

3. *The use of tokens only for the local downtown traffic, while contemporaneously using cash fares for the other local traffic of respondent, is impracticable.*

. . . . .

4. *The use of an alternative-fare basis of 11 tokens for $1 or a cash fare of a dime for local interstate passengers on both the downtown and uptown lines is the only practicable method now available by which respondent can reasonably be expected to obtain the financial benefits contemplated by our findings and conclusions in the second report as necessary to insure adequate transportation service.*

. . . . .

5. *The modification of our prior findings as made in the third report of August 3, 1943, is not in conflict with the Emergency Price Control Act of 1942, as amended by the Stabilization Act.*

. . . . .

6. *A cash fare of 10 cents for the occasional or irregular passenger on the downtown line compares favorably with the reasonable charge made for similar service on railroads generally.*"

On the basis of these findings the Commission authorized a fare of eleven tokens for $1.00 or a cash fare of 10 cents, payable by a dime, as reasonable and otherwise lawful for application during the war and for six months after its termination.

Jersey City thereupon amended its complaint pending in the District Court. It asked that the Commission's order of June 8, 1943, which established the 9-cent rate, as well as that of November 2, 1943, which modified it as stated, be enjoined, in so far as such order permitted any fare on appellant's downtown line in excess of 8 cents. The Price Administrator intervened, alleging that an increase over the 8-cent fare in effect on September 15, 1942 was in violation of the Stabilization Act. The United States was named as a defendant but filed a neutral answer because two government agencies were in opposition to each other. The Commission and the railroad answered. A statutory court of three judges was constituted and

an interlocutory injunction was granted November 26, 1943.

On January 12, 1944 a majority of the court below, one judge dissenting, held both of the Commission's orders invalid upon two grounds. It was of the view that the Commission had denied a full hearing in refusing to reopen the whole proceeding to receive evidence relating to the 1943 earnings of the carrier, and it held that the Commission had brushed aside too lightly the economic stabilization arguments of the Price Administrator. The effect of the District Court's order is to disallow not only the token and cash combination fare, but also the 9-cent fare which the Commission found just, reasonable and lawful, and to continue the 8-cent rate fixed in 1938 and held by the Commission to have become clearly inadequate to the rights and needs of the Company.

Each of the findings of fact by the Commission appears to be supported by substantial evidence. The court below has not found to the contrary, nor do we. Reasonable persons could no doubt differ as to whether it is probable that 90 per cent of the patrons will purchase tokens, whether the revenues of the lines will increase more than the operating costs, and as to various other features of the contest. But when this same railroad came to us complaining of such predicative findings we refused to review the weight of evidence and held that being supported by evidence the judgment of the Commission was final. *Hudson & Manhattan R. Co.* v. *United States,* 313 U. S. 98. Of course we cannot hold that the judgment of the Commission is less final merely because it has been exercised on this occasion for relief of the Company.

"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 con-

vincing showing that it is invalid because it is unjust and unreasonable in its consequences." *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 602. The Commission considered that it had, and we find no reason to doubt that it had, the evidence before it that was needful to the discharge of its duty to the public and to the regulated railroad. "With that sort of evidence before them, rate experts of acknowledged ability and fairness, and each acting independently of the other, may not have reached identically the same conclusion. We do not know whether the results would have been approximately the same. For there is no possibility of solving the question as though it were a mathematical problem to which there could only be one correct answer. Still there was in this mass of facts that out of which experts could have named a rate. The law makes the Commission's finding on such facts conclusive." *Interstate Commerce Commission* v. *Union Pacific R. Co.*, 222 U. S. 541, 550.

"So long as there is warrant in the record for the judgment of the expert body it must stand. . . . '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, 145–46; *Mississippi Valley Barge Line Co.* v. *United States*, 292 U. S. 282, 286–87.

Unless, therefore, the court below is correct in holding that a fair hearing has been denied or in holding that the Commission misapprehended the effect of the emergency legislation, the order of the Commission is entitled to stand. We turn to those questions.

I.

The District Court has set aside for want of fair hearing two orders of the Commission, one of which permitted an increase from 8 cents to 9 cents in the rate and the latter of which modified the 9-cent rate so far as to permit a $9\frac{1}{11}$-cent token rate and a 10-cent cash rate.

No claim is made that full hearing was denied as to the first order. The original complaint in this action, as we have pointed out, did not question the 9-cent rate order, but only the subsequent steps to modify it. The contention as to the first order is that the Commission in the circumstances was compelled to give a full rehearing before its order could become final. And it is urged that the order after the limited rehearing is invalid because there was a legal right to a wider range of inquiry before modification of the first order.

This raises an important but not a new question of administrative law. The Price Administrator's contention is that this record is "stale" and that a fresh record is important. One of the grounds of resistance to administrative orders throughout federal experience with the administrative process has been the claims of private litigants to be entitled to rehearings to bring the record up to date and meanwhile to stall the enforcement of the administrative order. Administrative consideration of evidence—particularly where the evidence is taken by an examiner, his report submitted to the parties, and a hearing held on their exceptions to it—always creates a gap between the time the record is closed and the time the administrative decision is promulgated. This is especially true if the issues are difficult, the evidence intricate, and the consideration of the case deliberate and careful. If upon the coming down of the order litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening. It has been almost a rule of necessity that rehearings were not matters of right, but were pleas to discretion. And likewise it has been considered that the

discretion to be invoked was that of the body making the order, and not that of a reviewing body.

Only once in the history of administrative law has this Court reversed a Commission for refusing to grant a rehearing on the contention that the record was "stale." In *Atchison, T. & S. F. Ry. Co.* v. *United States,* 284 U. S. 248, this Court held that because of changed conditions the Interstate Commerce Commission abused its discretion in denying a rehearing. The record in that case was closed in September 1928. In February 1931, the railroads petitioned for rehearing and "pointed out the grave reductions, in traffic and earnings, from which they were suffering, that their net operating income for 1930 was over $100,000,000 less than their average annual net operating income for the five years preceding, and that their credit was seriously impaired. At the time of this petition, the order . . . had not yet become effective, but the Commission stood upon the record of 1928 and, without reopening the proceedings or taking further evidence, provided that its order should become effective on June 1, 1931." This, it was held, "was not within the permitted range of the Commission's discretion, but was a denial of right." 284 U. S. 248, 261–62.

The Court, however, promptly restricted that decision to its special facts, *United States* v. *Northern Pacific Ry. Co.,* 288 U. S. 490, and it stands virtually alone. In *Baltimore & Ohio R. Co.* v. *United States,* 298 U. S. 349, 389, Mr. Justice Brandeis, concurring, said, "The *Atchison* case rests upon its exceptional facts. It is apparently the only instance in which this Court has interfered with the exercise of the Commission's discretion in granting, or refusing, to reopen a hearing." *St. Joseph Stock Yards* v. *United States,* 298 U. S. 38, arose under the Packers and Stockyards Act. The Secretary of Agriculture was upheld in refusing to reopen the proceeding to take account of

changed conditions resulting from the economic legislation of Congress in 1933. Again, under the same Act, the Secretary of Agriculture denied a request to add three months' developments to the record, we refused to interfere, and the Court said, through MR. JUSTICE ROBERTS, "The amended petition was filed about three months after the original order issued. It is inconceivable that economic conditions had so altered in this brief period as to demonstrate that the new schedule of rates, if just when promulgated, had become unjust and oppressive. The schedule should have been given a trial and any alteration or modification should have been asked in the light of more extensive experience. We are unable to find anything arbitrary or unreasonable in the denial of the petitions." *Acker* v. *United States,* 298 U. S. 426, 433.

This Court has held that the Interstate Commerce Commission did not abuse its discretion in refusing a request for a new study as a basis for rate-making, although changes were alleged consisting of a falling off in volume of traffic, improvement of highways in the district resulting in diversion of traffic from rail to truck, decline in value of the articles transported, reduction in wages and cost of supplies, and curtailment of the amount of service rendered, and where the Commission decided that it was able on the record before it to consider the effect of the factors suggested by the appellants and that a new cost study was unnecessary. *Illinois Commerce Commission* v. *United States,* 292 U. S. 474, 480. Except that the trends are in an opposite direction, the inquiry demanded here is of the same nature. See also *Georgia Public Service Commission* v. *United States,* 283 U. S. 765, 769–70.

The Court has held that administrative tribunals "have power themselves to initiate inquiry, or, when their authority is invoked, to control the range of investigation in ascertaining what is to satisfy the requirements of the public interest in relation to the needs of vast regions and

sometimes the whole nation in the enjoyment of facilities for transportation, communication and other essential public services." *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 142. Cf. *American Bridge Co.* v. *Railroad Commission*, 307 U. S. 486, 494.

Nor can a litigant insist that a commission may not take a second step in a rate-making process without retracing all previous ones. As put by the CHIEF JUSTICE, "The establishment of a rate for a regulated industry often involves two steps of different character, one of which may appropriately precede the other. The first is the adjustment of the general revenue level to the demands of a fair return. The second is the adjustment of a rate schedule conforming to that level so as to eliminate discriminations and unfairness from its details." Such procedure may be adopted where it is appropriate to carry out the provisions of an act. *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U. S. 575, 584.

We have held that "The refusal to reconsider the issue of domination in the present unfair labor practice hearing accords, in our view, with the Board's discretionary powers." *Pittsburgh Glass Co.* v. *Labor Board*, 313 U. S. 146, 161.

We have rejected the plea of railroad stockholders that events subsequent to approval of a reorganization plan of a very similar character to those alleged here, require its return for reconsideration. *Group of Institutional Investors* v. *Chicago, M., St. P. & P. R. Co.*, 318 U. S. 523, 542-44; *Ecker* v. *Western Pacific R. Co.*, 318 U. S. 448, 506–09.

The rule that petitions for rehearings before administrative bodies are addressed to their own discretion is uniformly accepted and seems to be almost universally applied in other federal courts. *United States ex rel. Maine Potato Growers Assn.* v. *Interstate Commerce Commission*, 88 F. 2d 780, 784, cert. denied, 300 U. S. 684; *Mississippi Valley Barge Line Co.* v. *United States*, 4 F. Supp.

745, 748; *Union Stock Yards Co.* v. *United States,* 9 F. Supp. 864, 873; *American Commission Co.* v. *United States,* 11 F. Supp. 965, 972; *R. C. A. Communications* v. *United States,* 43 F. Supp. 851, 858.

Central & South West Utilities Co. v. *Securities & Exchange Commission,* 136 F. 2d 273, 275, involved an order of simplification under the holding company act, in which the petitioner moved for leave to adduce additional evidence. Denying the motion, the court said, "Petitioners show that their financial position has improved somewhat since the Commission held its hearings. Section 11 (b) authorizes the Commission to revoke or modify its order, after notice and hearing, in response to changed conditions, and there is no reason to assume that it will not do so if sufficient occasion arises. Nevertheless petitioners now ask leave, under Section 24 (a) of the Act, to adduce their improved position as 'additional evidence' in the completed hearings which led to the present order. We need not decide whether supervening events of this general sort may sometimes be 'additional evidence' within the meaning of Section 24 (a). If so, final administrative disposition and judicial review may often be prevented altogether by the mere fact that they take time." See also *Koppers United Co.* v. *Securities & Exchange Commission,* 138 F. 2d 577; *Colorado Radio Corp.* v. *Federal Communications Commission,* 118 F. 2d 24; *Red River Broadcasting Co.* v. *Federal Communications Commission,* 98 F. 2d 282, cert. denied, 305 U. S. 625.

Various objections to the Price Administrator's contention are made, such as that the evidence he proposed to offer was remote, or of no probative value, that the application to reopen did not conform to the Commission's rules, that he became, along with Jersey City, estopped from questioning the 9-cent fare by the original complaint in district court, which raised no issue about it, and that

the parties did not proceed with due diligence. We do not find it necessary to examine any of these contentions.

It is perfectly plain that unless the statutory authority of the Price Administrator gives him a different standing before administrative tribunals than can be claimed by private litigants there is no ground for holding that the denial of a rehearing constituted an abuse of discretion or amounted to unfairness which would invalidate the Commission's orders. The authorities referred to above make it abundantly plain that had the railroad's petition for rehearing been denied we would have held it to be in the sound discretion of the Commission and not reviewable. The rule of administrative law should not change because the shoe is on the other foot. There is no sufficient reason for breaking down our decisional rules that protect the administrative process against tactics to delay finality, unless Congress has so ordered us, as to which we next inquire.

II.

The court below gave as a second reason for setting aside the two orders that the Commission "lightly brushed aside" the economic stabilization phase of the case and gave too little weight to the Price Administrator's contentions as to inflationary tendencies of rate increases. It said, and of course we agree, that the "Commission here is under a distinct duty in this particular case, to give full effect to wartime conditions and the stabilization legislation."

But that does not answer the real question, which is what is the effect of the stabilization legislation. In seeking this answer we are inquiring as to the relative powers and responsibilities of two federal agencies. Congress was free to apportion their functions as it saw fit and to transfer any part of the normal responsibility of the Commission to the Price Administrator or other executive agencies.

Commerce Commission authorization of rate increases could have been subjected to review or veto so far as any objection of the Commission is concerned.

But Congress did no such thing. The legislative history of relevant provisions of the Act was reviewed in *Davies Warehouse Co.* v. *Bowles,* 321 U. S. 144. It was there pointed out that Congress rejected a proposal that such rates should not be increased without consent of the President. On the other hand it was assured by executive representatives that rate advances already subject to scrutiny on behalf of the public and to proof of reasonableness were not the source of the more substantial inflationary threats. Congress then adopted the provision we earlier quoted.

In the light of such history this Court has been reluctant to construe the emergency legislation as giving the Administrator standing to make mandatory demands upon other tribunals or to strip them of their usual discretions. Under this statutory plan, as we have said in the language of MR. JUSTICE DOUGLAS, "The Administrator does not carry the sole burden of the war against inflation." *Hecht Co.* v. *Bowles,* 321 U. S. 321, 325, 331. At the same time, we said that the discretionary action of other tribunals, even of courts, "should reflect an acute awareness of the Congressional admonition that 'of all the consequences of war, except human slaughter, inflation is the most destructive' and that delay or indifference may be fatal."

No charge that the Commission ignored the Administrator's contentions can fairly be made on this record.[8] Al-

[8] The Commission has shown in other cases that it is watchful against inflation and charges itself with enforcing stabilization policy. See Increases in Texas Rates, Fares, and Charges, 253 I. C. C. 723, 734: "We are not unmindful of the evil effects of inflation, and, in our judgment, the inflationary tendencies of general increases in rates constitute a factor which we may and should take into consideration in passing judgment upon such increases. . . . Increases in the gen-

though he intervened in the original proceeding, first on his own behalf and then for the Stabilization Director, he made no effort to offer any evidence either before or after the hearing closed, despite the fact that nearly nine months elapsed between the close of the hearing and the Commission's order.[9] Nor did he even move for rehearing, until after the railroad had asked for modification of the order. He was then permitted to intervene, to file briefs and to be heard in argument, to cross-examine and to offer evidence. His desire to reopen the whole case was refused, because the Commission, considering all that he offered to show, said, "Considering the contents of the motion now before us, and the offers of additional evidence made at the recent further hearing, we have no reason to believe that, if the additional hearing sought were held, we would feel warranted in modifying our findings as made in the second report." And the Commission in its second report weighed the contentions of the Administrator and decided that they did not outweigh the needs for added revenue

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eral price level ultimately affect the costs of rendering transportation service and the value of such service to the public. Such considerations were in fact carefully weighed and reflected in the increases which we authorized under Ex Parte No. 148." In Ex Parte No. 148, reported as Increased Railway Rates, Fares, and Charges, 1942, 248 I. C. C. 545, the railroads sought general increases of 10 per cent in freight and passenger rates. The Office of Price Administration appeared but took no position with respect to the general increase sought, and did not name the individual commodities with whose rates it professed to be particularly concerned. 248 I. C. C. at 571. Nevertheless the Commission apparently took careful note of "the effect upon the national defense of cumulated increases in production costs of manufactured products" and as to specific commodities, after consideration of the financial position of the affected railroads, denied or restricted the increases sought. 248 I. C. C. at 610.

[9] The Commission did have before it, however, traffic and gross revenue figures for the first two months of 1943, which were incorporated into the record by stipulation at the oral argument on April 20, 1943.

for the road. It said, "It seems to us that an increase of 1 cent in respondent's downtown fare is unlikely to have any inflationary effect, and that the effect thereof upon the cost of living, while a factor to be given consideration, will be so slight, a maximum of about 12 cents a week and 52 cents a month per passenger, as to be negligible." Considering this among other findings of fact it concluded to authorize the increased fare "to meet increased operating costs and the interest on its bonds."

That the weight to be given to stabilization considerations in relation to other factors calls for an exercise of judgment in any given case is not denied by the Administrator. Indeed in excepting to the examiner's report he said, "We did not nor do we now suggest that this proposed increase in fare [from 8 cents to 10 cents] will in and of itself result in inflation. Such a suggestion would, of course, be asinine." Who, then, in this case is to judge the weight to be given such a factor? The opinion of the Administrator is not, as we have pointed out, mandatory on the Commission. Nor is such an economic judgment the function of the courts unless all that has been established in administrative law concerning the limitation on judicial review is to be thrown overboard. The decision of such a matter by the Commission is clearly not reviewable by a court because it thinks differently of the weight that should be accorded to some factors in relation to others.

The Interstate Commerce Commission has responsibility for maintaining an adequate system of wartime transportation. It is without power to protect these essential transportation agencies from rising labor and material costs. It can decide only how such unavoidable costs shall be met. They can in whole or in part be charged to increased fares, or they can be allowed to result in defaults and receiverships and reorganizations, or they may be

offset by inadequate service or delayed maintenance. All of these considerations must be weighed by the Commission with wartime transportation needs as well as avoiding inflationary tendencies as a public responsibility. The need for informed, expert and unbiased judgment is apparent. The problem is intricate, the carrier is one of peculiar characteristics, its wartime traffic is of varying density, with peaks and rush hours, the rates and carrying capacities of competitors by bus and ferry are involved in any estimate of traffic diversions or probable effects of rates. What rates are required to meet actual and proper operating expenses, what revenue must be available to avoid defaults and sustain credit, what divisions should be made on interchanged traffic are as complex problems in rate-making as can readily be imagined. The delicacy of the Commission's task in wartime is no reason for allowing greater scope to judicial review than we are willing to exercise in peacetime. We think the weight to be given to the Price Administrator's contentions was for the Commission, not the court, to determine. The scope of proper judicial review does not expand or contract, depending on what party invokes it. It is as narrow now as it was when appealed to by the Company. Cf. *Hudson & Manhattan R. Co.* v. *United States,* 313 U. S. 98. If Congress desires to grant its own agencies greater privileges of judicial review than have been allowed to private parties it is at liberty to do so, but it is not for the Court to set aside, without legislative command, its slow-wrought general principles which protect the finality and integrity of decisions by administrative tribunals.

As to the contention that the Stabilization Act gave the Administrator standing superior to that of other litigants to ask the courts to override the normal discretion of the Commission in granting or refusing rehearings, we have already spoken in *Vinson* v. *Washington Gas Light Co.,*

321 U. S. 489. There, as here, the Stabilization Director insisted that he was "denied a fair hearing because the Commission refused in the current proceeding to alter and enlarge the scope of inquiry." There, as here, the controversy was "between two governmental agencies as to whether the powers of the one or the other are preponderant in the circumstances." Here, as there, we decline to invade the discretion of administrative tribunals to control their own rehearing procedure where the Congress has not given the Administrator standing superior to that of a litigant and has not divested the Commission of its ordinary discretions. The judgment below is

Reversed.

MR. JUSTICE RUTLEDGE dissents.

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

MR. JUSTICE DOUGLAS:

I would decide this case differently. I think this decision and *Vinson* v. *Washington Gas Light Co.*, 321 U. S. 489, pretty well emasculate the provision of the Act of October 2, 1942 (56 Stat. 765) which prohibits "any general increase" in utility rates unless notice is given to the federal agency in charge of inflation control and that agency is allowed to intervene in the proceedings. As I stated in my dissent in *Vinson* v. *Washington Gas Light Co., supra,* Congress intended by that provision that there should be as great an accommodation as possible between established standards for rate-making and existing wartime necessities. General rate increases were not to be allowed unless, for example, it was shown that they were necessary to preserve existing facilities under war conditions. I agree with Judge McLaughlin and Judge Meaney of the three-judge court that this emergency legislation

required the Commission "to give full effect to wartime conditions and the stabilization legislation." It was that policy which was reflected in Executive Order 9328 promulgated by the President on April 8, 1943 (8 Fed. Reg. 4681, 4682) and providing as follows:

"The attention of all agencies of the Federal Government, and of all State and municipal authorities, concerned with the rates of common carriers or other public utilities, is directed to the stabilization program of which this order is a part so that rate increases will be disapproved and rate reductions effected, consistently with the Act of October 2, 1942, and other applicable federal, state or municipal law, in order to keep down the cost of living and effectuate the purposes of the stabilization program."

That policy is once more disregarded. The Interstate Commerce Commission proceeds to grant rate increases on the basis of peacetime standards. It justifies the increase under the Act of October 2, 1942, by saying that the increase per consumer is negligible. By the same token every item in the list of consumer necessities could be increased a like percentage. What was negligible item by item would soon be substantial in the aggregate. That which first appears as a small trickle may eventually undermine the dam.

But though I disagree with the result reached, I think it is precisely what *Vinson* v. *Washington Gas Light Co.* intended. That case and *Davies Warehouse Co.* v. *Bowles,* 321 U. S. 144, give preferred treatment to a few businesses by allowing them to gain advantages from war conditions. I would overrule them. But so long as they stand I do not see how we can deny the Interstate Commerce Commission the power to do for the Hudson & Manhattan Railroad Co. what another commission was allowed to do for the Washington Gas Light Co.

MR. JUSTICE MURPHY joins in this opinion.

WISCONSIN GAS & ELECTRIC CO. *v.* UNITED STATES.

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

No. 565. Argued March 10, 1944.—Decided May 29, 1944.

1. Payments made by a corporation of the tax levied by the Wisconsin Privilege Dividend Tax Act, *held,* for federal income tax purposes, not deductible from gross income of the corporation, either under § 23 (c) or § 23 (d) of the Revenue Act of 1934. Pp. 529, 531.
2. The payments were not deductible under § 23 (c) as "taxes paid," since, within the meaning of applicable Treasury Regulations, the tax was not "imposed" on the corporation. P. 529.
3. Nor were the payments deductible under § 23 (d) as "taxes imposed upon a shareholder of the corporation upon his interest as shareholder which are paid by the corporation without reimbursement from the shareholder," since, within the meaning of the section, the tax was not "paid by the corporation without reimbursement from the shareholder." P. 531.

138 F. 2d 597, affirmed.

CERTIORARI, 321 U. S. 757, to review a judgment for the company, 46 F. Supp. 929, in a suit for a refund of federal income tax.

Mr. Van B. Wake for petitioner.

Assistant Attorney General Samuel O. Clark, Jr., with whom *Solicitor General Fahy,* and *Messrs. Sewall Key, J. Louis Monarch,* and *Ray A. Brown* were on the brief, for the United States.

MR. JUSTICE RUTLEDGE delivered the opinion of the Court.

Wisconsin Gas and Electric Company is a Wisconsin corporation engaged in public utility and associated operations wholly within that State. In 1935 it declared a dividend from its public utility earnings, and in accord-

ance with the requirements of Wisconsin's Privilege Dividend Tax Act (Wisconsin Laws of 1935, c. 505, § 3; c. 552), it paid to the State two and one-half per cent of the amount of dividends thus declared. It now claims this sum, $3,750, as a deduction from its gross income for 1935 for federal income tax purposes.

After the claim was disallowed and a deficiency assessed, the company paid the tax and brought this suit for refund under 28 U. S. C. § 41 (20). The District Court was of the opinion that the decision in *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, required permitting the deduction under § 23 (c) of the Revenue Act of 1934, 48 Stat. 680, 688. It therefore gave judgment for the company. 46 F. Supp. 929. The Circuit Court of Appeals disagreed on this question and, holding the deficiency correctly determined, reversed the judgment. 138 F. 2d 597. We granted certiorari, 321 U. S. 757, because of the claimed conflict with the *Penney* case and the importance of the question in the administration of the revenue laws.

Petitioner's claim for a refund rests on the assertion it was entitled to deduct the Privilege Dividend Tax payments under either § 23 (c) or § 23 (d) of the Revenue Act of 1934, 48 Stat. 680, 688, 689.

Section 23 (c) allows a taxpayer to deduct from gross income "taxes paid or accrued within the taxable year." The relevant Treasury Regulation, which is of long standing,[1] includes among "taxes paid" those imposed by any State, and provides: "In general taxes are deductible only by the person upon whom they are imposed." The question in this branch of the case, therefore, comes down to whether the Privilege Dividend Tax is "imposed" upon the corporation declaring the dividends.

[1] Treasury Regulations 86, Art. 23 (c)–(1); cf. Treasury Regulations 65, Art. 131; Treasury Regulations 69, Art. 131; Treasury Regulations 74, Art. 151; Treasury Regulations 77, Art. 151.

Resolution of that question requires examination of the Wisconsin statute and its application and interpretation by the courts of that State. *Keith* v. *Johnson,* 271 U. S. 1; *United States* v. *Kombst,* 286 U. S. 424; *Magruder* v. *Supplee,* 316 U. S. 394. In 1935 the state Act [2] provided:

"(1) For the privilege of declaring and receiving dividends, out of income derived from property located and business transacted in this state, there is hereby imposed a tax equal to two and one-half per centum of the amount of such dividends declared and paid by all corporations (foreign and local) after the passage and publication of this act and prior to July 1, 1937. Such tax shall be deducted and withheld from such dividends payable to residents and nonresidents by the payor corporation.

"(2) Every corporation required to deduct and withhold any tax under this section shall, on or before the last day of the month following the payment of the dividend, make return thereof and pay the tax to the tax commission, reporting such tax on the forms to be prescribed by the tax commission.

"(3) Every such corporation hereby made liable for such tax, shall deduct the amount of such tax from the dividends so declared." [3]

The tax is aimed at corporate earnings "derived from property located and business transacted in" Wisconsin. Doubtless all taxes on corporate earnings are, to a greater or lesser extent, translated into economic burdens upon the shareholder. And not all such taxes can be said, for

[2] Wisconsin Laws of 1935, c. 505, § 3 as amended by Wisconsin Laws of 1935, c. 552. The Act was subsequently amended (Wisconsin Laws of 1937, c. 233; c. 309, § 3; Wisconsin Laws of 1939, c. 198; Wisconsin Laws of 1941, c. 63, § 3; Wisconsin Laws of 1943, c. 367, § 2), but the amendments leave the present question unaffected.

[3] The Act is set out in full in *Wisconsin* v. *J. C. Penney Co.,* 311 U. S. 435 at note 1.

that reason, to be "imposed" upon the shareholder. Cf. *Biddle* v. *Commissioner,* 302 U. S. 573. However, here the burden is placed upon him, not derivatively as through an income tax upon the corporation, but directly and exclusively. While corporate earnings are the target of this tax, its specific thrust, according to the Wisconsin Supreme Court, is at their transfer as dividends to the shareholder, rather than at their receipt as income by the corporation. *J. C. Penney Co.* v. *Tax Commission,* 238 Wis. 69, 298 N. W. 186. It is not imposed until dividends are declared. When imposed it is to be deducted and withheld not from earnings received by the corporation, but "from the dividends so declared." The sums thus paid to the State are to be deducted from the fixed dividends owed to the preferred stockholder who cannot recover his loss from the corporation. *Blied* v. *Wisconsin Foundry Co.,* 243 Wis. 221, 10 N. W. 2d 142. And the corporation which seeks to leave the stockholder's dividend whole by absorbing the tax itself receives no credit therefor under those provisions of the Wisconsin income tax law comparable to § 23 (c), because the State "puts the burden of this tax upon the stockholder and not upon the corporation." *Wisconsin Gas Co.* v. *Department of Taxation,* 243 Wis. 216, 10 N. W. 2d 140.

That Wisconsin has made the corporation its tax collector by requiring it to withhold payment of a portion of the dividends and to turn that portion over to the State does not make the tax one "imposed" upon the corporation, at least under § 23 (c) and the relevant Treasury Regulation. Compare *Eliot National Bank* v. *Gill,* 218 F. 600 (C. C. A.); *Porter* v. *United States,* 27 F. 2d 882 (C. C. A.). The fact is that the tax is extracted from fixed dividends owed to the stockholder, not merely from his common interest in corporate earnings. Under Wisconsin decisions the impact of the tax is focused narrowly and

falls independently upon each recipient of the dividend without affecting the tax burden of the corporation or other shareholders. The operation thus disclosed for the tax amply sustains the emphatic declaration of the Wisconsin Supreme Court that it is imposed upon the shareholder, not upon the corporation. This view is complemented by the interpretation of the Bureau of Internal Revenue that the tax payments, although formally made by the corporation, are deductible by the shareholder.[4] We conclude that the Privilege Dividend Tax is not "imposed" upon petitioner and therefore payments of it are not deductible under § 23 (c).

There is of course no question in this case that Wisconsin has the power, under the Federal Constitution, to impose this tax. That question was involved in *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, where this Court was concerned with dividends declared by a foreign corporation doing a local business in Wisconsin. The decision was that the relationship of the State to the enterprises there shown to have been carried on within its boundaries and under the protection of its police power was such that its taxing power could constitutionally reach earnings derived from those operations, regardless of how the impost was characterized by the State. The State's power to tax earnings of that character is not dependent upon whether the tax is hinged on the receipt of them as corporate income or on the transfer and receipt of them as dividends. Nor does it depend upon whether the tax here involved is "imposed" upon the corporation or upon the stockholder. *International Harvester Co.* v. *Wisconsin Department of Taxation, ante,* p. 435; *Minnesota Mining & Manufacturing Co.* v. *Wisconsin Department of Taxation, ante,* p. 435. In this case, where the earnings of a Wisconsin corporation doing business solely in Wisconsin are the source of the

[4] I. T. 3002, XV–2 Cum. Bull. 142–143 (1936).

dividends, the State's power to tax their transfer and impose that tax upon the stockholder cannot be doubted.

Petitioner also urges that if the payments are not deductible from its gross income under § 23 (c), they are deductible under § 23 (d) as "taxes imposed upon a shareholder of the corporation upon his interest as shareholder which are paid by the corporation without reimbursement from the shareholder." [5] The Government responds that the Privilege Dividend Tax is not the kind of tax "upon his interest as shareholder" which § 23 (d) contemplates, and that in any event it is not one which is "paid by the corporation without reimbursement from the shareholder" within the meaning of the section. Since we think the Government is correct in the latter contention, we have no occasion to consider whether this tax is one "upon his interest as shareholder."

The origins of the present § 23 (d) in the Revenue Act of 1921 disclose that its adoption was prompted by the plight of various banking corporations which paid and voluntarily absorbed the burden of certain local taxes imposed upon their shareholders, but were not permitted to deduct those payments from gross income.[6] This history suggests it is the voluntary assumption of the burden of the tax, rather than acting as tax collector and paying it for another on whom the burden falls, which underpins the

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[5] Section 23 (d) provides: "Taxes of Shareholder Paid by Corporation.—The deduction for taxes allowed by subsection (c) shall be allowed to a corporation in the case of taxes imposed upon a shareholder of the corporation upon his interest as shareholder which are paid by the corporation without reimbursement from the shareholder, but in such cases no deduction shall be allowed the shareholder for the amount of such taxes."

[6] Hearings before Committee on Finance on H. R. 8245, U. S. Senate, 67th Cong., 1st Sess., 250–251. Compare, e. g., *Eliot National Bank* v. *Gill*, 218 F. 600 (C. C. A.); *National Bank of Commerce* v. *Allen*, 223 F. 472 (C. C. A.); *First National Bank* v. *McNeel*, 238 F. 559 (C. C. A.).

deduction. And this is plainly demonstrated by the requirement that to be entitled to the deduction the corporation must not be reimbursed by the shareholder for paying the tax. To pay the tax with sums which have been deducted and withheld from dividends declared and distributed amounts to obtaining the reimbursement which renders the deduction unavailable. Hence petitioner cannot prevail on § 23 (d).

Accordingly, the judgment is

Affirmed.

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

MR. JUSTICE JACKSON:

Since I think this tax was not one on the corporation (see dissent in *International Harvester Co.* v. *Wisconsin Department of Taxation, ante,* p. 445) I see no basis for the corporation to claim a deduction under § 23 (c) of the Revenue Act of 1934. The tax was on the stockholder, and it was paid by the corporation. The Company would be entitled to deductions under § 23 (d) if it were not reimbursed. The credit given to the corporation against a declared dividend is in my opinion a "reimbursement" of the corporation for payment of the tax if the Wisconsin Taxing Act is valid. Notwithstanding dissenting views on that subject, I consider myself now bound by the conclusion of the Court. Hence I agree that no right to a deduction exists.

Counsel for Parties.

UNITED STATES *v.* SOUTH-EASTERN UNDERWRITERS ASSOCIATION ET AL.

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

No. 354. Argued January 11, 1944.—Decided June 5, 1944.

1. A fire insurance company which conducts a substantial part of its business transactions across state lines is engaged in "commerce among the several States" and subject to regulation by Congress under the Commerce Clause. P. 539.
2. A conspiracy to restrain interstate trade and commerce by fixing and maintaining arbitrary and noncompetitive premium rates on fire and allied lines of insurance, and a conspiracy to monopolize interstate trade and commerce in such lines of insurance, *held* violations of the Sherman Antitrust Act. P. 553.
3. Congress did not intend that the business of insurance should be exempt from the operation of the Sherman Act. Pp. 553, 560.

51 F. Supp. 712, reversed.

APPEAL under the Criminal Appeals Act from a judgment sustaining a demurrer to an indictment for violation of the Sherman Antitrust Act.

Attorney General Biddle, with whom *Solicitor General Fahy, Assistant Attorney General Berge,* and *Messrs. Robert L. Stern, Frank H. Elmore, Jr.,* and *Manuel M. Gorman* were on the brief, for the United States.

Messrs. John T. Cahill and *Dan MacDougald,* with whom *Messrs. Thurlow M. Gordon, Neil C. Head, Jerrold G. Van Cise,* and *Howard C. Wood* were on the brief, for appellees.

Briefs were filed (1) on behalf of the States of Alabama, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Minnesota, Mississippi, Ne-

braska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, Tennessee, Utah, Vermont, Washington, Wisconsin and West Virginia, and (2) on behalf of the State of Virginia, as *amici curiae,* urging affirmance.

MR. JUSTICE BLACK delivered the opinion of the Court.

For seventy-five years this Court has held, whenever the question has been presented, that the Commerce Clause of the Constitution does not deprive the individual states of power to regulate and tax specific activities of foreign insurance companies which sell policies within their territories. Each state has been held to have this power even though negotiation and execution of the companies' policy contracts involved communications of information and movements of persons, moneys, and papers across state lines. Not one of all these cases, however, has involved an Act of Congress which required the Court to decide the issue of whether the Commerce Clause grants to Congress the power to regulate insurance transactions stretching across state lines. Today for the first time in the history of the Court that issue is squarely presented and must be decided.

Appellees—the South-Eastern Underwriters Association (S. E. U. A.), and its membership of nearly 200 private stock fire insurance companies, and 27 individuals—were indicted in the District Court for alleged violations of the Sherman Anti-Trust Act. The indictment alleges two conspiracies. The first, in violation of § 1 of the Act, was to restrain interstate trade and commerce by fixing and maintaining arbitrary and non-competitive premium rates on fire and specified "allied lines" [1] of insurance in

[1] The "allied lines" of insurance handled by appellees are described in the indictment as "inland navigation and transportation, inland marine, sprinkler leakage, explosion, windstorm and tornado, extended coverage, use and occupancy, and riot and civil commotion insurance."

Alabama, Florida, Georgia, North Carolina, South Carolina, and Virginia; the second, in violation of § 2, was to monopolize trade and commerce in the same lines of insurance in and among the same states.[2]

The indictment makes the following charges: The member companies of S. E. U. A. controlled 90 per cent of the fire insurance and "allied lines" sold by stock fire insurance companies in the six states where the conspiracies were consummated.[3] Both conspiracies consisted of a continuing agreement and concert of action effectuated through S. E. U. A. The conspirators not only fixed premium rates and agents' commissions, but employed boycotts together with other types of coercion and intimidation to force nonmember insurance companies into the conspiracies, and to compel persons who needed insurance to buy only from S. E. U. A. members on S. E. U. A. terms. Companies not members of S. E. U. A. were cut off from the opportunity to reinsure their risks, and their services and facilities were disparaged; independent sales agencies who defiantly rep-

[2] The pertinent provisions of §§ 1 and 2 of the Act of July 2, 1890, 26 Stat. 209, as amended, 15 U. S. C. §§ 1 and 2, commonly known as the Sherman Act, are as follows:

"Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: . . . Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1–7 of this title to be illegal shall be deemed guilty of a misdemeanor. . . .

"Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, . . ."

[3] The indictment does not state the proportion of fire insurance and "allied lines" sold by stock companies, as distinguished from mutuals, etc., in the six states involved. But it does state that "stock companies receive approximately 85% of the total premium income of all fire insurance companies operating in the United States."

resented non-S. E. U. A. companies were punished by a withdrawal of the right to represent the members of S. E. U. A.; and persons needing insurance who purchased from non-S. E. U. A. companies were threatened with boycotts and withdrawal of all patronage. The two conspiracies were effectively policed by inspection and rating bureaus in five of the six states, together with local boards of insurance agents in certain cities of all six states.

The kind of interference with the free play of competitive forces with which the appellees are charged is exactly the type of conduct which the Sherman Act has outlawed for American "trade or commerce" among the states.[4] Appellees [5] have not argued otherwise. Their defense, set forth in a demurrer, has been that they are not required to conform to the standards of business conduct established by the Sherman Act because "the business of fire insurance is not commerce." Sustaining the demurrer, the District Court held that "the business of insurance is not commerce, either intrastate or interstate"; it "is not interstate commerce or interstate trade, though it might be considered a trade subject to local laws, either State or Federal, where the commerce clause is not the authority relied upon." 51 F. Supp. 712, 713, 714.

The District Court's opinion does not contain the slightest intimation that the indictment was held defective on a theory that it charged the appellees with restraining and monopolizing nothing but the making of local contracts.

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[4] See, e. g., *Fashion Guild* v. *Trade Comm'n*, 312 U. S. 457, 465–468; *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 210–224; *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 394; *United States* v. *Trenton Potteries Co.*, 273 U. S. 392, 395–402; *United States* v. *Patten*, 226 U. S. 525; *Swift & Co.* v. *United States*, 196 U. S. 375.

[5] The appellees include all of the individuals and companies named as defendants in the indictment except the Universal Insurance Company and the Kansas City Fire and Marine Insurance Company, neither of which joined in the demurrer to the indictment.

There was not even a demurrer on that ground. The District Court treated the indictment as charging illegal restraints of trade in the total "activities complained of as constituting the business of insurance." 51 F. Supp. 712, 713. And in great detail the indictment set out these total activities, of which the actual making of contracts was but a part. As recognized by the District Court, the insurance business described in the indictment included not only the execution of insurance contracts but also negotiations and events prior to execution of the contracts and the innumerable transactions necessary to performance of the contracts. All of these alleged transactions, we shall hereafter point out, constituted a single continuous chain of events, many of which were multistate in character, and none of which, if we accept the allegations of the indictment, could possibly have been continued but for that part of them which moved back and forth across state lines. True, many of the activities described in the indictment which constituted this chain of events might, if conceptually separated from that from which they are inseparable, be regarded as wholly local. But the District Court in construing the indictment did not attempt such a metaphysical separation. Looking at all the transactions charged, it felt compelled by previous decisions of this Court to hold that despite the interstate character of many of them "the business of insurance is not commerce," and that as a consequence this "business," contracts and all, could not be "interstate commerce" or "interstate trade." In other words, the District Court held the indictment bad for the sole reason that the entire "business of insurance" (not merely the part of the business in which contracts are physically executed) can never under any possible circumstances be "commerce," and that therefore, even though an insurance company conducts a substantial part of its business transactions across state lines, it is not engaged in "commerce among the States" within the meaning of

either the Commerce Clause or the Sherman Anti-Trust Act.[6] Therefore to say that the indictment charges nothing more than restraint and monopoly in the "mere formation of an insurance contract," as has been suggested in this Court, is to give it a different and narrower meaning than did the District Court,—something we cannot do consistently with the Criminal Appeals Act which permits the case to come here on direct appeal.[7]

The record, then, presents two questions and no others: (1) Was the Sherman Act intended to prohibit conduct of fire insurance companies which restrains or monopolizes the interstate fire insurance trade? (2) If so, do fire insurance transactions which stretch across state lines constitute "Commerce among the several States" so as to make them subject to regulation by Congress under the

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[6] Although the District Court also sustained two additional grounds of demurrer (that the indictment did not state facts sufficient to constitute a federal offense, and that the court lacked jurisdiction of the subject matter), the opinion makes clear it did so because of the conclusion that "the business of insurance is not commerce." Two further grounds of demurrer, based upon the Fifth, Sixth, and Tenth Amendments, were not considered by the District Court.

[7] See 56 Stat. 271 amending 34 Stat. 1246; 18 U. S. C. 682; *United States* v. *Borden Co.*, 308 U. S. 188, 192–193. Appellees contend that the District Court read both counts of the indictment as alleging that the trade or commerce sought to be restrained and monopolized was the business of selling fire insurance, that the Court rightly decided that such business was not commerce, and that therefore its judgment should be affirmed. The Government denies that the Court construed the indictment so narrowly. It insists that the first count of the indictment charges a violation of § 1 of the Act regardless of whether the insurance business itself be commerce, since that count charges that the practices of the fire insurance companies constituted an unlawful restraint of interstate trade or commerce in such fields as transportation and industry which must purchase fire insurance. Cf. *Polish Alliance* v. *Labor Board*, *post*, p. 643. In the view we take of the case it is unnecessary to pass upon this question. We consider the case on the assumption that appellees' contention on this point is correct.

Commerce Clause? Since it is our conclusion that the Sherman Act was intended to apply to the fire insurance business we shall, for convenience of discussion, first consider the latter question.

I.

Ordinarily courts do not construe words used in the Constitution so as to give them a meaning more narrow than one which they had in the common parlance of the times in which the Constitution was written. To hold that the word "commerce" as used in the Commerce Clause does not include a business such as insurance would do just that. Whatever other meanings "commerce" may have included in 1787, the dictionaries, encyclopedias, and other books of the period show that it included trade: business in which persons bought and sold, bargained and contracted.[8] And this meaning has persisted to modern times. Surely, therefore, a heavy burden is on him who asserts that the plenary power which the Commerce Clause grants to Congress to regulate "Commerce among the several States" does not include the power to regulate trading in insurance to the same extent that it includes power to regulate other trades or businesses conducted across state lines.[9]

The modern insurance business holds a commanding position in the trade and commerce of our Nation. Built

[8] See *Gibbons* v. *Ogden*, 9 Wheat. 1; also, Hamilton and Adair, The Power to Govern (N. Y. 1937), pp. 53–63.

[9] Alexander Hamilton, in 1791, stating his opinion on the constitutionality of the Bank of the United States, declared that it would "admit of little if any question" that the federal power to regulate foreign commerce included "the regulation of policies of insurance." 3 Works of Alexander Hamilton (Fed. Ed., N. Y. 1904) pp. 445, 469–470. Speaking of the need of a federal power to regulate "commerce," Hamilton had earlier said, "It is, indeed, evident, on the most superficial view, that there is no object, either as it respects the interests of trade or finance, that more strongly demands a federal superintendence." Federalist No. XXII, The Federalist (Rev. Ed., N. Y. 1901) 110.

upon the sale of contracts of indemnity, it has become one of the largest and most important branches of commerce.[10] Its total assets exceed $37,000,000,000, or the approximate equivalent of the value of all farm lands and buildings in the United States.[11] Its annual premium receipts exceed $6,000,000,000, more than the average annual revenue receipts of the United States Government during the last decade.[12] Included in the labor force of insurance are 524,000 experienced workers, almost as many as seek their livings in coal mining or automobile manufacturing.[13] Perhaps no modern commercial enterprise directly affects so many persons in all walks of life as does the insurance business. Insurance touches the home, the family, and the occupation or the business of almost every person in the United States.[14]

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[10] According to figures gathered by the National Resources Committee, each of the three largest legal reserve life insurance companies in 1935 had assets greater than any one of the three largest industrial corporations, viz., the Standard Oil Company of New Jersey, the United States Steel Corporation, or the General Motors Corporation. Report to the President by the National Resources Committee, June 9, 1939: The Structure of the American Economy, Part I, pp. 100, 101 (U. S. Government Printing Office).

[11] U. S. Department of Commerce, Statistical Abstract of the United States, 1942, pp. 335–342, 694.

[12] *Ibid.*, pp. 195, 335–342.

[13] Sixteenth Census of the United States—1940; Part 1: United States Summary, Vol. III, The Labor Force, pp. 180, 181.

[14] "We have shown that the business of insurance has very definite characteristics, with a reach of influence and consequence beyond and different from that of the ordinary businesses of the commercial world, to pursue which a greater liberty may be asserted. . . . Insurance . . . is practically a necessity to business activity and enterprise. It is, therefore, essentially different from ordinary commercial transactions, and, as we have seen, according to the sense of the world from the earliest times—certainly the sense of the modern world—is of the greatest public concern." *German Alliance Ins. Co.* v. *Kansas*, 233 U. S. 389, 414–415.

This business is not separated into 48 distinct territorial compartments which function in isolation from each other. Interrelationship, interdependence, and integration of activities in all the states in which they operate are practical aspects of the insurance companies' methods of doing business. A large share of the insurance business is concentrated in a comparatively few companies located, for the most part, in the financial centers of the East.[15] Premiums collected from policyholders in every part of the United States flow into these companies for investment. As policies become payable, checks and drafts flow back to the many states where the policyholders reside. The result is a continuous and indivisible stream of intercourse among the states composed of collections of premiums, payments of policy obligations, and the countless documents and communications which are essential to the negotiation and execution of policy contracts. Individual policyholders living in many different states who own policies in a single company have their separate interests blended in one assembled fund of assets upon which all are equally dependent for payment of their policies. The decisions which that company makes at its home office—the risks it insures, the premiums it charges, the investments it makes, the losses it pays—concern not just the people of the state where the home office happens

[15] The five largest legal reserve life insurance companies, owning total assets of approximately $15,000,000,000, have their home offices in or near New York City. Best's Life Reports, 1939, as summarized in Monograph 28 printed for the use of the Temporary National Economic Committee, Appendix A (U. S. Government Printing Office, 1940). Each of these companies is licensed in every state of the Union except that two of them are not licensed in Texas. Life Insurance Year Book, 1942–3.

The five largest stock fire and marine insurance companies, owning total assets of approximately $550,000,000, are similarly located. Best's 1943 Digest of Insurance Stocks, xxxii. And each does business in every state of the Union. *Ibid.*

to be located. They concern people living far beyond the boundaries of that state.

That the fire insurance transactions alleged to have been restrained and monopolized by appellees fit the above described pattern of the national insurance trade is shown by the indictment before us. Of the nearly 200 combining companies, chartered in various states and foreign countries, only 18 maintained their home offices in one of the six states in which the S. E. U. A. operated; and 127 had headquarters in either New York, Pennsylvania, or Connecticut. During the period 1931–1941 a total of $488,000,000 in premiums was collected by local agents in the six states, most of which was transmitted to home offices in other states; while during the same period $215,000,000 in losses was paid by checks or drafts sent from the home offices to the companies' local agents for delivery to the policyholders.[16] Local agents solicited prospects, utilized policy forms sent from home offices, and made regular reports to their companies by mail, telephone or telegraph. Special travelling agents supervised local operations. The insurance sold by members of S. E. U. A. covered not only all kinds of fixed local properties, but also such properties as steamboats, tugs, ferries, shipyards, warehouses, terminals, trucks, busses, railroad equipment and rolling stock, and movable goods of all types carried in interstate and foreign commerce by every media of transportation.

Despite all of this, despite the fact that most persons, speaking from common knowledge, would instantly say that of course such a business is engaged in trade and

[16] The amounts given as premiums collected and losses paid during the period 1931–1941 are for all stock fire insurance companies operating in the six states involved. The companies which were parties to the alleged conspiracies probably collected and paid about 90% of these amounts since they controlled that percentage of the total business.

commerce, the District Court felt compelled by decisions of this Court to conclude that the insurance business can never be trade or commerce within the meaning of the Commerce Clause. We must therefore consider these decisions.

In 1869 this Court held, in sustaining a statute of Virginia which regulated foreign insurance companies, that the statute did not offend the Commerce Clause because "issuing a policy of insurance is not a transaction of commerce." *Paul* v. *Virginia,* 8 Wall. 168, 183.[17] Since then, in similar cases, this statement has been repeated, and has been broadened. In *Hooper* v. *California,* 155 U. S. 648, 654, 655, decided in 1895, the *Paul* statement was reaffirmed, and the Court added that, "The business of insurance is not commerce." In 1913 the New York Life Insurance Company, protesting against a Montana tax, challenged these broad statements, strongly urging that its business, at least, was so conducted as to be engaged in interstate commerce. But the Court again approved the *Paul* statement and held against the company, saying that "contracts of insurance are not commerce at all,

[17] "The defect of the argument lies in the character of their business. Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one State to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not inter-state transactions, though the parties may be domiciled in different States. The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law." 8 Wall. 168, 183.

neither state nor interstate." *New York Life Ins. Co.* v. *Deer Lodge County*, 231 U. S. 495, 503–504, 510.[18]

In all cases in which the Court has relied upon the proposition that "the business of insurance is not commerce," its attention was focused on the validity of state statutes—the extent to which the Commerce Clause automatically deprived states of the power to regulate the insurance business. Since Congress had at no time attempted to control the insurance business, invalidation of the state statutes would practically have been equivalent to granting insurance companies engaged in interstate activities a blanket license to operate without legal restraint. As early as 1866 the insurance trade, though still in its infancy,[19] was subject to widespread abuses.[20] To meet the imperative need for correction of these abuses

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[18] Other cases which have repeated or relied upon the *Paul* generalization are *Ducat* v. *Chicago*, 10 Wall. 410, 415; *Liverpool Insurance Co.* v. *Massachusetts*, 10 Wall. 566, 573; *Philadelphia Fire Assn.* v. *New York*, 119 U. S. 110, 118; *Noble* v. *Mitchell*, 164 U. S. 367, 370; *New York Life Ins. Co.* v. *Cravens*, 178 U. S. 389, 401; *Nutting* v. *Massachusetts*, 183 U. S. 553; *Northwestern Mutual Life Ins. Co.* v. *Wisconsin*, 247 U. S. 132; *National Union Fire Ins. Co.* v. *Wanberg*, 260 U. S. 71, 75; *Bothwell* v. *Buckbee, Mears Co.*, 275 U. S. 274, 276–277; and *Colgate* v. *Harvey*, 296 U. S. 404, 432. For a collection and analysis of the cases see Gavit, The Commerce Clause of the United States Constitution (Bloomington, Indiana, 1932), pp. 134–139.

[19] For statistics illustrative of the tremendous expansion of the fire and marine insurance business between 1860–1941, see New York Insurance Report for 1942, Vol. II, Table A. In 1860 fire and marine insurance companies reporting to the New York Superintendent of Insurance listed assets of $44,500,000 and premiums written of $13,500,000. In 1941 they listed assets of almost $3,000,000,000, and premiums written of $1,150,000,000. *Ibid.*

[20] See generally Insurance Blue Book (Centennial Issue 1876–77), c. VI, "Fire Insurance, 1860–1869"; Patterson, The Insurance Commissioner in the United States (Camb. 1927), pp. 519–537; Nehemkis, Paul v. Virginia, The Need for Re-examination, 27 Georgetown L. J. 519 (1939).

the various state legislatures, including that of Virginia, passed regulatory legislation.[21] *Paul* v. *Virginia* upheld one of Virginia's statutes. To uphold insurance laws of other states, including tax laws, *Paul* v. *Virginia's* generalization and reasoning have been consistently adhered to.

Today, however, we are asked to apply this reasoning, not to uphold another state law, but to strike down an Act of Congress which was intended to regulate certain aspects of the methods by which interstate insurance companies do business; and, in so doing, to narrow the scope of the federal power to regulate the activities of a great business carried on back and forth across state lines. But past decisions of this Court emphasize that legal formulae devised to uphold state power cannot uncritically be accepted as trustworthy guides to determine Congressional power under the Commerce Clause.[22] Furthermore, the reasons given in support of the generalization that "the business of insurance is not commerce" and can never be conducted so as to constitute "Commerce among the States" are inconsistent with many decisions of this Court which have upheld federal statutes regulating interstate commerce under the Commerce Clause.[23]

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[21] *Ibid.*

[22] See, e. g., *Wickard* v. *Filburn,* 317 U. S. 111, 121–122; *Binderup* v. *Pathe Exchange,* 263 U. S. 291, 311; *Stafford* v. *Wallace,* 258 U. S. 495, 525–528; *Bacon* v. *Illinois,* 227 U. S. 504, 516–517; *Swift & Co.* v. *United States,* 196 U. S. 375, 400.

[23] That the decisions of this Court upholding state insurance laws do not necessarily constitute a denial of federal power to regulate insurance has, upon occasion, been recognized both by insurance executives and lawyers. See, for example, An Address on the Regulation of Insurance By Congress, by John F. Dryden, President, Prudential Insurance Company of America, delivered November 22, 1904, pp. 12–13: "The decision [*Paul* v. *Virginia*], and those that have followed, did not relate to the real point involved in a consideration of the regulation of *the insurance business* as interstate commerce by the Federal government. . . . It is the opinion of qualified authori-

One reason advanced for the rule in the *Paul* case has been that insurance policies "are not commodities to be shipped or forwarded from one State to another." [24] But both before and since *Paul* v. *Virginia* this Court has held that Congress can regulate traffic though it consist of intangibles.[25] Another reason much stressed has been that insurance policies are mere personal contracts subject to the laws of the state where executed. But this reason rests upon a distinction between what has been called "local" and what "interstate," a type of mechanical criterion which this Court has not deemed controlling in the measurement of federal power. Cf. *Wickard* v. *Filburn*, 317 U. S. 111, 119–120; *Parker* v. *Brown*, 317 U. S. 341, 360. We may grant that a contract of insurance, considered as a thing apart from negotiation and execution,

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ties who have given most careful consideration to this aspect of the subject . . . that under the implied and resulting powers of the Constitution the Supreme Court would not withhold the verdict of constitutionality from an act of Congress declaring interstate insurance to be interstate commerce." See, similarly, Insurance is Commerce, by George F. Seward, President, The Fidelity and Casualty Company of New York (1910) pp. 15–16; S. S. Huebner, Federal Supervision and Regulation of Insurance, Annals, Amer. Acad. of Pol. and Soc. Science, Vol. xxvi, No. 3 (1905) 681–707. But see, e. g., *contra:* Vance, Federal Control of Insurance Corporations, 17 Green Bag (1905) 83, 89; Randolph, Opinion on the Proposal for Federal Supervision of Insurance (N. Y. 1905) pp. 12–20.

The report of the Committee on Insurance Law of the American Bar Association, in 1906, discussing the constitutionality of federal supervision of insurance, stated flatly that *Paul* v. *Virginia* and the cases which follow it "do not bar Congressional action." Reports of American Bar Association, Vol. xxix, Part 1 (1906), pp. 538, 552–567.

[24] See Note 17, *supra.*

[25] See for illustration *Gibbons* v. *Ogden*, 9 Wheat. 1, 189–190, 229–230; *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U. S. 1; *Lottery Case*, 188 U. S. 321; *Jordan* v. *Tashiro*, 278 U. S. 123, 127–128; *Electric Bond & Share Co.* v. *Securities & Exchange Comm'n*, 303 U. S. 419, 432–433; and *American Medical Assn.* v. *United States*, 317 U. S. 519.

does not itself constitute interstate commerce. Cf. *Hall* v. *Geiger-Jones Co.*, 242 U. S. 539, 557–558. But it does not follow from this that the Court is powerless to examine the entire transaction, of which that contract is but a part, in order to determine whether there may be a chain of events which becomes interstate commerce.[26] Only by treating the Congressional power over commerce among the states as a "technical legal conception" rather than as a "practical one, drawn from the course of business" could such a conclusion be reached. *Swift & Co.* v. *United States*, 196 U. S. 375, 398. In short, a nationwide business is not deprived of its interstate character merely because it is built upon sales contracts which are local in nature. Were the rule otherwise, few businesses could be said to be engaged in interstate commerce.[27]

Another reason advanced to support the result of the cases which follow *Paul* v. *Virginia* has been that, if any as-

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[26] Cf. *Hoopeston Canning Co.* v. *Cullen*, 318 U. S. 313, 317. "The contracts of insurance may be said to be interdependent. They cannot be regarded singly, or isolatedly, and the effect of their relation is to create a fund of assurance and credit, the companies becoming the depositories of the money of the insured, possessing great power thereby and charged with great responsibility." *German Alliance Ins. Co.* v. *Kansas*, 233 U. S. 389, 414. And see *Furst* v. *Brewster*, 282 U. S. 493, 497–498.

[27] Appraising the *Swift* case, Mr. Chief Justice Taft had this to say: "That case was a milestone in the interpretation of the commerce clause of the Constitution. It recognized the great changes and development in the business of this vast country and drew again the dividing line between interstate and intrastate commerce where the Constitution intended it to be. *It refused to permit local incidents of great interstate movement, which taken alone were intrastate, to characterize the movement as such.* [Italics supplied.] The *Swift* case merely fitted the commerce clause to the real and practical essence of modern business growth." *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1, 35.

Compare *Indiana Farmer's Guide Co.* v. *Prairie Farmer Co.*, 293 U. S. 268, 274–277; *Stafford* v. *Wallace*, 258 U. S. 495, 518–519.

pects of the business of insurance be treated as interstate commerce, "then all control over it is taken from the States and the legislative regulations which this Court has heretofore sustained must be declared invalid." [28] Accepted without qualification, that broad statement is inconsistent with many decisions of this Court. It is settled that, for Constitutional purposes, certain activities of a business may be intrastate and therefore subject to state control, while other activities of the same business may be interstate and therefore subject to federal regulation.[29] And there is a wide range of business and other activities which, though subject to federal regulation, are so intimately related to local welfare that, in the absence of Congressional action, they may be regulated or taxed by the states.[30] In marking out these activities the primary test applied by the Court is not the mechanical one of whether the particular activity affected by the state regulation is part of interstate commerce, but rather whether, in each case, the competing demands of the state and national interests involved can be accommodated.[31] And the fact that partic-

[28] *New York Life Ins. Co.* v. *Deer Lodge County*, 231 U. S. 495, 509.

[29] See, e. g., *Crutcher* v. *Kentucky*, 141 U. S. 47, 59–61; *Atlantic Refining Co.* v. *Virginia*, 302 U. S. 22, 26; *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33.

[30] See *Gibbons* v. *Ogden*, 9 Wheat. 1, 200, 203–210; *Willson* v. *Black Bird Creek Marsh Co.*, 2 Pet. 245, 250–252; *License Cases*, 5 How. 504, Opinion of Mr. Chief Justice Taney, 578–586; *Cooley* v. *Board of Wardens*, 12 How. 299, 318–321; *Kelly* v. *Washington*, 302 U. S. 1, 9–10. Cf. *Sturges* v. *Crowninshield*, 4 Wheat. 122, 192–196; *Houston* v. *Moore*, 5 Wheat. 1, Opinion of Mr. Justice Story, 48–50.

[31] *Parker* v. *Brown*, 317 U. S. 341, 362–363; cf. *California* v. *Thompson*, 313 U. S. 109, 112–116; *South Carolina State Highway Dept.* v. *Barnwell Brothers*, 303 U. S. 177, 184–192, and cases cited therein in footnote 5; *Hall* v. *Geiger-Jones Co.*, 242 U. S. 539, 558–559; *Bowman* v. *Chicago & North Western Ry. Co.*, 125 U. S. 465, 482–483. That different members of the Court applying this test to a particular state statute may reach opposite conclusions as to its validity does not argue

ular phases of an interstate business or activity have long been regulated or taxed by states has been recognized as a strong reason why, in the continued absence of conflicting Congressional action, the state regulatory and tax laws should be declared valid.[32]

The real answer to the question before us is to be found in the Commerce Clause itself and in some of the great cases which interpret it. Many decisions make vivid the broad and true meaning of that clause. It is interstate commerce subject to regulation by Congress to carry lottery tickets from state to state. *Lottery Case,* 188 U. S. 321, 355. So also is it interstate commerce to transport a woman from Louisiana to Texas in a common carrier, *Hoke* v. *United States,* 227 U. S. 308, 320–323; to carry across a state line in a private automobile five quarts of whiskey intended for personal consumption, *United States* v. *Simpson,* 252 U. S. 465; to drive a stolen automobile from Iowa to South Dakota, *Brooks* v. *United States,* 267 U. S. 432, 436–439. Diseased cattle ranging between Georgia and Florida are in commerce, *Thornton* v. *United States,* 271 U. S. 414, 425; and the transmission of an electrical impulse over a telegraph line between Alabama and Florida is intercourse and subject to paramount federal regulation, *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.,* 96 U. S. 1, 11. Not only, then, may transactions be commerce though non-commercial; they may be commerce though illegal and

against the correctness of the test itself. Such differences in judgment are inevitable where solution of a Constitutional problem must depend upon considered evaluation of competing Constitutional objectives. See, e. g., *McGoldrick* v. *Berwind-White Co.,* 309 U. S. 33, 48, 59; *McCarroll* v. *Dixie Greyhound Lines,* 309 U. S. 176, 183; *Duckworth* v. *Arkansas,* 314 U. S. 390, 397; cf. *Gwin, White & Prince* v. *Henneford,* 305 U. S. 434, 442.

[32] See, e. g., *Cooley* v. *Board of Wardens,* 12 How. 299; *New York Life Ins. Co.* v. *Deer Lodge County,* 231 U. S. 495; cf. *Bowman* v. *Chicago & North Western Ry. Co.,* 125 U. S. 465, 482–483.

sporadic, and though they do not utilize common carriers or concern the flow of anything more tangible than electrons and information. These activities having already been held to constitute interstate commerce, and persons engaged in them therefore having been held subject to federal regulation, it would indeed be difficult now to hold that no activities of any insurance company can ever constitute interstate commerce so as to make it subject to such regulation;—activities which, as part of the conduct of a legitimate and useful commercial enterprise, may embrace integrated operations in many states and involve the transmission of great quantities of money, documents, and communications across dozens of state lines.

The precise boundary between national and state power over commerce has never yet been, and doubtless never can be, delineated by a single abstract definition.[33] The most widely accepted general description of that part of commerce which is subject to the federal power is that given in 1824 by Chief Justice Marshall in *Gibbons* v. *Ogden,* 9 Wheat. 1, 189–190: "Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and

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[33] *Lottery Case,* 188 U. S. 321, 363; cf. *Kirschbaum Co.* v. *Walling,* 316 U. S. 517, 520. This particular difficulty was recognized by the authors of the Federalist Papers: "All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications. . . . Here, then, are three sources of vague and incorrect definitions: indistinctness of the object, imperfection of the organ of conception, inadequateness of the vehicle of ideas. Any one of these must produce a certain degree of obscurity. The Convention, in delineating the boundary between the federal and State jurisdictions must have experienced the full effect of them all." Federalist No. XXXVI, The Federalist (Rev. Ed., N. Y. 1901), pp. 193–194.

parts of nations, in all its branches. . . ." Commerce is interstate, he said, when it "concerns more States than one." *Id.*, 194. No decision of this Court has ever questioned this as too comprehensive a description of the subject matter of the Commerce Clause.[34] To accept a description less comprehensive, the Court has recognized, would deprive the Congress of that full power necessary to enable it to discharge its Constitutional duty to govern commerce among the states.[35]

The power confined to Congress by the Commerce Clause is declared in The Federalist to be for the purpose of securing the "maintenance of harmony and proper intercourse among the States." [36] But its purpose is not confined to empowering Congress with the negative authority

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[34] "Commerce is intercourse: one of its most ordinary ingredients is traffic." *Brown* v. *Maryland*, 12 Wheat. 419, 446. "And although commerce includes traffic in this narrower sense, for more than a century it has been judicially recognized that in a broad sense it embraces every phase of commercial and business activity and intercourse." *Jordan* v. *Tashiro*, 278 U. S. 123, 127–128.

Commerce "comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities. . . ." *Welton* v. *Missouri*, 91 U. S. 275, 280. And "intercourse or communication between persons in different States, by means of correspondence through the mails, is commerce among the States within the meaning of the Constitution, especially where . . . such intercourse and communication really relates to matters of regular, continuous business and to the making of contracts and the transportation of books, papers, etc., appertaining to such business." *International Textbook Co.* v. *Pigg*, 217 U. S. 91, 107.

[35] See *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U. S. 1, 9.

"A government ought to contain in itself every power requisite to the full accomplishment of the objects committed to its care, and to the complete execution of the trusts for which it is responsible, free from every other control, but a regard to the public good and to the sense of the people." Federalist No. XXX, The Federalist, *supra*, 154.

[36] Federalist No. XL; Federalist No. XLI; The Federalist, *supra*, pp. 220, 231.

to legislate against state regulations of commerce deemed inimical to the national interest. The power granted Congress is a positive power. It is the power to legislate concerning transactions which, reaching across state boundaries, affect the people of more states than one;—to govern affairs which the individual states, with their limited territorial jurisdictions, are not fully capable of governing.[37] This federal power to determine the rules of intercourse across state lines was essential to weld a loose confederacy into a single, indivisible Nation; its continued existence is equally essential to the welfare of that Nation.[38]

Our basic responsibility in interpreting the Commerce Clause is to make certain that the power to govern intercourse among the states remains where the Constitution placed it. That power, as held by this Court from the beginning, is vested in the Congress, available to be exer-

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[37] Compare Federalist No. XXIII, The Federalist, *supra*, 121: "Shall the Union be constituted the guardian of the common safety? Are fleets and armies, and revenues, necessary to this purpose? The government of the Union must be empowered to pass all laws, and to make all regulations which have relation to them. The same must be the case in respect to commerce, and to every other matter to which its jurisdiction is permitted to extend. . . . Not to confer in each case a degree of power commensurate to the end, would be to violate the most obvious rules of prudence and propriety, and improvidently to trust the great interests of the nation to hands which are disabled from managing them with vigor and success."

See Note (1943), 32 Georgetown Law Journal 66.

[38] The powers conferred by the Commerce Clause "are not confined to the instrumentalities of commerce . . . known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. . . . They were intended for the government of the business to which they relate, at all times and under all circumstances." *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U. S. 1, 9. Compare Federalist No. XLIII, The Federalist, *supra*, 248.

cised for the national welfare as Congress shall deem necessary. No commercial enterprise of any kind which conducts its activities across state lines has been held to be wholly beyond the regulatory power of Congress under the Commerce Clause. We cannot make an exception of the business of insurance.

II.

We come then to the contention, earnestly pressed upon us by appellees, that Congress did not intend in the Sherman Act to exercise its power over the interstate insurance trade.

Certainly the Act's language affords no basis for this contention. Declared illegal in § 1 is "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . ."; and "every person" who shall make such a contract or engage in such a combination or conspiracy is deemed guilty of a misdemeanor. Section 2 is not less sweeping. "Every person" who monopolizes, or attempts to monopolize, or conspires with "any other person" to monopolize, "any part of the trade or commerce among the several States" is, likewise, deemed guilty of a misdemeanor. Language more comprehensive is difficult to conceive. On its face it shows a carefully studied attempt to bring within the Act every person engaged in business whose activities might restrain or monopolize commercial intercourse among the states.

A general application of the Act to all combinations of business and capital organized to suppress commercial competition is in harmony with the spirit and impulses of the times which gave it birth. "Trusts" and "monopolies" were the terror of the period.[39] Their power to fix

[39] A historian of the Wheel, one of the strongest of the farmers' organizations in the '80's, had this to say about its origin: "The question has often been asked, what gave rise to the Wheel? This ques-

prices, to restrict production, to crush small independent traders, and to concentrate large power in the few to the detriment of the many, were but some of numerous evils ascribed to them.[40] The organized opponents of trusts aimed at the complete destruction of all business combinations which possessed potential power, or had the intent, to destroy competition in whatever the people needed or

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tion is as easily answered as asked, *Monopoly!* . . . Monopoly aspires to make the people its servants, politically, financially and socially, and demands that we offer on its golden altar all that we are and have, souls, bodies, lives, liberty, and common country, unreservedly and without complaint." Morgan, History of the Wheel and Alliance (Fort Scott, Kan. 1889), p. 56. Compare *Slaughter-House Cases,* 16 Wall. 36 (1873), Dissenting opinions of Justices Field and Bradley, pp. 83, 101–110, 111, 119–121.

[40] See *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, 491–493, 497–498; *Standard Oil Co.* v. *United States,* 221 U. S. 1, 58; *United States* v. *Trans-Missouri Freight Assn.,* 166 U. S. 290, 322–325. See also *Paramount Famous Lasky Corp.* v. *United States,* 282 U. S. 30, 42–43.

Nor was the opposition to trusts limited to the monopolization of "goods and services." At the instance of Senator Ingalls of Kansas an amendment was added to the Sherman bill designed to tax out of existence the business of dealing in futures contracts. 21 Cong. Rec. 2613. The Ingalls amendment was adopted by the Senate without a record vote. *Id.* Subsequently the Sherman bill, as amended, was redrafted by the Senate Judiciary Committee which used substantially the same broad and sweeping language which Sections 1 and 2 of the Act contain today. With that language the Sherman bill had the support of Senator Ingalls and other proponents of the Ingalls amendment. 21 Cong. Rec. 3145, 3153. And see *United States* v. *Patten,* 226 U. S. 525; *Peto* v. *Howell,* 101 F. 2d 353; cf. *Chicago Board of Trade* v. *Olsen,* 262 U. S. 1; *Stafford* v. *Wallace,* 258 U. S. 495.

See, generally, Ashby, The Riddle of the Sphinx (Des Moines 1890); Morgan, History of the Wheel and Alliance (Fort Scott, Kan. 1889); Buck, The Granger Movement (Camb. 1913); Cloud, Monopolies and the People (Davenport, Iowa 1873); Weaver, A Call to Action (Des Moines 1892); Hicks, The Populist Revolt (Minneapolis 1931).

wanted.[41] So great was the strength of the anti-trust forces that the issue of trusts and monopolies became non-partisan. The question was not whether they should be abolished, but how this purpose could best be accomplished.[42]

Combinations of insurance companies were not exempt from public hostility against the trusts. Between 1885 and 1912 twenty-three states enacted laws forbidding insurance combinations.[43] When, in 1911, one of these state

[41] Representative of anti-trust platforms, resolutions, etc., of contemporary agrarian-political movements are the following: "We demand . . . the passage of a law prohibiting the formation of trusts and combinations by speculators to secure control of the necessaries of life for the purpose of forcing up prices on consumers, imposing heavy penalties" (Texas Farmers' State Alliance, Report of Committee on Industrial Depression (1888)); "The objects of the National Alliance are . . . to oppose all forms of monopoly as being detrimental to the best interests of the public" (National Farmers' Alliance, Constitution (1887)); "We hold to the principle that all monopolies are dangerous . . ., tending to enslave a free people . . ." (National Farmers' Alliance and Industrial Union, Constitution (1889)); "We oppose the tyranny of monopolies" (National Grange, Declaration of Purposes (1874)).

[42] The platforms of both the Republican and the Democratic parties in 1888 stated unqualified opposition to monopolies and trusts. Brandon, Platforms of the Two Great Political Parties 1856–1928. The recorded vote in the House on the final conference report on the Sherman Act shows 242 ayes, no nays, and 85 not voting. 21 Cong. Rec. 6314.

[43] Four of these statutes were enacted before 1890. L. N. H. 1885, ch. 93, p. 289; L. Ohio 1885, No. 284, p. 231; L. Mich. 1887, No. 285, p. 384; L. Kan. 1889, ch. 257, p. 389, and L. Kan. 1897, ch. 265, p. 481; L. Ga. 1890–91, No. 745, p. 206; L. Maine 1893, ch. 285, p. 339; L. Mo. 1895, p. 237; L. Iowa 1896, ch. 22, p. 31; L. Ala. 1896–97, No. 634, p. 1428; L. Neb. 1897, ch. 79, p. 347; L. Neb. 1897, ch. 81, p. 354; L. Neb. 1913, ch. 154, pp. 393, 419; L. Wis. 1897, ch. 356, p. 908; Acts Va. 1898, ch. 644, p. 683; Acts S. C. 1902, No. 574, p. 1057; L. S. D. 1903, ch. 158, p. 183; G. L. Tex. 1903, ch. 94, p. 119; Ark. Acts 1905,

statutes was unsuccessfully challenged in this Court, the Court had this to say: "We can well understand that fire insurance companies, acting together, may have owners of property practically at their mercy in the matter of rates, and may have it in their power to deprive the public generally of the advantages flowing from competition between rival organizations engaged in the business of fire insurance. In order to meet the evils of such combinations or associations, the State is competent to adopt appropriate regulations that will tend to substitute competition in the place of combination or monopoly." *German Alliance Ins. Co.* v. *Hale*, 219 U. S. 307, 316.[44]

Appellees argue that the Congress knew, as doubtless some of its members did, that this Court had prior to 1890 said that insurance was not commerce and was subject to state regulation, and that therefore we should read the Act as though it expressly exempted that business. But neither by reports nor by statements of the bill's sponsors or others was any purpose to exempt insurance companies revealed. And we fail to find in the legislative history of the Act an expression of a clear and unequivocal desire of Congress to legislate only within that area previously

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No. 1, p. 1, as amended by Ark. Acts 1907, No. 184, p. 430; P. L. N. C. 1905, ch. 424, p. 429, and P. L. N. C. 1915, ch. 166, p. 243; Acts Tenn. 1905, ch. 479, p. 1019; Miss. Code 1906, § 5002, adopted L. Miss. 1906, ch. 101, p. 78; Gen. L. Ore. 1909, ch. 230, pp. 388, 399; Sess. L. Wash. 1911, ch. 49, pp. 161, 195, and Sess. L. Wash. 1915, ch. 97, p. 278; L. Ariz. 1912, ch. 73, p. 354; Acts La. 1912, No. 224, p. 509.

[44] The farm organizations of this period did not rely solely upon prohibitory legislation to protect themselves from combinations of insurance companies. "In 1886, tired of the extortions of the old-line insurance companies, the Territorial Alliance appointed a committee . . . to devise and put in operation a system of mutual insurance . . ., the result of which has been eminently successful." Report of Alonzo Wardall, President of the Alliance Insurance Companies of the Dakotas, printed in Ashby, The Riddle of the Sphinx (Des Moines 1890), p. 363.

declared by this Court to be within the federal power.[45] Cf. *Helvering* v. *Griffiths,* 318 U. S. 371; *Parker* v. *Motor Boat Sales,* 314 U. S. 244. We have been shown not one piece of reliable evidence that the Congress of 1890 intended to freeze the proscription of the Sherman Act within the mold of then current judicial decisions defining the commerce power. On the contrary, all the acceptable

[45] We have been pointed to only one reference made to the business of insurance in the Congressional discussions preceding passage of the Sherman Act, and that is a statement of Senator Turpie which flatly challenged the reasoning of this Court in holding that insurance was not commerce, and further predicted that in the future the Commerce Clause would not be given such a limited construction:

"The Senator from Missouri [Mr. Vest] spoke the other day about the difficulty of defining the word 'commerce,' especially as contained in the phrase 'interstate commerce.' I recollect one judicial decision upon this subject very definitely. The Supreme Court has decided that insurance is not commerce, and I suppose by following the circle of negations long enough and excluding all the things not commerce we should come at last to the residuum, which must be commerce or interstate commerce, because it can be nothing else. *A fortiori,* judging from this principle, I should myself have decided that transportation is not commerce nor interstate commerce either. . . .

"I feel inclined to make the prediction, as one of the things to come in this vast domain, scarcely touched, of cases arising under the Constitution and laws of Congress, that the whole mass of merchantable paper known as negotiable by the law merchant, made at one place, negotiable at another, payable at another, transcending in its negotiation State lines, will be remitted to Congressional action, and with respect to its creation, its formation, its negotiation, with respect to all the rights and liabilities which may arise under it, the people, stunned with the eternal dissonance of conflicting decisions and judgments of forty-eight or fifty tribunals of last resort in the States upon the subject of interstate negotiable paper, will require Congress to act therein, and that, unconstitutional as I now deem it or think it, it will as a matter of necessity be done, and in any such legislation with respect to that paper, the whole bulk of it, the personal and peculiar conditions of litigants will not be inquired about, but simply whether the one party or the other is entitled to relief or liable to recovery against him by reason of being a party to interstate commercial paper,

evidence points the other way. That Congress wanted to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements such as the indictment here charges admits of little, if any, doubt.[46]

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negotiable and payable and suable under the action of Congress which may finally take place upon that subject. . . .

"Nor do I think with the Senator from New York that we are discharged from duty or released from our obligation to legislate upon the subject of trusts because the States have a right to do so." 21 Cong. Rec. 2556–2557.

And see Note 48, *infra*.

[46] Senator George, a member of the Senate Judiciary Committee which redrafted the Sherman Act before its final passage, stated on the floor of the Senate that, "The bill has been very ingeniously and properly drawn to cover every case which comes within what is called the commercial power of Congress. . . . It is well known that the great evil of these combinations, these conspiracies, as they are called, these monopolies, as they are denominated by the bill, consists in the fact that by combination, by association, there have been gathered together the money and the means of large numbers of persons, and under these combinations, or conspiracies, or trusts, this great aggregated capital is wielded by a single hand and guided by a single brain, or at least by hands and brains acting in complete harmony and co-operation, and that in this way, by this association, by this direction of this immense amount of capital, by one organized will, to a very large extent, these wrongs have been perpetrated upon the American people." 21 Cong. Rec. 3147.

Earlier, Senator Sherman had explained, "I do not wish to single out any particular trust or combination. It is not a particular trust, but the system I aim at." 21 Cong. Rec. 2457. And in the House, Representative Stewart, delivering the last speech preceding the unanimous adoption of the present Act, stated ". . . The provisions of this trust bill are just as broad, sweeping, and explicit as the English language can make them to express the power of Congress over this subject under the Constitution of the United States. . . ." 21 Cong. Rec. 6314.

Compare *Kidd* v. *Pearson*, 128 U. S. 1 and *United States* v. *E. C. Knight Co.*, 156 U. S. 1, with *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211 and *United States* v. *American Tobacco Co.*, 221 U. S. 106.

The purpose was to use that power to make of ours, so far as Congress could under our dual system, a competitive business economy.[47] Nor is it sufficient to justify our reading into the Act an exemption for insurance that the Congress of 1890 may have known that states already were regulating the insurance business. The Congress of 1890 also knew that railroads were subject to regulation not only by states but by the federal government itself, but this fact has been held insufficient to bring to the railroad companies the interpretative exemption from the Sherman Act they have sought. *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290, 314–315, 320–325.

Appellees further argue that, quite apart from what the Sherman Act meant in 1890, the succeeding Congresses have accepted and approved the decisions of this Court that the business of insurance is not commerce. They call attention to the fact that at various times since 1890 Congress has refused to enact legislation providing for federal regulation of the insurance business, and that several resolutions proposing to amend the Constitution specifically to authorize federal regulation of insurance have failed of passage. In addition they emphasize that, although the Sherman Act has been amended several times, no amendments have been adopted which specifically bring insurance within the Act's proscription. The Government, for its part, points to evidence that various members of Congress during the period 1900–1914 considered there were "trusts" in the insurance business, and expressed the view that the insurance business should be subject to the anti-

[47] Senator Sherman, explaining his bill to the Senate, stated, "It is to arm the Federal courts within the limits of their constitutional power that they may co-operate with the State courts in checking, curbing, and controlling the most dangerous combinations that now threaten the business, property, and trade of the people of the United States." 21 Cong. Rec. 2457.

trust laws.[48] It also points out that in the Merchant Marine Act of 1920 Congress specifically exempted certain conduct of marine insurance companies from the "anti-trust" laws.[49]

The most that can be said of all this evidence considered together is that it is inconclusive as to any point here relevant. By no means does it show that the Congress of 1890 specifically intended to exempt insurance companies from the all-inclusive scope of the Sherman Act. Nor can we attach significance to the omission of Congress to include in its amendments to the Act an express statement that the Act covered insurance. From the beginning Congress has used language broad enough to include all businesses, and never has amended the Act to define these businesses with particularity. And the fact that several Congresses since 1890 have failed to enact proposed legislation providing for more or less comprehensive federal regula-

[48] For example, the following colloquy occurred in the House during the debate in passage of the Clayton Act:

"Mr. BARTON. We had an illustration recently where a big fire insurance company came into the State where local insurance companies have been doing business, not confined to the border of the State, and cut prices in that immediate locality until we had in three States 40 or 50 local companies put out of business, and then the price was put back where it was profitable to the company. Might not this same condition exist where we started a wholesale house in a State where their territory was confined to the State—might it not be a reduction of prices for putting that institution out of business?

"Mr. WEBB. If the purpose is to wrongfully injure or destroy a competitor, this section will cover such practice; but insurance companies are not reached, as the Supreme Court has held that their contracts or policies are not interstate commerce.

"Mr. BARTON. Is it not right that they should come within the law?

"Mr. WEBB. Yes." 51 Cong. Rec. 9390.

So far as appears, this was the only mention of the insurance cases during the discussions leading to passage of the Clayton Act. And, as in 1890, when the Sherman Act was under consideration, the reference to these cases showed dissatisfaction with them. See note 45, *supra*.

[49] § 29 (b), 41 Stat. 988, 1000.

tion of insurance does not even remotely suggest that any Congress has held the view that insurance alone, of all businesses, should be permitted to enter into combinations for the purpose of destroying competition by coercive and intimidatory practices.

Finally it is argued at great length that virtually all the states regulate the insurance business on the theory that competition in the field of insurance is detrimental both to the insurers and the insured, and that if the Sherman Act be held applicable to insurance much of this state regulation will be destroyed. The first part of this argument is buttressed by opinions expressed by various persons that unrestricted competition in insurance results in financial chaos and public injury. Whether competition is a good thing for the insurance business is not for us to consider. Having power to enact the Sherman Act, Congress did so; if exceptions are to be written into the Act, they must come from the Congress, not this Court. And as was said in answer to a similar argument that the Sherman Act should not be applied to a railroad combination:

"It is the history of monopolies in this country and in England that predictions of ruin are habitually made by them when it is attempted, by legislation, to restrain their operations and to protect the public against their exactions. . . .

"But even if the court shared the gloomy forebodings in which the defendants indulge, it could not refuse to respect the action of the legislative branch of the Government if what it has done is within the limits of its constitutional power. The suggestions of disaster to business have, we apprehend, their origin in the zeal of parties who are opposed to the policy underlying the act of Congress or are interested in the result of this particular case; at any rate, the suggestions imply that the court may and ought to refuse the enforcement of the provisions of the

act if, in its judgment, Congress was not wise in prescribing as a rule by which the conduct of interstate and international commerce is to be governed, that every combination, whatever its form, in restraint of such commerce and the monopolizing or attempting to monopolize such commerce shall be illegal. These, plainly, are questions as to the policy of legislation which belong to another department, and this court has no function to supervise such legislation from the standpoint of wisdom or policy. . . ." Harlan, J., Affirming decree, *Northern Securities Co.* v. *United States,* 193 U. S. 197, 351–352.

The argument that the Sherman Act necessarily invalidates many state laws regulating insurance we regard as exaggerated. Few states go so far as to permit private insurance companies, without state supervision, to agree upon and fix uniform insurance rates. Cf. *Parker* v. *Brown,* 317 U. S. 341, 350–352. No states authorize combinations of insurance companies to coerce, intimidate, and boycott competitors and consumers in the manner here alleged, and it cannot be that any companies have acquired a vested right to engage in such destructive business practices.[50]

Reversed.

MR. JUSTICE ROBERTS and MR. JUSTICE REED took no part in the consideration or decision of this case.

MR. CHIEF JUSTICE STONE, dissenting:

This Court has never doubted, and I do not doubt, that transactions across state lines which often attend and are incidental to the formation and performance of an insurance contract, such as the use of facilities for interstate

[50] Whether reliance on earlier statements of this Court in the *Paul* v. *Virginia* line of cases that insurance is not "commerce" could ever be pleaded as a defense to a criminal prosecution under the Sherman Act is a question which has been suggested but one it is not necessary to discuss at this time.

communication and transportation, are acts of interstate commerce subject to regulation by the federal government under the commerce clause. Nor do I doubt that the business of insurance as presently conducted has in many aspects such interstate manifestations and such effects on interstate commerce as may subject it to the appropriate exercise of federal power. See *Polish Alliance* v. *Labor Board, post,* p. 643.

But such are not the questions now before us. We are not concerned here with the power of Congress to do what it has not attempted to do, but with the question whether Congress in enacting the Sherman Act has asserted its power over the business of insurance.

The questions which the Government has raised, advisedly it would seem (cf. *New York Life Ins. Co.* v. *Deer Lodge County,* 231 U. S. 495, 499), by the indictment in this case, as it has been interpreted by the District Court below, are quite different from the question, discussed in the Court's opinion, whether the incidental use of the facilities of interstate commerce and transportation in the conduct of the fire insurance business renders the business itself "commerce" within the meaning of the Sherman Act and the commerce clause. The questions here are whether the business of entering into contracts in one state, insuring against the risk of loss by fire of property in others, is itself interstate commerce; and whether an agreement or conspiracy to fix the premium rates of such contracts and in other ways to restrict competition in effecting policies of fire insurance, violates the Sherman Act. The court below has answered "no" to both of these questions. I think that its answer is right and its judgment should be affirmed, both on principle and in view of the permanency which should be given to the construction of the commerce clause and the Sherman Act in this respect, which has until now been consistently adhered to by all branches of the Government.

The case comes here on direct appeal by the Government from the District Court's judgment dismissing the indictment. Under the provisions of the Criminal Appeals Act, 18 U. S. C. § 682, the only questions open for decision here are whether the District Court's constructions of the commerce clause and of the Sherman Act, on which it rested its decision, are the correct ones. *United States* v. *Borden Co.*, 308 U. S. 188, 193; *United States* v. *Wayne Pump Co.*, 317 U. S. 200, 208; *United States* v. *Swift & Co.*, 318 U. S. 442, 444.

For the particular facts to which the court below applied the Constitution and the Sherman Act we must look to the indictment as the District Court has construed it. And we must accept that construction, for by the provisions of the Criminal Appeals Act the District Court's construction of the indictment is reviewable on appeal not by this Court but by the Circuit Court of Appeals. *United States* v. *Patten*, 226 U. S. 525, 535; *United States* v. *Colgate & Co.*, 250 U. S. 300, 306; *United States* v. *Borden Co.*, *supra*.

The District Court pointed out that the offenses charged by the indictment are a conspiracy to fix arbitrary and non-competitive premium rates on fire insurance sold in several named states, and by means of that conspiracy to restrain and to monopolize trade and commerce in fire insurance in those states. The court went on to say:

"To constitute a violation of the Sherman Act, the restraint and monopoly denounced must be that of interstate trade or commerce, and, unless the restraint and monopoly charged in the indictment be restraint or monopoly in interstate trade or commerce, the indictment must fall.

"It is not a question here of whether the defendants participated in some incidental way in interstate commerce or used in some instances the facilities of interstate commerce, but is rather whether the activities complained

of as constituting the business of insurance would themselves constitute interstate trade or commerce, and whether defendants' method of conducting same amounted to restraint or monopoly of same. It is not a question as to whether or not Congress had power to regulate the insurance companies or some phases of their activities, but rather whether Congress did so by the Sherman Act.

"Persons may be engaged in interstate commerce, yet, if the restraint or monopoly complained of is not itself a restraint or monopoly of interstate trade or commerce, they may not be convicted of violation of the Sherman Act. The fact that they may use the mails and instrumentalities of interstate commerce and communication, and be subject to Federal regulations relating thereto, would not make applicable the Sherman Act to interstate commerce or to activities which were not commerce at all.

"The whole case, therefore, depends upon the question as to whether or not the business of insurance is interstate trade or commerce, and if so, whether the transactions alleged in the indictment constitute interstate commerce."

In short the District Court construed the indictment as charging restraints not in the incidental use of the mails or other instrumentalities of interstate commerce, nor in the insurance of goods moving in interstate commerce, but in the "business of insurance." And by the "business of insurance" it necessarily meant the business of writing contracts of insurance, for the indictment charges only restraints in entering into such contracts, not in their performance,[1] and the Court deemed it irrelevant that in

[1] It charges an agreement (a) to fix premium rates, (b) to fix commissions paid, (c) to adopt reclassifications of risks on the basis of which premium rates are fixed, (d) to adhere to standard terms, conditions, and clauses, in the insurance contract, (e) to withhold reinsurance facilities from non-members of the South-Eastern Underwriters

the negotiation and performance of the contracts appellees "may use the mails and instrumentalities of interstate commerce." It held that that business is not in itself interstate commerce, and that the alleged conspiracies to restrain and to monopolize that business were not, without more, in restraint of interstate commerce and consequently were not violations of the Sherman Act.

This construction of the indictment as confined in its scope to a conspiracy to fix premium rates and otherwise restrain competition in the business of writing insurance contracts, and to monopolize that business—a construction requiring decision of the question whether that business is interstate commerce—is adopted by the Government. Its brief in this Court states the "questions presented" as follows:

"1. Whether the fire insurance business is in commerce.

"2. Whether the fire insurance business is subject to the constitutional power of Congress to regulate commerce among the several states.

"3. Whether, if so, the Sherman Act is violated by an agreement among fire insurance companies to fix and maintain arbitrary and non-competitive rates and to monopolize trade and commerce in fire insurance, in part through boycotts directed at companies not part of the conspiracy and the agents and purchasers of insurance who deal with them."

Association, (f) to withdraw from and refuse to enter agencies representing non-members, (g) to boycott and withhold patronage from purchasers of insurance from non-members, (h) to disparage the services and facilities of non-members, (i) to establish and maintain rating bureaus to police and maintain these agreements, (j) to establish and maintain boards and groups of agents for the same purpose. There is no allegation that commissions are paid otherwise than on the entering into of the contracts. The indictment thus charges only restraints in the terms of the insurance contracts and restraints, by boycotts, in competition in entering into such contracts and in entering into contracts of reinsurance.

The numerous and unvarying decisions of this Court that "insurance is not commerce" [2] have never denied that acts of interstate commerce may be incidental to the business of writing and performing contracts of insurance, or that those incidental acts are subject to the commerce power. Our decisions on this subject have uniformly rested on the ground that the formation of an insurance contract, even though it insures against risk of loss to property located in other states or moving in interstate commerce, is not interstate commerce, and that although the incidents of interstate communication and transportation which often attend the formation and performance of an insurance contract are interstate commerce, they do not serve to render the business of insurance itself interstate commerce. See *Hooper* v. *California,* 155 U. S. 648, 655; *New York Life Ins. Co.* v. *Deer Lodge County,* 231 U. S. 495, 508–9.

If an insurance company in New York executes and delivers, either in that state or another, a policy insuring the owner of a building in New Jersey against loss by fire, no act of interstate commerce has occurred. True, if the owner comes to New York to procure the insurance or after delivery in New York carries the policy to New Jersey, or the company sends it there by mail or messenger, such would be acts of interstate commerce. Similarly if the owner pays the premiums by mail to the company in New

[2] E. g., *Paul* v. *Virginia,* 8 Wall. 168; *Ducat* v. *Chicago,* 10 Wall. 410; *Liverpool Insurance Co.* v. *Massachusetts,* 10 Wall. 566; *Philadelphia Fire Assn.* v. *New York,* 119 U. S. 110; *Hooper* v. *California,* 155 U. S. 648; *Noble* v. *Mitchell,* 164 U. S. 367; *Orient Insurance Co.* v. *Daggs,* 172 U. S. 557; *New York Life Ins. Co.* v. *Cravens,* 178 U. S. 389; *Nutting* v. *Massachusetts,* 183 U. S. 553; *New York Life Ins. Co.* v. *Deer Lodge County,* 231 U. S. 495; *Northwestern Mutual Life Ins. Co.* v. *Wisconsin,* 247 U. S. 132; *National Insurance Co.* v. *Wanberg,* 260 U. S. 71; *Bothwell* v. *Buckbee, Mears Co.,* 275 U. S. 274. See also *Doyle* v. *Continental Ins. Co.,* 94 U. S. 535, overruled on other grounds by *Terral* v. *Burke Construction Co.,* 257 U. S. 529.

York, or the company's New Jersey agent sends the premiums to New York, or the company in New York sends money to New Jersey on the occurrence of the loss insured against, acts of interstate commerce would occur. But the power of the Congress to regulate them is derived, not from its authority to regulate the business of insurance, but from its power to regulate interstate communication and transportation. And such incidental use of the facilities of interstate commerce does not render the insurance business itself interstate commerce. Nor is the nature of a single insurance transaction or a few such transactions not involving interstate commerce altered in that regard merely because their number is multiplied. The power of Congress to regulate interstate communication and transportation incidental to the insurance business is not any more or any less because the number of insurance transactions is great or small. The Congressional power to regulate does not extend to the formation and performance of insurance contracts save only as the latter may affect communication and transportation which are interstate commerce or may otherwise be found by Congress to affect transactions of interstate commerce. And even then, such effects on the commerce as do not involve restraints in competition in the marketing of goods and services are not within the reach of the Sherman Act. That such are the controlling principles has been fully recognized by this Court in the numerous cases which have held that the business of insurance is not commerce or as such subject to the commerce power. See, for example, *New York Life Ins. Co.* v. *Deer Lodge County, supra,* 508–9.

These principles are not peculiar to insurance contracts. They are equally applicable to other types of contracts which relate to things or events in other states than that of their execution, but which do not contain any obligation to engage in any form of interstate commerce. The

parties to them are not engaged in interstate commerce, for such commerce is not necessarily involved in or prerequisite to the formation of such contracts and they do not in their performance necessarily involve the doing of interstate business. The mere formation of a contract to sell and deliver cotton or coal or crude rubber is not in itself an interstate transaction and does not involve any act of interstate commerce because cotton, coal and crude rubber are subjects of interstate or foreign commerce, or because in fact performance of the contract may not be effected without some precedent or subsequent movement interstate of the commodities sold, or because there may be incidental use of the facilities of interstate commerce or transportation in the formation of the contract. *Ware & Leland* v. *Mobile County,* 209 U. S. 405, 411–13; *Western Live Stock* v. *Bureau of Revenue,* 303 U. S. 250, 253. Compare *Dahnke-Walker Co.* v. *Bondurant,* 257 U. S. 282, 292. That the principle underlying that conclusion is the same as that underlying the decisions of this Court that the business of insurance is not interstate commerce, has been repeatedly recognized and affirmed. *Paul* v. *Virginia,* 8 Wall. 168, 183; *Hooper* v. *California,* 155 U. S. 648, 654; *Ware & Leland* v. *Mobile County, supra,* 411; *Engel* v. *O'Malley,* 219 U. S. 128, 139; *New York Life Ins. Co.* v. *Deer Lodge County, supra,* 511–12; *Blumenstock Bros.* v. *Curtis Publishing Co.,* 252 U. S. 436, 443; *Hill* v. *Wallace,* 259 U. S. 44, 69; *Chicago Board of Trade* v. *Olsen,* 262 U. S. 1, 32–3; *Moore* v. *New York Cotton Exchange,* 270 U. S. 593, 604; *Western Live Stock* v. *Bureau of Revenue, supra;* and see *Hopkins* v. *United States,* 171 U. S. 578, 588–9, 602.

The conclusion that the business of writing insurance is not interstate commerce could not rightly be otherwise unless we were to depart from the universally accepted view that the act of making any contract which does not stipulate for the performance of an act or transaction of

interstate commerce is not in itself interstate commerce. And this has been held to be true even though the contract be effected by exchange of communications across state lines, see *New York Life Ins. Co.* v. *Cravens,* 178 U. S. 389, 400; *Ware & Leland* v. *Mobile County, supra; New York Life Ins. Co.* v. *Deer Lodge County, supra,* 509, a point which need not be considered here for the indictment makes no charge that the policies written by appellees are thus effected, but alleges only that they are "sold" by the defendants in certain named states.

Undoubtedly contracts so entered into for the sale of commodities which move in interstate commerce may become the implements for restraints in marketing those commodities, and when so used may for that reason be within the Sherman Act, see *Northern Securities Co.* v. *United States,* 193 U. S. 197, 334, 338; *United States* v. *Patten, supra,* 543–4; *Standard Oil Co.* v. *United States,* 283 U. S. 163, 168–9. Compare *Thames & Mersey Ins. Co.* v. *United States,* 237 U. S. 19. But it is quite another matter to say that the contracts are themselves interstate commerce or that restraints in competition as to their terms or conditions are within the Sherman Act, in the absence of a showing that the purpose or effect is to restrain competition in the marketing of the goods or services to which the contracts relate. Compare *Hill* v. *Wallace, supra,* 69, with *Chicago Board of Trade* v. *Olsen, supra,* 31–3; *Blumenstock Bros.* v. *Curtis Publishing Co., supra,* with *Indiana Farmer's Guide Co.* v. *Prairie Farmer Co.,* 293 U. S. 268; *Moore* v. *New York Cotton Exchange, supra,* with *United States* v. *Patten, supra.*

In this respect insurance contracts do not in point of law stand on any different footing as regards the Sherman Act. If contracts of insurance are in fact made the instruments of restraint in the marketing of goods and services in or affecting interstate commerce, they are not beyond the reach of the Sherman Act more than contracts

for the sale of commodities,—contracts which, not in themselves interstate commerce, may nevertheless be used as the means of its restraint. But since trade in articles of commerce is not the subject matter of contracts of insurance, it is evident that not only is the writing of insurance policies not interstate commerce but there is little scope for their use in restraining competition in the marketing of goods and services in or affecting the commerce.

The contract of insurance makes no stipulation for the sale or delivery of commodities in interstate commerce or for any other interstate transaction. It provides only for the payment of a sum of money in the event of the loss insured against, and it is no necessary consequence of the alleged restraints on competition in fixing premiums that interstate commerce will be restrained. We have no occasion to consider the argument which the court below rejected, that the indictment charges that the conspiracy to fix premiums adversely affects interstate commerce because in some instances the commodities insured move across state lines, or because interstate communication and transportation are in some instances incidental to the business of issuing insurance contracts. This is so both because, as we have said, we are bound by the District Court's construction of the indictment, and, more importantly, because such effects on interstate commerce, as will presently appear, are not within the reach of the Sherman Act.

The conclusion seems inescapable that the formation of insurance contracts, like many others, and the business of so doing, is not, without more, commerce within the protection of the commerce clause of the Constitution and thereby, in large measure, excluded from state control and regulation. See *Hooper* v. *California, supra,* 655; *New York Life Ins. Co.* v. *Deer Lodge County, supra.* This conclusion seems, upon analysis, not only correct on

principle and in complete harmony with the uniform rulings by which this Court has held that the formation of all types of contract which do not stipulate for the performance of acts of interstate commerce, are likewise not interstate commerce, but it has the support of an unbroken line of decisions of this Court beginning with *Paul* v. *Virginia*, seventy-five years ago, and extending down to the present time. In 1913 this Court was asked, on elaborate briefs and arguments, such as are now addressed to us, to overrule *Paul* v. *Virginia, supra*, and the many cases which have followed it. *New York Life Ins. Co.* v. *Deer Lodge County, supra.* See also *New York Life Ins. Co.* v. *Cravens, supra.* In the *Deer Lodge* case the mode of conducting the insurance business was almost identical with that alleged here (231 U. S. at 499–500); it was strenuously urged, as here, that by reason of the great size of insurance companies "modern life insurance had taken on essentially a national and international character" (231 U. S. at 507); and, as here, that the use of the mails incident to the formation of the contract and the interstate transmission of premiums and the proceeds of the policies "constitute 'a current of commerce among the states'" (231 U. S. at 509). All these arguments were rejected, and the business of insurance was held not to be interstate commerce, on the grounds which we have stated and think valid—but which the Government's brief and the opinion of the Court in this case have failed to notice.

If the business of entering into insurance contracts is not interstate commerce, it seems plain that agreements to fix premium rates, or other restraints on competition in entering into such contracts, are not violations of the Sherman Act. As we have often had occasion to point out, the restraints prohibited by the Sherman Act are of competition in the marketing of goods or services whenever the competition occurs in or affects interstate commerce in those goods or services. See *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 495–501, and cases cited. The contract of

insurance does not undertake to supply or market goods or services and there is no suggestion that policies of insurance when issued are articles of commerce or that after their issue they are sold in the market as such, or, if they were, that the formation of the contract would itself be interstate commerce. See *Hooper* v. *California, supra; New York Life Ins. Co.* v. *Deer Lodge County, supra,* 510; cf. *Ware & Leland* v. *Mobile County, supra; Moore* v. *New York Cotton Exchange, supra.*

No more does the performance of an insurance contract involving the payment of premiums by the insured and the payment of losses by the insurer involve the marketing of goods or services. The indictment here, as the District Court pointed out, charges restraints on competition in fixing the terms and conditions of insurance contracts. And even if we assume, although the District Court did not mention it, that the indictment also charges restraints on the performance of such contracts, it is plain that such restraints on the performance as well as the formation of the contracts cannot operate as restraints on competition in the marketing of goods or services. Such restraints are not within the purview of the Sherman Act. Compare *Federal Club* v. *National League,* 259 U. S. 200, 209; *United Mine Workers* v. *Coronado Coal Co.,* 259 U. S. 344, 410–411; *Blumenstock Bros.* v. *Curtis Publishing Co., supra; Moore* v. *New York Cotton Exchange, supra.* The practice of law is not commerce, nor, at least outside the District of Columbia, is it subject to the Sherman Act, and it does not become so because a law firm attracts clients from without the state or sends its members or juniors to other states to argue cases, or because its clients use the interstate mails to pay their fees. *Federal Club* v. *National League, supra.*

It would be strange, indeed, if Congress, in adopting the Sherman Act in 1890, more than twenty years after this Court had supposedly settled the question, had considered that the business of insurance was interstate com-

merce or had contemplated that the Sherman Act was to apply to it. Nothing in its legislative history suggests that it was intended to apply to the business of insurance.[3] The legislative materials indicate that Congress was primarily concerned with restraints of competition in the marketing of goods sold in interstate commerce, which were clearly within the federal commerce power.[4] And while the Act is not limited to restraints of commerce in physical goods, see *e. g., Atlantic Cleaners & Dyers* v. *United States,* 286 U. S. 427, there is no reason to suppose that Congress intended the Act to apply to matters in which, under prevailing decisions of this Court, commerce was not involved. On the contrary the House committee, in reporting the bill which was adopted without change, declared: "No attempt is made to invade the legislative authority of the several States or even to occupy doubtful grounds. No system of laws can be devised by Congress alone which would effectually protect the people of the

[3] The decisions of this Court that the negotiation of a contract between citizens of different states is not interstate commerce were known to and accepted by Congress. In the course of the debates in the Senate on the original bill introduced by Senator Sherman, Senator Turpie, discussing the extent of the federal commerce power, stated, "I recollect one judicial decision upon this subject very definitely. The Supreme Court has decided that insurance is not commerce. . . ." 21 Cong. Rec. 2556. During subsequent debates on that bill Senator Hoar, who later took charge of the revised bill reported by the Judiciary Committee and ultimately enacted, 21 Cong. Rec. 3145 *et seq.*, denied the existence of federal substantive power, under the commerce clause or Article III, § 2, over contracts between citizens of different states, asserting that Senator Sherman's bill could be supported only as a regulation of the "importation, transportation, or sale of articles. . . ." 21 Cong. Rec. 2567. See also the statements of Senator Eustis at 21 Cong. Rec. 2646, 2651–2.

[4] See Senator Sherman's original bill, S. 3445, 50th Cong., S. 1, 51st Cong., and his statement at 21 Cong. Rec. 2562. Texts of the bill throughout its various amendments are set out in Bills and Debates Relating to Trusts, Sen. Doc. No. 147, 57th Cong., 2d Sess. (1903).

United States against the evils and oppression of trusts and monopolies. Congress has no authority to deal, generally, with the subject within the States, and the States have no authority to legislate in respect of commerce between the several States or with foreign nations." [5]

In 1904 and again in 1905 President Roosevelt urged "that the Congress carefully consider whether the power of the Bureau of Corporations cannot constitutionally be extended to cover interstate transactions in insurance." [6]

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[5] H. R. Rep. No. 1707, 51st Cong., 1st Sess., p. 1. See also the statement on the floor of the House by Mr. Culberson, in charge of the bill, "There is no attempt to exercise any doubtful authority on this subject, but the bill is confined strictly and alone to subjects over which, confessedly, there is no question about the legislative power of Congress . . ." 21 Cong. Rec. 4089. And see the statement of Senator Edmunds, chairman of the Senate Judiciary Committee which reported out the bill in the form in which it passed, that in drafting that bill the committee thought that "we would frame a bill that should be clearly within our constitutional power, that we should make its definition out of terms that were well known to the law already, and would leave it to the courts in the first instance to say how far they could carry it or its definitions as applicable to each particular case as it might arise." 21 Cong. Rec. 3148. Similarly Senator Hoar, a member of that committee who with Senator Edmunds was in charge of the bill, stated "Now we are dealing with an offense against interstate or international commerce, which the State can not regulate by penal enactment, and we find the United States without any common law. The great thing that this bill does, except affording a remedy, is to extend the common-law principles, which protected fair competition in trade in old times in England, to international and interstate commerce in the United States." 21 Cong. Rec. 3152.

[6] Messages of the Presidents, 6901, 6986–7. See the Report of the Commissioner of Corporations, 1905, p. 5, urging that Congress "so legislate upon the subject as to afford an opportunity to present to the Supreme Court the question whether insurance as now conducted is interstate commerce, and hence subject to Federal regulation."

See also Sen. Doc. No. 333, 59th Cong., 1st Sess. (1906), for a message of President Roosevelt proposing an insurance code for the District of Columbia and enclosing a report of a convention of State officers called by him to investigate wrongful insurance methods.

The American Bar Association, executives of leading insurance companies, and others joined in the request.[7] Numerous bills providing for federal regulation of various aspects of the insurance business were introduced between 1902 and 1906[8] but the judiciary committees of both House and Senate concluded that the regulation of the business of marine, fire and life insurance was beyond Congressional power. Sen. Rep. No. 4406, 59th Cong., 1st Sess.; H. R. Rep. No. 2491, 59th Cong., 1st Sess., 12–25. The House committee stated that "the question as to whether or not insurance is commerce has passed beyond the realm of argument, because the Supreme Court of the United States has said many times for a great number of years that insurance is not commerce." (p. 13.)[9]

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[7] See, e. g., 29 American Bar Association Reports 538 (1906); 24 Annals of American Academy of Political and Social Sciences (1904) 69, 78–83; 26 *Id.* (1905) 681; Dryden, An Address on the Regulation of Insurance by Congress (1904); 1 Moody's Magazine (1905–6) 271 *et seq.;* 38 American Law Review (1904) 181.

[8] H. R. 7054, 58th Cong., 2d Sess. (1903); H. R. 13791, 58th Cong., 2d Sess. (1904); H. R. 16274, 58th Cong., 3d Sess. (1904); S. 7277, 58th Cong., 3d Sess. (1905); H. R. 15092, 59th Cong., 1st Sess. (1906); H. Res. No. 417, 59th Cong., 1st Sess. (1906). See footnote 9 *infra.* See also S. 1743, 56th Cong., 1st Sess. (1899).

[9] Compare the debates in the House on the bill, S. 569, to establish a Department of Commerce and Labor. As reported by the House Committee on Interstate and Foreign Commerce, § 6 of the bill provided for the creation of a bureau of insurance to "exercise such control as may be provided by law" over insurance companies and to "foster, promote, and develop" the insurance business by collecting and compiling statistics. H. R. Rep. No. 2970, 57th Cong., 2d Sess., 12, 15. After extended debate, in which the provision was objected to for want of power in the federal government to regulate the insurance business and as a threat to the continuance of existing state regulation, 36 Cong. Rec. 868–9, 872–3, 908–11, 919–21, and in which it was insisted by proponents of the bill, as now, that insurance is commerce, 36 Cong. Rec. 876–7, amendments to strike all reference to insurance from the bill were adopted. 36 Cong. Rec. 911, 921. A proposed amendment to prohibit the use of the mails by insurance companies doing business

And when in 1914, one year after the decision in *New York Life Ins. Co.* v. *Deer Lodge County, supra,* Congress by the Clayton Act, 38 Stat. 730, amended the Sherman Act and defined the term "commerce" as used in that Act, it gave no indication that it questioned or desired this Court to overrule the decision of the *Deer Lodge* case and those preceding it. On the contrary Mr. Webb, who was in charge of the bill in the House of Representatives, stated that "insurance companies are not reached as the Supreme Court has held that their contracts or policies are not interstate commerce." 51 Cong. Rec. 9390.[10]

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in violation of state law was likewise defeated. 36 Cong. Rec. 922–3. The conference committee then inserted the provision, adopted as § 6 of the Act, 32 Stat. 828, authorizing the Bureau of Corporations to compile and publish useful information concerning corporations doing business in the United States and engaged in interstate or foreign commerce, "including corporations engaged in insurance." Upon assurances that this section "simply authorizes information being secured" and that "there is nothing in this measure that contravenes the votes of the House on that subject," 36 Cong. Rec. 2008, the conference report was adopted. The insurance provisions were not in the bill as it had originally passed the Senate, and the conference report was adopted by that body without debate. 36 Cong. Rec. 1990, 2035–6.

The Commissioner of Corporations made a study of state legislation, but reported that "in view of the decisions of the Supreme Court I have not felt warranted in trying to assume jurisdiction over insurance companies for the purpose of investigation." Report of the Commissioner of Corporations, 1905, p. 5; see Report of the Commissioner of Corporations, 1904, pp. 29–33; Report of the Secretary of Commerce and Labor, 1903, p. 26.

[10] Mr. Webb's statement was made in answer to an inquiry by Mr. Barton as to whether the proposed section 2 of the Clayton Act would render illegal certain practices if engaged in by wholesalers, in the course of which Mr. Barton referred to an instance of such practices committed by insurance companies. The colloquy continued:

"Mr. BARTON. It is not right that they should come within the law?

Mr. WEBB. Yes."

Assuming that Mr. Webb's answer related to insurance companies, and expressed a desire that such companies should be included within

This Court, throughout the seventy-five years since the decision of *Paul* v. *Virginia*, has adhered to the view that the business of insurance is not interstate commerce.[11] Such has ever since been the practical construction by the other branches of the Government of the application to insurance of the commerce clause and the Sherman Act. Long continued practical construction of the Constitution or a statute is of persuasive force in determining its meaning and proper application. *Pocket Veto Case*, 279 U. S. 655, 688–90; *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349, 351–2; *United States* v. *Cooper Corp.*, 312 U. S. 600, 613–14. It is significant that in the fifty years since the enactment of the Sherman Act the Government has not until now sought to apply it to the business of insurance,[12] and that Congress has continued to regard

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the prohibitions of the Sherman and Clayton Acts, but were not, nothing was done to amend those Acts so as to carry out that desire or which would require this Court to reexamine the scope of federal power over insurance.

[11] For cases arising under the Anti-Trust laws in which this Court has so stated see *Hopkins* v. *United States*, 171 U. S. 578, 602; *Blumenstock Bros.* v. *Curtis Publishing Co.*, 252 U. S. 436, 443; *Federal Club* v. *National League*, 259 U. S. 200, 209; *Standard Oil Co.* v. *United States*, 283 U. S. 163, 168–9; and see *Northern Securities Co.* v. *United States*, 193 U. S. 197, 372, 377 (dissenting opinion). See also *United Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344, 410; *United Leather Workers* v. *Herkert & Meisel Co.*, 265 U. S. 457, 470–71, relying on *Ware & Leland* v. *Mobile County*, 209 U. S. 405, a case applying the insurance rule to cotton futures contracts not calling for interstate shipment or delivery.

[12] One private suit was brought in the District of Columbia to enjoin rate-fixing by an underwriters' association; the suit was dismissed on the ground that insurance was not commerce. *Lown* v. *Underwriters' Assn.*, Sup. Ct. D. C. June 23, 1915, reported in 6 Federal Anti-Trust Decisions 1048.

Over 252 criminal prosecutions and 272 suits at equity have been instituted by the United States under the Sherman Act, Hamilton, Antitrust in Action, Monograph No. 16, prepared for the Temporary

insurance as not constituting interstate commerce. Although often asked to do so it has repeatedly declined to pass legislation regulating the insurance business and to sponsor constitutional amendments subjecting it to Congressional control.[13]

The decision now rendered repudiates this long-continued and consistent construction of the commerce clause and the Sherman Act. We do not say that that is in itself a sufficient ground for declining to join in the Court's decision. This Court has never committed itself to any rule or policy that it will not "bow to the lessons of experience and the force of better reasoning" by overruling a mistaken precedent. See cases collected in Justice Brandeis's dissenting opinion in *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 406–9, notes 1–4, and in *Smith* v. *Allwright*, 321 U. S. 649, 665, n. 10; and see *Legal Tender Cases*, 12 Wall. 457, 553–54. This is especially the case when the meaning of the Constitution is at issue and a mistaken construction is one which cannot be corrected by legislative action.

To give blind adherence to a rule or policy that no decision of this Court is to be overruled would be itself to overrule many decisions of the Court which do not accept that view. But the rule of *stare decisis* embodies a wise policy because it is often more important that a rule of law be settled than that it be settled right. This is especially so where, as here, Congress is not without regulatory power. Cf. *Penn Dairies* v. *Milk Control Comm'n*, 318 U. S. 261, 271, 275. The question then is not whether an earlier decision should ever be overruled, but whether a

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National Economic Committee (1940) 76, 78, and over 103 private actions have been brought, Note, 49 Yale L. J. 284, 296 (1939).

[13] In addition to the bills at note 8, *supra*, see H. J. Res. 31, 60th Cong., 1st Sess. (1907); S. J. Res. 103, 63d Cong., 2d Sess. (1914); H. J. Res. 194, 63d Cong., 2d Sess. (1914); S. J. Res. 58, 64th Cong., 1st Sess. (1915); S. J. Res. 51, 73d Cong., 1st Sess. (1933), all proposing constitutional amendments.

particular decision ought to be. And before overruling a precedent in any case it is the duty of the Court to make certain that more harm will not be done in rejecting than in retaining a rule of even dubious validity. Compare *Helvering* v. *Griffiths,* 318 U. S. 371, 400–4.

From what has been said it seems plain that our decisions that the business of insurance is not commerce are not unsound in principle, and involve no inconsistency or lack of harmony with accepted doctrine. They place no field of activity beyond the control of both the national and state governments as did *Hammer* v. *Dagenhart,* 247 U. S. 251, overruled three years ago by a unanimous Court in *United States* v. *Darby,* 312 U. S. 100, 117. On the contrary the ruling that insurance is not commerce, and is therefore unaffected by the restrictions which the commerce clause imposes on state legislation, removed the most serious obstacle to regulation of that business by the states. Through their plenary power over domestic and foreign corporations which are not engaged in interstate commerce, the states have developed extensive and effective systems of regulation of the insurance business, often solving regulatory problems of a local character with which it would be impractical or difficult for Congress to deal through the exercise of the commerce power. And in view of the broad powers of the federal government to regulate matters which, though not themselves commerce, nevertheless affect interstate commerce, *Wickard* v. *Filburn,* 317 U. S. 111; *Polish Alliance* v. *Labor Board, supra,* there can be no doubt of the power of Congress if it so desires to regulate many aspects of the insurance business mentioned in this indictment.

But the immediate and only practical effect of the decision now rendered is to withdraw from the states, in large measure, the regulation of insurance and to confer it on the national government, which has adopted no legis-

lative policy and evolved no scheme of regulation with respect to the business of insurance. Congress having taken no action, the present decision substitutes, for the varied and detailed state regulation developed over a period of years, the limited aim and indefinite command of the Sherman Act for the suppression of restraints on competition in the marketing of goods and services in or affecting interstate commerce, to be applied by the courts to the insurance business as best they may.

In the years since this Court's pronouncement that insurance is not commerce came to be regarded as settled constitutional doctrine, vast efforts have gone into the development of schemes of state regulation and into the organization of the insurance business in conformity to such regulatory requirements. Vast amounts of capital have been invested in the business in reliance on the permanence of the existing system of state regulation. How far that system is now supplanted is not, and in the nature of things could not well be, explained in the Court's opinion. The Government admits that statutes of at least five states will be invalidated by the decision as in conflict with the Sherman Act, and the argument in this Court reveals serious doubt whether many others may not also be inconsistent with that Act. The extent to which still other state statutes will now be invalidated as in conflict with the commerce clause has not been explored in any detail in the briefs and argument or in the Court's opinion.

Certainly there cannot but be serious doubt as to the validity of state taxes which may now be thought to discriminate against the interstate commerce, cf. *Philadelphia Fire Assn.* v. *New York,* 119 U. S. 110; or the extent to which conditions may be imposed on the right of insurance companies to do business within a state; or in general the extent to which the state may regulate whatever aspects of the business are now for the first time to be

regarded as interstate commerce. While this Court no longer adheres to the inflexible rule that a state cannot in some measure regulate interstate commerce, the application of the test presently applied requires "a consideration of all the relevant facts and circumstances" in order to determine whether the matter is an appropriate one for local regulation and whether the regulation does not unduly burden interstate commerce, *Parker* v. *Brown,* 317 U. S. 341, 362—a determination which can only be made upon a case-to-case basis. Only time and costly experience can give the answers.

Congress made the choice against so drastic a change when in 1906 it rejected the proposals to assume national control over the insurance business. The report of the House Committee on the Judiciary pointed out that "all of the evils and wrongs complained of are subject to the exclusive regulation of State legislative power" and added: "assuming that Congress declares that insurance is commerce and the Supreme Court holds the legislation constitutional, how much could Congress regulate, and what effect would such legislation have? It would disturb the very substructure of government by precipitating a violent conflict between the police power of the States and the power of Congress to regulate interstate commerce. To uphold the Federal power would be to extinguish the police power of the State by the legislation of Congress. In other words, Congress would admit corporations into the respective States and have the entire regulating power." H. R. Rep. No. 2491, 59th Cong., 1st Sess., 13, 15–16. See *id.* 18.

Had Congress chosen to legislate for such parts of the insurance business as could be found to affect interstate commerce, whether by making the Sherman Act applicable to them or by regulation in some other form, it could have resolved many of these questions of conflict between

federal and state regulation. But this Court can decide only the questions before it in particular cases. Its action in now overturning the precedents of seventy-five years governing a business of such volume and of such wide ramifications, cannot fail to be the occasion for loosing a flood of litigation and of legislation, state and national, in order to establish a new boundary between state and national power, raising questions which cannot be answered for years to come, during which a great business and the regulatory officers of every state must be harassed by all the doubts and difficulties inseparable from a realignment of the distribution of power in our federal system. These considerations might well stay a reversal of long-established doctrine which promises so little of advantage and so much of harm. For me these considerations are controlling.

The judgment should be affirmed.

MR. JUSTICE FRANKFURTER:

I join in the opinion of the CHIEF JUSTICE.

The relations of the insurance business to national commerce and finance, I have no doubt, afford constitutional authority for appropriate regulation by Congress of the business of insurance, certainly not to a less extent than Congressional regulation touching agriculture. See, *e. g.*, *Smith* v. *Kansas City Title Co.*, 255 U. S. 180; *Wickard* v. *Filburn*, 317 U. S. 111. But the opinion of the CHIEF JUSTICE leaves me equally without doubt that by the enactment of the Sherman Act in 1890, Congress did not mean to disregard the then accepted conception of the constitutional basis for the regulation of the insurance business. And the evidence is overwhelming that the inapplicability of the Sherman Act, in its contemporaneous setting, to insurance transactions such as those charged by this indictment has been confirmed and not modified by

Congressional attitude and action in the intervening fifty years. There is no Congressional warrant therefore for bringing about the far-reaching dislocations which the opinions of the CHIEF JUSTICE and MR. JUSTICE JACKSON adumbrate.

MR. JUSTICE JACKSON, dissenting in part:

I.

The historical development of public regulation of insurance underwriting in this country has created a dilemma which confronts this Court today. It demonstrates that "The life of the law has not been logic: it has been experience."

For one hundred fifty years Congress never has undertaken to regulate the business of insurance. Therefore to give the public any protection against abuses to which that business is peculiarly susceptible the states have had to regulate it. Since 1851 the several states, spurred by necessity and with acquiescence of every branch of the Federal Government, have been building up systems of regulation to discharge this duty toward their inhabitants.[1]

There never was doubt of the right of a state to regulate the business of its domestic companies done within the home state. The foreign corporation was the problem. Such insurance interests resisted state regulation and brought a series of cases to this Court. The companies sought to disable the states from regulating them by arguing that insurance business is interstate commerce, an argument almost identical with that now made by the

[1] Insurance commissions were established by New Hampshire in 1851 (N. H. Laws 1851, c. 1111); by Massachusetts in 1852 (Mass. Laws 1852, c. 231); by Rhode Island in 1855 (R. I. Laws, October 1854, p. 17, § 17). By 1890, when the Sherman Act became law, seventeen states had established supervisory authorities. Patterson, The Insurance Commissioner in the United States (1927), p. 536, n. 62.

Government.[2] The foreign companies thus sought to vest insurance control exclusively in Congress and to deprive every state of power to exclude them, to regulate them, or to tax them for the privilege of doing business.

The practical and ultimate choice that faced this Court was to say either that insurance was subject to state regulation or that it was subject to no existing regulation at all. The Court consistently sustained the right of the states to represent the public interest in this enterprise. It did so, wisely or unwisely, by resort to the doctrine that insurance is not commerce and hence is unaffected by the grant of power to Congress to regulate commerce among the several states. Each state thus was left free to exclude foreign insurance companies altogether or to admit them to do business on such conditions as it saw fit to impose. The whole structure of insurance regulation and taxation as it exists today has been built upon this assumption.[3]

The doctrine that insurance business is not commerce always has been criticized as unrealistic, illogical, and inconsistent with other holdings of the Court. I am unable to make any satisfactory distinction between insurance business as now conducted and other transactions that are held to constitute interstate commerce.[4] Were we con-

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[2] See particularly argument of New York Life Insurance Company in *New York Life Ins. Co.* v. *Deer Lodge County,* 231 U. S. 495, 496 (1913), and that for Paul in *Paul* v. *Virginia,* 8 Wall. 168 (1868).

[3] *Paul* v. *Virginia,* 8 Wall. 168, 183 (1868); *Hooper* v. *California,* 155 U. S. 648, 655 (1895); *Noble* v. *Mitchell,* 164 U. S. 367, 370 (1896); *New York Life Ins. Co.* v. *Cravens,* 178 U. S. 389, 401 (1900); *New York Life Ins. Co.* v. *Deer Lodge County,* 231 U. S. 495 (1913); *Bothwell* v. *Buckbee, Mears Co.,* 275 U. S. 274; *Ducat* v. *Chicago,* 10 Wall. 410; *Liverpool Insurance Co.* v. *Massachusetts,* 10 Wall. 566; *Philadelphia Fire Assn.* v. *New York,* 119 U. S. 110; *Nutting* v. *Massachusetts,* 183 U. S. 553; *Northwestern Mutual Life Ins. Co.* v. *Wisconsin,* 247 U. S. 132.

[4] E. g., *Champion* v. *Ames,* 188 U. S. 321 (lottery tickets); *Electric Bond & Share Co.* v. *Securities & Exchange Comm'n,* 303 U. S. 419 (holding companies).

sidering the question for the first time and writing upon a clean slate, I would have no misgivings about holding that insurance business is commerce and where conducted across state lines is interstate commerce and therefore that congressional power to regulate prevails over that of the states. I have little doubt that if the present trend continues federal regulation eventually will supersede that of the states.

The question therefore for me settles down to this: What role ought the judiciary to play in reversing the trend of history and setting the nation's feet on a new path of policy? To answer this I would consider what choices we have in the matter.

II.

The Government claims, and we must approve or reject the claim, that the antitrust laws constitute an exercise of congressional power which reaches the insurance business. That might be true on either of two different bases. The practical as well as the theoretical difference is substantial, as this case will show.

1. If an activity is held to be interstate commerce, Congress has paramount regulatory power. If it acts at all in relation to such a subject, it often has been held that it has "occupied the field" to the exclusion of the states, that the federal legislation defines the full measure of regulation and outside of it the activity is to be free.[5] This Court now is not fully agreed as to the effects of the Commerce Clause on state power,[6] but at least the Court always has considered that if an activity is held to be interstate in character a state may not exclude, burden, or obstruct it,[7]

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[5] E. g., *Pennsylvania R. Co.* v. *Public Service Comm'n*, 250 U. S. 566.

[6] *McCarroll* v. *Dixie Greyhound Lines*, 309 U. S. 176; *Duckworth* v. *Arkansas*, 314 U. S. 390.

[7] *Furst* v. *Brewster*, 282 U. S. 493, and cases cited.

nor impose a license tax on the privilege of carrying it on within the state.[8] The holding of the Court in this case brings insurance within this line of decisions restricting state power.

2. Although an activity is held not to be commerce or not to be interstate in character, Congress nevertheless may reach it to prohibit specific activities in its conduct that substantially burden or restrain interstate commerce. *Wickard* v. *Filburn,* 317 U. S. 111. When this power is exercised by Congress, it impairs state regulation only in so far as it actually conflicts with the federal regulation. *Terminal Railroad Association* v. *Brotherhood of Railroad Trainmen,* 318 U. S. 1. This congressional power to reach activities that are not interstate commerce interferes with state power only in a milder, narrower, and more specific way.

Instead of overruling our repeated decisions that insurance is not commerce, the Court could apply to this case the principle that even if it is not commerce the antitrust laws prohibit its manipulation to restrain interstate commerce, just as we hold that the National Labor Relations Act prohibits insurance companies, even if not in commerce, from engaging in unfair labor practices which affect commerce. *Polish Alliance* v. *Labor Board, post,* p. 643. This would require the Government to show that any acts it sought to punish affect something more than insurance and substantially affect interstate transportation or interstate commerce in some commodity. Whatever problems of reconciliation between state and federal authority this would present—and it would not avoid them all—it would leave the basis of state regulation unimpaired.

The principles of decision that I would apply to this case are neither novel nor complicated and may be shortly put:

1. As a *matter of fact,* modern insurance business, as

[8] *Alpha Portland Cement Co.* v. *Massachusetts,* 268 U. S. 203; *Cudahy Packing Co.* v. *Hinkle,* 278 U. S. 460.

usually conducted, is commerce; and where it is conducted across state lines, it is *in fact* interstate commerce.

2. In contemplation of law, however, insurance has acquired an established doctrinal status not based on present-day facts. For constitutional purposes a fiction has been established, and long acted upon by the Court, the states, and the Congress, that insurance is not commerce.

3. So long as Congress acquiesces, this Court should adhere to this carefully considered and frequently reiterated rule which sustains the traditional regulation and taxation of insurance companies by the states.

4. Any enactment by Congress either of partial or of comprehensive regulations of the insurance business would come to us with the most forceful presumption of constitutional validity. The fiction that insurance is not commerce could not be sustained against such a presumption, for resort to the facts would support the presumption in favor of the congressional action. The fiction therefore must yield to congressional action and continues only at the sufferance of Congress.

5. Congress also may, without exerting its full regulatory powers over the subject, and without challenging the basis or supplanting the details of state regulation, enact prohibitions of any acts in pursuit of the insurance business which substantially affect or unduly burden or restrain interstate commerce.

6. The antitrust laws should be construed to reach the business of insurance and those who are engaged in it only under the latter congressional power. This does not require a change in the doctrine that insurance is not commerce. The statute as thus construed would authorize prosecution of all combinations in the course of insurance business to commit acts not required or authorized by state law, such as intimidation, disparagement, or coer-

cion, if they unreasonably restrain interstate commerce in commodities or interstate transportation.[9] It would leave state regulation intact.

III.

The majority of the sitting Justices insist that we follow the more drastic course. Abstract logic may support them, but the common sense and wisdom of the situation seem opposed. It may be said that practical consequences are no concern of a court, that it should confine itself to legal theory. Of course, in cases where a constitutional provision or a congressional statute is clear and mandatory, its wisdom is not for us. But the Court now is not following, it is overruling, an unequivocal line of authority reaching over many years. We are not sustaining an act of Congress against attack on its constitutionality, we are making unprecedented use of the Act to strike down the constitutional basis of state regulation. I think we not only are free, but are duty bound, to consider practical consequences of such a revision of constitutional theory. This Court only recently recognized that certain former decisions as to the dividing line between state and federal power were illogical and theoretically wrong, but at the same time it announced that it would adhere to them because both governments had accommodated the structure of their laws to the error. *Davis* v. *Department of Labor*, 317 U. S. 249, 255. It seemed a common-sense course to follow then, and I think similar considerations should restrain us from following a contrary and destructive course now.

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[9] The Government contends that at least Count One of the present indictment conforms to this interpretation of the antitrust laws. Under the Criminal Appeals Act we have no jurisdiction to construe or reconstrue the indictment. My view would require remand to the District Court or the Circuit Court of Appeals for consideration in the light of our opinion.

The states began nearly a century ago to regulate insurance, and state regulation, while no doubt of uneven quality, today is a successful going concern. Several of the states, where the greatest volume of business is transacted, have rigorous and enlightened legislation, with enforcement and supervision in the hands of experienced and competent officials. Such state departments, through trial and error, have accumulated that body of institutional experience and wisdom so indispensable to good administration. The Court's decision at very least will require an extensive overhauling of state legislation relating to taxation and supervision. The whole legal basis will have to be reconsidered. What will be irretrievably lost and what may be salvaged no one now can say, and it will take a generation of litigation to determine. Certainly the states lose very important controls and very considerable revenues.[10]

The recklessness of such a course is emphasized when we consider that Congress has not one line of legislation deliberately designed to take over federal responsibility for this important and complicated enterprise.[11] There is no federal department or personnel with national experience

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[10] In 1943, gross premiums taxes on insurance companies yielded 40 states an aggregate of $96,108,000 and the remaining eight an estimated $26,892,000, making a total of $123,000,000. State Tax Collections in 1943, pamphlet published by Bureau of the Census, p. 8.

[11] It is impossible to believe that Congress, if it ever intended to assume responsibility for general regulation of insurance, would have made the antitrust laws the sole manifestation of its purpose. Its only command is to refrain from restraints of trade. Intelligent insurance regulation goes much further. It requires careful supervision to ascertain and protect solvency, regulation which may be inconsistent with unbridled rate competition. It prescribes some provisions of policies of insurance and many other matters beyond the scope of the Sherman Act.

Also it requires sanctions for obedience far more effective than the $5,000 maximum fine on corporations prescribed by the antitrust laws. Violation of state laws are commonly punishable by cancellation of

in the subject on which Congress can call for counsel in framing regulatory legislation. A poorer time to thrust upon Congress the necessity for framing a plan for nationalization of insurance control would be hard to find.

Moreover, we have not a hint from Congress that it concurs in the plan to federalize responsibility for insurance supervision. Indeed, every indication is to the contrary.[12]

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permission to do business therein—a drastic sanction that really commands respect.

The antitrust law sanctions are little better than absurd when applied to huge corporations engaged in great enterprise. In the two related *Madison Oil* cases (see *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150) fifteen of the seventeen corporations convicted had combined capital and surplus reported to be $2,833,516,247. The total corporate fines on them were $255,000, making a ratio of fines to corporate capital and surplus of less than 1/100 of 1 per cent. In addition, fines of $180,000 were assessed against individuals. In the automobile financing case (see *United States* v. *General Motors Corp.*, 121 F. 2d 376, cert. denied, 314 U. S. 618) General Motors Corporation, three wholly owned subsidiaries and no individuals were convicted. The fines were $20,000. Capital and surplus were then reported at $1,047,840,321, the fine being somewhat less than 1/500 of 1 per cent thereof.

In each case the corporate fines were $5,000, the maximum permitted by the statute. 15 U. S. C. § 1.

[12] The last agency to investigate insurance problems was the Temporary National Economic Committee. It made no recommendation of federal control. Its chairman, Senator O'Mahoney, after reviewing carefully the problems caused by the concentration of economic power in the hands of the insurance companies and the abuses of the business, said: "Therefore I say again that personally I would not support any law that would undertake to do away with state regulation of insurance, and there never has been suggested to me or to any member of the TNEC or to the committee as a whole any thought of doing away with state regulation or imposing federal supervision." 26 American Bar Association Journal 913. Both dominant political parties have supported the present system. In 1940, the Democratic platform contained this provision: "We favor strict supervision of all forms of the insurance business by the several States for the protection of policyholders and the public." The Republican platform of that

It was urged to do so by one President,[13] and by the insurance companies.[14] The decisions of this Court confirming state power over insurance have been paralleled by a history of congressional refusal to extend federal authority into the field,[15] although no decision ever has explicitly denied the power to do so.

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year contained this provision: "We favor a continuance of regulation of insurance by the several States."

[13] President Theodore Roosevelt twice recommended that Congress assume control of insurance. Message of December 6, 1904, 39 Cong. Rec. 12, and Message of December 5, 1905, 40 Cong. Rec. 95.

[14] See Insurance Blue Book (Centennial Issue, 1876) Ch. VI, Fire Insurance, p. 32.

[15] In 1866, a bill was introduced in the House, providing for creation of a national bureau of insurance in the Treasury Department. It was not passed. H. R. 738, 39th Cong., 1st Sess.

In 1868, a bill was introduced in the Senate proposing a national bureau of insurance, but never passed. S. 299, 40th Cong., 2d Sess.

In 1892, a bill was introduced in the House creating the office of Commissioner of Insurance. It was never reported out of committee. H. R. 9629, 52d Cong., 1st Sess.

In 1897, a bill was introduced in the Senate to declare that insurance companies doing business outside of the states of their incorporation were to be deemed to be engaged in interstate commerce. It was not reported out of committee. S. 2736, 55th Cong., 2d Sess.

After President Roosevelt's recommendation of 1904, Senator Dryden introduced a bill in the Senate to establish a bureau of insurance in the Department of Commerce. The bill died in committee. S. 7277, 58th Cong., 3d Sess.

After President Roosevelt's second recommendation, the House Judiciary Committee reported that Congress had no power to regulate insurance, and said: "The views of the Supreme Court have practically met the approval of the bar and business men of the United States as being in accordance with law and common sense." H. R. Rep. 2491, 59th Cong., 1st Sess., March 23, 1906, p. 14.

The Senate Committee on the Judiciary made a similar report. Sen. Rep. 4406, 59th Cong., 1st Sess., 1906.

In 1914–15, resolutions were introduced in both the House and the Senate proposing an amendment to the Constitution to the effect that Congress should have power to regulate the business or commerce of

The orderly way to nationalize insurance supervision, if it be desirable, is not by court decision but through legislation. Judicial decision operates on the states and the industry retroactively. We cannot anticipate, and more than likely we could not agree, what consequences upon tax liabilities, refunds, liabilities under state law to states or to individuals, and even criminal liabilities will follow this decision. Such practical considerations years ago deterred the Court from changing its doctrine as to insurance.[16] Congress, on the other hand, if it thinks the time has come to take insurance regulation into the federal system, may formulate and announce the whole scope and effect of its action in advance, fix a future effective date, and avoid all the confusion, surprise, and injustice which will be caused by the action of the Court.[17]

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insurance throughout the United States and its territories or possessions. The resolutions were not reported out of the Judiciary Committee. S. J. Res. 103, 63d Cong., 2d Sess.; H. J. Res. 194, 63d Cong., 2d Sess.; S. J. Res. 58, 64th Cong., 1st Sess.

In 1933, a resolution was introduced for a similar constitutional amendment which died in committee. S. J. Res. 51, 73d Cong., 1st Sess.

Moreover, by exceptions and exemptions Congress has indicated a clear intent to avoid interference with state supervision. Insurance corporations are excepted from those who may become bankrupts. 11 U. S. C. § 22. Insurance issued by any issuer under state supervision is exempted from the Securities Act. 15 U. S. C. § 77c (a) (8). Insurance companies supervised by state authority are exempted from regulation as investment companies. 15 U. S. C. §§ 80a–2 (a) (17) and 80a–3 (c) (3).

[16] In *New York Life Ins. Co.* v. *Deer Lodge County*, 231 U. S. 495, 502, the Court said: "To reverse the cases, therefore, would require us to promulgate a new rule of constitutional inhibition upon the States and which would compel a change of their policy and a readjustment of their laws. Such result necessarily urges against a change of decision."

[17] In resisting pressure to federalize insurance supervision Congress has followed the advice of some of the best informed champions of

A judgment as to when the evil of a decisional error exceeds the evil of an innovation must be based on very practical and in part upon policy considerations. When, as in this problem, such practical and political judgments can be made by the political branches of the Government, it is the part of wisdom and self-restraint and good government for courts to leave the initiative to Congress.

Moreover, this is the method of responsible democratic government. To force the hand of Congress is no more

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the public interest on insurance problems. One was Louis D. Brandeis. Speaking as counsel for the Protective Committee of Policy-holders in the Equitable Life Assurance Society, before the Commercial Club of Boston, on October 26, 1905, Mr. Brandeis said:

"The sole effect of a Federal law would be—the sole purpose of the Dryden bill [see note 15, *supra*] must have been—to free the companies from the careful scrutiny of the commissioners of some of the States. It seeks to rob the State even of the right to protect its own citizens from the legalized robbery to which present insurance measures subject the citizens, for by the terms of the bill a Federal license would secure the right to do business within the borders of the State, regardless of the State prohibitions, free from the State's protective regulations. With a frankness which is unusual—and an effrontery which is common—among the insurance magnates—this bill is introduced in the Senate by John F. Dryden, the president of the Prudential Life Insurance Company—the company which pays to stockholders annual dividends equivalent to 219.78 per cent. for each dollar paid in on the stock; the company which devotes itself mainly to insuring the working men at an expense of over 37.28 cents on every dollar of premiums paid; the company which, in 1904, made the worst record of lapsed and surrendered industrial policies. . . .

"Federal supervision is also advocated by Mr. James M. Beck (formerly Assistant Attorney General of the United States), the counsel for the Mutual Life Insurance Company, and his main argument against State supervision appears to be that the companies pay, in the aggregate, for fees and taxes in the several States $10,000,000, which he says is twice as much as is necessary to cover the expense of proper supervision. Ten million dollars is a large sum in itself, but a very small one compared with the aggregate assets or the aggregate

the proper function of the judiciary than to tie the hands of Congress. To use my office, at a time like this, and with so little justification in necessity, to dislocate the functions and revenues of the states [18] and to catapult Congress into immediate and undivided responsibility for supervision of the nation's insurance businesses is more than I can reconcile with my view of the function of this Court in our society.

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expense of management. Mr. Beck's company paid in 1904 $1,138,663 in taxes and fees. Its management expenses were $15,517,520, or nearly fourteen times as much. Our Massachusetts savings banks paid in the year ending October 31, 1904, $1,627,794.46 in taxes to this Commonwealth: that is $80,890.02 more than the whole expense of management, which was $1,546,904.44.

"Doubtless the insurance departments of some States are subjects for just criticism. In many of the States the department is inefficient, in some doubtless corrupt. But is there anything in our experience of Federal supervision of other departments of business which should lead us to assume that it will be freer from grounds of criticism or on the whole more efficient than the best insurance department of any of the States? For it must be remembered that an efficient supervision by the department of any State will in effect protect all the policy-holders of the company wherever they may reside. Let us remember rather the ineffectiveness for eighteen long years of the Interstate Commerce Commission to deal with railroad abuses, the futile investigation by Commissioner Garfield of the Beef Trust, and the unfinished investigation into the affairs of the Oil Trust in which he has since been engaged. Federal supervision would serve only to centralize still further the power of our Government and to increase still further the powers of the corporations."

Mr. Justice Brandeis for a unanimous Court wrote, in *Bothwell* v. *Buckbee, Mears Co.*, 275 U. S. 274, 276 (1927): "A contract of insurance, although made with a corporation having its office in a State other than that in which the insured resides and in which the interest insured is located, is not interstate commerce." He joined in other similar decisions in *Northwestern Mutual Life Ins. Co.* v. *Wisconsin*, 247 U. S. 132; *National Union Fire Ins. Co.* v. *Wanberg*, 260 U. S. 71.

[18] Thirty-five states of the Union have filed *amicus curiae* briefs with us, protesting against the decision which the Court is promulgating.

LYONS *v.* OKLAHOMA.

CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF OKLAHOMA.

No. 433. Argued April 26, 1944.—Decided June 5, 1944.

1. The instruction to the jury in this case fairly raised the question whether the challenged confession was voluntary, and did not deny to the defendant any right under the Fourteenth Amendment. P. 601.
2. The Fourteenth Amendment does not forbid the use, at a trial of an accused from whom a confession was coerced, of a subsequent voluntary confession. P. 603.
3. Where the evidence as to whether there was coercion is conflicting, or where different inferences may fairly be drawn from the admitted facts, the question whether a confession was voluntary is for the triers of the facts. P. 602.
4. The evidence in this case warranted the inferences that the effects of the coercion which vitiated an earlier confession by the accused had been dissipated prior to his second confession and that the latter was voluntary; and the conviction will not be set aside as violative of due process. P. 604.
5. The Fourteenth Amendment protects against such conduct of criminal trials as amounts to a disregard of that fundamental fairness essential to the very concept of justice and as necessarily prevents a fair trial, but does not protect against mere error in jury verdicts. P. 605.

138 P. 2d 142, affirmed.

CERTIORARI, 320 U. S. 732, to review the affirmance of a conviction for murder.

Mr. Thurgood Marshall, with whom *Messrs. Amos T. Hall, William H. Hastie,* and *Leon A. Ransom* were on the brief, for petitioner.

Mr. Sam H. Lattimore, Assistant Attorney General of Oklahoma, with whom *Mr. Randell S. Cobb,* Attorney General, was on the brief, for respondent.

Mr. Morris L. Ernst filed a brief on behalf of the American Civil Liberties Union, as *amicus curiae,* urging reversal.

MR. JUSTICE REED delivered the opinion of the Court.

This writ brings to this Court for review a conviction obtained with the aid of a confession which furnished, if voluntary, material evidence to support the conviction. As the questioned confession followed a previous confession which was given on the same day and which was admittedly involuntary,[1] the issue is the voluntary character of the second confession under the circumstances which existed at the time and place of its signature and, particularly, because of the alleged continued influence of the unlawful inducements which vitiated the prior confession.

The petitioner was convicted in the state district court of Choctaw County, Oklahoma, on an information charging him and another with the crime of murder. The jury fixed his punishment at life imprisonment. The conviction was affirmed by the Criminal Court of Appeals, 77 Okl. Cr. —, 138 P. 2d 142, rehearing 140 P. 2d 248, and this Court granted certiorari, 320 U. S. 732, upon the petitioner's representation that there had been admitted against him an involuntary confession procured under circumstances which made its use in evidence a violation of his rights under the due process clause of the Fourteenth Amendment.[2]

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[1] Whether or not the other evidence in the record is sufficient to justify the general verdict of guilty is not necessary to consider. The confession was introduced over defendant's objection. If such admission of this confession denied a constitutional right to defendant the error requires reversal. *Bram* v. *United States*, 168 U. S. 532, 540–42. Cf. *Stromberg* v. *California*, 283 U. S. 359, 367, 368; *Williams* v. *North Carolina*, 317 U. S. 287, 291, 292.

[2] In petitioner's brief a claim is made that Oklahoma denied to him the equal protection of the laws guaranteed by the Fourteenth Amendment. Apparently petitioner relies upon his undue detention without preliminary examination, which was in violation of the state criminal procedure, as a denial by Oklahoma of equal protection of the law. But the effect of the mere denial of a prompt examining

Prior to Sunday, December 31, 1939, Elmer Rogers lived with his wife and three small sons in a tenant house situated a short distance northwest of Fort Towson, Choctaw County, Oklahoma. Late in the evening of that day Mr. and Mrs. Rogers and a four-year-old son Elvie were murdered at their home and the house was burned to conceal the crime.

Suspicion was directed toward the petitioner Lyons and a confederate, Van Bizzell. On January 11, 1940, Lyons was arrested by a special policeman and another officer whose exact official status is not disclosed by the record. The first formal charge that appears is at Lyons' hearing before a magistrate on January 27, 1940. Immediately after his arrest there was an interrogation of about two hours at the jail. After he had been in jail eleven days he was again questioned, this time in the county prosecutor's office. This interrogation began about six-thirty in the evening, and on the following morning between two and four produced a confession. This questioning is the basis of the objection to the introduction as evidence of a second confession which was obtained later in the day at the state penitentiary at McAlester by Warden Jess Dunn and introduced in evidence at the trial. There was also a third confession, oral, which was admitted on the trial without objection by petitioner. This was given to a guard at the penitentiary two days after the second. Only the petitioner, police, prosecuting and penitentiary officials were present at any of these interrogations, except that a private citizen who drove the car that brought Lyons to McAlester witnessed this second confession.

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trial is a matter of state, not of federal, law. To refuse this is not a denial of equal protection under the Fourteenth Amendment although it is a fact for consideration on an allegation that a confession used at the trial was coerced. Cf. *McNabb* v. *United States,* 318 U. S. 332, 340; *United States* v. *Mitchell,* 322 U. S. 65.

Lyons is married and was 21 or 22 years of age at the time of the arrest. The extent of his education or his occupation does not appear. He signed the second confession. From the transcript of his evidence, there is no indication of a subnormal intelligence. He had served two terms in the penitentiary—one for chicken stealing and one for burglary. Apparently he lived with various relatives.

While petitioner was competently represented before and at the trial, counsel was not supplied him until after his preliminary examination, which was subsequent to the confessions. His wife and family visited him between his arrest and the first confession. There is testimony by Lyons of physical abuse by the police officers at the time of his arrest and first interrogation on January 11th. His sister visited him in jail shortly afterwards and testified as to marks of violence on his body and a blackened eye. Lyons says that this violence was accompanied by threats of further harm unless he confessed. This evidence was denied *in toto* by officers who were said to have participated.

Eleven days later the second interrogation occurred. Again the evidence of assault is conflicting. Eleven or twelve officials were in and out of the prosecutor's small office during the night. Lyons says that he again suffered assault. Denials of violence were made by all the participants accused by Lyons except the county attorney, his assistant, the jailer and a highway patrolman. Disinterested witnesses testified to statements by an investigator which tended to implicate that officer in the use of force, and the prosecutor in cross-examination used language which gave color to defendant's charge. It is not disputed that the inquiry continued until two-thirty in the morning before an oral confession was obtained and that a pan of the victims' bones was placed in Lyons' lap by his

interrogators to bring about his confession. As the confession obtained at this time was not offered in evidence, the only bearing these events have here is their tendency to show that the later confession at McAlester was involuntary.

After the oral confession in the early morning hours of January 23, Lyons was taken to the scene of the crime and subjected to further questioning about the instruments which were used to commit the murders. He was returned to the jail about eight-thirty A. M. and left there until early afternoon. After that the prisoner was taken to a nearby town of Antlers, Oklahoma. Later in the day a deputy sheriff and a private citizen took the petitioner to the penitentiary. There, sometime between eight and eleven o'clock on that same evening, the petitioner signed the second confession.

When the confession which was given at the penitentiary was offered, objection was made on the ground that force was practiced to secure it and that, even if no force was then practiced, the fear instilled by the prisoner's former treatment at Hugo on his first and second interrogations continued sufficiently coercive in its effect to require the rejection of the second confession.

The judge, in accordance with Oklahoma practice and after hearing evidence from the prosecution and the defense in the absence of the jury, first passed favorably upon its admissibility as a matter of law, *Lyons* v. *State,* 138 P. 2d 142, 163; cf. *McNabb* v. *United States,* 318 U. S. 332, 338, n. 5, and then, after witnesses testified before the jury as to the voluntary character of the confession, submitted the guilt or innocence of the defendant to the jury under a full instruction, approved by the Criminal Court of Appeals, to the effect that voluntary confessions are admissible against the person making them but are to be "carefully scrutinized and received with great caution"

by the jury and rejected if obtained by punishment, intimidation or threats. It was added that the mere fact that a confession was made in answer to inquiries "while under arrest or in custody" does not prevent consideration of the evidence if made "freely and voluntarily." The instruction did not specifically cover the defendant's contention, embodied in a requested instruction, that the second confession sprang from the fear engendered by the treatment he had received at Hugo.

The mere questioning of a suspect while in the custody of police officers is not prohibited either as a matter of common law or due process. *Lisenba* v. *California,* 314 U. S. 219, 239–241; *Wan* v. *United States,* 266 U. S. 1, 14. The question of how specific an instruction in a state court must be upon the involuntary character of a confession is, as a matter of procedure or practice, solely for the courts of the state. When the state-approved instruction fairly raises the question of whether or not the challenged confession was voluntary, as this instruction did, the requirements of due process, under the Fourteenth Amendment, are satisfied and this Court will not require a modification of local practice to meet views that it might have as to the advantages of concreteness. The instruction given satisfies the legal requirements of the State of Oklahoma as to the particularity with which issues must be presented to its juries, *Lyons* v. *State,* 138 P. 2d 142, 164, and in view of the scope of that instruction, it was sufficient to preclude any claim of violation of the Fourteenth Amendment.

The federal question presented is whether the second confession was given under such circumstances that its use as evidence at the trial constitutes a violation of the due process clause of the Fourteenth Amendment, which requires that state criminal proceedings "shall be consistent with the fundamental principles of liberty and

justice." *Hebert* v. *Louisiana,* 272 U. S. 312, 316; *Mooney* v. *Holohan,* 294 U. S. 103, 112; *Buchalter* v. *New York,* 319 U. S. 427, 429.

No formula to determine this question by its application to the facts of a given case can be devised. *Hopt* v. *Utah,* 110 U. S. 574, 583; *Betts* v. *Brady,* 316 U. S. 455, 462. Here improper methods were used to obtain a confession, but that confession was not used at the trial. Later, in another place and with different persons present, the accused again told the facts of the crime. Involuntary confessions, of course, may be given either simultaneously with or subsequently to unlawful pressures, force or threats. The question of whether those confessions subsequently given are themselves voluntary depends on the inferences as to the continuing effect of the coercive practices which may fairly be drawn from the surrounding circumstances. *Lisenba* v. *California,* 314 U. S. 219, 240. The voluntary or involuntary character of a confession is determined by a conclusion as to whether the accused, at the time he confesses, is in possession of "mental freedom" to confess to or deny a suspected participation in a crime. *Ashcraft* v. *Tennessee,* 322 U. S. 143, 154; *Hysler* v. *Florida,* 315 U. S. 411, 413.

When conceded facts exist which are irreconcilable with such mental freedom, regardless of the contrary conclusions of the triers of fact, whether judge or jury, this Court cannot avoid responsibility for such injustice by leaving the burden of adjudication solely in other hands. But where there is a dispute as to whether the acts which are charged to be coercive actually occurred, or where different inferences may fairly be drawn from admitted facts, the trial judge and the jury are not only in a better position to appraise the truth or falsity of the defendant's assertions from the demeanor of the witnesses but the legal duty is upon them to make the decision. *Lisenba* v. *California, supra,* p. 238.

Review here deals with circumstances which require examination into the possibility as to whether the judge and jury in the trial court could reasonably conclude that the McAlester confession was voluntary. The fact that there is evidence which would justify a contrary conclusion is immaterial. To triers of fact is left the determination of the truth or error of the testimony of prisoner and official alike. It is beyond question that if the triers of fact accepted as true the evidence of the immediate events at McAlester, which were detailed by Warden Dunn and the other witnesses, the verdict would be that the confession was voluntary, so that the petitioner's case rests upon the theory that the McAlester confession was the unavoidable outgrowth of the events at Hugo.

The Fourteenth Amendment does not protect one who has admitted his guilt because of forbidden inducements against the use at trial of his subsequent confessions under all possible circumstances. The admissibility of the later confession depends upon the same test—is it voluntary. Of course the fact that the earlier statement was obtained from the prisoner by coercion is to be considered in appraising the character of the later confession. The effect of earlier abuse may be so clear as to forbid any other inference than that it dominated the mind of the accused to such an extent that the later confession is involuntary. If the relation between the earlier and later confession is not so close that one must say the facts of one control the character of the other, the inference is one for the triers of fact and their conclusion, in such an uncertain situation, that the confession should be admitted as voluntary, cannot be a denial of due process. *Canty* v. *Alabama,* 309 U. S. 629, cannot be said to go further than to hold that the admission of confessions obtained by acts of oppression is sufficient to require a reversal of a state conviction by this Court. Our judgment there relied solely upon *Chambers* v. *Florida,* 309 U. S. 227. The Oklahoma

Criminal Court of Appeals in the present case decided that the evidence would justify a determination that the effect of a prior coercion was dissipated before the second confession and we agree.

Petitioner suggests a presumption that earlier abuses render subsequent confessions involuntary unless there is clear and definite evidence to overcome the presumption. We need not analyze this contention further than to say that in this case there is evidence for the state which, if believed, would make it abundantly clear that the events at Hugo did not bring about the confession at McAlester.

In our view, the earlier events at Hugo do not lead unescapably to the conclusion that the later McAlester confession was brought about by the earlier mistreatments. The McAlester confession was separated from the early morning statement by a full twelve hours. It followed the prisoner's transfer from the control of the sheriff's force to that of the warden. One person who had been present during a part of the time while the Hugo interrogation was in progress was present at McAlester, it is true, but he was not among those charged with abusing Lyons during the questioning at Hugo. There was evidence from others present that Lyons readily confessed without any show of force or threats within a very short time of his surrender to Warden Dunn and after being warned by Dunn that anything he might say would be used against him and that he should not "make a statement unless he voluntarily wanted to." Lyons, as a former inmate of the institution, was acquainted with the warden. The petitioner testified to nothing in the past that would indicate any reason for him to fear mistreatment there. The fact that Lyons, a few days later, frankly admitted the killings to a sergeant of the prison guard, a former acquaintance from his own locality, under circumstances free of coercion suggests strongly that the petitioner had concluded that it was wise to make a clean breast of his guilt and that

his confession to Dunn was voluntary. The answers to the warden's questions, as transcribed by a prison stenographer, contain statements correcting and supplementing the questioner's information and do not appear to be mere supine attempts to give the desired response to leading questions.

The Fourteenth Amendment is a protection against criminal trials in state courts conducted in such a manner as amounts to a disregard of "that fundamental fairness essential to the very concept of justice," and in a way that "necessarily prevents a fair trial." *Lisenba* v. *California,* 314 U. S. 219, 236. A coerced confession is offensive to basic standards of justice, not because the victim has a legal grievance against the police, but because declarations procured by torture are not premises from which a civilized forum will infer guilt. The Fourteenth Amendment does not provide review of mere error in jury verdicts, even though the error concerns the voluntary character of a confession. We cannot say that an inference of guilt based in part upon Lyons' McAlester confession is so illogical and unreasonable as to deny the petitioner a fair trial.

Affirmed.

MR. JUSTICE DOUGLAS concurs in the result.

MR. JUSTICE RUTLEDGE dissents.

MR. JUSTICE MURPHY, dissenting:

This flagrant abuse by a state of the rights of an American citizen accused of murder ought not to be approved. The Fifth Amendment prohibits the federal government from convicting a defendant on evidence that he was compelled to give against himself. *Bram* v. *United States,* 168 U. S. 532. Decisions of this Court in effect have held that the Fourteenth Amendment makes this prohibition applicable to the states. *Chambers* v. *Florida,*

309 U. S. 227; *Canty* v. *Alabama,* 309 U. S. 629; *Lisenba* v. *California,* 314 U. S. 219; *Ashcraft* v. *Tennessee,* 322 U. S. 143. Cf. Green, "Liberty Under the Fourteenth Amendment," 27 Wash. Univ. L. Q. 497, 533. It is our duty to apply that constitutional prohibition in this case.

Even though approximately twelve hours intervened between the two confessions and even assuming that there was no violence surrounding the second confession, it is inconceivable under these circumstances that the second confession was free from the coercive atmosphere that admittedly impregnated the first one. The whole confession technique used here constituted one single, continuing transaction. To conclude that the brutality inflicted at the time of the first confession suddenly lost all of its effect in the short space of twelve hours is to close one's eyes to the realities of human nature. An individual does not that easily forget the type of torture that accompanied petitioner's previous refusal to confess, nor does a person like petitioner so quickly recover from the gruesome effects of having had a pan of human bones placed on his knees in order to force incriminating testimony from him. Cf. *State* v. *Ellis,* 294 Mo. 269; *Fisher* v. *State,* 145 Miss. 116, 110 So. 361; *Reason* v. *State,* 94 Miss. 290, 48 So. 820; *Whitley* v. *State,* 78 Miss. 255; *State* v. *Wood,* 122 La. 1014, 48 So. 438. Moreover, the trial judge refused petitioner's request that the jury be charged that the second confession was not free and voluntary if it was obtained while petitioner was still suffering from the inhuman treatment he had previously received. Thus it cannot be said that we are confronted with a finding by the trier of facts that the coercive effect of the prior brutality had completely worn off by the time the second confession was signed.

Presumably, therefore, this decision means that state officers are free to force a confession from an individual

by ruthless methods, knowing full well that they dare not use such a confession at the trial, and then, as a part of the same continuing transaction and before the effects of the coercion can fairly be said to have completely worn off, procure another confession without any immediate violence being inflicted. The admission of such a tainted confession does not accord with the Fourteenth Amendment's command that a state shall not convict a defendant on evidence that he was compelled to give against himself. *Chambers* v. *Florida, supra; Canty* v. *Alabama, supra; Lisenba* v. *California, supra; Ashcraft* v. *Tennessee, supra.*

MR. JUSTICE BLACK concurs in this opinion.

ADDISON ET AL. *v.* HOLLY HILL FRUIT PRODUCTS, INC.

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

No. 217. Argued January 10, 1944.—Decided June 5, 1944.

1. Section 13 (a) (10) of the Fair Labor Standards Act exempts from the minimum wage and overtime requirements of the Act persons employed, "within the area of production (as defined by the Administrator)," in canning agricultural commodities for market. The Administrator's definition of "area of production" brought within the exemption employees of canneries which obtained "all" of their farm products from within ten miles and had not more than seven employees. *Held:*

   (1) Judicial construction of "all" in the Administrator's definition as meaning "substantially all" was not permissible. P. 610.

   (2) The Administrator's discrimination between canneries having seven or less employees and those having more was unauthorized and invalid. Pp. 611, 618.

2. A judgment of the District Court allowing recovery under the minimum wage and overtime provisions of the Act having been reversed by the Circuit Court of Appeals on the ground that the

Administrator's discrimination based on number of employees was invalid and that the cannery in question was exempt under the remainder of the Administrator's definition, the cause on review here is remanded to the District Court with directions to retain jurisdiction until the Administrator, by making with reasonable promptness a valid definition, acts within the authority granted him by Congress. P. 619.

136 F. 2d 323, remanded.

CERTIORARI, 320 U. S. 725, to review the reversal of a judgment for the complainants in a suit to recover minimum wages, overtime compensation, and liquidated damages under the Fair Labor Standards Act.

Messrs. George Palmer Garrett and *Ellis F. Davis* for petitioners.

Mr. G. L. Reeves, with whom *Messrs. R. B. Huffaker* and *C. O. Andrews, Jr.* were on the brief, for respondent.

By special leave of Court, *Mr. Douglas B. Maggs,* with whom *Solicitor General Fahy, Messrs. Archibald Cox* and *James H. Shelton,* and *Miss Bessie Margolin* were on the brief, for the Administrator of the Wage and Hour Division, Department of Labor, as *amicus curiae,* urging reversal.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This is a suit brought by employees of Holly Hill Fruit Products, Inc. for wage payments under the Fair Labor Standards Act. 52 Stat. 1060, 29 U. S. C. §§ 201 *et seq.* A judgment for the employees, the petitioners here, was reversed by the Circuit Court of Appeals, which held that Holly Hill's employees were by virtue of § 13 (a) (10) of the Act exempted from its scope, in that they were "within the area of production (as defined by the Administrator), engaged in . . . canning of agricultural . . . commodities for market . . ." The court below reached this con-

clusion by holding that a portion of the definition of "area of production" made by the Administrator of the Wage and Hour Division was invalid and that the remaining portion afforded exemption. 136 F. 2d 323. We brought the case here, 320 U. S. 725, to settle a much litigated question of importance in the administration of the Fair Labor Standards Act.

Holly Hill, a citrus fruit cannery employing some two hundred workers, is located in Davenport, Florida, a town with a population of about 650 people. During the two seasons in controversy—November 14, 1938 to May 26, 1939, and November 16, 1939 to March 30, 1940—the Administrator promulgated three regulations based on the scope he gave to his authority under § 13 (a) (10) to define "area of production." The validity of aspects of these regulations is the crucial issue.

By regulation of October 20, 1938, the Administrator defined "area of production" as used in § 13 (a) (10) to include an individual engaged in canning "if the agricultural or horticultural commodities are obtained by the establishment where he is employed from farms in the immediate locality and the number of employees in such establishment does not exceed seven." 29 Code Fed. Reg. (Supp. 1938) § 536.2 (b). Effective April 20, 1939, an alternative definition, applicable to perishable or seasonal fresh fruits and vegetables, brought workers into the "area of production" if employed "in an establishment which is located in the open country or in a rural community and which obtains all of its products from farms in its immediate locality." It was provided that " 'open country' or 'rural community' shall not include any city or town of 2,500 or greater population according to the 15th United States Census, 1930, and 'immediate locality' shall not include any distance of more than ten miles." 29 Code Fed. Reg. (Supp. 1939) § 536.2 (e), pp. 2239–40. Finally, this alternative definition, no longer limited to

fruits and vegetables, was in substance incorporated into the regulations effective June 17, 1939, but in addition it was provided that an individual might also be within the "area of production" "if he performs those [canning] operations on materials all of which come from farms in the general vicinity of the establishment where he is employed and the number of employees engaged in those operations in that establishment does not exceed seven." 29 Code Fed. Reg. (Supp. 1939) § 536.2 (a) (d), p. 2240.

Before coming to the main question, that of the validity of adding a limitation on the allowable number of employees in one canning establishment within the exempted geographic bounds, we shall dispose of the applicability of the Administrator's other exempting definitions to Holly Hill's employees.

The definitions which contain no employee limitation impose two essential conditions on an exemption sought under § 13 (a) (10): the establishment must be located in a city or town having a population smaller than 2,500,[1] and all of its products must be obtained from within ten miles of the establishment. Since Davenport contains less than 2,500 persons, the first condition is met and we need not pass on its validity.[2] As to the second condition, the only evidence introduced indicates that during the 1938–1939 season, about 2% of the fruit used came from beyond ten air miles of the plant, and that for the 1939–1940 season, about 3.75% came from groves more than ten air miles from Holly Hill. Since all of the fruit did not come from within ten miles, Holly Hill did not

[1] The fact that Davenport is within four miles of Haines City, with a population greater than 2,500, led the district court to conclude that Holly Hill was not located in the "open country" or a "rural community." This appears to be a plain solecism. 29 Code Fed. Reg. (Supp. 1939) § 536.2 (e), pp. 2239–40, and § 536.2 (d), p. 2240.

[2] It is conceded that a specific ruling on the population criterion is unnecessary.

satisfy this condition of the Administrator's definitions. There can be no doubt that this conclusion is justified by a literal reading of the regulations, and the court below, in holding that the Administrator's requirement that all the goods come from within ten miles must be construed to mean "substantially all," entered the Administrator's domain. What was said in another connection is relevant here. "Looked at by itself without regard to the necessity behind it the line or point seems arbitrary. It might as well or nearly as well be a little more to one side or the other. But when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the [Administrator] must be accepted unless we can say that it is very wide of any reasonable mark." Mr. Justice Holmes, dissenting, in *Louisville Gas Co.* v. *Coleman*, 277 U. S. 32, 41.[3]

We come then to the validity of the October 20, 1938, regulation and that of the alternative in the June 17, 1939, regulation which provide in substance that an individual is employed within the "area of production" if an establishment obtains the commodities from the "immediate locality" (1938) or all the materials come from the "general vicinity" (1939), and in addition the number of employees in the establishment "does not exceed seven." In short, when Congress exempted "any individual employed within the area of production (as defined by the Administrator)" (§ 13 (a) (10)), did it authorize the Administrator not only to designate territorial bounds for the purposes of exemption but also to except establishments from such exemption according to the number of workers employed.

[3] Holly Hill here attacked the finding of the district court that all of the fruit did not come from within ten miles, but we see no reason to disturb it.

Congress provided for eleven exemptions from the controlling provisions relating to minimum wages or maximum hours of the Fair Labor Standards Act.[4] Employment in agriculture is probably the most far-reaching exemption. Closely related to it is the exemption which is our immediate concern—those workers engaged in processes necessary for the marketing of agricultural products and employed "within the area of production" of

[4] "SEC. 13 (a) The provisions of sections 6 and 7 shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator); or (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce; or (3) any employee employed as a seaman; or (4) any employee of a carrier by air subject to the provisions of title II of the Railway Labor Act; or (5) any employee employed in the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, including the going to and returning from work and including employment in the loading, unloading, or packing of such products for shipment or in propagating, processing, marketing, freezing, canning, curing, storing, or distributing the above products or byproducts thereof; or (6) any employee employed in agriculture; or (7) any employee to the extent that such employee is exempted by regulations or orders of the Administrator issued under section 14; or (8) any employee employed in connection with the publication of any weekly or semiweekly newspaper with a circulation of less than three thousand the major part of which circulation is within the county where printed and published; or (9) any employee of a street, suburban, or interurban electric railway, or local trolley or motor bus carrier, not included in other exemptions contained in this section; or (10) to any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products; or (11) any switchboard operator employed in a public telephone exchange which has less than five hundred stations." 52 Stat. 1067, as amended, 53 Stat. 1266.

such commodities. Such was the phrase and such its conjunction with the exemption for agriculture of which it formed an integral part as the bill passed both Houses, except that the enumerated exempted employments subsidiary to agriculture varied in the two bills.[5] The parenthetical qualification "(as defined by the Administrator)" emerged from the conference committee of the two Houses.[6]

The textual meaning of "area of production" is thus reinforced by its context: "area" calls for delimitation of

[5] The exemptions provided in § 13 (a) (10) did not appear in the bill as reported to the Senate, but in the debate on the floor of that body an effort was made to extend the exemption accorded to agricultural workers, and as passed by the Senate the bill provided that "The term 'person employed in agriculture', as used in this act, insofar as it shall refer to fresh fruits and vegetables, shall include persons employed within the area of production engaged in preparing, packing, or storing such fresh fruits or vegetables in their raw or natural state." 81 Cong. Rec. 7876, 7949, 7957. This provision, varied somewhat by extending its coverage to all "agricultural commodities" (82 Cong. Rec. 1783–1784), remained as part of the definition of "Employee employed in agriculture" (H. Rep. No. 2182, 75th Cong., 3d Sess., p. 2) until shortly before the bill was finally adopted by the House, at which time the so-called Biermann amendment included within the definition of employees engaged in agriculture "individuals employed within the area of production, engaged in the handling, packing, storing, ginning, compressing, pasteurizing, drying, or canning of farm products and in making cheese and butter." 83 Cong. Rec. 7401, 7407. At the conference on the disagreeing votes of the two Houses, the "area of production" provision was given the form in which it was finally enacted, and there the parenthetical phrase "as defined by the Administrator" was inserted after "area of production." 83 Cong. Rec. 9249.

[6] Compare this provision with § 13 (a) (1) exempting employees in "a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator)." For this class, the Administrator is given the authority to define and delimit the "terms" used. But in the same section, subdivision 10 grants authority to define not the term "area," but to define the "area."

territory in relation to the complicated economic factors that operate between agricultural labor conditions and the labor market of enterprises concerned with agricultural commodities and more or less near their production. The phrase is the most apt designation of a zone within which economic influences may be deemed to operate and outside of which they lose their force. In view, however, of the variety of agricultural conditions and industries throughout the country, the bounds of these areas could not be defined by Congress itself. Neither was it deemed wise to leave such economic determination to the contingencies and inevitable diversities of litigation. And so Congress left the boundary-making to the experienced and informed judgment of the Administrator. Thereby Congress gave the Administrator appropriate discretion to assess all the factors relevant to the subject matter, that is, the fixing of minimum wages and maximum hours.

In delimiting the area the Administrator may properly weigh and synthesize all such factors. So long as he does that and no more, judgment belongs to him and not to the courts. For Congress has cast upon him the authority and the duty to define the "area of production" of agricultural commodities with reference to which exemption in subsidiary employments may operate. But if Congress intended to allow the Administrator to discriminate between smaller and bigger establishments within the zone of agricultural production, Congress wholly failed to express its purpose. Where Congress wanted to make exemption depend on size, as it did in two or three instances not here relevant, it did so by appropriate language.[7] Congress referred to quantity when it desired to legislate on the basis of quantity.

[7] See §§ 13 (a) (2) (8) (11) dealing respectively with retail or service establishments, weekly or semi-weekly newspapers and public telephone exchanges.

Congressional purpose as manifested by text and context is not rendered doubtful by legislative history. Meagre as that is, it confirms what Congress has formally said. The only extrinsic light cast on Congressional purpose regarding "area of production" is that cast by the sponsors of this provision for enlarging the range of agricultural exemptions. Senator Schwellenbach frankly stated that the largest apple packing plant in the world would be exempt if the "work done in that plant is as described in the amendment." 81 Cong. Rec. 7877. And in the House, Representative Biermann, while explaining his amendment in somewhat Delphic terms, did indicate plainly enough that he had in mind not differences between establishments within the same territory but between rural communities and urban centers: "may I say that all over this country it has been recognized that there should be a labor differential between the large city and the little town." 83 Cong. Rec. 7401.[8]

From such light as Congress gave us beyond its words, it would appear that in giving exemption to an "area of production," without differentiating as between establishments within such area, Congress might well have considered that a large plant within an area should not be given an advantage over small plants in competing for labor within the same locality, while at the same time it

[8] Representative Biermann was asked whether his amendment "would apply to a packing house located in Iowa and Illinois in the area of production, which employs two or three hundred men." This was his complete answer: "Speaking frankly, I think that is something that would have to be worked out. There are some packing houses in the State of Iowa that this amendment would apply to perhaps; but may I say that all over this country it has been recognized that there should be a labor differential between the large city and the little town." Certainly Mr. Biermann did not give the remotest intimation that "area of production" was meant to convey any idea other than that which area usually conveys.

gave the Administrator ample power, in defining the area, to take due account of the appropriate economic factors in drawing the geographic lines. In any event, Congress did not leave it to the Administrator to decide whether within geographic bounds defined by him the Act further permits discrimination between establishment and establishment based upon the number of employees. The determination of the extent of authority given to a delegated agency by Congress is not left for the decision of him in whom authority is vested.

The wider a delegation is made by Congress to an administrative agency the more incomplete is a statute and the ampler the scope for filling in, as it is called, its details. But when Congress wants to give wide discretion it uses broad language. Thus, in the Interstate Commerce Act, Congress prohibited a lower rate for a longer than a shorter haul, but it gave an authority to the Interstate Commerce Commission, undefined except as the general purposes of that Act implied the basis for affording exemption, to grant relief from this prohibition. *Intermountain Rate Cases,* 234 U. S. 476. Again in the National Labor Relations Act, Congress gave the Board authority to take such action "as will effectuate the policies of this Act." § 10 (c), 49 Stat. 449, 454, 29 U. S. C. § 160 (c). The "policies" of the Act were so broadly defined by Congress that the determination of "the relation of remedy to policy is peculiarly a matter for administrative competence." *Phelps Dodge Corp.* v. *Labor Board,* 313 U. S. 177, 194. In the Fair Labor Standards Act, Congress legislated very differently in relation to the problem before us. To be sure, the Fair Labor Standards Act, like the National Labor Relations Act, was based on findings and a declaration of broad policy. But Congress did not prescribe or proscribe generally and then give broad discretion for administrative relief as in the Interstate Commerce Act or for remedies as in the

National Labor Relations Act. Congress did otherwise. It dealt with exemptions in detail and with particularity, enumerating not less than eleven exempted classes based on different industries, on different occupations within the same industry (the classification in some instances to be defined by the Administrator, in some made by Congress itself, in others subject to definition by other legislation), on size and on areas. In short the Administrator was not left at large. A new national policy was here formulated with exceptions, catalogued with particularity and not left within the broad dispensing power of the Administrator. Exemptions made in such detail preclude their enlargement by implication.

We should of course be faithful to the meaning of a statute. But after all Congress expresses its meaning by words. If legislative policy is couched in vague language, easily susceptible of one meaning as well as another in the common speech of men, we should not stifle a policy by a pedantic or grudging process of construction. To let general words draw nourishment from their purpose is one thing. To draw on some unexpressed spirit outside the bounds of the normal meaning of words is quite another. For we are here not dealing with the broad terms of the Constitution "as a continuing instrument of government" but with part of a legislative code "subject to continuous revision with the changing course of events." *United States* v. *Classic,* 313 U. S. 299, 316.

Legislation introducing a new system is at best empirical, and not infrequently administration reveals gaps or inadequacies of one sort or another that may call for amendatory legislation. But it is no warrant for extending a statute that experience may disclose that it should have been made more comprehensive. "The natural meaning of words cannot be displaced by reference to difficulties in administration." *Commonwealth* v. *Grunseit* (1943) 67 C. L. R. 58, 80. For the ultimate question

is what has Congress commanded, when it has given no clue to its intentions except familiar English words and no hint by the draftsmen of the words that they meant to use them in any but an ordinary sense. The idea which is now sought to be read into the grant by Congress to the Administrator to define "the area of production" beyond the plain geographic implications of that phrase is not so complicated nor is English speech so poor that words were not easily available to express the idea or at least to suggest it. After all, legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him.

The details with which the exemptions in this Act have been made preclude their enlargement by implication. While the judicial function in construing legislation is not a mechanical process from which judgment is excluded, it is nevertheless very different from the legislative function. Construction is not legislation and must avoid "that retrospective expansion of meaning which properly deserves the stigma of judicial legislation." *Kirschbaum Co.* v. *Walling,* 316 U. S. 517, 522. To blur the distinctive functions of the legislative and judicial processes is not conducive to responsible legislation.

We agree therefore with the Circuit Court of Appeals in holding invalid the limitations as to the number of employees within a defined area. But we cannot follow that Court in deleting this part of the administrative regulation and, by applying what remains of the definition, exempting Holly Hill's employees from the requirements of the Act. Since the provision as to the number of employees was not authorized, the entire definition of which that limitation was a part must fall. We can hardly assume that the Administrator would have defined "area of production" merely by deleting the employee pro-

vision, had he known of its invalidity. It would be the sheerest guesswork to believe that elimination of an important factor in the Administrator's equation would have left his equation unaffected even if he did not here insist upon its importance. It is not for us to write a definition. That is the Administrator's duty.

Concluding, then, that when Congress granted exemptions for workers within the "area of production (as defined by the Administrator)" it restricted the Administrator to the drawing of geographic lines, even though he may take into account all relevant economic factors in the choice of areas open to him, the regulations which made discriminations within the area defined by applying the exemption only to plants with less than seven employees are *ultra vires*. But that leaves the difficult problem of the proper disposition of the case. It is our view that the case should be remanded to the district court with instructions to hold it until the Administrator, by making a valid determination of the area with all deliberate speed, acts within the authority given him by Congress.

Such a disposition is most consonant with justice to all interests in retracing the erroneous course that has been taken. Neither law nor logic dictates an "either-or" conclusion—that is, a conclusion that the employment in these industries is entirely exempt because the Administrator misconceived the bounds of his regulatory powers although plainly enough he meant to exercise them so as not to withdraw all these employments from the requirements of the Act, or that employment in these industries is subject to the Act because no exception excludes it. The two opposing alternatives do violence to the law as Congress wrote it. To hold that all individuals "engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy

products" are exempt from the operation of the Act is obviously to fly in the face of Congressional purpose. The Act exempts some but not all of the employees engaged in these industries, and it is not for us now to say that all are exempt. So to hold would postpone the operation of the Act in the enumerated instances for at least six years beyond the date fixed by Congress. Equally offending to the purposes of Congress and therefore to fairness in this situation is the suggestion that if the exemption falls all employees engaged in the designated industries are covered by the Act.

The accommodation that we are making assumes, what we must assume, that the Administrator will retrospectively act as conscientiously within the bounds of the power given him by Congress as he would have done initially had he limited himself to his authority. To be sure this will be a retrospective judgment, and law should avoid retroactivity as much as possible. But other possible dispositions likewise involve retroactivity, with the added mischief of producing a result contrary to the statutory design.

Such an adaptation of court procedure to a remolding of the situation as nearly as may be to what it should have been initially is not unprecedented. Such was essentially the procedure which was devised to unravel the skein in *United States* v. *Morgan,* 307 U. S. 183. The Court did not feel itself balked by the kind of considerations that seemed controlling to a Baron Parke. The creative analogies of the law were drawn upon by which great equity judges, exercising imaginative resourcefulness, have always escaped the imprisonment of reason and fairness within mechanical concepts of the common law. See, *e. g., Atlantic Coast Line* v. *Florida,* 295 U. S. 301; *Inland Steel Co.* v. *United States,* 306 U. S. 153; and for some examples of this approach see *Graf* v. *Hope Building Corp.,* 254 N. Y. 1, 7 (Cardozo, Ch. J., dissenting). That

such were the large considerations that guided decision in the *Morgan* case the opinion makes clear:

". . . in construing a statute setting up an administrative agency and providing for judicial review of its action, court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in the performance of its prescribed statutory duty without regard to the appropriate function of the other in securing the plainly indicated objects of the statute. Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through coordinated action. Neither body should repeat in this day the mistake made by the courts of law when equity was struggling for recognition as an ameliorating system of justice; neither can rightly be regarded by the other as an alien intruder, to be tolerated if must be, but never to be encouraged or aided by the other in the attainment of the common aim." 307 U. S. at 191.

If it be said that in the *Morgan* case the Court was dealing with a fund in court—irrelevant though that be to the governing principles of that decision—no such constriction can be made of the import of our decision in *General American Tank Car Corp.* v. *Terminal Co.*, 308 U. S. 422. That, like this, was an action at law and not a suit in equity involving a *res*. The respondent was seeking to recover a sum admittedly due under a car-leasing agreement with petitioner. The Interstate Commerce Commission urged that since the Commission had not, as the law required, passed upon the validity of the practice involved in the agreement, the district court was without jurisdiction. And so, technically speaking, the district court was. But this Court remanded the case to the district court with instructions to hold the cause "pending the conclusion of an appropriate administra-

tive proceeding." The petition for rehearing claimed that our decision involved retroactivity. 309 U. S. 694. So it did. But as against retroactivity we balanced the considerations that made retroactivity seem the lesser evil.

In short, the judicial process is not without the resources of flexibility in shaping its remedies, though courts from time to time fail to avail themselves of them. The interplay between law and equity in the evolution of more just results than the hardened common law afforded, has properly been drawn upon in working out accommodating relationships between the judiciary and administrative agencies. And certainly in specific cases, such as those already referred to and in this, it is consonant with judicial administration and fairness not to be balked by the undesirability of retroactive action any more than courts have found it difficult to sanction legislative ratification of acts originally unlawful, *United States* v. *Heinszen & Co.*, 206 U. S. 370; *Tiaco* v. *Forbes*, 228 U. S. 549; *Graham & Foster* v. *Goodcell*, 282 U. S. 409; *Hirabayashi* v. *United States*, 320 U. S. 81, 91, or retroactively to give prior legislation new scope. *Paramino Lumber Co.* v. *Marshall*, 309 U. S. 370. And in *habeas corpus* proceedings, even though a petitioner was unlawfully in custody, this Court has allowed continued retention of custody until a valid order could be made. *Mahler* v. *Eby*, 264 U. S. 32; *Tod* v. *Waldman*, 266 U. S. 113.

Finally, there is no difficulty upon such a remand in requiring the Administrator to promulgate his definition. This Court has on several occasions required the Interstate Commerce Commission to take jurisdiction when it declined to do so or to discharge a duty laid upon the Commission by statute. *Interstate Commerce Commission* v. *Humboldt Steamship Co.*, 224 U. S. 474; *Louisville Cement Co.* v. *Interstate Commerce Commission*, 246 U. S. 638. See also *Kansas City Southern Ry. Co.* v. *Interstate Commerce Commission*, 252 U. S. 178. The district court

would not be telling the Administrator how to exercise his discretion but would merely require him to exercise it. It is a remedy against inaction.

Holly Hill also contended that if it is not entirely exempt from paying the overtime rates here awarded, it is entitled to the advantage of the partial seasonal exemptions afforded by §§ 7 (b) (3) and 7 (c). The district court ruled adversely to Holly Hill on these claims, but the Circuit Court of Appeals did not reach them. It will be time enough to reach them if they survive the disposition now made of this case.

Accordingly, the case is remanded to the district court to proceed in conformity with this opinion.

So ordered.

MR. JUSTICE ROBERTS:

I agree with the opinion of this court and with the opinion of the Circuit Court of Appeals that the Administrator was without power (if "area of production" is to have any sensible meaning) to exclude from the area and from the operation of the exemption workers in a processing plant clearly within the area on the ground that a certain number of employes worked in the plant. If Congress, when it said that the area of production should be defined by the Administrator, meant that that official should have a roving commission to create exemptions from the Act, the entire provision must fall as an unconstitutional attempt to delegate legislative power. We should never, however, construe an Act in a sense which would render it unconstitutional if a different and permissible construction will save it.

The legislative history makes it clear enough that Congress wished to exempt plants processing agricultural commodities in the locality of the farms which produced the commodities. Realizing that the ascertainment of the facts in particular cases would be essential to definition or

delimitation of the area served, Congress, by the phrase "as defined by the Administrator," meant to permit him to draw lines in delimitation of areas appropriately to correspond to the facts. I construe the word "define," in this context, to mean "ascertain the facts and announce the result of such ascertainment." The opinions of the court below elaborate this view.

I think the Administrator's order may well be allowed to stand with the illegal and unauthorized feature of it deleted. This is what the Circuit Court of Appeals decided and I believe it was right. Other features of the order were not, and are not, attacked and if, for the future, the Administrator desires, in other aspects, to amend his order, there is nothing to prevent. This would lead to affirmance of the judgment of the Circuit Court of Appeals and, if I could make my vote effective to that end, I should vote for affirmance. The other members of the court, however, are for reversal, but are divided on the question whether the judgment of the District Court should be affirmed or the case held in that court pending amendment of the order by the Administrator. Entertaining the views which I do, I cannot vote to affirm the judgment of the District Court, but that will be the effect of my action if I vote simply to reverse the judgment of the Circuit Court of Appeals. While I think none of the authorities cited in the opinion of MR. JUSTICE FRANKFURTER justify the procedure there outlined, I am constrained to vote in accordance with his opinion.

I am clear that, if the Administrator is to be permitted to amend his order, or to enter a new order effective from the date of the one under attack, he may not resort to gerrymandering or to any other device to accomplish by indirection what the decision holds he cannot do directly. I personally believe the scope of his discretion is more limited than some of my colleagues think and I do not wish my concurrence in the remand of the case to the

District Court, to be there held pending the promulgation of an amended order, or a new order, to be taken as approving in advance the views expressed as to the extent of the Administrator's discretion.

MR. JUSTICE RUTLEDGE, with whom MR. JUSTICE BLACK and MR. JUSTICE MURPHY concur, dissenting:

In my opinion the Administrator has defined "area of production" in a valid manner, and therefore the employee petitioners should prevail. But if, as the majority hold, his definition is not valid, then the exemption is not operative, and for that reason the petitioners likewise should prevail. I dissent, therefore, from the Court's conclusion that the definition is void. I dissent equally from the wholly novel disposition it makes of the cause on that hypothesis, in remanding it to await the Administrator's retroactive redetermination of the parties' rights.

I.

The basic issue, as the case was presented, is whether the Administrator can include in the definition not only spacial limits but also a limit upon the number of employees in exempted establishments. The Administrator included this factor in his first definition; [1] later reexamined it in extensive hearings; [2] concluded on the record thus made that no purely geographical definition could be conformed to the major legislative policies announced in the statute; [3] has retained it in each of several later

[1] Promulgated October 20, 1938, effective four days later. 3 Fed. Reg. 2536.

[2] See Hearings on Proposed Amendment of Section 536.2 (area of production) of Regulations issued under the Fair Labor Standards Act of 1938, Wage and Hour Division, Department of Labor Ref. Nos. 54; 73; 162a; 162b; 162c.

[3] Tests proposed and considered included: the mapping of producing territories; a flat mileage-population definition; a "first concentration point" criterion; a standard which would include only estab-

definitions, varying in other details, framed after extensive hearing; [4] and now earnestly insists it, or an equivalent limitation on size of the plant, must be included, unless any definition he may make is to work havoc with some major policy of the Act, either by exempting large numbers of industrial employees [5] or by creating disturbances of competitive situations, both for farmers and for canners and packers,[6] which the statute expressly sought to avoid.

The Administrator's task is highly complex. It involves defining exemptions for employees throughout the nation engaged in "handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products." § 13 (a) (10). All these operations follow immediately upon harvest and removal from the field or milking. All can be done on the farm and frequently are done there, but may be done elsewhere, often in factories. All consist in the first stages of preparation for market.

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lishments which handled and prepared for the account of the farmer commodities to which he retained title. All these and others were rejected by successive administrators, after being urged and opposed by industry representatives, as presenting insuperable obstacles to carrying out the statute's major policies.

[4] Compare the definition promulgated October 20, 1938, 3 Fed. Reg. 2536, with the amendments of April 20, 1939, 4 Fed. Reg. 1655; June 17, 1939, 4 Fed. Reg. 2436; October 1, 1940, 5 Fed. Reg. 2647; and April 1, 1941, 6 Fed. Reg. 1476.

[5] Cf. Department of Labor Release R.–226, March 18, 1939; G.–60, July 24, 1940.

[6] A flat mileage definition was in force during part of the time material in this case, but was abandoned after its effects, by way of creating serious unfair discrimination between competing establishments and narrowing grocers' outlets, became evident. Cf. Department of Labor Release G.–60, July 24, 1940.

But whether the specified operations will be done on the farm, as part of the farm work or away from it, and in either small neighborhood establishments or in larger industrial plants, will depend upon a variety of factors as great as that which comprehends the whole vast process of starting the nation's crops, over 300,[7] on their respective marketing courses. The initial steps in marketing such widely different products as cotton and apples; tobacco and milk; potatoes and citrus fruits; legume crops, wheat, corn and other grains, on the one hand, and tomatoes, strawberries, truck garden products, etc., on the other, are within the delegation.

The mere enumeration of these instances indicates some of the variables involved. Others add to the difficulty. Highly perishable crops, as fruits and vegetables, require immediate action in these stages of handling. Cotton, grains, root crops, etc., less perishable, may wait longer on the farm, some for months, before these processes become necessary. Some crops are highly concentrated for production in a few regions, such as citrus fruits in Florida, Southern Texas, and Southern California, but are marketed on a nation-wide scale. Others have regional areas of production, like cotton in the South, celery in Michigan, tobacco in the border states and a few northern regions, yet depend on the national market. Still others have regions of greater or less concentration, but are grown all over the nation, like wheat and other grains, apples, potatoes, etc.

Obviously, "area of production," in the sense of where the commodity is produced for purposes of commercial marketing, will vary from the whole nation, in the case of the more common grains, fruit crops and root crops, down to a few highly concentrated regions or areas in

[7] Cf. Farm and Ranch Schedules, U. S. Census of Agriculture, 16th Census of the United States, 1940.

the case of others more dependent upon special climatic and soil combinations. And between the extremes of nation-wide and highly localized production are all ranges of sectional and regional production areas.[8]

Respondent regards the "area of production" as the whole region where a commodity is grown, and therefore says the Administrator has no more to do than locate the existing limits of these areas. By this criterion the South, perhaps including California, would be the unalterable "area of production" for cotton, the whole nation for eggs, wheat, corn, etc. This conception would nullify the delegation, making of the Administrator merely a surveyor in the wrong place. Congress clearly was not making him only a finder of fact, namely, of the geographical limits surrounding regions where 300 different commodi-

[8] As the legislative history shows, cf. text *infra* at notes 13–16, there was fairly general agreement that some part of the work specified in § 13 (a) (10) should be exempt, whether or not it was done on the farm. But beyond this, a great variety of opinion existed both as to how far the exemption should go and as to the economic basis for it. Among the latter were views that the exemption should be made because the farmer bore the cost of the work, cf. 81 Cong. Rec. 7656, 7877, 7880; or because many farmers in fact performed it on their farms and as part of their operations, cf. § 3 (f), 52 Stat. 1060; 81 Cong. Rec. 7657–7659; or because others who had to resort to independent contractors to have it done would be discriminated against unless the work were exempt; cf. 81 Cong. Rec. 7656, 7658–7660, 7876. Some legislators were concerned to have the exemption apply whether the work were done in large or small plants; others to limit it to small ones only; and still others to secure it completely for particular crops. Numerous amendments were tendered, but for the most part defeated. It was not until the Conference Committee's report was framed that the problem was solved by referring it to definition by the Administrator. But even proponents of the amendments which were adopted recognized that the problem was one which "the board . . . would have to decide," 81 Cong. Rec. 7878, "something that would have to be worked out," 83 Cong. Rec. 7401.

ties are produced. Such a view would exempt all employees engaged in the operations specified in § 13 (a) (10).

The same objections forbid regarding the "area of production" as the region from which the particular plant purchases its raw material. The only substantial difference would be to make the Administrator's fact-finding task a more impossible one. A definition would be required for every plant engaging in any of the specified operations for each of the more than 300 agricultural and horticultural commodities produced annually in the United States. Congress hardly could have intended to load upon the Administrator a task of these infinite proportions. Nor did it intend the employer to define its own exemption, or to make that exemption automatic. Congress intended the Administrator to define the area of production. It did not at the same time intend to overwhelm him with making myriads of particular and highly variable definitions for each operating unit, or to make him merely a runner of courses and distances, whether large or small. It rather intended him to make practical, workable and therefore generic and stable definitions.

It follows necessarily that the Administrator's power is discretionary and the important questions are to what extent and in what manner may his discretion work. Neither subdivision (a) (10) nor § 13 as a whole supplies these answers. The section itself does not supply all the standards necessary for definition of the term. At most it affords direction to exempt some but not other employees engaged in the specified activities and that those exempted must be within the "area of production." This necessarily includes some region where the commodity is produced. But since that region is an unknown quantity and so also is the question what employees within it are to be exempted, solutions must be found either in other

provisions of the statute or in the legislative history, unless the delegation is to fall for want of standards.

The statute itself furnishes clear guides for directing the Administrator. He is confined, as has been noted, by subsection (a) (10) to employees engaged in the specified initial operations of marketing. They must work within some producing region. Apart from the exemption they are within the Act's coverage, but close to the major line it draws between farm workers, who are excluded from, and industrial labor, which is within its coverage. Depending, not upon what they do, but upon where and how they do this work, they would fall on one side or the other of this line and within or without the incidence of the evils the Act sought to eradicate. These were "the existence, *in industries* . . . of *labor conditions* detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers. . . ." [9] Congress exercised its authority over commerce, "to correct and as rapidly as practicable to eliminate the conditions above referred to *in such industries* without substantially curtailing employment or earning power." § 2 (a), (b). (Emphasis added.)

The broad line between farming and industry runs throughout the Act.[10] It is the statute's basic line of

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[9] Section 2 (a). These conditions Congress found burden commerce, lead to labor disputes obstructing it, interfere with fair and orderly marketing, and spread themselves by causing the channels of commerce to be used for marketing among the several states the goods produced under them. *Ibid.*

[10] " 'Industry' means a trade, business, industry . . . in which individuals are gainfully employed." § 3 (h). " 'Agriculture' includes farming in all its branches . . . and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market." § 3 (f). Section 5 provides for industry committees and their functioning, to which the

policy between coverage and noncoverage. The line not only is pertinent to each of the statute's provisions but, where the contrary is not clearly and unambiguously stated, it is controlling. There can be no assumption that Congress intended employees in one group to be transferred to or treated as being in the other where no such clear mandate can be found.

In determining what Congress intended by the delegation, it is crucial to keep in mind that, whatever decision the Administrator may make and by whatever criteria, the effect of his action must be to put some employees on one side of this line and others on the opposite side. That consequence he cannot escape. And, because he cannot avoid it, the line is pertinent and material to his choice, as it is to all others he must make in performing his duties. It is the statute's lodestar. The distinction between farming and industry is the essence of his determination. An "area of production" determined without reference to this distinction would contradict, not enforce, the statute's basic policy. And this appears, not solely from the policy itself and the effects of failure to take it into account, but from a consideration of other determinations the Act confides to the Administrator and of the manner in which it requires him to make them.

Thus, in issuing minimum wage orders and industry classifications, he and the industry committees must have "due regard to economic and competitive conditions," and act so as not to "substantially curtail employment" or "give a competitive advantage to any group." And there is a specific prohibition against fixing wages or classifications "solely on a regional basis." Rather the governing criteria are to be competitive conditions, wages for com-

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Administrator submits data and from which he receives recommendations and reports which he must approve before making them effective in the form of minimum wage rates and industry classifications. Cf. § 8.

parable work fixed by collective bargaining or by voluntary minimum wage plans. § 8 (b), (c), (d). The statute's primary design was to bring industrial workers under its protections and to eliminate as rapidly as possible the substandard conditions of such labor. But this was to be done with an eye also to two other matters: one, that by too rapid advance employment be not curtailed; and, two, that competitive conditions in the affected industries be not unduly disturbed or competitive advantages created. Cf. § 2.

These purposes were inescapably pertinent to the problems of exemption arising under § 13 (a) (10). They were likewise pertinent to other exemptions, cf. § 7 (c) and compare § 7 (b), and to still other delegations the statute confided to the Administrator. That Congress did not burden the books with "an itemized catalogue" [11] of standards in each instance of delegation, gives no basis for believing that what permeated all else found these parts insulated. The Administrator clearly had power, and more, the duty, to take account of these factors.

If so, he could not escape the question of size. And indeed the Court does not deny this. Size certainly is not irrelevant to distinguish within any group which may do essentially the same work in two different ways, one the farming way, the other the industrial one. It is not irrelevant to economic dislocations or to curtailments of employment. And it is relevant to these things as much within as without an area of production.[12]

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[11] *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 219.

[12] Respondent, however, consistently with its "fact-finder" or "surveyor" theory of the Administrator's function, says the purpose was not to distinguish, within the specified activities, between farmers and industrial workers; it was rather to go a step further and exempt the latter as well, provided only they were within an area of production as respondent conceives it. That the Administrator may exempt some, or perhaps many, who are in fact industrial workers, because

The legislative history discloses one object of the exemption as originally proposed was to protect small farmers, who are unable to perform these operations at the farm and therefore are dependent upon whatever nearby establishments may exist, whether large or small. Various members of the Senate and of the House sponsored amendments for this purpose.[13] As the bills went to conference each contained flat exemptions, substantially covering the activities now specified in § 13 (a) (10). But the debates in both houses show that even the sponsors of the various amendments differed or were doubtful concerning whether the amendments would give exemption to large plants.[14] There was general agreement that

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they are doing these activities under factory conditions and methods, may be conceded. That he must exempt all of them, or some larger number than his judgment, formed after considering the facts, the statute's policies, and the effects of what he may do, finds proper, cannot be accepted. Respondent claims an exemption fixed by the Act. The statute has given it one only when, in the Administrator's judgment, not arbitrarily formed, it meets the conditions which he finds will execute the legislative policy.

[13] The Senate's first suggestion of "area of production" came from Senator Copeland, 81 Cong. Rec. 7656, although Senator Schwellenbach became the chief proponent of the concept there. Senator Black, sponsor of the bill, was concerned with the scope of "area" and sought a more accurate term for limiting its effect so as not to exempt workers in large plants, cf. 81 Cong. Rec. 7656–7660, 7876–7878, and others expressed opinions that large operators should not be exempted. For portions of the discussion on the Senate floor see also 81 Cong. Rec. 7648–7673, 7876–7888, 7927–7929, 7947–7949.

In the House of Representatives, the sponsor of the bill was Representative Norton. Chief proponent of the amendment involving "area of production" was Representative Biermann. Cf. 83 Cong. Rec. 7325–7326, 7401–7408.

[14] Responding to inquiry whether packing houses in Iowa and Illinois would be exempted by his amendment, Representative Biermann said: "Speaking frankly, I think that is something that would have to be worked out." 83 Cong. Rec. 7401. Senator Schwellenbach clearly recognized his amendment would exempt large as well as small packing

small ones should be relieved from coverage.[15] Senator Reynolds went further and proposed several amendments to relieve all small plants from the Act's provisions, not merely those engaged in the limited operations specified in the bills or § 13 (a) (10). These were defeated.[16] And there was vigorous demand, from the sponsor of the bill in the Senate and others,[17] for restricting the scope of the amending exemptions to small plants. These differences were not settled on the floor of either house. But when the bills came to conference, they were resolved by changing the flat exemptions into discretionary ones to be defined by the Administrator.

Since the delegation feature did not appear until the conference report and there is little in that report or in

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and similar plants, 81 Cong. Rec. 7877, 7878, but expressed the opinion there would not be "any large or enormous plants" in the specified operations. In response to Senator Black's inquiry concerning the indefinite effect of "area" without further definition, he said: "I gave considerable thought to that. I do not believe it is possible, and that is something which the board, which has been accused of receiving too much power, would have to decide. It would have to provide a definition of 'immediate production area.'" Cf. 81 Cong. Rec. 7876–7878.

[15] See the discussions cited in notes 8, 13 and 14.

[16] Cf. 81 Cong. Rec. 7948. Respondent argues from this that the intent of Congress was shown not to authorize the Administrator, by the later conference amendment, to distinguish among plants within the "area of production" on the basis of size. The argument, however, ignores the fact that the amendments proposed by Senator Reynolds were drawn and intended to exempt from the statute's operation *all* plants having fewer than the number of employees (the amendments varied from five to ten in this respect), not merely plants engaged in the particular marginal operations specified in the various forms the Schwellenbach Amendment took during the debate. The conclusion to be drawn from the rejection of the Reynolds Amendments is not that the Senate intended to exempt all plants, large and small, covered by the Schwellenbach Amendment or by the form taken by § 13 (a) (10) in conference, but rather that the Senate was unwilling to except even all plants having as few as five employees from the statute's coverage.

[17] Cf. notes 13 and 14, *supra*, and the cited discussions.

the debates upon it to add light, the previous discussions are wholly inconclusive, except in one respect. This was to show that there was great variety and complexity of opinion, and that this revolved around the question of size. That question continued unresolved up to conference and was resolved there, not by decision either way, but by reference to the Administrator. It must be taken therefore that the purpose was to give him discretion to make the necessary choices between the conflicting viewpoints as the facts of particular situations would give occasion for doing. And, it would seem, the preponderance of sentiment in favor of exempting small plants, but not large ones, except in occasional instances where this would be necessary to protect the small farmer, well could be taken as his guiding light. The legislative history, therefore, in so far as it sheds light at all, clearly is not inconsistent with what the Administrator has done, but on the contrary supports it.

The Court does not find the Administrator acted improperly by taking these considerations into account. He only must not state them in his definition. And this matter of mere formulation is the crux of the case. The definition must be made "in relation to the complicated economic factors that operate between *agricultural labor conditions* and *the labor market of enterprises* concerned with agricultural commodities and more or less near their production." (Emphasis added.) The Administrator is given "appropriate discretion to assess all the factors relevant to the subject matter," which is essentially one of "economic determination," too complex for litigation to solve. He "may properly weigh and synthesize all such factors."

In making his economic synthesis, however, the Administrator must state his results only in surveyor's terms. Congress, when it granted the exemption, "restricted the Administrator to the drawing of geographic

lines, even though he may take into account all relevant economic factors. . . ." The "zone within which economic influences may be deemed to operate and outside of which they lose their force" cannot be defined directly and purposively to draw the line between the zone of farming and the zone of industry. This must be done only indirectly, in an awkward, roundabout way.

Nothing prevents the Administrator from drawing the lines as he thinks best, unless the suggestion of the specially concurring opinion is followed that they must be drawn in regular circles or squares. The courts have no business to tell him where to put them. He can define distance by air lines or by road lines to market. He can run the lines around big towns, but not around big factories. Baltimore could be excluded, but not Martin's bomber plant or one like it, in size and methods, for processing or canning fruits and vegetables. Towns may go out, though surrounded by truck farms, but not commercial canneries. Residences, apparently, must surround the cannery. In short, the Administrator can draw whatever map lines he thinks will achieve the appropriate economic adjustments, except one which leaves out perhaps the biggest canning factory of all, and no court can interfere. I do not believe that Congress, when it gave the Administrator his complicated task and authorized him to consider all the relevant and complex economic factors, not only denied him the power to execute those considerations in his action, but compelled him to frustrate them in defining "area of production." The Court does not deny the Administrator may consider the size of the plant, and make this even the crucial factor in his decision. Yet it would only impede or defeat his judgment, formed on proper considerations, as well as the statute's purposes, to require him to state the exemption, not simply in the terms best chosen to express his meaning clearly and definitely, but in others couched in pure though tortured geography. According to his experience

and confirmed judgment, shared by successive administrators and never reversed or modified, to require the latter method of formulation would make his task well nigh impossible or, if not that, incapable of being discharged without doing violence to the Act's major purposes and standards.[18]

So much of authority and power to defeat the statute's intended operation cannot be given to mere verbalism, more especially to one word, torn in context, function and purpose from the remainder of the Act. "Area," it is true, means area. But "area of production" means more. "The notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification. It is a wooden English doctrine of rather recent vintage . . . to which lip service has on occasion been given here, but which since the days of Marshall this Court has rejected, especially in practice. . . . A statute, like other living organisms, derives significance and sustenance from its environment, from which it cannot be severed without being mutilated." [19] And so does a section in a statute. "Area of production" as used in § 13 (a) (10) means an exemption, limited to persons performing the specified operations within a producing region, but selected from all so situated by an exercise of the Administrator's judgment in accordance with the statute's prime objects and chief limitations, among which necessarily is the size of the plant. If that is so, I see no good reason for forbidding the Administrator to say so.

It follows the Administrator has not improperly exercised his function, the definitions are valid, and respondent's employees were not exempt from the statute's provisions.

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[18] Cf. notes 1–6, *supra*, and text.

[19] *United States* v. *Monia*, 317 U. S. 424, dissenting opinion at 431–432.

II.

But if the definitions were invalid, as the Court holds, I could not agree to the extremely novel disposition it makes of the case. We are dealing with an exemption, not with the statute's primary coverage. Concededly the respondent employer was liable to petitioners for the minimum wages, overtime pay and statutory penalties under § 16 (b), if they were not exempt under § 13 (a) (10) or some other exemption. Ordinarily exemptions are not favored. Coverage, not exemption, is preferred. If the exemption is dubious, it is not given effect. If ambiguous, it is resolved strictly in favor of the statute's application. *Spokane & Inland Empire R. Co.* v. *United States,* 241 U. S. 344; *Piedmont & Northern Ry. Co.* v. *Interstate Commerce Commission,* 286 U. S. 299, 311–312; *McDonald* v. *Thompson,* 305 U. S. 263. In this case, if the exemption does not apply, the petitioners are within the statute and respondent is liable on their claims.

To escape liability, respondent has the burden of showing the exemption does apply. But to do this it cannot merely show the definition of the Administrator is invalid. That would only leave itself and the petitioning employees subject to the Act's provisions, which require the payment of the claims. Respondent's dilemma therefore is both sharp and real. If the definition is valid, it does not cover these employees and respondent is liable to them. If the definition is invalid, clearly it exempts no one, petitioners are covered by the Act, and the respondent must pay. This is true whether the reason dictating invalidity is want of standards, application of the wrong ones, or merely formulating the result in the wrong way. This dilemma presents the alternative which respondent, the Court of Appeals and this Court have attempted to avoid in order, so it is said, to escape an "either-or" conclusion, which is the kind the law almost always must make. It is one from which there is no

escape without exercise of inventive genius beyond the right of either court to apply and which, as applied here, makes the cure worse than the disease.

Respondent's invention, and likewise the Court of Appeals', was to strike the limitation on the number of employees and apply the remainder of the definition. This but emasculates it. Hence all here, but one, are agreed such liberty cannot be taken with the Administrator's function. This Court's invention, however, does it equal or greater violence, first, as I think, in emasculating it; second, and lacking even more in justification, in requiring it to be exercised with backward-reaching effect.

If the Court had sought its escape in finding that there were no standards to control the Administrator's discretion or that he had applied the wrong standards, one might understand its refusal to sustain the definition. But that too would mean that petitioners would recover. The Court does neither. There is no claim, except a semblance of suggestion in a separate opinion, that the statute supplies no standards and therefore gives the Administrator "a roving commission to create exemptions." Nor is there one that the wrong standards were used. The invention is called forth only to correct a mode of statement.

If that were all, there would not be much room to complain. But, in addition to compelling the Administrator to make the definition in a manner which frustrates his function and the statute's objectives, or only partly fulfills them, the decision opens the door to a general expansion of the novel, and I think unauthorized, practice of retroactive administrative determination of private rights. That is true, unless these petitioners are to be specially treated, although less than a majority of the Court agree that the authorities cited to sustain it justify the procedure outlined. But if the procedure is justified in this case, it is in any other where an administrator

mistakenly includes in a regulation a factor later held to make it invalid. No reason stated makes this case a special one. And there is none. It cannot be taken that these parties are to be singled out for unique treatment, merely in order to avoid the normal legal consequences of invalidating administrative action. Hence, every interest affected by such action now must take two risks in place of one: first, the normal, inescapable risk that the governing regulation may be held invalid; second, in that event, the novel one that some future regulation, a wholly unknown quantity, will relate back over an indefinite time to create entirely new or different and unexpected rights and liabilities.

Of course there must be room for creative analogies in the law to give the desired escape from mechanical concepts and permit shaping its remedies. But we are as often told that Congress should perform the creative act in Congress' field. This should be most true where what we are called upon to recreate is Congress' own handiwork. If Congress intended the Administrator to act retroactively, Congress wholly failed to express this purpose.

Moreover, it is not remedies but rights which are thus refashioned. And not equity but law remolds them. Who knows, before the redefinition, what persons may be included in its coverage? Or whether it may not have to be made again? The same persons cannot be included. Otherwise there would be no point to this decision. If the Administrator can rephrase the same coverage in wholly geographic terms, apart from delay the only result will be to have criticized his language. If he cannot do this some persons, and no one can tell in advance how many, will be deprived altogether of rights, others given them who had none. So with liabilities.

The innovation would be serious if confined to this case or this Act. It is beyond prediction what the conse-

quences may be, of uncertainty, or hardship, of injustice in deprivation of rights, in windfalls of right to others, in laying on new and wholly unexpected liabilities and in relieving from anticipated ones, if retroactive administrative refashioning becomes the general practice. The alternative, either to sustain or to hold void the regulation, and fix the rights accordingly, is not only the accepted and established one. It is the only one by which men can know the risks they assume at the time they become subject to them.

Retroactivity is not favored in law. For this there are sound reasons, in some cases constitutional ones. Cf. *Forbes Pioneer Boat Line* v. *Board of Commissioners,* 258 U. S. 338; *Ochoa* v. *Hernandez y Morales,* 230 U. S. 139. There are few occasions when retroactivity does not work more unfairly than fairly. Congress, the state legislatures and the courts apply the principle sparingly, even where they may. Cf. *Graham & Foster* v. *Goodcell,* 282 U. S. 409; *United States* v. *Heinszen & Co.,* 206 U. S. 370. Seldom if ever therefore may administrative or executive authority to apply it be inferred from legislation not expressly giving it. Compare *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.,* 284 U. S. 370; *Helvering* v. *R. J. Reynolds Tobacco Co.,* 306 U. S. 110. But, in any event, whatever corrective needs may prompt and vindicate a grant of such authority in other circumstances are not present in this application. Yet, if this decision is to mark the beginning of a general pattern, such authority now bids fair to become a common characteristic of administrative action.

The administrative process has increasingly important functions in our legal system. Ordinarily it does enough if it takes care of today and tomorrow. When it begins to add yesterday, without clear congressional mandate, the burden may become too great. In any event, that has not heretofore generally been considered its task. If that task

is to be added, the addition should be made by the body whence administrative power is derived, not by this Court's imaginative resourcefulness.

Finally, respondent has not asked for this retroactive "relief." And this may be for entirely good reasons of its own. What respondent sought in the District Court, what it secured in the Court of Appeals, and what it has sought here, but clearly is not entitled to have, is a judicial declaration that, as a matter of law, its employees would have been exempt under any valid definition the Administrator might have adopted. In effect, this is a claim of exemption by the statute itself, one which would nullify the Administrator's power. Relief not sought should not be forced on respondent by an exercise of this Court's inventive genius. More especially should this not be done on the Court's own motion, without any of the parties having had an opportunity to consider or discuss it in the briefs or in argument. Under such a policy, generally followed, a litigant never can know with what kind of gift horse he may come out, even if successful. And in this case the parties have faced the double uncertainty, wholly unanticipated, of creation here and re-creation by the Administrator, when the latter undertakes relieving the District Court of the duty to await his further action.[20]

The judgment of the Court of Appeals should be reversed and the cause should be remanded to that court for determination of the other issues in the case.[21]

MR. JUSTICE DOUGLAS joins in that part of this dissent which would hold that the Administrator has defined "area of production" in a valid manner.

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[20] The Administrator is not a party to this suit, but has appeared and participated here as *amicus curiae*.

[21] In view of its disposition of the case, the Court of Appeals did not consider respondent's defenses under §§ 7 (b) and 7 (c) of the Act, on both of which the District Court held for petitioners.

POLISH NATIONAL ALLIANCE OF THE UNITED STATES OF NORTH AMERICA *v.* NATIONAL LABOR RELATIONS BOARD.

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

No. 226. Argued January 11, 12, 1944.—Decided June 5, 1944.

1. In view of the activities of the petitioner in the conduct of its insurance business (described in the opinion), the National Labor Relations Board was justified in concluding that the practices in which the petitioner was found to be and to have been engaged were, within the meaning of the National Labor Relations Act, unfair labor practices "affecting commerce," which the Board was empowered by the Act to prevent. Pp. 644, 648.
2. The cultural and fraternal aspects of the petitioner's activities did not except it from the operation of the National Labor Relations Act. P. 648.
3. The application of the National Labor Relations Act to the activities of the petitioner, though in the business of insurance, was a valid exercise of the power of Congress under the commerce clause of the Federal Constitution. P. 649.

136 F. 2d 175, affirmed.

CERTIORARI, 320 U. S. 725, to review a decree granting enforcement of an order (as modified) of the National Labor Relations Board, 42 N. L. R. B. 1375.

Mr. Ewart Harris, with whom *Mr. Casimir E. Midowicz* was on the brief, for petitioner.

Attorney General Biddle, with whom *Solicitor General Fahy, Messrs. Robert L. Stern, Alvin J. Rockwell, Frank Donner,* and *Miss Ruth Weyand* were on the brief, for respondent.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

The National Labor Relations Board, having found that petitioner, in violation of the National Labor Rela-

tions Act, had engaged in unfair labor practices, issued an order of cessation against it. 42 N. L. R. B. 1375. On a petition for review and a cross-petition of the Board for enforcement, the Circuit Court of Appeals for the Seventh Circuit sustained the order. 136 F. 2d 175. Of the numerous issues before that court only two are open here, the importance of which led us to grant certiorari. 320 U. S. 725. The questions are these: (1) In view of the petitioner's activities, is the conduct found by the Board to constitute unfair labor practices within the scope of the National Labor Relations Act; (2) if Congress has proscribed such conduct, has it exceeded its power to regulate commerce among the several States?

The Polish National Alliance is a fraternal benefit society providing death, disability, and accident benefits to its members and their beneficiaries. Incorporated under the laws of Illinois, it is organized into 1,817 lodges scattered through twenty-seven States, the District of Columbia, and the Province of Manitoba, Canada. As the "largest fraternal organization in the world of Americans of Polish descent," it had outstanding, in 1941, 272,897 insurance benefit certificates with a face value of nearly $160,000,000. Over 76% of these certificates were held by persons living outside of Illinois. At the end of that year, petitioner's assets totalled about $30,000,000, in cash, real estate in five States, United States Government bonds, foreign government bonds, bonds of various States and their political subdivisions, railroad, public utility, and industrial bonds, and stocks. From its organization in 1880 until the end of 1940, the Alliance spent over $7,000,000 for charitable, educational, and fraternal activities among its members. During the same period, it paid out over $38,000,000 in "mortuary claims."

Petitioner directs from its home office in Chicago a staff of over 225 full and part-time organizers and field agents in twenty-six States whose traveling expenses are

borne by Alliance and who receive commissions for new memberships. Since its 1939 convention, Alliance has admitted no more "social members." Thereafter, all applicants have been required to buy insurance certificates providing various types of life, endowment, and term coverage. These policies contain the typical loan, cash surrender value, optional settlement, and dividend provisions. Petitioner spent over $10,000 for advertising outside of Illinois during 1941. It employs a Georgia credit company to report on the financial standing and character of the applicants, and reinsures substandard risks with an Indiana company.

Alliance lodges are organized into 190 councils, 160 of which are outside the State of Illinois. The councils elect delegates to the national convention, and it in turn elects the executive and administrative officers. The Censor of Alliance is its ranking officer and he appoints an editorial staff which publishes a weekly paper distributed to members. Of the 6,857,556 copies published in 1941, about 80% were mailed to persons living outside of Illinois.

This summary of the activities of Alliance and of the methods and facilities for their pursuit amply shows the web of money-making transactions woven across many state lines. An effective strike against such a business enterprise, centered in Chicago but radiating from it all over the country, would as a practical matter certainly burden and obstruct the means of transmission and communication across these state lines. Stoppage or disruption of the work in Chicago involves interruptions in the steady stream, into and out of Illinois, of bills, notices, and policies, the payments of commissions, the making of loans on policies, the insertion and circulation of advertising material in newspapers, and its dissemination over the radio. The effect of such interruptions on commerce is unmistakable. The load of interstate communication

and transportation services is lessened, cash necessary for interstate business becomes unavailable, the business, interstate, of newspapers and radio stations suffer. Nor is this all. Alliance, it appears, plays a credit rôle in interstate industries, railroads, and other public utilities. In 1941, it acquired securities in an amount in excess of $11,000,000, and sold or redeemed securities costing more than $7,500,000. Financial transactions of this magnitude cannot be impeded even temporarily without affecting to an extent not negligible the interstate enterprises in which the large assets of Alliance are invested. That such are the substantial effects on interstate commerce of dislocating labor practices by insurance companies, was established before the Labor Board in at least thirteen comparable situations.[1] The practical justification of such a conclusion has not heretofore been challenged. Considerations like these led the Board to find that petitioner's practices "have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce," and were therefore "unfair labor practices affecting commerce within the

[1] Matter of John Hancock Mutual Life Insurance Co., 26 N. L. R. B. 1024; Matter of Life Insurance Co. of Virginia, 29 N. L. R. B. 246; Matter of Life Insurance Co. of Virginia, 31 N. L. R. B. 674; Matter of Supreme Liberty Life Insurance Co., 32 N. L. R. B. 94; Matter of Life Insurance Co. of Virginia, 38 N. L. R. B. 20; Matter of Colonial Life Insurance Co. of America, 42 N. L. R. B. 1177; Matter of Metropolitan Life Insurance Co., 43 N. L. R. B. 962; Matter of Prudential Insurance Co. of America, 46 N. L. R. B. 430; Matter of Northwestern Mutual Fire Association, 46 N. L. R. B. 825; Matter of Peoples Life Insurance Co. of Washington, D. C., 46 N. L. R. B. 1115; Matter of Prudential Insurance Co. of America, 47 N. L. R. B. 1103; Matter of Prudential Insurance Co. of America, 49 N. L. R. B. 450; Matter of Life and Casualty Insurance Co. of Tennessee, 53 N. L. R. B. 1196. See also *Labor Board* v. *Bank of America*, 130 F. 2d 624, 626.

meaning of Section 2 (6) and (7)," and as such, prohibited by § 10 of the Wagner Act.

By that Act, Congress in order to protect interstate commerce from adverse effects of labor disputes has undertaken to regulate all conduct having such consequences that constitutionally it can regulate. *Labor Board* v. *Jones & Laughlin Corp.*, 301 U. S. 1, 31; *Labor Board* v. *Fainblatt*, 306 U. S. 601, 607. With negligible exceptions, Congress did not exercise its power to regulate commerce prior to its enactment in 1887 of the Interstate Commerce Act. 24 Stat. 379, 49 U. S. C. § 1 *et seq.* Since that time it has frequently chosen, as the Statutes at Large abundantly prove, to regulate only part of what it constitutionally can regulate. Again, half a dozen enactments, other than the National Labor Relations Act, are sufficient to illustrate that when it wants to bring aspects of commerce within the full sweep of its constitutional authority, it manifests its purpose by regulating not only "commerce" but also matters which "affect," "interrupt," or "promote" interstate commerce. See, for example, Act of June 18, 1934, § 2, 48 Stat. 979, 18 U. S. C. § 420a; Bituminous Coal Act, § 4–A, 50 Stat. 72, 83, 15 U. S. C. § 834; Civil Aeronautics Act, § 1 (3), 52 Stat. 973, 977, 49 U. S. C. § 401 (3); Federal Employers' Liability Act, § 1, as amended, 53 Stat. (part 2) 1404, 45 U. S. C. § 51; Transportation Act of 1920, § 307 (b) (3), 41 Stat. 456, 471; Tennessee Valley Authority Act, § 31, 49 Stat. 1075, 1080, 16 U. S. C. § 831dd. In so describing the range of its control, Congress is not indulging stylistic preferences; it is mediating between federal and state authorities, and deciding what matters are to be taken over by the central Government and what to be left to the States. *United States* v. *Darby*, 312 U. S. 100; *Kirschbaum Co.* v. *Walling*, 316 U. S. 517. And so in this Act, unlike some federal regulatory measures, see *Federal Trade Comm'n* v. *Bunte Bros.*, 312 U. S. 349, 351; *Kirschbaum Co.* v. *Wal-*

ling, supra, at 522–523, Congress has explicitly regulated not merely transactions or goods in interstate commerce but activities which in isolation might be deemed to be merely local but in the interlacings of business across state lines adversely affect such commerce. By the Wagner Act, Congress gave the Board authority to prevent practices "tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." § 2 (7) of the National Labor Relations Act (49 Stat. 449, 450, 29 U. S. C. § 152 (7)). Congress therefore left it to the Board to ascertain whether proscribed practices would in particular situations adversely affect commerce when judged by the full reach of the constitutional power of Congress. Whether or no practices may be deemed by Congress to affect interstate commerce is not to be determined by confining judgment to the quantitative effect of the activities immediately before the Board. Appropriate for judgment is the fact that the immediate situation is representative of many others throughout the country, the total incidence of which if left unchecked may well become far-reaching in its harm to commerce. *Labor Board* v. *Fainblatt, supra,* at 607–608.

We have said enough to indicate the ground for our conclusion that the Board was not unjustified in finding that the unfair labor practices found by it would affect commerce. And the undoubted fact that Alliance promotes, among Americans of Polish descent, interest in, and devotion to, the contributions that Poland has made to civilization does not subordinate its business activities to insignificance. Accordingly, the Board could find that its cultural and fraternal activities do not withdraw Alliance from amenability to the Wagner Act.

In this aspect, the case we have before us presents a wholly new problem of the relation of federal authority to the business of insurance. The long series of insurance cases that have come to this Court for more than seventy-

five years, from *Paul* v. *Virginia,* 8 Wall. 168, to *New York Life Ins. Co.* v. *Deer Lodge County,* 231 U. S. 495, have invariably involved some exercise of state power resisted, in most instances, on the claim that it was impliedly forbidden by the Commerce Clause. Such was the context in which this Court decided again and again that the making of a contract of insurance is not interstate commerce and that, since the business of insurance is in effect merely a congeries of contracts, the States may, for taxing and diverse other purposes, regulate the making of such contracts and the insurance business free from the limitations imposed upon state action by the Commerce Clause. Constitutional questions that look alike often are altogether different and call for different answers because they bring into play different provisions of the Constitution or different exertions of power under it. Thus, federal regulation does not preclude state taxation and state taxation does not preclude federal regulation. Compare, for example, *Heisler* v. *Thomas Colliery Co.,* 260 U. S. 245, with *Sunshine Coal Co.* v. *Adkins,* 310 U. S. 381.

We have, therefore, now presented for the first time not an exercise of state but of national power in relation to the insurance business. And so the ultimate question is whether, in view of the relation between the activities of the insurance business before us and the operation of economic forces across state lines, the Constitution denies to Congress the power to say that the interplay of the insurance business and those economic forces is such that its power "to regulate Commerce . . . among the several States" carries with it the power to regulate the conduct here regulated by relevant legislation.

The process of adjusting the interacting areas of national and state authority over commerce has been reflected in hundreds of cases from the very beginning of our history. Precisely the same kind of issues has plagued

the two great English-speaking federations, the constitutions of which similarly distribute legislative power over business between central and subordinate governments. See § 91 of the British North America Act, 1867, 30 & 31 Vict., c. 3, and Report of the (Canadian) Royal Commission on Dominion-Provincial Relations, (1940) Bk. II, c. IV; § 51 of the Australia Constitutional Act, 1900, 63 & 64 Vict., c. 12, and Report of the (Australian) Royal Commission on the Constitution, (1929) c. XIV. These are difficulties inherent in such a federal constitutional system.

The interpenetrations of modern society have not wiped out state lines. It is not for us to make inroads upon our federal system either by indifference to its maintenance or excessive regard for the unifying forces of modern technology. Scholastic reasoning may prove that no activity is isolated within the boundaries of a single State, but that cannot justify absorption of legislative power by the United States over every activity. On the other hand, the old admonition never becomes stale that this Court is concerned with the bounds of legal power and not with the bounds of wisdom in its exercise by Congress. When the conduct of an enterprise affects commerce among the States is a matter of practical judgment, not to be determined by abstract notions. The exercise of this practical judgment the Constitution entrusts primarily and very largely to the Congress, subject to the latter's control by the electorate. Great power was thus given to the Congress: the power of legislation and thereby the power of passing judgment upon the needs of a complex society. Strictly confined though far-reaching power was given to this Court: that of determining whether the Congress has exceeded limits allowable in reason for the judgment which it has exercised. To hold that Congress could not deem the activities here in question to affect what men of practical affairs would call commerce, and to deem them

related to such commerce merely by gossamer threads and not by solid ties, would be to disrespect the judgment that is open to men who have the constitutional power and responsibility to legislate for the Nation.

Judgment affirmed.

MR. JUSTICE ROBERTS took no part in the consideration or disposition of this case.

MR. JUSTICE BLACK, concurring:

The National Labor Relations Act does not vest courts with power to review the evidence presented to the Labor Board and make independent findings of fact. 29 U. S. C. 160 (e). Therefore the propriety of the Board's order in this case must be considered on the basis of the facts the Board found.

The Board did not exercise jurisdiction and enter its order on a fact finding that petitioner's insurance activities merely affected commerce in types of interstate business other than its own. On this fact issue it made no finding at all. Its finding was that the petitioner, being "engaged in the insurance business," was "engaged in commerce within the meaning of the Act." This ultimate finding of fact rested on detailed subordinate findings which revealed the widespread interstate activities of the petitioner in carrying on its insurance business. As the Court's opinion points out, these insurance activities involved a "steady stream, into and out of Illinois, of bills, notices, and policies, the payments of commissions, the making of loans on policies, the insertion and circulation of advertising material in newspapers, and its dissemination over the radio." Only on the basis of the ultimate finding that petitioner was itself "engaged in commerce" did the Board make the essential further finding that petitioner's refusal to bargain collectively with its employees had a "close, intimate, and substantial relation to com-

merce among the several States" and tended "to lead to labor disputes burdening and obstructing commerce."

As a conclusion of law the Board stated that petitioner's unfair labor practices constituted "unfair labor practices affecting commerce, within the meaning of Section 2 (6) and (7) of the Act." Section 2 (6) defines the term "commerce" to mean "trade, traffic . . ."; and § 2 (7) defines the term "affecting commerce" to mean either "in commerce" or "burdening or obstructing commerce." 49 Stat. 449, 450; 29 U. S. C. 152 (6) and (7). From the language of these definitions, and the Board's findings above described, it is apparent that the Board's conclusion of law that "commerce" was "affected" by petitioner's unfair labor practices rested upon its previous conclusion of fact that petitioner's insurance business was engaged in commerce. The Board concluded that, since the insurance business itself was engaged in commerce, petitioner's refusal to bargain, and the strike thereby provoked, would affect commerce. Compare *Associated Press* v. *Labor Board,* 301 U. S. 103, 128–130 with *Consolidated Edison Co.* v. *Labor Board,* 305 U. S. 197, 219–224.

The doctrine that Congress may provide for regulation of activities not themselves interstate commerce, but merely "affecting" such commerce, rests on the premise that in certain fact situations the federal government may find that regulation of purely local and intrastate commerce is "necessary and proper" to prevent injury to interstate commerce. *Houston, E. & W. T. Ry. Co.* v. *United States,* 234 U. S. 342; *Second Employers' Liability Cases,* 223 U. S. 1, 46–47; and see *Wickard* v. *Filburn,* 317 U. S. 111, 121. In applying this doctrine to particular situations this Court properly has been cautious, and has required clear findings before subjecting local business to paramount federal regulation. *City of Yonkers* v. *United States,* 320 U. S. 685, and cases therein cited. It has insisted upon "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." *Id.; Florida* v. *United States,* 282 U. S. 194, 211–212; cf. *Phelps Dodge Corp.* v. *Labor Board,* 313 U. S. 177, 196–197; *Securities & Exchange Comm'n* v. *Chenery Corp.,* 318 U. S. 80, 92–95.

The Board not having found as a fact that petitioner's life insurance business affected interstate activities of other businesses, the first issue is whether the Board's findings that petitioner's insurance activities were conducted across state lines are supported by evidence. I think they are. This leads to the question, chiefly argued by both parties, "Is the business of insurance commerce, and, when conducted across state lines, subject to federal regulation as such under the Commerce Clause of the Constitution?" For the reasons given in the Court's opinions in this case and in *United States* v. *South-Eastern Underwriters Association,* 322 U. S. 533, I agree that the business of insurance is commerce, subject to federal regulation as such when conducted across state lines, and that the Board's order was proper.

MR. JUSTICE DOUGLAS and MR. JUSTICE MURPHY join in this opinion.

KANSAS *v.* MISSOURI.

No. 9, original. Opinion, *ante*, p. 213. Decree entered June 5, 1944.

DECREE.

This cause having been submitted upon the pleadings, evidence and exhibits, after arguments by counsel, and upon the Master's Report, and the Court having duly considered same and being sufficiently advised,

It Is Ordered, Adjudged and Decreed that the boundary line between the States of Kansas and Missouri, which extends from the intersection of the Missouri River with the 40th parallel, north latitude, southward to the middle of the mouth of the Kaw or Kansas River, be and it is hereby established as the middle line of the main navigable channel of said Missouri River as said river flowed at the time of the filing of Complainant's Bill of Complaint herein, throughout the entire course of said river from its intersection with the 40th parallel, north latitude, southward to the middle of the mouth of the Kaw or Kansas River, with the exception of such deviations and departures from the course of said Missouri River, as it then flowed, as are covered by and provided for in the written stipulations between the parties and are incorporated in the description of said entire boundary hereinafter set forth.

The boundary line nereinbefore mentioned and hereby established is more particularly described as follows, to-wit:

Beginning with the fortieth parallel of north latitude, the same being the boundary between the State of Kansas and the State of Nebraska, (at its intersection with the Missouri River) thence down the course or channel of the said Missouri River to a place therein opposite which the left bank thereof is a point 15.50 chains West and 9.75 chains South of the Northwest corner of Section Fourteen,

Township One-South, Range Nineteen-East, Doniphan County, Kansas.

Thence departing upon and from the left bank (at a point 15.50 chs. South of the NW. corner of Sec. 14, T. 1 S., R. 19 E., Doniphan County, Kansas) of the present course or channel of the said Missouri River and running N. 40° 33′ E. for a distance of 34.33 chs.;

Thence N. 73°00′ E. for a distance of 20.89 chs.;

Thence N. 72°30′ E. for a distance of 21.30 chs.;

Thence N. 73°40′ E. for a distance of 5.22 chs. (the same being a point 14.44 chs. South of the SW. corner of Sec. 26, T. 60 N., R. 39 W., Holt County, Missouri);

Thence N. 73°40′ E. for a distance of 8.59 chs.;

Thence N. 74°45′ E. for a distance of 10.01 chs.;

Thence N. 72°15′ E. for a distance of 12.09 chs.;

Thence N. 77°00′ E. for a distance of 1.32 chs. (the same being a point 36.24 chs. North of the NW. corner of Sec. 13, T. 1 S., R. 19 E., Doniphan County, Kansas);

Thence N. 73°45′ E. for a distance of 6.99 chs. (the same being a point 3.57 chs. South of the quarter section corner on the South side of Sec. 26, T. 60 N., R. 39 W., Holt County, Missouri);

Thence N. 73°45′ E. for a distance of 33.35 chs. (the same being a point 7.75 chs. North of the center of Sec. 12, T. 1 S., R. 19 E., Doniphan County, Kansas);

Thence S. 85°00′ E. for a distance of 40.20 chs.;

Thence S. 83°30′ E. for a distance of 8.00 chs. (the same being a point 38.66 chs. South of the center of Sec. 25, T. 60 N., R. 39 W., Holt County, Missouri);

Thence S. 83°30′ E. for a distance of 4.95 chs.;

Thence S. 82°45′ E. for a distance of 11.01 chs.;

Thence S. 80°30′ E. for a distance of 9.91 chs.;

Thence S. 80°00′ E. for a distance of 8.95 chs.;

Thence S. 46°00′ E. for a distance of 8.67 chs.;

Thence S. 42°30′ E. for a distance of 10.45 chs.;

Thence S. 38°00′ E. for a distance of 10.98 chs.;

Thence S. 40°30′ E. for a distance of 9.99 chs.;

Thence S. 38°00′ E. for a distance of 9.89 chs. (the same being to the center of the road);

Thence S. 18°00′ E. for a distance of 12.57 chs.;

Thence S. 14°26′ E. for a distance of 13.72 chs.;

Thence S. 8°30′ W. for a distance of 11.74 chs. (the same being a point 40.52 chs. West of the SE. corner of Sec. 31, T. 60 N., R. 38 W., Holt County, Missouri);

Thence S. 8°30′ W. for a distance of 5.60 chs.;

Thence S. 12°30′ W. for a distance of 12.22 chs.;

Thence S. 19°30′ W. for a distance of 8.98 chs.;

Thence S. 25°00′ W. for a distance of 15.50 chs. (the same being a point 52.98 chs. W. and 1.24 chs. South of the E. quarter corner of Sec. 6, T. 59 N., R. 38 W., Holt County, Missouri, which point also is 68.80 chs. East of and 0.47 ch. South of the corner to Secs. 13, 18, 19, 24 in T. 1 S., Rs. 19 and 20 E., Doniphan County, Kansas);

Thence S. 36°45′ W. for a distance of 21.00 chs.;

Thence S. 28°30′ W. for a distance of 18.50 chs.;

Thence S. 38°15′ W. (for a distance of 36.30 chs.) to the left bank of the Missouri River, at which latter point the said boundary returns to the left bank of the present course or channel of the said Missouri River and from there down the course or channel of the said Missouri River to the place therein where the said Missouri River intersects the West line of Sec. 28, T. 59 N., R. 38 W., Holt County, Missouri.

Thence from the place where the Missouri River intersects the West line of Sec. 28, T. 59 N., R. 38 W., Holt County, Missouri, on down the course or channel of the said Missouri River, and with the middle line of the main navigable channel of said Missouri River as the same flowed on the 27th day of May, 1940, through the section of said river known as Forbes Bend, in a general easterly and southeasterly direction downstream to the lower end of Forbes Bend to a point in the present course or channel

of said Missouri River opposite which the left bank of said river intersects the North and South center section line of Sec. 1, T. 58 N., R. 38 W., in Holt County, Missouri, and then beginning at said point in the present course or channel of the said Missouri River opposite which point the left bank of the said Missouri River intersects the North and South center section line of Sec. 1, T. 58 N., R. 38 W., in Holt County, Missouri, and thence proceeding down the course or channel of the said Missouri River to the place therein opposite which the left bank of said Missouri River is a point 2,216 feet West and 2,096 feet South of the Northeast corner of the NW. quarter Sec. 22, T. 2 S., R. 21 E. in Doniphan County, Kansas.

Thence departing upon and from the left bank (at a point 2,216 feet West and 2,096 feet South of the Northeast corner of the NW. quarter of Sec. 22, T. 2 S., R. 21 E., in Doniphan County, Kansas) of the present course or channel of the said Missouri River and running thence N. 19°13′ E., 2,200 feet;

Thence N. 46°30′ E., 4,312 feet;

Thence N. 29°40′ E., 5,104 feet;

Thence N. 35°45′ E., 3,432 feet;

Thence N. 44°10′ E., 660 feet to a point 1,298 feet West of the NW. corner of Sec. 12, T. 2 S., R. 21 E. in Doniphan County, Kansas;

Thence in a Northeasterly direction for a distance of 1,868 feet to a point on the W. line of Sec. 1, T. 2 S., R. 21 E. in Doniphan County, Kansas, which latter point on said W. line of said Sec. 1 is 1,350 feet N. of the SW. corner of said Sec. 1;

Thence N. 60°00′ E., 1,188 feet;

Thence N. 66°25′ E., 1,960 feet to a point 820 feet South of the SW. corner of Sec. 24, T. 59 N., R. 37 W. in Holt County, Missouri;

Thence N. 84°05′ E., 2,618 feet to a point 534.6 feet South of the S. quarter corner of Sec. 24, T. 59 N., R. 37 W. in Holt County, Missouri;

Thence S. 78°00′ E., 2,409 feet;

Thence S. 60°00′ E., 2,323 feet;

Thence S. 43°30′ E., 2,748 feet to the left bank of the Missouri River (the same being a point 561 feet upstream from U. S. River Marker numbered 482) at which latter point the said boundary returns upon the left bank of the said Missouri River to the present course or channel of the said Missouri River;

Thence down the course or channel of the said Missouri River to the place therein opposite which the right bank thereof intersects the S. line of Sec. 10, T. 5 S., R. 21 E. in Doniphan County, Kansas;

Thence departing upon and from the right bank of said Missouri River and running thence W. upon the S. line of said Sec. 10, T. 5 S., R. 21 E. in Doniphan County, Kansas, to the SW. corner of said Sec. 10;

Thence North on the W. line of said Sec. 10 for a distance of 1,322 feet;

Thence N. 18°25′ W., 1,122 feet;

Thence N. 61°53′ W., 793 feet;

Thence S. 88°21′ W., 3,434 feet to the W. line of Ogden land;

Thence S. 89°40′ W., 1,783 feet on the S. line of the Koch land;

Thence S. 10°03′ W., 309 feet;

Thence S. 43°36′ E., 196 feet (along center of road);

Thence S. 24°30′ W., 504 feet;

Thence S. 27°00′ W., 282 feet (to top of levee);

Thence S. 32°30′ W., 360 feet (across ditch);

Thence S. 35°34′ W., 245 feet;

Thence S. 34°18′ W., 809 feet;

Thence S. 30°25′ W., 132 feet;

Thence S. 14°13′ W., 1,254 feet, to a point (marked by an old fence corner post) on the N. line of Atchison County, Kansas, which point is 1,571 feet East of the present East bank of Independence Creek;

Thence S. 00°00′ W., 500 feet;
Thence S. 00°11′ W., 750.65 feet;
Thence S. 14°37′ W., 749.35 feet;
Thence S. 14°45′ W., 800.00 feet;
Thence S. 14°55′ W., 1,000.00 feet;
Thence S. 15°14′ W., 1,200.00 feet;
Thence S. 15°02′ W., 1,000.00 feet;
Thence S. 14°48′ W., 795.00 feet;
Thence N. 71°46′ E., 117.00 feet;
Thence N. 48°20′ E., 100.00 feet;
Thence N. 00°52′ W., 158.75 feet;
Thence N. 53°36′ E., 259.90 feet;
Thence N. 62°28′ E., 159.60 feet;
Thence N. 85°16′ E., 326.10 feet;
Thence S. 57°06′ E., 519.35 feet;
Thence S. 63°26′ E., 268.0 feet;
Thence N. 86°19′ E., 412.0 feet;
Thence S. 57°46′ E., 536.0 feet;
Thence N. 71°46′ E., 124.0 feet;
Thence N. 12°34′ W., 328.1 feet;
Thence N. 16°23′ E., 295.8 feet;
Thence N. 40°17′ E., 238.8 feet;
Thence N. 71°29′ E., 166.7 feet;
Thence S. 48°13′ E., 201.2 feet;
Thence N. 74°21′ E., 694.6 feet;
Thence N. 41°51′ E., 125.0 feet;
Thence N. 33°47′ E., 59.2 feet;
Thence N. 57°55′ E., 193.9 feet;
Thence S. 87°03′ E., 369.9 feet;
Thence N. 75°39′ E., 285.5 feet;
Thence N. 80°36′ E., 361.1 feet;
Thence S. 82°23′ E., 304.0 feet;
Thence S. 59° 00′ E., 187.7 feet;
Thence S. 34°54′ E., 173.1 feet;
Thence S. 24°54′ E., 268.1 feet;
Thence S. 05°46′ E., 77.8 feet;

Thence S. 36°59′ W., 338.7 feet;
Thence S. 61°16′ W., 252.4 feet;
Thence S. 62°45′ W., 313.3 feet;
Thence S. 17°30′ W., 296.5 feet;
Thence S. 11°05′ W., 167.2 feet;
Thence S. 01°48′ W., 460.6 feet;
Thence S. 25°22′ E., 250.1 feet;
Thence S. 73°38′ E., 277.4 feet;
Thence N. 33°02′ E., 151.0 feet;
Thence S. 75°13′ E., 329.5 feet;
Thence S. 07°28′ E., 126.1 feet;
Thence S. 25°02′ W., 244.5 feet;
Thence S. 41°54′ W., 215.7 feet;
Thence S. 80°24′ W., 251.4 feet;
Thence S. 69°29′ W., 210.1 feet;
Thence S. 62°14′ W., 495.0 feet;
Thence S. 54°34′ W., 386.2 feet;
Thence S. 12°54′ W., 443.1 feet;
Thence S. 60°06′ E., 263.4 feet;
Thence S. 02°56′ W., 283.3 feet;
Thence S. 80°36′ W., 136.4 feet;
Thence S. 64°04′ W., 192.8 feet;
Thence S. 62°04′ W., 236.8 feet;
Thence S. 57°44′ W., 342.2 feet;
Thence S. 62°54′ W., 293.0 feet;
Thence S. 73°24′ W., 230.3 feet;
Thence S. 60°22′ W., 267.4 feet;
Thence S. 49°36′ W., 344.1 feet;
Thence S. 49°36′ W., 200.0 feet;
Thence S. 49°36′ W., 71.4 feet (Northeast corner of St. Benedict's);
Thence S. 00°12′ W., 180.3 feet;
Thence S. 44°46′ W., 162.4 feet;
Thence S. 42°33′ W., 528.0 feet;
Thence S. 35°10′ W., 621.7 feet;
Thence S. 12°59′ W., 254.8 feet;

Thence S. 13°20′ W., 240.2 feet;
Thence S. 21°23′ W., 382.8 feet;
Thence S. 18°05′ W., 343.9 feet;
Thence S. 20°47′ W., 198.0 feet;
Thence S. 13°18′ W., 264.0 feet;
Thence S. 05°40′ W., 264.0 feet;
Thence S. 13°00′ W., 326.0 feet;
Thence S. 19°30′ W., 330.0 feet;
Thence S. 26°44′ W., 208.6 feet;
Thence S. 00°00′ W., 126.1 feet;
Thence S. 00°00′ W., 495.0 feet;

Thence S. 00°00′ W., 495.0 feet, to a point upon the right bank of the said Missouri River, at which latter point the said boundary returns upon the right bank of the said Missouri River to the present course or channel of the said Missouri River and running thence down the course or channel of the said Missouri River to the place therein opposite which the left bank of the said Missouri River is 2,898 feet East and 2,124 feet South of the center of Sec. 26, T. 54 N., R. 37 W. in Platte County, Missouri, thence departing upon and from the left bank of the present course or channel of the said Missouri River, and running thence North to a point 1,850 feet South and 258 feet East of the SW. corner of Sec. 24, T. 54, R. 37 W. of the 5th principal meridian in Platte County, Missouri;

Thence E. 481 feet;

Thence N. 15°55′ E. 1,924 feet to the South line of the aforesaid Sec. 24;

Thence E. to the North and South center line of Sec. 6, T. 7 S., R. 22 E. in Atchison County, Kansas;

Thence N. to a point 880 feet North of the center corner of said Kansas Sec. 6;

Thence E. 1 mile to a point 880 feet North of the center line of Kansas Sec. 5, T. 7 S., R. 22 E., in Atchison County, Kansas;

Thence S. 880 feet to the center of the aforesaid Kansas Sec. 5;

Thence E. 645 feet to the top of a levee;

Thence S. 17° and 30′ E., along the top of said levee, 2,772 feet;

Thence S. 14° E., 2,740 feet;

Thence S. 11° and 30′ E., 2,721 feet to a point 130 feet East of the SE. corner of Sec. 8, T. 7, R. 22 E. of the 6th principal meridian in Atchison County, Kansas;

Thence S. 5° and 10′ E., along the center of a slough, 2,969 feet to the left bank of the Missouri River, the latter point being 1,750 feet West of the SE. corner of the SW. quarter of Fractional Sec. 32, T. 54, R. 36 W. of 5th principal meridian, in Platte County, Missouri, at which latter point the said boundary returns upon the left bank of the said Missouri River to the present course or channel of the said Missouri River;

Thence down the course or channel of the said Missouri River to the place therein opposite which the left bank of the said Missouri River is 1,878 feet West and 1,172 feet North of the W. quarter corner of Sec. 35, T. 7 S., R. 22 E. in Leavenworth County, Kansas;

Thence departing upon and from the left bank of the present course or channel of the said Missouri River and running

Thence S. 65°57′ E., 502 feet;

Thence N. 86°03′ E., 207 feet;

Thence N. 74°03′ E., 200 feet;

Thence S. 71°57′ E., 300 feet;

Thence S. 86°57′ E., 800 feet;

Thence N. 77°03′ E., 2 feet to a point on the West line of Sec. 35, T. 7 S., R. 22 E. in Leavenworth County, Kansas;

Thence N. 77°03′ E., 628 feet;

Thence N. 36°03′ E., 900 feet;

Thence N. 51°03′ E., 900 feet;

Thence N. 63°03′ E., 7 feet to a point on the North line of Sec. 35, T. 7 S., R. 22 E. in Leavenworth County, Kansas;

Thence N. 63°03′ E., 294 feet;

Thence N. 76°18′ E., 292 feet;

Thence N. 78°18′ E., 111 feet to a point on the north and south center section line of Sec. 26, T. 7 S., R. 22 E. in Leavenworth County, Kansas;

Thence N. 78°18′ E., 648 feet;

Thence N. 84°30′ E., 688 feet;

Thence N. 86°56′ E., 915 feet;

Thence N. 65°28′ E., 450 feet to a point on the East line of Sec. 26, T. 7 S., R. 22 E. in Leavenworth County, Kansas;

Thence N. 65°28′ E., 212 feet;

Thence N. 81°57′ E., 1,054 feet;

Thence N. 86°29′ E., 301 feet;

Thence S. 87°11′ E., 350 feet;

Thence S. 85°31′ E., 382 feet;

Thence S. 84°30′ E., 1,478 feet;

Thence S. 80°00′ E., 628 feet;

Thence S. 72°31′ E., 196 feet to Bear Creek;

Thence following the meander of said Bear Creek and running thence S. 39°03′ E., 601 feet to a point on the North line of Sec. 36, T. 7 S., R. 22 E. in Leavenworth County, Kansas;

Thence S. 39°03′ E., 609 feet to a point on the East line of Sec. 36, T. 7 S., R. 22 E. in Leavenworth County, Kansas;

Thence S. 39°03′ E., 231 feet;

Thence S. 41°39′ E., 1,995 feet;

Thence S. 8°01′ E., 505 feet to a point on the East and West center section line of Sec. 31, T. 7 S., R. 23 E. in Leavenworth County, Kansas;

Thence S. 08°01′ E., 175 feet;

Thence S. 43°56′ E., 290 feet;

Thence S. 78°52′ E., 400 feet;

Thence S. 03°00′ E., 329 feet;

Thence S. 38°58′ E., 480 feet;

Thence S. 68°02′ E., 930 feet to a point upon the left bank of the Missouri River where the said Bear Creek

empties into the said Missouri River and which latter point is 1,039 feet North and 408 feet East of the S. quarter corner of Sec. 31, T. 7 S., R. 23 E. in Leavenworth County, Kansas, at which latter point the said boundary returns upon the left bank of the said Missouri River to the present course or channel of the said Missouri River and running thence down the course or channel of the said Missouri River to the mouth of the Kansas River.

The State of Kansas, its officers, agents and representatives, its inhabitants, and all other persons, are perpetually enjoined from disputing or opposing the sovereignty, jurisdiction and dominion of the State of Missouri over the territory adjudged to said state by or in consequence of this decree; and the State of Missouri, its officers, agents and representatives, its inhabitants, and all other persons, are perpetually enjoined from disputing or opposing the sovereignty, jurisdiction and dominion of the State of Kansas over the territory adjudged to said state by or in consequence of this decree.

That insofar as the claims asserted by Complainant, the State of Kansas, in its Bill and, particularly in paragraphs VI and VII thereof, with respect to the Forbes Bend area of the Missouri River, and the relief sought by said Complainant in and by said Bill, are at variance with the terms of the foregoing decree, such claims and relief are denied and said Bill to this extent is dismissed.

Both States having requested postponement of entry of an order directing the placing of suitable monuments or markers on the above designated boundary until they have had opportunity to consider exchanging certain lands and to make such exchanges, jurisdiction of this cause is retained for the purpose of entering such order at an appropriate time.

The costs of this suit are equally divided between the two States, Complainant and Defendant, and this case is retained on the docket for further orders in fulfillment and enforcement of the provisions of this decree.

BAUMGARTNER *v.* UNITED STATES.

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

No. 493. Argued April 26, 1944.—Decided June 12, 1944.

1. The rule that concurrent findings of two lower courts are persuasive in support of their judgments does not relieve this Court of the task of examining the foundation of findings in particular cases. P. 670.
2. In a denaturalization proceeding involving issues of belief or fraud, the Government's proof must be clear, unequivocal, and convincing. P. 670.
3. The conclusion of the two lower courts that that exacting standard of proof has on the whole record been satisfied can not be deemed an unreviewable "finding of fact." P. 671.
4. In a suit brought by the United States under § 338 of the Nationality Act of 1940 to set aside a naturalization decree and cancel a certificate of citizenship—issued ten years previously—on grounds of fraud and illegal procurement, *held* that the evidence was insufficient to sustain the charges that at the time of his admission to citizenship the defendant did not truly and fully renounce his foreign allegiance and did not in fact intend to support the Constitution and laws of the United States. P. 677.

138 F. 2d 29, reversed.

CERTIORARI, 321 U. S. 756, to review the affirmance of a decree which, in a proceeding brought by the United States, set aside an order admitting the defendant to citizenship and canceled his certificate of naturalization, 47 F. Supp. 622.

Mr. Harold Evans for petitioner.

Solicitor General Fahy, with whom *Assistant Attorney General Tom C. Clark*, and *Messrs. Robert S. Erdahl* and *D. E. Balch* were on the brief, for the United States.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

On September 26, 1932, the United States District Court for the Western District of Missouri entered its

order admitting Baumgartner to citizenship and issued a certificate of naturalization to him. Almost ten years later, on August 21, 1942, the United States brought this suit under § 338 of the Nationality Act of 1940 (54 Stat. 1137, 1158, 8 U. S. C. § 738) to set aside the naturalization decree and cancel the certificate.[1] The District Court entered a decree for the Government, 47 F. Supp. 622, which the Circuit Court of Appeals for the Eighth Circuit, with one judge dissenting, affirmed. 138 F. 2d 29. We brought the case here because it raises important issues in the proper administration of the law affecting naturalized citizens. 321 U. S. 756.

As a condition to receiving his American citizenship, Baumgartner, like every other alien applying for that great gift, was required to declare on oath that he renounced his former allegiance, in this case to the German Reich, and that he would "support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic," and that he would "bear true faith and allegiance to the same." That he did not truly and fully renounce his allegiance to Germany and that he did not in fact intend to support the Constitution and laws of the United States and to give them true faith and allegiance, are the charges of fraud and illegality on which his citizenship is claimed forfeit.

As is true of the determination of all issues of falsity and fraud, the case depends on its own particular facts. But the division of opinion among the judges below makes manifest that facts do not assess themselves and that the

[1] Section 338 (a) provides: "It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings . . . for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground of fraud or on the ground that such order and certificate of naturalization were illegally procured."

decisive element is the attitude appropriate for judgment of the facts in a case like this. The two lower courts have sustained the Government's claim that expressions by Baumgartner, in conversations with others and in the soliloquies of a diary, showed that he consciously withheld complete renunciation of his allegiance to Germany and entertained reservations in his oath of allegiance to this country, its Constitution and its laws. What follows is a fair summary of the evidence on which this finding rests, putting the Government's case in its most favorable light.

Baumgartner was born in Kiel, Germany, on January 20, 1895, and brought up in modestly comfortable circumstances. He received a classical high-school education, which he completed in time to enter the German army in 1914. He was commissioned a second lieutenant in 1917, and shortly thereafter he was captured by the British and confined in England until November, 1919. Upon his return to Germany, Baumgartner studied at the University of Darmstadt, from which he was graduated in 1925 as an electrical engineer. Thereupon he was employed by a public utility company until January, 1927, when he left for the United States. Shortly before, Baumgartner had married, and his wife followed him to this country later in the same year.

For about three months, Baumgartner stayed with friends in Illinois, and then came to Kansas City, Missouri, where he was employed by the Kansas City Power and Light Company. He continued in its employ down to the time of this suit. The man to whom he reported to work testified that after about two days on the job, Baumgartner began to discuss the political scene in Germany, to express a lack of enthusiasm for the then German Government, and to extol the virtues of Hitler and his movement. Baumgartner spoke so persistently about the superiority of German people, the German schools, and

the engineering work of the Germans, that he aroused antagonism among his co-workers and was transferred to a different section of the plant.

There was testimony that in 1933 or 1934 Mrs. Baumgartner's mother visited this country, and that after this visit, Baumgartner, beginning in 1934, "praised the work that Hitler was doing over there in bringing Germany back, on repeated occasions." Evidence of statements made by Baumgartner over a period of about seven years beginning in 1933 indicated oft-repeated admiration for the Nazi Government, comparisons between President Roosevelt and Adolf Hitler which led to conclusions that this country would be better off if run as Hitler ran Germany, "that regimentation, as the Nazis, formed it [sic] was superior to the democracy," and that "the democracy of the United States was a practical farce." One witness of German extraction testified that Baumgartner told him he was "a traitor to my country" because of the witness's condemnation of Hitler. Baumgartner made public speeches on at least three occasions before businessmen's groups, clubs, and the like, in which he told of the accomplishments of the Nazi Government and indicated that "he would be glad to live under the regime of Hitler."

During 1937 and 1938, Baumgartner conducted a Sunday school class, and former students testified that the discussion in class turned to Germany very frequently, that Baumgartner indicated that his students could get a fairer picture of conditions in Germany from the German radio, and that Germany was justified in much of what it was doing. The school superintendent also testified that he had received complaints that Baumgartner was preaching Nazism.

In 1938 Baumgartner resigned from the Country Club Congregational Church in Kansas City because he objected to the injection of politics into the sermons. In

May of the next year his wife and their three children, who had been born in Kansas City, went to Germany to visit Mrs. Baumgartner's parents. One witness testified that Baumgartner explained this trip in part by saying that "he wanted the children to be brought up in German schools," and when war broke out in September, 1939, Mrs. Baumgartner cabled for money to return but Baumgartner could not raise the necessary funds and felt that his family would be as safe in Germany as here. Baumgartner remarked that he wanted his wife to come back from Germany, when she did, on a German boat. One of Baumgartner's neighbors testified that in a conversation in December, 1939, Baumgartner, asked about his thirteen-year-old daughter then in Germany, said sarcastically: "Edith has done a very un-American thing, she has joined the Nazi Youth Movement."

There was testimony that Baumgartner justified the German invasions in the late 1930's, and announced, when Dunkerque fell, that "Today I am rejoicing." One witness testified that Baumgartner told him that he "belonged to an order called the so-called 'Bund'," and the diary which Baumgartner kept from December 1, 1938, to the summer of 1941 reveals that he attended a meeting of the German Vocational League where the German national anthem was sung and "everyone naturally arose and assumed the usual German stance with the arm extended to give the National Socialist greeting." Other diary entries reflect violent anti-Semitism, impatience at the lack of pro-German militancy of German-Americans, and approval of Germans who have not "been Americanized, that is, ruined." [2] Finally, Baumgartner replied in the

[2] The following are some excerpts from Baumgartner's diary: "The only ones who have any ideas here are the Jews and their ideas are vile, mean, and malicious. . . . Today the President of the United States delivered his message to the new Congress. The speech was a horrible mixture of war agitation and laughable talk about

affirmative to the trial judge's question: "was your attitude towards the principles of the American government in 1932 when you took the oath the same as it has been ever since?"

That the concurrent findings of two lower courts are persuasive proof in support of their judgments is a rule of wisdom in judicial administration. In reaffirming its importance we mean to pay more than lip service. But the rule does not relieve us of the task of examining the foundation for findings in a particular case. The measure of proof requisite to denaturalize a citizen was before this Court in *Schneiderman* v. *United States*, 320 U. S. 118. It was there held that proof to bring about a loss of citizenship must be clear and unequivocal. We cannot escape the conviction that the case made out by the Government lacks that solidity of proof which leaves no troubling doubt in deciding a question of such gravity as is implied in an attempt to reduce a person to the status of alien from that of citizen.

The phrase "finding of fact" may be a summary characterization of complicated factors of varying significance for judgment. Such a "finding of fact" may be the ultimate judgment on a mass of details involving not merely an assessment of the trustworthiness of witnesses but other appropriate inferences that may be drawn from living testimony which elude print. The conclusiveness

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the freedom of press, speech, etc., which this country allegedly has and which has to be protected with guns. . . . we drank a bottle of Pschorr brew together to the welfare and the future of Germany. . . . The Jewish-American-English fortress in the heart of Central Europe has fallen. A terrible defeat for the above named powers who will probably have a difficult time recovering from this. . . . Listened to Hitler's speech from the Krolls Opera House on 15.2. It was wonderful as usual. . . . The whole country is under the influence of the insane actions of the Government in Washington which have the character of wild, unbridled despotism."

of a "finding of fact" depends on the nature of the materials on which the finding is based. The finding even of a so-called "subsidiary fact" may be a more or less difficult process varying according to the simplicity or subtlety of the type of "fact" in controversy. Finding so-called ultimate "facts" more clearly implies the application of standards of law. And so the "finding of fact" even if made by two courts may go beyond the determination that should not be set aside here. Though labeled "finding of fact," it may involve the very basis on which judgment of fallible evidence is to be made. Thus, the conclusion that may appropriately be drawn from the whole mass of evidence is not always the ascertainment of the kind of "fact" that precludes consideration by this Court. See, *e. g., Beyer* v. *LeFevre,* 186 U. S. 114. Particularly is this so where a decision here for review cannot escape broadly social judgments—judgments lying close to opinion regarding the whole nature of our Government and the duties and immunities of citizenship. Deference properly due to the findings of a lower court does not preclude the review here of such judgments. This recognized scope of appellate review is usually differentiated from review of ordinary questions of fact by being called review of a question of law, but that is often not an illuminating test and is never self-executing. Suffice it to say that emphasis on the importance of "clear, unequivocal, and convincing" proof, see *Schneiderman* v. *United States, supra,* at 125, on which to rest the cancellation of a certificate of naturalization would be lost if the ascertainment by the lower courts whether that exacting standard of proof had been satisfied on the whole record were to be deemed a "fact" of the same order as all other "facts," not open to review here.

The gravamen of the Government's complaint and of the findings and opinions below is that Baumgartner con-

sciously withheld allegiance to the United States and its Constitution and laws; in short, that Baumgartner was guilty of fraud. To prove such intentional misrepresentation evidence calculated to establish only the objective falsity of Baumgartner's oath was adduced. Nothing else was offered to show that Baumgartner was aware of a conflict between his views and the new political allegiance he assumed. But even if objective falsity as against perjurious falsity of the oath is to be deemed sufficient under § 338 (a) of the Nationality Act of 1940 to revoke an admission to citizenship, it is our view that the evidence does not measure up to the standard of proof which must be applied to this case.

We come then to a consideration of the evidence in the context in which that evidence is to be judged. Congress alone has been entrusted by the Constitution with the power to give or withhold naturalization and to that end "to establish a uniform Rule of Naturalization." Art. I, § 8, Clause 4. In exercising its power, Congress has authorized the courts to grant American citizenship only if the alien has satisfied the conditions imposed by Congress for naturalization. There is no "right to naturalization unless all statutory requirements are complied with." *United States* v. *Ginsberg,* 243 U. S. 472, 475. And so "If a certificate is procured when the prescribed qualifications have no existence in fact, it may be cancelled by suit." *Tutun* v. *United States,* 270 U. S. 568, 578. From the earliest days of the Republic, Congress has required as a condition of citizenship that the alien renounce his foreign allegiance and swear allegiance to this country and its Constitution. Act of January 29, 1795, 1 Stat. 414. By this requirement Congress has not used meaningless words. Nor, on the other hand, has it thereby expressed a narrow test or formula susceptible of almost mechanical proof, as is true of other prerequisites for

naturalization—period of residence, documentation of arrival, requisite number of sponsoring witnesses and the like. Allegiance to this Government and its laws, is a compendious phrase to describe those political and legal institutions that are the enduring features of American political society. We are here dealing with a test expressing a broad conception—a breadth appropriate to the nature of the subject matter, being nothing less than the bonds that tie Americans together in devotion to a common fealty. The spacious scope of this conception was expressed by this Court in stating that the Constitution "was made for an undefined and expanding future, and for a people gathered and to be gathered from many nations and of many tongues," *Hurtado* v. *California,* 110 U. S. 516, 530–31, and again, "when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago." *Missouri* v. *Holland,* 252 U. S. 416, 433.

To ascertain fulfilment of a test implying so expansive a reach presents difficult and doubtful problems even for judges presumably well-trained in the meaning of our country's institutions and their demands from its citizens. "Under our Constitution, a naturalized citizen stands on an equal footing with the native citizen in all respects, save that of eligibility to the Presidency." *Luria* v. *United States,* 231 U. S. 9, 22. One of the prerogatives of

American citizenship is the right to criticize public men and measures—and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation. Our trust in the good sense of the people on deliberate reflection goes deep. For such is the contradictoriness of the human mind that the expression of views which may collide with cherished American ideals does not necessarily prove want of devotion to the Nation. It would be foolish to deny that even blatant intolerance toward some of the presuppositions of the democratic faith may not imply rooted disbelief in our system of government.

Forswearing past political allegiance without reservation and full assumption of the obligations of American citizenship are not at all inconsistent with cultural feelings imbedded in childhood and youth.[3] And during a period when new strength of the land of one's nativity was flamboyantly exploited before its full sinister meaning had been adequately revealed even to some Americans of the oldest lineage, such old cultural loyalty, it is well

[3] The retention of cultural ties despite the change in "juridical and political" status has thus been put by a distinguished historian, Gaetano Salvemini, in speaking of his own naturalization: "There is in this country a wider area of generosity than in any other country—at least in Europe. It is this feeling that one is at home here that conquers you little by little. And one fine day you feel that you are no longer an exile but a citizen in your own country. When I took my oath I felt that really I was performing a grand function. I was throwing away not my intellectual and moral but my juristic past. I threw it away without any regret. The Ethiopian war, the rape of Albania, the Spanish crime, and this last idiotic crime, had really broken my connection with sovereigns, potentates, and all those ugly things which are enumerated in the formula of the oath. It is a wonderful formula. Your pledges are only juridical and political. You are asked to sever your connections with the government of your former country, not with the people and the civilization of your former country. And you are asked to give allegiance to the Constitution of your adopted country, that is, to an ideal of life." Radcliffe Quarterly, August 1941, pp. 8–9.

known, was stimulated into confusion of mind and sometimes to expressions of offensive exuberance.

The denial of application for citizenship because the judicial mind has not been satisfied that the test of allegiance has been met, presents a problem very different from the revocation of the naturalization certificate once admission to the community of American citizenship has been decreed. No doubt the statutory procedure for naturalization (§ 334, Nationality Act of 1940), and § 338, with which we are here concerned, "were designed to afford cumulative protection against fraudulent or illegal naturalization." *United States* v. *Ness*, 245 U. S. 319, 327. But relaxation in the vigor appropriate for scrutinizing the intensity of the allegiance to this country embraced by an applicant before admitting him to citizenship is not to be corrected by meagre standards for disproving such allegiance retrospectively. New relations and new interests flow, once citizenship has been granted. All that should not be undone unless the proof is compelling that that which was granted was obtained in defiance of Congressional authority. Non-fulfilment of specific conditions, like time of residence or the required number of supporting witnesses, are easily established, and when established leave no room for discretion because Congress has left no area of discretion. But where the claim of "illegality" really involves issues of belief or fraud, proof is treacherous and objective judgment, even by the most disciplined minds, precarious. That is why denaturalization on this score calls for weighty proof, especially when the proof of a false or fraudulent oath rests predominantly not upon contemporaneous evidence but is established by later expressions of opinion argumentatively projected, and often through the distorting and self-deluding medium of memory, to an earlier year when qualifications for citizenship were claimed, tested and adjudicated.

It is idle to try to capture and confine the spirit of this requirement of proof within any fixed form of words. The exercise of our judgment is of course not at large. We are fully mindful that due observance of the law governing the grant of citizenship to aliens touches the very well-being of the Nation. Nothing that we are now deciding is intended to weaken in the slightest the alertness with which admission to American citizenship should be safeguarded. But we must be equally watchful that citizenship once bestowed should not be in jeopardy nor in fear of exercising its American freedom through a too easy finding that citizenship was disloyally acquired. We have sufficiently indicated the considerations of policy, derived from the traditions of our people, that require solid proof that citizenship was falsely and fraudulently procured. These considerations must guide our judicial judgment. Nor can the duty of exercising a judgment be evaded by the illusory definiteness of any formula.

The insufficiency of the evidence to show that Baumgartner did not renounce his allegiance to Germany in 1932 need not be labored. Whatever German political leanings Baumgartner had in 1932, they were to Hitler and Hitlerism, certainly not to the Weimar Republic. Hitler did not come to power until after Baumgartner forswore his allegiance to the then German nation.

Views attributed to Baumgartner as to the superiority of German people, schools, engineering techniques, and the virtues of Hitler, expressed in 1927, when he began to work in Kansas City, are the only direct evidence introduced to show that before he was naturalized in 1932, his attitude precluded his truly or honestly taking an oath of allegiance to the United States, its Constitution and its laws. And his statement at the trial that his attitude toward the principles of the American Government was the same in 1932 as it was at the time of the trial, is hardly significant. For Baumgartner professed

loyalty at the trial, denied or explained the few disturbing statements attributed to him by others, and reconciled suspicious diary entries in ways that do not preclude the validity of his oath of allegiance. In short, the weakness of the proof as to Baumgartner's state of mind at the time he took the oath of allegiance can be removed, if at all, only by a presumption that disqualifying views expressed after naturalization were accurate representations of his views when he took the oath. The logical validity of such a presumption is at best dubious even were the supporting evidence less rhetorical and more conclusive. Baumgartner was certainly not shown to have been a party Nazi, and there is only the statement of one witness that Baumgartner had told him that he was a member of the Bund, to hint even remotely that Baumgartner was associated with any group for the systematic agitation of Nazi views or views hostile to this Government. On the contrary, Baumgartner's diary, on which the Government mainly relies, reveals that when in 1939 he attended a meeting of the German Vocational League at which the Nazi salute was given, it was apparently his only experience with this group, and he went "Since I wanted to see what sort of an organization this Vocational League was."

And so we conclude that the evidence as to Baumgartner's attitude after 1932 affords insufficient proof that in 1932 he had knowing reservations in forswearing his allegiance to the Weimar Republic and embracing allegiance to this country so as to warrant the infliction of the grave consequences involved in making an alien out of a man ten years after he was admitted to citizenship. The evidence in the record before us is not sufficiently compelling to require that we penalize a naturalized citizen for the expression of silly or even sinister-sounding views which native-born citizens utter with impunity. The judgment must accordingly be reversed and the case re-

manded to the District Court for further proceedings not inconsistent with this opinion.

Reversed.

MR. JUSTICE MURPHY:

The issue in this case is clear. The Government has sought to set aside petitioner's naturalization certificate because of alleged fraudulent and illegal procurement. It was thus incumbent on the Government to meet the standard of proof laid down by this Court in *Schneiderman* v. *United States,* 320 U. S. 118, 125, 158, by presenting evidence of a "clear, unequivocal, and convincing" character which did not leave "the issue in doubt" as to whether petitioner fraudulently or illegally procured his certificate.

It is true that in the *Schneiderman* case we were met with the issue as to whether the petitioner in that case had illegally procured his naturalization certificate in that he had not, at the time of his naturalization and five years prior thereto, behaved as a person attached to the principles of the Constitution, and well disposed to the good order and happiness of the United States. We expressly did not pass upon the charge of fraud in obtaining the certificate, which is the primary charge present in this proceeding. But the requirement that the Government prove its case by "clear, unequivocal, and convincing" evidence transcends the particular ground upon which the Government seeks to set aside the naturalization certificate. The decision in the *Schneiderman* case was not merely a decision of an isolated case. It was a formulation by a majority of the Court of a rule of law governing all denaturalization proceedings.[1] That rule of law is

[1] The denaturalization proceeding in the *Schneiderman* case was brought under the provisions of § 15 of the Act of June 29, 1906, 34 Stat. 596, 8 U. S. C. § 405. Practically identical provisions are con-

equally applicable whether the citizen against whom the proceeding is brought is a Communist, a Nazi or a follower of any other political faith. This requirement of proof was recognized by the court below, 138 F. 2d 29, 34, and by both the Government and the petitioner before us.

In the instant case the failure of the Government to present evidence of a "clear, unequivocal, and convincing" nature that petitioner fraudulently or illegally procured his naturalization certificate in 1932 is patent. With one unimportant exception, the Government proved only that petitioner displayed certain Nazi sympathies and was critical of the United States several years after 1932. There was no competent evidence that he entertained these strong beliefs or that he had any mental reservations in forswearing his allegiance to the Weimar Republic in 1932.

American citizenship is not a right granted on a condition subsequent that the naturalized citizen refrain in the future from uttering any remark or adopting an attitude favorable to his original homeland or those there in power, no matter how distasteful such conduct may be to most of us. He is not required to imprison himself in an intellectual or spiritual strait-jacket; nor is he obliged to retain a static mental attitude. Moreover, he does not lose the precious right of citizenship because he subsequently dares to criticize his adopted government in vituperative or defamatory terms. It obviously is more difficult to conform to the standard set forth in the *Schneiderman* case by mere proof of a state of mind subsequent to naturalization than by proof of facts existing

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tained in § 338 of the Nationality Act of 1940, 54 Stat. 1137, 1158, 8 U. S. C. § 738, under which the proceeding in the instant case was instituted. See *Schneiderman* v. *United States*, 320 U. S. at 121, note 1.

prior to or at the time of naturalization. But that does not excuse a failure to meet that standard. The naturalized citizen has as much right as the natural-born citizen to exercise the cherished freedoms of speech, press and religion, and without "clear, unequivocal, and convincing" proof that he did not bear or swear true allegiance to the United States at the time of naturalization he cannot be denaturalized. Proper realization of that principle makes clear the error of setting aside petitioner's naturalization certificate on the basis of the facts adduced in this proceeding.

MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS and MR. JUSTICE RUTLEDGE join in this opinion.

HARTZEL *v.* UNITED STATES.

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

No. 531. Argued April 25, 1944.—Decided June 12, 1944.

Evidence in this case *held* insufficient to sustain a conviction of violation of § 3 of the Espionage Act of 1917, upon an indictment charging that the defendant, in time of war, willfully attempted to cause insubordination, disloyalty, mutiny and refusal of duty in the armed forces and willfully obstructed the recruiting and enlistment service of the United States. P. 688.

138 F. 2d 169, reversed.

CERTIORARI, 320 U. S. 734, to review the affirmance of a conviction for violation of the Espionage Act of 1917.

Mr. Ode L. Rankin for petitioner.

Solicitor General Fahy, with whom *Assistant Attorney General Tom C. Clark, Mr. Robert S. Erdahl,* and *Miss Beatrice Rosenberg* were on the brief, for the United States.

MR. JUSTICE MURPHY announced the conclusion and judgment of the Court.

For the first time during the course of the present war we are confronted with a prosecution under the Espionage Act of 1917.[1] The narrow issue is whether there was sufficient evidence to support the jury's determination that petitioner violated the Act in that, in time of war, he willfully attempted to cause insubordination, disloyalty, mutiny and refusal of duty in the armed forces and willfully obstructed the recruiting and enlistment service of the United States.

Petitioner and two others were charged in a seven-count indictment with violations of the second and third clauses[2] of § 3 of the Act, together with a violation of § 4. It was alleged that in time of war they published and disseminated three pamphlets to numerous persons and organizations, among whom were individuals available and eligible for recruitment and enlistment in the military and naval forces of the United States as well as individuals already members of the armed forces. Counts 1, 3 and 5 charged that by these actions they willfully obstructed the recruiting and enlistment service of the United States in violation of the third clause of § 3. Counts 2, 4 and 6 charged that these activities constituted a willful attempt to cause insubordination, disloyalty, mutiny and refusal

[1] Espionage Act of June 15, 1917, c. 30, 40 Stat. 217, 50 U. S. C. § 31 *et seq.*

[2] The second and third clauses of § 3 of the Act provide as follows: "Whoever, when the United States is at war, . . . shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both." 40 Stat. 217, 219, 41 Stat. 1359, 50 U. S. C. § 33.

of duty in the military and naval forces of the United States in violation of the second clause of § 3. Count 7 charged a conspiracy to violate § 3, in violation of § 4 of the Act. Petitioner was found guilty on all counts and was sentenced generally to five years in prison. The court below affirmed his conviction on appeal.[3] 138 F. 2d 169. The importance of the issues involved led us to grant certiorari. 320 U. S. 734.

Petitioner, an American citizen, was born 52 years ago in Pennsylvania. His ancestors, of Scotch, Irish and German descent, came to this country over 120 years ago. He enlisted in the armed forces in 1917 and served overseas. After his honorable discharge in 1919, he was employed in the city health department at Akron, Ohio, while earning a degree in science at Akron University. He then took courses in economics and political economy at the University of Chicago and became a financial analyst and statistician for various banks, investment brokers and investment companies in Chicago. After 1938 he was employed as an auditor and statistician, first by the State of Illinois and then by the federal government in corporations in Detroit and Chicago producing material for the United States Army Air Corps. During all this time he had constantly engaged in economic research on his own behalf and several articles by him were

[3] Petitioner's co-defendants—Mecartney, an attorney, and Soller, the mimeographer—were found guilty on counts 5, 6 and 7. But the trial judge set aside Mecartney's conviction on a motion for a new trial on the ground that there was no evidence that he had any active part in the distribution of the pamphlets produced by petitioner. Soller's conviction was set aside by the court below on the ground that there was no proof that he knew what use petitioner made of the pamphlets. Mecartney and Soller were the only co-conspirators of petitioner named in the indictment and the setting aside of their convictions makes it impossible to sustain petitioner's conviction upon the basis of count 7, the conspiracy count.

published in reputable business and financial periodicals. There was no evidence of his having been associated in any way with any foreign or subversive organization.

Prior to the entry of the United States into the present war, petitioner wrote several short articles containing scurrilous and vitriolic attacks on the English, the Jews and the President of the United States. Americans were urged not to ally themselves with the English. Only a German victory, it was said, would bring "increased stability and safety for the West." Petitioner had certain of these articles mimeographed by various individuals in Chicago, including one Elmer Soller, who was later indicted as a co-defendant with petitioner. Several hundred copies of the mimeographed articles were mailed by petitioner to individuals and organizations appearing on his mailing list.

Petitioner then wrote three articles in 1942 which formed the basis for his conviction under the Espionage Act of 1917. These articles repeated the same themes and were marked by the same calumny and invective; they are set out at length in the opinion of the court below, 138 F. 2d at 170–172, and need not be repeated here. In substance, they depict the war as a gross betrayal of America, denounce our English allies and the Jews and assail in reckless terms the integrity and patriotism of the President of the United States. They call for an abandonment of our allies and a conversion of the war into a racial conflict. They further urge an "internal war of race against race" and "occupation [of America] by foreign troops until we are able to stand alone."

After writing these articles, petitioner had them mimeographed by his co-defendant Soller and mailed about six hundred copies of them, anonymously, to persons and organizations on his mailing list. In order to avoid detection, he deposited the envelopes in several different mail-

boxes and endeavored to leave no fingerprints.[4] He had compiled this mailing list from several sources: (1) the World Almanac, which gave him the names of various prominent people, associations, fraternities, sororities, etc.; (2) a government publication containing a list of labor unions; (3) daily newspapers which mentioned the names of people actively engaged in the America First Committee; and (4) telephone directories at the public library which gave him the names of various state and district commanders of the American Legion. Included in his list were such persons as United States senators, representatives, bishops and other church officials; such organizations as the Daughters of the American Revolution and We the Mothers Mobilize were also included.

The Government proved that two of these pamphlets were mailed to and read by the Commanding General of the United States Army Air Forces and a colonel attached to the General Staff. All three pamphlets were mailed to the United States Infantry Association, which publishes the Infantry Journal, a service publication, and were read at its headquarters by two Army officers in the course of their duties. The evidence also showed that

[4] Petitioner testified that "I sent the documents out anonymously because I almost lost my job several times and I knew I had to be careful and also because of a great deal of espionage in the community. I did not sign my name to the documents I sent out for the same reason. . . . I took them out and dropped them in several boxes. I did that because with such a large quantity of them, I thought someone might throw them out. I mailed them all at once, but I dropped one hundred in one box and another hundred in each of four or five boxes. I didn't put them all in one box simply because, if someone would throw one out they would throw them all out. I had a suspicion that someone in authority might well find these articles and throw them out for the reasons I gave you. I had heard that fingerprints would be identified so I put my hand over it like that (indicating). I was suspicious of it for the same reasons I gave you." There was no evidence contradicting any of this testimony.

one or more of the pamphlets were received in the mail by the president of Northwestern University, the American Newspaper Publishers Association, the Kiwanis International, the Lions International, the Air Line Pilots Association and the American Legion, Department of Illinois. Individuals registered under the Selective Training and Service Act of 1940 and employed by these various organizations read the pamphlets in the ordinary course of their work, including one 20-year-old clerk whose duty it was to open the incoming mail at the office of the Lions International. In addition, envelopes addressed to at least eighteen high-ranking Army officers were found secreted under a bathtub in petitioner's home, together with several of the pamphlets.

Shortly after being taken into custody, petitioner signed a statement in which he claimed that "the prime motive which impelled me in writing and distributing the articles discussed above, was the hope that they might tend to create sentiment against war amongst the white races and in diverting the war from them, to unite the white races against what I consider to be the more dangerous enemies, the yellow races." At the trial he testified that "I thought there was a trend toward Communism, and I thought it was quite a dangerous position because of warfare between the white races, it would be the cause of war between the white and yellow races, and rather than have it beat into us, we might as well face the facts and know what we were facing, a certain group of Communists discussing methods, their viewpoints, I wanted to help minimize that so we could again have public standpoint established in this country." He said he thought his articles might improve the morale of persons available and eligible for recruiting and enlistment in the armed forces, though he retracted this statement on cross-examination. His efforts, he thought, "were political in character" and "the effect on the troops of saying that America was betrayed would be

for them to consider whether it was or not and, if so, to fight for Americans."

On the basis of these facts, petitioner was found guilty of violating the second and third clauses of § 3 of the Act. These clauses are directed at those who, in time of war, "willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States," or who, in time of war, "willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service of the United States." Thus these clauses punish the making and dissemination of statements and writings which are intended to have the evil effects set forth by Congress. No question is here raised as to the constitutionality of these provisions or as to the sufficiency of the indictment returned thereunder. But such legislation, being penal in nature and restricting the right to speak and write freely, must be construed narrowly and "must be taken to use its words in a strict and accurate sense." Mr. Justice Holmes, dissenting in *Abrams* v. *United States,* 250 U. S. 616 at 627.

The language of the second and third clauses of § 3 makes clear that two major elements are necessary to constitute an offense under these clauses. The first element is a subjective one, consisting of a specific intent or evil purpose at the time of the alleged overt acts to cause insubordination or disloyalty in the armed forces or to obstruct the recruiting and enlistment service. This requirement of a specific intent springs from the statutory use of the word "willfully." That word, when viewed in the context of a highly penal statute restricting freedom of expression, must be taken to mean deliberately and with a specific purpose to do the acts proscribed by Congress. Cf. *United States* v. *Murdock,* 290 U. S. 389 at 394; *United States* v. *Illinois Central R. Co.,* 303 U. S. 239 at 242; *Browder* v. *United States,* 312 U. S. 335 at 341;

Spies v. *United States,* 317 U. S. 492 at 497. The second element is an objective one, consisting of a clear and present danger that the activities in question will bring about the substantive evils which Congress has a right to prevent. *Schenck* v. *United States,* 249 U. S. 47. Both elements must be proved by the Government beyond a reasonable doubt.

The requisite specific intent in such a case as this may be proved not only by the language actually used in the statements or writings themselves but also by the circumstances surrounding their preparation and dissemination. But, so far as the record in this case is concerned, neither of these sources is productive of evidence from which a jury could properly find beyond a reasonable doubt that petitioner had such an intent at the time he composed and mailed the three pamphlets. For that reason alone the conviction must be reversed.

There is nothing on the face of the three pamphlets in question to indicate that petitioner intended specifically to cause insubordination, disloyalty, mutiny or refusal of duty in the military forces or to obstruct the recruiting and enlistment service. No direct or affirmative appeals are made to that effect and no mention is made of military personnel or of persons registered under the Selective Training and Service Act. They contain, instead, vicious and unreasoning attacks on one of our military allies, flagrant appeals to false and sinister racial theories and gross libels of the President. Few ideas are more odious to the majority of the American people or more destructive of national unity in time of war. But while such iniquitous doctrines may be used under certain circumstances as vehicles for the purposeful undermining of the morale and loyalty of the armed forces and those persons of draft age, they cannot by themselves be taken as proof beyond a reasonable doubt that petitioner had the narrow intent requisite to a violation of this statute.

Nor do the circumstances of the distribution of the three pamphlets, supplemented by petitioner's pre-trial statement, his testimony and the similar articles written and disseminated by him before the war, supply sufficient evidence of the necessary intent. There was no evidence that petitioner intended to influence military personnel or individuals of draft age in the manner forbidden by the statute in composing his mailing list or in sending his pamphlets to those listed therein. His purpose, rather, appears to have been to obtain the names of prominent individuals and organizations and to propagate his ideas among them. The fact that some of these individuals and some of the representatives of these organizations were of draft age was not shown to have been dominant, or even present, in petitioner's mind or to have motivated him in any degree. And the fact that he mailed his pamphlets to at least four high-ranking Army officers and addressed envelopes to at least eighteen others is not evidence from which the jury could infer beyond a reasonable doubt that he intended to cause insubordination, disloyalty, mutiny or refusal of duty among them. Their inclusion in a mailing list of six hundred persons and organizations is quite consistent with a mere intent to influence public opinion and to circulate malicious political propaganda among outstanding personages, whether they be in the armed forces or not.

His prewar writings, if they should be taken into account at all, are no more indicative of the necessary intent than are the three pamphlets in issue. His statements and testimony concerning his motive in preparing and distributing the three pamphlets are likewise indecisive. Proof that he intended, in his words, to "create sentiment against war amongst the white races" and to "unite the white races against what I consider to be the more dangerous enemies, the yellow races" does not satisfy the burden which rests on the Government to prove beyond a

reasonable doubt that petitioner had the purpose or intent to do what is outlawed by § 3 of this Act. Thoughtlessness, carelessness and even recklessness are not substitutes for the more specific state of mind which the statute makes an essential ingredient of the crime.

We are not unmindful of the fact that the United States is now engaged in a total war for national survival and that total war of the modern variety cannot be won by a doubtful, disunited nation in which any appreciable sector is disloyal. For that reason our enemies have developed psychological warfare to a high degree in an effort to cause unrest and disloyalty. Much of this type of warfare takes the form of insidious propaganda in the manner and tenor displayed by petitioner's three pamphlets. Crude appeals to overthrow the government or to discard our arms in open mutiny are seldom made. Emphasis is laid, rather, on such matters as the futility of our war aims, the vices of our allies and the inadequacy of our leadership. But the mere fact that such ideas are enunciated by a citizen is not enough by itself to warrant a finding of a criminal intent to violate § 3 of the Espionage Act. Unless there is sufficient evidence from which a jury could infer beyond a reasonable doubt that he intended to bring about the specific consequences prohibited by the Act, an American citizen has the right to discuss these matters either by temperate reasoning or by immoderate and vicious invective without running afoul of the Espionage Act of 1917. Such evidence was not present in this case.

The judgment of the court below is

Reversed.

MR. JUSTICE ROBERTS:

Without discussing the evidence in detail or characterizing the petitioner's conduct, I deem it sufficient to say that I concur in the view that there was not sufficient evi-

dence in the case to warrant submission to the jury. The conviction of violation of the statute should, therefore, be reversed.

MR. JUSTICE REED, with whom MR. JUSTICE FRANKFURTER, MR. JUSTICE DOUGLAS and MR. JUSTICE JACKSON concur, dissenting:

The First Amendment to the Constitution preserves freedom of speech and of the press in war as well as in peace. The right to criticize the Government and the handling of the war is not questioned. Congress has not sought, directly or indirectly, to abridge the right of anyone to present his views on the conduct of the war or the making of the peace. The legislation under which Hartzel was tried and convicted was aimed at those who, in time of war, "shall willfully cause or attempt to cause insubordination, disloyalty, or refusal of duty, in the military or naval forces of the United States." It is only when the requisite intent to produce those results is present that criticism may cross over the line of prohibited conduct. The constitutional power of Congress so to protect the national interest is beyond question. *Schenck* v. *United States,* 249 U. S. 47.

If the petitioner committed acts from which a properly instructed jury could reasonably conclude that the requisite intention existed to cause the evils against which the statute is directed, the sentence was proper. As the verdict was general, we need only to examine the proceedings under the count of the indictment which charged violation of the law in the words quoted in the preceding paragraph. *Hirabayashi* v. *United States,* 320 U. S. 81, 105.

Petitioner urges that these articles, which contain on their face no explicit call upon the military to disobey orders, act in a disloyal manner, mutiny or disregard their duty, cannot be a violation of the statute because they offer no proof of the necessary intent and none is offered

outside of the papers themselves. We think that this argument fails. Congress has made it an offense willfully to attempt to cause insubordination and likewise willfully to obstruct the recruiting and enlistment service of the Nation. It does not commend itself to us to hold that thereby Congress was merely concerned with crude attempts to undermine the war effort but gave free play to less obvious and more skillful ways of bringing about the same mischievous results. Papers or speeches may contain incitements for the military to be insubordinate or to mutiny without a specific call upon the armed forces so to act. If circulated for the purpose of undermining military discipline, scurrilous articles, attacking an ally, a minority of our citizens and the President, may contain, without words of solicitation, indications of purpose sufficient, if accepted as true, from which to draw an intent to accomplish the unlawful results.

Moreover, when the other evidence is added to the articles themselves, we think that enough facts revealing the requisite intent were presented to justify the verdict. Other similar articles circulated prior to the declaration of war tended to show a continuing intention. The articles which were the basis of the indictment were sent to military officers including those of the highest rank. This circumstance is brought forward by petitioner as indicative of a lack of intention to undermine the military forces. This was doubtless weighed by the jury, but certainly it cannot be said that circulation of propaganda among officers shows less intention to proselyte than to circulate among the enlisted personnel. Copies were sent to the Infantry Journal, a publication circulating largely in the armed forces. Nothing appears as to any motive, other than interference with discipline, that the petitioner might have in distributing this type of pamphlet to professional military officers. The jury was entitled to weigh the fact that the articles were sent anonymously. The

jury was also entitled to weigh the fact that those to whom the articles were sent were hand-picked and composed a select group. These actions speak as loud as words.

Hartzel himself, moreover, made a statement which was introduced at the trial. In it he told of the preparation of the pamphlets, the selection of the mailing list from among prominent personages and associations and his reason for his acts. His intent appears in these words:

"Finally, the prime motive which impelled me in writing and distributing the articles discussed above, was the hope that they might tend to create sentiment against war amongst the white races and in diverting the war from them, to unite the white races against what I consider to be the more dangerous enemies, the yellow races."

The jury might well infer from the quoted paragraph that Hartzel, by placing these pamphlets in military hands, was attempting to cause insubordination among the troops. He sought to develop sentiment "against war among the white races." Germans are a "white race."

These pamphlets were distributed in 1942. The military situation was then nothing like so strong as now nor confidence in our strategy so uniform. A large segment of public opinion desired to concentrate against Japan, rather than Germany and Italy, a viewpoint which doubtless had advocates among the members of the armed forces. It was an opportune time from the viewpoint of the German enemy to put pamphlets such as these in circulation which taught suspicion of Britain, vilified Jews and promoted lack of confidence in the President. On the question of intention, the circumstances under which the pamphlets were distributed were important and entitled to weight. Petitioner played precisely upon those prejudices from which at that time insubordination or disloyalty was most likely to develop.

We are not a jury passing on Hartzel's state of mind. Our sole and very limited duty is to decide whether there

was evidence enough warranting the trial judge letting the case go to the jury, whether 12 jurymen had warrant for their finding that Hartzel's very purpose was to undermine the will of our soldiers to fight our Nazi enemy, and whether the Circuit Court of Appeals was warranted in sustaining such a finding. We are at a loss to know what other intent is to be attributed to the dissemination of these documents to our soldiery. To adopt the language of Mr. Justice Holmes speaking for a unanimous Court in *Schenck* v. *United States,* 249 U. S. 47, 51, of course the documents would not have been sent unless they had been intended to have some effect, and we do not see what effect they could be expected to have upon persons in the military service except to influence them to obstruct the carrying on of the war against Germany when petitioner deemed that a betrayal of our country.

As the trial judge aptly stated:

"All of the circumstances of the case, it seems to me, the very language of the pamphlets composed and distributed by Hartzel show such intent. For what purpose other than hindering the carrying on of the war in any way did he have or could he have had in mind? He appeared on the stand to be an unusually shrewd person. The story he tells of his education and his activities indicates that whatever he does is deliberate and with a definite purpose. He is not a fanatic attached to a cause, having political and economic theories for the liberation of oppressed peoples as were the defendants in *Pierce* v. *United States,* 252 U. S. 239, and *Abrams* v. *United States,* 250 U. S. 616, where Justices Holmes and Brandeis in dissenting opinions found that the literature distributed by the defendants had as its purpose propagating certain economic ideas rather than interfering with enlistment or recruiting or insubordination or disloyalty to the army. In this case the jury were warranted in presuming from the preparation and circulation of the literature that Hartzel intended

to obstruct enlistment and recruiting and to cause insubordination and disloyalty in the military service of the United States."

On these facts we would intrude on the historic function of the jury in criminal trials to say that the requisite intent "to cause insubordination, disloyalty, or refusal of duty, in the military or naval forces" was lacking. The right of free speech is vital. But the necessity of finding beyond a reasonable doubt the intent to produce the prohibited result affords abundant protection to those whose criticism is directed to legitimate ends.

UNITED STATES *v.* WHITE.

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

No. 366. Argued March 6, 1944.—Decided June 12, 1944.

1. The constitutional privilege against self-incrimination is essentially a personal one, applying only to natural individuals. P. 698.
2. The papers and effects which the privilege protects must be the private property of the person claiming the privilege, or at least in his possession in a purely personal capacity. P. 699.
3. An officer of an unincorporated labor union has no right, under the Fourth and Fifth Amendments of the Federal Constitution, to refuse to produce books and records of the union—which are in his possession and which a federal court by a subpoena duces tecum has required to be produced—on the ground that they might tend to incriminate the union or himself as an officer thereof and individually. P. 704.

   The test of the applicability of the privilege is whether one can fairly say under all the circumstances that a particular type of organization has a character so impersonal in the scope of its membership and activities that it can not be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only. If so, the privilege can not be invoked on behalf of the organization or its representatives in their official capacity. P. 701.

4. Whether the person asserting the privilege in such case is a member of the union, and whether the union was subject to the provisions of the statute in relation to which the investigation was being made, are immaterial. P. 704.

137 F. 2d 24, reversed.

CERTIORARI, 320 U. S. 729, to review the reversal of a judgment sentencing the respondent for contempt.

Assistant Attorney General Tom C. Clark, with whom *Solicitor General Fahy,* and *Messrs. Chester T. Lane, Philip Marcus, Jesse Climenko, Malcolm A. Hoffman,* and *George M. Fay* were on the brief, for the United States.

Mr. Robert J. Fitzsimmons for respondent.

MR. JUSTICE MURPHY delivered the opinion of the Court.

During the course of a grand jury investigation into alleged irregularities in the construction of the Mechanicsburg Naval Supply Depot, the District Court of the United States for the Middle District of Pennsylvania issued a subpoena duces tecum directed to "Local No. 542, International Union of Operating Engineers." This subpoena required the union to produce before the grand jury on January 11, 1943, copies of its constitution and by-laws and specifically enumerated union records showing its collections of work-permit fees, including the amounts paid therefor and the identity of the payors from January 1, 1942, to the date of the issuance of the subpoena, December 28, 1942.

The United States marshal served the subpoena on the president of the union. On January 11, 1943, respondent appeared before the grand jury, describing himself as "assistant supervisor" of the union. Although he was not shown to be the authorized custodian of the union's books, he had the demanded documents in his possession. He

had not been subpoenaed personally to testify nor personally directed by the subpoena duces tecum to produce the union's records. Moreover, there was no effort or indicated intention to examine him personally as a witness. Nevertheless he declined to produce the demanded documents "upon the ground that they might tend to incriminate Local Union 542, International Union of Operating Engineers, myself as an officer thereof, or individually." He reiterated his refusal after consulting counsel.

He was immediately cited for contempt of court and during the hearing on the contempt repeated his refusal once again. He based his refusal on the opinion of his counsel that "great uncertainty exists today as to what may or may not constitute a violation of Section 276 (b), Title 40, of the United States Code." [1] He made no effort, although he apparently was willing, to tender the records for the judge's inspection in support of his assertion that their contents would tend to incriminate him or the union. The District Court held his refusal inexcusable, adjudged him guilty of contempt of court and sentenced him to thirty days in prison.

The court below reversed the District Court's judgment by a divided vote. 137 F. 2d 24. The majority held that the records of an unincorporated labor union were the property of all its members and that, if respondent were a

[1] This was a reference to the so-called "Kickback" Act, which was before us in *United States* v. *Laudani*, 320 U. S. 543. Section 1 of the Act provides that whoever shall induce any person employed in the construction, prosecution or completion of any public building or work financed in whole or in part by the United States, or in the repair thereof, to give up part of his compensation by force, intimidation, threat of procuring dismissal from employment, or by any other manner whatsoever shall be fined not more than $5,000, or imprisoned not more than five years, or both. Act of June 13, 1934, c. 482, 48 Stat. 948, 40 U. S. C. § 276 (b).

union member and if the books and records would have tended to incriminate him, he properly could refuse to produce them before the grand jury. The court below accordingly remanded the case to the District Court with directions to sustain the claim of privilege if after further inquiry it should determine that respondent was in fact a member of the union and that the documents would tend to incriminate him as an individual. We granted certiorari, 320 U. S. 729, because of the novel and important question of constitutional law which is presented.[2]

The only issue in this case relates to the nature and scope of the constitutional privilege against self-incrimination. We are not concerned here with a complete delineation of the legal status of unincorporated labor unions. We express no opinion as to the legality or desirability of incorporating such unions or as to the necessity of considering them as separate entities apart from their members for purposes other than the one posed by the narrow issue in this case. Nor do we question the obvious fact that business corporations, by virtue of their creation by the state and because of the nature and purpose of their activities, differ in many significant respects from unions, religious bodies, trade associations, social clubs and other types of organizations, and accordingly owe different obligations to the federal and state gov-

[2] In its petition for a writ of certiorari in this case, the Government claimed that respondent had taken his appeal to the Circuit Court of Appeals by filing a notice of appeal pursuant to the Criminal Appeals Rules rather than by application for appeal as required by § 8 (c) of the Act of February 13, 1925, c. 229, 43 Stat. 940, 28 U. S. C. § 230. See *Nye* v. *United States*, 313 U. S. 33, 43–44. It appears, however, that at the contempt hearing an extensive colloquy took place between the district judge and counsel with respect to the perfecting of the appeal and respondent at that time made in effect an oral application for appeal which was allowed by the court within the meaning of the Act of February 13, 1925.

ernments. Our attention is directed solely to the right of an officer of a union to claim the privilege against self-incrimination under the circumstances here presented.

Respondent contends that an officer of an unincorporated labor union possesses a constitutional right to refuse to produce, in compliance with a subpoena duces tecum, records of the union which are in his custody and which might tend to incriminate him. He relies upon the "unreasonable search and seizure" clause of the Fourth Amendment and the explicit guarantee of the Fifth Amendment that no person shall be compelled in any criminal case to be a witness against himself. We hold, however, that neither the Fourth nor the Fifth Amendment, both of which are directed primarily to the protection of individual and personal rights, requires the recognition of a privilege against self-incrimination under the circumstances of this case.

The constitutional privilege against self-incrimination is essentially a personal one, applying only to natural individuals. It grows out of the high sentiment and regard of our jurisprudence for conducting criminal trials and investigatory proceedings upon a plane of dignity, humanity and impartiality. It is designed to prevent the use of legal process to force from the lips of the accused individual the evidence necessary to convict him or to force him to produce and authenticate any personal documents or effects that might incriminate him. Physical torture and other less violent but equally reprehensible modes of compelling the production of incriminating evidence are thereby avoided. The prosecutors are forced to search for independent evidence instead of relying upon proof extracted from individuals by force of law. The immediate and potential evils of compulsory self-disclosure transcend any difficulties that the exercise of the privilege may impose on society in the detection and prosecution of crime. While the privilege is subject to abuse and mis-

use, it is firmly embedded in our constitutional and legal frameworks as a bulwark against iniquitous methods of prosecution. It protects the individual from any disclosure, in the form of oral testimony, documents or chattels, sought by legal process against him as a witness.

Since the privilege against self-incrimination is a purely personal one, it cannot be utilized by or on behalf of any organization, such as a corporation. *Hale* v. *Henkel,* 201 U. S. 43; *Wilson* v. *United States,* 221 U. S. 361; *Essgee Co.* v. *United States,* 262 U. S. 151. See also *United States* v. *Invader Oil Corp.,* 5 F. 2d 715. Moreover, the papers and effects which the privilege protects must be the private property of the person claiming the privilege, or at least in his possession in a purely personal capacity. *Boyd* v. *United States,* 116 U. S. 616. But individuals, when acting as representatives of a collective group, cannot be said to be exercising their personal rights and duties nor to be entitled to their purely personal privileges. Rather they assume the rights, duties and privileges of the artificial entity or association of which they are agents or officers and they are bound by its obligations. In their official capacity, therefore, they have no privilege against self-incrimination. And the official records and documents of the organization that are held by them in a representative rather than in a personal capacity cannot be the subject of the personal privilege against self-incrimination, even though production of the papers might tend to incriminate them personally. *Wilson* v. *United States, supra; Dreier* v. *United States,* 221 U. S. 394; *Baltimore & Ohio R. Co.* v. *Interstate Commerce Commission,* 221 U. S. 612; *Wheeler* v. *United States,* 226 U. S. 478; *Grant* v. *United States,* 227 U. S. 74; *Essgee Co.* v. *United States, supra.* Such records and papers are not the private records of the individual members or officers of the organization. Usually, if not always, they are open to inspection by the members and this right may be enforced on ap-

propriate occasions by available legal procedures. See *Guthrie* v. *Harkness,* 199 U. S. 148, 153. They therefore embody no element of personal privacy and carry with them no claim of personal privilege.

The reason underlying the restriction of this constitutional privilege to natural individuals acting in their own private capacity is clear. The scope and nature of the economic activities of incorporated and unincorporated organizations and their representatives demand that the constitutional power of the federal and state governments to regulate those activities be correspondingly effective. The greater portion of evidence of wrongdoing by an organization or its representatives is usually to be found in the official records and documents of that organization. Were the cloak of the privilege to be thrown around these impersonal records and documents, effective enforcement of many federal and state laws would be impossible. See *Hale* v. *Henkel, supra,* 70, 74; 8 Wigmore on Evidence (3d ed.) § 2259a. The framers of the constitutional guarantee against compulsory self-disclosure, who were interested primarily in protecting individual civil liberties, cannot be said to have intended the privilege to be available to protect economic or other interests of such organizations so as to nullify appropriate governmental regulations.

The fact that the state charters corporations and has visitorial powers over them provides a convenient vehicle for justification of governmental investigation of corporate books and records. *Hale* v. *Henkel, supra; Wilson* v. *United States, supra.* But the absence of that fact as to a particular type of organization does not lessen the public necessity for making reasonable regulations of its activities effective, nor does it confer upon such an organization the purely personal privilege against self-incrimination. Basically, the power to compel the production of the records of any organization, whether it be incor-

porated or not, arises out of the inherent and necessary power of the federal and state governments to enforce their laws, with the privilege against self-incrimination being limited to its historic function of protecting only the natural individual from compulsory incrimination through his own testimony or personal records.

It follows that labor unions, as well as their officers and agents acting in their official capacity, cannot invoke this personal privilege. This conclusion is not reached by any mechanical comparison of unions with corporations or with other entities nor by any determination of whether unions technically may be regarded as legal personalities for any or all purposes. The test, rather, is whether one can fairly say under all the circumstances that a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only. If so, the privilege cannot be invoked on behalf of the organization or its representatives in their official capacity. Labor unions—national or local, incorporated or unincorporated—clearly meet that test.

Structurally and functionally, a labor union is an institution which involves more than the private or personal interests of its members. It represents organized, institutional activity as contrasted with wholly individual activity. This difference is as well defined as that existing between individual members of the union. The union's existence in fact, and for some purposes in law, is as perpetual as that of any corporation, not being dependent upon the life of any member. It normally operates under its own constitution, rules and by-laws which, in controversies between member and union, are often enforced by the courts. The union engages in a multitude of business and other official concerted activities, none of which

can be said to be the private undertakings of the members.[3] Duly elected union officers have no authority to do or sanction anything other than that which the union may lawfully do; nor have they authority to act for the members in matters affecting only the individual rights of such members. The union owns separate real and personal property, even though the title may nominally be in the names of its members or trustees.[4] The official union books and records are distinct from the personal books and records of the individuals, in the same manner as the union treasury exists apart from the private and personal funds of the members. See *United States* v. *B. Goedde & Co.*, 40 F. Supp. 523, 534. And no member or officer has the right to use them for criminal purposes or for his purely private affairs. The actions of one individual member no more bind the union than they bind another individual member unless there is proof that the union authorized or ratified the acts in question. At the same time, the members are not subject to either criminal or civil liability for the acts of the union or its officers as such unless it is shown that they personally authorized or participated in the particular acts. See *Lawlor* v.

[3] In *United Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344, 385, this Court described the union there involved in the following terms: "The membership of the union has reached 450,000. The dues received from them for the national and district organizations make a very large annual total, and the obligations assumed in travelling expenses, holding of conventions, and general overhead cost, but most of all in strikes, are so heavy that an extensive financial business is carried on, money is borrowed, notes are given to banks, and in every way the union acts as a business entity, distinct from its members. No organized corporation has greater unity of action, and in none is more power centered in the governing executive bodies."

[4] Lloyd, The Law Relating to Unincorporated Associations (1938) 165 ff.; Wrightington, The Law of Unincorporated Associations (2d ed. 1923) 336 ff.

Loewe, 235 U. S. 522; *Eagle Glass & Mfg. Co.* v. *Rowe,* 245 U. S. 275.

Moreover, this Court in *United Mine Workers* v. *Coronado Coal Co.,* 259 U. S. 344, held that labor unions might be made parties defendant in suits for damages under the Sherman Act by service of process on their officers.

Both common law rules and legislative enactments have granted many substantive rights to labor unions as separate functioning institutions. In *United Mine Workers* v. *Coronado Coal Co., supra,* 385–386, this Court pointed out that "the growth and necessities of these great labor organizations have brought affirmative legal recognition of their existence and usefulness and provisions for their protection, which their members have found necessary. Their right to maintain strikes, when they do not violate law or the rights of others, has been declared. The embezzlement of funds by their officers has been especially denounced as a crime. The so-called union label, which is a quasi trademark to indicate the origin of manufactured product in union labor, has been protected against pirating and deceptive use by the statutes of most of the states, and in many states authority to sue to enjoin its use has been conferred on unions. They have been given distinct and separate representation and the right to appear to represent union interests in statutory arbitrations, and before official labor boards." Even greater substantive rights have been granted labor unions by federal and state legislation subsequent to the statutes enumerated in the opinion in that case.[5]

[5] Outstanding examples of federal legislation enacted subsequent to the *Coronado* case giving recognition to union personality are the National Labor Relations Act, 49 Stat. 449, 29 U. S. C. § 151, the Railway Labor Act, 44 Stat. 577, 45 U. S. C. § 151, and the Norris-LaGuardia Act, 47 Stat. 70, 29 U. S. C. § 101. The Anti-Racketeering Act, 48 Stat. 979, 18 U. S. C. § 420a–e, excepts certain types of

These various considerations compel the conclusion that respondent could not claim the personal privilege against self-incrimination under these circumstances. The subpoena duces tecum was directed to the union and demanded the production only of its official documents and records. Respondent could not claim the privilege on behalf of the union because the union did not itself possess such a privilege. Moreover, the privilege is personal to the individual called as a witness, making it impossible for him to set up the privilege of a third person as an excuse for a refusal to answer or to produce documents. Hence respondent could not rely upon any possible privilege that the union might have. *Hale* v. *Henkel, supra,* 69–70; *McAlister* v. *Henkel,* 201 U. S. 90. Nor could respondent claim the privilege on behalf of himself as an officer of the union or as an individual. The documents he sought to place under the protective shield of the privilege were official union documents held by him in his capacity as a representative of the union. No valid claim was made that any part of them constituted his own private papers. He thus could not object that the union's books and records might incriminate him as an officer or as an individual.

It is unnecessary to determine whether or not respondent was a member of the union in question, for in either event he could not invoke the privilege against self-incrimination under these facts. It is likewise immaterial whether the union was subject to the provisions of the statute in relation to which the grand jury was making

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activity by labor unions, thereby recognizing them as entities capable of violating the Act. The War Labor Disputes Act, 57 Stat. 163, 50 U. S. C. App. § 1501, evidences a similar recognition. See, in general, 1 & 2 Teller, Labor Disputes and Collective Bargaining (1940), Part V. For references to and discussions of recent state labor legislation, see *id.*, Part VI; Smith and DeLancey, "The State Legislatures and Unionism," 38 Michigan Law Rev. 987.

its investigation. The exclusion of the union from the benefits of the purely personal privilege does not depend upon the nature of the particular investigation or proceeding. The union does not acquire the privilege by reason of the fact that it is not charged with a crime or that it may not be subject to liability under the statute in question. The union and its officers acting in their official capacity lack the privilege at all times of insulating the union's books and records against reasonable demands of governmental authorities.

The judgment of the court below must be reversed and that of the District Court affirmed.

Reversed.

MR. JUSTICE ROBERTS, MR. JUSTICE FRANKFURTER and MR. JUSTICE JACKSON concur in the result.

DECISIONS PER CURIAM, ETC., FROM APRIL 11, 1944, THROUGH JUNE 12, 1944.*

No. —. Ex parte Oliver Gobin; and
No. —. Ex parte Noel Gaines. April 24, 1944. Applications denied.

No. —. Kelley *v.* United States. April 24, 1944. The motion for leave to file petition for writ of certiorari is denied.

No. —. Trice *v.* Wright, Warden. April 24, 1944. The motion for leave to file petition for writ of habeas corpus is denied.

No. 874. Donovan, Administrator, *v.* Kansas City. Appeal from the Supreme Court of Missouri. May 1, 1944. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Thomas* v. *City of Richmond,* 12 Wall. 349, 356–57; *Hedges* v. *Dixon County,* 150 U. S. 182, and cases cited. *Messrs. John G. Madden, Armwell L. Cooper, Cyrus Crane, Frank W. McAllister, William J. Carroll, Ralph M. Russell,* and *James E. Burke* for appellant. *Mr. Wm. E. Kemp* for appellee. Reported below: 352 Mo. 431, 179 S. W. 2d 108.

No. —, original. Jones, Governor, ex rel. Louisiana et al. *v.* Bowles, Price Administrator. May 1, 1944. The motion for leave to file the complaint is denied for want of jurisdiction of this Court to entertain it

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* Decisions on applications for certiorari, *post,* pp. 718, 726; rehearing, *post,* p. 766; cases disposed of without consideration by the Court, *post,* p. 766.

under Article III, § 2, of the Constitution. Cf. (1) *Massachusetts* v. *Mellon,* 262 U. S. 447, 485–86; *Florida* v. *Mellon,* 273 U. S. 12, 18; (2) *New Hampshire* v. *Louisiana,* 108 U. S. 76; *Oklahoma* v. *Atchison, T. & S. F. Ry. Co.,* 220 U. S. 277; *Oklahoma ex rel. Johnson* v. *Cook,* 304 U. S. 387. *Mr. Vernon B. Lowrey* for complainants.

No. —. Ex parte Samuel Jackson;

No. —. Ex parte Percy Arthur Whistler; and

No. —. Patterson *v.* Sanford, Warden. May 1, 1944. The motions for leave to file petitions for writs of habeas corpus are denied.

No. —. Ex parte William Hanley; and

No. —. Ex parte John Welch. May 1, 1944. The motions for leave to file petitions for writs of habeas corpus are denied. *Ex parte Hawk,* 321 U. S. 114, 117. Treating the papers as petitions for writs of certiorari to the Supreme Court of Illinois, the petitions are denied.

No. 5, original. Colorado *v.* Kansas et al. May 1, 1944.

This cause having been heretofore submitted on the pleadings and the evidence taken before and reported by the Commissioner and the Special Master appointed for the purpose, and the Court being now fully advised in the premises:

It is considered, ordered, and decreed that the defendant, The Finney County Water Users' Association, its officers, attorneys, agents, and employees, be, and they are hereby, severally enjoined from prosecuting further those certain cases now pending in the District Court of the United States for the District of Colorado entitled

The Finney County Water Users' Association, a corporation of Kansas, plaintiff, versus The Graham Ditch Company and others, defendants, and The Finney County Water Users' Association, a corporation of Kansas, plaintiff, versus The Coler Ditch and Reservoir Company, a corporation of Colorado, and others, defendants, said cases being numbered 6633 and 7493 respectively on the docket of said United States District Court.

It is further considered, ordered, and decreed that the prayers of both the State of Colorado and the State of Kansas for relief other than that decreed herein be, and they are hereby, dismissed.

It is also considered, ordered, and decreed that costs in this cause shall be borne and paid in equal parts by the States of Colorado and Kansas.

No. 613. AMERICAN SEATING CO. *v.* ZELL. Certiorari, 321 U. S. 757, to the Circuit Court of Appeals for the Second Circuit. Argued April 25, 1944. Decided May 8, 1944. *Per Curiam:* In this case two members of the Court think that the judgment of the Circuit Court of Appeals should be affirmed. Seven are of opinion that the judgment should be reversed and the judgment of the District Court affirmed—four because proof of the contract alleged in respondent's affidavits on the motion for summary judgment is precluded by the applicable state parol evidence rule, and three because the contract is contrary to public policy and void, see *Tool Company* v. *Norris,* 2 Wall. 45, 54; *Hazelton* v. *Sheckells,* 202 U. S. 71, 79; Executive Order No. 9001, Tit. II, par. 5, 6 Fed. Reg. 6788; War Department Procurement Regulations, 10 Code Fed. Reg. (Cum. Supp.) § 81.1181. The judgment of the Circuit Court of Appeals is reversed. *Mr. William Dwight Whitney,* with whom *Mr. Albert R. Connelly* was

on the brief, for petitioner. *Mr. J. Edward Lumbard, Jr.*, with whom *Messrs. Ralstone R. Irvine* and *Theodore S. Hope, Jr.* were on the brief, for respondent. Reported below: 138 F. 2d 641.

No. 598. McGuire *v.* Hunter, Warden. On petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit. May 8, 1944. *Per Curiam:* The motions for leave to proceed *in forma pauperis* and to add to the record the order of the District Court for the Western District of Michigan, dated April 7, 1944, are granted. The petition for writ of certiorari is also granted. In view of the new issues raised by the order of April 7, 1944, and with the consent of the Solicitor General, the judgments of the Circuit Court of Appeals and of the District Court are vacated, and the cause is remanded to the District Court, with leave to each party to present further evidence upon the material issues of the case. *Bernard G. McGuire, pro se. Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Messrs. Robert S. Erdahl* and *W. Marvin Smith* for respondent. Reported below: 138 F. 2d 379.

No. 936. House *v.* Mayo, State Prison Custodian. Appeal from the Supreme Court of Florida. May 8, 1944. *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.

No. —. Smith *v.* Pescor, Warden. May 8, 1944. The petition for appeal is denied.

No. —. Ex parte Stanley B. Peplowski. May 8, 1944. The motion for leave to file petition for writs of habeas corpus and mandamus is denied.

No. —. Ex parte Harold D. Reed. May 8, 1944. The motion for leave to file petition for writ of mandamus is denied.

No. —. Ex parte Raymond Jones; and

No. —. Ex parte Clarence Williams. May 8, 1944. The motions for leave to file petitions for writs of habeas corpus are denied.

No. —. Ex parte Monroe D. Neely. May 15, 1944. The motion for leave to file petition for writ of habeas corpus is denied.

No. —. Browder *v.* United States. May 15, 1944. Petition for appeal denied for want of jurisdiction to entertain it.

No. 942. Rock Island Refining Co. *v.* Oklahoma Tax Commission. Appeal from the Supreme Court of Oklahoma. May 22, 1944. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. (1) *U. S. Glue Co.* v. *Oak Creek,* 247 U. S. 321; *Matson Navigation Co.* v. *State Board,* 297 U. S. 441, 443–44; *Western Live Stock* v. *Bureau of Revenue,* 303 U. S. 250, 255. (2) *Lawrence* v. *State Tax Commission,* 286 U. S. 276; *New York ex rel. Cohn* v. *Graves,* 300 U. S. 308. *Mr. C. D. Cund* for appellant. Reported below: 145 P. 2d 194.

No. 943. Texas ex rel. City of West University Place et al. *v.* City of Houston et al. Appeal from the

Supreme Court of Texas. May 22, 1944. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. (1) *Pawhuska* v. *Pawhuska Oil Co.*, 250 U. S. 394; *Trenton* v. *New Jersey*, 262 U. S. 182, 187, 191–92; *Risty* v. *Chicago, R. I. & P. Ry. Co.*, 270 U. S. 378, 390; *Williams* v. *Mayor*, 289 U. S. 36, 40. (2) *King Mfg. Co.* v. *Augusta*, 277 U. S. 100, 103–4. *Messrs. Everett L. Looney* and *Edward Clark* for appellants. Reported below: 142 Tex. 190, 176 S. W. 2d 928.

No. —. ROLLS-ROYCE, INC. *v.* STIMSON, SECRETARY OF WAR. May 22, 1944. The motion for leave to file petition for writ of prohibition or mandamus is denied.

No. —. EX PARTE SYLVAN BLUMENFELD. May 22, 1944. The motion for leave to file petition for writ of mandamus is denied.

No. —. EX PARTE RAYMOND DECKER;
No. —. EX PARTE JOHN H. ROONEY;
No. —. EX PARTE LOUIS B. AMES; and
No. —. UNITED STATES EX REL. TOWNSEND *v.* RAGEN, WARDEN. May 22, 1944. The motions for leave to file petitions for writs of habeas corpus are denied.

No. —. KELLEY *v.* DOWD, WARDEN. May 22, 1944. The motion for leave to file petition for writ of certiorari is denied.

No. 977. ERICKSEN *v.* JOHN MORRELL & Co. Appeal from the Circuit Court of Minnehaha County, South Dakota. May 29, 1944. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a prop-

erly presented federal question. *Mr. George J. Danforth* for appellant. *Messrs. Paul M. Godehn* and *Leo F. Tierney* for appellee.

No. 992. WEBER *v.* HENDERSON ET AL., EXECUTRICES, ET AL. Appeal from the Circuit Court in and for the County of Essex, New Jersey. May 29, 1944. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. (1) *Memphis* v. *United States,* 97 U. S. 293, 295, 297; *McFaddin* v. *Evans-Snider-Buel Co.,* 185 U. S. 505, 510–13; *Graham & Foster* v. *Goodcell,* 282 U. S. 409, 429–30; *Paramino Lumber Co.* v. *Marshall,* 309 U. S. 370, 377–79. (2) *Richmond Mortgage Corp.* v. *Wachovia Bank Co.,* 300 U. S. 124, 130–31; *Gelfert* v. *National City Bank,* 313 U. S. 221, 235. *Messrs. Meyer M. Semel* and *Geo. H. Rosenstein* for appellant. *Mr. Michael J. Bruder* for appellees. Reported below: See 131 N. J. L. 299, 35 A. 2d 609.

No. 982. KARLOFTIS ET AL. *v.* HELTON ET AL. Appeal from the Court of Appeals of Kentucky. May 29, 1944. *Per Curiam:* The motion to dismiss is granted and 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. *Messrs. S. H. Brown* and *Cleon K. Calvert* for appellants. *Mr. Geo. E. H. Goodner* for appellees. Reported below: 297 Ky. 463, 178 S. W. 2d 959.

No. 1004. CLARKE, ADMINISTRATRIX, *v.* STORCHAK. Appeal from the Supreme Court of Illinois. May 29, 1944. *Per Curiam:* The motion to dismiss is granted and the

appeal is dismissed for want of a substantial federal question. *Silver* v. *Silver,* 280 U. S. 117. *Messrs. John E. Owens* and *Thomas L. Owens* for appellant. *Mr. Edward R. Adams* for appellee. Reported below: 384 Ill. 564, 52 N. E. 2d 229.

No. —. Ex parte James Gallagher; and

No. —. Ex parte Alice M. Betts. May 29, 1944. Applications denied.

No. —. Ex parte Charles Howerton; and

No. —. Ex parte Walker Kimler. May 29, 1944. The motions for leave to file petitions for writs of habeas corpus are denied.

No. —. Bulldog Electric Products Co. *v.* Galston, Judge;

No. —. Boyd *v.* MacDonald;

No. —. Boyd *v.* Curran;

No. —. Ex parte Carl Mingione;

No. —. Ex parte Daisy D. Wilson; and

No. —. Abbott, Administratrix, et al. *v.* Swinford, Judge. May 29, 1944. The motions for leave to file petitions for writs of mandamus are denied.

No. 11, original. Illinois *v.* Indiana et al. May 29, 1944. The motion of American Maize Products Company for leave to intervene and to file answer and cross-claim is granted with leave to any of the parties to reply and without prejudice to any order or motion to dismiss or strike any part of the intervenor's answer and cross-claim.

No. 754. Meshberger et al. *v.* Federal Land Bank of Louisville; and

No. 798. Garlington et al. *v.* Wasson. May 29, 1944. Motions denied. *Messrs. Elmer McClain* and

Samuel E. Cook for petitioners in No. 754. *Mr. Elmer McClain* for petitioners in No. 798. *Mr. William C. Goodwyn* for respondent in No. 754. Reported below: 138 F. 2d 954, 139 F. 2d 183.

No. 939. COFFMAN *v.* BREEZE CORPORATIONS, INC. ET AL. Appeal from the District Court of the United States for the District of New Jersey. May 29, 1944. The petition for a temporary injunction, referred to the conference of the Court by MR. JUSTICE ROBERTS, is denied. *Mr. James D. Carpenter, Jr.* for appellant. *Solicitor General Fahy* for appellees. Reported below: 55 F. Supp. 501.

No. 1018. PYRAMID MOVING CO. *v.* UNITED STATES ET AL. Appeal from the District Court of the United States for the Northern District of Ohio. June 5, 1944. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. (1) *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 480–82; *Alton R. Co.* v. *United States*, 315 U. S. 15, 23. (2) *Western Chemical Co.* v. *United States*, 271 U. S. 268, 271; *Virginian Ry. Co.* v. *United States*, 272 U. S. 658, 666. *Mr. H. W. Kiser* for appellant. *Solicitor General Fahy* and *Mr. Daniel W. Knowlton* for appellees.

No. —. LONG *v.* HICKS, PRESIDING JUDGE; and

No. —. LONG *v.* BENSON, WARDEN. June 5, 1944. The motions for leave to file petitions for peremptory writs of mandamus are denied.

No. —. LONG *v.* BENSON, WARDEN. June 5, 1944. The motion for a rule to show cause is denied.

No. —. MID-CONTINENT INVESTMENT CO. *v.* IGOE, JUDGE; and

No. —. MINNEAPOLIS-HONEYWELL REGULATOR CO. *v.* BARNES, JUDGE. June 5, 1944. The motions for leave to file petitions for writs of mandamus are denied.

No. —. EX PARTE GEORGE W. PULLITT; and

No. —. EX PARTE PERCY BERRY. June 5, 1944. The motions for leave to file petitions for writs of habeas corpus are denied.

No. —. EX PARTE THOMAS KING. June 5, 1944. The motion for leave to file petition for writ of habeas corpus is denied. Treating the papers as a petition for writ of certiorari to the Supreme Court of Illinois, certiorari is denied.

No. —. ROBERTS *v.* UNITED STATES DISTRICT COURT, EASTERN VIRGINIA. June 5, 1944. The motion for leave to file petition for certiorari is denied.

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. June 12, 1944. *Per Curiam:* In this case there is wanting a quorum of six Justices qualified to hear it, see 320 U. S. 708. The cause is accordingly certified and transferred to the Circuit Court of Appeals for the Second Circuit, pursuant to § 2 of the Act of February 11, 1903, 32 Stat. 823, 15 U. S. C., § 29, as amended by the Act of June 9, 1944, c. 239, 58 Stat. 272. Reported below: 47 F. Supp. 647.

No. 1024. VARNADO *v.* WOMACK ET AL. Appeal from the Supreme Court of Louisiana. June 12, 1944. *Per Curiam:* The motion for leave to file jurisdictional statement is granted. The appeal is dismissed for the reason that the judgment of the court below is based upon a non-federal ground adequate to support it. *Mr. M. C. Scharff* for appellant. Reported below: 204 La. 1019, 16 So. 2d 825.

No. 1033. JONES *v.* FREEMAN, SPEAKER OF THE HOUSE OF REPRESENTATIVES OF OKLAHOMA, ET AL. Appeal from the Supreme Court of Oklahoma. June 12, 1944. *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. Samuel A. Boorstin* for appellant. Reported below: 146 P. 2d 564.

No. —. EX PARTE JAMES M. JOHN; and

No. —. EX PARTE RAYMOND PAUL HILE. June 12, 1944. Applications denied.

No. —. EX PARTE ROBERT GEORGE BANKS;

No. —. EX PARTE ALLEN DIXON; and

No. —. EX PARTE JOHN GARDNER. June 12, 1944. The motions for leave to file petitions for writs of habeas corpus are denied.

No. —. EX PARTE EARL F. HALL. June 12, 1944. The motion for leave to file petition for writ of habeas corpus is denied. Treating the papers as a petition for writ of certiorari to the Supreme Court of Illinois, certiorari is denied.

No. 51. SMITH *v.* ALLWRIGHT, ELECTION JUDGE, ET AL. June 12, 1944. The sentence on page 9 of the slip opinion which reads:

"Under our Constitution, the great privilege of choosing his rulers may not be denied a man by the State because of his color," is amended to read as follows:

"Under our Constitution the great privilege of the ballot may not be denied a man by the State because of his color."

MR. JUSTICE ROBERTS and MR. JUSTICE FRANKFURTER took no part in the consideration of the order here entered.

Opinion reported as amended, 321 U. S. 649, 662.

No. 716. UNITED STATES *v.* SAYLOR ET AL.; and

No. 717. UNITED STATES *v.* POER ET AL. June 26, 1944. Order entered as of June 12, 1944, amending the opinion in these cases. Opinion reported as amended, *ante*, p. 385.

DECISIONS GRANTING CERTIORARI, FROM APRIL 11, 1944, THROUGH JUNE 12, 1944.

No. 804. SCREWS ET AL. *v.* UNITED STATES. April 24, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Mr. James F. Kemp* for petitioners. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Messrs. Edward G. Jennings, G. Maynard Smith,* and *W. Marvin Smith* for the United States. Reported below: 140 F. 2d 662.

No. 803. MCCARTHY ET AL., TRUSTEES, ET AL. *v.* BRUNER. May 1, 1944. Petition for writ of certiorari to the Supreme Court of Utah granted. *Messrs. P. T. Farnsworth, Jr.* and *W. Q. Van Cott* for petitioners. *Messrs. Calvin W. Rawlings* and *Harold E. Wallace* for

respondent. Reported below: 105 Utah 131, 142 P. 2d 649.

No. 598. McGuire *v.* Hunter, Warden. See *ante*, p. 710.

No. 847. Western Union Telegraph Co. *v.* Lenroot, Chief of the Children's Bureau. May 8, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Francis R. Stark* for petitioner. *Solicitor General Fahy* and *Messrs. Douglas B. Maggs* and *Archibald Cox* for respondent. Reported below: 141 F. 2d 400.

No. 857. Barber *v.* Barber. May 15, 1944. Petition for writ of certiorari to the Supreme Court of Tennessee granted. *Mr. C. W. K. Meacham* for petitioner. *Mr. J. Clifford Curry* for respondent. Reported below: 180 Tenn. 353, 175 S. W. 2d 324.

No. 855. Dow Chemical Co. *v.* Halliburton Oil Well Cementing Co.; and

No. 895. Halliburton Oil Well Cementing Co. *v.* Dow Chemical Co. May 15, 1944. Petitions for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Messrs. Russell Wiles* and *Wilber Owen* for Dow Chemical Co. *Messrs. Frederick S. Lyon, Leonard S. Lyon,* and *Earl Babcock* for Halliburton Oil Well Cementing Co. Reported below: 139 F. 2d 473.

No. 785. Keegan *v.* United States; and

No. 821. Kunze et al. *v.* United States. May 15, 1944. Petitions for writs of certiorari to the Circuit Court

of Appeals for the Second Circuit granted. *Wilbur V. Keegan, pro se. Messrs. Theodore Kiendl, John F. X. Finn, Joab H. Banton, Harold W. Hastings, George S. Leisure, Leo C. Fennelly,* and *Geo. C. Norton* for petitioners in No. 821. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Messrs. Edward G. Jennings* and *W. Marvin Smith* for the United States. Reported below: 141 F. 2d 248.

No. 708. SINGER ET AL. *v.* UNITED STATES. May 22, 1944. The order denying certiorari, 321 U. S. 791, is vacated and the petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit is granted limited to the second question presented by the petition. *Messrs. John W. Cragun* and *William Stanley* 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: 141 F. 2d 262.

No. 873. PACIFIC GAS & ELECTRIC CO. *v.* SECURITIES & EXCHANGE COMMISSION. May 22, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Messrs. Herman Phleger, Wm. B. Bosley, Robert H. Gerdes,* and *James S. Moore, Jr.* for petitioner. *Solicitor General Fahy, Messrs. Robert L. Stern, Roger S. Foster,* and *Milton V. Freeman,* and *Mrs. E. M. Calkin* for respondent. Reported below: 139 F. 2d 298.

No. 905. SPECTOR MOTOR SERVICE, INC. *v.* MCLAUGHLIN, TAX COMMISSIONER, ET AL. May 22, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Edward M. Day* for petitioner. Reported below: 139 F. 2d 809.

No. 915. NORTHWESTERN BANDS OF SHOSHONE INDIANS *v.* UNITED STATES. May 29, 1944. Petition for writ of certiorari to the Court of Claims granted. *Messrs. Ernest L. Wilkinson, Joseph Chez,* and *John W. Cragun* for petitioners. *Solicitor General Fahy, Assistant Attorney General Littell,* and *Mr. Norman MacDonald* for the United States. *Mr. Grover A. Giles,* Attorney General, and *Mr. Bert H. Miller,* Attorney General, on behalf of the States of Utah and Idaho, respectively, filed briefs, as *amici curiae,* in support of the petition. Reported below: 100 Ct. Cls. 455.

No. 927. WALLACE CORPORATION *v.* NATIONAL LABOR RELATIONS BOARD; and

No. 928. RICHWOOD CLOTHESPIN & DISH WORKER'S UNION *v.* NATIONAL LABOR RELATIONS BOARD. May 29, 1944. Petitions for writs of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. *Mr. Lyle M. Allen* for petitioner in No. 927. *Mr. Charles S. Rhyne* for petitioner in No. 928. *Solicitor General Fahy, Mr. Alvin J. Rockwell,* and *Miss Ruth Weyand* for respondent. Reported below: 141 F. 2d 87.

No. 958. FORD MOTOR CO. *v.* DEPARTMENT OF TREASURY OF INDIANA ET AL. May 29, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Mr. Merle H. Miller* for petitioner. *Messrs. James A. Emmert, Winslow Van Horne,* and *John J. McShane* for respondents. Reported below: 141 F. 2d 24.

No. 779. TUNSTALL *v.* BROTHERHOOD OF LOCOMOTIVE FIREMEN & ENGINEMEN ET AL. May 29, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. *Mr. Charles H. Houston*

for petitioner. *Messrs. Harold C. Heiss, Russell B. Day,* and *Wm. G. Maupin* for the Brotherhood of Locomotive Firemen & Enginemen et al., and *Mr. Jas. G. Martin* for the Norfolk Southern Railway Co., respondents. Reported below: 140 F. 2d 35.

No. 826. STEELE *v.* LOUISVILLE & NASHVILLE RAILROAD CO. ET AL. May 29, 1944. Petition for writ of certiorari to the Supreme Court of Alabama granted. *Messrs. Arthur D. Shores* and *Charles H. Houston* for petitioner. *Messrs. Harold C. Heiss, Russell B. Day, James A. Simpson,* and *John W. Lapsley* for respondents. Reported below: 245 Ala. 113, 16 So. 2d 416.

No. 869. COMMISSIONER OF INTERNAL REVENUE *v.* SCOTTISH AMERICAN INVESTMENT CO., LTD.;

No. 870. COMMISSIONER OF INTERNAL REVENUE *v.* BRITISH ASSETS TRUST, LTD.; and

No. 871. COMMISSIONER OF INTERNAL REVENUE *v.* SECOND BRITISH ASSETS TRUST, LTD. May 29, 1944. Petition for writs of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. *Solicitor General Fahy* for petitioner. *Mr. Marion N. Fisher* for respondents. Reported below: 139 F. 2d 419.

No. 925. UNITED STATES *v.* WADDILL, HOLLAND & FLINN, INC. ET AL. May 29, 1944. Petition for writ of certiorari to the Supreme Court of Appeals of Virginia granted. *Solicitor General Fahy* for the United States. *Mr. Henry R. Miller, Jr.* for respondents. Reported below: 182 Va. 351, 28 S. E. 2d 741.

No. 962. UNITED STATES *v.* GENERAL MOTORS CORP. May 29, 1944. Petition for writ of certiorari to the Circuit

Court of Appeals for the Seventh Circuit granted. The CHIEF JUSTICE and MR. JUSTICE MURPHY took no part in the consideration or decision of this application. *Solicitor General Fahy* for the United States. Reported below: 140 F. 2d 873.

No. 955. ARMOUR & CO. *v.* WANTOCK ET AL. May 29, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Messrs. Chas. J. Faulkner, Jr., John Potts Barnes, R. F. Feagans,* and *Paul E. Blanchard* for petitioner. Reported below: 140 F. 2d 356.

No. 218. SKIDMORE ET AL. *v.* SWIFT & CO. May 29, 1944. The order denying certiorari, 320 U. S. 763, is vacated and the petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit is granted. *Mr. Mack Taylor* for petitioners. Reported below: 136 F. 2d 112.

No. 587. SECURITIES & EXCHANGE COMMISSION *v.* ENGINEERS PUBLIC SERVICE CO. ET AL.; and

No. 635. ENGINEERS PUBLIC SERVICE CO. ET AL. *v.* SECURITIES & EXCHANGE COMMISSION. June 5, 1944. Petitions for writs of certiorari to the United States Court of Appeals for the District of Columbia granted. *Solicitor General Fahy* and *Mr. Milton V. Freeman* for the Securities & Exchange Commission. *Messrs. William E. Tucker, T. Justice Moore, Paul D. Miller,* and *George D. Gibson* for Engineers Public Service Co. et al. Reported below: 138 F. 2d 936.

No. 836. MCCULLOUGH *v.* KAMMERER CORPORATION ET AL. See *post,* p. 766.

No. 993. OTIS & Co. *v.* SECURITIES & EXCHANGE COMMISSION ET AL. June 12, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Messrs. Arthur G. Logan* and *Robert J. Bulkley* for petitioner. *Solicitor General Fahy* and *Messrs. Roger S. Foster, Homer Kripke,* and *Theodore L. Thau* for the Securities & Exchange Commission, and *Messrs. Donald R. Richberg* and *Clarence A. Southerland* for the United Light & Power Co., respondents. Reported below: 142 F. 2d 411.

No. 996. NEW YORK & SARATOGA SPRINGS COMMISSION ET AL. *v.* UNITED STATES. June 12, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Nathaniel L. Goldstein,* Attorney General of New York, 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: 140 F. 2d 608.

No. 1000. CENTRAL STATES ELECTRIC CO. *v.* CITY OF MUSCATINE ET AL. June 12, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Mr. Bert L. Klooster* for petitioner. *Solicitor General Fahy, Assistant Attorney General Shea,* and *Messrs. Chester T. Lane* and *Charles V. Shannon* for the Federal Power Commission; *Mr. Matthew Westrate* for the City of Muscatine; and *Elmer E. Johnson, pro se,*— respondents.

No. 995. SCHWARTZ *v.* COMMISSIONER OF INTERNAL REVENUE. June 12, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Arthur Rosenblum* for petitioner. *Solici-*

tor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., and *Messrs. Sewall Key, J. Louis Monarch*, and *Arnold Raum* for respondent. Reported below: 140 F. 2d 956.

No. 944. UNITED STATES *v.* STANDARD RICE CO., INC. June 12, 1944. Petition for writ of certiorari to the Court of Claims granted. *Solicitor General Fahy* for petitioner. *Mr. John C. White* for respondent. Reported below: 101 Ct. Cls. 85.

No. 668. ESENWEIN *v.* COMMONWEALTH EX REL. ESENWEIN. June 12, 1944. The order of March 6, 1944, denying certiorari, 321 U. S. 782, is vacated, and the petition for writ of certiorari to the Supreme Court of Pennsylvania is granted. *Mr. Sidney J. Watts* for petitioner. *Mr. J. Thomas Hoffman* for respondent. Reported below: 348 Pa. 455, 35 A. 2d 335.

No. 999. WILLIAMS ET AL. *v.* NORTH CAROLINA. June 12, 1944. Petition for writ of certiorari to the Supreme Court of North Carolina granted. *Mr. W. H. Strickland* for petitioners. *Messrs. Harry McMullan*, Attorney General of North Carolina, and *Hughes J. Rhodes*, Assistant Attorney General, for respondent. Reported below: 224 N. C. 183, 29 S. E. 2d 744.

No. 1037. WILLIAMS *v.* KAISER, WARDEN. June 12, 1944. Petition for writ of certiorari to the Supreme Court of Missouri granted.

No. 922. TOMKINS *v.* MISSOURI. June 12, 1944. The order of May 29, 1944, denying certiorari, *post*, p. 758, is vacated, and the petition for writ of certiorari to the Su-

preme Court of Missouri is granted. *O. C. Tomkins, pro se. Mr. Roy McKittrick,* Attorney General of Missouri, for respondent.

DECISIONS DENYING CERTIORARI, FROM APRIL 11, 1944, THROUGH JUNE 12, 1944.

No. 644. VALENTINE-CLARK CORPORATION *v.* COMMISSIONER OF INTERNAL REVENUE. April 24, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Hayner N. Larson* 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: 137 F. 2d 481.

No. 777. NORTHWEST BANCORPORATION *v.* COMMISSIONER OF INTERNAL REVENUE. April 24, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. J. B. Faegre* and *Hayner N. Larson* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Mr. Sewall Key,* and *Misses Helen R. Carloss* and *Helen Goodner* for respondent. Reported below: 140 F. 2d 958.

No. 749. GABLE ET AL. *v.* ALABAMA. April 24, 1944. Petition for writ of certiorari to the Supreme Court of Alabama denied. *Mr. G. Ernest Jones* for petitioners. *Messrs. William N. McQueen,* Attorney General of Alabama, and *John O. Harris,* Assistant Attorney General, for respondent. Reported below: 245 Ala. 53, 15 So. 2d 600.

No. 757. FEINBERG ET AL. *v.* UNITED STATES. April 24, 1944. Petition for writ of certiorari to the Circuit

Court of Appeals for the Second Circuit denied. *Messrs. George Wolf* and *Horace M. Barba* for petitioners. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Mr. Edward G. Jennings* for the United States. Reported below: 140 F. 2d 592.

No. 763. UNITED STATES EX REL. POTTS *v.* RABB, U. S. MARSHAL. April 24, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Walter Biddle Saul* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Messrs. Robert S. Erdahl* and *Shelby Fitze* for respondent. Reported below: 141 F. 2d 45.

No. 770. WILLIAMS *v.* UNITED STATES. April 24, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. W. F. Semple* and *George H. Jennings* for petitioner. *Solicitor General Fahy, Assistant Attorney General Littell,* and *Messrs. Norman MacDonald* and *Walter J. Cummings, Jr.* for the United States. Reported below: 139 F. 2d 83.

No. 778. MITCHELL IRRIGATION DISTRICT *v.* WHITING, WATER COMMISSIONER. April 24, 1944. Petition for writ of certiorari to the Supreme Court of Wyoming denied. *Mr. James A. Greenwood* for petitioner. *Messrs. Louis J. O'Marr* and *Ray E. Lee* for respondent. Reported below: 59 Wyo. 52, 136 P. 2d 502.

No. 792. TOWN OF PELHAM *v.* EMPLOYERS' LIABILITY ASSURANCE CORP., LTD. April 24, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. William L. Ransom* for petitioner.

Mr. Edward S. Bentley for respondent. Reported below: 139 F. 2d 989.

No. 796. EELLS *v.* HALL. April 24, 1944. Petition for writ of certiorari to the Supreme Court of Kansas denied. Reported below: 157 Kan. 551, 142 P. 2d 703.

No. 797. STARR PIANO CO. *v.* ROGAN, EXECUTRIX. April 24, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. John B. Milliken* and *L. A. Luce* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.*, and *Messrs. Sewall Key, J. Louis Monarch*, and *Homer R. Miller* for respondent. Reported below: 139 F. 2d 671.

No. 807. SUN PUBLISHING CO. *v.* WALLING, ADMINISTRATOR. April 24, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Elisha Hanson* and *C. E. Pigford* and *Miss Letitia Armistead* for petitioner. *Solicitor General Fahy, Messrs. Robert L. Stern, Douglas B. Maggs, Peter Seitz*, and *Miss Bessie Margolin* for respondent. Reported below: 140 F. 2d 445.

No. 602. KARP METAL PRODUCTS CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD. April 24, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Samuel Rubinton* and *Leonard Acker* for petitioner. *Solicitor General Fahy, Mr. Alvin J. Rockwell*, and *Miss Ruth Weyand* for respondent. Reported below: 134 F. 2d 954.

No. 673. THOMPSON *v.* FARMERS BANK. April 24, 1944. Petition for writ of certiorari to the Circuit Court

of Appeals for the Eighth Circuit denied. *Mr. William Lemke* for petitioner. *Mr. Harry G. Waltner, Jr.* for respondent. Reported below: 139 F. 2d 408.

No. 808. REICHERT *v.* FEDERAL LAND BANK OF ST. PAUL. April 24, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Elmer McClain* and *William Lemke* for petitioner. *Mr. Robert J. Barry* for respondent. Reported below: 139 F. 2d 627.

No. 775. GREAT SOUTHERN TRUCKING CO. ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. April 24, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. W. S. Blakeney* for petitioners. *Solicitor General Fahy, Messrs. Alvin J. Rockwell* and *Winthrop A. Johns,* and *Miss Ruth Weyand* for respondent. Reported below: 139 F. 2d 984.

No. 787. CALIFORNIA RETAIL GROCERS & MERCHANTS ASSOCIATION, LTD. ET AL. *v.* UNITED STATES. April 24, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Maurice E. Harrison* for petitioners. *Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. Charles H. Weston* for the United States. Reported below: 139 F. 2d 978.

No. 795. O'NEAL *v.* UNITED STATES. April 24, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. John J. Hooker* for petitioner. *Solicitor General Fahy* and *Mr. Thomas I. Emerson* for the United States. Reported below: 140 F. 2d 908.

No. 799. METROPOLITAN LIFE INSURANCE CO. *v.* MADDEN FURNITURE, INC. ET AL. April 24, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Peter O. Knight, C. Fred Thompson,* and *John Bell* for petitioner. *Mr. O. K. Reaves* for respondents. Reported below: 138 F. 2d 708.

No. 810. EGNER ET AL. *v.* E. C. SCHIRMER MUSIC CO. April 24, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Joseph Fischer* for petitioners. *Mr. Francis Gilbert* for respondent. Reported below: 139 F. 2d 398.

No. 812. AMERICAN STORES, INC. *v.* BOWLES, PRICE ADMINISTRATOR. April 24, 1944. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. Walter E. Gallagher* and *Herbert Levy* for petitioner. *Solicitor General Fahy* and *Mr. Thomas I. Emerson* for respondent. Reported below: 139 F. 2d 377.

No. 818. CITY OF NEW YORK *v.* NATIONAL CITY BANK. April 24, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Leo Brown* for petitioner. *Mr. Bernard L. Bermant* for respondent. Reported below: 139 F. 2d 244.

No. 658. MCDONALD *v.* UNITED STATES. April 24, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Walter McDonald, pro se. Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Messrs. Robert S. Erdahl* and *W. Marvin Smith* for the United States. Reported below: 139 F. 2d 939.

No. 786. WINSTON *v.* COURTNEY, STATE'S ATTORNEY, ET AL. April 24, 1944. The petition for writ of certiorari to the Supreme Court of Illinois is denied for failure to comply with paragraphs 1 and 2 of Rule 38 and paragraph 1 of Rule 12. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application. *Messrs. Weightstill Woods* and *Urban A. Lavery* for petitioner. *Messrs. Thomas J. Courtney* and *Francis S. Clamitz* for respondents. Reported below: 384 Ill. 287, 51 N. E. 2d 161.

No. 802. INDEPENDENT ASSOCIATION OF MILL WORKERS ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. April 24, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. The CHIEF JUSTICE took no part in the consideration or decision of this application. *Mr. C. C. Parsons* for petitioners. *Solicitor General Fahy, Mr. Alvin J. Rockwell,* and *Misses Ruth Weyand* and *Fannie M. Boyls* for respondent. Reported below: 139 F. 2d 788.

No. 751. SPENCER *v.* PESCOR, WARDEN. April 24, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Otis Spencer, pro se. Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Mr. Robert S. Erdahl* for respondent. Reported below: 140 F. 2d 73.

No. 800. SHOTKIN *v.* MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION. April 24, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. Reported below: 138 F. 2d 531.

No. 833. ADAMS *v.* RAGEN, WARDEN. April 24, 1944. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 837. SMITH *v.* RAGEN, WARDEN. April 24, 1944. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 859. SHEPPARD *v.* NIERSTHEIMER, WARDEN. April 24, 1944. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 772. GARDNER *v.* KAISER, WARDEN. April 24, 1944. Petition for writ of certiorari to the Supreme Court of Missouri denied.

No. 852. HAINES *v.* BOWLES, CLERK. April 24, 1944. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 872. HALL *v.* NIERSTHEIMER, WARDEN. April 24, 1944. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 879. BERNOVICH *v.* ILLINOIS. April 24, 1944. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 822. LONG *v.* BENSON, WARDEN. April 24, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. The motion for leave to file petition for writ of mandamus is also denied. Reported below: 140 F. 2d 195.

No. 875. HASKINS *v.* FEDERAL FARM MORTGAGE CORP. April 24, 1944. The application for a stay is denied. The petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit 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. 801. HODGE *v.* HUFF. April 24, 1944. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application. *Mr. Roger Robb* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Mr. Robert S. Erdahl,* and *Miss Beatrice Rosenberg* for respondent. Reported below: 140 F. 2d 686.

No. 780. VOORHEES *v.* COX, WARDEN. April 24, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Blatchford Downing* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Mr. Edward G. Jennings* for respondent. Reported below: 140 F. 2d 132.

No. —. EX PARTE WILLIAM HANLEY; and
No. —. EX PARTE JOHN WELCH. See *ante,* p. 708.

No. 223. SEVERIN, SURVIVING PARTNER, *v.* UNITED STATES. May 1, 1944. Petition for writ of certiorari to the Court of Claims denied. *Mr. Herman J. Galloway* for petitioner. *Solicitor General Fahy, Assistant Attorney General Shea,* and *Messrs. Paul A. Sweeney* and *Newell A. Clapp* for the United States. Reported below: 99 Ct. Cls. 435.

No. 758. GRAND RIVER DAM AUTHORITY *v.* BOARD OF EDUCATION OF WYANDOTTE. May 1, 1944. Petition for

writ of certiorari to the Supreme Court of Oklahoma denied. *Mr. Robert L. Davidson* for petitioner. *Mr. A. C. Wallace* for respondent. Reported below: 147 P. 2d 1003.

No. 798. GARLINGTON ET AL. *v.* WASSON. May 1, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Elmer McClain* for petitioners. Reported below: 139 F. 2d 183.

No. 806. LEDERER *v.* UNITED STATES EX REL. BROWN, PRICE ADMINISTRATOR. May 1, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. John Elliott Byrne* for petitioner. *Solicitor General Fahy* and *Messrs. Ralph F. Fuchs* and *Thomas I. Emerson* for respondent. Reported below: 140 F. 2d 136.

No. 809. KLEPINGER ET AL. *v.* RHODES. May 1, 1944. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. Patrick H. Loughran* for petitioners. *Mr. Jacob N. Halper* for respondent. *Messrs. Lawrence Koenigsberger, Hugh H. Obear, Paul B. Cromelin,* and *John J. Carmody,* constituting a committee of the Bar Association of the District of Columbia, filed a brief, as *amici curiae,* in support of the petition. Reported below: 140 F. 2d 697.

No. 813. GOUMAS *v.* K. KARRAS & SON ET AL. May 1, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. David P. Siegel* for petitioner. Reported below: 140 F. 2d 157.

No. 816. CITY OF MILWAUKEE ET AL. *v.* UNITED STATES ET AL. May 1, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Walter J. Mattison, Omar T. McMahon, Oliver L. O'Boyle,* and *C. Stanley Perry* for petitioners. *Solicitor General Fahy, Assistant Attorney General Littell,* and *Messrs. Valentine Brookes, Vernon L. Wilkinson,* and *Thomas L. McKevitt* for respondents. Reported below: 140 F. 2d 286.

No. 823. AMERICAN WEST AFRICAN LINE, INC. ET AL. *v.* "HUILEVER" S. A. DIVISION HUILERIES DU CONGO BELGE ET AL. May 1, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. John W. Crandall* and *Geo. Whitefield Betts, Jr.* for petitioners. *Messrs. Thomas H. Middleton* and *Gregory S. Rivkins* for "Huilever" S. A. Division Huileries du Congo Belge et al., and *Messrs. J. M. Richardson Lyeth* and *Mark W. Maclay* for J. H. Rossbach & Bros. et al., respondents. Reported below: 139 F. 2d 748.

No. 824. HOWELL *v.* COMMISSIONER OF INTERNAL REVENUE; and

No. 825. ESTATE OF HOWELL *v.* COMMISSIONER OF INTERNAL REVENUE. May 1, 1944. Petition for writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Robert Ash* for petitioners. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key* and *Harry Baum,* and *Miss Helen R. Carloss* for respondent. Reported below: 140 F. 2d 765, 768.

No. 827. MURPHY *v.* CITY OF ASBURY PARK. May 1, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Theodore*

D. Parsons for petitioner. *Mr. Ward Kremer* for respondent. Reported below: 139 F. 2d 888.

No. 832. INNIS *v.* UNITED MERCANTILE AGENCIES, INC. May 1, 1944. 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 petitioner. *Mr. Henry I. Green* for respondent. Reported below: 140 F. 2d 479.

No. 843. SAFEWAY TRAILS, INC. *v.* GREENLEAF. May 1, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Louis B. Arnold* for petitioner. *Mr. Louis H. Sheriff* for respondent. Reported below: 140 F. 2d 889.

No. 748. JOGGER MANUFACTURING CORP. *v.* ROQUEMORE, DOING BUSINESS AS MULTIGRAPH SALES AGENCY. May 1, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Howard D. Moses* for petitioner. *Mr. Philip M. Aitken* for respondent.

No. 754. MESHBERGER ET AL. *v.* FEDERAL LAND BANK OF LOUISVILLE. May 1, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. The application for appeal is also denied. *Messrs. Elmer McClain* and *Samuel E. Cook* for petitioners. *Mr. William C. Goodwyn* for respondent. Reported below: 138 F. 2d 954.

No. 789. BLUE ET AL. *v.* UNITED STATES;
No. 790. CLARK ET AL. *v.* UNITED STATES; and

No. 791. PARDEE ET AL. *v.* UNITED STATES. May 1, 1944. The petition for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit is denied. MR. JUSTICE MURPHY is of opinion that the petition should be granted. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Messrs. Matthew L. Bigger, Frank Wiedemann,* and *Carrington T. Marshall* for petitioners. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Messrs. Robert S. Erdahl* and *Robert L. Stern,* and *Miss Beatrice Rosenberg* for the United States. Reported below: 138 F. 2d 351.

No. 771. TELFIAN *v.* UNITED STATES. May 1, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Charles Telfian, 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: 142 F. 2d 556.

No. 891. WATSON *v.* DOWD, WARDEN; and

No. 898. TAYLOR *v.* DOWD, WARDEN. May 1, 1944. Petitions for writs of certiorari to the Supreme Court of Indiana denied. Reported below: No. 898, 222 Ind. 289, 53 N. E. 2d 543.

No. 899. DUGAN ET AL. *v.* RAGEN ET AL.;

No. 900. SMITH *v.* RAGEN, WARDEN;

No. 901. BONHAM *v.* RAGEN, WARDEN;

No. 902. STOCKEY *v.* RAGEN, WARDEN;

No. 903. SHELLING *v.* RAGEN, WARDEN;

No. 904. GUNTHER *v.* RAGEN, WARDEN;

No. 917. ANDERSON *v.* RAGEN, WARDEN;

No. 918. LULLO *v.* RAGEN, WARDEN;

No. 919. HOGMIRE *v.* RAGEN, WARDEN; and

No. 920. LASHBROOK *v.* SULLIVAN, DIRECTOR OF PUBLIC SAFETY. May 1, 1944. The petitions for writs of certiorari to the Supreme Court of Illinois are denied.

No. 762. BUTSCH *v.* O'HARROW, SPECIAL JUDGE. May 1, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied.

No. 936. HOUSE *v.* MAYO, STATE PRISON CUSTODIAN. See *ante*, p. 710.

No. 815. ZALKIND *v.* SCHEINMAN ET AL. May 8, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Samuel Ostrolenk* for petitioner. *Messrs. Armand E. Lackenbach* and *Newton A. Burgess* for respondents. Reported below: 139 F. 2d 895.

No. 819. ILLINOIS CENTRAL RAILROAD CO. *v.* KELLEY. May 8, 1944. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Messrs. William R. Gentry, Vernon W. Foster, Charles A. Helsell,* and *John W. Freels* for petitioner. *Messrs. Mark D. Eagleton* and *Roberts P. Elam* for respondent. Reported below: 352 Mo. 301, 177 S. W. 2d 435.

No. 820. LAUGHLIN *v.* GARNETT ET AL. May 8, 1944. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. James J. Laughlin* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Messrs. Chester T. Lane* and *Edward G. Jennings,* and *Miss Beatrice*

Rosenberg for respondents. Reported below: 138 F. 2d 931.

No. 830. HYMAN, TRUSTEE IN BANKRUPTCY, ET AL. *v.* McLENDON ET AL. May 8, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Marion W. Seabrook* for petitioners. *Messrs. Henry E. Davis* and *Samuel Want* for respondents. Reported below: 140 F. 2d 76.

No. 831. THOMAS *v.* KANSAS. May 8, 1944. Petition for writ of certiorari to the Supreme Court of Kansas denied. *Mr. Elisha Scott* for petitioner. Reported below: 157 Kan. 526, 142 P. 2d 692.

No. 836. McCULLOUGH *v.* KAMMERER CORPORATION ET AL. May 8, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. R. Welton Whann, A. W. Boyken,* and *Robert M. McManigal* for petitioner. *Messrs. Frederick S. Lyon* and *Leonard S. Lyon* for respondents. Reported below: 138 F. 2d 482.

No. 840. PEKRAS *v.* COMMISSIONER OF INTERNAL REVENUE; and

No. 841. PEKRAS *v.* COMMISSIONER OF INTERNAL REVENUE. May 8, 1944. Petition for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Robert H. Rice* for petitioners. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key, Newton K. Fox, Robert L. Stern,* and *Miss Helen R. Carloss* for respondent. Reported below: 139 F. 2d 699.

No. 842. DOVEL ET AL. *v.* SLOSS-SHEFFIELD STEEL & IRON CO. May 8, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Hugh A. Locke* for petitioners. *Mr. E. L. All* for respondent. Reported below: 139 F. 2d 36.

No. 850. ORANGE THEATRE CORP. *v.* BRANDT ET AL. May 8, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Israel B. Greene* for petitioner. *Mr. Milton C. Weisman* for respondents. Reported below: 139 F. 2d 871.

No. 851. ROWAN COTTON MILLS CO. *v.* COMMISSIONER OF INTERNAL REVENUE. May 8, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. J. Gilmer Korner, Jr.* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key* and *Joseph M. Jones,* and *Miss Helen R. Carloss* for respondent. Reported below: 140 F. 2d 277.

No. 858. SANTLY BROTHERS, INC. *v.* WILKIE. May 8, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Sidney Kocin* for petitioner. *Mr. Louis Nizer* for respondent. Reported below: 139 F. 2d 264.

No. 728. TINKOFF ET AL. *v.* WEST PUBLISHING CO. ET AL. May 8, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. Reported below: 138 F. 2d 607.

No. 740. BARBER *v.* UNITED STATES. May 8, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *William Barber, pro se. Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Mr. W. Marvin Smith,* and *Miss Beatrice Rosenberg* for the United States. Reported below: 142 F. 2d 805.

No. 834. SEGAL *v.* NEW JERSEY. May 8, 1944. Petition for writ of certiorari to the Supreme Court of New Jersey denied.

No. 860. BERTRAND *v.* ILLINOIS. May 8, 1944. Petition for writ of certiorari to the Supreme Court of Illinois denied. Reported below: 385 Ill. 289, 52 N. E. 2d 706.

No. 835. CHALFONTE *v.* SMITH, WARDEN. May 8, 1944. The petition for writ of certiorari to the Supreme Court of Pennsylvania 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. 838. RHODES *v.* FEDERAL LAND BANK OF ST. PAUL ET AL. May 15, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. William Lemke* for petitioner. *Mr. Robert J. Barry* for respondents. Reported below: 140 F. 2d 612.

No. 839. WALLING, ADMINISTRATOR, *v.* PLYMOUTH MANUFACTURING CORP. ET AL. May 15, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Solicitor General Fahy* and

Mr. Douglas B. Maggs for petitioner. *Mr. Albert B. Chipman* for respondents. Reported below: 139 F. 2d 178.

No. 848. LYNBROOK GARDENS, INC. *v.* ULLMAN. May 15, 1944. Petition for writ of certiorari to the Supreme Court of New York denied. *Mr. Cornelius O. Donahue* for petitioner. *Mr. Thayer Burgess* for respondent. *Messrs. Ignatius M. Wilkinson, Ray L. Chesebro, Ganson Taggart, Leo Brown,* and *Charles S. Rhyne* on behalf of the National Institute of Municipal Law Officers; *Mr. Mortimer M. Kassell* on behalf of the State Tax Commission of New York; and *Mr. L. Arnold Frye* on behalf of Chautauqua County et al., filed briefs, as *amici curiae,* in support of the petition. *Mr. Milton Pinkus* filed a brief on behalf of Anne M. Leach, as *amicus curiae,* in opposition to the petition. Reported below: 265 App. Div. 859, 37 N. Y. S. 2d 671.

No. 849. BOWMAN ET AL. *v.* BOWLES, PRICE ADMINISTRATOR. May 15, 1944. Petition for writ of certiorari to the United States Emergency Court of Appeals denied. *Mr. Paul W. Steer* for petitioners. *Solicitor General Fahy* and *Mr. Richard H. Field* for respondent. Reported below: 140 F. 2d 974.

No. 853. BELLAVANCE *v.* FRANK MORROW CO., INC. May 15, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Harold E. Cole* for petitioner. *Mr. Nathaniel Frucht* for respondent. Reported below: 141 F. 2d 378.

No. 877. HIGHFILL ET AL. *v.* DILATUSH. May 15, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Archer Wheat-*

ley for petitioners. *Mr. E. L. Westbrooke* for respondent. Reported below: 140 F. 2d 741.

No. 888. SULLIVAN *v.* MEYER. May 15, 1944. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. Wm. J. Neale* and *George E. Sullivan* for petitioner. *Mr. Spencer Gordon* for respondent. Reported below: 141 F. 2d 21.

No. 893. ANTHONY ET AL. *v.* UNITED STATES TRUST CO. May 15, 1944. Petition for writ of certiorari to the Court of Appeals of New York denied. *Mr. Eli J. Blair* for petitioners. *Messrs. George L. Shearer* and *M'Cready Sykes* for respondent. Reported below: 292 N. Y. 514, 53 N. E. 2d 849.

No. 924. DENTAL PRODUCTS CO., INC. *v.* SMITH. May 15, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Max W. Zabel* for petitioner. *Mr. James R. McKnight* for respondent. Reported below: 140 F. 2d 140.

No. 817. BEEGLE *v.* THOMPSON, TRUSTEE, ET AL. May 15, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Max W. Zabel* for petitioner. *Messrs. Harry Frease* and *Joseph Frease* for respondents. Reported below: 138 F. 2d 875.

No. 946. RUZON *v.* BARTLEY, JUDGE, ET AL. May 15, 1944. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 968. PAPPAS *v.* RAGEN, WARDEN. May 15, 1944. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 734. SANDERS *v.* SANFORD, WARDEN. May 15, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Hilliard Sanders, pro se. Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Messrs. Robert S. Erdahl* and *W. Marvin Smith* for respondent. Reported below: 138 F. 2d 415.

No. 856. COLLINS *v.* WAYLAND ET AL. May 22, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Thomas A. Flynn* for petitioner. *Messrs. Charles L. Strouss* and *Frank L. Snell* for respondents. Reported below: 139 F. 2d 677.

No. 876. NEW ENGLAND MUTUAL LIFE INSURANCE CO. *v.* COHEN ET AL. May 22, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. J. Robert Cohler* for petitioner. *Mr. Ray E. Lane* for respondents. Reported below: 140 F. 2d 1.

No. 883. GRIEME *v.* UNITED STATES. May 22, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Hayden C. Covington* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Mr. Robert S. Erdahl* for the United States. Reported below: 141 F. 2d 495.

No. 884. UNITED STATES EX REL. LOHRBERG *v.* NICHOLSON, WARDEN, ET AL. May 22, 1944. Petition for writ of

certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Hayden C. Covington* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Mr. Robert S. Erdahl* for respondents. Reported below: 141 F. 2d 689.

No. 885. UNITED STATES EX REL. FALBO *v.* KENNEDY, SUPERINTENDENT, ET AL. May 22, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Hayden C. Covington* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Mr. Robert S. Erdahl* for respondents. Reported below: 141 F. 2d 689.

No. 886. CLAYTON *v.* UNITED STATES. May 22, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Hayden C. Covington* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Mr. Robert S. Erdahl* for the United States. Reported below: 141 F. 2d 494.

No. 887. STULL *v.* UNITED STATES. May 22, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Hayden C. Covington* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Mr. Robert S. Erdahl* for the United States. Reported below: 141 F. 2d 494.

No. 889. ROBINETTE *v.* COMMISSIONER OF INTERNAL REVENUE. May 22, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. T. G. Thompson* 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: 139 F. 2d 285.

No. 894. LUNDGREN *v.* UNITED STATES. May 22, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Thomas O. Marlar* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark*, and *Mr. Robert S. Erdahl* for the United States. Reported below: 141 F. 2d 497.

No. 897. WARDEN *v.* CITY OF ST. LOUIS. May 22, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Harold Olsen* for petitioner. *Mr. Lawrence C. Kingsland* for respondent. Reported below: 140 F. 2d 615.

No. 906. WATSON *v.* MASSACHUSETTS MUTUAL LIFE INSURANCE CO.; and

No. 907. WATSON *v.* MASSACHUSETTS MUTUAL LIFE INSURANCE CO. May 22, 1944. Petition for writs of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. Seth W. Richardson, Alfons B. Landa, Raymond C. Cushwa*, and *Warren E. Magee* for petitioners. *Mr. Leopold V. Freudberg* for respondent. Reported below: 140 F. 2d 673.

No. 908. GEORGE LAWLEY & SON CORP. *v.* SOUTH. May 22, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Paul B. Sargent* for petitioner. *Mr. Thomas H. Mahony* for respondent. *Solicitor General Fahy, Mr. Douglas B. Maggs*, and *Miss Bessie Margolin* filed a memorandum on

behalf of the Administrator of the Wage and Hour Division, U. S. Dept. of Labor, as *amicus curiae,* opposing the petition. Reported below: 140 F. 2d 439.

No. 909. PHOENIX-EL PASO EXPRESS, INC. *v.* NATIONAL CARLOADING CORP. May 22, 1944. Petition for writ of certiorari to the Supreme Court of Texas denied. *Mr. Robert L. Holliday* for petitioner. *Messrs. Robert E. Quirk* and *Thornton Hardie* for respondent. Reported below: 142 Tex. 141, 178 S. W. 2d 133.

Nos. 911, 912, and 913. CHICAGO & EASTERN ILLINOIS RAILROAD CO. ET AL. *v.* GRAND TRUNK WESTERN RAILROAD CO. ET AL. May 22, 1944. Petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Arthur M. Cox, Frederic H. Stafford, Andrew J. Dallstream, Carleton S. Hadley,* and *Elmer W. Freytag* for petitioners. *Messrs. John C. Slade, Frank H. Towner, Bryce L. Hamilton, H. V. Spike, Clyde E. Shorey,* and *Fred Barth* for respondents. Reported below: 140 F. 2d 120, 130.

No. 916. BERKSHIRE KNITTING MILLS *v.* NATIONAL LABOR RELATIONS BOARD. May 22, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Joseph W. Henderson, Wellington M. Bertolet,* and *George M. Brodhead, Jr.* for petitioner. *Solicitor General Fahy, Mr. Alvin J. Rockwell,* and *Miss Ruth Weyand* for respondent. Reported below: 139 F. 2d 134.

No. 921. CITY OF NEW YORK *v.* BROOKLYN EASTERN DISTRICT TERMINAL. May 22, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second

Circuit denied. *Mr. Leo Brown* for petitioner. *Mr. William M. Sperry, 2nd,* for respondent. Reported below: 139 F. 2d 1007.

No. 938. W. E. VALLIANT CO., INC. *v.* RAYONIER, INC. May 22, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. John H. Skeen* for petitioner. *Mr. George W. P. Whip* for respondent. Reported below: 140 F. 2d 589.

No. 854. WILEMON ET AL., DOING BUSINESS AS GOOD LUCK OIL CO., *v.* BOWLES, PRICE ADMINISTRATOR, ET AL. May 22, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Eustis Myres* for petitioners. *Solicitor General Fahy* and *Mr. Thomas I. Emerson* for respondents. Reported below: 139 F. 2d 730.

No. 654. FLYNN *v.* UNITED STATES. May 22, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Arthur Lee Flynn, 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: 139 F. 2d 669.

No. 828. PHILLIPS *v.* NEW YORK. May 22, 1944. Petition for writ of certiorari to the Court of Appeals of New York denied. *George Phillips, pro se. Messrs. Frank S. Hogan* and *Stanley H. Fuld* for respondent. Reported below: 292 N. Y. 506, 53 N. E. 2d 846.

No. 910. BAYLESS *v.* UNITED STATES. May 22, 1944. Petition for writ of certiorari to the Circuit Court of Ap-

peals for the Ninth Circuit denied. *John Richard Bayless, pro se. Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Mr. Edward G. Jennings* for the United States. Reported below: 141 F. 2d 578.

No. 978. TEKSON *v.* MICHIGAN. May 22, 1944. Petition for writ of certiorari to the Supreme Court of Michigan denied.

No. 979. PAGE *v.* RAGEN, WARDEN. May 22, 1944. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 980. LYONS *v.* RAGEN, WARDEN. May 22, 1944. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 981. VINCI *v.* ILLINOIS. May 22, 1944. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 984. WATERMAN *v.* MCMILLAN ET AL. May 22, 1944. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. Reported below: 135 F. 2d 807.

No. 994. HAINES *v.* MISSOURI. May 22, 1944. Petition for writ of certiorari to the Supreme Court of Missouri denied.

No. 861. FLETCHER *v.* WOOL ET AL.;

No. 862. FLETCHER *v.* WILLARD R. COOK & CO., INC. ET AL.;

No. 863. FLETCHER *v.* D. H. GOODMAN, INC.;
No. 864. FLETCHER *v.* KRISE, RECEIVER, ET AL.;
No. 865. FLETCHER *v.* BARRON ET AL.;
No. 866. FLETCHER *v.* NATIONAL BANK OF COMMERCE;
No. 867. FLETCHER *v.* NATIONAL BANK OF COMMERCE ET AL.; and
No. 868. FLETCHER *v.* MAUPIN. May 22, 1944. Petitions for writs of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. MR. JUSTICE JACKSON and MR. JUSTICE RUTLEDGE took no part in the consideration or decision of these applications. Reported below: 138 F. 2d 740, 742.

No. 931. UNITED STATES EX REL. MCCANN *v.* THOMPSON, WARDEN, ET AL. May 22, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. Petitioner's applications for other relief are also denied. *Gene McCann, pro se. Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Mr. Robert S. Erdahl* for respondents.

No. 982. KARLOFTIS ET AL. *v.* HELTON ET AL. See *ante,* p. 713.

No. 892. DENNIS ET AL. *v.* MABEE ET AL. May 29, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Thomas B. Greenwood* for petitioners. Reported below: 139 F. 2d 941.

No. 914. PENNZOIL COMPANY ET AL. *v.* CROWN CENTRAL PETROLEUM CORP. May 29, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Edward S. Rogers* and *John S. Powers* for petitioners. *Messrs. Karl F. Steinmann* and

Edwin H. Brownley for respondent. Reported below: 140 F. 2d 387.

No. 923. WELSBACH ENGINEERING & MANAGEMENT CORP. *v.* COMMISSIONER OF INTERNAL REVENUE. May 29, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Hugh Satterlee* and *Francis H. Scheetz* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Mr. Sewall Key,* and *Mrs. Maryhelen Wigle* for respondent. Reported below: 140 F. 2d 584.

No. 926. UNITED STATES EX REL. JACOBS *v.* BARC, U. S. MARSHAL. May 29, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Paul B. Mayrand* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Mr. Robert S. Erdahl* for respondent. Reported below: 141 F. 2d 480.

No. 933. WESTERN UNION TELEGRAPH CO. *v.* COMMISSIONER OF INTERNAL REVENUE. May 29, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Francis R. Stark* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key, J. Louis Monarch,* and *Paul R. Russell* for respondent. Reported below: 141 F. 2d 774.

No. 975. HARTFORD FIRE INSURANCE CO. *v.* COMMISSIONER OF INTERNAL REVENUE. May 29, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Francis W. Cole* for petitioner. *Solicitor General Fahy, Assistant Attorney*

General Samuel O. Clark, Jr., and *Messrs. Sewall Key, J. Louis Monarch*, and *Paul R. Russell* for respondent. Reported below: 141 F. 2d 774.

No. 934. EMPORIUM CAPWELL CO. *v.* ANGLIM, COLLECTOR OF INTERNAL REVENUE. May 29, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. M. C. Sloss* and *E. D. Turner, Jr.* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.*, and *Messrs. Sewall Key, J. Louis Monarch*, and *Joseph M. Jones* for respondent. Reported below: 140 F. 2d 224.

No. 935. MILES LABORATORIES, INC. *v.* FEDERAL TRADE COMMISSION ET AL. May 29, 1944. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. James F. Hoge* and *Preston B. Kavanagh* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Mr. Robert S. Erdahl*, and *Miss Beatrice Rosenberg* for respondents. Reported below: 140 F. 2d 683.

No. 937. ESTATE OF HERBERT ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. May 29, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Raymond F. Garrity* for petitioners. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Mr. Sewall Key*, and *Misses Helen R. Carloss* and *Melva M. Graney* for respondent. Reported below: 139 F. 2d 756.

No. 945. COUNTRY GARDEN MARKET, INC. *v.* BOWLES, PRICE ADMINISTRATOR, ET AL. May 29, 1944. Petition

for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. Albert Brick* for petitioner. *Solicitor General Fahy* and *Mr. Thomas I. Emerson* for respondents. Reported below: 141 F. 2d 540.

No. 947. DAVIS *v.* SHELL UNION OIL CORP. ET AL. May 29, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Samuel B. Stewart, Jr.* and *George C. Dix* for petitioner. *Mr. Wm. Dwight Whitney* for respondents.

No. 951. SCHWARZ *v.* WITWER GROCER CO. May 29, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. John D. Randall* for petitioner. *Mr. Stewart Holmes* for respondent. Reported below: 141 F. 2d 341.

No. 954. RONEY ET AL. *v.* FEDERAL LAND BANK OF LOUISVILLE. May 29, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Samuel E. Cook* for petitioners. *Mr. William C. Goodwyn* for respondent. Reported below: 139 F. 2d 175.

No. 960. STANDARD KNITTING MILLS, INC. *v.* COMMISSIONER OF INTERNAL REVENUE. May 29, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. J. Gilmer Korner, Jr.* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.*, and *Messrs. Sewall Key, J. Louis Monarch*, and *F. E. Youngman* for respondent. Reported below: 141 F. 2d 195.

No. 964. FIRST NATIONAL BANK *v.* AMERICAN SURETY CO. May 29, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Louis A. Johnson* and *James M. Guiher* for petitioner. *Mr. George Foster, Jr.* for respondent. Reported below: 141 F. 2d 411.

No. 966. WARNER'S RENOWNED REMEDIES CO. *v.* FEDERAL TRADE COMMISSION. May 29, 1944. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. Horace J. Donnelly, Jr.* for petitioner. *Solicitor General Fahy, Assistant Attorney General Berge,* and *Messrs. Charles H. Weston, Matthias N. Orfield,* and *W. T. Kelley* for respondent. Reported below: 140 F. 2d 18.

No. 970. RICHTER'S BAKERY *v.* NATIONAL LABOR RELATIONS BOARD. May 29, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. J. C. Hall* and *Karl H. Mueller* for petitioner. *Solicitor General Fahy, Messrs. Walter J. Cummings, Jr.* and *Alvin J. Rockwell,* and *Misses Ruth Weyand* and *Fannie M. Boyls* for respondent. Reported below: 140 F. 2d 870.

No. 971. NATIONAL BANK OF MIDDLEBORO ET AL. *v.* UNITED STATES. May 29, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Geo. E. H. Goodner* for petitioners. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key, J. Louis Monarch, Robert L. Stern,* and *Miss Louise Foster* for the United States. Reported below: 140 F. 2d 547.

No. 972. LOUISVILLE PROPERTY CO., H. C. WILLIAMS, ASSIGNEE, *v.* COMMISSIONER OF INTERNAL REVENUE. May 29, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Geo. E. H. Goodner* and *Scott P. Crampton* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key, J. Louis Monarch, Robert L. Stern,* and *Miss Louise Foster* for respondent. Reported below: 140 F. 2d 547.

No. 974. GOULANDRIS ET AL. *v.* AMERICAN TOBACCO CO. ET AL. May 29, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. I. Maurice Wormser* for petitioners. *Messrs. Henry N. Longley* and *John W. R. Zisgen* for respondents. Reported below: 140 F. 2d 780.

No. 997. NAGAYAMA *v.* SHIMABUKURO. May 29, 1944. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. Richard E. Wellford* and *Stuart H. Robeson* for petitioner. *Messrs. John Wattawa* and *Vivion O. Hill* for respondent. Reported below: 140 F. 2d 13.

No. 953. CRUME *v.* PACIFIC MUTUAL LIFE INSURANCE CO. May 29, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Harry C. Alberts* for petitioner. *Mr. Orville J. Taylor* for respondent. Reported below: 140 F. 2d 182.

No. 956. LUMPKIN *v.* BOWERS, COLLECTOR OF INTERNAL REVENUE. May 29, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Cir-

cuit denied. *Messrs. Pinckney L. Cain* and *R. Beverley Herbert* for petitioner. *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: 140 F. 2d 927.

No. 963. BATTERMAN *v.* COMMISSIONER OF INTERNAL REVENUE. May 29, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Sydney A. Davies* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key, J. Louis Monarch, Ray A. Brown,* and *Robert L. Stern* for respondent. Reported below: 142 F. 2d 448.

No. 969. LOCAL No. 6167, UNITED MINE WORKERS OF AMERICA, ET AL. *v.* JEWELL RIDGE COAL CORP. May 29, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Crampton Harris, Frank W. Rogers,* and *Leonard G. Muse* for petitioners. *Mr. Wm. A. Stuart* for respondent.

No. 989. GELDZAHLER *v.* UNITED STATES. May 29, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Brien McMahon* 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: 141 F. 2d 496.

No. 941. UNITED STATES EX REL. LYNN *v.* DOWNER, COMMANDING OFFICER. May 29, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Sec-

ond Circuit denied on the ground that the case is moot, it appearing that petitioner no longer is in respondent's custody, *United States ex rel. Innes* v. *Crystal*, 319 U. S. 755, and cases cited. *Messrs. Arthur Garfield Hays* and *Gerald Weatherly* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark*, and *Messrs. Chester T. Lane* and *Edward G. Jennings* for respondent. *Messrs. William H. Hastie, Thurgood Marshall*, and *Leon A. Ransom* filed a brief on behalf of the National Association for the Advancement of Colored People, as *amicus curiae*, in support of petitioner. Reported below: 140 F. 2d 397.

No. 950. GRESHAM *v.* INDIANA BAR ASSOCIATION. May 29, 1944. The petition for writ of certiorari to the District Court of the United States for the Southern District of Indiana or for other relief is denied. *Mr. Otto Gresham* for petitioner.

No. 949. UNITED STATES *v.* LOS ANGELES & SALT LAKE RAILROAD CO. May 29, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. MR. JUSTICE JACKSON took no part in the consideration or decision of this application. *Solicitor General Fahy* for the United States. *Messrs. Louis W. Myers, William W. Clary, Joseph F. Mann, T. W. Bockes*, and *Henry M. Isaacs* for respondent. Reported below: 140 F. 2d 436.

No. 844. KITZMILLER *v.* PESCOR, WARDEN. May 29, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Albert Kitzmiller, pro se. Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Messrs. Robert S. Erdahl* and *W.*

Marvin Smith, and *Miss Beatrice Rosenberg* for respondent. Reported below: 142 F. 2d 455.

No. 985. SHARPE *v.* KENTUCKY. May 29, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. Reported below: 135 F. 2d 974.

No. 1001. BRIGGS *v.* ILLINOIS. May 29, 1944. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 1006. THOMPSON *v.* NIERSTHEIMER, WARDEN. May 29, 1944. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 1007. MOSS *v.* RAGEN, WARDEN. May 29, 1944. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 1014. KELLY *v.* ILLINOIS. May 29, 1944. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 1015. RAGGIO *v.* RAGEN, WARDEN. May 29, 1944. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 1016. SAMPSON *v.* RAGEN, WARDEN. May 29, 1944. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 922. TOMKINS *v.* MISSOURI. May 29, 1944. Petition for writ of certiorari to the Supreme Court of Mis-

souri denied. *O. C. Tomkins, pro se. Mr. Roy McKittrick,* Attorney General of Missouri, for respondent.

No. 1021. RICO ET AL. *v.* CALIFORNIA. May 29, 1944. Petition for writ of certiorari to the District Court of Appeal, 4th Appellate District, of California, denied.

No. 742. KESLING *v.* HUMPHREY, WARDEN. May 29, 1944. 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 no longer is in respondent's custody. *Floyd J. Kesling, pro se. Solicitor General Fahy* for respondent. Reported below: 141 F. 2d 497.

No. 1017. MILLER *v.* DOWD, WARDEN. May 29, 1944. Petition for writ of certiorari to the Supreme Court of Indiana denied without prejudice to the presentation of a petition for writ of habeas corpus and to a hearing thereon in the appropriate United States District Court.

No. 948. FITZPATRICK *v.* NIERSTHEIMER, WARDEN. May 29, 1944. Petition for writ of certiorari to the Supreme Court of Illinois denied. The motion for leave to file petition for writ of habeas corpus is also denied. *Wm. H. Fitzpatrick, pro se. Messrs. George F. Barrett,* Attorney General of Illinois, and *William C. Wines,* Assistant Attorney General, for respondent.

No. 835. CHALFONTE *v.* SMITH, WARDEN. See *post,* p. 766.

No. —. EX PARTE THOMAS KING. See *ante,* p. 716.

No. 952. EMPIRE STATE CHAIR CO., INC. *v.* BELDOCK, TRUSTEE IN BANKRUPTCY. June 5, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Harold Forstenzer* for petitioner. *Mr. Gustave B. Garfield* for respondent. Reported below: 140 F. 2d 587.

No. 959. VAN CAMP SEA FOOD CO., INC. ET AL. *v.* NORDYKE. June 5, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Lasher B. Gallagher* for petitioners. *Mr. Herbert Resner* for respondent. Reported below: 140 F. 2d 902.

No. 961. WHITE, ADMINISTRATOR, ET AL. *v.* SINCLAIR PRAIRIE OIL CO. ET AL. June 5, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Neil Burkinshaw, Frank M. Goodwin,* and *Hiram P. White* for petitioners. *Messrs. Edward H. Chandler* and *Summers Hardy* for respondents. Reported below: 139 F. 2d 103.

No. 965. SKELLY OIL CO. *v.* AMACKER ET AL. June 5, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. W. P. Z. German* and *Alvin F. Molony* for petitioner. Reported below: 140 F. 2d 21.

No. 990. CROMER *v.* UNITED STATES. June 5, 1944. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. Levi H. David* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Mr. Robert S. Erdahl* for the United States. Reported below: 142 F. 2d 697.

No. 983. BLANC *v.* CAYO. June 5, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Gordon F. Hook* for petitioner. *Mr. Wm. S. Hodges* for respondent. Reported below: 139 F. 2d 695.

No. 1008. HOFHEIMER *v.* GOLD ET AL.; and

No. 1009. HOFHEIMER *v.* MCINTEE ET AL. June 5, 1944. Petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Myron Frantz* for petitioner. *Solicitor General Fahy* and *Mr. Roger S. Foster* for the Securities & Exchange Commission, respondent in No. 1008. *Messrs. Claude A. Roth, I. E. Ferguson,* and *Lewis E. Pennish* for Ben Gold et al., respondents in Nos. 1008 and 1009. Reported below: 140 F. 2d 363.

No. 986. STERLING ALUMINUM PRODUCTS, INC. *v.* SHELL OIL CO. June 5, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Morris J. Levin* for petitioner. *Mr. John S. Marsalek* for respondent. Reported below: 140 F. 2d 801.

No. 1040. LUKSICH *v.* MISETICH ET AL. June 5, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Philbrick McCoy* for petitioner. *Mr. Lasher B. Gallagher* for respondents. Reported below: 140 F. 2d 812.

No. 750. SCHITA *v.* PESCOR, WARDEN. June 5, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Valdo B. Schita, pro se. Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Mr. Robert S. Erdahl,* and *Miss Bea-*

trice Rosenberg for respondent. Reported below: 139 F. 2d 971.

No. 1022. DZAN *v.* RAGEN, WARDEN. June 5, 1944. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 1023. GREEN *v.* MISSOURI. June 5, 1944. Petition for writ of certiorari to the Supreme Court of Missouri denied.

No. 1035. DIEHL *v.* NIERSTHEIMER, WARDEN. June 5, 1944. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 1042. PEARSON *v.* HEINZE, WARDEN, ET AL. June 5, 1944. Petition for writ of certiorari to the Supreme Court of California denied.

No. 1049. LAZAR *v.* RAGEN, WARDEN. June 5, 1944. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 1002. BRACEY *v.* UNITED STATES. June 5, 1944. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. James J. Laughlin* for petitioner. Reported below: 142 F. 2d 85.

No. 1053. BARLAND *v.* RAGEN, WARDEN;
No. 1054. BLANKENSHIP *v.* RAGEN, WARDEN;
No. 1055. WITT *v.* RAGEN, WARDEN;
No. 1056. MCCAULEY *v.* RAGEN, WARDEN;
No. 1057. BRIDGES *v.* RAGEN, WARDEN;
No. 1058. RASMUSSEN *v.* RAGEN, WARDEN; and

No. 1059. CONKLIN *v.* RAGEN, WARDEN. June 5, 1944. Petitions for writs of certiorari to the Supreme Court of Illinois denied.

No. 1060. BASS ET AL. *v.* NEW HAMPSHIRE. June 5, 1944. Petition for writ of certiorari to the Supreme Court of New Hampshire denied. *Mr. William G. McCarthy* for petitioners. Reported below: 93 N. H. 172, 37 A. 2d 7.

No. 1050. PATTON *v.* RAGEN, WARDEN. June 5, 1944. Petition for writ of certiorari to the Supreme Court of Illinois denied for want of a final judgment.

No. 1033. JONES *v.* FREEMAN ET AL. See *ante*, p. 717.

No. —. EX PARTE EARL F. HALL. See *ante*, p. 717.

No. 940. YLAGAN *v.* UNITED STATES. June 12, 1944. Petition for writ of certiorari to the Court of Claims denied. *Anastasio A. Ylagan, pro se. Solicitor General Fahy* and *Assistant Attorney General Shea* for the United States. Reported below: 101 Ct. Cls. 872.

No. 991. CAPITOL GREYHOUND LINES ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. June 12, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Thomas L. Tallentire* and *Leonard Garver, Jr.* for petitioners. *Solicitor General Fahy, Messrs. Robert L. Stern, Alvin J. Rockwell, Frank J. Donner,* and *Miss Ruth Weyand* for respondent. Reported below: 140 F. 2d 754.

No. 998. GASTON *v.* UNITED STATES. June 12, 1944. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. P. Bateman Ennis* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Mr. Robert S. Erdahl* for the United States. Reported below: 143 F. 2d 10.

No. 1010. NELSON ET AL. *v.* UNITED STATES. June 12, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *George Nelson, Agnes Nelson,* and *Ollie Halpin, pro se. Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Mr. Sewall Key,* and *Miss Helen R. Carloss* for the United States. Reported below: 139 F. 2d 162.

No. 1043. GALLAGHER'S STEAK HOUSE, INC. *v.* BOWLES, PRICE ADMINISTRATOR, ET AL. June 12, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Mark Eisner* for petitioner. *Solicitor General Fahy* and *Mr. Thomas I. Emerson* for respondents. Reported below: 142 F. 2d 530.

No. 1061. PRESQUE-ISLE TRANSPORTATION CO., INC. *v.* KOEHLER. June 12, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Edward W. Hamilton* for petitioner. *Mr. Thomas C. Burke* for respondent. Reported below: 141 F. 2d 490.

No. 1019. SHEEHAN *v.* HUFF, SUPERINTENDENT. June 12, 1944. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. John J. Carmody* for petitioner. *Solicitor*

General Fahy, Assistant Attorney General Tom C. Clark, and *Messrs. Robert S. Erdahl* and *W. Marvin Smith* for respondent. Reported below: 142 F. 2d 81.

No. 1069. HUFFMAN *v.* RAGEN, WARDEN; and

No. 1074. WILLIS *v.* NIERSTHEIMER, WARDEN. June 12, 1944. Petitions for writs of certiorari to the Supreme Court of Illinois denied.

No. 1085. KNIGHT *v.* CALIFORNIA ET AL. June 12, 1944. Petition for writ of certiorari to the Supreme Court of California denied.

No. 1088. MILLWOOD *v.* RAGEN, WARDEN. June 12, 1944. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 1098. EX PARTE THOMPSON, EXECUTRIX. June 12, 1944. Petition for writ of certiorari to the Supreme Court of Louisiana denied.

No. 1100. POTERACKI *v.* RAGEN, WARDEN;

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No. 1103. NORVAL *v.* RAGEN, WARDEN. June 12, 1944. Petitions for writs of certiorari to the Supreme Court of Illinois denied.

No. 1099. SOGAN *v.* RAGEN, WARDEN. June 12, 1944. 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.

No. 1107. GRAND *v.* MAYO, STATE PRISON CUSTODIAN. June 12, 1944. 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. Reported below: 153 Fla. 917, 14 So. 2d 906.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT, FROM APRIL 11, 1944, THROUGH JUNE 12, 1944.

No. 896. HUBER ET AL. *v.* MORAN. May 22, 1944. On petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit. Dismissed on motion of petitioners. Reported below: 140 F. 2d 823.

No. 967. BACHRACH, TRUSTEE IN BANKRUPTCY, *v.* CENTRAL HANOVER BANK & TRUST CO., TRUSTEE. May 22, 1944. On petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit. Dismissed on motion of counsel for the petitioner. *Mr. Walter Bachrach* for petitioner. Reported below: 141 F. 2d 734.

DECISIONS GRANTING REHEARING, FROM APRIL 11, 1944, THROUGH JUNE 12, 1944.

No. 835. CHALFONTE *v.* SMITH, WARDEN. May 29, 1944. The petition for rehearing is granted. The order of May 8th, 322 U. S. 741, denying certiorari on the ground that application therefor was not made within the time provided by law, is vacated. The petition for writ of certiorari to the Supreme Court of Pennsylvania is denied.

No. 836. MCCULLOUGH *v.* KAMMERER CORPORATION ET AL. June 5, 1944. The petition for rehearing is granted.

The order of May 8, 1944, denying certiorari, 322 U. S. 739, is vacated and the petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit is granted. *Messrs. R. Welton Whann, A. W. Boyken,* and *Robert M. McManigal* for petitioner. *Messrs. Frederick S. Lyon* and *Leonard S. Lyon* for respondents. Reported below: 138 F. 2d 482.

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No. 232. SARTOR ET AL. *v.* ARKANSAS NATURAL GAS CORP. April 24, 1944. The petitions for rehearing are denied. 321 U. S. 620.

No. 310. WELLS FARGO BANK & UNION TRUST CO., EXECUTOR, ET AL. *v.* IMPERIAL IRRIGATION DISTRICT ET AL. April 24, 1944. 321 U. S. 787.

No. 492. EQUITABLE LIFE ASSURANCE SOCIETY *v.* COMMISSIONER OF INTERNAL REVENUE. April 24, 1944. 321 U. S. 560.

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No. 657. WESTERN CARTRIDGE CO. *v.* NATIONAL LABOR RELATIONS BOARD. April 24, 1944. 321 U. S. 786.

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* See Table of Cases Reported in this volume for earlier decisions in these cases, unless otherwise indicated.

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No. 51. SMITH *v.* ALLWRIGHT, ELECTION JUDGE, ET AL. May 8, 1944. Petitions for rehearing denied. 321 U. S. 649.

No. 499. O'BRIEN *v.* O'BRIEN ET AL. May 8, 1944. MR. JUSTICE MURPHY took no part in the consideration or decision of this application. 321 U. S. 767.

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No. 658. MCDONALD *v.* UNITED STATES. May 15, 1944.

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No. —. EX PARTE STANLEY B. PEPLOWSKI. May 22, 1944.

Nos. 336 and 338. NATIONAL LABOR RELATIONS BOARD *v.* HEARST PUBLICATIONS, INC. May 22, 1944.

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No. 73. FALBO *v.* UNITED STATES. May 22, 1944. The second petition for rehearing is denied. 321 U. S. 802.

No. 335. LLOYD *v.* UNITED STATES FIDELITY & GUARANTY CO. May 22, 1944. The second petition for rehearing is denied. 320 U. S. 814.

No. 545. SCHROEPFER ET AL. *v.* A. S. ABELL CO., INC.; and

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No. 798. GARLINGTON ET AL. *v.* WASSON. May 29, 1944.

No. 409. TENNESSEE COAL, IRON & RAILROAD CO. ET AL. *v.* MUSCODA LOCAL No. 123 ET AL. May 29, 1944. The petitions for rehearing are denied. 321 U. S. 590.

No. 592. ALLEN CALCULATORS, INC. *v.* NATIONAL CASH REGISTER CO. ET AL. May 29, 1944. The CHIEF JUSTICE took no part in the consideration or decision of this application.

No. 754. MESHBERGER ET AL. *v.* FEDERAL LAND BANK OF LOUISVILLE. May 29, 1944. Petitions for rehearing denied.

No. 786. WINSTON *v.* COURTNEY, STATE'S ATTORNEY, ET AL. May 29, 1944. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application.

No. 789. BLUE ET AL. *v.* UNITED STATES;

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No. 355. INTERNATIONAL HARVESTER CO. ET AL. *v.* DEPARTMENT OF TREASURY OF INDIANA ET AL. June 12, 1944. MR. JUSTICE ROBERTS took no part in the consideration or decision of this application.

No. 728. TINKOFF ET AL. *v.* WEST PUBLISHING CO. ET AL. June 12, 1944. The petition for rehearing or in the alternative for a writ of mandamus is denied.

No. 734. SANDERS *v.* SANFORD, WARDEN. June 12, 1944. The petition for rehearing is denied without prejudice to the presentation to the District Court, in an appropriate proceeding, of the new matters referred to in the petition for rehearing and accompanying papers.

No. 766. HUDSON & MANHATTAN RAILROAD CO. *v.* CITY OF JERSEY CITY ET AL. June 12, 1944. In this case the appeal from the interlocutory injunction was dismissed on the ground that the appeal had become moot, the interlocutory injunction having merged in the final injunction. The petition for rehearing is denied.

AMENDMENT OF RULES.

ORDER.

It is ordered that paragraph 2 of Rule 2 of the Rules of this Court be, and the same is hereby, amended to read as follows:

"2. Not less than two weeks in advance of application for admission, each applicant shall file with the clerk (1) a certificate from the presiding judge or clerk of the proper court showing that he possesses the foregoing qualifications, (2) his personal statement, on the form approved by the court and furnished by the clerk, and (3) two letters or signed statements of members of the bar of this court, not related to the applicant, who are resident practitioners within the State, Territory, District, or Insular Possession (to which the application refers as provided in paragraph 1 of this rule) stating that the applicant is personally known to them, that he possesses all the qualifications required for admission to the bar of this court, that they have examined his personal statement, and that they affirm that his personal and professional character and standing are good."

JUNE 5, 1944.

STATEMENT SHOWING THE NUMBER OF CASES FILED, DISPOSED OF, AND REMAINING ON DOCKETS, AT CONCLUSION OF OCTOBER TERMS—1941, 1942 AND 1943

	ORIGINAL			APPELLATE			TOTALS		
Terms	1941	1942	1943	1941	1942	1943	1941	1942	1943
Number of cases on dockets	12	15	11	1,290	1,103	1,107	1,302	1,118	1,118
Cases disposed of during terms	2	5	1	1,166	992	960	1,168	997	961
Number of cases remaining on dockets	10	10	10	124	111	147	134	121	157

	TERMS		
	1941	1942	1943
Distribution of cases disposed of during terms:			
Original cases	2	5	1
Appellate cases on merits	381	261	211
Petitions for certiorari	785	731	749
Distribution of cases remaining on dockets:			
Original cases	10	10	10
Appellate cases on merits	65	75	85
Petitions for certiorari	59	36	62

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