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IN

THE SUPREME COURT

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Erratum.—318 U. S. 306, line 9 from bottom, "§ 24 (a) (4)" should be § 27 (a) (4).

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.)

PROCEEDINGS IN THE SUPREME COURT OF THE UNITED STATES

In Memory of Mr. Justice Sutherland[1]

MONDAY, DECEMBER 18, 1944.

Present: THE CHIEF JUSTICE, MR. JUSTICE ROBERTS, MR. JUSTICE BLACK, MR. JUSTICE REED, MR. JUSTICE FRANKFURTER, MR. JUSTICE DOUGLAS, MR. JUSTICE MURPHY, MR. JUSTICE JACKSON, and MR. JUSTICE RUTLEDGE.

MR. GEORGE WHARTON PEPPER addressed the Court as follows:

May it please the Court: At a meeting of the Bar of the Supreme Court of the United States held this morning,[2] to take appropriate action following the death of Mr. Justice Sutherland, a Minute was adopted which I have been requested to present to the Court with the prayer that it be made a part of its permanent records.

Mr. Pepper then read the following:

RESOLUTIONS

George Sutherland was born at Stoney Stratford, Buckinghamshire, England, on March 25, 1862. Of his Scotch-Irish and English forebears he was always proud and it

[1] MR. JUSTICE SUTHERLAND retired from active service on January 18, 1938 (303 U. S. IV), and died in Washington, D. C., on July 18, 1942 (317 U. S. III, V).

[2] The Committee on Arrangements for the meeting of the Bar consisted of Solicitor General Charles Fahy, Chairman, and Messrs. James

was to this racial blend that many of his distinguished characteristics may be attributed.

When he was but eighteen months old his parents came to the United States and made their home in Utah. There his early life was lived and there, even in boyhood, he engaged in the man-making struggle for existence characteristic of the American frontier. At Brigham Young Academy he received his preliminary, if not his only, academic education. In 1882 he entered the law school of the University of Michigan of which at the time Judge Thomas N. Cooley was dean. His law school experience, as he often stated in later life, marked the beginning of his intellectual development. After a brief period of intensive study he was admitted, in March 1883, to practice in the Supreme Court of Michigan and joined his father in the general practice of the law in Provo, Utah.

Immediately after his admission to the bar he was married to Miss Rosamond Lee, of Beaver City. Of the three children of their marriage, only Mrs. Walter A. Bloedorn now survives.

While practicing with his father he accepted any business that came his way, whether civil or criminal. He often traveled miles on horseback through the mountains to try cases before justices of the peace. He defended many persons indicted under the Federal Anti-Polygamy Statutes and throughout his life he had the esteem and confidence of his Mormon neighbors.

In 1886 he formed a partnership with Samuel R. Thurman, Esq., afterward Chief Justice of the Supreme Court of Utah. Entering politics he became an active member of the Liberal or Gentile Party opposed to the practice of

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Francis Byrnes, Homer Cummings, William H. King and William W. Ray. Addresses were made at the meeting by the Honorable Harold M. Stephens, Associate Justice of the United States Court of Appeals for the District of Columbia; Colonel William Cattron Rigby, and Mr. Charles Evans Hughes, Jr. The addresses appear in a memorial volume published under the supervision of Mr. Charles Elmore Cropley, Clerk of the Court.

polygamy, and later was influential in the organization of the Republican Party of Utah. When Utah finally attained Statehood in 1895 he was elected to the first State Legislature, where his legal ability was promptly recognized. In April 1896, when the United States Circuit Court was organized for the District of Utah, he was admitted to practice before that tribunal. Thereafter, he became a member of the firm of Sutherland, Van Cott & Allison of Salt Lake City and on October 20, 1899, he was admitted to the Bar of the Supreme Court of the United States.

Elected in the fall of 1900 to the United States House of Representatives as a Republican, he gave hearty support to all measures which he deemed to be for the public good. After serving one term he declined renomination and resumed practice with his old firm. However, he was not suffered to remain long in private life and in 1904 was elected to the Senate of the United States.

During his service as a Senator he was active in the cause of judicial reform and took a leading part in the evolution of the Penal and Judicial Codes. During his first term the controversy over Senator Smoot's right to his seat became acute. While Senator Sutherland had opposed Smoot's nomination on the ground that no representative of the Mormon Church or of any other religious body ought to be sent to the Senate, yet when the people of Utah had fairly elected Smoot, Senator Sutherland vigorously and successfully supported the right of the Senator-elect to take his seat.

In his second term Senator Sutherland became deeply interested in foreign affairs and in legislation relating to employers' liability, workmen's compensation, and labor relations. His great speech in July of 1911 in opposition to the movement for recall of judicial decisions made him a national figure.

In September of 1916 he was elected president of the American Bar Association but when nominated for a third

term in the Senate he was defeated at the polls by his Democratic opponent and former partner, Senator King. After his retirement he resumed the practice of law and found time to deliver a course of lectures at Columbia University and to make many important public addresses. In the years immediately preceding his elevation to the Bench, he appeared in many cases before the Court of which he was so soon to become a member. He was appointed by President Harding as counsel for the United States in the *Norwegian Ship* cases before the Permanent Court of Arbitration at The Hague. When, likewise under President Harding's appointment, he took his seat upon the Bench he was the fifth member of the Court from the date of its creation who had not been born a citizen of the United States or of the American Colonies.

In the sixteen years of his service upon the Bench the opinions which he delivered covered a wide range of subjects. His intimate knowledge of the laws relating to land, mining, and irrigation in the Rocky Mountain and desert States was of special value to the Court when called upon to render decisions in this field. His own early fight against poverty and his sympathy for the pioneers of the great West who had turned a vast wilderness into a land of promise made him an advocate of the rights of men who acquired their property by labor and physical privation, but he had no sympathy with the speculator who accumulates his wealth by preying upon his fellows.

It was in the field of constitutional law that he made his greatest contribution to our jurisprudence. Most of his judicial service was rendered in the closing years of that century of constitutional interpretation which began at the death of Chief Justice Marshall. This was the period in which the judicial tendency was to maintain a balanced and substantially equal dual sovereignty, with reliance upon natural law and the due process clauses of the Fifth and Fourteenth Amendments. It would be difficult to specify any one of his opinions as being the

greatest that he wrote. In *United States* v. *Curtiss-Wright Export Corp.,* 299 U. S. 304 (1936), he delivered the opinion of the Court which with clarity and force supports the doctrine that in the field of international relations the President is "the sole organ of the federal government" and as such possesses a power which does not require an act of Congress as a basis for its exercise. His dissenting opinion in the Minnesota Moratorium case (*Home Building & Loan Association* v. *Blaisdell,* 290 U. S. 398; 1934) is certainly one of the most powerful opinions ever written with an exclusively historical approach. His point of view is well illustrated by the following extract from the opinion:

"The present exigency is nothing new. From the beginning of our existence as a nation, periods of depression, of industrial failure, of financial distress, of unpaid and unpayable indebtedness, have alternated with years of plenty. The vital lesson that expenditure beyond income begets poverty, that public or private extravagance, financed by promises to pay, either must end in complete or partial repudiation or the promises be fulfilled by self-denial and painful effort, though constantly taught by bitter experience, seems never to be learned; and the attempt by legislative devices to shift the misfortune of the debtor to the shoulders of the creditor without coming into conflict with the contract impairment clause has been persistent and oft-repeated."

His felicity of expression and his mastery of clear and vigorous English were all the more remarkable when his limited opportunities for formal education are borne in mind. He was tenacious of his views without being pugnacious in asserting them. He never antagonized his associates and always retained their friendship and affection. His judgments were the result of independent reasoning. In the *O'Donoghue, Hitz,* and *Williams* cases (289 U. S. 516–553; 1933) he delivered the opinion of the Court, holding that the Supreme Court and the Court

of Appeals of the District of Columbia are constitutional courts and that the compensation of their judges may not be diminished during their terms of office, thus distinguishing them from the Court of Claims and the Court of Customs Appeals. An illustration of his wholly impersonal approach is the disapproval expressed in this opinion of a dictum which his close friend and colleague, Mr. Justice Van Devanter, had previously uttered in the *Bakelite* case (279 U. S. 438; 1929).

Although even as a child he had struggled for self-support, he could not bring himself to uphold the constitutionality of the Federal Child Labor Legislation. Similarly, it was his view that the minimum wage law of the District of Columbia was unconstitutional in that (to quote the language of his own opinion) "it exacts from the employer an arbitrary payment for a purpose and upon a basis having no causal connection with his business, or the contract or the work the employee engages to do. The declared basis . . . is not the value of the service rendered, but the extraneous circumstance that the employee needs to get a prescribed sum of money to insure her subsistence, health and morals." (*Adkins* v. *Children's Hospital,* 261 U. S. 525; 1923). He was firm in his belief in the Bill of Rights and wrote the opinion of the Court in the Scottsboro case (*Powell* v. *Alabama,* 287 U. S. 45; 1932) and many others in which the rights and liberties of individuals were upheld.

Perhaps the character of the man himself cannot better be described than in the words which he himself used when, in 1941, he spoke thus to the graduating class of his Alma Mater, the Brigham Young University:

"Good character does not consist in the mere ability to store away in the memory a collection of moral aphorisms that runs loosely off the tongue. Seneca gave the world a book of beautifully-written moral maxims; but he stood in the Roman Senate and shamelessly justified Nero's murder of his own mother. Character to be good must

be stable—must have taken root. It is an acquisition of thought and conduct which have become habitual—an acquisition of real substance, so firmly fixed in the conscience, and indeed in the body itself, as to insure unhesitating rejection of an impulse to do wrong."

He was the personification of his own ideals. This was the opinion of all who knew him and to this effect is the testimony of his associates in the letter which they addressed to him upon the announcement of his intention to retire from the Bench.

His death on July 18, 1942, was the passing of a great American. The services at Washington Cathedral conducted on July 22, 1942, by the late Bishop Freeman were in keeping with the simplicity of his life and the reasoned certainty of his Christian faith.

Resolved, That the Chairman of the Committee on Resolutions be requested to present these Resolutions to the Court with the prayer that they be embodied in its permanent records.

The CHIEF JUSTICE directed that the resolutions be received and spread upon the minutes of the Court.

MR. ATTORNEY GENERAL BIDDLE addressed the Court, as follows:

Mr. Chief Justice and Associate Justices: I deem it a privilege to offer these remarks in memory of Mr. Justice Sutherland who died July 18, 1942, and to ask that they be spread upon the permanent records of this Court.

George Sutherland, born in Buckinghamshire, England, of Scotch-English parents, was brought to the United States by his parents shortly after his birth on March 25, 1862. The family settled in a pioneer community in the Far West which was later to become the State of Utah, and young Sutherland was educated in the public schools of Salt Lake City and at the University of Michigan. Before

he reached his 21st birthday, his studies had been completed and he had been admitted to the bar. Some thirteen years later, in 1896, when Utah was admitted to the Union, he became a member of its first Senate and also of the State's first judiciary committee. He later served one term in the House of Representatives at Washington and two terms in the United States Senate. During his years in the Senate he formed a close bond of friendship with his colleague Reed Smoot, one of the Republican leaders, and was a member of the Senate Judiciary Committee. It was during his service in the Senate that he established his reputation as an able and conscientious exponent of the Constitution, a lawyer and a scholar of high distinction.

In 1916 he was elected President of the American Bar Association to succeed Elihu Root, and devoted much of his time to its interests. It was while he was in this office that he registered a warning about national prohibition which later events proved to be of striking accuracy. "It does not require a prophet," he said, "to foresee that laws of this character, exacting penalties so utterly disproportionate to the offense, can never be generally enforced, and to write them into the statutes to be cunningly evaded or contemptuously ignored will have a strong tendency to bring just and wholesome laws dealing with the liquor question into disrepute." His vision on this highly controversial issue of national policy is the more striking when it is coupled with his personal approval of abstinence from alcoholic beverages and of prohibition by local option.

It is interesting at this time to recall the toast he made to the Allies when, as retiring President of the Association, he said on September 6, 1917: "To our Allies. May they and we together soon celebrate the surrender of the last stronghold of autocracy in a world of universal liberty." And he added prophetically, ". . . for it is as certain as anything can be that the Imperial German Government aimed at nothing less than . . . to occupy toward the

modern world the same relation which Imperial Rome occupied toward the ancient world 2,000 years ago."

During the five years of private life which intervened between his service in the Senate and his appointment to the Bench, Justice Sutherland served, in 1921, as Chairman of the Advisory Committee to the International Armament Conference; and, in the same year, represented the United States Government at The Hague in the dispute with the Norwegian Government over requisitioning Norwegian ships during the war.

An appointment to the Bench had been suggested for him for more than a dozen years prior to the time he was appointed and assumed his seat in the Supreme Court of the United States in 1922. It was not surprising that his former associate in the Senate, President Harding, remembering Sutherland's frequent speeches on constitutional law on the floor of the Senate, and impressed with his learning and lucidity, should have made the appointment. He came to this Court as a leader to whom his country even then owed its gratitude for his contribution as a scholar, legislator, and statesman.

He was an active member of this Court for sixteen years. His service extended even to a year after his retirement when he sat in an important case involving the misconduct of a member of the federal judiciary. When he died on July 18, 1942, at the age of 80, he left to his country a record of public service which extended over a period of nearly thirty years.

Justice Sutherland frankly described himself as a conservative, and he brought to the Halls of Congress, and later to the Bench, unmistakably conservative views. His essential conservatism did not, however, prevent him from vigorously advocating, while in the Senate, reforms in which he believed, such as postal savings banks, employees' compensation, parcel post, the Railway Safety Appliance Act, and the Hours of Labor Act. He strongly advocated giving this Court the power to regulate practice

in the federal courts, and he was active as a member of the Statutory Revision Committee and the Joint Congressional Committee on Revision and Codification of the Law.

Even though he opposed the application of federal power to the regulation of industrial evils, as enunciated in the *Adkins* case, he strongly supported the power of the national government in foreign affairs. As early as 1910, he was found vigorously endorsing the view that the federal government is not one of limited powers in the family of nations, but on the contrary is clothed with all the power inherent in sovereignty to deal with international affairs. "It results that the investment of the federal government with the powers of external sovereignty," he wrote in *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, "did not depend upon the affirmative grants of the Constitution. . . . As a member of the family of nations, the right and power of the United States in that field are equal to the right and power of other members of the international family."

In the great tradition of this Court, Justice Sutherland was vigilant in sustaining the fundamental personal rights guaranteed by the Federal Constitution. Speaking for the Court in *Powell* v. *Alabama*, 287 U. S. 45, for instance, he insisted on the right of the Scottsboro Negroes not only to have counsel but also sufficient time to prepare their defense.

His firm belief in the protective function of the Court extended to personal rights and property rights alike, perceiving a larger area of similarity than of difference in the two areas of protection. In this respect he embraced a tradition of great importance in the history of our thought. The philosophy of *laissez faire* abhorred interference by the state with what were considered the competitive forces of nature and the free market place. It was believed that these forces, harsh as they often proved to be, ultimately brought about the best possible result,

namely, the survival of the fit. It was natural that men who held to the theory of the free market place should extend it from trade to ideas, and that they should be particularly concerned with the protection of freedom of speech. In *Grosjean* v. *American Press Co.*, 297 U. S. 233, in setting aside a state tax imposed on the owners of newspapers as a violation of the First Amendment, Justice Sutherland used these words: "The predominant purpose of the grant of immunity here invoked was to preserve an untrammeled press as a vital source of public information. . . . Since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgment of the publicity afforded by a free press cannot be regarded otherwise than with grave concern. . . . A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves."

This outlook was in keeping with the economic beliefs of John Stuart Mill and his nineteenth century followers, who still largely dominated English and American thinking when, during his early years in the frontier State of Utah, the basis for Justice Sutherland's emotional and intellectual background was being laid. This background cannot be forgotten when making a fair appraisal of his views—views which have at times been so bitterly assailed. And when we observe that he said to a graduating class at Brigham Young University in 1941 that "nobody worried about child labor" in that pioneer community in which his parents first settled, we better understand his point of view, and indeed that of many of his contemporaries. His philosophy sprang from an environment where the nineteenth century still lingered, untouched by the impact of life under conditions of modern mass production.

Justice Sutherland will long be remembered by his friends and associates for his amiability and consideration for the feelings of others. He was warm, kind and friendly

to all who met him. His admirable human qualities won him devoted friends, including many who disputed his views with a sincerity equal to his own. Those who worked with him knew his devotion to the business of the Court; his painstaking examination of briefs and records; his absorption in the questions involved and his quiet courtesy to the members of the bar.

I close with a quotation from an address made by Justice Sutherland while he was a Senator. It was on an occasion similar to this:

"While the stern necessities of the living will not permit us to sit idly with the dead, it is fitting and proper that we pause in the conflict and pay passing tribute to the memory of those who, having borne with us the heat and stress of the struggle, have passed on to their final rest. It is appropriate that we reverently give expression to our gratitude for what they did and our appreciation of what they were."

The CHIEF JUSTICE responded:

Mr. Attorney General: For more than twelve years it was my privilege to sit on this Bench, in close association with Mr. Justice Sutherland. Your words stir in me, as they will in many others, intimate recollections of his genial and kindly personality and his high conception of the public service and of the duty of public officials. It is well too for us all to be reminded of his vision of the mission and greatness of his adopted country, and of his constant concern for the true dignity of this Court and the faithful performance of its great function of holding even the balances which measure the distribution of the powers of government under a written constitution.

Justice Sutherland was one of the five Justices of this Court who were born in foreign lands. But his life experience and his outlook were typically American and typical also of those Justices who came to this Court from beyond the Mississippi River during the period between the out-

break of the Civil War and the First World War. Indeed, his life was a part of and symbolizes the epic story of the great west. His life in America began as a child in the mining camps of Montana and Utah. At twelve years of age he was working for his living in Salt Lake City. After two years at the Brigham Young Academy in Utah and a year spent at the University of Michigan, when he was twenty years of age, his formal education came to an end and he was admitted to the Bar in Michigan and in Utah, then a territory, where he began his practice of the law. Among all the demands and exigencies of a country law practice in a western pioneer community, later after he removed to Salt Lake City, and still later after he took up his practice in the District of Columbia, he continued and in truth never ceased to be an assiduous student of the law, and especially of the problems growing out of the relations of law to government. After he removed to Salt Lake City in 1894 and until his appointment to this Bench in 1922, he frequently made addresses before Bar Associations and other public gatherings, which won wide attention by their felicity of expression, their philosophical bent, and their grasp of governmental and constitutional problems.

He early became active in politics, supporting the movement for the suppression of polygamy in Utah and for restriction of the Mormon influence in the state government. His career in the House of Representatives, from 1902 to 1903, and for two terms in the Senate, from 1905 to 1917, marked him as a zealous student of public affairs and as an able and resourceful antagonist in debate. His diligent service on the committees of House and Senate, particularly the Judiciary Committee of the Senate and the Joint Committee on the Revision of the Federal Statutes, extended his knowledge of government and public affairs. It was knowledge which later enabled him to wield a potent influence in the deliberations of this Court.

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In 1916, the year before his retirement from the Senate, he became President of the American Bar Association. In 1919 he delivered the Blumenthal Lectures at Columbia University on "Constitutional Power and World Affairs," in which he gave special attention to the war and treaty-making powers under the Constitution. He also served as a member of the Advisory Committee of the International Disarmament Conference held in Washington in 1921, and in 1922 as counsel for the United States in the Norway-United States arbitration at The Hague for the adjustment of the dispute growing out of our seizure of Norwegian ships during the First World War.

By this time he had become a national figure, generally recognized as a leading exponent of constitutional theory and practice. His selection in 1922 to succeed Mr. Justice Clarke as an Associate Justice of this Court was not unexpected and met with general approval. Chief Justice Taft then presided over this Court. With him and with Justice Van Devanter and Justice Butler, the newly appointed Justice shared substantially common views of law, government and public policy, and in them especially he found congenial companions. But his relations with all of his associates were characterized by a personal regard and esteem which found their source in mutual respect and derived their strength from common devotion to the institution which they served. This friendly relationship with his colleagues rose above all differences of opinion and was ended only by his death on July 18, 1942, in his eightieth year, four years and six months from the day of his retirement from this Court.

The period from the close of the Civil War to the time of Justice Sutherland's retirement constitutes an epoch in our constitutional history and in the history of this Court. That period saw the adoption of the Fourteenth Amendment, the expansion and, so far as we can now see, the culmination of the constitutional restraints of due process on state action in the field of business and economics. We already know that during the sixteen years when Justice

Sutherland served on this Court he exercised a profound influence on the development of constitutional law, and especially on the interpretation of the Fourteenth Amendment. But only when that period is viewed in the perspective which time alone can give to historic trends and events, will it be possible to appraise the permanence and the extent of that influence. It is too soon, and we are perhaps still too close to the smoke of battle, to see clearly or to say with omniscient finality precisely how the great constitutional issues of that period should have been decided. Indeed, who would be so rash as to say now, despite shifting emphases and attitudes and the changes which time has brought and will bring, that Justice Sutherland's influence will not continue, perhaps in greater measure than today, to play its part in directing the current of our legal thinking. In any event, wise men will not doubt that the viewpoint which he so ably represented must be reckoned with in the formulation of constitutional principles by a tribunal which must determine the boundaries and distribution of power under a federal constitutional system.

In a time when it had become the fashion to classify men by labelling them, Justice Sutherland was labelled a conservative. It is true, as he said of himself, that his was the type of mind "to put a great deal of faith in experience and very little in mere experiment." He was profoundly convinced that ill-considered experimentation in government in pursuit of passing fashions in legislation, and the loose governmental control of administrative officers, would in the end prove to be the real enemies of true democracy, and a grave danger to constitutional government. Among those who did not share fully his views of constitutional functions, few would be so bold as to deny those dangers. He saw in these encroachments of government on the freedom of the individual, the perils of the oppressive exercise of governmental power which he held it was the design of the due process clause to prevent.

He gave vigorous expression to these views in a series of opinions which stirred widespread public discussion of some of the most fundamental problems of constitutional government. Notable among them were his opinions holding unconstitutional the legislative regulation of the wages of women in *Adkins* v. *Children's Hospital,* 261 U. S. 525; the regulation of the fees of employment agencies in *Ribnik* v. *McBride,* 277 U. S. 350; the regulation of the resale price of theatre tickets in *Tyson* v. *Banton,* 273 U. S. 418; and a statute prohibiting the operation of drug-stores owned by corporations whose stockholders were not licensed pharmacists in *Liggett Co.* v. *Baldridge,* 278 U. S. 105.

Let it be said that the so-called conservative temper of these opinions was not inspired by any antagonism to progress in the law, but rather by the emphasis which Justice Sutherland placed on the constitutional protection of the few from the tyranny of the many. Indeed, these opinions were but steps in the process of finding solutions of what perhaps has been the greatest problem of constitutional interpretation throughout the twentieth century, the need to bring into proper balance the competing demands, on the one hand that constitutional sanctions shall safeguard the individual from the abuse of power by the majority, and on the other that the Constitution be not so interpreted as to clothe the individual with power to restrict unduly the welfare and progress of the community as a whole.

Sound legal principles adequate to meet all the vicissitudes of human experience never sprang full-fledged from the brains of any man or group of men. They are the ultimate resultant of the abrasive force of the clash of competing and sometimes conflicting ideas—ideas which are rooted in different experiences and different appraisals of all the multifarious interests which it is in some measure the concern of government to foster and protect. The time will come when it will be recognized, perhaps more clearly than it is at present, how fortunate it has been for the true progress of the law that, at a time when the trend

was in the opposite direction, there sat upon this Bench a man of stalwart independence, and of the purest character who, without a trace of intellectual arrogance, and always with respectful toleration for the views of colleagues who differed with him, fought stoutly for the constitutional guaranties of the liberty of the individual. As one of those who sometimes differed, I shall ever hold in grateful remembrance this contribution of Justice Sutherland to the work of the Court.

It would be a grave error to suppose for a moment that Justice Sutherland did not see and appreciate the need of progress in the law. In a speech in the Senate on July 11, 1911, he said: "I am not in favor of standing still. No one who takes the slightest thought desires that we shall do that. Of course, we must advance, but we must at our peril distinguish between real progress and what amounts to a mere manifestation of the speed mania. Among the games of the ancient Greeks there was a running match in which each participant carried a lighted torch. The prize was awarded not to that one who crossed the line first, but to him who crossed the line first with his torch still burning." Justice Sutherland was a consistent advocate of progress in the law, but he wished to make progress with the torch of the law still burning. While he was a vigorous opponent of the now forgotten proposals for the recall of judicial decisions, he was an equally vigorous advocate of the adoption of laws for the improvement of the postal service, of workmen's compensation laws and the Safety Appliance Act. He was especially interested in legislation for the relief of working conditions of seamen, and as a Justice he was deeply interested in the cases involving their rights under such legislation.

He never thought of the law as a cut-and-dried system and he realized that if it is to perform its true function it must be flexible enough to be adaptable to the changing conditions of a changing world. His belief that the law carries within it the germ of its own capacity for growth is illustrated and admirably stated in his opinion in *Funk* v. *United States,* 290 U. S. 371, 380–386, which rejected, as outmoded, the common law rule disqualifying a wife

from testifying in behalf of her husband in a criminal trial. His opinion in *Radice* v. *New York*, 264 U. S. 292, sustaining the constitutionality of a statute prohibiting women's work at night, and in *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, upholding the constitutionality of zoning ordinances, are illuminating examples of the application of constitutional principles to new situations. His decision in the Scottsboro cases, *Powell* v. *Alabama*, 287 U. S. 45, that the Fourteenth Amendment requires a state court to so conduct a criminal trial as not to deprive the defendant of the benefit of counsel, opened a new and important chapter in the judicial history of civil liberty.

Justice Sutherland's sixteen years' service on this Court were marked throughout by his diligence in carrying on the work of the Court, his unusual capacity for sustained productive work, and his complete fidelity to the highest interests of the Court as an institution. His opinions are models of legal exposition. He wrote easily, with graceful lucidity, and developed the principles of decision with logical and persuasive power.

When he laid aside his judicial labors, he left the Court with the personal esteem and affectionate regards of all his associates. Chief Justice Hughes then rightly said to him: "Not only have you brought to our deliberations learning and dialectical skill, a wide knowledge of affairs enriched by varied and eminent public service, and a habit of thoroughness and precision, but you have matched tenacity of purpose with an unvarying kindliness and have mellowed our deliberations with unfailing humor."

As we recall the years of Justice Sutherland's service on this Court, in the common endeavor with his colleagues to attain the ideal of justice under law, we cherish the recollection of this man's integrity and sturdy independence, and his devoted loyalty to a great task. Let our memory of him remind us that these, rather than unanimity of thought and opinion of those who must shape the course of law, are the indispensable qualities of the judge, without which justice will not prevail.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1944.

POPE *v.* UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 26. Argued October 16, 1944.—Decided November 6, 1944.

By the Special Act of February 27, 1942, Congress conferred upon the Court of Claims jurisdiction to hear, determine and render judgment upon certain claims of a contractor against the Government, in conformity with directions given in the Act. The court had previously denied recovery on the claims. The Act authorized review here by certiorari. *Held:*

1. The Act is to be construed not as setting aside the judgment in a case already decided or as changing the rules of decision for the determination of a pending case, but rather as creating a new obligation of the Government to pay the contractor's claims where no obligation existed before. *United States* v. *Klein,* 13 Wall. 128, distinguished. P. 8.

(a) There is no constitutional obstacle to Congress' imposing on the Government a new obligation where none existed before, for work performed by the contractor which was beneficial to the Government and for which Congress thought he had not been adequately compensated. P. 9.

(b) The power of Congress to provide for the payment of debts, conferred by § 8 of Article I of the Constitution, is not restricted to payment of those debts which are legally binding on the Government, but extends to the creation of such obligations in recognition of claims which are merely moral or honorary. P. 9.

2. By the creation of a legal, in recognition of a moral, obligation to pay the contractor's claims, Congress did not encroach upon the judicial function which the Court of Claims had previously exercised in adjudicating that the obligation was not legal. P. 10.

3. Nor did the Act encroach upon the judicial function of the Court of Claims by directing that court to pass upon the contractor's claims in conformity to the particular rule of liability prescribed by the Act and to give judgment accordingly. P. 10.

(a) By the Act, Congress in effect consented to judgment in an amount to be ascertained by reference to specified data. P. 11.

(b) When a plaintiff brings suit to enforce a legal obligation it is not any the less a case or controversy, upon which a court possessing the federal judicial power may rightly give judgment, because the plaintiff's claim is uncontested or incontestable. P. 11.

(c) Whether the Act makes the findings in the earlier suit conclusive, and, if not, whether the evidence would establish the facts on which the Act predicates liability, are judicial questions. P. 11.

(d) Whether the facts be ascertained by proof or by stipulation, it is still a part of the judicial function to determine whether there is a legally binding obligation and, if so, to give judgment for the amount due even though the amount depends upon mere computation. P. 11.

4. The Act authorized the claimant to invoke the judicial power of the Court of Claims and he did so. P. 12.

5. The appellate jurisdiction conferred upon this Court by Art. III, § 2, cl. 2 of the Constitution extends to decisions of the Court of Claims rendered in exercise of its judicial functions, and such appellate review is not precluded by the fact that Congress has also imposed upon the Court of Claims non-judicial functions of an administrative or legislative character. P. 13.

6. The Court of Claims' determination that the Act conferred upon it only non-judicial functions and hence that it had no judicial duty to perform was itself an exercise of judicial power reviewable here. *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U. S. 693, distinguished. P. 14.

100 Ct. Cls. 375, reversed.

CERTIORARI, 321 U. S. 761, to review the dismissal of a proceeding brought in the Court of Claims pursuant to a special jurisdictional Act, which that court held unconstitutional.

Mr. George R. Shields, with whom *Mr. Herman J. Galloway* was on the brief, for petitioner. *Allen Pope, pro se,* filed a supplemental brief.

Assistant Attorney General Shea, with whom *Solicitor General Fahy, Messrs. Robert L. Stern, Joseph B. Goldman,* and *Miss Cecelia H. Goetz* were on the brief, for the United States.

Mr. John W. Cragun, as *amicus curiae,* filed a brief urging reversal.

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

The question for decision is whether Congress exceeded its constitutional authority in enacting the Special Act of February 27, 1942, 56 Stat. 1122,[1] by which, "not-

[1] "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That jurisdiction be, and the same is hereby, conferred upon the Court of Claims of the United States, notwithstanding any prior determination, any statute of limitations, release, or prior acceptance of partial allowance, to hear, determine, and render judgment upon the claims of Allen Pope, his heirs or personal representatives, against the United States, as described and in the manner set out in section 2 hereof, which claims arise out of the construction by him of a tunnel for the second high service of the water supply in the District of Columbia.

"Sec. 2. The Court of Claims is hereby directed to determine and render judgment at contract rates upon the claims of the said Allen Pope, his heirs or personal representatives, for certain work performed for which he has not been paid, but of which the Government has received the use and benefit; namely, for the excavation and concrete work found by the court to have been performed by the said Pope in complying with certain orders of the contracting officer, whereby the plans for the work were so changed as to lower the upper 'B' or 'pay' line three inches, and as to omit the timber lagging from the side walls of the tunnel; and for the work of excavating materials which caved in over the tunnel arch and for filling such caved-in spaces with dry packing and grout, as directed by the contracting officer, the amount of dry packing to be determined by the liquid method as described by the court and based on the volume of grout actually used, and the amount of grout to be as determined by the

withstanding any prior determination" or "any statute of limitations," it purported to confer jurisdiction on the Court of Claims to "hear and determine," and directed it to "render judgment" upon, certain claims of petitioner against the Government in conformity to directions given in the Act.

Petitioner brought the present proceeding in the Court of Claims to recover upon his claims as specified and sanctioned by the Special Act. The court dismissed the proceeding on the ground that the Act was unconstitutional. 100 Ct. Cls. 375. It thought that in requiring the court to make a mathematical calculation of the amount of petitioner's claims upon the basis of data enumerated in the Act and to give judgment for the amount so ascertained, notwithstanding the rejection of those claims in an earlier suit in the Court of Claims, the Act was an unconstitutional encroachment by Congress upon the judicial function of the court. Holding that it was free to ignore the Congressional command because given without constitutional authority, the court gave judgment dismissing the proceeding.

The case comes here on petition for certiorari which assigns as error the ruling below that the Congressional mandate was without constitutional authority. Because of the importance of the questions involved we issued the

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court's previous findings based on the number of bags of cement used in the grout actually pumped into the dry packing.

"Sec. 3. Any suit brought under the provisions of this Act shall be instituted within one year from the date of the approval hereof, and the court shall consider as evidence in such suit any or all evidence heretofore taken by either party in the case of Allen Pope against the United States, numbered K–366, in the Court of Claims, together with any additional evidence which may be taken.

"Sec. 4. From any decision or judgment rendered in any suit presented under the authority of this Act, a writ of certiorari to the Supreme Court of the United States may be applied for by either party thereto, as is provided by law in other cases."

writ, 321 U. S. 761. For reasons which will presently appear, we hold that we have jurisdiction to review the judgment below.

Several years before the enactment of the Special Act, petitioner brought suit in the Court of Claims to recover amounts alleged to be due upon his contract with the Government for the construction of a tunnel as a part of the water system of the District of Columbia. The construction involved certain excavation and certain filling of the excavated space, in part with concrete and in part with dry packing and grout. Dry packing consists of closely packed broken rock, into which is pumped the grout, a thin liquid mixture of sand, cement and water, which, when it hardens, serves to solidify and strengthen the dry packing.

Included in the demands for which the suit was brought were certain claims which are now asserted in this proceeding. They comprise a claim for additional excavation and concrete work alleged to have been required because of certain orders of the contracting officer, and a claim for dry packing and grout furnished by petitioner and placed by him in certain excavated space outside the so-called "B" line shown on the contract drawings. The "B" line marked the outer limits of the tunnel beyond which, by the terms of the contract, petitioner was not to be paid for excavation.

In the first suit it appeared that petitioner sought recovery for excavation, for which he had not been paid, of the space at the top of the tunnel where the contracting officer had lowered the "B" line by three inches, thus decreasing the space for the excavation for which the contract authorized payment to be made. The Court of Claims denied recovery of this item. The contracting officer had also directed the omission of certain timber supports or lagging required by the contract to be placed on the side walls of certain sections of the tunnel. Cave-ins from the sides resulted, making it necessary that the caved-in

material be removed and that the resulting space be filled with concrete, all at increased expense to petitioner. The Court of Claims made findings showing the amount of the additional excavation and concrete work claimed, but denied recovery on these items because the order of the contracting officer for the additional work involved a change in the contract which was not in writing as the contract required.

The Court of Claims also denied petitioner's claim for dry packing and grout. It was of opinion that the Government had received the benefit of and was liable for whatever dry packing petitioner had done and for so much of the grout as had actually found its way into the dry packed space and had remained there. But it denied recovery because of deficiency in the proof as to the extent of this space. The only proof offered was the "liquid method" of computation, based on the number of bags of cement used in the preparation of all the grout furnished by petitioner, the cement constituting a fixed proportion of the grout. The court held, with the Government, that the seepage of the grout into areas outside that dry packed rendered the liquid method an unreliable measure for determining either the volume of the dry packing or the amount of the grout required for it. The court gave judgment accordingly, while allowing to petitioner other claims upon his contract with which we are not here concerned. Petitioner's motions for a new trial were denied by the Court of Claims, and this Court denied certiorari. 303 U. S. 654.

The Special Act of Congress directed the Court of Claims to "render judgment at contract rates upon the claims" of petitioner for "certain work performed for which he has not been paid, but of which the Government has received the use and benefit," and gave jurisdiction to this Court to review the judgment by certiorari. Section 2 of the Act defined the work to be compensated as "the excavation and concrete work found by the court to

have been performed by the said Pope in complying with certain orders of the contracting officer, whereby the plans for the work were so changed as to lower the upper 'B' or 'pay' line three inches, and as to omit the timber lagging from the side walls of the tunnel; and for the work of excavating materials which caved in over the tunnel arch and for filling such caved-in spaces with dry packing and grout, as directed by the contracting officer, the amount of dry packing to be determined by the liquid method as described by the court and based on the volume of grout actually used, and the amount of grout to be as determined by the court's previous findings based on the number of bags of cement used in the grout actually pumped into dry packing."

The Act further directed that the court should consider as evidence in the case "any or all of the evidence" taken by either party in the earlier suit, "together with any additional evidence which may be taken."

The Court of Claims in construing the Special Act said (100 Ct. Cls. p. 379):

"A rereading of Section 2 of the act will show that the task which the court is directed to perform is a small and unimportant one. It is directed to refer to its previous findings, take certain cubic measurements and certain numbers of bags of cement which are recited there by reference, multiply those figures by the several unit prices stipulated in the contract for the several kinds of work, add the results and render judgment for the plaintiff for the sum. If this reading of Section 2 is correct, not only does the special act purport to confer upon the plaintiff the unusual privilege of litigating the same case a second time in a court which once finally decided it, and applying a second time for a review in the Supreme Court of the United States, which once considered and denied such a review. The special act also purports to decide the ques-

tions of law which were in the case upon its former trial and would, but for the act, be in it now, and to decide all questions of fact except certain simple computations." So construed it thought the Special Act directed the Court of Claims to decide again the case or controversy which it had decided in the first suit, "to decide it for the plaintiff and give him a judgment for an amount" determined by a "simple computation, based upon data referred to in the Special Act." This, it concluded, Congress could not "effectively direct."

For this conclusion it relied upon *United States* v. *Klein*, 13 Wall. 128, in which this Court ruled that Congress was without constitutional power to prescribe a rule of decision for a case pending on appeal in this Court so as to require it to order dismissal of the suit in which the Court of Claims had given judgment for the claimant. Decision was rested upon the ground that the judicial power over the pending appeal resided with this Court in the exercise of its appellate jurisdiction, and that Congress was without constitutional authority to control the exercise of its judicial power and that of the court below by requiring this Court to set aside the judgment of the Court of Claims by dismissing the suit.

As the opinion in the *Klein* case pointed out, pp. 144, 145, the Act of March 17, 1866, 14 Stat. 9, conferred on the Court of Claims judicial power by giving it authority to render final judgments in those cases and controversies which, pursuant to existing statutes, had been previously litigated before it. By later statutes this authority was extended to future cases, and the Court has since exercised the judicial power thus conferred upon it. See *Ex parte Bakelite Corp.*, 279 U. S. 438, 454; *United States* v. *Jones*, 119 U. S. 477. We do not consider just what application the principles announced in the *Klein* case could rightly be given to a case in which Congress sought, *pendente lite*, to set aside a judgment of the Court of Claims in favor

of the Government and to require relitigation of the suit. For we do not construe the Special Act as requiring the Court of Claims to set aside the judgment in a case already decided or as changing the rules of decision for the determination of a pending case.

Before the Special Act the claims of petitioner on his contract with the Government had been passed upon judicially and merged in a judgment which was final. *United States* v. *Jones, supra; In re Sanborn,* 148 U. S. 222, 225; *Luckenbach S. S. Co.* v. *United States,* 272 U. S. 533, 536 *et seq.* This Court denied certiorari, and the judgment, which remains undisturbed by any subsequent legislative or judicial action, conclusively established that petitioner was not entitled to recover on his claims. The Special Act did not purport to set aside the judgment or to require a new trial of the issues as to the validity of the claims which the Court had resolved against petitioner. While inartistically drawn the Act's purpose and effect seem rather to have been to create a new obligation of the Government to pay petitioner's claims where no obligation existed before. And such being its effect, the Act's impact upon the performance by the Court of Claims of its judicial duties seems not to be any different than it would have been if petitioner's claims had not been previously adjudicated there.

We perceive no constitutional obstacle to Congress' imposing on the Government a new obligation where there had been none before, for work performed by petitioner which was beneficial to the Government and for which Congress thought he had not been adequately compensated. The power of Congress to provide for the payment of debts, conferred by § 8 of Article I of the Constitution, is not restricted to payment of those obligations which are legally binding on the Government. It extends to the creation of such obligations in recognition of claims which are merely moral or honorary. *Roberts* v. *United*

States, 92 U. S. 41; *United States* v. *Realty Co.,* 163 U. S. 427; *United States* v. *Cook,* 257 U. S. 523; *Cincinnati Soap Co.* v. *United States,* 301 U. S. 308, 314. Congress, by the creation of a legal, in recognition of a moral, obligation to pay petitioner's claims plainly did not encroach upon the judicial function which the Court of Claims had previously exercised in adjudicating that the obligation was not legal.[2] Nor do we think it did so by directing that court to pass upon petitioner's claims in conformity to the particular rule of liability prescribed by the Special Act and to give judgment accordingly. *Pennsylvania* v. *Wheeling & Belmont Bridge Co.,* 18 How. 421; *Roberts* v. *United States, supra;* see *Cherokee Nation* v. *United States,* 270 U. S. 476, 486; cf. *Klamath Indians* v. *United States,* 296 U. S. 244; *United States* v. *Klamath Indians,* 304 U. S. 119.

Congress having exercised its constitutional authority to impose on the Government a legally binding obligation, the decisive question is whether it invaded the judicial province of the Court of Claims by directing it to determine the extent of the obligation by reference, as directed, to the specified facts, and to give judgment for that amount. In answering, it is important that the Act contemplated that petitioner should bring suit on his claims in the usual manner, that the court was given jurisdiction to decide it, and that petitioner by bringing the suit has invoked, for its decision, whatever judicial power the court possesses. Cf. *United States* v. *Realty Co., supra.* In this posture of the case it is pertinent to inquire what, if any-

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[2] The Court of Claims has often so held in earlier cases. See e. g. *Nock* v. *United States,* 1 Ct. Cls. 71, 2 Ct. Cls. 451; *Murphy* v. *United States,* 14 Ct. Cls. 508, 15 Ct. Cls. 217, affirmed 104 U. S. 464, 35 Ct. Cls. 494; *Alcock & Co.* v. *United States,* 61 Ct. Cls. 312, 74 Ct. Cls. 308; *DeLuca* v. *United States,* 69 Ct. Cls. 262, cert. denied 283 U. S. 862, 84 Ct. Cls. 217. And see *Menominee Indians* v. *United States,* 101 Ct. Cls. 10.

thing, Congress added to or subtracted from the judicial duties of the Court of Claims by directing that it consider the case and give judgment for the amount found to be due. Stripped of all complexities of detail the case is one in which, simply stated, petitioner has sought to enforce the obligation, which the Government has assumed, to pay him for work done and not paid for. Congress has in effect consented to judgment in an amount to be ascertained by reference to the specified data.

When a plaintiff brings suit to enforce a legal obligation it is not any the less a case or controversy upon which a court possessing the federal judicial power may rightly give judgment, because the plaintiff's claim is uncontested or incontestable. Nor is it any the less so because the amount recoverable depends upon a mathematical computation based upon data to be ascertained which by the terms of the obligation are its measure. For in any case the court is called on to sanction, by its judgment, an alleged obligation in a proceeding in which the existence, validity and extent of the obligation, the existence of the data, and the correctness of the computation may be put in issue.

The court below seems to have assumed that its only function under the Special Act was to make a calculation based upon data to be found in the Act and in the findings of the earlier suit. In view of the provisions of the Special Act for taking evidence and for considering the evidence in the first suit, we cannot say that all the earlier findings are to be deemed conclusive and that the court could not have been called on in this proceeding to determine judicially whether they are so. Whether the Act makes them conclusive, and if not, whether the evidence would establish the facts on which the Act predicates liability, are judicial questions. But if the facts be ascertained by proof or by stipulation, it is still a part of the judicial function to determine whether there is a legally binding obligation

and, if so, to give judgment for the amount due even though the amount depends upon mere computation.

It is a judicial function and an exercise of the judicial power to render judgment on consent. A judgment upon consent is "a judicial act." *United States* v. *Swift & Co.*, 286 U. S. 106, 115; *Swift & Co.* v. *United States*, 276 U. S. 311, 324; see also *Pacific R. Co.* v. *Ketchum*, 101 U. S. 289; *United States* v. *Babbitt*, 104 U. S. 767; *Nashville, C. & St. L. R. Co.* v. *United States*, 113 U. S. 261; *Thompson* v. *Maxwell Land Grant & R. Co.*, 168 U. S. 451. It is likewise a judicial act to give judgment on a legal obligation which the court finds to be established by stipulated facts; *J. I. Case Co.* v. *Labor Board*, 321 U. S. 332, 333; *Johnson* v. *Yellow Cab Co.*, 321 U. S. 383, 388; *Equitable Society* v. *Commissioner*, 321 U. S. 560, 561; or when the defendant is in default. *Voorhees* v. *Bank of the United States*, 10 Pet. 449; *Randolph* v. *Barrett*, 16 Pet. 138; *Clements* v. *Berry*, 11 How. 398; *Cooper* v. *Reynolds*, 10 Wall. 308; *Rio Grande Irrigation Co.* v. *Gildersleeve*, 174 U. S. 603; *Fidelity & Deposit Co.* v. *United States*, 187 U. S. 315; *Christianson* v. *King County*, 239 U. S. 356, 372. It is a familiar practice and an exercise of judicial power for a court upon default, by taking evidence when necessary or by computation from facts of record, to fix the amount which the plaintiff is lawfully entitled to recover and to give judgment accordingly. *Renner & Bussard* v. *Marshall*, 1 Wheat. 215; *Aurora City* v. *West*, 7 Wall. 82, 104; *Clements* v. *Berry, supra;* cf. *Mayhew* v. *Thatcher*, 6 Wheat. 129. In all these cases the court determines that the unchallenged facts shown of record establish a legally binding obligation; it adjudicates the plaintiff's right of recovery and the extent of it, both of which are essential elements of the judgment.

We conclude that the effect of the Special Act was to authorize petitioner to invoke the judicial power of the Court of Claims, and that he has done so. It is true that

Congress has imposed on that court, as it has on the courts of the District of Columbia, non-judicial duties of an administrative or legislative character. See *In re Sanborn, supra; Federal Radio Comm'n* v. *Nelson Bros. Co.,* 289 U. S. 266, 275. Those imposed on the Court of Claims are such as it has traditionally exercised ever since its original organization as a mere agency of Congress to aid it in the performance of its constitutional duty to provide for payment of the debts of the Government. Such administrative duties coexist with its judicial functions. See *Ex parte Bakelite Corp., supra,* 452, *et seq.* Its decisions rendered in its administrative capacity are not judicial acts, and their review, even though sanctioned by Congress, is not within the appellate jurisdiction of this Court. *Gordon* v. *United States,* 2 Wall. 561; and see the views expressed by Taney, C. J., in 117 U. S. 697; *In re Sanborn, supra.* But notwithstanding the retention of such administrative duties by the Court of Claims, as in the case of the courts of the District of Columbia, Congress has provided for appellate review of the judgments of both courts rendered in their judicial capacity. And this Court has held, by an unbroken line of decisions, that its appellate jurisdiction, conferred by Art. III, § 2, Cl. 2 of the Constitution, extends to the review of such judgments of the Court of Claims; *De Groot* v. *United States,* 5 Wall. 419; *United States* v. *Jones, supra; Nashville, C. & St. L. R. Co.* v. *Wallace,* 288 U. S. 249, 263; and of the courts of the District of Columbia; *Federal Radio Comm'n* v. *Nelson Bros. Co., supra,* and cases cited.

We have no occasion to consider what effect the imposition of non-judicial duties on the Court of Claims may have affecting its constitutional status as a court and the permanency of tenure of its judges. Cf. *Williams* v. *United States,* 289 U. S. 553. It is enough that, although the Court of Claims, like the courts of the District of Columbia, exercises non-judicial duties, Congress has also

authorized it as an inferior court to perform judicial functions whose exercise is reviewable here. The problem presented here is no different than if Congress had given a like direction to any district court to be followed as in other Tucker Act cases. Its possession of non-judicial functions by direction of Congress presents no more obstacle to appellate review of its judicial determinations by this Court, than does the performance of like functions by the courts of the District of Columbia or by state courts whose exercise of judicial power, in the cases specified in Article III, § 2, Cl. 1, of the Constitution, is reviewable here by virtue of Cl. 2 of § 2. Compare *Southwestern Bell Tel. Co.* v. *Oklahoma,* 303 U. S. 206 with *Barnett* v. *Rogers,* 302 U. S. 655. See also *Prentis* v. *Atlantic Coast Line,* 211 U. S. 210, 225, 226; *Oklahoma Natural Gas Co.* v. *Russell,* 261 U. S. 290.

The Court of Claims' determination that the Special Act conferred upon it only non-judicial functions and hence that it had no judicial duty to perform was itself an exercise of judicial power reviewable here. *Interstate Commerce Commission* v. *Brimson,* 154 U. S. 447. The case is not one where the court below has made merely an administrative decision not subject to judicial review, without purporting to act judicially or to rule as to the extent of its judicial authority as the ground of its action or refusal to act. *Postum Cereal Co.* v. *California Fig Nut Co.,* 272 U. S. 693. Jurisdiction to decide is jurisdiction to make a wrong as well as a right decision. *Fauntleroy* v. *Lum,* 210 U. S. 230, 234, 235; *Burnet* v. *Desmornes,* 226 U. S. 145, 147.

Reversed.

Mr. Justice Jackson took no part in the consideration or decision of this case.

BATES *v.* UNITED STATES.

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

No. 92. Decided November 6, 1944.

The judgment of the Circuit Court of Appeals affirming a conviction of the offense of conspiracy to export gold in violation of Executive Order No. 6260 (31 C. F. R. 50.6), and other offenses, on grounds conceded to be erroneous by the Government, is vacated. The Government's contention that the conviction can be sustained on other grounds is not passed upon, and the cause is remanded to the Circuit Court of Appeals, since it is more appropriate that the contention be considered in the first instance by that Court. P. 16.

141 F. 2d 436, vacated.

PETITION for a writ of certiorari, herein granted, to review the affirmance of a conviction of conspiracy to commit federal offenses.

Messrs. Charles Bushnell Fullerton and *Harold V. Snyder* were on the brief for petitioner.

Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Messrs. Robert S. Erdahl, W. Marvin Smith, and *Miss Beatrice Rosenberg* were on the brief for the United States.

PER CURIAM.

Petitioner asks certiorari to review his conviction upon an indictment charging criminal conspiracy to commit several separate offenses. The indictment charged petitioner, one Smith, and another (who was acquitted by the jury), and persons unknown, with a conspiracy to acquire gold bullion without a license in violation of § 4 of Executive Order 6260 (31 C. F. R. § 50.4); to earmark for export, and to export to Germany gold bullion without a license, both in violation of § 6 of the Order (31 C. F. R.

§ 50.6); and with conspiracy to commit two counterfeiting offenses.

At the trial the evidence showed that petitioner, who was interested in making a profit from the sale of gold, was introduced by an informer to one Schaetzel, a Government agent who posed as the owner of a gold mine, interested in disposing of gold. Petitioner told Schaetzel a story, conceded by the Government to be without foundation, to the effect that petitioner wished to procure gold for sale to Nazi agents in this country who proposed to transport it to Germany by submarine. Petitioner, who was in fact seeking other ways of disposing of gold, tried without success to negotiate with numerous dealers, some of whose names were suggested to petitioner by Smith on petitioner's promise to pay him a commission. When Schaetzel complained to petitioner of the delay in consummating the proposed arrangement with the supposed Nazi agents, petitioner induced Smith to pose as such to reassure Schaetzel.

On the verdict of the jury, finding petitioner and Smith guilty as charged by the indictment, the district court gave judgment against them. The Court of Appeals for the Seventh Circuit reversed the conviction of Smith but affirmed that of petitioner, 141 F. 2d 436, on the ground that the jury could have found that petitioner had conspired with unknown Nazi agents to export gold.

The Government, by its brief here, formally concedes that petitioner's conviction cannot be sustained on this ground. It admits that petitioner's story of his negotiations with Nazi agents was sham, as he testified at the trial, and as is shown by other evidence submitted to the jury and by the failure of the Government to produce evidence of contacts with Nazi agents although petitioner was under almost constant surveillance by government agents. The Government also concedes that it has no evidence and that there is none in the record to support peti-

tioner's conviction on any theory of a conspiracy to export gold. It in effect confesses that the affirmance on that ground is error. The Government also admits that the conviction cannot be supported on the counterfeiting charges.

But the Government argues that there is evidence in the record sufficient to sustain the conviction of petitioner and Smith of conspiracy to acquire gold without the prescribed license, notwithstanding the Government's failure to seek a review of the reversal of Smith's conviction. The district court's instructions to the jury are not included in the record on appeal. In this state of the record there can be no question that this charge of the indictment was not properly submitted to the jury.

On the Government's concession, which we accept, as to the charge of conspiracy to export gold and to commit counterfeiting offenses, the judgment of the Court of Appeals cannot be sustained. We do not consider the merits of the Government's contention that the conviction can be sustained on other grounds, since, in the circumstances of this case, we deem it more appropriate that the Court of Appeals consider that question in the first instance. Cf. *Manufacturers' Finance Co.* v. *McKey,* 294 U. S. 442, 453–454, and cases cited; *United States* v. *Malphurs,* 316 U. S. 1, 3.

The petition for writ of certiorari is granted, the judgment is vacated and the cause remanded to the Circuit Court of Appeals for further proceedings in conformity to this opinion.

So ordered.

CAROLENE PRODUCTS CO. ET AL. *v.* UNITED STATES.

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

No. 21. Argued October 16, 17, 1944.—Decided November 6, 1944.

The Filled Milk Act forbids shipment in interstate commerce of milk "to which has been added, or which has been blended or compounded with, any fat or oil other than milk fat, so that the resulting product is in imitation or semblance of milk." *Held:*

1. In a prosecution for violation of the Act, evidence that the defendant's compound was not nutritionally deficient was properly excluded. P. 22.

(a) The Act is not to be construed as inapplicable to products in which nutritional deficiency has been corrected, although by methods developed subsequently to the passage of the Act, since the Act was aimed not only at nutritional deficiency but also at substitution for or confusion with milk products. P. 22.

(b) Thus to control shipments in interstate commerce so as to prevent confusion, deception and substitution is within the power of Congress under the commerce clause. P. 23.

2. Though the Act applies only to products "in imitation or semblance of milk," such imitation or semblance may result from the ingredients used and need not be the result of conscious effort. P. 25.

3. As applied to the filled milk involved here, though the product be assumed to be wholesome and properly labeled, the Act does not violate the due process clause of the Fifth Amendment. P. 31.

(a) Judicial notice may be taken of reports of committees of the House of Representatives and the Senate, which show that considerations besides nutritional deficiency influenced passage of the Act. P. 28.

(b) Here, milk from which a valuable element (butterfat) has been removed is artificially enriched with cheaper fats and vitamins so that it is indistinguishable by the average purchaser from whole milk products. The result is that the compound is confused with and passed off as the whole milk product despite proper labeling. P. 31.

(c) When Congress exercises a delegated power such as that over interstate commerce, the methods which it employs may be

stricken down only upon a clear and convincing showing that there is no rational basis for the legislation. P. 31.
140 F. 2d 61, affirmed.

CERTIORARI, 321 U. S. 760, to review the affirmance of convictions of violation of the Filled Milk Act.

Mr. Samuel H. Kaufman, with whom *Messrs. Crampton Harris* and *George Trosk* were on the brief, for petitioners.

Mr. Chester T. Lane, with whom *Solicitor General Fahy* and *Assistant Attorney General Tom C. Clark* were on the brief, for the United States.

MR. JUSTICE REED delivered the opinion of the Court.

The limited writ of certiorari in this case was granted to review petitioners' conviction, affirmed by the Circuit Court of Appeals, for a violation of the Filled Milk Act.[1] The Court was moved to allow the petition in order to examine the contentions that the accused articles of food cannot, under the due process clause of the Fifth Amendment to the Constitution, be banned from commerce when these compounds are nutritionally sufficient and not "in imitation or semblance" of milk or any milk product within the meaning of the statute and are not sold as milk or a milk product.

The contentions which are raised by petitioners to avoid their conviction were not dealt with in our prior decision which upheld the act's validity upon demurrer to an earlier indictment which charged its violation. *United States* v. *Carolene Products Co.,* 304 U. S. 144.[2] Since these is-

[1] Act of March 4, 1923, 42 Stat. 1486; *United States* v. *Carolene Products Co.,* 51 F. Supp. 675; *Carolene Products Co.* v. *United States,* 140 F. 2d 61; *Carolene Products Co.* v. *United States,* 321 U. S. 760.

[2] Cf. *Carolene Products Co.* v. *Evaporated Milk Association,* 93 F. 2d 202. In *Carolene Products Co.* v. *Wallace,* 307 U. S. 612, 308 U. S. 506, here on appeal, we affirmed the refusal of the trial

sues are important to those affected by the act, certiorari was granted. 321 U. S. 760. Questions of due process under the Fourteenth Amendment, similar to those presented here, had arisen from state filled-milk legislation with varying results.[3] Consideration by this Court of the filled-milk legislation of Kansas appears in *Sage Stores Co.* v. *Kansas*, *post*, p. 32.

The facts, which are undisputed, are fully set out in the opinions of the District Court and the Circuit Court of Appeals. It is sufficient for our purposes to summarize them as follows. The corporate petitioner sells the products mentioned in the indictment which are manufactured for it by another corporation from skim milk, that is, milk from which a large percentage of the butterfat has been removed. The process of manufacture consists of taking natural whole milk, extracting the butterfat content and then adding cottonseed or cocoanut oil and fish liver oil, which latter oil contains vitamins A and D. The process includes pasteurization of the milk, evaporation, homogenization of the mixture and sterilization. The compound is sold under various trade names in cans of the same size and shape as those used for evaporated milk.

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court to grant an interlocutory or final decree which would enjoin prosecution of the corporate petitioner for alleged violation of the Filled Milk Act. The affirmance was based on a lack of necessity for equitable intervention to protect the Carolene Products Co. from criminal prosecution.

[3] Cases which sustained the validity of state acts against attacks which were based on the due process clause of the Fourteenth Amendment were: *Carolene Products Co.* v. *Harter*, 329 Pa. 49, 197 A. 627; *Carolene Products Co.* v. *Mohler*, 152 Kans. 2, 13, 102 P. 2d 1044; *Carolene Products Co.* v. *Hanrahan*, 291 Ky. 417, 421, 164 S. W. 2d 597; *State* v. *Sage Stores Co.*, 157 Kans. 404, 412, 413, par. 5, 143 P. 2d 652.

Contra: People v. *Carolene Products Co.*, 345 Ill. 166, 177 N. E. 698; *Carolene Products Co.* v. *Thomson*, 276 Mich. 172, 267 N. W. 608; *Carolene Products Co.* v. *Banning*, 131 Nebr. 429, 268 N. W. 313.

The contents of the can are practically indistinguishable by the buying public from evaporated whole milk, but the cans are truthfully labeled to show the trade names and the ingredients.

The indictment charged the petitioner corporation and the individual petitioners, its president and vice president, with violation of the statute by making interstate shipments of the compounds contrary to § 2.[4] The convictions and sentences are assailed as improper on three grounds: first, that the petitioner's compounds were not covered by the rationale of the Filled Milk Act; second, that the Act did not cover the compounds because they were not "in imitation or semblance" of a milk product; and third, that since the compounds were wholesome food products and sold without fraud, in any sense, Congress could not constitutionally prohibit their interstate shipment.

First. As a basis for petitioner's position that the Filled Milk Act does not cover their compounds, it is argued that the nutritional deficiencies of filled milks led to the Act's enactment so as to protect the public health. These deficiencies occurred because the extraction of the butterfat from the whole milk removed a large proportion of the fat soluble vitamins A and D. The hearings on the bill and the course of the debate make it quite clear that this vitamin deficiency was of major importance in bringing about the enactment of the act.[5] Petitioners then offered

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[4] "SEC. 2. . . . It shall be unlawful for any person . . . to ship or deliver for shipment in interstate or foreign commerce, any filled milk.

"SEC. 3. Any person violating any provision of this Act shall upon conviction thereof be subject to a fine of not more than $1,000 or imprisonment of not more than one year, or both; . . ." 42 Stat. 1487.

[5] *United States* v. *Carolene Products Co.*, 304 U. S. 144, 149. H. Rep. No. 355, 67th Cong., 1st Sess., pp. 3–4; S. Rep. No. 987, 67th

in the trial court to prove that since the passage of the Filled Milk Act in 1923, the technique of fortification of foods with vitamins A and D had advanced to a point where these vitamins could be restored to skim milk compounds so that the compounds were equally valuable in that respect to whole milk products and that their products had been so enriched. The offer was refused.

Filled milk is defined in § 1 (c) of the act as any milk, "whether or not condensed, evaporated, concentrated, powdered, dried, or desiccated, to which has been added, or which has been blended or compounded with, any fat or oil other than milk fat, so that the resulting product is in imitation or semblance of milk . . ., whether or not condensed, evaporated, concentrated, powdered, dried, or desiccated." The petitioner's compounds, it is agreed, fall within this definition. But, petitioners contend, they do not fall within its spirit, since the vitamins which cause deficiency have been restored and that therefore the act is inapplicable to the enriched compounds within that rule of statutory construction, as illustrated by *Church of the Holy Trinity* v. *United States,* 143 U. S. 457; *United States* v. *Aetna Explosives Co.,* 256 U. S. 402, and other cases, which excludes from the coverage of a statute things or situations which are beyond the legislative intent.

Petitioners' position as to the legislative purpose of the act was not accepted by the trial or reviewing court. We agree with those courts. While, as we have stated above, the vitamin deficiency was an efficient cause in bringing about the enactment of the Filled Milk Act, it was not the sole reason for its passage. A second reason was that the compounds lend themselves readily to substitution

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Cong., 4th Sess., pp. 3–4; 62 Cong. Rec. pp. 7581, 7616; Hearings, House Committee on Agriculture, H. Res. 6215, 67th Cong., 1st Sess., Vol. I, pp. 144, 176–77; Hearings, Senate Sub-Committee of the Committee on Agriculture and Forestry, H. Res. 8086, 67th Cong., 2d Sess., Vol. I, pp. 27, 48, 67, 89–90, 121–24, 143, 177, 226, 266.

for or confusion with milk products. Although, so far as the record shows, filled milk compounds as enriched are equally wholesome and nutritious as milk with the same content of calories and vitamins, they are artificial or manufactured foods which are cheaper to produce than similar whole milk products. When compounded and canned, whether enriched or not, they are indistinguishable by the ordinary consumer from processed natural milk. The purchaser of these compounds does not get evaporated milk. This situation has not changed since the enactment of the act. The possibility and actuality of confusion, deception and substitution was appraised by Congress.[6] The prevention of such practices or dangers through control of shipments in interstate commerce is within the power of Congress. *United States* v. *Carolene Products Co.*, 304 U. S. at p. 148; cf. *McCray* v. *United States*, 195 U. S. 27, 63. The manner by which Congress carries out this power, subject to constitutional objections which are considered hereinafter in part

[6] H. Rep. No. 355, 67th Cong., 1st Sess., p. 2: "The compound can be made more cheaply than the regular article. . . . Filled milk is sold under various trade names. . . . The manufacturers can not sell it as milk, but it is put up in the same size cans as regular condensed milk, and the evidence before the committee shows that it is advertised by the retail dealers as milk and evaporated milk. Storekeepers sell it with the statements that 'it takes the place of milk,' 'just as good as condensed and much cheaper,' 'nothing better on the market,' 'takes the place of condensed milk.' Instances have been found in which the coconut fat was mixed with milk and sold for cream; the compound has been used for making ice cream. . . . In many cases retailers sell the compound for the same price as the straight evaporated milk, although the price per 1-pound can to them is about 3 cents less. A number of surveys in various parts of the country show that the compound is sold largely in sections inhabited by people unable to read English and sections inhabited by people of limited means, and not sold at all in better residential districts." Cf. also S. Rep. No. 987, 67th Cong., 4th Sess., p. 3.

"Third" of this opinion, is within legislative discretion,[7] even though the method chosen is prohibition of manufacture, sale or shipment.[8] Congress evidently determined that exclusion from commerce of filled milk compounds in the semblance of milk was an appropriate method to strike at evils which it desired to suppress. Although it now is made to appear that one evil, the nutritional deficiencies, has been overcome, the evil of confusion remains and Congress has left the statute in effect. It seems to us clear, therefore, that there is no justification for judicial interference to withdraw these assumedly nondeleterious compounds from the prohibitions of the act. It follows from the point of view of the coverage of the

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[7] *Jacob Ruppert* v. *Caffey*, 251 U. S. 264, 299–301; *Milliken* v. *United States*, 283 U. S. 15, 24. Cf. *Purity Extract Co.* v. *Lynch*, 226 U. S. 192, 201; *Sterling* v. *Constantin*, 287 U. S. 378, 398.

[8] See *Nebbia* v. *New York*, 291 U. S. 502, 528, note 26. To the cases there cited may be added *Patterson* v. *Kentucky*, 97 U. S. 501, upholding the constitutional validity of a state statute prohibiting the sale of oils or fluids which can be used for illuminating purposes if such oils or fluids ignite or permanently burn below 130 degrees Fahrenheit; *Price* v. *Illinois*, 238 U. S. 446, establishing the constitutionality of a state statute prohibiting the sale of a food preservative that contained formaldehyde, hydrofluoric acid, boric acid and salicylic acid; *United States* v. *Hill*, 248 U. S. 420, prohibiting by federal statute the transportation of liquor into a state whose laws forbade only manufacturing and sale; *Crescent Cotton Oil Co.* v. *Mississippi*, 257 U. S. 129, validating a state statute prohibiting a corporation from owning or operating a cotton gin when also interested in the manufacture of cottonseed oil or cottonseed meal; *Whitfield* v. *Ohio*, 297 U. S. 431, holding valid a state statute which prohibited the sale in open market of goods manufactured by convicts or prisoners; *Henderson Co.* v. *Thompson*, 300 U. S. 258, upholding the validity of a state statute prohibiting the use of sweet natural gas for the manufacture of carbon black (see also *Walls* v. *Midland Carbon Co.*, 254 U. S. 300); and *Federal Security Administrator* v. *Quaker Oats Co.*, 318 U. S. 218, holding valid an administrative regulation prohibiting manufacture of "farina" enriched solely with vitamin D.

act that it was not erroneous to refuse to consider the evidence which petitioners offered as to the wholesomeness of the compounds.

Second. The petitioners urge another reason why the act does not cover their compounds. This ground is that the compounds are not "in imitation or semblance" of milk within the meaning of the act's definition of filled milk. § 1 (c), *supra,* p. 22. Compare *State* v. *Carolene Products Co.,* 346 Mo. 1049, 1060–62, 144 S. W. 2d 153. We agree that the product must be in imitation or semblance of milk to fall within the prohibition of the act.

Petitioners rely upon the admitted fact that no ingredient is added to the skim milk, oil and vitamins to alter the appearance of the compound. Accepting the evidence that the compounds are indistinguishable from whole milk products by purchasers, it is urged that they cannot be held to be in "imitation or semblance" of milk unless the manufacturer purposefully adds something to make the mixture simulate milk. It is said Congress adopted this language from § 64 (3) of the Farms and Markets Law of New York.[9] Prior to that time, the Court of Appeals of New York, in construing the words "imitation or semblance" as they appeared in another section of the New York law directed at the regulation of oleomargarine, had interpreted them as denouncing trade in oleomargarine only when the manufacturer consciously and purposefully attempted to create an imitation or semblance of milk products. *People* v. *Guiton,* 210 N. Y.

[9] Sec. 64 (3). "No person shall manufacture, sell or exchange, offer or expose for sale or exchange, or have in his possession with the intent to sell or exchange any condensed, evaporated, concentrated, powdered, dried or desiccated milk, cream or skimmed milk to which there has been added or with which there has been mixed, blended or compounded, any fats or oils, other than milk fat, so that the finished product shall be in imitation or semblance of condensed, evaporated, concentrated, powdered, dried or desiccated milk." N. Y. Laws 1922, ch. 365, § 64, as amended.

1, 8, 9, 103 N. E. 773. The adoption of these words after this interpretation and in the face of the Congressional knowledge of the New York decision and of the controversy over the effect of the use of such language,[10] petitioners contend, brings into play the general rule that adoption of the wording of a statute from another legislative jurisdiction carries with it the previous judicial interpretations of the wording. *Willis* v. *Eastern Trust & Banking Co.*, 169 U. S. 295, 307; cf. *James* v. *Appel*, 192 U. S. 129, 135; *Joines* v. *Patterson*, 274 U. S. 544, 549.

The cases just cited have established under suitable conditions the rule for which petitioners contend that the interpretation goes with the act. It is a presumption of legislative intention, however, which varies in strength with the similarity of the language, the established character of the decisions in the jurisdiction from which the language was adopted and the presence or lack of other indicia of intention. *Copper Queen Mining Co.* v. *Arizona Board*, 206 U. S. 474, 479; *Whitney* v. *Fox*, 166 U. S. 637, 647.

Here we cannot be sure that Congress, deliberately or otherwise, adopted the wording from the New York statute. In § 2 of the federal act of August 2, 1886, 24 Stat. 209, taxing and regulating oleomargarine, somewhat similar language occurs.[11] That may be the source of the

[10] Hearings, Senate Sub-Committee of the Committee on Agriculture and Forestry, H. Res. 8086, 67th Cong., 2d Sess., pp. 219, 221–22, 248–49.

[11] "SEC. 2. That for the purposes of this act certain manufactured substances, certain extracts, and certain mixtures and compounds, including such mixtures and compounds with butter, shall be known and designated as 'oleomargarine', namely: All substances heretofore known as oleomargarine, oleo, oleomargarine-oil, butterine, lardine, suine, and neutral; all mixtures and compounds of oleomargarine, oleo, oleomargarine-oil, butterine, lardine, suine, and neutral; all lard extracts and tallow extracts; and all mixtures and compounds of tallow, beef-fat, suet, lard, lard-oil, vegetable-oil annotto, and other

phrase. Furthermore the *Guiton* case did not interpret the section of the New York statute upon which petitioners contend the federal act is modeled. In the *Guiton* case, the Court of Appeals explained the force of "imitation and semblance" as used in the oleomargarine section, § 38, N. Y. Laws 1909, ch. 9. That court relied upon the special statutory definition of oleomargarine in § 30, *id.*, as a reason for its conclusion that the words prohibited only conscious imitation, 210 N. Y. 7. Oleomargarine was there defined as an article "in the semblance of butter." The court thought that as the sale of natural oleomargarine, which might have the "semblance" of butter was permitted, it was not intended to prohibit products which looked like butter unless the imitation came from choice. As no corresponding definition of filled milk occurs, there could be no certainty that the same result would be reached, if New York had been called upon to interpret section 64.

Finally, as determinative of the intention of Congress to include compounds whose resemblance to milk products arises from their ingredients and not from conscious effort, we note the fact that compounds of this innocent character were specifically included by name in the list of compounds which the Congressional reports pointed out as products which were covered by the proposed act.[12] Petitioner's compounds were themselves so named. The addition of vitamins does not affect their physical likeness to milk products.

Third. If the Filled Milk Act is applicable to the compounds whose shipment was the basis of the indictment in this case, as we have just concluded, petitioners assert

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coloring matter, intestinal fat, and offal fat made in imitation or semblance of butter, or when so made, calculated or intended to be sold as butter or for butter." 24 Stat. 209.

[12] S. Rep. No. 987, 67th Cong., 4th Sess., p. 3; H. Rep. No. 355, 67th Cong., 1st Sess., p. 2; 64 Cong. Rec. pp. 3951, 7593.

that the act, as thus applied, violates the due process clause of the Fifth Amendment. Their argument runs in this manner. Since these enriched compounds are admittedly wholesome and sold under trade names with proper labels without the commission of any fraud by petitioners on the public, Congress cannot prohibit their interstate shipment without denying to petitioners a right protected by the due process clause, the right to trade in innocent articles. They rely upon *Weaver* v. *Palmer Bros. Co.*, 270 U. S. 402, and continue their protest against the refusal of the trial court to receive the evidence as to the wholesomeness of their product.

We do not need to consider the refusal of the trial court to receive evidence of the purity and wholesomeness of petitioner's products. Such evidence could be material only if the sole basis for Congressional action was impurity and unwholesomeness.[13] Under the first point of this opinion, we have determined that the avoidance of confusion furnished a reason for the enactment of the Filled Milk Act. The trial court took judicial notice, as did the District Court of the District of Columbia, *United States* v. *Carolene Products Co.*, 51 F. Supp. 675, 678–79, and as we do, of the reports of the committees of the House of Representatives and the Senate which show that other considerations than nutritional deficiencies influenced the prohibition of the shipment of filled milk in interstate commerce. These unchallenged reports, as we indicated

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[13] See American Law Institute, Model Code of Evidence, ch. 9, Rules 801, 802, 803, pp. 319–22; Bikle, Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action, 38 Harv. L. Rev. 6; Note, The Presentation of Facts Underlying Constitutionality of Statutes, 49 Harv. L. Rev. 631; Morgan, Judicial Notice, 57 Harv. L. Rev. 269, 291–94; Note, 30 Col. L. Rev. 360; Wigmore, Evidence (3d Ed.), § 2555 (d), p. 522; *Borden's Co.* v. *Baldwin*, 293 U. S. 194, 209; *United States* v. *Carolene Products Co.*, 304 U. S. 144, 153–54.

in part "First" above, furnish an adequate basis, other than unwholesomeness, for the action of Congress.[14] The reports show that it was disputable as to whether wholesome filled milk should be excluded from commerce because of the danger of its confusion with the condensed or evaporated natural product or whether regulation would be sufficient. The power was in Congress to decide its own course. We need look no further.[15]

Weaver v. *Palmer Bros. Co., supra,* is not to the contrary. This Court thought that under the facts of that record there was no reasonable basis for the legislative determination that the use of shoddy in comfortables was dangerous to the public health or that it offered opportunity for deception, pp. 412 and 414. Therefore the prohibition of its use violated the due process clause of the Fourteenth Amendment. Sterilization, inspection and labeling were deemed to be sufficient to negative the possibility of such evils. It was pointed out in the course of the opinion, p. 413, that where the possibility of evil was not negatived, legislation prohibiting the sale of a wholesome article would not be invalidated. *Powell* v. *Pennsylvania,* 127 U. S. 678. In dealing with the evils of filled milk, Congress reached the conclusion that labeling was not an adequate remedy for deception. On the point of the constitutionality in relation to due process of the prohibition of trade in articles which are not in themselves dangerous but which make other evils more difficult

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[14] *West India Oil Co.* v. *Domenech,* 311 U. S. 20, 28; *United States* v. *Stewart,* 311 U. S. 60, 64; *Neuberger* v. *Commissioner,* 311 U. S. 83, 85, n. 1; *Milk Wagon Drivers' Union* v. *Lake Valley Co.,* 311 U. S. 91, 101–103; *Federal Communications Comm'n* v. *Columbia Broadcasting System,* 311 U. S. 132, 137; *Taft* v. *Helvering,* 311 U. S. 195, 197, n. 4.

[15] Cf. *Zahn* v. *Board of Public Works,* 274 U. S. 325, 326, 328; *Sproles* v. *Binford,* 286 U. S. 374, 388–89; *Olsen* v. *Nebraska,* 313 U. S. 236, 246.

to control, such as confusion in the filled milk legislation, the *Powell* case is authority for the validity of Congressional action in the Filled Milk Act. It involved a sale of an article assumed to be just as good as butter but which was prohibited because of its ingredients. In the *Powell* case, this Court said:

"The defendant then offered to prove by Prof. Hugo Blanck that he saw manufactured the article sold to the prosecuting witness; that it was made from pure animal fats; that the process of manufacture was clean and wholesome, the article containing the same elements as dairy butter, . . . that the oleaginous substances in the manufactured article were substantially identical with those produced from milk or cream; and that the article sold to the prosecuting witness was a wholesome and nutritious article of food, in all respects as wholesome as butter produced from pure unadulterated milk or cream from unadulterated milk." Pp. 681–82.

"It will be observed that the offer in the court below was to show by proof that the particular articles the defendant sold, and those in his possession for sale, in violation of the statute, were, in fact, wholesome or nutritious articles of food. It is entirely consistent with that offer that many, indeed, that most kinds of oleomargarine butter in the market contain ingredients that are or may become injurious to health. The court cannot say, from anything of which it may take judicial cognizance, that such is not the fact. . . .

"Whether the manufacture of oleomargarine, or imitation butter, of the kind described in the statute, is, or may be, conducted in such a way, or with such skill and secrecy, as to baffle ordinary inspection, or whether it involves such danger to the public health as to require, for the protection of the people, the entire suppression of the business, rather than its regulation in such manner as to permit the manufacture and sale of articles of that class

that do not contain noxious ingredients, are questions of fact and of public policy which belong to the legislative department to determine. And as it does not appear upon the face of the statute, or from any facts of which the court must take judicial cognizance, that it infringes rights secured by the fundamental law, the legislative determination of those questions is conclusive upon the courts." Pp. 684–85.

In *Hebe Co.* v. *Shaw,* 248 U. S. 297, this Court in 1919 upheld the validity of an Ohio statute which prohibited the sale of condensed milk made otherwise than from whole milk against an attack under the Fourteenth Amendment. It was assumed that the compound was wholesome and it was properly labeled. The act was sustained, however, as a proper exercise of legislative power to protect the public against fraudulent substitution, pp. 302–303. *Purity Extract Co.* v. *Lynch,* 226 U. S. 192, 204.

In the action of Congress on filled milk there is no prohibition of the shipment of an article of commerce merely because it competes with another such article which it resembles. Such would be the prohibition of the shipment of cotton or silk textiles to protect rayon or nylon or of anthracite to aid the consumption of bituminous coal or of cottonseed oil to aid the soybean industry. Here a milk product, skimmed milk, from which a valuable element—butterfat—has been removed is artificially enriched with cheaper fats and vitamins so that it is indistinguishable in the eyes of the average purchaser from whole milk products. The result is that the compound is confused with and passed off as the whole milk product in spite of proper labeling.

When Congress exercises a delegated power such as that over interstate commerce, the methods which it employs to carry out its purposes are beyond attack without a clear and convincing showing that there is no rational basis for

the legislation; that it is an arbitrary fiat.[16] This is not shown here. The judgment is

Affirmed.

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

SAGE STORES CO. ET AL. *v.* KANSAS EX REL. MITCHELL (SUBSTITUTED AS ATTORNEY GENERAL).

CERTIORARI TO THE SUPREME COURT OF KANSAS.

No. 34. Argued October 17, 1944.—Decided November 6, 1944.

A statute of Kansas forbids the sale or keeping for sale of milk "to which has been added any fat or oil other than milk fat." One of the purposes of the legislation was prevention of fraud and deception in the sale of such compounds. *Held:*

1. The statute does not violate the equal protection clause of the Fourteenth Amendment. P. 34.

The statute is not without rational basis even though it permits the sale of skim milk while forbidding the sale of allegedly more nutritive compounds.

2. The question of the coverage of the statute is one of state law. P. 35.

3. As applied to the petitioners' products, which had the taste, consistency, color and appearance of whole milk products, the statute did not violate the due process clause of the Fourteenth Amendment. *Carolene Products Co.* v. *United States, ante,* p. 18. P. 36.

157 Kan. 404, 622, 143 P. 2d 652, affirmed.

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[16] *United States* v. *Carolene Products Co.,* 304 U. S. 144, 153–54; *Hebe Co.* v. *Shaw,* 248 U. S. 297, 304; *Munn* v. *Illinois,* 94 U. S. 113, 132; *South Carolina Highway Dept.* v. *Barnwell Bros.,* 303 U. S. 177, 191–92; *Carmichael* v. *Southern Coal Co.,* 301 U. S. 495, 509; *Townsend* v. *Yeomans,* 301 U. S. 441, 451; *O'Gorman & Young* v. *Hartford Ins. Co.,* 282 U. S. 251, 257–58; *Hamilton* v. *Kentucky Distilleries Co.,* 251 U. S. 146, 163; *Rast* v. *Van Deman & Lewis Co.,* 240 U. S. 342, 357.

CERTIORARI, 321 U. S. 762, to review a judgment of the Supreme Court of Kansas which, in an original proceeding in quo warranto, sustained the constitutionality of a statute of that State as applied to the petitioners here.

Mr. Thomas M. Lillard for the Sage Stores Co., and *Mr. Samuel H. Kaufman,* with whom *Messrs. Thomas M. Lillard, Crampton Harris,* and *George Trosk* were on the brief, for Carolene Products Co., petitioners.

Mr. C. Glenn Morris, with whom *Mr. A. B. Mitchell,* Attorney General of Kansas, and *Mr. Warden L. Noe* were on the brief, for respondent.

MR. JUSTICE REED delivered the opinion of the Court.

An original action in quo warranto in the Supreme Court of the State of Kansas was begun against The Sage Stores, a Kansas corporation, and Carolene Products Company, a Michigan corporation, by the State of Kansas on the relation of its Attorney General. The purpose of the proceeding was to stop the sale or offering for sale in Kansas of filled milk, manufactured by the Michigan corporation and sold by the Kansas corporation. A judgment granting this relief was entered by the Supreme Court of Kansas. 157 Kans. 404, 141 P. 2d 655.

A petition for a writ of certiorari was filed by both corporations and granted by this Court, 321 U. S. 762, to examine a single issue presented by the petition, to wit, whether the Kansas statute, which prohibits the selling or keeping for sale of the products of the Carolene Products Co., was an arbitrary, unreasonable and discriminatory interference with petitioners' rights of liberty and property in violation of the due process and equal protection of law clauses of the Fourteenth Amendment of the Constitution of the United States. A similar question as to the federal Filled Milk Act under the Fifth Amendment is decided today by this Court. *Carolene Products Co.* v.

United States, ante, p. 18. Little need be added to that opinion.

The Kansas statute was first passed in 1923. Rev. Stat. Kans. 1923, § 65–713. It was reenacted as it now stands in 1927. Laws of Kans. 1927, c. 242, § 8 (F) (2). It reads as follows:

"It shall be unlawful to manufacture, sell, keep for sale, or have in possession with intent to sell or exchange, any milk, cream, skim milk, buttermilk, condensed or evaporated milk, powdered milk, condensed skim milk, or any of the fluid derivatives of any of them to which has been added any fat or oil other than milk fat, either under the name of said products, or articles or the derivatives thereof, or under any fictitious or trade name whatsoever." § 65–707 (F) (2), Gen. Stat. Kans. 1935.

The compounds which petitioners manufacture and sell are covered by this statute. They are the same compounds which are described in *Carolene Products Co.* v. *United States, supra.* Petitioners' defense is that the compounds are sanitary and healthful. They assert that the canned compound is properly labeled and that no fraud is practiced upon the buying public to induce it to use petitioners' compound instead of whole milk products. It is admitted that the ordinary consumer cannot distinguish between the compounds and evaporated whole milk by odor, taste, consistency or other means short of chemical analysis. *State* v. *Sage Stores Co.,* 157 Kans. 404, 443, Finding 33.

In these circumstances, it is petitioners' contention that Kansas' prohibition of the sale, or keeping for sale, of this healthful product violates the due process and equal protection clauses of the Fourteenth Amendment.

Apparently the objection under the equal protection clause is that the Kansas statute permits the sale of skimmed milk which has less calories and fewer vitamins than petitioners' compound and yet forbids the sale of

the compound despite its higher nutritive value. Such an objection is governed by the same standards of legislation as objections under the due process clause. It is a matter of classification and the power of the legislature to classify is as broad as its power to prohibit. A violation of the Fourteenth Amendment in either case would depend upon whether there is any rational basis for the action of the legislature. *United States* v. *Carolene Products Co.*, 304 U. S. 144, 153–54; *Carmichael* v. *Southern Coal Co.*, 301 U. S. 495, 509.

This writ of certiorari brings to us only the question of the violation by the Kansas legislation of the Fourteenth Amendment. The coverage of the Kansas statute is a matter solely for the determination of Kansas. *Allen-Bradley Local* v. *Board,* 315 U. S. 740, 747; *United States* v. *Texas,* 314 U. S. 480, 487. In this case evidence was introduced as to the deficiencies in certain particulars of petitioners' compounds as compared with whole milk products. The findings of the commissioner who acted for the Supreme Court of Kansas appear in *State* v. *Sage Stores Co.*, 157 Kans. 430. His conclusions which were accepted by the court as to the properties of petitioners' compound may be gauged by his finding 53, *State* v. *Sage Stores Co.*, 157 Kans. at pp. 449–50.

"Defendant's product is wholesome, nutritious and harmless, in the sense that it contains nothing of a toxic nature, but it is inferior to evaporated whole milk in the content of fatty acids, phospholipins, sterols and Vitamins E and K, all of which are essential in human nutrition, with the probable exception of Vitamin E in the diet of infants. In addition, evaporated whole milk contains a superior growth-promoting property, found in butterfat and not in cottonseed oil, essential to the optimum growth of infants.

"These deficiencies in defendant's product, as compared to evaporated whole milk, are largely made up from other

sources when the product is used as a substitute for whole milk or evaporated whole milk in the diet of adults who consume a varied diet. When defendant's product is used as a substitute for whole milk or evaporated whole milk in the diet of infants and children who do not consume a varied diet, such deficiencies are not made up, and the diet is partially inadequate. Defendant's product does 'get into the channels of infant nutrition.' "

It was also determined by the commissioner and approved by the court that one purpose of the legislature was the prevention of fraud and deception in the sale of these compounds. *State* v. *Sage Stores Co.*, 157 Kans. 404, 412–13.

As a consequence of this evidence, findings of fact and conclusions of law, the rational basis for the action of the legislature in prohibiting the sale, or keeping for sale, of the compounds is even more definite and clear than in *Carolene Products Co.* v. *United States, ante,* p. 18. Since petitioners' products had the taste, consistency, color and appearance of whole milk products, we need not consider the validity of the Kansas act as applied to compounds which are readily distinguishable from whole milk compounds. Reference is made to part "Third" of the *Carolene* opinion for a discussion as to whether or not a prohibition of these products violates due process.

In our opinion the Kansas legislation did not violate the Fourteenth Amendment.

Affirmed.

Mr. Justice Black and Mr. Justice Douglas concur in the result.

WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, U. S. DEPARTMENT OF LABOR, *v.* HELMERICH & PAYNE, INC.

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

No. 27. Argued October 17, 1944.—Decided November 6, 1944.

1. Contracts of employment providing for the computation of compensation on the so-called Poxon or split-day plan, *held* not in conformity with requirements of § 7 (a) of the Fair Labor Standards Act. *Walling* v. *Belo Corp.*, 316 U. S. 624, distinguished. P. 39.
   The vice of the split-day plan was that the contract regular rate did not represent the rate which was actually paid for ordinary, non-overtime hours, nor did it allow extra compensation to be paid for true overtime hours. It was derived not from the actual hours and wages but from a mathematical formula designed to perpetuate the pre-statutory wage scale.
2. A suit by the Administrator under the Fair Labor Standards Act to enjoin an employer from use of contracts of employment providing for computation of compensation on the so-called split-day plan, *held* not rendered moot by the employer's voluntary discontinuance of the use of such contracts. P. 43.

138 F. 2d 705, reversed.

CERTIORARI, 321 U. S. 759, to review the affirmance, as modified, of a judgment which, in a suit by the Administrator, sustained the validity of certain contracts of employment under the Fair Labor Standards Act.

Mr. Irving J. Levy, with whom *Solicitor General Fahy* and *Messrs. Ralph F. Fuchs, Douglas B. Maggs,* and *Harry M. Leet* were on the brief, for petitioner.

Mr. Eugene O. Monnet, with whom *Messrs. Frank Settle* and *Sam Clammer* were on the brief, for respondent.

MR. JUSTICE MURPHY delivered the opinion of the Court.

We are concerned here with the question whether certain provisions of employment contracts relating to the

computation and application of regular and overtime wage rates conform to the requirements of § 7 (a) of the Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U.S.C. § 201 *et seq.*

Respondent is engaged in the production of oil and gas for interstate commerce and its employees admittedly are covered by the Act. Prior to October 24, 1938, the effective date of the Act, certain of respondent's employees worked 8-, 10- and 12-hour daily shifts, or "tours," and were paid a specified wage for each tour. These wages were in excess of the minimum required by the Act, though the number of tours per week would often cause an employee to work more than the maximum hours allowed by the Act without overtime pay being required.

In order to maintain the same wage levels after the Act became effective, respondent made new employment contracts with the employees in question whereby they received their wages under the so-called "Poxon" or split-day plan. This plan arbitrarily divided each regular tour into two parts for purposes of calculating and applying hourly wage rates. The first four hours of each 8-hour tour, the first five hours of each 10-hour tour and the first five hours of each 12-hour tour were assigned a specified hourly rate described as the "base or regular rate." The remaining hours in each tour were treated as "overtime" and called for payment at one and one-half times the "base or regular rate." The contracts then recited that the "base rate" set forth "shall never apply to more than 40 hours in any work week."

These so-called "regular" and "overtime" hourly rates were calculated so as to insure that the total wages for each tour would continue the same as under the original contracts,[1] thereby avoiding the necessity of increasing

[1] Thus the rotary helpers employed by respondent formerly received $7 for each eight hour tour. Under the split-day plan, they received a "regular rate" of 70 cents an hour for the first four hours

wages or decreasing hours of work as the statutory maximum workweek of 40 hours became effective.[2] Only in the extremely unlikely case where an employee's tours totalled more than 80 hours in a week[3] did he become entitled to any pay in addition to the regular tour wages that he would have received prior to the adoption of the split-day plan. Until more than 80 hours had been worked the plan operated so that the employee could not be credited with more than 40 hours of "regular" work, the remaining time being denominated "overtime." Hence, since the wages under the old system and under the split-day plan were identical, the original tour rates could be used as the simple method of computing wages for each pay period. The actual and regular workweek was accordingly shorn of all significance.

The District Court and the Circuit Court of Appeals both held that the split-day plan of compensation, under the decision of this Court in *Walling* v. *Belo Corp.*, 316 U. S. 624, did not violate the provisions of § 7 (a) of the Fair Labor Standards Act. We cannot agree.

Section 7 (a) limits to 40 a week the number of hours that an employer may employ any of his employees subject to the Act, unless the employee receives compensation for his employment in excess of 40 hours at a rate "not less than one and one-half times the regular rate at which he is employed." The split-day plan here in issue satisfies neither the purpose nor the mechanics of this requirement.

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of each tour and an "overtime" rate of $1.05 for each of the remaining four hours. This totalled $7 for the tour.

[2] During the first year after the effective date of the Act the maximum was 44 hours; during the second year 42 hours; and thereafter 40 hours.

[3] For an employee working on 12-hour tours, it was necessary to work at least 96 hours per week before becoming entitled to increased wages under the split-day plan.

As we pointed out in *Overnight Motor Co.* v. *Missel,* 316 U. S. 572, 577–578, the Congressional purpose in enacting § 7 (a) was twofold: (1) to spread employment by placing financial pressure on the employer through the overtime pay requirement, see also *Southland Gasoline Co.* v. *Bayley,* 319 U. S. 44, 48; and (2) to compensate employees for the burden of a workweek in excess of the hours fixed in the Act. Yet neither objective could be attained under the split-day plan. It enabled respondent to avoid paying real overtime wages for at least the first 40 hours worked in excess of the statutory maximum workweek, thus negativing any possible effect such a payment might have had upon the spreading of employment. And the plan was so designed as to deprive the employees of their statutory right to receive for all hours worked in excess of the first regular 40 hours one and one-half times the actual regular rate. The statutory maximum workweek of 40 hours was by contract twisted into an 80 hour maximum workweek. No plan so obviously inconsistent with the statutory purpose can lay a claim to legality.

The split-day plan, moreover, violated the basic rules for computing correctly the actual regular rate contemplated by § 7 (a). While the words "regular rate" are not defined in the Act, they obviously mean the hourly rate actually paid for the normal, non-overtime workweek. *Overnight Motor Co.* v. *Missel, supra.* To compute this regular rate for respondent's employees, assuming the same wages and tours, required only the simple process of dividing the wages received for each tour by the number of hours in that tour.[4] This regular rate was

[4] In this case the weekly wage divided by the number of hours actually worked in the week would have yielded the same regular rate. Under either computation, a rotary helper being paid $7 for each eight-hour tour was receiving 87½ cents per hour. This was his regular rate regardless of the number of tours per week. That rate was applicable to the first 40 hours regularly worked, or to the first five

then applicable to the first 40 hours regularly worked on the tours and the overtime rate (150% of the regular rate) became effective as to all hours worked in excess of 40.

But respondent's plan made no effort to base the regular rate upon the wages actually received or upon the hours actually and regularly spent each week in working. Nor did it attempt to apply the regular rate to the first 40 hours actually and regularly worked. Instead the plan provided for a fictitious regular rate consisting of a figure somewhat lower than the rate actually received. This illusory rate was arbitrarily allocated to the first portion of each day's regular labor; the latter portion was designated "overtime" and called for compensation at a rate one and one-half times the fictitious regular rate. Thus when an employee on regular eight-hour tours had actually worked 40 hours, respondent could point to the employee's contract and claim that he had worked only 20 "regular" hours and 20 "overtime" hours. Hence he was entitled to no additional remuneration for work in excess of 40 hours except in the unlikely situation, which never in fact occurred, of his actually working more than 80 hours. The vice of respondent's plan lay in the fact that the contract regular rate did not represent the rate which was actually paid for ordinary, non-overtime hours, nor did it allow extra compensation to be paid for true overtime hours. It was derived not from the actual hours and wages but from ingenious mathematical manipulations, with the sole purpose being to perpetuate the pre-statutory wage scale.[5]

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tours. For all hours in excess of 40, the rotary helper was entitled to one and one-half times that rate, or $1.31¼. We, of course, express no opinion as to the proper computation of the regular rate under other circumstances. Nor do we intend to indicate that the formula we have used as satisfying the statutory requirements is the only one which respondent could adopt as complying with them.

[5] In paragraph 70 (4) of Interpretative Bulletin No. 4, as revised in November, 1940, the Administrator expressed his opinion that a

It is no answer that the artificial regular rate was a product of contract or that it was in excess of the statutory minimum. The Act clearly contemplates the setting of the regular rate in a bona fide manner through wage negotiations between employer and employee, provided that the statutory minimum is respected. But this freedom of contract does not include the right to compute the regular rate in a wholly unrealistic and artificial manner so as to negate the statutory purposes. Even when wages exceed the minimum prescribed by Congress, the parties to the contract must respect the statutory policy of requiring the employer to pay one and one-half times the regular hourly rate for all hours actually worked in excess of 40. Any other conclusion in this case would exalt ingenuity over reality and would open the door to insidious disregard of the rights protected by the Act.

Nothing in this Court's decision in *Walling* v. *Belo Corp., supra,* sanctions the use of the split-day plan. The controversy there centered about the question whether the regular rate should be computed from the guaranteed weekly wage or whether it should be identical with the hourly rate set forth in the employment contract. There was no question, as here, pertaining to the applicability of the regular rate to the first 40 hours actually and regularly worked, with the overtime rate applying to all hours worked in excess thereof.

One final point remains. Petitioner here filed a complaint in the District Court seeking, in part, an injunction to compel respondent to cease its use of the split-day contracts. Two months after the complaint was filed, but

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plan similar to that of respondent's did not conform to the Act. While this opinion is not binding on the administration of the Act, it does "carry persuasiveness as an expression of the view of those experienced in the administration of the Act and acting with the advice of a staff specializing in its interpretation and application." *Overnight Motor Co.* v. *Missel,* 316 U. S. 572, 580–581, n. 17.

before the case came on for trial, respondent discontinued the use of these contracts and substituted different compensation plans not now before us. The District Court, however, denied the injunction on the merits insofar as the split-day contracts were concerned, and the court below affirmed on a like basis. 138 F. 2d 705. In granting certiorari upon the question of the legality of the split-day plan we asked for a discussion of the question whether respondent's discontinuance of the plan rendered the case moot. 321 U. S. 759. We hold that the case is not moot under these circumstances. Despite respondent's voluntary cessation of the challenged conduct, a controversy between the parties over the legality of the split-day plan still remains. Voluntary discontinuance of an alleged illegal activity does not operate to remove a case from the ambit of judicial power. See *Hecht Co.* v. *Bowles,* 321 U. S. 321, 327; *Otis & Co.* v. *Securities & Exchange Commission,* 106 F. 2d 579, 583–584. Respondent has consistently urged the validity of the split-day plan and would presumably be free to resume the use of this illegal plan were not some effective restraint made. There is thus "an actual controversy, and adverse interests," *Lord* v. *Veazie,* 8 How. 251, 255, with a "subject-matter on which the judgment of the court can operate," *Ex parte Baez,* 177 U. S. 378, 390; *St. Pierre* v. *United States,* 319 U. S. 41, 42.

We accordingly reverse the judgment of the court below with directions to remand the case to the District Court for further proceedings in conformity with this opinion.

Reversed.

COMMISSIONER OF INTERNAL REVENUE *v.* HARMON.

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

No. 33. Argued October 18, 19, 1944.—Decided November 20, 1944.

Husband and wife who elect to have the optional Oklahoma community property law apply to them are not entitled thereafter to divide the community income equally between them for purposes of federal income tax. *Poe* v. *Seaborn,* 282 U. S. 101, distinguished. P. 45.

139 F. 2d 211, reversed.

CERTIORARI, 321 U. S. 760, to review the affirmance of a decision of the Tax Court, 1 T. C. 40, which reversed the Commissioner's determination of a deficiency in income tax.

Assistant Attorney General Samuel O. Clark, Jr., with whom *Solicitor General Fahy, Messrs. Sewall Key, Paul A. Freund, Bernard Chertcoff,* and *Miss Helen R. Carloss* were on the brief, for petitioner.

Messrs. L. Karlton Mosteller and *Villard Martin* for respondent.

Mr. George Neuner, Attorney General of Oregon, and *Grace L. Bottler,* Assistant Attorney General, filed a brief on behalf of that State, as *amicus curiae,* urging affirmance.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The question posed by this case is whether, upon a state's adoption of an optional community property law, a husband and wife who elect to come under that law are entitled thereafter to divide the community income equally between them for purposes of federal income tax.

July 29, 1939, Oklahoma adopted a community property law operative only if and when husband and wife

elect to avail of its provisions. In conformity to the requirements of the statute, the respondent and his wife filed, October 26, 1939, a written election to have the law apply to them. From November 1 to December 31, 1939, they received income consisting of his salary, dividends from his stocks, dividends from her stocks, interest on obligations due him, distribution of profits of a partnership of which he was a member, and oil royalties due to each of them. The Act constitutes all of these receipts community income. The taxpayer and his wife filed separate income tax returns for 1939 in which each reported one half of the November and December income. The Commissioner determined a deficiency in the view that the respondent was taxable on all of the income derived from his earnings and from his separate property, but on none of that derived from his wife's separate property.

The Tax Court sustained the method adopted by the respondent and his wife.[1] The Circuit Court of Appeals, one judge dissenting, affirmed the decision.[2] Both courts relied on *Poe* v. *Seaborn*, 282 U. S. 101. They concluded that, after election to take the benefit of the law, the wife became vested with one half of all community income as therein defined. And, since this court held in *Poe* v. *Seaborn* that the community income there involved was, as to one half, the income "of" the wife within the intent of what is now § 11 of the Internal Revenue Code,[3] because she had an original and not a derivative vested property interest therein, it must follow that, under the Oklahoma law, one half of the income is the wife's for income tax purposes. They overruled the petitioner's contention that, as the statute permits voluntary action which effects a transfer of rights of the husband and wife, the case is

[1] 1 T. C. 40.

[2] 139 F. 2d 211.

[3] 26 U. S. C. § 11. The section provides that the tax shall be levied "upon the net income of every individual." The language has been the same in each of the Revenue Acts.

governed by *Lucas* v. *Earl*, 281 U. S. 111, and other decisions of like import.[4] We hold that the petitioner's view is the right one.

Under *Lucas* v. *Earl* an assignment of income to be earned or to accrue in the future, even though authorized by state law and irrevocable in character, is ineffective to render the income immune from taxation as that of the assignor. On the other hand, in those states which, by inheritance of Spanish law, have always had a legal community property system, which vests in each spouse one half of the community income as it accrues, each is entitled to return one half of the income as the basis of federal income tax. Communities are of two sorts,—consensual and legal. A consensual community arises out of contract. It does not significantly differ in origin or nature from such a status as was in question in *Lucas* v. *Earl*, where by contract future income of the spouses was to vest in them as joint tenants. In *Poe* v. *Seaborn, supra*, the court was not dealing with a consensual community but one made an incident of marriage by the inveterate policy of the State. In that case the court was faced with these facts: The legal community system of the States in question long antedated the Sixteenth Amendment and the first Revenue Act adopted thereunder. Under that system, as a result of State policy, and without any act on the part of either spouse, one half of the community income vested in each spouse as the income accrued and was, in law, to that extent, the income of the spouse. The Treasury had consistently ruled that the Revenue Act applied to the property systems of those States as it found them and consequently husband and wife were entitled each to return one half the community income. The Congress was fully conversant of these rulings and the practice thereunder, was asked to alter the provisions of

[4] See also *Burnet* v. *Leininger*, 285 U. S. 136; *Helvering* v. *Horst*, 311 U. S. 112; *Helvering* v. *Eubank*, 311 U. S. 122.

later revenue acts to change the incidence of the tax, and refused to do so. In these circumstances, the court declined to apply the doctrine of *Lucas* v. *Earl.*

In Oklahoma, prior to the passage of the community property law, the rules of the common law, as modified by statute, represented the settled policy of the State concerning the relation of husband and wife. A husband's income from earnings was his own; that from his securities was his own. The same was true of the wife's income. Prior to 1939, Oklahoma had no policy with respect to the artificial being known as a community. Nor can we say that, since that year, the State has any new policy, for it has not adopted, as an incident of marriage, any legal community property system. The most that can be said is that the present policy of Oklahoma is to permit spouses, by contract, to alter the status which they would otherwise have under the prevailing property system in the State.

Such legislative permission cannot alter the true nature of what is done when husband and wife, after marriage, alter certain of the incidents of that relation by mutual contract. Married persons in many noncommunity states might, by agreement, make a similar alteration in their prospective rights to the fruits of each other's labors or investments, as was done in *Lucas* v. *Earl.* This would seem to be possible in every State where husband and wife are permitted freely to contract with each other respecting property thereafter acquired by either.

Much of counsel's argument is addressed to specific features of the Oklahoma community property law and comparison of those features with the laws of the traditional community property States. We lay this aside and assume that, once established, the community property status of Oklahoma spouses is at least equal to that of man and wife in any community property State with whose law we were concerned in *Poe* v. *Seaborn.* To cite

examples: We think it immaterial, for present purposes, that the community status may or may not be altered by contract between the parties, may or may not be avoided by antenuptial agreements, or that certain assets of a spouse may or may not be classed as "separate" property excluded from the community. The important fact is that the community system of Oklahoma is not a system, dictated by State policy, as an incident of matrimony.

Our decisions in *United States* v. *Robbins*, 269 U. S. 315, and in *United States* v. *Malcolm*, 282 U. S. 792, do not, as respondent argues, require an affirmance of the judgment. Those cases dealt with the community property law of California. The concept of community property came to California from the Spanish law, as it did in other States whose territory had once been a part of the Spanish possessions on this continent. There had been a series of decisions in California with respect to the character of the wife's rights in the community. The courts had at times indicated that this was a vested property right and on other occasions had indicated that all the wife had was a mere expectancy which ripened on the death of the husband. Prior to the decision in the *Robbins* case the Supreme Court of the State had finally ruled that her interest was of the latter sort. The Treasury had taken the same view and had denied California spouses the privilege of each returning one-half of the community income. In view of the decision of the Supreme Court of California this court sustained the Treasury's ruling in the *Robbins* case. This was in spite of the fact that over a period of years the legislature of California had adopted statutes which indicated that the wife's interest was in fact more than a mere expectancy. In 1927 the California legislature, in an effort to settle this controversy of long standing, adopted a statute declaring that the wife's interest in the community was a present vested interest. Then came the *Malcolm* case in which the Circuit Court of Appeals

for the Ninth Circuit certified to this court two questions: First, whether in view of the law of California the husband must return the entire income, and, second, whether the wife, under the Act of 1927, had such an interest in the community income that she should separately report and pay tax on one half thereof. In a *per curiam* opinion this court answered the first question "No" and the second question "Yes." Two circumstances must be borne in mind in connection with that decision. The incidents of the system had been the subject of litigation for years. The final action of the legislature could well be taken as declaratory of what it involved and implied as respects the interests of husbands and wives. Thus the court was not required to meet any such question as is presented here by the permissive initiation of community property status. In addition, inspection of the briefs and of the report will show that the court's action was bottomed on a concession by the Government that "with respect to the particular income here in question, the interests of the husband and wife were such as to bring the case within the rulings" in *Poe* v. *Seaborn* and related cases, "because of amendments of the California statutes made since *United States* v. *Robbins,* 269 U. S. 315, was decided." It is apparent, therefore, that our decisions dealing with California law do not answer the question presented in this case.

The judgment is

Reversed.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK concurs, dissenting.

The federal income tax law makes a discrimination in favor of the community property states. In 1937 the Secretary of the Treasury pointed out [1] that

[1] Tax Evasion and Avoidance, Hearings, House Committee On Ways and Means, 75th Cong., 1st Sess., p. 4.

"A New York resident with a salary of $100,000 pays about $32,525 Federal income tax; a Californian with the same salary may cause one-half to be reported by his wife and the Federal income taxes payable by the two will be only $18,626. The total loss of revenue due to this unjustifiable discrimination against the residents of 40 States runs into the millions."

That discrimination has become increasingly sharp as surtax rates have increased.[2] The source of that discrimination is to be found in decisions of this Court.

Those decisions[3] are best illustrated by *Poe* v. *Seaborn*, 282 U. S. 101, which involved the community property system of the State of Washington. They held that the husband need pay the federal income tax on only one-half of his salary and other income from the community, since the other half of those earnings from their very inception belonged to his wife. The collector had argued that the control exercised by the husband over the community was sufficient to make him liable for the tax on the full amount. That result had indeed been indicated by Mr. Justice Holmes speaking for the Court in *United States* v. *Robbins*, 269 U. S. 315, 327. And it has been strongly urged that our recent decisions—such as *Helvering* v. *Clifford*, 309 U. S. 331, and *Harrison* v. *Schaffner*, 312 U. S. 579—make for the same result.[4] But in *Poe* v. *Seaborn* and related cases the Court discarded that test. It was more concerned with legal doctrine than it was with economic realities. It held that the wife's interest in the com-

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[2] See the table computed on the 1941 rates in 3 Mertens, Law of Federal Income Taxation (1942) p. 20.

[3] *Goodell* v. *Koch*, 282 U. S. 118, involving the community property system of Arizona; *Hopkins* v. *Bacon*, 282 U. S. 122 (Texas); *Bender* v. *Pfaff*, 282 U. S. 127 (Louisiana); *United States* v. *Malcolm*, 282 U. S. 792 (California).

[4] See for example Ray, Proposed Changes in Federal Taxation of Community Property, 30 Calif. L. Rev. 397, 407; 1 Paul, Federal Estate & Gift Taxation (1942) § 1.09.

munity (including the husband's salary) was "vested" [5] and that therefore the husband need pay the federal income tax on only half of that income.

One dubious decision does not of course justify another. But if Texas can reduce the husband's income tax by creating in his wife a "vested" interest in half his salary and other income, I fail to see why its neighbor, Oklahoma, may not do the same thing. The Court now concedes that once established, the community property status of Oklahoma spouses is at least equal to that of man and wife in any community property state. How then can Oklahoma be denied the same privilege which other community property states enjoy?

It is said that the elective feature of the Oklahoma statute causes it to run afoul of *Lucas* v. *Earl*, 281 U. S. 111, which held that an assignment of income to be earned or to accrue in the future was ineffective to render the income immune from taxation as that of the assignor. But the Court was not troubled with *Lucas* v. *Earl* in *Poe* v. *Seaborn*. It disposed of that argument by saying that in *Lucas* v. *Earl* the "very assignment" was bottomed on the fact that "the earnings would be the husband's property, else there would have been nothing on which it could operate. That case presents quite a different question from this, *because here, by law, the earnings are never the property of the husband, but that of the community.*" 282 U. S. p. 117. (Italics added.) By the same reasoning we should say that Oklahoma has made these earnings the "property" of the community once the written election

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[5] Cf. *Helvering* v. *Hallock*, 309 U. S. 106, 118:

"The importation of these distinctions and controversies from the law of property into the administration of the estate tax precludes a fair and workable tax system. Essentially the same interests, judged from the point of view of wealth, will be taxable or not, depending upon elusive and subtle casuistries which may have their historic justification but possess no relevance for tax purposes."

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has been filed and that income which accrues thereafter never becomes the sole "property" of the husband. Indeed we have the word of the Supreme Court of Oklahoma that such a transfer was effected by the written election filed by the husband and wife in this case. *Harmon* v. *Oklahoma Tax Commission,* 189 Okla. 475, 118 P. 2d 205. There is no suggestion that the transfer of "property" interests in this case is any less genuine or effective than it was in *Poe* v. *Seaborn.* The written election once filed is irrevocable. Only death or a decree of absolute divorce can alter it. Okla. Stats. Ann. 1941, Title 32, § 51. If as *Poe* v. *Seaborn* holds the crucial circumstance is whether the income as it accrues is the "property" of the community, it should make no difference for federal income tax purposes that the transfer from the husband to the community was effected by the act of filing a written election rather than by the act of marriage. If, "by law, the earnings are never the property of the husband, but that of the community" (*Poe* v. *Seaborn, supra,* p. 117), the husband should fare no better in Washington or Texas or California than in Oklahoma. The source of the "law" which determines whether or not that result obtains is the same in each case—the legislature and the judiciary of the particular state. If they declare that the husband has lost and the wife acquired a "property" interest by a certain act (whether by marriage, or by the filing of a paper), it is the "law" though it is a recent pronouncement and not an "inveterate" and long standing rule of that particular state. The consequence under the federal income tax statute is of course for us to decide. My only point is that if that is the formula for some states it should be the formula for all. We should apply it equally and without discrimination or we should discard it completely.

But it is said that the filing of a written election under the Oklahoma statute is an "anticipatory arrangement"

for the disposition of income under the rule of *Lucas* v. *Earl;* that a "consensual" community will not be recognized for federal income tax purposes but that a "legal" community will. As the Tax Court, however, pointed out (1 T. C. 40, 49) such a distinction will not stand scrutiny. Community property created by marriage is the effect of a contract.[6] It is the result of a consensual act. The same is true where husband and wife agree to leave Oklahoma and establish their domicile in Texas so as to gain the advantages of a community property system. I can see no difference in substance whether the state puts its community property system in effect by one kind of contract or another. One is as much "legal" as another. The agreement to marry or the agreement to move from Oklahoma to Texas is as "consensual" as the act of filing a written election under the Oklahoma statute.

But if a distinction is taken between a "legal" and a "consensual" community, it cannot be consistently maintained for federal income tax purposes. In the first place, even the distinction which the Court seeks to take between this case and *Poe* v. *Seaborn* vanishes when after-acquired property is considered. Let us assume there is property first acquired in Oklahoma after the written election has been filed [7] and in Washington after marriage. How are we justified in saying that *Lucas* v. *Earl* makes the written election but not the marriage an anticipatory arrangement affecting the income from that after-acquired property? Oklahoma is as explicit as Washington in saying

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[6] Louisiana has recognized that "The community of property, created by marriage is not a partnership; it is the effect of a contract governed by rules prescribed for that purpose in this Code." Civ. Code, Art. 2807. This Court applied the rule of *Poe* v. *Seaborn* to the Louisiana community property system in *Bender* v. *Pfaff, supra,* note 3.

[7] For all we know some of the income involved in this case may have accrued from property acquired after the written election was filed.

that property so acquired by the husband "shall be deemed the community or common property of the husband and the wife and each, subject to the provisions of this Act, shall be vested with an undivided one-half interest therein." Okla. Stats. Ann. 1941, Title 32, § 56. In both cases the husband never was and never could be the sole owner of that property if local law is to be the guide. His "status" under Oklahoma law is as fixed and irrevocable as it is under Washington law. How can it be said that after-acquired property is governed by "status" in one case and by "contract" in the other? If such a distinction is drawn, we are indeed making income tax liability turn on "elusive and subtle casuistries." Cf. *Helvering* v. *Hallock,* 309 U. S. 106, 118. In the second place, the Tax Court pointed out in this case that the difference "between a community property law which is operative only when expressly invoked and one which operates unless expressly revoked" (1 T. C. p. 46) has no practical basis. There may be a "consensual" community within a so-called "legal" community. In some of the so-called "legal" community property states separate property of one spouse may be converted by contract or deed into community property or *vice versa. Volz* v. *Zang,* 113 Wash. 378, 194 P. 409; *State ex rel. Van Moss* v. *Sailors,* 180 Wash. 269, 39 P. 2d 397; *Kenney* v. *Kenney,* 220 Calif. 134, 136, 30 P. 2d 398. But see *Kellett* v. *Kellett,* 23 Tex. Civ. App. 571, 56 S. W. 766; *McDonald* v. *Lambert,* 43 N. M. 27, 85 P. 2d 78. And it has been supposed since *Poe* v. *Seaborn* that income from that type of community property was not thereafter to be treated as the separate property of the spouse who originally owned it. See 3 Mertens, The Law of Federal Income Taxation (1942) § 19.29. That has been the consistent view [8] both

[8] Likewise if in the traditional community property States community property is transmuted by agreement of the spouses into the separate property of one spouse, the income thereafter is taxable

of the courts (*Black* v. *Commissioner,* 114 F. 2d 355) and of the Tax Court. Shoenhair *v.* Commissioner, 45 B. T. A. 576, 579; Harmon *v.* Commissioner, 1 T. C. 40, 46–47. And that has been the Treasury position. G. C. M. 19248, Int. Rev. Bull., Cum. Bull. 1937–2, p. 59. If *Poe* v. *Seaborn* states the correct rule, that view seems irrefutable. Community property is no less created "by law" whether it was created by the contract of marriage or by a post-nuptial agreement.

But are we now to understand that post-nuptial agreements in all community property states are ineffective for federal income tax purposes because they are "consensual"? Or is the Court willing to give income tax effect to such contracts only within the established community property states? If it is the former then we are overriding settled administrative construction on which great reliance was placed in *Poe* v. *Seaborn,* 282 U. S. p. 116. If it is the latter, then we can hardly say that the difference between the Oklahoma system and the Washington system is that Washington has created its system "as an incident of matrimony" while Oklahoma has not. In that event we make unmistakably plain the discrimination against Oklahoma—we give income tax effect to a post-nuptial agreement between spouses in eight states and deny effect to a similar agreement in Oklahoma. The only apparent basis for such discrimination is that the community property systems in the eight states are traditional; that those eight states have a well-settled policy; that Oklahoma merely gives its citizens a choice to get under or stay out of its community property system. Yet how can we say that the state which allows husband and wife to revoke or alter its community property system by

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solely to the latter. The Tax Court has so held. Brooks *v.* Commissioner, 43 B. T. A. 860; Shoenhair *v.* Commissioner, 45 B. T. A. 576. And the courts have sustained that position. *Sparkman* v. *Commissioner,* 112 F. 2d 774; *Helvering* v. *Hickman,* 70 F. 2d 985.

contract has a more "settled" policy towards community property than a state which gives husband and wife the choice to invoke its community property system or to keep their marital property on a common law basis? The truth is that there is a wide range of choice in each. But the fact that there is a choice should not be deemed fatal when Oklahoma's case comes before the Court and irrelevant when Washington's case is here.

The distinctive feature of the community property system is that the products of the industry of either spouse are attributed to both; the husband is never the sole "owner" of his earnings; his wife acquires a half interest in them from their very inception. 1 de Funiak, Principles of Community Property (1943) § 239. That was the test which *Poe* v. *Seaborn* adopted. If Oklahoma meets that test, then she should be treated on a parity with her sister states. The fact that her system is newborn [9] does not make it any the less genuine.

I do not mean to defend *Poe* v. *Seaborn*. I only say that if we are to stand by it, we should not allow it to become a "vested" interest of only a few of the states. The truth of the matter is that *Lucas* v. *Earl* and *Helvering* v. *Clifford* on the one hand and *Poe* v. *Seaborn* on the other state competing theories of income tax liability. Or to put it another way, *Poe* v. *Seaborn* has been carved out as an exception to the general rules of liability for income taxes. If we are to create such exceptions we should do so uniformly. We should not allow the rationale of *Poe* v. *Seaborn* to be good for one group of states and for one group only. If we are to abandon the

[9] Even the argument based on tradition must be taken with a grain of salt unless history is to be no guide. Apparently some of the states were merely one jump ahead of the decisions of this Court in providing the wife with a "vested" interest in the community. The story is briefly related in Cahn, Federal Taxation and Private Law, 44 Col. L. Rev. 669, 674–677.

rationale of *Poe* v. *Seaborn*, we should do so openly and avowedly. If the practical consequences of applying the rationale of *Poe* v. *Seaborn* to other situations would be disastrous to federal finance, it is time to reexamine the case. The rule which it fashions is the rule of this Court. We have the responsibility for its creation. If we adhere to it, we should apply it without discrimination. If we are not to apply it equally to all states, we should be rid of it. This is the time to face the issue squarely.

McDONALD *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 36. Argued October 20, 1944.—Decided November 20, 1944.

The judgment of the Circuit Court of Appeals affirming a decision of the Tax Court disallowing, in computing petitioner's income tax for 1939, a deduction of campaign expenses—including an "assessment" by the political party of which he was a candidate—incurred in contesting unsuccessfully an election for a judgeship which he had been holding temporarily by appointment, is affirmed.

Opinion of FRANKFURTER, J., in which STONE, C. J., and ROBERTS and JACKSON, JJ., concur:

1. Petitioner's campaign expenses were not deductible (1) under § 23 (a) (1) (A) of the Internal Revenue Code as expenses incurred in "carrying on any trade or business"; (2) under § 23 (e) (2) as a loss incurred in a "transaction entered into for profit"; nor (3) under § 23 (a) (2) as expenses incurred "for the production or collection of income." P. 60.

2. Under existing legislation, an incumbent is no more than others entitled to deduction of campaign expenses. P. 63.

3. Affirmance of the decision of the Tax Court in this case is supported also by the rationale of *Dobson* v. *Commissioner*, 320 U. S. 489. P. 64.

139 F. 2d 400, affirmed.

CERTIORARI, 321 U. S. 762, to review the affirmance of a decision of the Tax Court, 1 T. C. 738, which sustained the Commissioner's determination of a deficiency in income tax.

Mr. Frederick E. S. Morrison, with whom *Mr. John W. Bodine* was on the brief, for petitioner.

Mr. Ralph F. Fuchs, with whom *Solicitor General Fahy, Mr. Sewall Key* and *Miss Helen R. Carloss* were on the brief, for respondent.

MR. JUSTICE FRANKFURTER announced the conclusion and judgment of the Court, and an opinion in which the CHIEF JUSTICE, MR. JUSTICE ROBERTS and MR. JUSTICE JACKSON concur.

This is a controversy concerning a deficiency in petitioner's income tax for 1939.

In December 1938, the Governor of Pennsylvania appointed petitioner to serve an unexpired term as Judge of the Court of Common Pleas of Luzerne County. Under Pennsylvania law such an interim judgeship is filled for a full term at the next election. McDonald accepted this temporary appointment with the understanding that he would contest both the primary and general elections. To obtain the support of his party organization he was obliged to pay to the party fund an "assessment" made by the party's executive committee against all of the party's candidates. The amounts of such "assessments" were fixed on the basis of the total prospective salaries to be received from the various offices. The salary of a common pleas judge was $12,000 a year for a term of ten years, and the "assessment" against petitioner was fixed at $8,000. The proceeds from these "assessments" went to the general campaign fund in the service of the party's entire ticket. In addition to this political levy, McDonald also spent $5,017.27 for customary campaign expenses—adver-

tising, printing, travelling, etc. The sum of these outlays, $13,017.27, McDonald deducted as a "reelection expense." The Commissioner of Internal Revenue disallowed the item and notified him of a deficiency of $2,506.77.

In appropriate proceedings before the Tax Court of the United States that Court sustained the Commissioner, 1 T. C. 738, and its decision was affirmed by the Circuit Court of Appeals for the Third Circuit. 139 F. 2d 400. We brought the case here, 321 U. S. 762, to give a definitive judicial answer to an important problem in the administration of the federal income tax.

What class of outlays may, in relation to the federal income tax, be deducted from gross income and in what amount are matters solely for Congress. Our only problem is to ascertain what provisions Congress has made regarding such expenditures as those for which the petitioner claims the right of deduction. The case is not embarrassed by any entanglement with corrupt practices legislation either state or federal.

The materials from which must be distilled the will of Congress are the following provisions of the Internal Revenue Code: § 23 (a) (1) (A), 56 Stat. 798, 819, 26 U. S. C. § 23 (a) (1) (A) (Supp. 1943), in connection with § 24 (a) (1), 26 U. S. C. § 24 (a) (1), and § 48 (d), 26 U. S. C. § 48 (d); § 23 (e) (2), 26 U. S. C. § 23 (e) (2); § 23 (a) (2) as amended by § 121 of the Revenue Act of 1942, 56 Stat. 798, 819.

"All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business" are allowed by § 23 (a) (1) (A) as deductions in computing net income. According to tax law terminology (§ 48 (d) of the Internal Revenue Code) the performance by petitioner of his judicial office constituted carrying on a "trade or business" within the terms of § 23 of the Internal Revenue Code. He was therefore entitled to deduct from his gross income all the "ordinary and

necessary expenses" paid during 1939 in carrying on that "trade or business." He could, that is, deduct all expenses that related to the discharge of his functions as a judge. But his campaign contributions were not expenses incurred in being a judge but in trying to be a judge for the next ten years. That is as true of the money he spent more immediately for his own reelection as it is of the "assessment" he paid into the party coffers for the success of his party's ticket. The incongruity of allowing such contributions as expenses incidental to the means of earning income as a judge is underlined by the insistence that payment of the "assessment" levied by the party as a prerequisite to being allowed to be a candidate is deductible as a "business" expense. If such "assessments" for future acquisition of a profitable office are part of the expenses in performing the functions of that office for the taxable year, then why should not the same deduction be allowed for "assessment" against officeholders not candidates for immediate reappointment or reelection but who pay such "assessments" out of party allegiance mixed or unmixed by a lively sense of future favors?

In order to disallow them we are not called upon to find that petitioner's outlays come within the prohibition of § 24 of the Internal Revenue Code in that they constituted "Personal . . . expenses." "Whether and to what extent deductions shall be allowed depends upon legislative grace; and only as there is clear provision therefor can any particular deduction be allowed." *New Colonial Ice Co.* v. *Helvering,* 292 U. S. 435, 440. For these campaign expenses to be deductible, it must be found that they can conveniently come within § 23 (a) (1) (A). To put it mildly, that section is not a clear provision for such an allowance. To determine allowable deductions by the different internal party arrangements for bearing the cost of political campaigns in the forty-eight states would disregard the explicit restrictions of § 23 confining deduct-

ible expenses solely to outlays in the efforts or services—here the business of judging—from which the income flows. Compare *Welch* v. *Helvering*, 290 U. S. 111, 115–116.

Petitioner next insists that inasmuch as he was defeated for reelection his campaign expenses constitute a loss incurred in a "transaction entered into for profit" and as such a deductible allowance by virtue of § 23 (e) (2).[1] Such an argument does not deserve more than short shrift. It suffices to say that petitioner's money was not spent to buy the election but to buy the opportunity to persuade the electors. His campaign contribution was not an insurance of victory frustrated by "an act of God" but the price paid for an active share in the hazards of popular elections. To argue that the loss of the election proves that the expense incurred in such election is a deductible "loss" under § 23 (e) (2) is to play with words.

Finally, reliance is placed on an amendment to the Internal Revenue Code introduced by § 121 of the Revenue Act of 1942, 56 Stat. 798, 819.[2] This amendment was proposed by the Treasury (1 Hearings before Committee on Ways and Means, Revenue Revision, 1942, 77th Cong., 2d Sess., p. 88) to afford relief for a specifically defined inequitable situation which had become manifest by the decision of the Court in *Higgins* v. *Commissioner*, 312 U. S. 212. In that case this Court held that by previous enactments Congress had made no provision for al-

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[1] "*Losses by individuals.*—In the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise . . . if incurred in any transaction entered into for profit, though not connected with the trade or business."

[2] "*Non-trade or non-business expenses.*—In the case of an individual, all the ordinary and necessary expenses paid or incurred during the taxable year for the production or collection of income, or for the management, conservation, or maintenance of property held for the production of income."

lowable deductions from profitable transactions not covered by the statutory concept of "business" income. But of course earnings from "the performance of the functions of a public office" had specifically been so covered. § 48 (d).[3] Congress adopted the Treasury proposal for the restricted purpose which originated it. And so here the difficulty is not that petitioner's expenditures related to "non-business" income, and thus were excluded from the legislative scheme before the 1942 Amendment, but that they were not incurred in "carrying on" his "business" of judging. The amendment of 1942 merely enlarged the category of incomes with reference to which expenses were deductible. It did not enlarge the range of allowable deductions[4] of "business" expenses. In short, the act of 1942 in no wise affected the disallowance of campaign expenses as consistently reflected by legislative history, court decision, Treasury practice and Treasury regulations.[5] Nothing whatever in the circumstances attending the adoption of § 121 of the Revenue Act of 1942 warrants the suggestion that Congress unwittingly initiated a radi-

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[3] "*Trade or business.*—The term 'trade or business' includes the performance of the functions of a public office." This amendment, added by the Revenue Act of 1934, 48 Stat. 680, 696, was merely "declaratory of existing law." S. Rep. No. 558, 73d Cong., 2d Sess., p. 29. It had "nothing to do" with campaign expenses, 1 Hearings before Committee on Finance on H. R. 8735, 73d Cong., 2d Sess. (March 6, 1934), p. 29, which continued to be outside deductions allowed by § 23 (a) (1).

[4] "A deduction under this section is subject, except for the requirement of being incurred in connection with a trade or business, to all the restrictions and limitations that apply in the case of the deduction under section 23 (a) (1) (A) of an expense paid or incurred in carrying on any trade or business." H. Rep. No. 2333, 77th Cong., 2d Sess., p. 75; S. Rep. No. 1631, 77th Cong., 2d Sess., p. 88.

[5] *Reed* v. *Commissioner,* 13 B. T. A. 513, reversed on another ground, 34 F. 2d 263, reversed *sub nom. Lucas* v. *Reed,* 281 U. S. 699; Treas. Reg. 103, § 19.23 (a)–15; Treas. Reg. 103, § 23 (o)–1; O. D. 864, 4 Cum. Bull. 211 (1921).

cal change of policy regarding campaign expenditures. Every relevant item of evidence bearing upon the history of this amendment precludes the inference that the Treasury without intent and the Congress without appreciation opened wide the door for the allowance of campaign expenditures as deductible expenses. It surely is not fair to attribute to Congress the reversal of its policy and the enactment of a far-reaching new policy in the absence of any evidence, however tenuous or speculative, that Congress was legislating on the subject.

It is not for this Court to initiate policies as to the deduction of campaign expenses. It is for Congress to determine the relation of campaign expenditures to tax deductions by candidates for public office, under such circumstances and within such limits as commend themselves to its judgment. But we certainly cannot draw intimations of such a policy from legislation by Congress increasingly restrictive against campaign contributions and political activities by government officials. The relation between money and politics generally—and more particularly the cost of campaigns and contributions by prospective officeholders, especially judges—involves issues of far-reaching importance to a democracy and is beset with legislative difficulties that even judges can appreciate. But these difficulties can neither be met nor avoided by spurious interpretation of tax provisions dealing with allowable deductions.

To find sanction in existing tax legislation for deduction of petitioner's campaign expenditures would necessarily require allowance of deduction for campaign expenditures by all candidates, whether incumbents seeking reelection or new contenders. To draw a distinction between outlays for reelection and those for election—to allow the former and disallow the latter—is unsupportable in reason. It is even more unsupportable in public policy to derive from what Congress has thus far enacted a handicap against

candidates challenging existing officeholders. And so we cannot recognize petitioner's claim on the score that he was a candidate for reelection.[6]

Even if these conclusions, in the setting of federal income tax legislation, derived less easily than they do from the statutory provisions under scrutiny, we should not be inclined to displace the views of the Tax Court with our own.[7] Of course the Tax Court cannot define the limits of its own authority. And in cases like *Commissioner* v. *Heininger*, 320 U. S. 467, where the Tax Court mistakenly felt itself bound by superior judicial authority, we must give corrective relief. But, as a system, tax legislation is not to be treated as though it were loose talk or presented isolated abstract questions of law casting upon the federal courts the task of independent construction. Tax language normally has an enclosed meaning or has legitimately acquired such by the authority of those specially skilled in its application. To speak of tax determinations made in the system of review specially designed for federal tax cases as technical is not to imply opprobrium.

Having regard to the controversies which peculiarly call for this Court's adjudication and to the demands for their adequate disposition, as well as to the exigencies of litigation generally, relatively few appeals from Tax Court decisions can in any event come here. That court of necessity must be the main agency for nation-wide supervision of tax administration. Whatever the statutory or practical limitations upon the exercise of its authority, Congress has plainly designed that tribunal to serve, as it were, as the exchequer court of the country. Due regard

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[6] In the interest of accuracy it is to be pointed out that petitioner was not a candidate for reelection; he was a candidate for election for the first time.

[7] That the Tax Court may, as is sometimes true even of other courts, indulge in needless and erroneous observations is beside the point. See *Helvering* v. *Gowran*, 302 U. S. 238, 245–246.

for these considerations is the underlying rationale of *Dobson* v. *Commissioner,* 320 U. S. 489. We are therefore relieved from discussing the numerous cases in which the Tax Court or its predecessor, the Board of Tax Appeals, allowed or disallowed deductions and their bearing on the situation before us. To do so involves detailed analysis of the special circumstances of various "businesses" and expenses incident to their "carrying on." We shall not enter this quagmire of particularities.

Affirmed.

MR. JUSTICE RUTLEDGE concurs in the result.

MR. JUSTICE BLACK, dissenting.

Petitioner, a lawyer of many years' experience, gave up his practice and accepted appointment as a judge upon condition that he run to succeed himself. In campaigning for reelection he incurred certain campaign expenses. These expenses, according to the Circuit Court of Appeals were "legitimate in their entirety," and "the objective of the expenditures was to obtain a considerable amount of money, over at least a decade of years." This Court has not reached a contrary conclusion. For our purpose, therefore, we may consider that the expenses were incurred, at least in part, "for the production . . . of income." The literal language of § 121 of the Revenue Act of 1942, 56 Stat. 798, 819, is broad enough to allow a deduction for expenses so induced. That statute, which Congress made applicable retroactively, allows the following deduction, in computing net income:

"In the case of an individual, all the ordinary and necessary expenses paid or incurred during the taxable year for the production or collection of income, or for the management, conservation, or maintenance of property held for the production of income."

Prior to the enactment of this section, taxpayers in computing net income were not allowed deductions from gross

income for expenses incurred unless they were "ordinary and necessary expenses paid or incurred . . . in carrying on a trade or business." Congress, by this new section, introduced a new type of deduction, for as the House and Senate Committees said, it allowed ". . . a deduction for the ordinary and necessary expenses of an individual paid or incurred . . . for the production and collection of income . . ." Before the 1942 Act, an expense to be deductible had to be "ordinary and necessary" in its relationship to the taxpayer's business; under the new section it need only be "ordinary and necessary" in its relationship to the taxpayer's efforts to produce income. Hence, while the words "ordinary and necessary expenses," defining permissible deductions, remained unchanged in the new section, they were given added content in their new relationship. Obviously, Treasury regulations and decisions limiting the scope of "ordinary and necessary" as applied to business expenses under the old law may be wholly unsuited to define the meaning of those words in their new context, and such rulings and decisions can throw little if any light on the meaning of § 121. Since the enactment of the new section, the two questions essential to determination of deductibility are: Were the expenses incurred in an effort to produce income? Were these expenses, or part of them, "ordinary and necessary" in connection with that effort? These are in most instances pure questions of fact and in cases such as this are to be determined by the Tax Court. See *Commissioner* v. *Heininger*, 320 U. S. 467, 475. The Tax Court did not make findings of fact on these crucial issues, but categorically denied that campaign expenses could be deducted at all. This, I think, was an erroneous interpretation of § 121.

The 1942 Act articulated the purpose of Congress to wipe out every vestige of a policy which denied tax deductions for legitimate expenses incurred in producing taxable income. Taxation on net, not on gross, income has

always been the broad basic policy of our income tax laws. Net income may be defined as what remains out of gross income after subtracting the ordinary and necessary expenses incurred in efforts to obtain or to keep it. In 1941, this Court upheld in *Higgins* v. *Commissioner,* 312 U. S. 212, a finding of the Board of Tax Appeals that one who managed, conserved and maintained his own property was not engaged in a "trade or business" and for this reason was not entitled to deduct expenses incurred in producing his gross income. The effect of this holding was to impair the general Congressional policy to tax only net income. Congress in its Revenue Act of 1942, *supra,* took note of this impairment and indicated in a most forthright manner its allegiance to the net income tax policy. Except for transactions carried on "primarily as a sport, hobby, or recreation," see Senate and House Committee Reports, *supra,* Congress provided a deduction for all ordinary and necessary expenses incurred in the production of income. The language it utilized was certainly far broader than was required to meet the narrow problem presented by the *Higgins* case. Congress specifically disposed of the *Higgins* problem by allowing a deduction for the expenses incurred in ". . . the management, conservation or maintenance of property held for the production of income." Had Congress simply enacted these words, and nothing more, it might properly have been inferred that it intended to grant the type of deduction denied in the *Higgins* case, and no other. But it provided an additional deduction, in the very same section, for expenses incurred "in the production . . . of income." To hold, therefore, that Congress in this new section was concerning itself only with the restricted issue created by the *Higgins* case, is to deny any meaning or validity to this latter clause; in a larger sense, such a construction carves out of the section a vital segment which Congress intentionally—or so we must assume—put there.

The Court interprets § 121 as not permitting the deductions, without denying that the expenditures were made by petitioner for "the production of income." This interpretation rests in part on the conclusion that the Section in no wise applies to expenses incurred in "business," and that the deductions claimed by the petitioner were in relation to a "business" explicitly so denominated by § 48 (d) of the Internal Revenue Code.[1] The Court's construction would appear to be quite different from that of the House and Senate committees which reported their construction of the measure to their respective bodies. The reports expressly stated that "The Amendment . . . allows a deduction for the ordinary and necessary expenses of an individual incurred during the taxable year for the production and collection of income . . . whether or not such expenses are incurred in carrying on a trade or business." We cannot question the special competence of these two committees to interpret their own legislation. Congress therefore apparently intended to obliterate the legal niceties of the "trade or business" distinction, insofar as they affected deductions for expenses incurred in the "production and collection of income."

The Court's decision is also grounded upon its reference to congressional policy restricting compaign contributions and political activities by government officials. We are

[1] Cf. *United States* v. *Pyne*, 313 U. S. 127. If the petitioner is to be denied the benefit of the deduction under the 1942 amendment (§ 121 (a) (2)) on the ground that these expenses were incurred in a "business," then it is difficult to understand why he should be denied the deduction under § 23 (a) (1) (A) of the Internal Revenue Code, which provides deductions for expenses incurred in carrying on a business. On the one hand, the Court denies the deduction because the expenses were incurred in relation to a "business"; on the other hand, the Court denies the deduction as a "business expense" on the ground that his expenses "were not incurred in 'carrying on' his 'business' . . ." This is a distinction without a difference, two phrases with but a single thought.

not dealing here, however, with campaign contributions made by one person to further the candidacy of another. Besides, Congress has not attempted to regulate expenditures of candidates for state office. I can hardly conceive that we should infer that it wanted to penalize through its tax laws necessary campaign expenses, and thereby condemn a practice of campaigning that is as old as our country and which exists in every state of the Union. Unless our democratic philosophy is wrong, there can be no evil in a candidate spending a legally permissible and necessary sum to approach the electorate and enable them to pass an informed judgment upon his qualifications. This is not, of course, to be taken as denoting approval of corrupt campaign expenditures, or of any of the myriad abuses which beset our systems of election. But we ought not to eviscerate a revenue act, and deny this state official a deduction for expenses incurred in a state election campaign, because Congress has limited campaign contributions in federal elections, and passed restrictive legislation against political activities by federal employees.

The Tax Court too relied upon grounds of public policy. It thought it contrary to "the basic ideology underlying the principles of our government" to hold that a public office constitutes a "trade or business," although Congress for tax purposes had declared it was. The Tax Court also thought that "under the ban of public conscience and . . . public policy is the contention that expenditures made to promote one's candidacy for election to public office represent expenses 'paid . . . for the production or collection of income.' " Public officials in this country, many of whom must campaign for election, are almost universally paid for their services. That we do pay our public servants is not at all inconsistent with the fact that public service in a large measure represents an honest expression of the social conscience. Nor does individual dependence upon remuneration for such services detract

at all from the high and uncompromising standards of those who perform public duties. Without monetary rewards office-holding would necessarily be limited to one class only—the independently wealthy. Proposals to accomplish such a purpose were deliberately rejected at the very beginning of the Nation's history. I deny the existence of a public policy which, while permitting Congress to tax the income of elected public officials, bars Congress from allowing a deduction for necessary campaign expenses.

It is said that *Dobson* v. *Commissioner,* 320 U. S. 489, gives some support to the Court's decision, and that we should not "displace the views of the Tax Court with our own." Cf. *Security Flour Mills Co.* v. *Commissioner,* 321 U. S. 281. The Court's opinion does exactly that, for it rests in part upon its holding that McDonald as a judge was engaged in "business," while the Tax Court specifically found that he was not. Neither the *Dobson* case nor any other to which the Court's opinion points has indicated that we should automatically accept the Tax Court's construction of a statute, while repudiating the reasons on which its conclusion rested.

State officials all over this nation have been subject to federal income taxes since 1939. When they run for office, they must necessarily spend some money to advertise their campaigns. We permit private individuals to deduct expenses incurred in advertising to get business. If this petitioner had owned a factory, the operations of which were suspended because of war contracts, and had advertised goods which he could not presently sell, the expenses of such advertising would have been deductible under Treasury rulings.[2]

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[2] I. T. 3581, 1–2 Cum. Bull. 88 (1942); I. T. 3564, 1–2 Cum. Bull. 87 (1942). The following types of expenses have been held to be deductible as business expenses: ". . . payments by brewers to

So long as campaign expenses spent by candidates are legitimate, ordinary, and necessary, I am unwilling to assume that Congress intended by the 1942 Act to discriminate against the thousands of state officials subject to federal income taxes. The language Congress used literally protects petitioner's right to a deduction; nothing in the legislative history indicates an intent to deny it. Certainly there are abuses in campaign expenditures. But that is a problem that should be attacked squarely by the proper state and federal authorities, and not by strained statutory construction which permits a discriminatory penalty to be imposed on taxpayers who work for the states, counties, municipalities, or the federal government. I think we should reverse and remand this cause to the Tax Court with instructions to pass upon the factual questions which it did not previously determine.

MR. JUSTICE REED, MR. JUSTICE DOUGLAS, and MR. JUSTICE MURPHY join in this dissent.

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associations to combat prohibition; railroad contributions to an association conducting a campaign to create favorable public opinion; fees paid to organizations to avoid labor trouble and combat unionization, and also union dues; payments to a fund to fight the boll weevil by a taxpayer in the cotton business; membership fees or dues paid by individuals or corporations to a chamber of commerce or board of trade where the membership is employed as a means of advancing the business interests of the individual or corporation; . . . contributions to a chamber of commerce engaged in stimulating and expanding local business; assessments paid by member banks to a clearing house association as a means of furthering their business interests, as well as amounts to be distributed by the association to civic organizations for building up local trade; payments to organizations designed to expand trade; and membership dues paid associations organized to promote the business interests of the members by the collection and dissemination to its members of information and statistics." 4 Mertens, Law of Federal Income Taxation, 505–7, and cases therein cited. For further analogous business expense deductions, see 4 Mertens, *ibid.*, chapter 25.

BUSBY ET AL. *v.* ELECTRIC UTILITIES EMPLOYEES UNION, ETC.

CERTIFICATE FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

No. 74. Argued November 17, 1944.—Decided December 4, 1944.

1. The "law applied in the District of Columbia," which by Rule 81 (e) of the Rules of Civil Procedure governs proceedings in the District Court of the United States for the District of Columbia whenever under the Rules the "law of the state" is made applicable, is derived from the common law and statutes of Maryland in force at the time of the cession of the District to the United States, as modified by statutes of Congress and as determined and developed by the courts of the District. P. 73.
2. Under the provision of Rule 17 (b) of the Rules of Civil Procedure which permits suit against an unincorporated association for the enforcement of "a substantive right existing under the Constitution or laws of the United States," a certified question whether an unincorporated labor union is suable in the District Court of the United States for the District of Columbia in an action of debt can not arise in the present suit unless it first be decided that under the law of the District of Columbia an unincorporated labor union is without capacity to be sued in its own name; and that question of local law should be decided by the courts of the District of Columbia before this Court is called upon to decide it. P. 74.
3. On certificate from the United States Court of Appeals for the District of Columbia under 28 U. S. C. § 346, this Court does not answer a question of law which would be decisive of the cause only in the event that a question of local law, not answered by the Court of Appeals and inappropriate for this Court to consider in the first instance, receives one answer rather than another. P. 75.

Dismissed.

CERTIFICATE from the United States Court of Appeals for the District of Columbia upon an appeal to that court from a judgment of the District Court of the United States for the District of Columbia dismissing the com-

plaint in an action of debt against an unincorporated labor union.

Mr. Warren E. Magee for Busby et al.

Mr. John J. Carmody for the Electric Utilities Employees Union, etc.

PER CURIAM.

In this case the Court of Appeals for the District of Columbia, pursuant to Judicial Code, § 239, 28 U. S. C. § 346, has certified to this Court the following question:

"Is an unincorporated Labor Union, with its principal office in the District of Columbia, suable as such in an action in debt brought against it in the District Court of the United States for the District of Columbia, where service of process is duly had upon its President at its principal office?"

Rule 17 (b) of the Rules of Civil Procedure for the District Courts of the United States provides, in the case of a party other than an individual or a corporation, that: "capacity to sue or be sued shall be determined by the law of the state in which the district court is held; except that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States."

By Rule 81 (e), the "law of the state" in proceedings in the District Court of the United States for the District of Columbia is "the law applied in the District of Columbia." That law is derived from the common law and statutes of Maryland in force at the time of the cession of the District to the United States, as modified by statutes of Congress and as determined and developed by the courts of the District. Act of February 27, 1801, 2 Stat.

103; *Armstrong* v. *Lear,* 12 Wheat. 169, 176; *McKenna* v. *Fisk,* 1 How. 241, 249.

Under these Rules, a plaintiff may proceed in the District Court for the District of Columbia against an unincorporated labor union in its common name if, by the law of the District, it has capacity to be sued as such. Only if it be decided that by the local law such a union does not have capacity to be sued in its own name need there be consideration of the second part of Rule 17 (b), which permits a suit against an unincorporated association for the enforcement of "a substantive right existing under the Constitution or laws of the United States."

The certificate in this case discloses that the Court of Appeals is in doubt as to the meaning and application of the rule laid down in *United Mine Workers* v. *Coronado Coal Co.,* 259 U. S. 344, 383–392, and the effect upon it of the second part of Rule 17 (b); cf. *Brown* v. *United States,* 276 U. S. 134, 141; *Puerto Rico* v. *Russell & Co.,* 288 U. S. 476, 480–482, 483–484; *Moffat Tunnel League* v. *United States,* 289 U. S. 113, 118. But under Rules 17 and 81 of the Rules of Civil Procedure, as we have said, that question cannot arise in the present suit, unless it is first decided that under the law of the District an unincorporated labor union is without capacity to be sued in its own name. And we do not understand the certificate to seek our aid in the determination of this question of local law.

In any event, we think it appropriate that the question of local law should be answered by the courts of the District before this Court is called upon to answer it, or to consider the application and effect of the second part of Rule 17 (b) in an action in debt brought in the District of Columbia against an unincorporated labor union. There are cogent reasons why this Court should not undertake to decide questions of local law without the aid of some expression of the views of judges of the local courts

who are familiar with the intricacies and trends of local law and practice. We do not ordinarily decide such questions without that aid where they may conveniently be decided in the first instance by the court whose special function it is to resolve questions of the local law of the jurisdiction over which it presides. *Huddleston* v. *Dwyer,* 322 U. S. 232, 237, and cases cited. Only in exceptional cases will this Court review a determination of such a question by the Court of Appeals for the District. *District of Columbia* v. *Pace,* 320 U. S. 698, 702, and cases cited.

It is not the function of the certificate authorized by 28 U. S. C. § 346 to require this Court to answer questions not shown to be necessary to the decision of the case. A question will not be answered if it is hypothetical, *Webster* v. *Cooper,* 10 How. 54, 55; *Pelham* v. *Rose,* 9 Wall. 103, 107; *White* v. *Johnson,* 282 U. S. 367, 373; *Lowden* v. *Northwestern National Bank Co.,* 298 U. S. 160, 162–163, or if it is dependent upon other questions which may not appropriately be answered, *Jewell* v. *Knight,* 123 U. S. 426, 432–433, 435; *Lowden* v. *Northwestern National Bank Co., supra,* 166. This Court will not answer a question which will not arise in the pending controversy unless another issue, not yet resolved by the certifying court, is decided in a particular way. *Triplett* v. *Lowell,* 297 U. S. 638, 647–649; *Webster* v. *Cooper, supra,* 55; cf. *United States* v. *Buzzo,* 18 Wall. 125, 129.

We do not answer the question as to the effect of the second part of Rule 17 (b), since the answer will be decisive of the case only in the event that a question of local law, not answered by the Court of Appeals and inappropriate for us to consider in the first instance, receives one rather than another answer. We have no occasion to discuss the meaning and application of the rule of the *Coronado* case or the second part of Rule 17 (b), which are relevant only for the purpose of answering the question

which, as we have said, we cannot properly answer. The certificate is accordingly dismissed.

So ordered.

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

MR. JUSTICE FRANKFURTER, concurring.

I join in the *per curiam* on the assumption that after the Court of Appeals will have disposed of all issues to be decided by local District of Columbia law nothing will be left in the certified question for this Court to answer.

This is a suit for a lawyer's fee, that is, an ordinary District of Columbia common law action of debt and not one to enforce "a substantive right existing under the Constitution or laws of the United States." For, I take it, in allowing an unincorporated association to be sued "in its common name for the purpose of enforcing . . . a substantive right existing under the . . . laws of the United States," Rule 17 (b) of the Rules of Civil Procedure referred to laws of general applicability throughout the United States and not to the body of local law governing the District of Columbia. Therefore, suability of an unincorporated labor union is a local procedural problem to be determined, according to Rule 17 (b) in conjunction with Rule 81 (e), by the local law of the District. That "the suability of trades unions . . . is after all in essence and principle merely a procedural matter" is vouched for by the *Coronado* case, 259 U. S. 344, 390, the scope of which has been authoritatively defined in *Brown* v. *United States,* 276 U. S. 134, 141 and *Moffat Tunnel League* v. *United States,* 289 U. S. 113, 118. Since substantive rights were outside the authority given by Congress for prescribing rules of civil procedure, Rule 17 (b) and the note thereto by the Advisory Committee on Rules, by dealing with capacity to sue or be sued, decisively confirm the

statement in the *Coronado* case that the suability of a trade union is a procedural matter.

But if such a procedural matter may be cast in the form of a substantive issue for the determination of status, it would, in this case in any event, be a question of the substantive law of the District and not raise any substantive issue of federal law. If a suit like this were brought in the District Court for the Southern District of New York under diversity jurisdiction, no conceivable question other than that of the procedural or substantive law of the State of New York could arise. No federal question is infused into the litigation because such a local suit was brought in the District of Columbia.

In view of the increase in the volume and the complexity of the business that is coming to this Court, and the bearing of this increase upon the proper discharge of its work (see *Ex parte Peru,* 318 U. S. 578, 602–604), I deem it important to avoid any encouragement however slight to futile resort to this Court.

BARBER *v.* BARBER.

CERTIORARI TO THE SUPREME COURT OF TENNESSEE.

No. 51. Argued November 9, 1944.—Decided December 4, 1944.

1. Upon review here of a judgment of a court of one State refusing to give full faith and credit to a judgment of a court of another, the sufficiency of the grounds of refusal is for this Court to determine. P. 81.
2. Upon review here of a decision of a court of one State involving the law of another, a federal right being asserted, it is the duty of this Court to determine for itself the law of such other State. P. 81.
3. A duly authenticated judgment of a court of general jurisdiction of another State is prima facie evidence of the jurisdiction of the court to render it and of the right which it purports to adjudicate. P. 86.
4. A money judgment of a court of North Carolina for arrears of alimony, not by its terms conditional and on which execution was directed to issue, *held,* under the law of that State, not subject to

modification or recall; and, under the Federal Constitution and the Act of May 26, 1790, as amended, entitled to full faith and credit. P. 86.

180 Tenn. 353, 175 S. W. 2d 324, reversed.

CERTIORARI, 322 U. S. 719, to review the reversal of a decree in a suit to enforce a judgment of a court of another State for arrears of alimony.

Mr. C. W. K. Meacham, with whom *Mr. J. Y. Jordan, Jr.* was on the brief, for petitioner.

Mr. J. Clifford Curry submitted for respondent.

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

The question for decision is whether the Supreme Court of Tennessee, in a suit brought upon a North Carolina judgment for arrears of alimony, rightly denied full faith and credit to the judgment, on the ground that it lacks finality because, by the law of North Carolina, it is subject to modification or recall by the court which entered it.

In 1920 petitioner secured in the Superior Court of North Carolina for Buncombe County, a court of general jurisdiction, a judgment of separation from respondent, her husband. The judgment directed payment to petitioner of $200 per month alimony, later reduced to $160 per month. In 1932 respondent stopped paying the prescribed alimony. In 1940, on petitioner's motion in the separation suit for a judgment for the amount of the alimony accrued and unpaid under the earlier order, the Superior Court of North Carolina gave judgment in her favor. It adjudged that respondent was indebted to petitioner in the sum of $19,707.20, under its former order, that petitioner have and recover of respondent that amount, and "that execution issue therefor."

Petitioner then brought the present suit in the Tennessee Chancery Court to recover on the judgment thus ob-

tained. Respondent, by his answer, put in issue the finality, under North Carolina law, of the judgment sued upon, and the cause was submitted for decision on the pleadings and a stipulation that the court might consider as duly proved the records in two prior appeals in the North Carolina separation proceeding "upon the authority of which the judgment sued upon in the present case is predicated," and that the opinions of the Supreme Court of North Carolina upon these appeals, *Barber* v. *Barber*, 216 N. C. 232, 4 S. E. 2d 447; 217 N. C. 422, 8 S. E. 2d 204, should be "admissible in evidence to prove or tend to prove the North Carolina law."

The Tennessee Chancery Court held the judgment sued upon to be entitled to full faith and credit, and gave judgment for petitioner accordingly. The Supreme Court of Tennessee reversed on the ground that the judgment was without the finality entitling it to credit under the full faith and credit clause of the Constitution, Art. IV, § 1. 180 Tenn. 353, 175 S. W. 2d 324. We granted certiorari because of an asserted conflict with *Sistare* v. *Sistare*, 218 U. S. 1, and because of the importance of the issue raised. 322 U. S. 719.

The constitutional command is that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." Article IV, § 1 of the Constitution also provides that "Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." And Congress has enacted that judgments "shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken." Act of May 26, 1790, c. 11, 1 Stat. 122, as amended, 28 U. S. C. § 687.

In *Sistare* v. *Sistare*, *supra*, 16–17, this Court considered whether a decree for future alimony, brought to a sister

state, was entitled to full faith and credit as to installments which had accrued, but which had not been reduced to a further judgment. The Court held that a decree for future alimony is, under the Constitution and the statute, entitled to credit as to past due installments, if the right to them is "absolute and vested," even though the decree might be modified prospectively by future orders of the court. See also *Barber* v. *Barber,* 21 How. 582. The *Sistare* case also decided that such a decree was not final, and therefore not entitled to credit, if the past due installments were subject retroactively to modification or recall by the court after their accrual. See also *Lynde* v. *Lynde,* 181 U. S. 183, 187.

The *Sistare* case considered the applicability of the full faith and credit clause, only as to decrees for future alimony some of the installments of which had accrued. The present suit was not brought upon a decree of that nature, but upon a money judgment for alimony already due and owing to the petitioner, as to which execution was ordered to issue. The Supreme Court of Tennessee applied to this money judgment the distinction taken in the *Sistare* case as to decrees for future alimony. It concluded that by the law of North Carolina the judgment for the specific amount of alimony already accrued, was subject to modification by the court which awarded it, that it was not a final judgment under the rule of the *Sistare* case, and therefore was not entitled to full faith and credit.

As we are of opinion that the Tennessee Supreme Court erroneously construed the law of North Carolina as to the finality of the judgment sued upon here, it is unnecessary to consider whether the rule of the *Sistare* case as to decrees for future alimony is also applicable to judgments subsequently entered for arrears of alimony. Compare *Lynde* v. *Lynde, supra,* 187, where this Court distinguished between a decree for arrears of alimony and one for future alimony, some of the installments of which had ac-

crued. See also *Audubon* v. *Shufeldt,* 181 U. S. 575, 577–578. For the same reason, it is unnecessary to consider whether a decree or judgment for alimony already accrued, which is subject to modification or recall in the forum which granted it, but is not yet so modified, is entitled to full faith and credit until such time as it is modified. Cf. *Levine* v. *Levine,* 95 Ore. 94, 109–113, 187 P. 609; *Hunt* v. *Monroe,* 32 Utah 428, 440, 91 P. 269; and compare *Milwaukee County* v. *White Co.,* 296 U. S. 268, 275–276, and cases cited.

We assume for present purposes that petitioner's judgment for accrued alimony is not entitled to full faith and credit, if by the law of North Carolina it is subject to modification. The refusal of the Tennessee Supreme Court to give credit to that judgment because of its nature is a ruling upon a federal right, and the sufficiency of the grounds of denial is for this Court to decide. *Magnolia Petroleum Co.* v. *Hunt,* 320 U. S. 430, 443, and cases cited. And in determining the applicable law of North Carolina, this Court reexamines the issue with deference to the opinion of the Tennessee court, although we cannot accept its view of the law of North Carolina as conclusive. This is not a case where a question of local law is peculiarly within the cognizance of the local courts in which the case arose. The determination of North Carolina law can be made by this Court as readily as by the Tennessee courts, and since a federal right is asserted, it is the duty of this Court, upon an independent investigation, to determine for itself the law of North Carolina. See *Adam* v. *Saenger,* 303 U. S. 59, 64, and cases cited.

We are thus brought to the question whether, by the law of North Carolina, the judgment which petitioner has secured in that state for arrears of alimony is so wanting in finality as not to be within the command of the Constitution and the Act of Congress. Our examination of the North Carolina law on this subject must be in the

light of the admonition of *Sistare* v. *Sistare, supra,* 22, that "every reasonable implication must be resorted to against the existence of" a power to modify or revoke installments of alimony already accrued "in the absence of clear language manifesting an intention to confer it." The admonition is none the less to be heeded when the debt has been reduced to a judgment upon which execution has been directed to issue.

Section 1667 of the North Carolina Consolidated Statutes (General Stats. of 1943, Michie, § 50–16), under which petitioner brought her suit for separation and alimony, provides that "If any husband shall separate himself from his wife and fail to provide her and the children of the marriage with . . . necessary subsistence," she may maintain an action in the Superior Court to have a "reasonable subsistence" allotted and paid to her. It declares that "the order of allowance . . . may be modified or vacated at any time, on the application of either party or of any one interested."

This statute by its terms makes provision only for the modification of the "order of allowance," not of a judgment rendered for the amount of the unpaid allowances which have accrued under such an order. Nor does it state that the order of allowance may be modified retroactively as to allowances already accrued. The original North Carolina judgment ordering the payment of subsistence installments of alimony is not in the record, and we are not advised of its terms. Respondent places his reliance not on them, but upon the North Carolina law, apart from the terms of the decree, as providing for modification of such a judgment. But we are aware of no statute or decision of any court of North Carolina and none has been cited, to the effect that an unconditional judgment of that state for accrued allowances of alimony may be modified or recalled after its rendition. Indeed, we find no pronouncement of any North Carolina court

that before such a judgment is rendered, an order for future allowances may be modified or set aside with respect to allowances which have accrued and are due and owing.

The Supreme Court of Tennessee found no support in North Carolina statutes or judicial decisions for its conclusion that the North Carolina judgment for arrears of alimony is subject to such modification, other than a single paragraph of the opinion of the Supreme Court of North Carolina at an early stage of the suit which resulted in the judgment upon which suit was here brought.[1] But these remarks, as their context shows, appear to be addressed, not to the power of the court to modify or set aside a judgment for arrears of alimony, but to the authority conferred by N. C. Con. Stat. § 1667 upon the court in the suit for alimony to modify its previous order for the allowance of subsistence.

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[1] The language quoted from *Barber* v. *Barber*, 217 N. C. 422, 427–28, is as follows:

"It is not a final judgment in the action, since both the plaintiff and the defendant may apply for other orders and for modifications of orders already made, which the court will allow as the ends of justice require, according to the changed conditions of the parties. The orders made from time to time are, of course, *res judicata*, between the parties, subject to this power of the court to modify them. The consolidation of the amounts due, when ascertained in one order or decree, does not invest any of these orders with any other character than that which they originally had. If the defendant is in court only by reason of the original service of summons, he is in court only for such orders as, upon motion, are appropriate and customary in the proceeding thus instituted. There is no reason why a judgment should not be rendered on an allowance for alimony, which is a debt—and more than an ordinary one. The court below, in its sound discretion, which is not ordinarily reviewable by this Court, under the motion of plaintiff in this cause can hear the facts, change of conditions of the parties, the present needs of support of any of the children and, in its sound discretion, render judgment for what defendant owes under the former judgment and failed to pay and see to it that such judgment is given to protect plaintiff, and 'give diligence to make her (your) calling and election sure.'"

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Consistently with *Sistare* v. *Sistare, supra,* the passage points out that such an order is not final in the proceeding in which it is entered, but is subject to modification by further orders of the court. In this respect the North Carolina court was but following its own pronouncement in the first appeal in the separation proceeding, *Barber* v. *Barber, supra,* 216 N. C. 232, 234, and in numerous other decisions of that court. See *Crews* v. *Crews,* 175 N. C. 168, 173, 95 S. E. 149; *Anderson* v. *Anderson,* 183 N. C. 139, 142, 110 S. E. 863; *Tiedemann* v. *Tiedemann,* 204 N. C. 682, 683, 169 S. E. 422; *Wright* v. *Wright,* 216 N. C. 693, 696, 6 S. E. 2d 555. But it is quite another matter to say that past due installments may be modified, or that a judgment, not by its terms conditional and on which execution may issue, is subject to modification because the obligation for accrued alimony could have been modified or set aside before its merger in the judgment. And in fact the North Carolina Supreme Court has been at pains to indicate that such is not the case.

In considering whether the decree of another state for future alimony is entitled to full faith and credit, the North Carolina court recognizes that such faith and credit is required as to past due installments when it does not appear that they may be modified or revoked. And it interprets general provisions for modification of a decree directing future allowances of alimony as inapplicable to allowances which have become due and owing. Since its decision in *Barber* v. *Barber,* in the 217th N. C., it has held in *Lockman* v. *Lockman,* 220 N. C. 95, that such a decree in Florida is entitled to credit in North Carolina with respect to arrears in alimony. The court said, at page 103:

"The rule in North Carolina is that a judgment awarding alimony is a judgment directing the payment of money by the defendant, and by such judgment the defendant becomes indebted to the plaintiff for such alimony as it falls due, and when the defendant is in arrears in the pay-

ment of alimony, the Court may judicially determine the amount due and enter decree accordingly. It has no less dignity than any other contractual obligation. *Barber* v. *Barber*, 217 N. C. 422, 8 S. E. (2d) 204. In *Duss* v. *Duss*, 92 Fla. 1081, the obligation of the divorced husband to pay alimony was stated in language of similar import."

The Supreme Court of North Carolina thus has assimilated the law of North Carolina to that of Florida, under which it had just held that past due installments of alimony were not subject to modification. In this state of the law of North Carolina, we cannot say that past due installments under a decree for future alimony can be revoked or modified.

Still less can we say that a judgment for such installments can be so modified. The North Carolina Supreme Court said in the *Barber* case, 217 N. C. 422, 428: "There is no reason why a judgment should not be rendered on an allowance for alimony, which is a debt—and more than an ordinary one." And elsewhere in its opinion it said (page 427):

"A judgment awarding alimony is a judgment directing the payment of money by a defendant to plaintiff and, by such judgment, the defendant thereupon becomes indebted to the plaintiff for such alimony as it becomes due, and when the defendant is in arrears in the payment of alimony the court may, on application of plaintiff, judicially determine the amount then due and enter its decree accordingly. The defendant, being a party to the action and having been given due notice of the motion, is bound by such decree, and the plaintiff is entitled to all the remedies provided by law for the enforcement thereof."

We do not find in the language on which the Tennessee court relied any clear or unequivocal indication that the judgment for arrears of alimony, on which execution was directed to issue, was itself subject to modification or recall. True, as the opinion of the North Carolina court states, the judgment for arrears of alimony was not a final

judgment in the separation suit. As to future alimony payments not merged in the money judgment, the allotments ordered are, by the terms of the statute, subject to modification. But it would hardly be consistent with the court's statements, that accrued alimony is a debt for which a judgment may be rendered, that the defendant is bound by the judgment, and that "the plaintiff is entitled to all the remedies provided by law" for its enforcement, to say that the judgment may be modified or set aside by virtue of a statute which in terms merely authorizes modification of the order for payment of allowances.

The judgment of a court of general jurisdiction of a sister state duly authenticated is prima facie evidence of the jurisdiction of the court to render it and of the right which it purports to adjudicate. *Adam* v. *Saenger, supra,* 62, and cases cited. The present judgment is on its face an unconditional adjudication of petitioner's right to recover a sum of money due and owing which, by the law of the state, is a debt. The judgment orders that execution issue. To overcome the prima facie effect of the judgment record, it is necessary that there be some persuasive indication that North Carolina law subjects the judgment to the infirmity of modification or recall which is wanting here.

Upon full consideration of the law of North Carolina we conclude that respondent has not overcome the prima facie validity and finality of the judgment sued upon. We cannot say that the statutory authority to modify or recall an order providing for future allowances of installments of alimony extends to a judgment for overdue installments or that such a judgment is not entitled to full faith and credit.

Reversed.

MR. JUSTICE JACKSON, concurring.

I concur in the result, but I think that the judgment of the North Carolina court was entitled to faith and

credit in Tennessee even if it was not a final one. On this assumption I do not find it necessary or relevant to examine North Carolina law as to whether its judgment might under some hypothetical circumstances be modified.

Neither the full faith and credit clause of the Constitution nor the Act of Congress implementing it says anything about final judgments or, for that matter, about any judgments. Both require that full faith and credit be given to "judicial proceedings" without limitation as to finality. Upon recognition of the broad meaning of that term much may some day depend.

Whatever else this North Carolina document might be, no one denies that it is a step in a judicial proceeding, instituted validly under the strictest standards of due process. On its face it is final and by its terms it awards a money judgment in a liquidated amount, presently collectible and provides "that execution issue therefor." Tennessee should have rendered substantially the same judgment that it received from the courts of North Carolina. If later a decree is made in North Carolina which modifies or amends its judgment, that modification or amendment will also be entitled to faith and credit in Tennessee.

Of course a judgment is entitled to faith and credit for just what it is, and no more. But its own terms constitute a determination by the rendering court as to what it is, and an enforcing court may not search the laws of the state to see whether the judgment terms are erroneous. Of course, if a judgment by its terms reserves power to modify or states conditions, a judgment entered upon it could appropriately make like reservations or conditions. No such appear in this judgment unless they are to be annexed to it by a study of the law of North Carolina. Any application for such relief should be addressed to the North Carolina court and not to the Tennessee

court nor to this one. The purpose of the full faith and credit clause is to lengthen the arm of the state court and to eliminate state lines as a shelter from judicial proceedings. This is defeated by entertaining a plea to review the support in state law for the judgment as it has been rendered, which is a delaying inquiry as has been shown by this case.

KANN *v.* UNITED STATES.

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

No. 35. Argued November 7, 1944.—Decided December 4, 1944.

1. An essential element of the offense under § 215 of the Criminal Code is that the use of the mails be for the purpose of executing the fraudulent scheme. P. 95.
2. The fraudulent scheme alleged being one to obtain money, and participants having obtained the money by cashing checks at banks which thereupon became holders in due course, the subsequent mailings of the checks by the banks to the drawees were not "for the purpose of executing such scheme," within the meaning of § 215 of the Criminal Code, and the conviction here can not be sustained. P. 94.

140 F. 2d 380, reversed.

CERTIORARI, 321 U. S. 761, to review the affirmance of a conviction of using the mails to defraud in violation of § 215 of the Criminal Code.

Mr. Simon E. Sobeloff, with whom *Mr. Bernard M. Goldstein* was on the brief, for petitioner.

Mr. William A. Paisley, with whom *Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Mr. Robert S. Erdahl,* and *Miss Beatrice Rosenberg* were on the brief, for the United States.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

We took this case because it involves important questions arising under § 215 of the Criminal Code.[1] The section provides that "Whoever, having devised . . . any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter . . . in any post office, or . . . cause to be delivered by mail according to the direction thereon . . . any such letter, . . . shall be fined not more than $1,000, or imprisoned not more than five years, or both."

The petitioner and six others were indicted in three counts for using the mail in execution of a scheme to defraud. Petitioner's co-defendants pleaded *nolo contendere*. He was tried and convicted on the second and third counts, and the Circuit Court of Appeals affirmed the conviction.[2]

The indictment alleged that Triumph Explosives, Inc. is a Maryland corporation engaged in the manufacture of munitions, for the United States, a large amount of whose stock is held by the general public; that petitioner was President, and a director, one of his co-defendants was an officer and director and five of them salaried executive and administrative employes of the company. The indictment continued that the defendants devised a scheme to defraud Triumph and its stockholders and obtain money for themselves by diverting part of the profits of Triumph on its Government contracts to a corporation known as Elk Mills Loading Corporation and distributing such profits through salaries, dividends, and

[1] 18 U. S. C. § 338.

[2] 140 F. 2d 380.

bonuses to be paid by Elk Mills to the defendants; that, in pursuance of the scheme, Elk Mills was organized, some defendants elected officers and directors, and others elected consultants at substantial salaries, and 49% of its stock distributed to five defendants, who were administrative employes of Triumph, without consideration; that Triumph, pursuant to the plan, subcontracted a Government contract to Elk Mills for 51% of the latter's stock, on a basis which would yield Elk Mills large profits, and would involve utilization of the employes and services of Triumph in the performance of the subcontract; and that the defendants, pursuant to the scheme, received from Elk Mills salaries and bonuses for which no substantial services were rendered, and dividends, to the detriment of Triumph. It was alleged that the fraudulent scheme was misrepresented upon the minutes of Triumph and false reasons for the transaction given. Further, that, pursuant to the scheme, it was to be represented that some of the defendants would purchase with their own money, and convey to Elk Mills, certain lands for the issue to them of 49% of the stock of Elk Mills, whereas it was not intended that these defendants should use their own funds in purchasing the land to be transferred in payment of the stock, and that this plan was carried out. In summary, it was charged that the scheme was such that Triumph should be deprived of the profits rightfully belonging to it and these profits should be distributed amongst the defendants through the instrumentality of Elk Mills; that bonuses were to be paid to each of the defendants out of the profits of Elk Mills, and such bonuses were paid.

In the first count it was charged that the defendants, for the purpose of executing the scheme, caused to be delivered by mail a check drawn by Elk Mills on the Peoples Bank of Elkton, Maryland, in favor of petitioner.[3]

[3] The Government abandoned the first count at the trial.

In the second, it was charged that, for the same purpose, the defendants caused to be placed in the post office at Elkton a check drawn by one Jackson on Industrial Trust Company of Wilmington, Delaware. In the third, it was charged that, for the same purpose, the defendants caused to be delivered by mail a check drawn by Elk Mills on the Peoples Bank of Elkton in favor of one of the defendants, Willis.

At the trial the Government proved the corporate existence of Triumph, proved that Triumph held Government contracts, that Elk Mills was incorporated and became subcontractor of a Government contract, that the stock of Elk Mills was distributed amongst certain of the defendants and Triumph, as in the indictment alleged, that, under the subcontract, Elk Mills was in receipt of substantial profits and that these profits were used to pay salaries and bonuses to the defendants, including petitioner. The Government offered evidence tending to prove that certain of these actions had been concealed from other directors of Triumph and that the true situation was discovered when a federal officer made an audit of Triumph's transactions under Government contracts.

The petitioner offered evidence tending to prove that in order to expand Triumph's business two banks had loaned large sums to Triumph under written agreements which restricted the amount it could invest in capital assets and restricted the salaries and bonuses it could pay; that the four defendants who were executive employes were dissatisfied with their compensation and threatened to leave Triumph unless they should receive increased compensation; that the directors of Triumph devised the plan of incorporating Elk Mills and subcontracting with it to make possible the payment of salaries and bonuses without violating Triumph's agreements with its banks; that petitioner had no other motive in participating in the transactions relating to Elk Mills, and that, upon being

advised of the arrangement, Triumph's banks were of opinion that it did not violate the agreements.

It was proved by the Government that one Jackson contracted with Triumph for the building of a factory for Elk Mills on land conveyed to Triumph by several of the defendants. Some of these defendants informed the contractor that he might use the timber standing on the land in the construction of the building. After he had done so they falsely represented to him that they owned the timber and that he must pay them some $12,000 for it. He did so, by a check, to their order, and, in turn, billed Triumph for the same amount. There was evidence that the petitioner was asked whether it was proper to pay the bill and that he stated he did not see why not. It is not contended that the petitioner received any of this money, and his evidence tended to show he had no knowledge of this fraud perpetrated on Triumph.

The use of the mails proved under count 2 was this: The check of Jackson, the contractor, for purchase of the timber, to the order of defendants Deibert, Feldman, Kann (not petitioner), Prial, and Willis, was by them endorsed and cashed at the Peoples Bank of Elkton, Maryland, and was, by that bank, deposited in the mail to be delivered to the bank in Wilmington, Delaware, on which it was drawn.

With respect to the third count, the proof was that Elk Mills delivered its check on the Peoples Bank of Elkton for $5,000 to Willis, one of the executive employes, as a bonus. It was endorsed by Willis and deposited with the Farmers Trust Company of Newark, Delaware. The Newark bank mailed the check to the Peoples Bank of Elkton.

The petitioner contends, first, that there is no substantial evidence that the transactions involving Elk Mills' subcontract were other than innocent transactions

intended to finance the Government contracts held by Triumph, in conformity to that Company's agreements with the bank; or, if the transactions were for an improper purpose, there is no proof that he was a party to any improper use of funds. Secondly, the petitioner urges that he admittedly received no money from the checks which are described in counts 2 and 3, and there is no proof he had knowledge, or reasonable cause to believe, that the checks would go through the mails and, therefore, he did not cause them to be sent or delivered within the intent of the statute. Thirdly, he urges that the mailing of the checks by the paying banks could not be for the purpose of executing the scheme since the defendants to whom those checks were delivered had received the money represented by the checks and each transaction, after such receipt, was irrevocable as respects the drawer.

The petitioner strenuously argues his first contention, but, in the view we take of the case, we find it unnecessary to review the evidence, if we were otherwise inclined to do so in the face of the agreement of the courts below that a case was made for the jury on the question of the fraudulent nature of the scheme and the petitioner's participation in it.

With respect to the second contention, while there may be some question as to whether the defendants may be said to have "caused" the mailing of the checks, we think it a fair inference that those defendants who drew, or those who cashed, the checks believed that the banks which took them would mail them to the banks on which they were drawn, and, assuming the petitioner participated in the scheme, their knowledge was his knowledge.[4]

The remaining contention is that the checks were not mailed in the execution of, or for the purpose of executing, the scheme. The check delivered to the five defendants

[4] *Weiss* v. *United States,* 120 F. 2d 472; *Steiner* v. *United States,* 134 F. 2d 931; *Blue* v. *United States,* 138 F. 2d 351.

by the building contractor in payment for timber they claimed to own was cashed by them at a local bank in Elkton, Maryland. By cashing it they received the moneys it was intended they should receive under the scheme. The Elkton bank became the owner of the check.[5] The same is true of the bonus check delivered to defendant Willis and deposited and credited to his account. The banks which cashed or credited the checks, being holders in due course, were entitled to collect from the drawee bank in each case and the drawer had no defense to payment. The scheme in each case had reached fruition. The persons intended to receive the money had received it irrevocably. It was immaterial to them, or to any consummation of the scheme, how the bank which paid or credited the check would collect from the drawee bank. It cannot be said that the mailings in question were for the purpose of executing the scheme, as the statute requires.[6]

The case is to be distinguished from those where the mails are used prior to, and as one step toward, the receipt of the fruits of the fraud, such as *United States* v. *Kenofskey*, 243 U. S. 440.[7] Also to be distinguished are cases where the use of the mails is a means of concealment so that further frauds which are part of the scheme

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[5] This is so under the Uniform Negotiable Instruments Act which has been adopted in Maryland and in Delaware. Anno. Code of Maryland 1939, Art. 13, § 76; Revised Code of Delaware (1935), c. 78, Art. 4, § 57. This Act has adopted the rule announced in *Burton* v. *United States*, 196 U. S. 283, 297; *City of Douglas* v. *Federal Reserve Bank*, 271 U. S. 489, 492; *Dakin* v. *Bayly*, 290 U. S. 143, 146.

[6] *McNear* v. *United States*, 60 F. 2d 861; *Dyhre* v. *Hudspeth*, 106 F. 2d 286; *Stapp* v. *United States*, 120 F. 2d 898; *United States* v. *McKay*, 45 F. Supp. 1001.

[7] See also *Shea* v. *United States*, 251 F. 440; *Spear* v. *United States*, 228 F. 485; *Savage* v. *United States*, 270 F. 14; *Stewart* v. *United States*, 300 F. 769; *Tincher* v. *United States*, 11 F. 2d 18.

may be perpetrated.[8] In these the mailing has ordinarily had a much closer relation to further fraudulent conduct than has the mere clearing of a check, although it is conceivable that this alone, in some settings, would be enough. The federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law.

The Government argues that the scheme was not complete, that so long as Elk Mills remained a subcontractor the defendants expected to receive further bonuses and profits and that the clearing of these checks in the ordinary course was essential to its further prosecution. But, even in that view, the scheme was completely executed as respects the transactions in question when the defendants received the money intended to be obtained by their fraud, and the subsequent banking transactions between the banks concerned were merely incidental and collateral to the scheme and not a part of it.

We hold, therefore, that one element of the offense defined by the statute, namely, that the mailing must be for the purpose of executing the fraud, is lacking in the present case. The judgment must be reversed.

Reversed.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK, MR. JUSTICE JACKSON and MR. JUSTICE RUTLEDGE concur, dissenting.

I hardly think we would set this conviction aside if the collecting bank instead of cashing the checks took them for collection only and refused to pay the defendants until the checks had been honored by the drawee. It is plain

[8] See e. g. *United States* v. *Lowe*, 115 F. 2d 596; *United States* v. *Riedel*, 126 F. 2d 81; *Dunham* v. *United States*, 125 F. 2d 895.

that the mails would then be used to obtain the fruits of the fraud. And I do not see why the fraud fails to become a federal offense merely because the collecting bank cashes the checks. That would seem to be irrelevant under these circumstances. As pointed out in *Decker* v. *United States*, 140 F. 2d 378, 379, the object of the scheme was to defraud Triumph; and the use of the mails was an essential step to that end. It is true that the collecting bank was a holder in due course against whom the drawer had no defense. But that does not mean that the fraudulent scheme had reached fruition at that point of time. Yet if legal technicalities rather than practical considerations are to decide that question it should be noted that the defendants were payee-indorsers of the checks. They had received only a conditional credit, or payment as the case may be. It took payment by the drawee to discharge them from their liability as indorsers. Not until then would the defendants receive irrevocably the proceeds of their fraud.

Moreover, this was not the last step in the fraudulent scheme. It was a continuing venture. Smooth clearances of the checks were essential lest these intermediate dividends be interrupted and the conspirators be called upon to disgorge. Different considerations would be applicable if we were dealing with incidental mailings. But we are not. To obtain money was the sole object of this fraud. The use of the mails was crucial to the total success of the fraudulent project. We are not justified in chopping up the vital banking phase of the scheme into segments and isolating one part from the others. That would be warranted if the scheme were to defraud the collecting bank. But it is plain that these plans had a wider reach and that but for the use of the mails they would not have been finally consummated.

CLINE, TRUSTEE IN BANKRUPTCY OF GOLD MEDAL LAUNDRIES, INC. *v.* KAPLAN ET AL.

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

No. 307. Submitted November 13, 1944.—Decided December 4, 1944.

1. Where a bona fide claim adverse to that of the bankrupt estate is asserted as to property which is not in the actual or constructive possession of the bankruptcy court, the claimant has the right to have the merits of his claim adjudicated in a plenary suit. P. 98.
2. The bankruptcy court has the power and the duty to examine the adverse claim to ascertain whether it is ingenuous and substantial. P. 99.
3. When it is established that the adverse claim is substantial, the bankruptcy court can not retain jurisdiction unless the claimant consents to its adjudication by that court. P. 99.
4. Consent to adjudication by the bankruptcy court of an adverse claim is lacking where the claimant has throughout resisted a petition for a turnover order and has made formal objection to the exercise of summary jurisdiction before the entry of a final order. *Louisville Trust Co.* v. *Comingor,* 184 U. S. 18. P. 99.
5. Upon the facts of this case, *held* that a claimant adverse to the bankrupt estate, as to property which was not in the actual or constructive possession of the bankruptcy court, did not consent to adjudication of the claim by the bankruptcy court. P. 100.

142 F. 2d 301, affirmed.

CERTIORARI, *post,* p. 691, to review a judgment which, reversing orders of the bankruptcy court, sustained the referee's dismissal, for lack of jurisdiction, of a petition for a turnover order.

Mr. Edward Rothbart submitted for petitioner.

Mr. Norman H. Nachman submitted for respondents.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This case concerns the powers of a bankruptcy court when a claim adverse to the bankrupt estate is asserted.

An involuntary petition for adjudication in bankruptcy was filed against Gold Medal Laundries on September 22, 1941. A month later the adjudication was made. On December 22, petitioner, the trustee in bankruptcy, filed with the referee a petition for an order directing the respondents to turn over certain assets, allegedly belonging to the bankrupt, which had come into possession of the respondents some fifteen months prior to the institution of the bankruptcy proceedings. Respondents' answer claimed ownership in themselves and prayed dismissal of the petition. Extensive hearings were held to determine whether the property was in the constructive possession of the bankrupt. Prior to the close of the hearings respondents orally moved that the petition be dismissed for want of summary jurisdiction and a formal motion to this effect was filed on May 19, 1942. On June 24, 1942, the referee granted this motion. The District Court reversed, whereupon the referee denied a turnover order on the merits and the District Court again reversed. Appeals from both decisions of the District Court were taken to the Circuit Court of Appeals for the Seventh Circuit. Having found that the objection to the summary jurisdiction had been timely and had not been waived, that court sustained the referee's dismissal for lack of jurisdiction. 142 F. 2d 301. Conflicting views having been expressed in different circuits on matters affecting bankruptcy administration which ought not to be left in doubt, we granted certiorari.

A bankruptcy court has the power to adjudicate summarily rights and claims to property which is in the actual or constructive possession of the court. *Thompson* v. *Magnolia Co.*, 309 U. S. 478, 481. If the property is not in the court's possession and a third person asserts a *bona fide* claim adverse to the receiver or trustee in bankruptcy, he has the right to have the merits of his claim adjudicated "in suits of the ordinary character, with the rights

and remedies incident thereto." *Galbraith* v. *Vallely,* 256 U. S. 46, 50; *Taubel-Scott-Kitzmiller Co.* v. *Fox,* 264 U. S. 426. But the mere assertion of an adverse claim does not oust a court of bankruptcy of its jurisdiction. *Harrison* v. *Chamberlin,* 271 U. S. 191, 194. It has both the power and the duty to examine a claim adverse to the bankrupt estate to the extent of ascertaining whether the claim is ingenuous and substantial. *Louisville Trust Co.* v. *Comingor,* 184 U. S. 18, 25–26. Once it is established that the claim is not colorable nor frivolous, the claimant has the right to have the merits of his claim passed on in a plenary suit and not summarily. Of such a claim the bankruptcy court cannot retain further jurisdiction unless the claimant consents to its adjudication in the bankruptcy court. *MacDonald* v. *Plymouth County Trust Co.,* 286 U. S. 263.

Consent to proceed summarily may be formally expressed, or the right to litigate the disputed claim by the ordinary procedure in a plenary suit, like the right to a jury trial, may be waived by failure to make timely objection. *MacDonald* v. *Plymouth County Trust Co., supra* at 266–267. Consent is wanting where the claimant has throughout resisted the petition for a turnover order and where he has made formal protest against the exercise of summary jurisdiction by the bankruptcy court before that court has made a final order. *Louisville Trust Co.* v. *Comingor, supra.* In the *Comingor* case although the claimant "participated in the proceedings before the referee, he had pleaded his claims in the outset, and he made his formal protest to the exercise of jurisdiction before the final order was entered." *Id.* at 26. This, it was held, negatived consent and thereby the right to proceed summarily.

Thus, what a bankruptcy court may do and what it may not do when a petition for a turnover order is resisted by an adverse claimant is clear enough. But whether or not

there was the necessary consent upon which its power to proceed may depend is, as is so often true in determining consent, a question depending on the facts of the particular case. And so we turn to the facts of this case.

When the trustee filed his petition for a turnover order, respondents denied any basis for such an order and asserted their adverse claim. There is no dispute about that. Before the matter went to the referee for determination, respondents explicitly raised objection to the disposition of their claim by summary procedure. They later amplified that objection by a written motion and supported it by extended argument. The established practice based on the criteria of the *Comingor* case was thus entirely satisfied. We reject the suggestion that respondents conferred consent by participating in the hearing on the merits. See *In re West Produce Corp.*, 118 F. 2d 274, 277. In view of the referee's opinion that the hearings were held to determine whether the bankrupt had constructive possession of the property, the petitioner can hardly claim the benefit of the restricted rule which he invokes. In any event, such a view is contrary to that which was decided in *Louisville Trust Co.* v. *Comingor, supra,* which held, as we have noted, that consent is not given even though claimant "participated in the proceedings" provided formal objection to summary jurisdiction is made before entry of the final order. And the *Comingor* case "has been repeatedly cited as determinative of the law and practice in similar cases." *Galbraith* v. *Vallely,* 256 U. S. 46, 49.

We find no merit in other questions raised by the petitioner. But they do not call for elaboration.

Affirmed.

SPECTOR MOTOR SERVICE, INC. *v.* McLAUGHLIN, TAX COMMISSIONER (WALSH, SUBSTITUTED DEFENDANT).

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

No. 62. Argued November 9, 1944.—Decided December 4, 1944.

Since the answers to the questions of local law involved in this case may render unnecessary, or may affect, the decision of the questions arising under the Federal Constitution, and since the local questions have not been passed upon by the state courts though an appropriate proceeding is available, the cause is remanded to the District Court with directions to retain the bill pending the determination of proceedings to be brought with reasonable promptitude in the state court. P. 105.

139 F. 2d 809, vacated.

CERTIORARI, 322 U. S. 720, to review a judgment which, on appeal from a decision of the District Court holding a state tax inapplicable to the petitioner, 47 F. Supp. 671, held the tax applicable and valid.

Messrs. J. Ninian Beall and *Cyril Coleman*, with whom *Mr. Roland Rice* was on the brief, for petitioner.

Mr. Frank J. DiSesa, Assistant Attorney General of Connecticut, with whom *Mr. Francis A. Pallotti*, Attorney General, was on the brief, for respondent.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This is a suit brought in a United States district court to enjoin the enforcement of a State tax and for a declaratory judgment.

The Connecticut Corporation Business Tax Act of 1935, as amended, imposed on every corporation, not otherwise specially taxed, carrying on or having the right to carry

on business within the State "a tax or excise upon its franchise for the privilege of carrying on or doing business within the state . . ." Conn. Gen. Stat. Cum. Supp. 1935, § 418c, as amended by Conn. Gen. Stat. Supp. 1939, § 354e. Petitioner, a Missouri corporation with its principal place of business in Illinois, is engaged exclusively in the interstate trucking business. It is neither authorized by Connecticut to do intrastate trucking nor in fact does it engage in it. It maintains two leased terminals in Connecticut solely for the purpose of carrying on its interstate business. At the request of its lessor, it has filed with the Secretary of State in Connecticut a certificate of its incorporation in Missouri, has designated an agent in Connecticut for service of process, and has paid the statutory fee. On this state of facts the State Tax Commissioner determined that petitioner was subject to the Act of 1935, as amended, and assessed the tax against Spector for the years 1937 to 1940. Whereupon petitioner brought this suit in the United States District Court for the District of Connecticut to free itself from liability for the tax. Alleging appropriate grounds for equitable relief, petitioner claims that the "tax or excise" levied by the Act does not apply to it; and in the alternative that, if it should be deemed within the scope of the statute, the tax offends provisions of the Connecticut Constitution as well as the Commerce and Due Process Clauses of the United States Constitution.

The District Court construed the statute to be "a tax upon the exercise of a franchise to carry on intrastate commerce in the state" and therefore not applicable to petitioner. 47 F. Supp. 671, 675. On appeal the Circuit Court of Appeals for the Second Circuit construed the statute to reach all corporations having activity in Connecticut, whether doing or authorized to do intrastate business or, like the petitioner, engaged exclusively in interstate commerce. It further decided all contentions under the Con-

necticut Constitution against the petitioner. And so, the court below found itself compelled "to face directly the main issue whether the tax is in fact an unconstitutional burden on interstate commerce." 139 F. 2d 809, 813. The dissenting judge thus phrased the issue: "we have before us in the barest possible form the effort of a state to levy an excise directly upon the privilege of carrying on an activity which is neither derived from the state, nor within its power to forbid." *Id.* at 822. It was conceded below that if the Connecticut tax was construed to cover petitioner it would run afoul the Commerce Clause, were this Court to adhere to what Judge Learned Hand called "an unbroken line of decisions." On the basis of what it deemed foreshadowing "trends," the majority ventured the prophecy that this Court would change its course, and accordingly sustained the tax. In view of the far-reaching import of such a disposition by the Circuit Court of Appeals we brought the case here. 322 U. S. 720.

Once doubts purely local to the Constitution and laws of Connecticut are resolved against the petitioner there are at stake in this case questions of moment touching the taxing powers of the States and their relation to the overriding national interests embodied in the Commerce Clause. This is so whether the issue be as broad and as bare as the District Court and Judge Learned Hand formulated it, or whether the Connecticut statute carries a more restricted meaning. If Connecticut in fact sought to tax the right to engage in interstate commerce, a long course of constitutional history and "an unbroken line of decisions" would indeed be brought into question. But even if Connecticut seeks merely to levy a tax on the net income of this interstate trucking business for activities attributed to Connecticut, questions under the Commerce Clause still remain if only because of what the court below called "ingenious provisions as to allocation of net income in the case of business carried on partly without the state." 139 F. 2d 809, 812.

We would not be called upon to decide any of these questions of constitutionality, with their varying degrees of difficulty, if, as the District Court held, the statute does not at all apply to one, like petitioner, not authorized to do intrastate business. Nor do they emerge until all other local Connecticut issues are decided against the petitioner. But even if the statute hits aspects of an exclusively interstate business, it is for Connecticut to decide from what aspect of interstate business she seeks an exaction. It is for her to say what is the subject matter which she has sought to tax and what is the calculus of the tax she seeks. Every one of these questions must be answered before we reach the constitutional issues which divided the court below.

Answers to all these questions must precede consideration of the Commerce Clause. To none have we an authoritative answer. Nor can we give one. Only the Supreme Court of Errors of Connecticut can give such an answer. But this tax has not yet been considered or construed by the Connecticut courts. We have no authoritative pronouncements to guide us as to its nature and application. That the answers are not obvious is evidenced by the different conclusions as to the scope of the statute reached by the two lower courts. The Connecticut Supreme Court may disagree with the District Court and agree with the Circuit Court of Appeals as to the applicability of the statute. But this is an assumption and at best "a forecast rather than a determination." *Railroad Commission* v. *Pullman Co.*, 312 U. S. 496, 499. Equally are we without power to pass definitively on the other claims urged under Articles I and II of the Connecticut Constitution.[1] If any should prevail, our constitutional

[1] For instance, petitioner claims that no standard for assessment is set up in the statute so that the executive officer is acting in a legislative capacity in violation of Article II; that failure to allow a deduction for rent violates §§ 1 and 12 of Article I. In addition he

issues would either fall or, in any event, may be formulated in an authoritative way very different from any speculative construction of how the Connecticut courts would view this law and its application. *Watson* v. *Buck,* 313 U. S. 387, 401-402.

If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality—here the distribution of the taxing power as between the State and the Nation—unless such adjudication is unavoidable. And so, as questions of federal constitutional power have become more and more intertwined with preliminary doubts about local law, we have insisted that federal courts do not decide questions of constitutionality on the basis of preliminary guesses regarding local law. *Railroad Commission* v. *Pullman Co., supra; Chicago* v. *Fieldcrest Dairies,* 316 U. S. 168; *In re Central R. Co. of New Jersey,* 136 F. 2d 633. See also *Burford* v. *Sun Oil Co.,* 319 U. S. 315; *Meredith* v. *Winter Haven,* 320 U. S. 228, 235; *Green* v. *Phillips Petroleum Co.,* 119 F. 2d 466; *Findley* v. *Odland,* 127 F. 2d 948; *United States* v. *150.29 Acres of Land,* 135 F. 2d 878. Avoidance of such guesswork, by holding the litigation in the federal courts until definite determinations on local law are made by the state courts, merely heeds this time-honored canon of constitutional adjudication.

We think this procedure should be followed in this case. The District Court had jurisdiction to entertain this bill and to give whatever relief is appropriate despite the Johnson Act [2] and *Great Lakes Dredge Co.* v. *Huff-*

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claims that the tax was assessed under the wrong subsection of the statute—§ 420c (b) instead of § 420c (a).

[2] Act of August 21, 1937, 50 Stat. 738, 28 U. S. C. § 41 (1). ". . . no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the assessment, levy, or collection of any tax imposed by or pursuant to the laws of any State where a plain, speedy, and

man, 319 U. S. 293, because of the uncertainty surrounding the adequacy of the Connecticut remedy. See *Waterbury Savings Bank* v. *Lawler,* 46 Conn. 243; *Wilcox* v. *Town of Madison,* 106 Conn. 223, 137 A. 742. But there is no doubt that Connecticut makes available an action for declaratory judgment for the determination of those issues of Connecticut law involved here. *Charter Oak Council, Inc.* v. *Town of New Hartford,* 121 Conn. 466, 185 A. 575; *Conzelman* v. *City of Bristol,* 122 Conn. 218, 188 A. 659; *Walsh* v. *City of Bridgeport,* 2 Conn. Supp. 88.

We therefore vacate the judgment of the Circuit Court of Appeals and remand the cause to the District Court with directions to retain the bill pending the determination of proceedings to be brought with reasonable promptitude in the State court in conformity with this opinion.

MR. JUSTICE DOUGLAS concurs in the result.

MR. JUSTICE BLACK dissents.

UNITED STATES *v.* STANDARD RICE CO., INC.

CERTIORARI TO THE COURT OF CLAIMS.

No. 72. Argued November 16, 1944.—Decided December 4, 1944.

1. A contract for the sale of material to the United States contained the following provision: "Prices bid herein include any federal tax heretofore imposed by the Congress which is applicable to the material on this bid. Any sales tax, duties, imposts, revenues, excise or other taxes which may hereafter (the date set for the opening of this bid) be imposed by the Congress and made applicable to the material on this bid will be charged to the Government and entered on invoices as a separate item." *Held* that the United States was not entitled to recover from the contractor processing taxes imposed by the Agricultural Adjustment Act, which taxes

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efficient remedy may be had at law or in equity in the courts of such State."

were "applicable" to the material within the meaning of the contract, but which, because subsequently adjudged invalid, were never collected from the contractor. *United States* v. *Kansas Flour Mills Corp.*, 314 U. S. 212, distinguished. P. 110.

2. Generally the United States as a contractor is to be treated as other contractors, and a contract which it draws is not to be judicially revised because it may have been improvident. P. 111.

101 Ct. Cls. 85, affirmed.

CERTIORARI, 322 U. S. 725, to review a judgment denying an offset to a claim against the United States.

Miss Helen R. Carloss, with whom *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key, Robert N. Anderson, Walter J. Cummings, Jr.,* and *Mrs. Elizabeth B. Davis* were on the brief, for the United States.

Mr. M. K. Eckert, with whom *Mr. John C. White* was on the brief, for respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This suit was brought in the Court of Claims to recover an overpayment of income taxes made by respondent. The United States conceded that the amount claimed was owed. But the Comptroller General, pursuant to his power under § 305 of the Budget and Accounting Act of 1921 (42 Stat. 20, 31 U. S. C. § 71) settled and adjusted the claim by offsetting against it an amount which he concluded respondent owed the United States under a contract. Since the latter claim equalled the overassessment on the income taxes, the Comptroller General refused to authorize a refund to respondent. This suit followed. The Court of Claims denied the offset and entered judgment for respondent in the amount claimed with interest. 101 Ct. Cls. 85, 53 F. Supp. 717. The case is here on a petition for a writ of certiorari[1] which we

[1] See Act of February 13, 1925, § 3 (b), 43 Stat. 939, amended by the Act of May 22, 1939, 53 Stat. 752, 28 U. S. C. § 288 (b).

granted because of an asserted conflict of the decision below with *United States* v. *American Packing & Provision Co.*, 122 F. 2d 445 and *United States* v. *Kansas Flour Mills Corp.*, 314 U. S. 212.

The contract under which the claim against respondent was asserted was made in November, 1935. Respondent agreed to supply rice to the Navy Department at the bid prices specified in the contract. A typical price provision listed 290,000 pounds of rice at a unit price (per pound) of .046¢ or a total price of $13,340. The contract contained the following provision:

"Prices bid herein include any federal tax heretofore imposed by the Congress which is applicable to the material on this bid. Any sales tax, duties, imposts, revenues, excise or other taxes which may hereafter (the date set for the opening of this bid) be imposed by the Congress and made applicable to the material on this bid will be charged to the Government and entered on invoices as a separate item."

Respondent made the required deliveries to the United States and received the full price specified in the contract. Respondent was the first domestic processor of the rice and accordingly paid the processing taxes imposed by the Agricultural Adjustment Act (48 Stat. 31, 7 U. S. C. §§ 609, 611) from April 1, 1935, until September 20, 1935. Before paying the processing tax on the rice processed for the month of October, 1935, respondent obtained an injunction against its collection. The tax was held invalid in *United States* v. *Butler*, 297 U. S. 1, decided January 6, 1936. Consequently respondent never paid the processing taxes on the rice supplied to the United States under the November, 1935, contract.[2]

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[2] Respondent did, however, pay an unjust enrichment tax of $72,072.30 on account of being relieved of the processing tax. See Title III of the Revenue Act of 1936, 49 Stat. 1648, 1734. It was computed and assessed upon the basis of inclusion of units involved

The tax was a federal tax "applicable" to the rice within the meaning of the contract. *United States* v. *Glenn L. Martin Co.*, 308 U. S. 62, 65. Its amount was known, and the vendor was responsible by regulation for its payment. *United States* v. *Kansas Flour Mills Corp., supra,* p. 214. It is therefore arguable that the vendor fixed the bid price to provide a margin of profit after payment of those taxes for which it was responsible, that the price was designed to offset *pro tanto* the amount of the taxes, and that if they were not paid, the price should be reduced. That is the position taken by the United States and it relies on the following statement in *United States* v. *Kansas Flour Mills Corp., supra,* pp. 216–217: "In the contracts in question, the Government did not buy for resale. Unless it received the tax it suffered a definite disadvantage. Its purpose, as shown by the contracts, was to balance the tax element in the price paid with the tax collected. The Government, which could not pass on the tax on resale, was thus protected, not against a fall in the market price but against a loss in its tax revenues." But we were there only answering the argument that since the vendor did not undertake to pay the tax, the rule in private contracts should be followed and no readjustment of the price made where the tax was not paid. The difference between the cases was that in the latter situation the vendee presumably passed on the tax while the United States did not since it did not buy for resale. The vital fact in *United States* v. *Kansas Flour Mills Corp.* was the provision in the contract for an up-or-down revision of the price in

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in this suit. If those units had been excluded, the unjust enrichment tax would have been reduced by $1,706.59. If respondent is required to reduce its price by the amount of the unpaid processing tax, it is not subject to the unjust enrichment tax on these transactions. See *United States* v. *Kansas Flour Mills Corp., supra,* p. 216, note 6. The United States concedes that if it prevails the respondent is entitled to recover $1,706.59.

case of a change in the processing tax by Congress. It provided that if a processing tax was thereafter "imposed or changed by the Congress," the contract price was to be "increased or decreased accordingly." It was held that the decision in *United States* v. *Butler* and its recognition in the Revenue Act of 1936 amounted to a downward change calling for a decrease in the contract price. 314 U. S. p. 217. There is no such provision in the present contract. The clause that the bid prices include "any federal tax heretofore imposed by the Congress which is applicable to the material" must be read in the context of this particular contract. When it is so read, a result different from that reached in *United States* v. *Kansas Flour Mills Corp.* is indicated.

The present contract provides for payment by the United States of sales and other taxes thereafter imposed by Congress and made applicable to the rice. But while it makes that provision for upward readjustment of the price, it provides for no downward revision in case of subsequent changes in any tax. That silence gains added significance here in view of the fact that at the time the contract was made the payment of these processing taxes was being hotly contested and the litigation resulting in *United States* v. *Butler, supra,* was well under way. The inference is strong therefore that the parties intended the price to be firm, except as it might be increased through the imposition of new taxes. The provision for the inclusion of applicable taxes provides a formula for determining the price to be billed. Since the tax in question could not by the terms of the contract be billed to the United States, there was no overcharge. If the contractor lawfully avoids payment of a tax he reduces his cost and increases his profit. But in absence of a provision which authorizes it the reduction of cost is hardly the basis of a refund to the United States. As the Court of Claims points out, it is hard to see how the vendor could be re-

quired to pay the United States any savings which it made as a result of reductions in tariff duties. Yet the difference between them and other taxes under this contract is not apparent. Although there will be exceptions, in general the United States as a contractor must be treated as other contractors under analogous situations. When problems of the interpretation of its contracts arise the law of contracts governs. *Hollerbach* v. *United States,* 233 U. S. 165, 171–172; *United States* v. *Bethlehem Steel Corp.,* 315 U. S. 289, 298–299. We will treat it like any other contractor and not revise the contract which it draws on the ground that a more prudent one might have been made. *United States* v. *American Surety Co.,* 322 U. S. 96.

Affirmed.

MR. JUSTICE BLACK dissents.

SMITH ET AL., PARTNERS, *v.* DAVIS ET AL., AS BOARD OF COUNTY TAX ASSESSORS OF FULTON COUNTY, ET AL.

CERTIORARI TO THE SUPREME COURT OF GEORGIA.

No. 23. Argued October 16, 1944.—Decided December 4, 1944.

1. An open account claim of a creditor of the United States, representing a balance claimed to be due under Army construction contracts, *held* not a credit instrumentality of the United States and not constitutionally immune from non-discriminatory state taxation. P. 113.
2. R. S. § 3701, exempting from state and local taxation "All stocks, bonds, Treasury notes, and other obligations of the United States," *held* inapplicable to an open account claim of a creditor of the United States. P. 116.
3. Under the rule of *ejusdem generis*, the words "other obligations" in R. S. § 3701 are to be construed as referring only to obligations or securities of the same type as those specifically enumerated, and not as extending to non-interest-bearing claims or obligations which the United States does not use or need for credit purposes. P. 117.

197 Ga. 95, 28 S. E. 2d 148, affirmed.

CERTIORARI, 321 U. S. 761, to review a judgment directing dismissal of a suit to enjoin the assessment of a state tax.

Mr. Ben H. Sullivan, with whom *Mr. John H. Connaughton* was on the brief, for petitioners.

Mr. W. S. Northcutt, with whom *Messrs. E. H. Sheats* and *Standish Thompson* were on the brief, for respondents.

At the request of the Court, *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key, J. Louis Monarch* and *Bernard Chertcoff* filed a brief on behalf of the United States, as *amicus curiae,* expressing the view that R. S. § 3701 does not apply to the obligation here involved but that Congress has constitutional power to declare such an immunity.

MR. JUSTICE MURPHY delivered the opinion of the Court.

Petitioners are partners engaged in the contracting and construction business. They claim that on January 1, 1942, the United States owed them a balance of $29,831.10. This amount was due under the terms of two contracts for work, labor and materials furnished in connection with the construction of two airports for the use of the United States Army. Petitioners state that this balance "was in the nature of an open account and represented an account receivable" in their hands.

The respondent tax officials of Fulton County, Georgia, sought to assess this open account for state and county ad valorem tax purposes.[1] Petitioners brought this action in

[1] Georgia Code (1933) § 92–101 subjects all real and personal property to taxation, except as otherwise provided by law, and § 92–102 includes within the definition of personal property "money due on open account or evidenced by notes, contracts, bonds, or other obligations, secured or unsecured."

a state court to enjoin such assessment, claiming that the open account was an instrumentality of the United States and hence was immune from state or county taxation. The Supreme Court of Georgia overruled the trial court's dismissal of respondents' general demurrer and directed that the petition be dismissed. 197 Ga. 95, 28 S. E. 2d 148. We granted certiorari because of the important constitutional and statutory problems inherent in the case.

I. Petitioners claim that the proposed tax on the open account claim against the United States is a tax upon the credit of the federal government and upon its power to raise money to carry on military and civil operations. Hence, it is argued, such a tax is unconstitutional under the rule, first enunciated in *McCulloch* v. *Maryland,* 4 Wheat. 316, that without Congressional action there is immunity from state and local taxation, implied from the Constitution itself, of all properties, functions and instrumentalities of the federal government.[2] We think otherwise.

In the first place, an open account claim against the United States does not represent a credit instrumentality of the federal government within the meaning of this constitutional immunity. The record here reveals only that petitioners claim that the United States owes them $29,831.10, which amount is carried by them as an account receivable and "is in the nature of an open account." There are the usual provisions of standard form government construction contracts calling for progress payments by the United States, with final payment being made after completion and acceptance of the work. There is no evidence of any bargaining for a credit extension of $29,831.10 or any provisions for the payment of interest

[2] *People ex rel. Astoria Light Co.* v. *Cantor,* 236 N. Y. 417, 141 N. E. 901, is cited in support of this argument.

on amounts due under the contracts. Nor is there any indication that any conditions precedent needed to be fulfilled or that, on the supposition that the amount was conceded to be correct by the United States, anything other than the formal mechanics of payment needed to be performed. We can only assume, therefore, that this is an ordinary open account as generally defined in the commercial world.[3] In other words, it is an unsettled claim or demand made by the creditor which appears in his account books. It is not evidenced by any written document whereby the United States, the debtor, has promised to pay this claim at a certain time in the future; nor is there any binding acknowledgment by the United States of the correctness of the claim. Conceivably the amount claimed to be due is incorrect or is subject to certain defenses or counterclaims by the United States, necessitating further settlement or adjustment. Such a unilateral, unliquidated creditor's claim, which by itself does not bind the United States and which in no way increases or affects the public debt, cannot be said to be a credit instrumentality of the United States for purposes of tax immunity.

In these respects a mere open account claim differs vitally from the type of credit instrumentalities which this Court in the past has recognized as constitutionally exempt from state and local taxation.[4] Such instrumentali-

[3] See Paton, Accountants' Handbook 229–30 (2d ed., 1934); Olson and Hallman, Credit Management 36 (1925); Jamison, Finance 56 ff (1927); *Kramer* v. *Gardner*, 104 Minn. 370, 373, 116 N. W. 925, 926.

[4] In *Bank* v. *Supervisors*, 7 Wall. 26, this Court held that Congress had the constitutional power, and exercised it, to exempt non-interest-bearing United States legal tender notes, called "greenbacks." The decision did not rest on a finding that these notes were constitutionally exempt in and of themselves. Congress thereafter enacted a statute which in effect reversed this decision and allowed such notes to be taxed by states. Act of Aug. 13, 1894, 28 Stat. 278, § 1, 31 U. S. C. § 425.

ties in each instance have been characterized by (1) written documents, (2) the bearing of interest, (3) a binding promise by the United States to pay specified sums at specified dates and (4) specific Congressional authorization, which also pledged the faith and credit of the United States in support of the promise to pay. Thus in *The Banks* v. *The Mayor,* 7 Wall. 16, immunity was granted to interest-bearing certificates of indebtedness issued to public creditors pursuant to the Act of March 1, 1862, 12 Stat. 352, and the Act of March 17, 1862, 12 Stat. 370. United States stock, bearing interest of 6% and 7%, issued pursuant to the Act of April 20, 1822, 3 Stat. 663, was declared immune in *Weston* v. *Charleston,* 2 Pet. 449. See also *Bank of Commerce* v. *New York City,* 2 Black 620, holding immune interest-bearing stock of the United States authorized by various acts of Congress,[5] and *Bank of the Commonwealth* v. *Commissioner of Taxes,* 2 Black 635, note, declaring immune United States stock, bearing not over 5% interest, authorized by the Act of June 14, 1858, 11 Stat. 365. Interest-bearing bonds of the federal government authorized by law have consistently been held immune from state and local taxation. See, for example, *Home Savings Bank* v. *Des Moines,* 205 U. S. 503. None of these cases is authority for placing an open account claim under the protective umbrella of constitutional immunity.

It is clear, moreover, that the proposed taxation of this open account will not affect or embarrass in any substantial measure the power of the United States to secure credit or to secure aid from independent contractors for necessary military and civil construction projects. The tax here is a uniform, non-discriminatory levy upon an unliquidated asset of the creditor and not upon a credit

[5] This case involved stock issued under the Act of April 15, 1842, 5 Stat. 473, the Act of Jan. 26, 1847, 9 Stat. 118, the Act of March 31, 1848, 9 Stat. 217, and the Act of Feb. 8, 1861, 12 Stat. 129.

instrumentality of the United States. That this asset involves a claim against the federal government is no more fatal to the validity of the tax than the fact that in *James* v. *Dravo Contracting Co.*, 302 U. S. 134, the tax was levied on the contractor's gross receipts from the United States or the fact that in *Alabama* v. *King & Boozer*, 314 U. S. 1, the sales tax was placed on the sale of property to a contractor for use in a federal government project. The assets of an independent contractor that are derived from the profits of a government contract stand in no preferred constitutional position so far as taxation is concerned. They too must bear their fair share of the tax burden. And as long as that burden is non-discriminatory, there is no basis for assuming that contractors will be any less willing to enter into construction contracts with the United States. Nor is such a tax likely to affect or impair in any way their ability to discharge their duties efficiently. There is thus no practical reason for immunizing open accounts of this nature from taxation.

II. The claim that an open account is an obligation exempt from taxation under the provisions of § 3701 of the Revised Statutes, 31 U. S. C. § 742, is also without merit. Congress by this section has provided that "All stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority." The plain meaning of these words and their legislative background dispel any doubt as to their inapplicability to an open account claim of a creditor of the United States.

Section 3701 on its face applies only to written interest-bearing obligations issued pursuant to Congressional authorization. Stocks, bonds and Treasury notes[6] are

[6] The only Treasury notes that could be included within § 3701 are interest-bearing ones, in light of the provisions of the Act of Aug. 13, 1894, 28 Stat. 278, § 1, 31 U. S. C. § 425, allowing notes and certificates payable on demand and circulating as currency to be taxed by the states.

obviously of that nature. And, under the rule of *ejusdem generis,* it is reasonable to construe the general words "other obligations," which allegedly cover open accounts, as referring only to obligations or securities of the same type as those specifically enumerated. *Hibernia Savings Society* v. *San Francisco,* 200 U. S. 310. Cf. *Helvering* v. *Stockholms Enskilda Bank,* 293 U. S. 84. This interpretation is in accord with the long established Congressional intent to prevent taxes which diminish in the slightest degree the market value or the investment attractiveness of obligations issued by the United States in an effort to secure necessary credit. It is unnecessary to extend such tax exemption, at least through statutory interpretation, to non-interest-bearing claims or obligations which the United States does not use or need for credit purposes. Tax exemptions being the exception rather than the rule, much clearer language evidencing an intent to immunize open account claims under § 3701 is necessary under these circumstances.

The seven statutory exemption provisions [7] from which § 3701 was derived further confirm the conclusion that Congress at no time intended to exempt open account claims. In all seven instances the exemption provisions appeared in statutes authorizing the issuance of interest-

[7] (1) Act of Feb. 25, 1862, 12 Stat. 345, 346, exempting "all stocks, bonds, and other securities of the United States"; (2) Act of March 3, 1863, 12 Stat. 709, 710, exempting "all the bonds and treasury notes or United States notes issued under the provisions of this act"; (3) Act of March 3, 1864, 13 Stat. 13, exempting "all bonds issued under this act"; (4) Act of June 30, 1864, 13 Stat. 218, exempting "all bonds, treasury notes, and other obligations of the United States"; (5) Act of Jan. 28, 1865, 13 Stat. 425, exempting "such notes" as were issued under the statute in lieu of bonds; (6) Act of March 3, 1865, 13 Stat. 468, 469, exempting "all bonds or other obligations issued under this act"; (7) Act of July 14, 1870, 16 Stat. 272, exempting "all of which said several classes of bonds [authorized to be issued under the Act] and the interest thereon."

bearing bonds or Treasury notes. Five of the seven statutes specifically limited tax exemptions to the securities issued under those enactments; one extended exemption to "all stocks, bonds, and other securities of the United States";[8] and the other granted exemption to "all bonds, Treasury notes, and other obligations of the United States."[9] Thus, if the rule of *ejusdem generis* be applied to the two latter provisions, all seven exemptions were limited by their terms to interest-bearing securities or obligations authorized by Congress, for the payment of which the credit and faith of the United States was pledged. Full effect must also be given to the subsequent statutory provision allowing states to tax "legal tender notes and other notes and certificates of the United States payable on demand and circulating or intended to circu-

[8] Act of Feb. 25, 1862, 12 Stat. 345, 346. This has been described in Congress as embracing "simply the public securities, such as are described as the permanent debt of the Government." Cong. Globe, p. 3184, 38th Cong., 1st Sess.

[9] Act of June 30, 1864, 13 Stat. 218. This provision comes closest to the wording of § 3701. In speaking of the term "other obligations," Rep. Hooper said during the Congressional debates on the Act that "I understand, however, that this provision applies only to the interest-bearing obligations of the Government." Cong. Globe, p. 3183, 38th Cong., 1st Sess. He also stated that the committee in charge of the bill which eventually became law "found the general practice since the commencement of the Government had been to exempt from taxation the obligations of the Government issued by the United States under loan bills." *Ibid.*

This Act, moreover, obviously used the word "obligation" throughout to refer to written documents, making provisions relating to counterfeiting, altering, printing and photographing them. And in § 13, the Act defined the words "obligation or other security of the United States," as used in this Act, to include and mean "all bonds, coupons, national currency, United States notes, treasury notes, fractional notes, checks for money of authorized officers of the United States, certificates of indebtedness, certificates of deposit, stamps, and other representatives of value of whatever denomination, *which have been or may be issued under any act of Congress.*" (Italics added.)

late as currency." [10] All of these related statutes are a clear indication of an intent to immunize from state taxation only the interest-bearing obligations of the United States which are needed to secure credit to carry on the necessary functions of government. That intent, which is largely codified in § 3701, should not be expanded or modified in any degree by the judiciary.

The judgment of the Supreme Court of Georgia is affirmed.

Affirmed.

COMMISSIONER OF INTERNAL REVENUE *v.* SCOTTISH AMERICAN INVESTMENT CO., LTD.

NO. 52. CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.*

Argued November 16, 1944.—Decided December 4, 1944.

1. The conclusion of the Tax Court that the taxpayers in this case had "an office or place of business" in the United States was supported by substantial evidence, and its determination that they were therefore entitled to be taxed as resident foreign corporations under § 231 (b) of the Revenue Acts of 1936 and 1938 could not be set aside on appellate review. P. 123.
2. When the Tax Court's factual inferences and conclusions are determinative of compliance with statutory requirements, the appellate courts are limited to a determination of whether they have

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[10] Act of Aug. 13, 1894, 28 Stat. 278, § 1, 31 U. S. C. § 425. See notes 4 and 6, *supra*.

*Together with No. 53, *Commissioner of Internal Revenue* v. *British Assets Trust, Ltd.*, and No. 54, *Commissioner of Internal Revenue* v. *Second British Assets Trust, Ltd.*, also on writs of certiorari to the Circuit Court of Appeals for the Fourth Circuit; and No. 220, *Scottish American Investment Co., Ltd.* v. *Commissioner of Internal Revenue*, No. 221, *British Assets Trust, Ltd.* v. *Commissioner of Internal Revenue*, and No. 222, *Second British Assets Trust, Ltd.* v. *Commissioner of Internal Revenue*, on writs of certiorari to the Circuit Court of Appeals for the Third Circuit.

any substantial basis in the evidence. The judicial eye must not in the first instance rove about searching for evidence to support other conflicting inferences and conclusions which the judges or the litigants may consider more reasonable or desirable. It must be cast directly and primarily upon the evidence in support of those made by the Tax Court. If a substantial basis is lacking the appellate court may then indulge in making its own inferences and conclusions or it may remand the case to the Tax Court for further appropriate proceedings. But if such a basis is present the process of judicial review is at an end. P. 124.

139 F. 2d 419, affirmed.

142 F. 2d 401, reversed.

CERTIORARI, 322 U. S. 722 and *post*, p. 693, to review in Nos. 52, 53, and 54 affirmances, and in Nos. 220, 221, and 222 reversals, of decisions of the Tax Court, 47 B. T. A. 474, which reversed the Commissioner's determinations of deficiencies in income tax.

Mr. J. Louis Monarch, with whom *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Mr. Sewall Key*, and *Miss Helen Goodner* were on the brief, for the Commissioner of Internal Revenue.

Mr. Marion N. Fisher, with whom *Mr. George Craven* was on the brief, for the taxpayers.

MR. JUSTICE MURPHY delivered the opinion of the Court.

We are confronted here with another aspect of the problem of the judicial reviewability of Tax Court determinations.

The three taxpayers involved in these cases are investment trusts organized under the laws of Great Britain, with principal offices in Edinburgh, Scotland. Each is engaged in the business of investing the funds of its security holders for the primary purpose of deriving income from investments. The Tax Court, formerly known as the Board of Tax Appeals, has held that these taxpayers

had an "office or place of business" within the United States during the four years in question and hence were entitled to be taxed as resident foreign corporations under § 231 (b) of the Revenue Acts of 1936 and 1938. 47 B. T. A. 474. Such a holding would result in substantial tax savings that would be unavailable to them had they not maintained such an office in this country. The tax returns for the various years having been filed in different collectors' offices, the Commissioner appealed to two Circuit Courts of Appeal.[1] The Circuit Court of Appeals for the Fourth Circuit, dealing with the 1936 and 1937 tax returns, affirmed the Tax Court's decision as to those years. 139 F. 2d 419. But the Circuit Court of Appeals for the Third Circuit, considering the identical facts and substantially the same statutes and regulations, held that the taxpayers did not have an office or place of business within the United States during 1938 and 1939; the decision of the Tax Court as to those years was accordingly reversed. 142 F. 2d 401. The irreconcilable conflict between the two courts below led us to grant certiorari.

The Tax Court made virtually undisputed findings of fact which need not be repeated here in detail. In brief, it was found that the three taxpayers jointly appointed a member of an American accounting firm as their assistant secretary. He was instructed to establish and maintain an office in the United States for them in order to obtain better representation of their interests in this country, large amounts of American securities being held as investments by them. By establishing this office they also sought

[1] The taxpayers' returns for 1936 and 1937 were filed with the Collector of Internal Revenue for the District of Maryland. The 1938 and 1939 returns were filed with the Collector of Internal Revenue at Newark, N. J. Under § 1141 of the Internal Revenue Code, decisions of the Tax Court may be reviewed by the Circuit Court of Appeals for the circuit in which is located the Collector's office where the tax return is filed.

to obtain certain tax advantages. The office was accordingly opened and two full-time assistants to the assistant secretary were employed. The American securities were kept in the custody of two banks, through which the securities were bought and sold, and assistance on certain matters was obtained from the accounting firm. This office of the taxpayers kept full records concerning all American holdings, collected and received dividends on such holdings, acted on proxies and performed other duties relative to the maintenance of these investments. The assistant secretary made periodic financial, economic and political reports to the home offices, as well as specific reports concerning particular holdings. United States tax returns were prepared in this office and local expenses were disbursed therefrom. All decisions as to the buying and selling of securities and as to investment policies, however, were made by the home offices in Edinburgh.

Certain inferences and conclusions were then drawn from these facts by the Tax Court. It refused to consider each separate activity in this office apart from its integral relation to the entire investment trust business and was of the opinion that "an office handling affairs to this extent must be regarded as real and substantial. It was here that a very large part of the affairs of petitioners in this country were taken care of." The Tax Court further concluded that this office was not a sham but was a place for the necessary transaction of the American affairs of the taxpayers; "the office was used for the regular transaction of business and not as a place where casual or incidental transactions might be, or were, effected."

Utilizing the provisions of § 231 (b) and of the regulations promulgated thereunder,[2] the Tax Court reached the

[2] Section 231 (b) of both the Revenue Acts of 1936 and 1938 provides for taxes on resident foreign corporations, defining them as "a foreign corporation engaged in trade or business within the United States or having an office or place of business therein." Revenue Act of 1936,

ultimate conclusion that the taxpayers maintained an office or place of business within the United States and were therefore entitled to be taxed as resident foreign corporations. There is no charge here that the Tax Court failed to follow the applicable statutes or regulations. No clear cut mistake of law is alleged. Nor are any constitutional issues involved. The sole issue revolves about the propriety of the inferences and conclusions drawn from the evidence by the Tax Court. The taxpayers claim that these determinations are supported by substantial evidence and hence were not reversible by an appellate court. The Commissioner charges that the facts demonstrate that the American office was not intended to be used for the transaction of the regular business of making investments and that it was improper as a matter of law to classify the taxpayers as resident foreign corporations.

The answer is to be found in a proper realization of the distinctive functions of the Tax Court and the Circuit Courts of Appeal in this respect. The Tax Court has the primary function of finding the facts in tax disputes,

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c. 690, 49 Stat. 1648, 1717; Revenue Act of 1938, c. 289, 52 Stat. 447, 530. The Tax Court and the two courts below did not pass upon the Commissioner's contention, renewed before us, that the taxpayers were not "engaged in trade or business" within the meaning of this section. We likewise do not discuss that claim here since it is sufficient if it be found that the taxpayers in this case had "an office or place of business" in this country. See *B. W. Jones Trust* v. *Commissioner,* 132 F. 2d 914, 917.

Art. 231–1 of Treasury Regulations 94, promulgated under the Revenue Act of 1936, provides in part: "Whether a foreign corporation has an 'office or place of business' within the United States depends upon the facts in a particular case. The term 'office or place of business,' however, implies a place for the regular transaction of business and does not include a place where casual or incidental transactions might be, or are, effected." Art. 231–1 of Treasury Regulations 101, promulgated under the Revenue Act of 1938, and § 19.231–1 of Treasury Regulations 103, applying to the year 1939, are substantially the same.

weighing the evidence, and choosing from among conflicting factual inferences and conclusions those which it considers most reasonable. The Circuit Courts of Appeal have no power to change or add to those findings of fact or to reweigh the evidence. And when the Tax Court's factual inferences and conclusions are determinative of compliance with statutory requirements, the appellate courts are limited to a determination of whether they have any substantial basis in the evidence. The judicial eye must not in the first instance rove about searching for evidence to support other conflicting inferences and conclusions which the judges or the litigants may consider more reasonable or desirable. It must be cast directly and primarily upon the evidence in support of those made by the Tax Court. If a substantial basis is lacking the appellate court may then indulge in making its own inferences and conclusions or it may remand the case to the Tax Court for further appropriate proceedings. But if such a basis is present the process of judicial review is at an end. *Helvering* v. *National Grocery Co.*, 304 U. S. 282, 294; *Wilmington Trust Co.* v. *Helvering*, 316 U. S. 164, 168; *Commissioner* v. *Heininger*, 320 U. S. 467, 475; *Dobson* v. *Commissioner*, 320 U. S. 489.

Our examination of the record convinces us that the factual inferences and conclusions of the Tax Court are supported by substantial evidence. While decisions as to the purchase and sale of American securities were made in the Edinburgh offices, there was abundant evidence that the American office performed vital functions in the taxpayers' investment trust business. The uncontradicted evidence showed that this office collected dividends from the vast holdings of American securities and did countless other tasks essential to the proper maintenance of a large investment portfolio. Although some matters pertaining to the American business were taken care of by others, this office performed a very substantial part

of these duties and could be held to have satisfied the statutory requirements. We cannot say that it was unreasonable for the Tax Court to conclude that this office was more than a sham and that it was used for the regular transaction of business. Hence it was proper as a matter of law for the Tax Court to classify the taxpayers as resident foreign corporations under § 231 (b). We do not decide or imply that the contrary inferences and conclusions urged by the Commissioner are entirely unreasonable or completely unsupported by any probative evidence. We merely hold that such contentions are irrelevant so long as there is adequate support in the evidence for what the Tax Court has inferred. It follows that the Tax Court's conclusions in this case cannot be set aside on appellate review.

Moreover, this case exemplifies one type of factual dispute where judicial abstinence should be pronounced. The decision as to the facts in this case, like analogous ones that preceded it,[3] is of little value as precedent. The factual pattern is too decisive and too varied from case to case to warrant a great expenditure of appellate court energy on unravelling conflicting factual inferences. The skilled judgment of the Tax Court, which is the basic fact-finding and inference-making body, should thus be given wide range in such proceedings.

The judgment of the Circuit Court of Appeals for the Fourth Circuit is affirmed. The judgment of the Circuit Court of Appeals for the Third Circuit is reversed.

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[3] See *Linen Thread Co.* v. *Commissioner,* 128 F. 2d 166; *Aktiebolaget Separator* v. *Commissioner,* 45 B. T. A. 243, affirmed in 128 F. 2d 739; *B. W. Jones Trust* v. *Commissioner,* 132 F. 2d 914; Fajardo Sugar Co. *v.* Commissioner, 20 B. T. A. 980; Recherches Industrielles *v.* Commissioner, 45 B. T. A. 253.

ARMOUR & CO. *v.* WANTOCK ET AL.

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

No. 73. Argued October 13, 1944.—Decided December 4, 1944.

1. Fireguards employed by a manufacturer of goods for interstate commerce, *held* covered by the Fair Labor Standards Act of 1938, as employed in an "occupation necessary to the production" of goods for interstate commerce. P. 129.
2. The conclusion of both courts below that, upon the facts of this case, time spent on the employer's premises by fireguards subject to call—excluding time spent sleeping and eating, but including time spent idling or in recreation—was working time compensable under the maximum hours and overtime provisions of the Fair Labor Standards Act, *sustained*. P. 132.
3. Opinions of the Court are to be read in the light of the facts of the case. P. 132.

140 F. 2d 356, affirmed.

CERTIORARI, 322 U. S. 723, to review the affirmance of a judgment for the plaintiffs in a suit under the Fair Labor Standards Act for overtime, liquidated damages, and attorney's fees.

Mr. Paul E. Blanchard, with whom *Messrs. Chas. J. Faulkner, Jr.* and *R. F. Feagans* were on the brief, for petitioner.

Mr. Ben Meyers for respondents.

Solicitor General Fahy, Mr. Douglas B. Maggs, and *Miss Bessie Margolin* filed a brief on behalf of the Administrator of the Wage and Hour Division, U. S. Department of Labor, as *amicus curiae,* urging affirmance.

MR. JUSTICE JACKSON delivered the opinion of the Court.

Armour and Company, petitioner, has been held liable to certain employees for overtime, liquidated damages,

and attorneys' fees under the Fair Labor Standards Act. 140 F. 2d 356. The overtime in question is that spent on the employer's premises as fireguards subject to call, but otherwise put to such personal use as sleeping or recreation. The Court of Appeals for the Fifth Circuit on facts of considerable similarity reached an opposite result, in *Skidmore* v. *Swift & Co.*, 136 F. 2d 112, *post*, p. 134. To resolve the conflict we granted certiorari in both cases. 322 U. S. 723.

Armour and Company operates a soap factory in Chicago which produces goods for interstate commerce. It maintains a private fire-fighting force to supplement that provided by the city. The respondents were employed as fire fighters only, and otherwise had nothing to do with the production of goods. They were not night watchmen, a separate force being maintained for that purpose. They were not given access to the factory premises at night except by call or permission of the watchmen.

These men worked in shifts which began at 8:00 a. m., when they punched a time clock. The following nine hours, with a half hour off for lunch, they worked at inspecting, cleaning, and keeping in order the company's fire-fighting apparatus, which included fire engines, hose, pumps, water barrels and buckets, extinguishers, and a sprinkler system. At 5:00 p. m. they "punched out" on the time clock. Then they remained on call in the fire hall, provided by the Company and located on its property, until the following morning at 8:00. They went off duty entirely for the next twenty-four hours and then resumed work as described.

During this nighttime on duty they were required to stay in the fire hall, to respond to any alarms, to make any temporary repairs of fire apparatus, and take care of the sprinkler system if defective or set off by mischance. The time spent in these tasks was recorded and amounts on average to less than a half hour a week. The employer

does not deny that time actually so spent should be compensated in accordance with the Act.

The litigation concerns the time during which these men were required to be on the employer's premises, to some extent amenable to the employer's discipline, subject to call, but not engaged in any specific work. The Company provided cooking equipment, beds, radios, and facilities for cards and amusements with which the men slept, ate, or entertained themselves pretty much as they chose. They were not, however, at liberty to leave the premises except that, by permission of the watchman, they might go to a nearby restaurant for their evening meal.

A single fixed weekly wage was paid to the men, regardless of the variation in hours per week spent on regular or on firehouse duty, the schedule of shifts occasioning considerable variation in weekly time.

This fire-fighting service was not maintained at the instance of the Company's officials in charge of production, but at that of its insurance department. Several other plants of Armour and those of numerous other manufacturers in the same industry produce similar goods for commerce without maintaining such a fire-fighting service.

On these facts the petitioner contends: first, that employees in such auxiliary fire-fighting capacity are not engaged in commerce or in production of goods for commerce, or in any occupation necessary to such production within the meaning of the Act; and, second, that even if they were within the Act, time spent in sleeping, eating, playing cards, listening to the radio, or otherwise amusing themselves, cannot be counted as working time. The employees contended in the District Court that all of such stand-by time, however spent, was employment time within the Act, but they took no appeal from the judgment in so far as it was adverse to them.

The District Court held that the employees in such service were covered by the Act. But it declined to go

to either extreme demanded by the parties as to working time. Usual hours for sleep and for eating it ruled would not be counted, but the remaining hours should. Judgment was rendered for Wantock of $505.67 overtime, the same amount in liquidated damages, and $600 for attorneys' fees; while Smith recovered $943.07 overtime, liquidated damages of equal amount, and attorneys' fees of $650. The Court of Appeals affirmed.

First. Were the employees in question covered by the Fair Labor Standards Act? Section 7 of the Act, 29 U. S. C. § 207, by its own terms applies maximum hours provisions to two general classes of employees, those who are engaged in commerce and those who are engaged in producing goods for commerce. Section 3 (j), 29 U. S. C. § 203 (j), adds another by the provision that "an employee shall be deemed to have been engaged in the production of goods if such employee was employed . . . in any process or occupation necessary to the production" of goods for commerce. The courts below held that the respondents were included in this class. The petitioner seeks to limit those entitled to this classification by reading the word "necessary" in the highly restrictive sense of "indispensable," "essential," and "vital"—words it finds in previous pronouncements of this Court dealing with this clause. *Kirschbaum Co.* v. *Walling,* 316 U. S. 517, 524–26; *Overstreet* v. *North Shore Corp.,* 318 U. S. 125, 129, 130. These and other cases, says petitioner, indicate that in applying the Act a distinction must be made between those processes or occupations which an employer finds advantageous in his own plan of production and those without which he could not practically produce at all. Present respondents, it contends, clearly fall within the former category because soap can be and in many other plants is produced without the kind of fire protection which these employees provide.

The argument would give an unwarranted rigidity to the application of the word "necessary," which has always

been recognized as a word to be harmonized with its context. See *McCulloch* v. *Maryland,* 4 Wheat. 316, 413, 414. No hard and fast rule will tell us what can be dispensed with in "the production of goods." All depends upon the detail with which that bare phrase is clothed. In the law of infants' liability, what are "necessaries" may well vary with the environment to which the infant is exposed: climate and station in life and many other factors. So, too, no hard and fast rule may be transposed from one industry to another to say what is necessary in "the production of goods." What is practically necessary to it will depend on its environment and position. A plant may be so built as to be an exceptional fire hazard, or it may be menaced by neighborhood. It may be farther from public fire protection, or its use of inflammable materials may make instantaneous response to fire alarm of peculiar importance to it. "Whatever terminology is used, the criterion is necessarily one of degree and must be so defined." *Santa Cruz Co.* v. *Labor Board,* 303 U. S. 453, 467; *Kirschbaum Co.* v. *Walling,* 316 U. S. 517, 526. In their context, the restrictive words like "indispensable," which petitioner quotes, do not have the automatic significance petitioner seeks to give them. What is required is a practical judgment as to whether the particular employer actually operates the work as part of an integrated effort for the production of goods.

The fact that respondents were hired by an employer which shows no ostensible purpose for being in business except to produce goods for commerce is not without weight, even though we recognized in *Kirschbaum Co.* v. *Walling* that it might not always be decisive (316 U. S. at 525). A court would not readily assume that a corporation's management was spending stockholders' money on a mere hobby or an extravagance. The company does not prove or assert that this fire protection is so unrelated to its business of production that it does not for income-tax

purposes deduct the wages of these employees from gross income as "ordinary and necessary expenses" (Int. Rev. Code § 23 (a) (1)). The record shows that this department not only helps to safeguard the continuity of production against interruption by fire but serves a fiscal purpose as well. Without the department, insurance could not be obtained at any price except by employing enough watchmen to make hourly rounds; with it, only enough watchmen for rounds every two hours are needed. This saves twelve watchmen, or about $17,600 a year, and reduces insurance premiums by $1,200 a year. What the net savings are has not been stipulated, but it is clear that this so-called "de luxe" service is maintained because it is good business to do so. More is necessary to a successful enterprise than that it be physically able to produce goods for commerce. It also aims to produce them at a price at which it can maintain its competitive place, and an occupation is not to be excluded from the Act merely because it contributes to economy or to continuity of production rather than to volume of production.

If some of the phrases quoted from previous decisions describe a higher degree of essentiality than these respondents can show, it must be observed that they were all uttered in cases in which the employees were held to be within the Act. A holding that a process or occupation described as "indispensable" or "vital" is one "necessary" within the Act cannot be read as an authority that all which cannot be so described are out of it. *McLeod* v. *Threlkeld,* 319 U. S. 491, which did exclude the employee from the scope of the Act, is not in point here because it involved application of the other clause of the Act, covering employees engaged "in commerce," and the test of whether one is in commerce is obviously more exacting than the test of whether his occupation is necessary to production for commerce.

But we think the previous cases indicate clearly that respondents are within the Act. *Kirschbaum Co.* v. *Wall-*

ing, supra, held that watchmen, as well as engineers, firemen, carpenters and others, were covered, because they contributed to "the maintenance of a safe, habitable building" which was, in turn, necessary for the production of goods. Again, in *Walton* v. *Southern Package Corp.,* 320 U. S. 540, the "necessary for production" clause was held to cover a night watchman for a manufacturing company, and we pointed to the reduction of fire insurance premiums as evidence that a watchman "would make a valuable contribution to the continuous production of respondent's goods." The function of these employees is not significantly different.

The courts below did not err in holding that respondents were employed in an occupation reasonably necessary to production as carried on by the employer and hence were covered by the Act.

Second. Was it error to count time spent in playing cards and other amusements, or in idleness, as working time?

The overtime provisions of the Act, § 7, 52 Stat. 1063, 29 U. S. C. § 207, apply only to those who are "employees" and to "employment" in excess of the specified hours; § 3 (g), 29 U. S. C. § 203 (g), provides that " 'employ' includes to suffer or permit to work."

Here, too, the employer interprets former opinions of the Court as limitations on the Act. It cites statements that the Congressional intent was "to guarantee either regular or overtime compensation for all *actual work* or employment" and that "Congress here was referring to work or employment . . . as those words are commonly used—*as meaning physical or mental exertion* (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business" (italics supplied). *Tennessee Coal, Iron & R. Co.* v. *Muscoda Local,* 321 U. S. 590, 597, 598. It is timely again to remind counsel that

words of our opinions are to be read in the light of the facts of the case under discussion. To keep opinions within reasonable bounds precludes writing into them every limitation or variation which might be suggested by the circumstances of cases not before the Court. General expressions transposed to other facts are often misleading. The context of the language cited from the *Tennessee Coal* case should be sufficient to indicate that the quoted phrases were not intended as a limitation on the Act, and have no necessary application to other states of facts.

Of course an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen. Refraining from other activity often is a factor of instant readiness to serve, and idleness plays a part in all employments in a stand-by capacity. Readiness to serve may be hired, quite as much as service itself, and time spent lying in wait for threats to the safety of the employer's property may be treated by the parties as a benefit to the employer. Whether time is spent predominantly for the employer's benefit or for the employee's is a question dependent upon all the circumstances of the case.

That inactive duty may be duty nonetheless is not a new principle invented for application to this Act. In *Missouri, K. & T. R. Co.* v. *United States,* 231 U. S. 112, 119, the Court held that inactive time was to be counted in applying a federal Act prohibiting the keeping of employees on duty for more than sixteen consecutive hours. Referring to certain delays, this Court said, "In the meantime the men were waiting, doing nothing. It is argued that they were not on duty during this period and that if it be deducted, they were not kept more than sixteen hours. But they were under orders, liable to be called upon at any moment, and not at liberty to go away. They were none the less on duty when inactive. Their duty was to stand and wait."

We think the Labor Standards Act does not exclude as working time periods contracted for and spent on duty in the circumstances disclosed here, merely because the nature of the duty left time hanging heavy on the employees' hands and because the employer and employee cooperated in trying to make the confinement and idleness incident to it more tolerable. Certainly they were competent to agree, expressly or by implication, that an employee could resort to amusements provided by the employer without a violation of his agreement or a departure from his duty. Both courts below having concurred in finding that under the circumstances and the arrangements between the parties the time so spent was working time, we therefore affirm.

Affirmed.

SKIDMORE ET AL. *v.* SWIFT & CO.

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

No. 12. Argued October 13, 1944.—Decided December 4, 1944.

1. No principle of law precluded a determination that waiting time was working time under the Fair Labor Standards Act. *Armour & Co.* v. *Wantock, ante,* p. 126. P. 136.
2. Whether time spent on the employer's premises (or in hailing distance) by fireguards subject to call was working time under the Fair Labor Standards Act is a question of fact to be resolved by appropriate findings of the trial court. P. 136.
3. Although the rulings, interpretations and opinions of the Administrator under the Fair Labor Standards Act do not control judicial decision, they do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. P. 140.

136 F. 2d 112, reversed.

CERTIORARI, 322 U. S. 723, to review the affirmance of a judgment, 53 F. Supp. 1020, denying recovery in a suit under the Fair Labor Standards Act for overtime, liquidated damages, and attorney's fees.

Mr. R. Curtis McBroom, with whom *Mr. Mark McGee* was on the brief, for petitioners.

Mr. Beverley V. Thompson, with whom *Mr. Wm. N. Strack* was on the brief, for respondent.

Solicitor General Fahy, Mr. Douglas B. Maggs, and *Miss Bessie Margolin* filed a brief on behalf of the Administrator of the Wage and Hour Division, U. S. Department of Labor, as *amicus curiae,* urging reversal.

Mr. Justice Jackson delivered the opinion of the Court.

Seven employees of the Swift and Company packing plant at Fort Worth, Texas, brought an action under the Fair Labor Standards Act to recover overtime, liquidated damages, and attorneys' fees, totalling approximately $77,000. The District Court rendered judgment denying this claim wholly, 53 F. Supp. 1020, and the Circuit Court of Appeals for the Fifth Circuit affirmed. 136 F. 2d 112.

It is not denied that the daytime employment of these persons was working time within the Act. Two were engaged in general fire-hall duties and maintenance of fire-fighting equipment of the Swift plant. The others operated elevators or acted as relief men in fire duties. They worked from 7:00 a. m. to 3:30 p. m., with a half-hour lunch period, five days a week. They were paid weekly salaries.

Under their oral agreement of employment, however, petitioners undertook to stay in the fire hall on the Company premises, or within hailing distance, three and a half to four nights a week. This involved no task except to answer alarms, either because of fire or because the sprinkler was set off for some other reason. No fires occurred during the period in issue, the alarms were rare, and the time required for their answer rarely exceeded an hour. For each alarm answered the employees were

paid in addition to their fixed compensation an agreed amount, fifty cents at first, and later sixty-four cents. The Company provided a brick fire hall equipped with steam heat and air-conditioned rooms. It provided sleeping quarters, a pool table, a domino table, and a radio. The men used their time in sleep or amusement as they saw fit, except that they were required to stay in or close by the fire hall and be ready to respond to alarms. It is stipulated that "they agreed to remain in the fire hall and stay in it or within hailing distance, subject to call, in event of fire or other casualty, but were not required to perform any specific tasks during these periods of time, except in answering alarms." The trial court found the evidentiary facts as stipulated; it made no findings of fact as such as to whether under the arrangement of the parties and the circumstances of this case, which in some respects differ from those of the *Armour* case (*ante,* p. 126), the fire-hall duty or any part thereof constituted working time. It said, however, as a "conclusion of law" that "the time plaintiffs spent in the fire hall subject to call to answer fire alarms does not constitute hours worked, for which overtime compensation is due them under the Fair Labor Standards Act, as interpreted by the Administrator and the Courts," and in its opinion observed, "of course we know pursuing such pleasurable occupations or performing such personal chores, does not constitute work." The Circuit Court of Appeals affirmed.

For reasons set forth in the *Armour* case decided herewith we hold that no principle of law found either in the statute or in Court decisions precludes waiting time from also being working time. We have not attempted to, and we cannot, lay down a legal formula to resolve cases so varied in their facts as are the many situations in which employment involves waiting time. Whether in a concrete case such time falls within or without the Act is a question of fact to be resolved by appropriate findings of the trial

court. *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 572. This involves scrutiny and construction of the agreements between the particular parties, appraisal of their practical construction of the working agreement by conduct, consideration of the nature of the service, and its relation to the waiting time, and all of the surrounding circumstances. Facts may show that the employee was engaged to wait, or they may show that he waited to be engaged. His compensation may cover both waiting and task, or only performance of the task itself. Living quarters may in some situations be furnished as a facility of the task and in another as a part of its compensation. The law does not impose an arrangement upon the parties. It imposes upon the courts the task of finding what the arrangement was.

We do not minimize the difficulty of such an inquiry where the arrangements of the parties have not contemplated the problem posed by the statute. But it does not differ in nature or in the standards to guide judgment from that which frequently confronts courts where they must find retrospectively the effect of contracts as to matters which the parties failed to anticipate or explicitly to provide for.

Congress did not utilize the services of an administrative agency to find facts and to determine in the first instance whether particular cases fall within or without the Act. Instead, it put this responsibility on the courts. *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, 523. But it did create the office of Administrator, impose upon him a variety of duties, endow him with powers to inform himself of conditions in industries and employments subject to the Act, and put on him the duties of bringing injunction actions to restrain violations. Pursuit of his duties has accumulated a considerable experience in the problems of ascertaining working time in employments involving periods of inactivity and a knowledge of the customs

prevailing in reference to their solution. From these he is obliged to reach conclusions as to conduct without the law, so that he should seek injunctions to stop it, and that within the law, so that he has no call to interfere. He has set forth his views of the application of the Act under different circumstances in an interpretative bulletin and in informal rulings. They provide a practical guide to employers and employees as to how the office representing the public interest in its enforcement will seek to apply it. Wage and Hour Division, Interpretative Bulletin No. 13.

The Administrator thinks the problems presented by inactive duty require a flexible solution, rather than the all-in or all-out rules respectively urged by the parties in this case, and his Bulletin endeavors to suggest standards and examples to guide in particular situations. In some occupations, it says, periods of inactivity are not properly counted as working time even though the employee is subject to call. Examples are an operator of a small telephone exchange where the switchboard is in her home and she ordinarily gets several hours of uninterrupted sleep each night; or a pumper of a stripper well or watchman of a lumber camp during the off season, who may be on duty twenty-four hours a day but ordinarily "has a normal night's sleep, has ample time in which to eat his meals, and has a certain amount of time for relaxation and entirely private pursuits." Exclusion of all such hours the Administrator thinks may be justified. In general, the answer depends "upon the degree to which the employee is free to engage in personal activities during periods of idleness when he is subject to call and the number of consecutive hours that the employee is subject to call without being required to perform active work." "Hours worked are not limited to the time spent in active labor but include time given by the employee to the employer. . . ."

The facts of this case do not fall within any of the specific examples given, but the conclusion of the Administrator, as expressed in the brief amicus curiae, is that the general tests which he has suggested point to the exclusion of sleeping and eating time of these employees from the workweek and the inclusion of all other on-call time: although the employees were required to remain on the premises during the entire time, the evidence shows that they were very rarely interrupted in their normal sleeping and eating time, and these are pursuits of a purely private nature which would presumably occupy the employees' time whether they were on duty or not and which apparently could be pursued adequately and comfortably in the required circumstances; the rest of the time is different because there is nothing in the record to suggest that, even though pleasurably spent, it was spent in the ways the men would have chosen had they been free to do so.

There is no statutory provision as to what, if any, deference courts should pay to the Administrator's conclusions. And, while we have given them notice, we have had no occasion to try to prescribe their influence. The rulings of this Administrator are not reached as a result of hearing adversary proceedings in which he finds facts from evidence and reaches conclusions of law from findings of fact. They are not, of course, conclusive, even in the cases with which they directly deal, much less in those to which they apply only by analogy. They do not constitute an interpretation of the Act or a standard for judging factual situations which binds a district court's processes, as an authoritative pronouncement of a higher court might do. But the Administrator's policies are made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case. They do determine the policy which will guide applications for enforcement

by injunction on behalf of the Government. Good administration of the Act and good judicial administration alike require that the standards of public enforcement and those for determining private rights shall be at variance only where justified by very good reasons. The fact that the Administrator's policies and standards are not reached by trial in adversary form does not mean that they are not entitled to respect. This Court has long given considerable and in some cases decisive weight to Treasury Decisions and to interpretative regulations of the Treasury and of other bodies that were not of adversary origin.

We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

The courts in the *Armour* case weighed the evidence in the particular case in the light of the Administrator's rulings and reached a result consistent therewith. The evidence in this case in some respects, such as the understanding as to separate compensation for answering alarms, is different. Each case must stand on its own facts. But in this case, although the District Court referred to the Administrator's Bulletin, its evaluation and inquiry were apparently restricted by its notion that waiting time may not be work, an understanding of the law which we hold to be erroneous. Accordingly, the judgment is reversed and the cause remanded for further proceedings consistent herewith.

Reversed.

Counsel for Parties.

CLARIDGE APARTMENTS CO. *v.* COMMISSIONER OF INTERNAL REVENUE.

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

Nos. 28 and 29. Argued October 19, 20, 1944.—Decided December 4, 1944.

1. Whether, by virtue of § 276c (3) of the Bankruptcy Act, § 270 was applicable to a proceeding under § 77B in which a final decree had been entered prior to the effective date of the Chandler Act is a question of law in respect of which the doctrine of *Dobson* v. *Commissioner*, 320 U. S. 489, is inapplicable and the determination of the Tax Court is not final. P. 145.
2. Section 270 of the Bankruptcy Act, as amended, requiring that for income tax purposes the basis of the debtor's property be decreased in the amount by which the indebtedness of the debtor has been canceled or reduced in a Chapter X proceeding, *held* not made applicable, by § 276c (3), to a § 77B proceeding in which a final decree had been entered prior to the effective date of the Chandler Act. P. 159.
3. Retroactive application of a statute is not favored. P. 164.
4. The findings of the Tax Court in this case as to the original cost of the property and the propriety of deductions of certain expenses were within the principle of the *Dobson* case. P. 165.

138 F. 2d 962, reversed.

CERTIORARI, 321 U. S. 759, to review the reversal of a decision of the Tax Court, 1 T. C. 163, setting aside, in part, deficiency assessments of income and excess profits taxes.

Mr. John E. Hughes for petitioner.

Mr. Chester T. Lane, with whom *Solicitor General Fahy*, *Assistant Attorney General Samuel O. Clark, Jr.*, *Messrs. Sewall Key*, *J. Louis Monarch*, and *Mrs. Muriel S. Paul* were on the brief, for respondent.

Mr. H. Brian Holland, as *amicus curiae*, filed a brief urging reversal.

MR. JUSTICE RUTLEDGE delivered the opinion of the Court.

The issues arise out of deficiency assessments made in respect to petitioner's federal income and excess profits taxes for the years 1935 to 1938 inclusive. They involve the applicability of § 270 of the Bankruptcy Act, as amended,[1] so as to require reduction of depreciation allowances claimed.

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[1] Bankruptcy Act of July 1, 1898, c. 541, 30 Stat. 544, as amended by the Act of June 22, 1938, c. 575, 52 Stat. 904, and the Act of July 1, 1940, c. 500, 54 Stat. 709, 11 U. S. C. §§ 668, 670. Section 270 is complementary to § 268, with which originally it was enacted as part of Chapter X of the Chandler Act. The two sections are as follows, the italicized portion of 270 constituting the whole of the amendment made in 1940.

"Sec. 268. Except as provided in section 270 of this Act, no income or profit, taxable under any law of the United States or of any State now in force or which may hereafter be enacted, shall, in respect to the adjustment of the indebtedness of a debtor in a proceeding under this chapter, be deemed to have accrued to or to have been realized by a debtor, by a trustee provided for in a plan under this chapter, or by a corporation organized or made use of for effectuating a plan under this chapter by reason of a modification in or cancelation in whole or in part of any of the indebtedness of the debtor in a proceeding under this chapter."

"Sec. 270. In determining the basis of property for any purposes of any law of the United States or of a State imposing a tax upon income, the basis of the debtor's property (other than money) or of such property (other than money) as is transferred to any person required to use the debtor's basis in whole or in part shall be decreased by an amount equal to the amount by which the indebtedness of the debtor, not including accrued interest unpaid and not resulting in a tax benefit on any income tax return, has been canceled or reduced in a proceeding under this chapter, *but the basis of any particular property shall not be decreased to an amount less than the fair market value of such property as of the date of entry of the order confirming the plan. Any determination of value in a proceeding under this chapter shall not be deemed a determination of fair market value for the purposes of this section.* The Commissioner of Internal Revenue, with

The transactions arose in connection with a reorganization proceeding under § 77B, 48 Stat. 912. They consisted essentially of petitioner's acquisition of all the assets of the insolvent debtor corporation, by an exchange of its capital stock without par value for the latter's bonds then outstanding. The Commissioner contends that the exchange resulted in a cancellation or reduction of indebtedness within the meaning of § 270, so as to require a corresponding reduction in the basis of the property transferred. Accordingly he now urges that the assessment should be made, as the section requires, upon the basis of the fair market value of the property.[2] The taxpayer's claim is made on the higher basis of the debtor corporation, in the view that § 270 is not applicable to such a transaction.

This difference has been the basic one between the parties in proceedings before the Tax Court,[3] the Circuit Court of Appeals and here. Others include a similar question with respect to the extinction of the debtor's liability for the accrued unpaid interest on the bonds and whether § 270 is made applicable retroactively to the years prior to 1938, by virtue of the provisions of § 276c (3) of the Chandler Act.[4]

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the approval of the Secretary of the Treasury, shall prescribe such regulations as he may deem necessary in order to reflect such decrease in basis for Federal income-tax purposes and otherwise carry into effect the purposes of this section." (Emphasis added.)

[2] Cf. note 1 *supra*. Originally the Commissioner contended that the taxpayer's basis for depreciation was the market value of the property on acquisition in 1935 and this was a major issue before the Tax Court, cf. 1 T. C. 163. But the Tax Court held petitioner had acquired the assets in connection with a reorganization as comprehended by § 112 (g) of the Revenue Act of 1934, and that therefore its basis was the adjusted basis in the hands of the debtor corporation. This ruling was not contested on appeal and is not in question here.

[3] Cf. note 2 *supra*.

[4] The section is set forth in Part III of the opinion.

The Tax Court decided the principal issue on the merits in favor of the taxpayer, except with respect to the accrued interest. Cf. also *Capento Securities Corp.* v. *Commissioner,* 47 B. T. A. 691, affirmed, 140 F. 2d 382. It likewise limited the application of § 270 to the year 1938 and succeeding years. 1 T. C. 163. The Court of Appeals reversed the Tax Court's decision in both respects, holding there was a cancellation of indebtedness with respect to the unpaid principal [5] and that § 270 was applicable retroactively to require the prescribed reduction in basis for each of the tax years in question. 138 F. 2d 962. Certiorari was granted, 321 U. S. 759, because of the importance of the questions presented and a conflict on the question of retroactivity.[6] The facts are stated shortly in the margin, to give concrete perspective.[7]

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[5] Consequently it made no ruling with reference to the accrued interest, since the amount of the principal held to have been "cancelled" was more than sufficient to bring the basis down to the fair market value in 1935.

[6] Cf. *Commissioner* v. *Commodore,* 135 F. 2d 89 (C. C. A. 6th), holding that § 276c (3) does not make §§ 268 and 270 retroactively applicable to tax years prior to 1938. The importance of the questions for the future has been minimized by repeal of § 270 by § 121 of the Revenue Act of 1943, c. 63, 58 Stat. 21, 41.

[7] The property consists of an apartment building, with furnishings, in Chicago. It was constructed in 1924 by the Claridge Building Corporation at a cost in excess of $385,000. The corporation at that time issued its 6½ per cent first mortgage bonds for $340,000. By October 1, 1931, the bonds outstanding amounted to $277,000. In consequence of defaults, on that date the trustee filed his bill of foreclosure, took possession of the property, and thereafter collected the rents. A decree for foreclosure was entered the following February, but there was no sale and the foreclosure proceeding was never consummated.

On June 16, 1934, the Building Corporation filed its voluntary petition under § 77B. In November of that year a plan of reorganization was agreed upon, which was confirmed and approved May 14, 1935. Pursuant to this the taxpayer corporation was organized and the property was transferred to it. Ninety per cent of its shares were

I.

Petitioner earnestly argues that the Tax Court's decision, so far as this was in its favor, should be affirmed on the authority of *Dobson* v. *Commissioner,* 320 U. S. 489, though in other respects it seeks a reversal of that court's judgment.[8] For reasons presently to be stated, we think the case must be disposed of in its entirety by the application of § 276c (3), which determines the extent to which §§ 268 and 270 are applicable in point of time. Accordingly, we are not required to pass upon the merits of the other interesting issues or whether they fall within the *Dobson* admonition. On the other hand, the question of the applicability of §§ 268 and 270, under the terms of § 276c (3), to the transactions involved in this case obviously is one of law and of a sort not requiring the specialized experience of the Tax Court to determine. Furthermore, it involves making an accommodation between the conflicting policies, in part, of the bankruptcy laws and the revenue enactments. Sections 268 and 270 are integral parts of the former, though related in subject matter to the latter, and were so placed for purposes relevant primarily to that legislation. For these reasons the issue falls beyond the scope of the *Dobson* case.

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issued to trustees for depositing bondholders and to nondepositing bondholders, on the basis of one share of stock for each $100 face amount of bonds; and ten per cent of the stock was issued to the shareholders in the old corporation. The final decree in the § 77B proceeding was entered March 1, 1937.

According to findings of the Tax Court, the fair market value of the building, as of May 14, 1935 (when the plan was confirmed, cf. § 270, note 1 *supra*), was not in excess of $141,000. The adjusted basis of the taxpayer's predecessor in that year was $239,377.33, at which time the building had a remaining useful life of twenty-five years. The fair market value of petitioner's stock did not exceed $45 per share in 1935. The Tax Court also found that the Claridge Building Corporation was insolvent throughout the reorganization proceedings.

[8] Cf. text *infra* at note 37.

II.

The question presented by § 276c (3) must be determined in the light of the problem created by §§ 268 and 270. A statement of their history is necessary to a general understanding of that problem. It stems basically from *United States* v. *Kirby Lumber Co.*, 284 U. S. 1, and subsequent decisions which have applied the principle of that case.[9] By them a corporation may realize income from the cancellation or reduction of indebtedness, depending upon the circumstances in which the transaction occurs. However, the line between income-producing reductions and others is not precise or definite and great uncertainty prevailed concerning it, both in 1934 when § 77B was enacted and in 1938 when Chapter X of the Chandler Act was adopted. The uncertainty was greatest perhaps in relation to transactions occurring in the course of insolvent reorganizations.[10]

Some of the obscurity has been created by the very legislation enacted to remove it. This has been true of the successive "reorganization" provisions, including those for "nonrecognition" and for transfer of "basis," which have appeared in the various revenue acts from 1918 (cf. 40 Stat. 1057) forward. Closely related, as these have been, to the problem whether income is realized by the cancellation or reduction of indebtedness in connection with a reorganization, they have tended to obscure if not to blot

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[9] Cf., e. g., *Helvering* v. *American Dental Co.*, 318 U. S. 322; Kraman Dev. Co., 3 T. C. 342; Paul, Debt and Basis Reduction under the Chandler Act (1940) 15 Tulane L. Rev. 1, 5, and authorities cited in notes 17, 19.

[10] Cf. Paul, *op. cit. supra*, note 9; Darrell, Discharge of Indebtedness and the Federal Income Tax (1940) 53 Harv. L. Rev. 977; Darrell, Creditors' Reorganizations and the Federal Income Tax (1944) 57 Harv. L. Rev. 1009; Banks, Treatise on Bankruptcy for Accountants (1939) 80–92.

out that problem altogether in situations covered by their terms.[11]

By and large the provisions are the product of and have reflected efforts at compromise, none too successful, between the conflicting pulls of policy involved in the revenue acts and in the bankruptcy legislation. They were drawn and enacted however as parts of the revenue laws and have reflected increasingly the policy of that legislation.[12] Accordingly, the succession of statutes relating to this field, prior to §§ 268 and 270, represents a series of shifts in the legislative pendulum from initial broad tax relief, to encourage needed reorganizations, toward narrowed exemption, in order to discourage use of reorganization for evasion of taxes. The general purpose of the provisions, however, was to postpone the tax consequences which otherwise might ensue upon transactions occurring in such circumstances that immediate imposition was regarded as economically unjustifiable.[13] This continued in the 1934 general revision,[14] which remained in effect during the period of this litigation.

In some respects, as compared with the preexisting legislation, the 1934 provisions broadened, but in others they restricted, the scope of application of the principles of nonrecognition and transfer of basis.[15] Nevertheless,

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[11] By assuming the existence of income or other taxable gain, but providing for nonrecognition, the inquiry whether gain or profit actually has accrued is wholly avoided.

[12] Cf. authorities cited note 10 *supra*.

[13] Cf. Paul, Studies in Federal Taxation, Third Series, 4, 5.

[14] §§ 112, 113 of the Revenue Act of 1934, c. 277, 48 Stat. 680, 704, 706.

[15] E. g., § 112 (g) of the 1934 Act redefined what might be a reorganization under the revenue act. Thus § 112 (g) (1) (A) included only statutory mergers or consolidations as revenue reorganizations, but dropped the earlier parenthetical clause; § 112 (g) (1) (B) required that the acquisition of stock or property of another corpora-

they were applicable to all exchanges falling within their terms, whether or not the plan was executed in connection with a judicial proceeding. Consequently, when in June, 1934, § 77B was adopted, the 1934 revenue provisions became applicable to reorganizations under that section, but only if they met the tests prescribed in the revenue acts, including such judicially interpolated matters as "continuity of interest" and "business purpose." [16] Many 77B reorganizations did not qualify under these tests or on substantial grounds were thought not to do so.

The consequence was seriously to clog the use of the 77B procedure. Obstacles were imposed not only by the differences in the two statutory definitions of "reorganization," but also by ambiguities in each definition which in themselves created considerable areas of uncertainty.[17] And underlying these remained the mystery of when income would be regarded as realized, which continued to haunt reorganizers unsure of whether they could bring themselves within the statutory exemptions. In short, the necessity of squaring the reorganization first with § 77B, then with the different terms of the revenue provisions, and the uncertainties involved under each statute in doing this, added to the puzzle of "realized income," made the process of creditors' reorganization under the former act a highly dubious adventure. To an undetermined extent

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tion be in exchange solely for all or a part of the *voting* stock of the acquiring corporation to qualify as a reorganization. *Helvering* v. *Southwest Consolidated Corp.*, 315 U. S. 194; cf. § 112 (b) (5); *Helvering* v. *Cement Investors*, 316 U. S. 527.

[16] Cf. *Helvering* v. *Alabama Asphaltic Limestone Co.*, 315 U. S. 179; *Palm Springs Holding Corp.* v. *Commissioner*, 315 U. S. 185; *Bondholders Committee* v. *Commissioner*, 315 U. S. 189; *Helvering* v. *Southwest Consolidated Corp.*, 315 U. S. 194; Darrell, Creditors' Reorganizations and the Federal Income Tax (1940) 57 Harv. L. Rev. 1009, 1017–1033.

[17] *Ibid.*

the effect of the revenue act's provisions was to nullify or make impossible of realization the objects of § 77B.

In this setting Congress adopted the Chandler Act in 1938. That statute was a general revision of the provisions for bankruptcy reorganization, including those previously made under § 77B. One of its principal objects was to encourage the freer use of bankruptcy reorganization in order to avoid unnecessary or premature liquidations. By this time Congress had become aware of the hazardous and hampering effects of the 1934 revenue provisions upon the operation of bankruptcy reorganizations under § 77B. The objectives of the Chandler Act, in similar situations, could not be achieved without removal of these impediments. Some provision was essential to prevent them from having the same effects upon the working of the new legislation. Accordingly § 268 was devised for this purpose and became a part of the Chandler Act itself. It had no other object, and there was no other occasion for its being, than to free Chapter X reorganizations from the tax deterrents, including tax uncertainties, imposed by the existing revenue act provisions.

The relieving effect of § 268 was confined in three ways, namely, (1) to transactions occurring in a Chapter X reorganization; (2) to transactions involving a modification or a cancellation, in whole or in part, of the debtor's indebtedness; and (3) its benefits were limited to the debtor corporation, the trustee, if any, provided for in the plan, and the successor or transferee corporation. Within these limitations the section provided that "no income or profit, taxable under any law . . . shall . . . be deemed to have accrued to or to have been realized by . . ." the parties specified, and thus removed Chapter X transactions from incidence of the uncertainties characterizing the general "reorganization" provisions. One who followed the procedure could be assured he would

not thereby run into tax consequences which would be worse than the economic illness requiring that cure.

As it was originally considered by the House Committee, the Chandler Act contained no counterpart of the present § 270. Had § 268 thus been left to stand alone, with no accompanying provision for "basis," either there would have been no applicable provision for "basis" or the general "basis" provisions would have remained applicable to Chapter X reorganizations falling within their terms, with the result that they would apply to some Chapter X reorganizations but not to others. The latter view apparently was generally accepted. Under it much of the previous uncertainty would have remained, but with its focus shifted from "realized income" to "basis." Moreover, it was the view of Treasury officials, apparently in the assumption of continued transfer of "basis" under the general provisions, that the effect of § 268 would be to provide a double deduction in some cases,[18] unless complemented by a corresponding "basis" provision, and thus be unfair to the revenue.

Accordingly the Treasury, and others, made various proposals,[19] which eventuated in the adoption of § 270 in its original form. This provided for transfer of basis, as did the code provisions, but required that it be decreased *by the amount of the reduction of indebtedness,* a measure at variance with the terms of the code. It was from the requirement of reduction, and the measure provided for it, that new difficulties were derived. Although the only occasion for making a further provision concerning basis arose from the adoption of § 268 and although the legislative history discloses the purpose of Congress exactly

[18] Hearings before the House Committee on the Judiciary on H. R. 8046, 75th Cong., 1st Sess., 352–354; Hearings before Subcommittee of Senate Committee on the Judiciary on H. R. 8046, 75th Cong., 2d Sess., 137–139.

[19] See House Committee Hearings, 353–354; Senate Subcommittee Hearings, 145–146.

contrary to placing Chapter X reorganizations at radical disadvantage from others, the literal effect of the original § 270 came near if not entirely to wiping out the whole benefit conferred by § 268.[20] Soon it was realized that literal application of the specified new measure of reduction would require decrease of basis in many instances to zero or even to a point below zero, because the amount of the debt cancelled or reduced would equal or exceed the value of the property or that assigned to the basis transferred. Thus, any tax benefit derived from § 268, in such cases, would be more than offset by the higher taxes resulting in later years from the absence of any depreciation base and in case of sale of the property acquired. And in cases where no benefit could be derived from § 268, the effect of applying § 270 was, if not to impose a capital levy,[21] then to deny the new owners equal treatment, not only with other transferees under the code provisions, but with all other taxpayers.

Congress, in view of its original object in adopting § 268, could not possibly have intended such consequences for § 270. The cure was worse than the disease.[22] The legislative history gives the clear impression that adoption of the original § 270 was a plain blunder, the consequences of which were not foreseen, understood or intended by those who finally gave it the form of law.[23]

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[20] H. Rep. No. 2372, 76th Cong., 3d Sess., 2–4; S. Rep. No. 1857, 76th Cong., 3d Sess., 1–5; Hearings before a special subcommittee on bankruptcy and reorganization of the House Judiciary Committee on H. R. 9864, 76th Cong., 3d Sess., 3, 5–11, 13–14, 16, 18–31, 54; cf. Paul, Debt and Basis Reduction under the Chandler Act (1940) 15 Tulane L. Rev. 1, 5.

[21] Cf. Darrell, Creditors' Reorganizations and the Federal Income Tax (1940) 57 Harv. L. Rev. 1009, 1016.

[22] Paul, Debt and Basis Reduction under the Chandler Act (1940) 15 Tulane L. Rev. 1, 5.

[23] Hearings before the House Committee on the Judiciary on H. R. 8046, 75th Cong., 1st Sess., 352–354; Hearings before Subcommittee

Legislative relief obviously was in order and was forthcoming at the next session of Congress, in the amendment of § 270 adding the language giving it its present form.[24] The amendment removed some, but not all of the uncertainty confronting Chapter X reorganizers. It placed a floor to the amount of reduction required. In no case would basis be reduced below fair market value. But this was only partial cure of the original infirmities. Above the floor, debt cancellation remained the measure of reduction, thus keeping Chapter X reorganizations generally at a disadvantage with those taking place under the code. But, what was more important, the chief hazard remained, namely, whether § 270 was intended to operate only where § 268 was effective to afford actual tax benefit or, as the Government contends, regardless of whether such relief was afforded. And in this case the hazard has been realized in assessment.

III.

With this background we turn to § 276c (3). By their own terms §§ 268 and 270 apply only to transactions arising in connection with proceedings "under this chapter," that is, Chapter X of the Chandler Act. The instant transactions arose in proceedings, not under Chapter X, but under § 77B, which had been closed by final decree

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of Senate Committee on the Judiciary on H. R. 8046, 75th Cong., 2d Sess., 137–139, 145–146; Hearings before a special subcommittee on bankruptcy and reorganization of the House Judiciary Committee on H. R. 9864, 76th Cong., 3d Sess., 52–59, 66–67. A significant letter written by Congressman Chandler shortly after the passage of the Chandler Act was submitted at the 1940 Hearings (Hearings on H. R. 9864, at 52) and was received by the Subcommittee into the record. For some reason it was not published in the record, although the Chandler letter was referred to in a letter which was published (Hearings on H. R. 9864, at 56). The Chandler letter may be found in Banks, Treatise on Bankruptcy for Accountants (1939) 84–85.

[24] Cf. note 1 *supra.*

March 1, 1937. The Chandler Act became effective September 22, 1938. Accordingly §§ 268 and 270, of their own force, are not applicable to these transactions. If they are so at all it is by virtue of § 276c (3), which the Government says must be construed to extend their operation retroactively to include these facts. This petitioner disputes.

The language immediately in question is the italicized part of subdivision (3), as follows:

"(c) the provisions of sections 77A and 77B . . . shall continue in full force and effect with respect to proceedings pending . . . upon the effective date of this amendatory Act, except that—

. .

"(3) *sections 268 and 270 of this Act shall apply to any plan confirmed under section 77B before the effective date of this amendatory Act and to any plan which may be confirmed under section 77B on and after such effective date,* except that the exemption provided by section 268 of this Act may be disallowed if it shall be made to appear that any such plan had for one of its principal purposes the avoidance of income taxes, and except further that where such plan has not been confirmed on and after such effective date, section 269 of this Act shall apply where practicable and expedient." (Emphasis added.) 52 Stat. 905, 11 U. S. C. § 676.

Three constructions have been advanced. Shortly stated they are that §§ 268 and 270 apply to transactions involved in 77B proceedings (1) only if the proceedings were pending September 22, 1938; (2) only for 1938 and later tax years, but including transactions in proceedings closed before September 22, 1938; (3) for all tax years from 1934 forward as to transactions in all proceedings in which a plan had been or should be confirmed, regardless of whether the proceedings were pending or had been closed on September 22, 1938.

The petitioner advances the first two views, alternatively; the Government the third. The Government interprets the italicized language as if it were wholly disconnected from and unrelated to the preceding portions of § 276c, in other words, as an entirely independent provision unlimited by its statutory context. Petitioner, on the other hand, regards it as merely a part or phase of § 276c,[25] and thus reaches the exactly contrary view of its meaning. The statute, it says, refers in the first paragraph of "c" to "proceedings pending" under 77B and, to quote the brief, "exceptions (1), (2) and (3) are keyed into this first paragraph and refer to pending proceedings also. They merely except from the *pending cases* those to which 77B is not to apply. Since (c) deals only with pending cases and not closed cases, they refer also to pending cases." The Government concedes there is force in this

[25] Petitioner's statement of the argument does not take account expressly of the obvious difference between what he calls "exceptions (1) and (2)," on the one hand, and "exception (3)," on the other. (1) and (2) are clearly true substantive exceptions to the general mandate of "c." That is, they provide instances in which § 77B shall not continue to operate, contrary to the general provision of "c" for its continued effectiveness in pending proceedings. Like effect however cannot be given to (3). It does not purport expressly to provide for nonoperation of 77B. Rather its force is to provide for an extended operation of §§ 268 and 270, with reference to 77B proceedings.

The formal difficulty however is more apparent than substantial. Nothing in (3) is at all inconsistent with its limitation to pending 77B proceedings. And the formal connection with "c," though awkwardly made, affords some evidence of purpose to limit the effects of (3) to such proceedings. The same consequence, however, would seem to be dictated, if the formal connection, as an "exception" to "c," were disregarded and (3) were treated as a separate subsection, like the corresponding provisions of other chapters. Cf. note 35 *infra*. The substantive relationship with the subject matter and purposes of the preceding provisions of the section as a whole would remain. Cf. text *infra* Part III.

view, though it suggests, we think untenably,[26] that the question is doubtfully open. The Court of Appeals accepted the Government's view, the Tax Court the alternative or second view advanced by the taxpayer. We think neither can be accepted and that the effect of § 276c (3) is to confine the application of §§ 268 and 270, in 77B proceedings, to proceedings pending when the Chandler Act became effective.

If §§ 268 and 270 were to be applied to all reorganizations completed under § 77B, literally they would cover all such transactions running back to 1934, when the latter section was enacted. As to proceedings closed when the Chandler Act took effect, this would involve disturbance of tax consequences already settled for five years, unless cases are excepted where the statute of limitations had run.[27] We have no means of knowing how much resurrection of old claims or generation of new ones in respect to settled matters this would create. Nor did the authors of

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[26] It is true petitioner did not present this interpretation in the Court of Appeals or in the Tax Court. It was advanced as a question presented on the petition for a writ of certiorari, the matter has been argued here, and the Government does not claim surprise. The issue of retroactivity and proper interpretation of § 276c (3) has been a focal point of the controversy in the Court of Appeals and in the Tax Court. Petitioner has maintained throughout that there was no tax deficiency for either 1938 or any prior year. Thus the issue has been presented at all stages, although a theory to sustain petitioner's position concerning it has been advanced here which was not put forward in prior stages of the litigation.

[27] It may be noted that the terms of § 276c (3) make no provision concerning the statute of limitations. They apply literally to all prior 77B proceedings. The Commissioner and the Treasury have not interpreted the section to make §§ 268 and 270 apply beyond the time when the general statute has run. But this interpretation is not necessarily controlling, in the face of the breadth of the language used, if it is taken as unlimited by its context. No assessment was made in this case for 1934 because the petitioner corporation was not organized until 1935.

the Chandler Act. But, from the circumstances of the time and the very necessities which brought about adoption of § 77B, the volume must have been considerable.

To construe § 276c (3) to produce such consequences in no way would further the primary objects of §§ 268 and 270, which were to encourage use of Chandler Act procedures, at the same time preventing their abuse for tax advantage. Rather it would pervert those sections by changing their character, to the extent of their retroactive operation, from relief provisions to purely revenue measures of the worst type. In adopting them Congress was not uprooting the whole tax past of reorganized debtors and their creditors. It was, or purported to be, giving relief from harsh or uncertain tax consequences to persons reorganizing presently or in the future.[28]

The language does not require such unlimited construction. The words are not directed expressly to past tax years. Nor are they focused upon transactions in closed proceedings. It is true that § 276c (3), if construed as though it were entirely independent of the remainder of § 276c, does not refer explicitly to *pending* 77B proceedings, except in its concluding clause. Yet it is part and parcel of that section, which in all other respects deals only with pending and future proceedings, not with closed ones. And the concluding clauses of (3) afford additional evidence that it was intended to apply only to plans confirmed or to be confirmed in pending proceedings, as does also its setting in the context of § 276 as a whole.[29]

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[28] Cf. Part II of this opinion.

[29] The section comprises the whole of Article XVI of Chapter X, entitled "When Chapter Takes Effect." It is as follows:

"Sec. 276. a. This chapter shall apply to debtors by whom or against whom petitions are filed on and after the effective date of this amendatory Act and to the creditors and stockholders thereof, whether their rights, claims, or interests of any nature whatsoever have been acquired or created before or after such date;

"b. a petition may be filed under this chapter in a proceeding in bankruptcy which is pending on such date, and a petition may be filed

Thus § 276, in subsections a, b and c (excepting only § 276c (3)), deals exclusively with pending or future proceedings. Congress' concern in "a" was that Chapter X should apply notwithstanding the substantive rights of debtors, creditors and others had arisen before the effective date of the Act. In "b" it was that the pendency of bankruptcy and receivership proceedings should not defeat resort to the Chandler Act's provisions; in "c" it was with an accommodation of the provisions of §§ 77A and 77B and those of the Chandler Act as to pending proceedings. Apart from § 276c (3), therefore, the whole

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under this chapter notwithstanding the pendency on such date of a proceeding in which a receiver or trustee of all or any part of the property of a debtor has been appointed or for whose appointment application has been made in a court of the United States or of any State;

"c. the provisions of sections 77A and 77B of chapter VIII, as amended, of the Act entitled 'An Act to establish a uniform system of bankruptcy throughout the United States', approved July 1, 1898, shall continue in full force and effect with respect to proceedings pending under those sections upon the effective date of this amendatory Act, except that—

"(1) if the petition in such proceedings was approved within three months prior to the effective date of this amendatory Act, the provisions of this chapter shall apply in their entirety to such proceedings; and

"(2) if the petition in such proceedings was approved more than three months before the effective date of this amendatory Act, the provisions of this chapter shall apply to such proceedings to the extent that the judge shall deem their application practicable; and

"(3) *sections 268 and 270 of this Act shall apply to any plan confirmed under section 77B before the effective date of this amendatory Act and to any plan which may be confirmed under section 77B on and after such effective date,* except that the exemption provided by section 268 of this Act may be disallowed if it shall be made to appear that any such plan had for one of its principal purposes the avoidance of income taxes, and except further that where such plan has not been confirmed on and after such effective date, section 269 of this Act shall apply where practicable and expedient." (Emphasis added.) 52 Stat. 905, 11 U. S. C. § 676.

problem treated in § 276 was to give the Chandler Act as wide room as possible for future operation, notwithstanding the previous vesting of substantive rights or institution of bankruptcy or reorganization proceedings. Congress was concerned with the Act's future operation, as a remedial provision, not as a method of creating new and retroactive substantive rights and liabilities.

This being true, it is difficult to understand why Congress might wish to follow exactly the opposite policy with reference to newly created substantive tax rights and liabilities. It would seem wholly incongruous to imply such a purpose in the absence of language unquestionably requiring it, both as a matter of general legislative policy and, more especially, as one of accommodation with the purposes of the particular legislation. In short, apart from subdivision (3), relating to tax incidents of reorganization, all of § 276 was devoted entirely to matters affecting pending and future proceedings. We can find reason for no other view than that this was true also of the provisions for application of the new tax features.

This is borne out by the concluding clauses of § 276c (3) itself, which provide for exceptions to its operation. The second exception in terms relates only to pending proceedings. It contemplated future confirmation exclusively. The first exception, standing alone, literally could be applied in the case of a closed proceeding. But reaching such cases was not a necessary reason for including it. Such a reason existed, however, in the necessity for covering plans already confirmed in pending proceedings, unless parties then reorganizing under § 77B were to be treated differently from others reorganizing at the same time under Chapter X. The two exceptions thus dovetailed to provide complete coverage for disallowing the exemption given by § 268 in pending proceedings. They comprehended distinct situations and provided dif-

ferent sanctions,[30] all however consistent with application only in pending proceedings. Thus the entire language of § 276c (3) was capable of full and complete application, although confined to pending proceedings. To give it greater scope, retroactively, is required neither by the terms nor by the purposes of the specific provision or others related to it in context or by reference.

That the narrower application was the intended one seems most apparent when the nature of the problem with which § 276c (3) sought to deal is considered. There was no problem, arising from enactment of the Chandler Act, with reference to closed 77B proceedings. And there was no reason originally, when § 268 stood alone, for giving the relief it afforded to taxpayers involved in such proceedings. Nothing in the legislative history of § 268, or of § 270, shows any concern, intent or occasion for dealing with such taxpayers. The whole desire related rather, as has been shown, to taxpayers who might be adversely affected by the general revenue provisions in taking advantage of the Chandler Act.

However, that Act itself created another problem, namely, how far its terms should apply in pending 77B proceedings. Congress decided that the Chandler procedure should be followed as far as possible, though not to the extent of displacing the 77B procedure in reorganizations far advanced.[31] The same policy was framed for other chapters. Consequently §§ 276c (1) and (2) were

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[30] I. e., refusal of confirmation where the plan had not been approved (cf. § 269) and disallowance of the tax exemption, if the plan had been confirmed. For tax purposes these come to the same result, a fact also indicative that both exceptions were intended to operate within the general limitation of pending proceedings.

[31] S. Rep. No. 1916, 75th Cong., 3d Sess., 39; Hearings before the House Committee on the Judiciary on H. R. 8046, 75th Cong., 1st Sess., 375–376, 383; Hearings before Subcommittee of the Senate Committee on the Judiciary on H. R. 8046, 75th Cong., 2d Sess., 6–7.

included, as were also comparable provisions in other chapters.[32] With them in, the problem was presented whether the Chandler Act's tax relief provisions, including §§ 268 and 270, should apply also in the pending 77B proceedings and, if so, to what extent—only to those converted into Chandler Act proceedings by § 276c (1), or also to those partially converted under § 276c (2) by an exercise of judicial discretion and those falling within 276c (2) but so nearly completed or otherwise situated that application of the Chandler Act in any respect would be impracticable and therefore 77B would continue exclusively effective.

Although these pending 77B proceedings, and particularly those nearing completion, having been already begun, were generally without the scope of the encouragement §§ 268 and 270 were intended to give to persons contemplating reorganization, Congress undoubtedly felt it would be unfair to give the relief to taxpayers following the Chandler Act procedure, but deny it to persons following that of 77B at the same time. To make this discrimination might force conversion of pending 77B proceedings into Chapter X proceedings, solely on account of tax consequences, where but for them such conversion would not be proper or desirable. Accordingly, by § 276c (3) Congress extended the tax relief provided by §§ 268 and 270 also to pending 77B proceedings in order to put persons continuing 77B reorganization on the same basis with others proceeding under Chapter X. There was no other occasion or object for the extension.

In view of these considerations, both of context and of consequence, we do not think § 276c (3) can be regarded as applicable to closed proceedings. The purpose rather, as in the other provisions of § 276, was to look to the future and in doing so to make the necessary adjustment, so far as was possible, between the provisions of the Chandler

[32] Cf. note 34 and text *infra*.

Act and preexisting laws as to proceedings pending when the former took effect. Thus construed, § 276c (3) becomes consistent, both in form and in the purpose and effects of applying the new tax provisions, with the other provisions of § 276 and with the general policy of the Chandler Act as to applicability of its terms.[33] Any other view would make § 276c (3) a unique provision in the statute's setting and one inconsistent with, if not also contradictory to, the Act's general purposes and the limited objects of the particular provisions immediately in issue.

Further support for this view would seem to be afforded, when the consequences of applying it or the contrary one to similar provisions appearing in other chapters of the Chandler Act[34] are taken into account. If those pro-

[33] "Except as otherwise provided in this amendatory Act, the provisions of this amendatory Act shall govern proceedings so far as practicable in cases pending when it takes effect; but proceedings in cases then pending to which the provisions of this amendatory Act are not applicable shall be disposed of conformably to the provisions of said Act approved July 1, 1898, and the Acts amendatory thereof and supplementary thereto." Act of June 22, 1938, c. 575, § 6b, 52 Stat. 940.

[34] Chapters XI, XII and XIII deal respectively with Arrangements, Real Property Arrangements by Persons Other Than Corporations, and Wage Earners' Plans. Each of these chapters embodies sections corresponding in principle to §§ 268, 270 and 276. Those comparable to § 276 are § 399 in Chapter XI, § 526 in Chapter XII, and § 686 in Chapter XIII. Each, like § 276, contains the whole of an article entitled "When Chapter Takes Effect." Each contains four subsections (with a fifth in § 686), corresponding to subsections a, b and c of § 276 *and subdivision c (3)* of that section. Thus, §§ 399 (4), 526 (4), and 686 (4) correspond to subdivision 276c (3). They differ from it however in that they are formally independent subsections, whereas § 276c (3) is formally a part of Subsection 276c, dependent upon its general mandate, and thus perhaps even more clearly limited by the preceding provisions. Cf. note 25 *supra.*

Sections 268, 270 and 276, therefore, do not represent isolated instances of legislation peculiar to corporate reorganizations under

visions are to be given retroactive application comparable to what the Government says should be given to §§ 268, 270 and 276c (3), the disruption of settled tax situations, by virtue of the Chandler Act's adoption, may be multiplied many times over what would follow from giving such an effect only to §§ 268, 270 and 276c (3). Although the immediate consequences of decision in this case are limited to the specific effects of these sections, it is at least doubtful that they could be given a different construction, as to retroactive application, from what might be given to the comparable sections of other chapters. The possibility that uniform interpretation may be required gives pause, at least, before adopting a view in this case which, if extended to the other provisions, would open so wide a door for retroactive taxation.

As against this interpretation, the Government's argument rests primarily on two bases: (1) that the words of § 276c (3) require its construction; and (2) that unless this is given, discriminations as to tax consequences will be created between taxpayers involved in closed proceedings and those in pending and future ones, with the result that mere speed in getting the proceedings pending prior to September 22, 1938, to a final decree would determine whether taxpayers equally deserving would be afforded the relief provided by §§ 268 and 270.

The answers are obvious. In the first place, the wording of § 276c (3) does not require the Government's con-

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Chapter X. They are rather particular instances of a general pattern of legislation, relating to a common problem running through Chapters X, XI, XII and XIII, namely, to what extent the Chandler Act's terms should be applied to pending reorganizations, arrangements, wage earners' plans, etc. Because of detailed differences in the situations affected, the provisions corresponding to §§ 268, 270 and 276 vary somewhat in detail. But the similarities rather than the variations, whether in situation or in terms, are significant for present purposes.

struction. That view can be taken only if subdivision (3) is torn, formally and substantively, from its context in the statute and the problems with which these surrounding provisions, including §§ 268 and 270, undertook to deal. Thus to treat the provision not only would disregard the purposes of all these related provisions. It would convert subdivision (3), in its practical application, into an entirely independent tax measure, solely in the nature of an amendment to the general revenue legislation, and with the harshest retroactive tax consequences. This in fact seems to be the Government's view of the character of the legislation.[35] But that view wholly disregards the fact that neither §§ 268 and 270 nor § 276c (3) had any purpose originally or later merely to produce larger revenues or to operate exclusively as revenue measures. It is true they modified the preexisting revenue provisions, so far as they were applicable by their terms to do so. But this was a function of their primary object, which was to give relief to parties undertaking reorganization, not simply to impose new and different taxes upon them, much less to do so with respect to transactions long since settled

[35] Thus, in its brief the Government asserts, concerning petitioner's argument that §§ 268 and 270 apply only to "pending" proceedings: "This contention, although plausible, neglects the fact that Sections 268 and 270 are *essentially tax provisions*." (Emphasis added.) To this it may be answered that the sections, in origin, purpose and function were "essentially reorganization provisions" or, to put it differently, "essentially tax relief provisions." The Government's emphasis upon the sections as taxing measures ignores their primary object and function, which were to provide tax relief for parties undertaking reorganization and to prevent the clogging effects of the existing tax laws upon the operation of the Chandler Act. It also fails to note that retroactive application, in closed proceedings, could have no possible relation to the latter aim. The matter is one of emphasis. But it is not permissible, in construing provisions designed to encourage reorganization, by giving relief from taxes, to take them by such an emphasis as if they were framed exclusively for raising revenue.

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both as to taxes and as to reorganization. The objects of § 276c (3) cannot be ignored or distorted by thus stripping the provision, formally and substantively, from its statutory setting and the limitations this clearly imposes.

So far as respects the Government's concern over the possible discriminations which will be created between taxpayers by acceptance of petitioner's view, it is perhaps enough to say that some such discrimination is inevitable with whatever solution may be accepted; and we think what follows from applying §§ 268 and 270 only to "pending proceedings" not only is preferable to any other but is most consistent with the normal course of legislation. Retroactivity, even where permissible, is not favored, except upon the clearest mandate. It is the normal and usual function of legislation to discriminate between closed transactions and future ones or others pending but not completed. The discrimination which the Government fears will follow from acceptance of the taxpayer's view admittedly will result. But it is one consistent with the normal consequences of legislation in the drawing of a line between the past or the present and the future. It also was one necessary for Congress to make if it were not to make another or others equally bad or worse. The Government's concern in this case is not that the taxpayer will suffer harsher discrimination under petitioner's construction than under its own. It is rather that he will not suffer it. For, as interpreted by the Government,[36] §§ 268, 270 and 276c (3) applied in conjunction would be much more likely to produce new, and retroactive, tax burdens than tax benefits. The present case is an illustration. To this the Government might be entitled if the statutory mandate were clear. It cannot have that

[36] That is, with § 270 as operating independently of § 268, to require reduction in basis even though no actual tax benefit has been derived under 268.

advantage by dubious construction which ignores so much of the statute's setting, purpose and history. The letter does not require this. The consequences forbid it.

There remains for consideration the refusal of the Court of Appeals to reverse the findings of the Tax Court as to the original cost of the apartment building and the propriety of deductions claimed in 1937 for decorating expenses.[37] The Tax Court, in arriving at the cost of the building, refused to allow an alleged ten per cent contractor's commission paid to the debtor company's principal promoter and original sole shareholder because it was not convinced by petitioner's witness "that any amount was actually paid by the old company for contractor's services. . . ." 1 T. C. 163, 175. The Tax Court also concluded, after hearing vague testimony on two small deductions in 1937 for decorating and repairs, that these were not properly taken, because the same deductions for the same purposes had been claimed and allowed in 1936. These issues were well within the principle of the *Dobson* case. The Tax Court was upheld in these respects by the Court of Appeals and we accept these findings.

Accordingly, the judgments are reversed and the causes are remanded to the Circuit Court of Appeals for further proceedings in conformity with this opinion.

Reversed and remanded.

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[37] Cf. text at note 8 *supra*.

ORDER OF RAILWAY CONDUCTORS OF AMERICA ET AL. *v.* PENNSYLVANIA RAILROAD CO. ET AL.

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

No. 200. Argued November 15, 1944.—Decided December 11, 1944.

1. In the present posture of this case—no review having been sought of the judgment below, now final, so far as it dismissed petitioners' suit as to the National Mediation Board—remedies which would, directly or indirectly, set aside the Board's certification of representatives of employees under the Railway Labor Act are inappropriate. P. 171.

   It is unnecessary to decide, and the Court does not decide, whether the remedies sought would be available under other circumstances.

2. Upon the allegations of the complaint in this case—the National Mediation Board having certified a representative for collective bargaining, and there being no election pending or in the offing—petitioners are not entitled to an injunction against future coercion by a carrier over the designation of representatives of employees under the Railway Labor Act. P. 172.

Writ dismissed.

CERTIORARI, *post,* p. 688, to review the dismissal of an appeal, 141 F. 2d 366, from a judgment dismissing the complaint in a suit for a declaratory judgment and an injunction.

Mr. Rufus G. Poole, with whom *Messrs. William A. Clineburg* and *V. C. Shuttleworth* were on the brief, for petitioners.

Mr. John B. Prizer, with whom *Messrs. John Dickinson* and *R. Aubrey Bogley* were on the brief, for the Pennsylvania Railroad Co., and *Mr. Bernard M. Savage* for the Brotherhood of Railroad Trainmen, respondents.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

This is a suit for a declaratory judgment and for an injunction brought by the Order of Railway Conductors of America, an unincorporated association of railway employes, against the National Mediation Board, two of its members, the Pennsylvania Railroad, and a subsidiary railroad company, and the Brotherhood of Railroad Trainmen, an unincorporated association of railway employes. For the sake of brevity, the plaintiffs will be called "plaintiff"; the National Mediation Board and its members "board"; the two railroads "railroad," and the Brotherhood of Railroad Trainmen "trainmen."

The complaint, after stating the capacity of the parties, makes the following allegations, which, as will appear, are, for purposes of decision, to be taken as true. The plaintiff is, and for years has been, the accredited representative and bargaining agent for the craft of road conductors of the railroad, and the trainmen the representative and agent of road brakemen, yard conductors, yard brakemen, baggagemen and switchtenders. The two associations have jointly negotiated contracts with the railroad, and such a contract was jointly negotiated effective April 1, 1927, and remains in force with respect to road conductors, except as modified concerning rates of pay. April 18, 1941, the railroad notified the two unions of its desire to alter the contract and, pursuant to the notice, the accredited representatives of the parties met in conference to adjust classifications of conductors, rates of pay for them, and the control of the so-called "extra board" for conductors. Due to disagreements between the two unions and the concurrence by the railroad in the attitude of the trainmen, representatives of the conductors withdrew from the joint negotiation and served notice of withdrawal on the railroad. Two weeks thereafter the railroad and the

trainmen signed a new agreement covering the matters under consideration. Certain provisions agreed upon between the railroad and the trainmen were in violation of sections of the Railway Labor Act and, therefore, void, and the prior agreement between the conductors and the railroad remained in force, but, nevertheless, the railroad, since execution of the new agreement with the trainmen, has refused to bargain with the plaintiff.

The railroad and the trainmen conspired and confederated in an unlawful programme designed to embarrass, discredit, and weaken the plaintiff and strengthen the trainmen and thus to influence, coerce, and interfere with the craft of road conductors in their choice of a bargaining representative, and the railroad and trainmen were guilty of acts intended, and effective, to that end. September 23, 1942, the trainmen filed with the board a request to be certified as the bargaining representative of the craft of road conductors.

The plaintiff protested to the board against the holding of an election, charging that the railroad was interfering with, influencing, and coercing conductors by unlawfully bargaining with the trainmen with respect to road conductors' working conditions, in breach of the existing contract between the plaintiff and the railroad. The board illegally and wrongfully ruled that it had no jurisdiction to consider the charges, ordered an election to determine the bargaining representative for road conductors, held such election, and issued a certification based thereon that trainmen was the authorized representative of the road conductors, which election and certification are illegal, null and void, *inter alia,* because the board refused to perform its duties by investigating the alleged unfair labor practices.

Based on the foregoing allegations, the relief demanded was (1) that the election and certification be annulled, vacated, and set aside; (2) (a) that the board and its mem-

bers be restrained from holding any election for a bargaining representative of road conductors until it shall have considered the unfair labor practices and found that they do not amount to interference, influence or coercion, and that (b), in the alternative, the court declare the practices complained of constitute unlawful interference or coercion of the craft of road conductors, and restrain the board from holding an election until the board determines, after investigation and hearing, that such interference, influence or coercion has ceased; (3) (4) that it be declared that certain paragraphs of the agreement negotiated by the railroad and the trainmen were not negotiated with the accredited representative of the road conductors and were illegal infringements upon the exclusive right of the plaintiff, as accredited bargaining agent, to represent the conductors; (5) that it be declared that the plaintiff, as such representative, has the exclusive right to negotiate in collective bargaining for the conductors; (6) that the railroad be permanently enjoined from bargaining or making or maintaining agreements with trainmen, or any other union except the plaintiff, on behalf of road conductors so long as the plaintiff is the accredited representative of that class; (7) that the railroad be directed to negotiate and bargain with the plaintiff, as representative of the road conductors, so long as the plaintiff remains such representative; (8) that the railroad be enjoined from directly or indirectly coercing, influencing, or interfering with the craft of road conductors and their choice of a representative under the Railway Labor Act; (9) further relief.

After answers by the defendants the plaintiff moved for summary judgment on the pleadings and an affidavit which added nothing to the matters appearing in the pleadings. The District Court, though of opinion that there was no genuine issue, as to any material fact, presented under the motion for judgment, nevertheless de-

nied the motion and also dismissed the complaint, because it held that the facts alleged and admitted failed to establish a cause of action.

The plaintiff appealed to the Court of Appeals for the District of Columbia. Each appellee filed a motion to dismiss on the ground that the court lacked jurisdiction. The motions were grounded on the decisions in *Switchmen's Union* v. *Mediation Board,* 320 U. S. 297 and related cases,[1] which were announced after the appeal had been taken. The plaintiff answered the motions. The court, being of opinion that, under the rulings in the *Switchmen's Union* case and others decided at the same term,[2] it was without jurisdiction of the controversy, dismissed the appeal.[3]

The plaintiff applied to this court for certiorari to review the judgment dismissing the trainmen and the railroad. It did not seek review of the judgment granting the board's motion, and dismissing the board. That judgment is now final and beyond review here.

The plaintiff based its claims to relief on § 2 Third of the Railway Labor Act, which bans interference, influence, or coercion by either party in respect of designation of representatives by the other. The board, in denying jurisdiction, evidently relied on a portion of § 2 Ninth, dealing with its function to investigate disputes concerning representation of employes, to hold elections, and to certify the authorized representative, as limiting its jurisdiction to the actual conduct of the investigation and election and precluding it from investigating prior action by any of the parties. The railroad relied upon § 2 Tenth,

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[1] *General Committee* v. *M.-K.-T. R. Co.,* 320 U. S. 323; *General Committee* v. *Southern Pacific Co.,* 320 U. S. 338.

[2] The court cited in addition to the cases relied on by the defendants, *Brotherhood of Clerks* v. *United Transport Service Employees,* 320 U. S. 715.

[3] 141 F. 2d 366.

which it asserts creates remedies for violation of § 2 Third that are exclusive of all other remedies. The relevant portions of the sections thus relied on are quoted in the margin.[4] The contentions so made raise important questions, but we express no opinion on them since, for reasons about to be stated, we hold that we do not reach them within the framework of this case.

The first and second prayers for relief seek the annulment and cancellation of the board's certification and an injunction against board action. Plainly no such relief should be granted, if at all, in the absence of the board as a party. Because of the failure to appeal from the order dismissing it, the board is not, and never can be, a party to this cause, either here or in the courts below.

The third, fourth and fifth prayers in effect request a declaration that the plaintiff is the representative of the

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[4] Sec. 2 Third. "Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. . . ." 45 U. S. C. § 152 Third.

Sec. 2 Ninth. ". . . the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. . . ." 45 U. S. C. § 152 Ninth.

Sec. 2 Tenth. "The willful failure or refusal of any carrier, its officers or agents, to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor . . . It shall be the duty of any district attorney of the United States to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof . . ." 45 U. S. C. § 152 Tenth.

road conductors for bargaining notwithstanding the board's certification to the contrary. Since the election and certification could not be annulled without making the board a party, that result cannot be obtained by indirection by having the court substitute itself for the board, or declare, independently of the board, who is the accredited representative of the plaintiff.

The sixth, seventh, and eighth prayers have a similar object. They ask an injunction to prevent the railroad from bargaining with trainmen and a mandatory injunction that it shall bargain with the plaintiff as representative of road conductors. Such a decree would be in the teeth of the board's certification. To grant such a decree would seem to be in contravention of the *Switchmen's Union* case, *supra,* and in any event such action should not be taken in the absence of the board.

The eighth prayer seeks an injunction against future acts of the railroad coercive of the class of road conductors in choosing a bargaining representative. As we have seen, an election has been held, a representative chosen and the choice certified by the board. No election is now pending and there is no averment in the bill that an election is about to be held or that the railroad is about to commit any act in violation of the proscription of § 2 Third. All that the bill does is to recite what the railroad has heretofore done in advance of the election already held and the certification based upon it. No case is stated requiring the entry of the injunction prayed.

The arguments in this case covered a wide range and embodied suggestions as to possible remedies should the board act or refuse to act on charges of coercion antecedent to election and on possible remedies to deprive an employer guilty of influence and coercion of the benefits of the election and the board's certification.

We do not reach the question reserved in *General Committee* v. *M.-K.-T. R. Co.,* 320 U. S. 323, 336, note 12,

whether the courts may afford relief where the board refuses or fails to perform a function delegated to it by Congress, since the board is not a party. Neither the pleadings nor the prayers disclose a situation in which the question of the availability of such remedies antecedent to, or subsequent to, the election or certification need be discussed or decided.

The writ is accordingly dismissed.

MR. JUSTICE RUTLEDGE concurs in the result.

UNITED STATES *v.* CRESCENT AMUSEMENT CO. ET AL.

NOS. 17 AND 18. APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.*

Argued November 6, 7, 1944.—Decided December 11, 1944.

1. The motions in the District Court to amend the findings in this case raised questions of substance, and an appeal applied for and allowed while such motions were pending was premature and must be dismissed. P. 177.
2. That the District Court has allowed a premature appeal does not deprive it of jurisdiction to allow a subsequent and timely appeal. P. 177.
3. The Sherman Antitrust Act may apply to the business of exhibiting motion pictures, when a regular interchange of films in interstate commerce is involved. P. 180.
4. On appeal this Court considers only the alleged errors which have been included in the assignments of error. P. 180.
5. The evidence sustains the District Court's findings of a conspiracy of the defendant exhibitors of motion pictures, and certain officers thereof, unreasonably to restrain interstate trade and commerce in motion picture films and to monopolize the exhibition of films in the areas in question, in violation of § 1 and § 2 of the Sherman Act. P. 181.

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*Together with No. 19, *Crescent Amusement Co. et al.* v. *United States*, also on appeal from the District Court of the United States for the Middle District of Tennessee.

(a) There was ample evidence that the combination used its buying power for the purpose either of restricting the ability of its competitors to license films or of eliminating competition by acquiring the competitor's property or otherwise. P. 181.

(b) Whether the distributors were technically co-conspirators is immaterial, since action by a combination of exhibitors to obtain an agreement with a distributor whereby commerce with a competing exhibitor is suppressed or restrained is itself a conspiracy in restraint of trade and a conspiracy to monopolize a part of the trade or commerce among the States, each of which is prohibited by the Sherman Act. P. 183.

(c) Even if error be assumed in the introduction of certain evidence—consisting of letters or reports written by employees of certain of the major distributors to other employees or officers in the same company stating reasons why the distributor was discriminating against an independent and in favor of the defendants—there is sufficient other evidence to establish the restraints of trade and monopolistic practices, and the burden of showing prejudice has not been sustained. P. 184.

(d) Though the findings leave much to be desired in the light of the function of the trial court, they are supported by the evidence and must therefore be sustained. P. 184.

6. Upon consideration of objections to provisions of the decree in this case, *held:*

(1) Lest the public interest be not adequately protected, the decree should be revised so as to prohibit future acquisitions of a financial interest in additional theatres outside of Nashville "except after an affirmative showing that such acquisition will not unreasonably restrain competition." P. 185.

(2) Provisions of the decree enjoining the defendant exhibitors from making franchises with certain distributors "with the purpose and effect of maintaining their theatre monopolies and preventing independent theatres from competing with them" and from entering into "any similar combinations and conspiracies having similar purposes and objects"; from combining, in licensing films, their closed towns with their competitive situations "for the purpose and with the effect of compelling the major distributors to license films on a non-competitive basis in competitive situations and to discriminate" against the independents; and enjoining each defendant exhibitor "from conditioning the licensing of films in any competitive situation (outside Nashville) upon the licensing of films in any other theatre situation"—are sustained. P. 187.

(a) The franchise agreements and the licensing system were the chief instruments of the unlawful practices, and it was the duty of the court to enjoin their continuance and resumption. P. 188.

(b) These provisions of the decree are not unenforceable as too vague and general. P. 188.

(3) The divestiture provisions of the decree—requiring each corporate exhibitor to divest itself of the ownership of any stock or other interest in any other corporate defendant or affiliated corporation, and enjoining it from acquiring any interest in those companies; requiring one of the individual defendants to resign as an officer of any corporation (except Crescent) which is affiliated with any defendant exhibitor and enjoining him from acquiring control over any such affiliate by acting as officer or otherwise; requiring another of the individual defendants to resign as an officer of the affiliates (except one corporation of his choice) and enjoining him from acquiring any control over the others by acting as an officer or otherwise; and allowing a year from the date of the decree for completion of the divestiture—are sustained. P. 189.

(a) In this type of Sherman Act case, the Government should not be confined to an injunction against further violations; dissolution of the combination may be ordered where the creation of the combination is itself the violation. P. 189.

(b) Those who violate the Act may not reap the benefits of their violations and avoid an undoing of their unlawful project on the plea of hardship or inconvenience. P. 189.

(c) The fact that minority stockholders of the affiliated companies are not parties to the suit does not bar a separation of the companies. P. 190.

(d) The requirement that two of the defendant corporate exhibitors sell their respective half-interests in two companies which were not made parties to the proceedings is sustained, since it does not appear on this record that any legal right of any other stockholder would be affected. P. 190.

No. 17 dismissed.

No. 18 reversed.

No. 19 affirmed.

DIRECT APPEALS under the Expediting Act from a decree against defendants in a civil suit under the Sherman Antitrust Act. Two of the appeals were taken by the Government, the other by certain of the defendants.

Assistant Attorney General Berge and *Mr. Robert L. Wright,* with whom *Solicitor General Fahy* and *Messrs. Charles H. Weston* and *Chester T. Lane* were on the brief, for the United States.

Mr. William Waller, with whom *Mr. Geo. H. Armistead, Jr.* was on the brief, for appellees in Nos. 17 and 18 and appellants in No. 19.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The United States brought this civil suit against nine affiliated companies (whom we will call the exhibitors) operating motion picture theatres in some 70 small towns in Alabama, Arkansas, Kentucky, Mississippi, and Tennessee; against certain officers of these companies; and against eight major distributors of motion picture films, charging them with a conspiracy unreasonably to restrain interstate trade and commerce in motion-picture films and to monopolize the exhibition of films in this area in violation of § 1 and § 2 of the Sherman Act. 26 Stat. 209, 15 U. S. C. §§ 1, 2. The suit was dismissed against five of the distributors on motion of the United States.[1] Of the other three the Court found that only one had violated the Sherman Act. The court also found that seven of the exhibitors and three of the individual defendants had violated the Sherman Act substantially as charged. It entered a decree against them. From the judgment en-

[1] This was done after a consent decree had been entered against five of the major distributors in *United States* v. *Paramount Pictures, Inc.* This dismissal did not eliminate the charge that these distributors had conspired with the defendant exhibitors to restrain and monopolize trade. And some of the distributors, though dismissed from the case, were found to be co-conspirators with the exhibitors in making franchise agreements and in licensing films for the purpose of maintaining the exhibitors' theatre monopolies and of preventing the independents from competing.

tered the United States, six of the exhibitors, and three individual defendants appeal directly to this Court under § 2 of the Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. § 29 and § 238 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 936, 938, 28 U. S. C. § 345.

I. Before we come to the merits there is a preliminary question as to whether the appeal of the United States in No. 17 is premature. The District Court entered a final judgment in this case on May 17, 1943. On the sixtieth day after judgment there were motions pending to amend the findings. On that day the appeal was applied for and allowed. On August 30, 1943, the court ruled on the motions to amend its findings. Within sixty days thereafter the United States applied for the appeal in No. 18 and it was allowed. The appeal in No. 17 was filed here at the same time as that in No. 18. The appellees move to dismiss No. 17 on the ground that it was premature and to dismiss No. 18 on the ground that the District Court by allowing the first appeal lost jurisdiction of the cause and was without power to allow a further appeal. We think the motion to dismiss the appeal in No. 17 must be granted and the motion to dismiss the appeal in No. 18 denied.

The motion to amend the findings tolled the time to appeal if it was not addressed to "mere matters of form but raised questions of substance," e. g., if it sought a "reconsideration of certain basic findings of fact and the alteration of the conclusions of the court." *Leishman* v. *Associated Electric Co.*, 318 U. S. 203, 205. An examination of the motion makes plain that matters of substance were raised. The appeal in No. 17 was accordingly premature. *Zimmern* v. *United States*, 298 U. S. 167. But it does not follow that the District Court had no jurisdiction to allow the appeal in No. 18. An appeal can hardly be premature (and therefore a nullity) here and yet not

premature (and therefore binding) below. Under these circumstances an appellant may rely upon the later appeal (*Ohio Public Service Co.* v. *Fritz,* 274 U. S. 12) and not run the risk of losing an appellate review on the appeal first allowed. Cf. *Wilentz* v. *Sovereign Camp,* 306 U. S. 573.

II. We turn to the merits. Crescent, the principal exhibitor,[2] owns 50% of the stock of Cumberland and Lyric. The majority of Crescent's stock is owned by defendant Sudekum, by certain of his relatives, and by defendants Stengel and Baulch. Prior to 1937 Crescent owned almost two-thirds of the stock of Muscle Shoals; since that time Muscle Shoals was run as a partnership in which Sudekum's wife had a half-interest. Defendant Stengel, Sudekum's son-in-law, is the record holder of all of Rockwood's stock. Rockwood owns 50% of the stock of Cherokee and Kentucky and of five other theatre corporations. Rockwood was operated as a "virtual branch" of the Crescent business under the immediate supervision of Stengel. Sudekum is president of Crescent, Cumberland, and Lyric; Stengel is an officer and director of Kentucky and Cherokee. Sudekum was paid $200 a week by Cherokee "for his advice and assistance in running the business." Each of these companies was an exhibitor operating motion picture theatres.

In the five-year period ended in August 1939 when this bill was filed the exhibitors experienced a rather rapid growth—in the number of towns where their theatres were operated; in the number of towns where they operated without competition; in their earnings and surplus. The United States claims that that growth was the prod-

[2] Crescent is used for Crescent Amusement Co.; Cumberland for Cumberland Amusement Co.; Lyric for Lyric Amusement Co., Inc.; Cherokee for Cherokee Amusements, Inc.; Kentucky for Kentucky Amusement Co., Inc.; Muscle Shoals for Muscle Shoals Theatres; and Rockwood for Rockwood Amusement Co.

uct of restraints of trade in violation of § 1 of the Sherman Act and of monopolistic practices in violation of § 2.

The District Court found that each of the seven exhibitors had violated the Sherman Act by

"A. Creating and maintaining an unreasonable monopoly of the business of operating theatres in the towns of Tennessee, Northern Alabama, and Central and Western Kentucky, in which each has theatres.

"B. Combining its closed towns with its competitive situations in licensing films for the purpose and with the effect of compelling the major distributors to license films on a non-competitive basis in competitive situations and to discriminate against its independent competitors in licensing films.

"C. Coercing or attempting to coerce independent operators into selling out to it, or to abandon plans to compete with it by predatory practices."

The court found that these violations were effected (a) by combining with each other and with certain major distributors in making franchises, i. e. term contracts for the licensing of films, with the purpose and effect of maintaining their theatre monopolies and preventing independents from competing with them; (b) by combining with each other for the purpose of dividing the territory in which theatres might be operated by any of them; (c) by combining with each other for the purpose and with the effect of eliminating, suppressing, and preventing independents from competing in the territory in which each operated; and (d) by combining with each other and with certain major distributors in licensing films for the purpose and with the effect of maintaining their theatre monopolies and preventing independents from competing with them. Three of the individual defendants were found to have participated actively in these violations.

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Interstate commerce was found to have been employed in consummating the conspiracy. In the selling season each year the distributor's salesmen solicit contracts from the exhibitors for the distributor's approval by the home office. As the films are released for exhibition, prints are sent to the numerous exchanges located in various states and delivered by them to the exhibitors in their respective areas.[3] The exhibitor ordinarily returns the print to the distributor's exchange, from which it is supplied to other theatres. The findings are wholly adequate to establish that the business of the exhibitors involves a regular interchange of films in interstate commerce. As we shall see, that course of business may be sufficient to make the Sherman Act applicable to the business of exhibiting motion pictures. *Interstate Circuit* v. *United States,* 306 U. S. 208. Cf. *Binderup* v. *Pathe Exchange,* 263 U. S. 291. The crucial issues in the present case relate to the evidence and the appropriateness of the decree.

III. The defendants assert that the United States failed to prove the allegations of the complaint as amplified by the bill of particulars. But no such error was assigned. The only assignments on this phase of the case relate to subsidiary findings which are parts of sixteen of the one hundred and eighty-seven findings of fact contained in one hundred and twenty printed pages. Hence they are the only ones we will consider. *Seaboard Air Line R. Co.* v. *Watson,* 287 U. S. 86, 91; *E. R. Squibb & Sons* v. *Mallinckrodt Chemical Works,* 293 U. S. 190; Rule 9, 275 U. S. 600. We have examined them and conclude that they do not constitute reversible error. If any modifications were made in these subsidiary findings they would not be basic or essential ones.

[3] The defendant exhibitors during the five-year period preceding the filing of this suit paid about 90% of their total film rental to the eight major distributors.

The crux of the government's case was the use of the buying power of the combination for the purpose of eliminating competition with the exhibitors and acquiring a monopoly in the areas in question. There was ample evidence that the combination used its buying power for the purpose either of restricting the ability of its competitors to license films or of eliminating competition by acquiring the competitor's property or otherwise. For example, the defendants would insist that a distributor give them monopoly rights in towns where they had competition or else defendants would not give the distributor any business in the closed towns where they had no competition. The competitor not being able to renew his contract for films would frequently go out of business or come to terms and sell out to the combination with an agreement not to compete for a term of years. The mere threat would at times be sufficient and cause the competitor to sell out to the combination "because his mule was scared." In that way some of the affiliates were born. In summarizing various deals of this character the District Court said, "Each of these agreements not to compete with Crescent or its affiliates in other towns extended far beyond the protection of the business being sold, and demonstrated a clear intention to monopolize theatre operation wherever they or their affiliates secured a foothold." [4]

[4] The expansion of the combination during this period was summarized by the District Court as follows:

"On August 11, 1934, the defendant exhibitors and their affiliates operated in thirty-two towns in Tennessee (excluding Nashville), Kentucky, and Alabama, in six of which they had competition. On August 11, 1939, the defendant exhibitors and their affiliates, with the exception of Strand, heretofore dismissed as a defendant, operated in seventy-eight towns in Tennessee (excluding Nashville), Kentucky, Alabama, and North Carolina, in five of which they had competition, and the only towns in which they have competition today outside of Nashville, are Gadsden, Alabama, Harriman, Gallatin and McMinn-

The same type of warfare was waged with franchise contracts with certain major distributors covering a term of years. These gave the defendants important exclusive film-licensing agreements. Their details varied. But generally they gave the defendant exhibitors the right to first-run exhibition of all feature pictures which they chose to select in their designated towns. Clearances over the same or nearby towns were provided, i. e. a time lag was established between the showing by the defendant exhibitors and a subsequent showing by others. The opportunity of competitors to obtain feature pictures for subsequent runs was further curtailed by repeat provisions

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ville, Tennessee, and Franklin, Kentucky. In two of these towns—Gadsden, Alabama, and Harriman, Tennessee—the independent theatres have opened since the filing of this suit and two more—Franklin, Kentucky, and Gallatin, Tennessee—are towns which Crescent entered less than two years before the filing of this suit.

"Of the forty-five towns in Tennessee listed in the 1940 census as having populations between 2,500 and 10,000, Crescent and its affiliates now operate theatres in all but nine. The independents operating in three of those nine towns have already been approached by Sudekum emissaries with the suggestion that they sell to one of the defendant exhibitors."

Their financial growth was found to be "out of all proportion" to their physical expansion:

"During the five-year period immediately preceding the suit, the Crescent and Rockwood companies each experienced a phenomenal growth in earnings and surplus which was out of all proportion to the increase in gross receipts and gross assets resulting from physical expansion of the business and improving general economic conditions. During the five-year fiscal period from June 30, 1934 to June 30, 1939, Crescent's total assets were less than doubled, but its surplus was increased thirty times. During the last fiscal year of said period its gross receipts were less than twice the amount of its gross receipts for the first fiscal year of said period, but its net profits (exclusive of dividends received) were more than five times those of the first year. During the five-year period, its net earnings (exclusive of dividends received) averaged about 35 per cent per annum, on its capitalization."

which gave the defendant exhibitors the option of showing the pictures in their theatres a second time. In reviewing one of these franchise agreements the District Court concluded, "The repeat-run clause in the franchise was completely effective in preventing the sale of a second-run of any Paramount features to any opposition theatre."

We are now told, however, that the independents were eliminated by the normal processes of competition; that their theatres were less attractive; that their service was inferior; that they were not as efficient businessmen as the defendants. We may assume that if a single exhibitor launched such a plan of economic warfare he would not run afoul of the Sherman Act.[5] But the vice of this undertaking was the combination of several exhibitors in a plan of concerted action. They had unity of purpose and unity of action. They pooled their buying power for a common end. It will not do to analogize this to a case where purchasing power is pooled so that the buyers may obtain more favorable terms. The plan here was to crush competition and to build a circuit for the exhibitors. The District Court found that some of the distributors were co-conspirators on certain phases of the program. But we can put that circumstance to one side and not stop to inquire whether the findings are adequate on that phase of the case. For it is immaterial whether the distributors technically were or were not members of the conspiracy. The showing of motion pictures is of course a local affair. But action by a combination of exhibitors to obtain an agreement with a distributor whereby commerce with a competing exhibitor is suppressed or restrained is a conspiracy in restraint of trade and a conspiracy to monopo-

[5] A union of the exhibitor with a distributor in such a program would of course constitute a conspiracy under the Sherman Act as held in *Interstate Circuit* v. *United States*, 306 U. S. 208.

lize a part of the trade or commerce among the States, each of which is prohibited by the Sherman Act. And as we have said, the course of business which involves a regular exchange of films in interstate commerce is adequate to bring the exhibitors within the reach of the Sherman Act. *Interstate Circuit* v. *United States, supra.*

The exhibitors, however, claim that the findings against them on the facts must fall because of improper evidence. The evidence to which this objection is directed consists of letters or reports written by employees of certain of the major distributors to other employees or officers in the same company stating reasons why the distributor was discriminating against an independent in favor of the defendants. The United States asserts that these letters or reports were declarations of one conspirator in furtherance of the common objective and therefore admissible as evidence against all under the rule of *Hitchman Coal & Coke Co.* v. *Mitchell,* 245 U. S. 229, 249. And it is argued that it makes no difference that these distributors were dismissed out of the case (*Delaney* v. *United States,* 263 U. S. 586, 590) since they were charged with being co-conspirators and since the findings are with certain exceptions adequate to support the charge. We do not come to that question. The other evidence established the position of the distributors and their relations to the theatres involved, what the distributors in fact did, the combination of the defendants, the character and extent of their buying power, and how it was in fact used. This other evidence was sufficient to establish the restraints of trade and monopolistic practices; the purpose, character, and extent of the combination are inferable from it alone. Thus even if error be assumed in the introduction of the letters and reports, the burden of showing prejudice has not been sustained.

The defendants finally object to the findings on the ground that they were mainly taken verbatim from the

government's brief. The findings leave much to be desired in light of the function of the trial court. See *United States* v. *Forness,* 125 F. 2d 928, 942–943. But they are nonetheless the findings of the District Court. And they must stand or fall depending on whether they are supported by evidence. We think they are.

IV. The major controversy here has turned on the provisions of the decree.

A. *Objections of the United States.* The United States objects to the provision of the decree that no defendant exhibitor shall acquire a financial interest in any additional theatre outside Nashville in any town where there already is a theatre "unless the owner of such theatre should voluntarily offer to sell same to either of the exhibitor defendants, and when none of said defendants, their officers, agents or servants are guilty of any of the acts or practices prohibited by paragraph nine (9) hereof." Paragraph 9 referred to enjoins the defendants "from coercing or attempting to coerce independent operators into selling out to it, or to abandon plans to compete with it by predatory practices." It asks that there be substituted for that provision one which the District Court had earlier approved restraining such acquisitions "except after an affirmative showing that such acquisition will not unreasonably restrain competition."

The Court at times has rather freely modified decrees in Sherman Act cases where it approved the conclusions of the District Court as to the nature and character of the violations. *Standard Oil Co.* v. *United States,* 221 U. S. 1, 78–82. *United States* v. *American Tobacco Co.,* 221 U. S. 106, 184–188. We recognize however that there is a wide range of discretion in the District Court to mould the decree to the exigencies of the particular case; and where the findings of violations are sustained, we will not direct a recasting of the decree except on a showing of abuse of discretion. See *Ethyl Gasoline Corp.* v. *United*

States, 309 U. S. 436, 461; *United States* v. *Bausch & Lomb Co.,* 321 U. S. 707, 725, 728. We think this is a case where we should act lest the public interest not be adequately protected by the decree as cast.

The generality of this provision of the decree bids fair to call for a retrial of a Sherman Act case any time a citation for contempt is issued. The crucial facts in each case would be subtle ones as is usually true where purpose and motive are at issue. This type of provision is often the only practical remedy against continuation of illegal trade practices. But we are dealing here with a situation which permits of a more select treatment. The growth of this combine has been the result of predatory practices condemned by the Sherman Act. The object of the conspiracy was the destruction or absorption of competitors. It was successful in that endeavor. The pattern of past conduct is not easily forsaken. Where the proclivity for unlawful activity has been as manifest as here, the decree should operate as an effective deterrent to a repetition of the unlawful conduct and yet not stand as a barrier to healthy growth on a competitive basis. The acquisition of a competing theatre terminates at once its competition. Punishment for contempt does not restore the competition which has been eliminated. And where businesses have been merged or purchased and closed out it is commonly impossible to turn back the clock. Moreover if the District Court were to supervise future acquisitions in this case, it would not be undertaking an onerous and absorbing administrative burden. The burden would not seem more onerous than under the alternative provision where in substance the issue would be violation of the Sherman Act *vel non.*

These considerations impel us to conclude that the decree should be revised so as to prohibit future acquisitions of a financial interest in additional theatres outside of

Nashville "except after an affirmative showing that such acquisition will not unreasonably restrain competition."

B. *Objections of the Defendants.* (1) The decree enjoins the defendant exhibitors from making franchises with certain distributors "with the purpose and effect of maintaining their theatre monopolies and preventing independent theatres from competing with them" and from entering into "any similar combinations and conspiracies having similar purposes and objects." The decree also enjoins them from combining, in licensing films, their closed towns with their competitive situations "for the purpose and with the effect of compelling the major distributors to license films on a non-competitive basis in competitive situations and to discriminate" against the independents. The decree also enjoins each defendant exhibitor "from conditioning the licensing of films in any competitive situation (outside Nashville) upon the licensing of films in any other theatre situation."

It is argued that these provisions will aggrandize the distributors at the expense of the exhibitors, that if such measures are taken they should be taken against the distributors, that they deprive the exhibitors of group purchasing power, that the franchise agreements are normal and necessary both for distributors and exhibitors, and that these provisions of the decree are so vague and general as to greatly burden the conduct of these businesses.

It is not for us, however, to pick and choose between competing business and economic theories in applying this law. Congress has made that choice. It has declared that the rule of trade and commerce should be competition, not combination. *United States* v. *Trenton Potteries Co.*, 273 U. S. 392, 397; *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U. S. 457, 465. Since Congress has made that choice, we cannot refuse to sustain a decree because by some other measure of the public

good the result may not seem desirable. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 221–222. The duty of the Court in these cases is "to frame its decree so as to suppress the unlawful practices and to take such reasonable measures as would preclude their revival." *Ethyl Gasoline Corp.* v. *United States, supra,* p. 461. The chief weapons used by this combination in its unlawful warfare were the franchise agreements and the licensing system. The fact that those instruments could be lawfully used does not mean that the defendants may leave the court unfettered. Civil suits under the Sherman Act would indeed be idle gestures if the injunction did not run against the continuance or resumption of the unlawful practice. And it is hard to see how the decree could be made less general and more specific. If it is a burden which cannot be lightened by application to the court for exercise of the power which it has reserved over the decree, it is a burden which those who have violated the Act must carry. And the fact that there may be somewhere in the background a greater conspiracy from which flow consequences more serious than we have here is no warrant for a refusal to deal with the lesser one which is before us.

(2) Serious complaint is made of the divestiture provisions of the decree. It requires each corporate exhibitor to divest itself of the ownership of any stock or other interest in any other corporate defendant or affiliated corporation,[6] and enjoins it from acquiring any interest in those companies. Sudekum is required to resign as an officer of any corporation (except Crescent) which is affiliated with any defendant exhibitor and he is enjoined from acquiring control over any such affiliate (except Crescent) by acting as officer or otherwise. Stengel is required to resign as

[6] Defined in the decree to exclude certain companies.

officer of the affiliates (except one corporation of his choice) and is enjoined from acquiring any control over the others by acting as an officer or otherwise. A year from the date of entry of the decree is allowed for completing this divestiture.

It is said that these provisions are inequitable and harsh income tax wise, that they exceed any reasonable requirement for the prevention of future violations, and that they are therefore punitive.

The Court has quite consistently recognized in this type of Sherman Act case that the government should not be confined to an injunction against further violations. Dissolution of the combination will be ordered where the creation of the combination is itself the violation. See *Northern Securities Co.* v. *United States,* 193 U. S. 197, 354–360; *Standard Oil Co.* v. *United States, supra; United States* v. *American Tobacco Co., supra,* pp. 186–188; *United States* v. *Union Pacific R. Co.,* 226 U. S. 61, 97; *United States* v. *Reading Co.,* 253 U. S. 26, 63; *United States* v. *Lehigh Valley R. Co.,* 254 U. S. 255; *United States* v. *Southern Pacific Co.,* 259 U. S. 214; *United States* v. *Corn Products Refining Co.,* 234 F. 964, 1018. Those who violate the Act may not reap the benefits of their violations and avoid an undoing of their unlawful project on the plea of hardship or inconvenience. That principle is adequate here to justify divestiture of all interest in some of the affiliates since their acquisition was part of the fruits of the conspiracy. But the relief need not, and under these facts should not, be so restricted. The fact that the companies were affiliated induced joint action and agreement. Common control was one of the instruments in bringing about unity of purpose and unity of action and in making the conspiracy effective. If that affiliation continues, there will be tempting opportunity for these exhibitors to continue to act in combination

against the independents. The proclivity in the past to use that affiliation for an unlawful end warrants effective assurance that no such opportunity will be available in the future. Hence we do not think the District Court abused its discretion in failing to limit the relief to an injunction against future violations. There is no reason why the protection of the public interest should depend solely on that somewhat cumbersome procedure when another effective one is available.

The fact that minority stockholders of the affiliated companies are not parties to the suit is no legal barrier to a separation of the companies. *United States* v. *American Tobacco Co., supra.* No legal right of one stockholder is normally affected if another stockholder is required to sell his stock. And no exception to that rule has been shown to exist here. Only business inconvenience and hardship are asserted. It is said, however, that the decree requires Rockwood and Cherokee (two defendant exhibitors) to sell their respective half-interests in two companies which were not made parties to the proceedings. The argument is that the latter companies are indispensable parties if such divestiture is required. Reliance is placed on *Minnesota* v. *Northern Securities Co.*, 184 U. S. 199. In that case Minnesota brought an original action in this Court alleging that the acquisition by Northern Securities Co. of the majority stock of two railroad companies effected a consolidation of the railroads in violation of Minnesota law. Minnesota asked, among other things, for an injunction against Northern Securities Co. voting the stock of those companies. The Court held that the two railroad companies were indispensable parties; and since the jurisdiction of the Court would have been defeated if they were joined, leave to file the bill was denied. Denial of the right of a majority stockholder to vote his stock would deprive the corporation of a board of direc-

tors elected in accordance with state law. If such a step were taken, the corporation should be a party so that all corporate interests might be represented. *Minnesota* v. *Northern Securities Co.* goes no farther than that. Here there is no showing of any complication of that order. If such a complication appeared, the District Court could bring in the two affiliates as parties in order to effectuate the decree. *United States* v. *Southern Pacific Co., supra,* p. 241. But on this record it does not appear that if Rockwood and Cherokee are required to sell their half-interests in those companies any legal right of any other stockholder would be affected. Cf. *Morgan* v. *Struthers,* 131 U. S. 246.

We have considered the other contentions and find them without merit.

The appeal in No. 17 is dismissed.

The judgment in No. 18 is reversed.

The judgment in No. 19 is affirmed.

It is so ordered.

MR. JUSTICE FRANKFURTER, MR. JUSTICE MURPHY, and MR. JUSTICE JACKSON took no part in the consideration or decision of these cases.

MR. JUSTICE ROBERTS dissents.

STEELE *v.* LOUISVILLE & NASHVILLE RAILROAD CO. ET AL.

CERTIORARI TO THE SUPREME COURT OF ALABAMA.

No. 45. Argued November 14, 15, 1944.—Decided December 18, 1944.

1. The Railway Labor Act imposes on a labor organization, acting by authority of the statute as the exclusive bargaining representative of a craft or class of railway employees, the duty to represent all the employees in the craft without discrimination because of their race, and the courts have jurisdiction to protect the minority of the craft or class from the violation of such obligation. P. 199.
2. The Railway Labor Act imposes on the statutory representative of a craft at least as exacting a duty to protect equally the interests of a member of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates. The Act confers on the bargaining representative powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents, but it also imposes on the representative a corresponding duty. P. 202.
3. So long as a labor union assumes to act as the statutory representative of a craft, it cannot rightly refuse to perform the duty, which is inseparable from the power of representation conferred upon it, to represent the entire membership of the craft. While the statute does not deny to such a bargaining labor organization the right to determine eligibility to its membership, it does require the union, in collective bargaining and in making contracts with the carrier, to represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith. Wherever necessary to that end, the union is required to consider requests of non-union members of the craft and expressions of their views with respect to collective bargaining with the employer and to give to them notice of and opportunity for hearing upon its proposed action. P. 204.
4. The right asserted by the petitioner, to a remedy for breach of the statutory duty of the bargaining representative to represent and act for the members of a craft without discrimination against Negroes solely because of their race, is claimed under the Constitution and a statute of the United States; and the adverse decision of the highest court of the State is reviewable here under § 237 (b) of the Judicial Code. P. 204.

5. The petitioner here has no available administrative remedy under the Railway Labor Act, and the bill of complaint states a cause of action entitling him to relief. P. 205.
6. The Railway Labor Act contemplates resort to the usual judicial remedies of injunction and award of damages when appropriate for breach of the duty imposed by the statute on a union representative of a craft to represent the interests of all its members. P. 207.

245 Ala. 113, 16 So. 2d 416, reversed.

CERTIORARI, 322 U. S. 722, to review the affirmance of a judgment sustaining a demurrer to a complaint asserting a federal right.

Mr. Charles H. Houston, with whom *Mr. Arthur D. Shores* was on the brief, for petitioner.

Mr. Charles H. Eyster, with whom *Mr. White E. Gibson* was on the brief, for the Louisville & Nashville Railroad Co.; and *Mr. James A. Simpson,* with whom *Messrs. Harold C. Heiss, Russell B. Day,* and *John W. Lapsley* were on the brief, for the Brotherhood of Locomotive Firemen & Enginemen et al., respondents.

Solicitor General Fahy, Messrs. Robert L. Stern, Alvin J. Rockwell, Joseph B. Robison, Frank Donner, Marcel Mallet-Provost and *Miss Ruth Weyand* filed a brief on behalf of the United States; *Messrs. Thurgood Marshall* and *William H. Hastie* on behalf of the National Association for the Advancement of Colored People; and *Messrs. Edgar Watkins, John D. Miller, Arthur Garfield Hays, R. Beverley Herbert,* and *T. Pope Shepherd* on behalf of the American Civil Liberties Union, as *amici curiae,* in support of petitioner.

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

The question is whether the Railway Labor Act, 48 Stat. 1185, 45 U. S. C. §§ 151 *et seq.*, imposes on a labor organi-

zation, acting by authority of the statute as the exclusive bargaining representative of a craft or class of railway employees, the duty to represent all the employees in the craft without discrimination because of their race, and, if so, whether the courts have jurisdiction to protect the minority of the craft or class from the violation of such obligation.

The issue is raised by demurrer to the substituted amended bill of complaint filed by petitioner, a locomotive fireman, in a suit brought in the Alabama Circuit Court against his employer, the Louisville & Nashville Railroad Company, the Brotherhood of Locomotive Firemen and Enginemen, an unincorporated labor organization, and certain individuals representing the Brotherhood. The Circuit Court sustained the demurrer, and the Supreme Court of Alabama affirmed. 245 Ala. 113, 16 So. 2d 416. We granted certiorari, 322 U. S. 722, the question presented being one of importance in the administration of the Railway Labor Act.

The allegations of the bill of complaint, so far as now material, are as follows: Petitioner, a Negro, is a locomotive fireman in the employ of respondent Railroad, suing on his own behalf and that of his fellow employees who, like petitioner, are Negro firemen employed by the Railroad. Respondent Brotherhood, a labor organization, is, as provided under § 2, Fourth of the Railway Labor Act, the exclusive bargaining representative of the craft of firemen employed by the Railroad and is recognized as such by it and the members of the craft. The majority of the firemen employed by the Railroad are white and are members of the Brotherhood, but a substantial minority are Negroes who, by the constitution and ritual of the Brotherhood, are excluded from its membership. As the membership of the Brotherhood constitutes a majority of all firemen employed on respondent Railroad, and as under § 2, Fourth the members because they are the ma-

jority have the right to choose and have chosen the Brotherhood to represent the craft, petitioner and other Negro firemen on the road have been required to accept the Brotherhood as their representative for the purposes of the Act.

On March 28, 1940, the Brotherhood, purporting to act as representative of the entire craft of firemen, without informing the Negro firemen or giving them opportunity to be heard, served a notice on respondent Railroad and on twenty other railroads operating principally in the southeastern part of the United States. The notice announced the Brotherhood's desire to amend the existing collective bargaining agreement in such manner as ultimately to exclude all Negro firemen from the service. By established practice on the several railroads so notified only white firemen can be promoted to serve as engineers, and the notice proposed that only "promotable," i. e. white, men should be employed as firemen or assigned to new runs or jobs or permanent vacancies in established runs or jobs.

On February 18, 1941, the railroads and the Brotherhood, as representative of the craft, entered into a new agreement which provided that not more than 50% of the firemen in each class of service in each seniority district of a carrier should be Negroes; that until such percentage should be reached all new runs and all vacancies should be filled by white men; and that the agreement did not sanction the employment of Negroes in any seniority district in which they were not working. The agreement reserved the right of the Brotherhood to negotiate for further restrictions on the employment of Negro firemen on the individual railroads. On May 12, 1941, the Brotherhood entered into a supplemental agreement with respondent Railroad further controlling the seniority rights of Negro firemen and restricting their employment. The Negro firemen were not given notice or opportunity to be

heard with respect to either of these agreements, which were put into effect before their existence was disclosed to the Negro firemen.

Until April 8, 1941, petitioner was in a "passenger pool," to which one white and five Negro firemen were assigned. These jobs were highly desirable in point of wages, hours and other considerations. Petitioner had performed and was performing his work satisfactorily. Following a reduction in the mileage covered by the pool, all jobs in the pool were, about April 1, 1941, declared vacant. The Brotherhood and the Railroad, acting under the agreement, disqualified all the Negro firemen and replaced them with four white men, members of the Brotherhood, all junior in seniority to petitioner and no more competent or worthy. As a consequence petitioner was deprived of employment for sixteen days and then was assigned to more arduous, longer, and less remunerative work in local freight service. In conformity to the agreement, he was later replaced by a Brotherhood member junior to him, and assigned work on a switch engine, which was still harder and less remunerative, until January 3, 1942. On that date, after the bill of complaint in the present suit had been filed, he was reassigned to passenger service.

Protests and appeals of petitioner and his fellow Negro firemen, addressed to the Railroad and the Brotherhood, in an effort to secure relief and redress, have been ignored. Respondents have expressed their intention to enforce the agreement of February 18, 1941 and its subsequent modifications. The Brotherhood has acted and asserts the right to act as exclusive bargaining representative of the firemen's craft. It is alleged that in that capacity it is under an obligation and duty imposed by the Act to represent the Negro firemen impartially and in good faith; but instead, in its notice to and contracts with the railroads, it has been hostile and disloyal to the Negro firemen, has deliberately discriminated against them, and has sought

to deprive them of their seniority rights and to drive them out of employment in their craft, all in order to create a monopoly of employment for Brotherhood members.

The bill of complaint asks for discovery of the manner in which the agreements have been applied and in other respects; for an injunction against enforcement of the agreements made between the Railroad and the Brotherhood; for an injunction against the Brotherhood and its agents from purporting to act as representative of petitioner and others similarly situated under the Railway Labor Act, so long as the discrimination continues, and so long as it refuses to give them notice and hearing with respect to proposals affecting their interests; for a declaratory judgment as to their rights; and for an award of damages against the Brotherhood for its wrongful conduct.

The Supreme Court of Alabama took jurisdiction of the cause but held on the merits that petitioner's complaint stated no cause of action.[1] It pointed out that the Act places a mandatory duty on the Railroad to treat with the Brotherhood as the exclusive representative of the employees in a craft, imposes heavy criminal penalties for willful failure to comply with its command, and provides

[1] The respondents urge that the Circuit Court sustained their demurrers on the ground that the suit could not be maintained against the Brotherhood, an unincorporated association, since by Alabama statute such an association cannot be sued unless the action lies against all its members individually, and on several other state-law grounds. They argue accordingly that the judgment of affirmance of the state Supreme Court may be rested on an adequate non-federal ground. As that court specifically rested its decision on the sole ground that the Railway Labor Act places no duty upon the Brotherhood to protect petitioner and other Negro firemen from the alleged discriminatory treatment, the judgment rests wholly on a federal ground, to which we confine our review. *Grayson* v. *Harris*, 267 U. S. 352, 358; *International Steel Co.* v. *National Surety Co.*, 297 U. S. 657, 666; *Indiana ex rel. Anderson* v. *Brand*, 303 U. S. 95, 98, 99 and cases cited.

that the majority of any craft shall have the right to determine who shall be the representative of the class for collective bargaining with the employer, see *Virginian R. Co.* v. *System Federation,* 300 U. S. 515, 545. It thought that the Brotherhood was empowered by the statute to enter into the agreement of February 18, 1941, and that by virtue of the statute the Brotherhood has power by agreement with the Railroad both to create the seniority rights of petitioner and his fellow Negro employees and to destroy them. It construed the statute, not as creating the relationship of principal and agent between the members of the craft and the Brotherhood, but as conferring on the Brotherhood plenary authority to treat with the Railroad and enter into contracts fixing rates of pay and working conditions for the craft as a whole without any legal obligation or duty to protect the rights of minorities from discrimination or unfair treatment, however gross. Consequently it held that neither the Brotherhood nor the Railroad violated any rights of petitioner or his fellow Negro employees by negotiating the contracts discriminating against them.

If, as the state court has held, the Act confers this power on the bargaining representative of a craft or class of employees without any commensurate statutory duty toward its members, constitutional questions arise. For the representative is clothed with power not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates and which is also under an affirmative constitutional duty equally to protect those rights. If the Railway Labor Act purports to impose on petitioner and the other Negro members of the craft the legal duty to comply with the terms of a contract whereby the representative has discriminatorily restricted their employment for the benefit and advantage of the Brotherhood's own members, we

must decide the constitutional questions which petitioner raises in his pleading.

But we think that Congress, in enacting the Railway Labor Act and authorizing a labor union, chosen by a majority of a craft, to represent the craft, did not intend to confer plenary power upon the union to sacrifice, for the benefit of its members, rights of the minority of the craft, without imposing on it any duty to protect the minority. Since petitioner and the other Negro members of the craft are not members of the Brotherhood or eligible for membership, the authority to act for them is derived not from their action or consent but wholly from the command of the Act. Section 2, Fourth provides: "Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. . . ." Under §§ 2, Sixth and Seventh, when the representative bargains for a change of working conditions, the latter section specifies that they are the working conditions of employees "as a class." Section 1, Sixth of the Act defines "representative" as meaning "Any person or . . . labor union . . . designated either by a carrier or group of carriers or by its or their employees, to act for it or them." The use of the word "representative," as thus defined and in all the contexts in which it is found, plainly implies that the representative is to act on behalf of all the employees which, by virtue of the statute, it undertakes to represent.

By the terms of the Act, § 2, Fourth, the employees are permitted to act "through" their representative, and it represents them "for the purposes of" the Act. Sections 2, Third, Fourth, Ninth. The purposes of the Act declared by § 2 are the avoidance of "any interruption to commerce or to the operation of any carrier engaged therein," and this aim is sought to be achieved by encouraging "the

prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions." Compare *Texas & New Orleans R. Co.* v. *Brotherhood of Clerks,* 281 U. S. 548, 569. These purposes would hardly be attained if a substantial minority of the craft were denied the right to have their interests considered at the conference table and if the final result of the bargaining process were to be the sacrifice of the interests of the minority by the action of a representative chosen by the majority. The only recourse of the minority would be to strike, with the attendant interruption of commerce, which the Act seeks to avoid.

Section 2, Second, requiring carriers to bargain with the representative so chosen, operates to exclude any other from representing a craft. *Virginian R. Co.* v. *System Federation, supra,* 545. The minority members of a craft are thus deprived by the statute of the right, which they would otherwise possess, to choose a representative of their own, and its members cannot bargain individually on behalf of themselves as to matters which are properly the subject of collective bargaining. *Order of Railroad Telegraphers* v. *Railway Express Agency,* 321 U. S. 342, and see under the like provisions of the National Labor Relations Act *J. I. Case Co.* v. *Labor Board,* 321 U. S. 332, and *Medo Photo Supply Corp.* v. *Labor Board,* 321 U. S. 678.

The labor organization chosen to be the representative of the craft or class of employees is thus chosen to represent all of its members, regardless of their union affiliations or want of them. As we have pointed out with respect to the like provision of the National Labor Relations Act in *J. I. Case Co.* v. *Labor Board, supra,* 338, "The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group. Its benefits and advantages are open to every employee of the repre-

sented unit. . . ." The purpose of providing for a representative is to secure those benefits for those who are represented and not to deprive them or any of them of the benefits of collective bargaining for the advantage of the representative or those members of the craft who selected it.

As the National Mediation Board said in In The Matter of Representation of Employees of the St. Paul Union Depot Company, Case No. R–635: "Once a craft or class has designated its representative, such representative is responsible under the law to act for all employees within the craft or class, those who are not members of the represented organization, as well as those who are members." [2]

Unless the labor union representing a craft owes some duty to represent non-union members of the craft, at least to the extent of not discriminating against them as such in the contracts which it makes as their representative, the minority would be left with no means of protecting their interests or, indeed, their right to earn a livelihood by pursuing the occupation in which they are employed.

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[2] The Mediation Board's decision in this case was set aside in *Brotherhood of Clerks* v. *United Transport Service Employees*, 137 F. 2d 817, reversed on jurisdictional grounds, 320 U. S. 715. The Court of Appeals was of the opinion that a representative is not only required to act in behalf of all the employees in a bargaining unit, but that a labor organization which excludes a minority of a craft from its membership has no standing to act as such representative of the minority.

The Act has been similarly interpreted by the Emergency Board referred to in *General Committee* v. *Southern Pacific Co.*, 320 U. S. 338, 340, 342–343 n. It declared in 1937: "When a craft or class, through representatives chosen by a majority, negotiates a contract with a carrier, all members of the craft or class share in the rights secured by the contract, regardless of their affiliations with any organization of employees . . . The representatives of the majority represent the whole craft or class in the making of an agreement for the benefit of all. . . ."

While the majority of the craft chooses the bargaining representative, when chosen it represents, as the Act by its terms makes plain, the craft or class, and not the majority. The fair interpretation of the statutory language is that the organization chosen to represent a craft is to represent all its members, the majority as well as the minority, and it is to act for and not against those whom it represents.[3] It is a principle of general application that the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf, and that such a grant of power will not be deemed to dispense with all duty toward those for whom it is exercised unless so expressed.

We think that the Railway Labor Act imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates. Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents, cf. *J. I. Case Co.* v. *Labor Board, supra,* 335, but it has also imposed on the representative a corresponding duty. We hold that the language of the Act to which we have referred, read in the light of the purposes of the Act, expresses the aim of Congress to impose on the bargaining representative of a craft

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[3] Compare the House Committee Report on the N. L. R. A. (H. Rep. No. 1147, 74th Cong., 1st Sess., pp. 20–22) indicating that although the principle of majority rule "written into the statute books by Congress in the Railway Labor Act of 1934" was to be applicable to the bargaining unit under the N. L. R. A., the employer was required to give "equally advantageous terms to nonmembers of the labor organization negotiating the agreement." See also the Senate Committee Report on the N. L. R. A. to the same effect. S. Rep. No. 573, 74th Cong., 1st Sess., p. 13.

or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them.

This does not mean that the statutory representative of a craft is barred from making contracts which may have unfavorable effects on some of the members of the craft represented. Variations in the terms of the contract based on differences relevant to the authorized purposes of the contract in conditions to which they are to be applied, such as differences in seniority, the type of work performed, the competence and skill with which it is performed, are within the scope of the bargaining representation of a craft, all of whose members are not identical in their interest or merit. Cf. *Carmichael* v. *Southern Coal Co.,* 301 U. S. 495, 509–510, 512 and cases cited; *Washington* v. *Superior Court,* 289 U. S. 361, 366; *Metropolitan Casualty Co.* v. *Brownell,* 294 U. S. 580, 583. Without attempting to mark the allowable limits of differences in the terms of contracts based on differences of conditions to which they apply, it is enough for present purposes to say that the statutory power to represent a craft and to make contracts as to wages, hours and working conditions does not include the authority to make among members of the craft discriminations not based on such relevant differences. Here the discriminations based on race alone are obviously irrelevant and invidious. Congress plainly did not undertake to authorize the bargaining representative to make such discriminations. Cf. *Yick Wo* v. *Hopkins,* 118 U. S. 356; *Yu Cong Eng* v. *Trinidad,* 271 U. S. 500; *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337; *Hill* v. *Texas,* 316 U. S. 400.

The representative which thus discriminates may be enjoined from so doing, and its members may be enjoined from taking the benefit of such discriminatory action. No more is the Railroad bound by or entitled to take the benefit of a contract which the bargaining representative

is prohibited by the statute from making. In both cases the right asserted, which is derived from the duty imposed by the statute on the bargaining representative, is a federal right implied from the statute and the policy which it has adopted. It is the federal statute which condemns as unlawful the Brotherhood's conduct. "The extent and nature of the legal consequences of this condemnation, though left by the statute to judicial determination, are nevertheless to be derived from it and the federal policy which it has adopted." *Deitrick* v. *Greaney,* 309 U. S. 190, 200–201; *Board of County Commissioners* v. *United States,* 308 U. S. 343; *Sola Electric Co.* v. *Jefferson Co.,* 317 U. S. 173, 176–7; cf. *Clearfield Trust Co.* v. *United States,* 318 U. S. 363.

So long as a labor union assumes to act as the statutory representative of a craft, it cannot rightly refuse to perform the duty, which is inseparable from the power of representation conferred upon it, to represent the entire membership of the craft. While the statute does not deny to such a bargaining labor organization the right to determine eligibility to its membership, it does require the union, in collective bargaining and in making contracts with the carrier, to represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith. Wherever necessary to that end, the union is required to consider requests of non-union members of the craft and expressions of their views with respect to collective bargaining with the employer and to give to them notice of and opportunity for hearing upon its proposed action.

Since the right asserted by petitioner "is . . . claimed under the Constitution" and a "statute of the United States," the decision of the Alabama court, adverse to that contention is reviewable here under § 237 (b) of the Judicial Code, unless the Railway Labor Act itself has excluded petitioner's claims from judicial consideration. The ques-

tion here presented is not one of a jurisdictional dispute, determinable under the administrative scheme set up by the Act, cf. *Switchmen's Union* v. *National Mediation Board,* 320 U. S. 297; *General Committee* v. *M.-K.-T. R. Co.,* 320 U. S. 323; *General Committee* v. *Southern Pacific Co.,* 320 U. S. 338; *Brotherhood of Clerks* v. *United Transport Service Employees,* 320 U. S. 715, 816, or restricted by the Act to voluntary settlement by recourse to the traditional implements of mediation, conciliation and arbitration. *General Committee* v. *M.-K.-T. R. Co., supra,* 332, 337. There is no question here of who is entitled to represent the craft, or who are members of it, issues which have been relegated for settlement to the Mediation Board, *Switchmen's Union* v. *National Mediation Board, supra; General Committee* v. *M.-K.-T. R. Co., supra.* Nor are there differences as to the interpretation of the contract which by the Act are committed to the jurisdiction of the Railroad Adjustment Board.

Section 3, First (i), which provides for reference to the Adjustment Board of "disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements," makes no reference to disputes between employees and their representative. Even though the dispute between the railroad and the petitioner were to be heard by the Adjustment Board, that Board could not give the entire relief here sought. The Adjustment Board has consistently declined in more than 400 cases to entertain grievance complaints by individual members of a craft represented by a labor organization. "The only way that an individual may prevail is by taking his case to the union and causing the union to carry it through to the Board." Administrative Procedure in Government Agencies, S. Doc. No. 10, 77th Cong., 1st Sess., Pt. 4, p. 7. Whether or not judicial power might be exerted to require the Adjustment Board to consider individual grievances,

as to which we express no opinion, we cannot say that there is an administrative remedy available to petitioner or that resort to such proceedings in order to secure a possible administrative remedy, which is withheld or denied, is prerequisite to relief in equity. Further, since § 3, First (c) permits the national labor organizations chosen by the majority of the crafts to "prescribe the rules under which the labor members of the Adjustment Board shall be selected" and to "select such members and designate the division on which each member shall serve," the Negro firemen would be required to appear before a group which is in large part chosen by the respondents against whom their real complaint is made. In addition § 3, Second provides that a carrier and a class or craft of employees, "all acting through their representatives, selected in accordance with the provisions of this Act," may agree to the establishment of a regional board of adjustment for the purpose of adjusting disputes of the type which may be brought before the Adjustment Board. In this way the carrier and the representative against whom the Negro firemen have complained have power to supersede entirely the Adjustment Board's procedure and to create a tribunal of their own selection to interpret and apply the agreements now complained of to which they are the only parties. We cannot say that a hearing, if available, before either of these tribunals would constitute an adequate administrative remedy. Cf. *Tumey* v. *Ohio,* 273 U. S. 510. There is no administrative means by which the Negro firemen can secure separate representation for the purposes of collective bargaining. For the Mediation Board "has definitely ruled that a craft or class of employees may not be divided into two or more on the basis of race or color for the purpose of choosing representatives." [4]

[4] National Mediation Board, The Railway Labor Act and the National Mediation Board, p. 17; see In the Matter of Representation of Employees of the Central of Georgia Ry. Co., Case No. R-234;

In the absence of any available administrative remedy, the right here asserted, to a remedy for breach of the statutory duty of the bargaining representative to represent and act for the members of a craft, is of judicial cognizance. That right would be sacrificed or obliterated if it were without the remedy which courts can give for breach of such a duty or obligation and which it is their duty to give in cases in which they have jurisdiction. *Switchmen's Union* v. *National Mediation Board, supra,* 300; *Stark* v. *Wickard,* 321 U. S. 288, 306–7. Here, unlike *General Committee* v. *M.-K.-T. R. Co., supra,* and *General Committee* v. *Southern Pacific Co., supra,* there can be no doubt of the justiciability of these claims. As we noted in *General Committee* v. *M.-K.-T. R. Co., supra,* 331, the statutory provisions which are in issue are stated in the form of commands. For the present command there is no mode of enforcement other than resort to the courts, whose jurisdiction and duty to afford a remedy for a breach of statutory duty are left unaffected. The right is analogous to the statutory right of employees to require the employer to bargain with the statutory representative of a craft, a right which this Court has enforced and protected by its injunction in *Texas & New Orleans R. Co.* v. *Brotherhood of Clerks, supra,* 556–557, 560, and in *Virginian R. Co.* v. *System Federation, supra,* 548, and like it is one for which there is no available administrative remedy.

We conclude that the duty which the statute imposes on a union representative of a craft to represent the interests of all its members stands on no different footing and that the statute contemplates resort to the usual judicial remedies of injunction and award of damages when appropriate for breach of that duty.

In the Matter of Representation of Employees of the St. Paul Union Depot Co., Case No. R–635, set aside in *Brotherhood of Clerks* v. *United Transport Service Employees,* 137 F. 2d 817, reversed on jurisdictional grounds, 320 U. S. 715.

The judgment is accordingly reversed and remanded for further proceedings not inconsistent with this opinion.

Reversed.

MR. JUSTICE BLACK concurs in the result.

MR. JUSTICE MURPHY, concurring.

The economic discrimination against Negroes practiced by the Brotherhood and the railroad under color of Congressional authority raises a grave constitutional issue that should be squarely faced.

The utter disregard for the dignity and the well-being of colored citizens shown by this record is so pronounced as to demand the invocation of constitutional condemnation. To decide the case and to analyze the statute solely upon the basis of legal niceties, while remaining mute and placid as to the obvious and oppressive deprivation of constitutional guarantees, is to make the judicial function something less than it should be.

The constitutional problem inherent in this instance is clear. Congress, through the Railway Labor Act, has conferred upon the union selected by a majority of a craft or class of railway workers the power to represent the entire craft or class in all collective bargaining matters. While such a union is essentially a private organization, its power to represent and bind all members of a class or craft is derived solely from Congress. The Act contains no language which directs the manner in which the bargaining representative shall perform its duties. But it cannot be assumed that Congress meant to authorize the representative to act so as to ignore rights guaranteed by the Constitution. Otherwise the Act would bear the stigma of unconstitutionality under the Fifth Amendment in this respect. For that reason I am willing to read the statute as not permitting or allowing any action by the

bargaining representative in the exercise of its delegated powers which would in effect violate the constitutional rights of individuals.

If the Court's construction of the statute rests upon this basis, I agree. But I am not sure that such is the basis. Suffice it to say, however, that this constitutional issue cannot be lightly dismissed. The cloak of racism surrounding the actions of the Brotherhood in refusing membership to Negroes and in entering into and enforcing agreements discriminating against them, all under the guise of Congressional authority, still remains. No statutory interpretation can erase this ugly example of economic cruelty against colored citizens of the United States. Nothing can destroy the fact that the accident of birth has been used as the basis to abuse individual rights by an organization purporting to act in conformity with its Congressional mandate. Any attempt to interpret the Act must take that fact into account and must realize that the constitutionality of the statute in this respect depends upon the answer given.

The Constitution voices its disapproval whenever economic discrimination is applied under authority of law against any race, creed or color. A sound democracy cannot allow such discrimination to go unchallenged. Racism is far too virulent today to permit the slightest refusal, in the light of a Constitution that abhors it, to expose and condemn it wherever it appears in the course of a statutory interpretation.

TUNSTALL *v.* BROTHERHOOD OF LOCOMOTIVE FIREMEN & ENGINEMEN ET AL.

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

No. 37. Argued November 14, 1944.—Decided December 18, 1944.

1. The Railway Labor Act imposes on a labor organization, acting as the exclusive bargaining representative of a craft or class of railway employees, the duty to represent all the employees in the craft without discrimination because of race. *Steele* v. *Louisville & Nashville R. Co., ante,* p. 192. P. 211.
2. The federal courts have jurisdiction to entertain a non-diversity suit in which petitioner, a railway employee subject to the Railway Labor Act, seeks remedies by injunction and award of damages for the failure of the union bargaining representative of his craft to perform the duty imposed on it by the Act, to represent petitioner and other members of his craft without discrimination because of race. P. 212.
3. Petitioner's cause of action is not excluded by the Railway Labor Act from the consideration of the federal courts. P. 213.
4. The right asserted by the petitioner is derived from the duty imposed by the Railway Labor Act on the bargaining representative, and is a federal right implied from the statute and the policy which it has adopted. P. 213.
5. The case is therefore one arising under a law regulating commerce, of which the federal courts are given jurisdiction by 28 U. S. C. § 41 (8). P. 213.
6. The petitioner has no administrative remedy available, and the bill of complaint states a cause of action entitling him to relief. P. 213.

140 F. 2d 35, reversed.

CERTIORARI, 322 U. S. 721, to review the affirmance of a judgment dismissing a complaint for want of jurisdiction.

Mr. Charles H. Houston for petitioner.

Mr. Harold C. Heiss, with whom *Messrs. Russell B. Day* and *William G. Maupin* were on the brief, for the Brother-

hood of Locomotive Firemen & Enginemen et al.; and *Mr. James G. Martin* for the Norfolk Southern Railway Co., respondents.

Solicitor General Fahy, Messrs. Robert L. Stern, Alvin J. Rockwell, Joseph B. Robison, Frank Donner, Marcel Mallet-Provost and *Miss Ruth Weyand* filed a brief on behalf of the United States; *Messrs. Thurgood Marshall* and *William H. Hastie* on behalf of the National Association for the Advancement of Colored People; and *Messrs. Edgar Watkins, John D. Miller, Arthur Garfield Hays, R. Beverley Herbert,* and *T. Pope Shepherd* on behalf of the American Civil Liberties Union, as *amici curiae,* in support of petitioner.

Mr. Chief Justice Stone delivered the opinion of the Court.

This is a companion case to *Steele* v. *Louisville & Nashville R. Co., ante,* p. 192, in which we answered in the affirmative a question also presented in this case. The question is whether the Railway Labor Act, 48 Stat. 1185, 45 U. S. C. §§ 151 *et seq.,* imposes on a labor organization, acting as the exclusive bargaining representative of a craft or class of railway employees, the duty to represent all the employees in the craft without discrimination because of their race. The further question in this case is whether the federal courts have jurisdiction to entertain a non-diversity suit in which petitioner, a railway employee subject to the Act, seeks remedies by injunction and award of damages for the failure of the union bargaining representative of his craft to perform the duty imposed on it by the Act, to represent petitioner and other members of his craft without discrimination because of race.

Petitioner, a Negro fireman, employed by the Norfolk & Southern Railway, brought this suit in the District Court against the Railway, the Brotherhood of Locomotive Fire-

men and Enginemen and certain of its subsidiary lodges, and one of its officers, setting up, in all material respects, a cause of action like that alleged in the *Steele* case. The Brotherhood, a labor union, is the designated bargaining representative under the Railway Labor Act, for the craft of firemen of which petitioner is a member, and is accepted as such by the Railway and its employees.

Acting as such the Brotherhood gave to the Railway the notice of March 28, 1940, and later entered into the contract of February 18, 1941 and its subsequent modifications, all of which were the subject of our consideration in the *Steele* case. Petitioner complains of the discriminatory application of the contract provisions to him and other Negro members of his craft in favor of "promotable," i. e. white, firemen, by which he has been deprived of his pre-existing seniority rights, removed from the interstate passenger run to which he was assigned and then assigned to more arduous and difficult work with longer hours in yard service, his place in the passenger service being filled by a white fireman.

He alleges that the contract was signed and put into effect without notice to him or other Negro members of his craft, and without opportunity for them to be heard with respect to its terms, and that his protests and demands for relief to the Railway and the Brotherhood have been unavailing. Petitioner prays for a declaratory adjudication of his rights, for an injunction restraining the discriminatory practices complained of, for an award of damages and for other relief.

The District Court dismissed the suit for want of jurisdiction. The Circuit Court of Appeals for the Fourth Circuit affirmed, 140 F. 2d 35, on the ground that the federal courts are without jurisdiction of the cause, there being no diversity of citizenship and, insofar as the suit is grounded on the wrongful acts of respondents, it is not one arising under the laws of the United States, even

though the union was chosen as bargaining representative pursuant to the Railway Labor Act. See *Gully* v. *First National Bank,* 299 U. S. 109, 112, 114.

For the reasons stated in our opinion in the *Steele* case the Railway Labor Act itself does not exclude the petitioner's cause of action from the consideration of the federal courts. Cf. *Switchmen's Union* v. *National Mediation Board,* 320 U. S. 297; *General Committee* v. *M.-K.-T. R. Co.,* 320 U. S. 323; *General Committee* v. *Southern Pacific Co.,* 320 U. S. 338; *Brotherhood of Clerks* v. *United Transport Service Employees,* 320 U. S. 715, 816, with *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks,* 281 U. S. 548; *Virginian R. Co.* v. *System Federation,* 300 U. S. 515.

We also hold that the right asserted by petitioner which is derived from the duty imposed by the Railway Labor Act on the Brotherhood, as bargaining representative, is a federal right implied from the statute and the policy which it has adopted. It is the federal statute which condemns as unlawful the Brotherhood's conduct. "The extent and nature of the legal consequences of this condemnation, though left by the statute to judicial determination, are nevertheless to be derived from it and the federal policy which it has adopted." *Deitrick* v. *Greaney,* 309 U. S. 190, 200–201; *Board of County Commissioners* v. *United States,* 308 U. S. 343; *Sola Electric Co.* v. *Jefferson Co.,* 317 U. S. 173, 176–7; cf. *Clearfield Trust Co.* v. *United States,* 318 U. S. 363. The case is therefore one arising under a law regulating commerce of which the federal courts are given jurisdiction by 28 U. S. C. § 41 (8), Judicial Code § 24 (8); *Mulford* v. *Smith,* 307 U. S. 38, 46; *Peyton* v. *Railway Express Agency,* 316 U. S. 350; cf. *Illinois Steel Co.* v. *B. & O. R. Co.,* 320 U. S. 508, 510–511.

For the reasons also stated in our opinion in the *Steele* case the petitioner is without available administrative remedies, resort to which, when available, is prerequisite

to equitable relief in the federal courts. *Goldsmith* v. *Board of Tax Appeals,* 270 U. S. 117, 123; *Porter* v. *Investors Syndicate,* 286 U. S. 461, 471; 287 U. S. 346; *Natural Gas Co.* v. *Slattery,* 302 U. S. 300, 309; *Atlas Ins. Co.* v. *Southern, Inc.,* 306 U. S. 563.

We hold, as in the *Steele* case, that the bill of complaint states a cause of action entitling plaintiff to relief. As other jurisdictional questions were raised in the courts below which have not been considered by the Court of Appeals, the case will be remanded to that court for further proceedings.

Reversed.

MR. JUSTICE MURPHY concurs in the result for the reasons expressed in his concurring opinion in *Steele* v. *Louisville & Nashville R. Co., ante,* p. 208.

KOREMATSU *v.* UNITED STATES.

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

No. 22. Argued October 11, 12, 1944.—Decided December 18, 1944.

1. Civilian Exclusion Order No. 34 which, during a state of war with Japan and as a protection against espionage and sabotage, was promulgated by the Commanding General of the Western Defense Command under authority of Executive Order No. 9066 and the Act of March 21, 1942, and which directed the exclusion after May 9, 1942 from a described West Coast military area of all persons of Japanese ancestry, *held* constitutional as of the time it was made and when the petitioner—an American citizen of Japanese descent whose home was in the described area—violated it. P. 219.
2. The provisions of other orders requiring persons of Japanese ancestry to report to assembly centers and providing for the detention of such persons in assembly and relocation centers were separate, and their validity is not in issue in this proceeding. P. 222.

3. Even though evacuation and detention in the assembly center were inseparable, the order under which the petitioner was convicted was nevertheless valid. P. 223.

140 F. 2d 289, affirmed.

CERTIORARI, 321 U. S. 760, to review the affirmance of a judgment of conviction.

Messrs. Wayne M. Collins and *Charles A. Horsky* argued the cause, and *Mr. Collins* was on the brief, for petitioner.

Solicitor General Fahy, with whom *Assistant Attorney General Wechsler* and *Messrs. Edward J. Ennis, Ralph F. Fuchs,* and *John L. Burling* were on the brief, for the United States.

Messrs. Saburo Kido and *A. L. Wirin* filed a brief on behalf of the Japanese American Citizens League; and *Messrs. Edwin Borchard, Charles A. Horsky, George Rublee, Arthur DeHon Hill, Winthrop Wadleigh, Osmond K. Fraenkel, Harold Evans, William Draper Lewis,* and *Thomas Raeburn White* on behalf of the American Civil Liberties Union, as *amici curiae,* in support of petitioner.

Messrs. Robert W. Kenney, Attorney General of California, *George Neuner,* Attorney General of Oregon, *Smith Troy,* Attorney General of Washington, and *Fred E. Lewis,* Acting Attorney General of Washington, filed a brief on behalf of the States of California, Oregon and Washington, as *amici curiae,* in support of the United States.

MR. JUSTICE BLACK delivered the opinion of the Court.

The petitioner, an American citizen of Japanese descent, was convicted in a federal district court for remaining in San Leandro, California, a "Military Area," contrary to Civilian Exclusion Order No. 34 of the Commanding Gen-

eral of the Western Command, U. S. Army, which directed that after May 9, 1942, all persons of Japanese ancestry should be excluded from that area. No question was raised as to petitioner's loyalty to the United States. The Circuit Court of Appeals affirmed,[1] and the importance of the constitutional question involved caused us to grant certiorari.

It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.

In the instant case prosecution of the petitioner was begun by information charging violation of an Act of Congress, of March 21, 1942, 56 Stat. 173, which provides that

". . . whoever shall enter, remain in, leave, or commit any act in any military area or military zone prescribed, under the authority of an Executive order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander, shall, if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty of a misdemeanor and upon conviction shall be liable to a fine of not to exceed $5,000 or to imprisonment for not more than one year, or both, for each offense."

Exclusion Order No. 34, which the petitioner knowingly and admittedly violated, was one of a number of military orders and proclamations, all of which were sub-

[1] 140 F. 2d 289.

stantially based upon Executive Order No. 9066, 7 Fed. Reg. 1407. That order, issued after we were at war with Japan, declared that "the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities. . . ."

One of the series of orders and proclamations, a curfew order, which like the exclusion order here was promulgated pursuant to Executive Order 9066, subjected all persons of Japanese ancestry in prescribed West Coast military areas to remain in their residences from 8 p. m. to 6 a. m. As is the case with the exclusion order here, that prior curfew order was designed as a "protection against espionage and against sabotage." In *Hirabayashi* v. *United States,* 320 U. S. 81, we sustained a conviction obtained for violation of the curfew order. The Hirabayashi conviction and this one thus rest on the same 1942 Congressional Act and the same basic executive and military orders, all of which orders were aimed at the twin dangers of espionage and sabotage.

The 1942 Act was attacked in the *Hirabayashi* case as an unconstitutional delegation of power; it was contended that the curfew order and other orders on which it rested were beyond the war powers of the Congress, the military authorities and of the President, as Commander in Chief of the Army; and finally that to apply the curfew order against none but citizens of Japanese ancestry amounted to a constitutionally prohibited discrimination solely on account of race. To these questions, we gave the serious consideration which their importance justified. We upheld the curfew order as an exercise of the power of the government to take steps necessary to prevent espionage and sabotage in an area threatened by Japanese attack.

In the light of the principles we announced in the *Hirabayashi* case, we are unable to conclude that it was beyond the war power of Congress and the Executive to exclude

those of Japanese ancestry from the West Coast war area at the time they did. True, exclusion from the area in which one's home is located is a far greater deprivation than constant confinement to the home from 8 p. m. to 6 a. m. Nothing short of apprehension by the proper military authorities of the gravest imminent danger to the public safety can constitutionally justify either. But exclusion from a threatened area, no less than curfew, has a definite and close relationship to the prevention of espionage and sabotage. The military authorities, charged with the primary responsibility of defending our shores, concluded that curfew provided inadequate protection and ordered exclusion. They did so, as pointed out in our *Hirabayashi* opinion, in accordance with Congressional authority to the military to say who should, and who should not, remain in the threatened areas.

In this case the petitioner challenges the assumptions upon which we rested our conclusions in the *Hirabayashi* case. He also urges that by May 1942, when Order No. 34 was promulgated, all danger of Japanese invasion of the West Coast had disappeared. After careful consideration of these contentions we are compelled to reject them.

Here, as in the *Hirabayashi* case, *supra,* at p. 99, ". . . we cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained. We cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety, which demanded that prompt and adequate measures be taken to guard against it."

Like curfew, exclusion of those of Japanese origin was deemed necessary because of the presence of an unascertained number of disloyal members of the group, most of

whom we have no doubt were loyal to this country. It was because we could not reject the finding of the military authorities that it was impossible to bring about an immediate segregation of the disloyal from the loyal that we sustained the validity of the curfew order as applying to the whole group. In the instant case, temporary exclusion of the entire group was rested by the military on the same ground. The judgment that exclusion of the whole group was for the same reason a military imperative answers the contention that the exclusion was in the nature of group punishment based on antagonism to those of Japanese origin. That there were members of the group who retained loyalties to Japan has been confirmed by investigations made subsequent to the exclusion. Approximately five thousand American citizens of Japanese ancestry refused to swear unqualified allegiance to the United States and to renounce allegiance to the Japanese Emperor, and several thousand evacuees requested repatriation to Japan.[2]

We uphold the exclusion order as of the time it was made and when the petitioner violated it. Cf. *Chastleton Corporation* v. *Sinclair*, 264 U. S. 543, 547; *Block* v. *Hirsh*, 256 U. S. 135, 154–5. In doing so, we are not unmindful of the hardships imposed by it upon a large group of American citizens. Cf. *Ex parte Kawato*, 317 U. S. 69, 73. But hardships are part of war, and war is an aggregation of hardships. All citizens alike, both in and out of uniform, feel the impact of war in greater or lesser measure. Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier. Compulsory

[2] Hearings before the Subcommittee on the National War Agencies Appropriation Bill for 1945, Part II, 608–726; Final Report, Japanese Evacuation from the West Coast, 1942, 309–327; Hearings before the Committee on Immigration and Naturalization, House of Representatives, 78th Cong., 2d Sess., on H. R. 2701 and other bills to expatriate certain nationals of the United States, pp. 37–42, 49–58.

exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.

It is argued that on May 30, 1942, the date the petitioner was charged with remaining in the prohibited area, there were conflicting orders outstanding, forbidding him both to leave the area and to remain there. Of course, a person cannot be convicted for doing the very thing which it is a crime to fail to do. But the outstanding orders here contained no such contradictory commands.

There was an order issued March 27, 1942, which prohibited petitioner and others of Japanese ancestry from leaving the area, but its effect was specifically limited in time "until and to the extent that a future proclamation or order should so permit or direct." 7 Fed. Reg. 2601. That "future order," the one for violation of which petitioner was convicted, was issued May 3, 1942, and it did "direct" exclusion from the area of all persons of Japanese ancestry, before 12 o'clock noon, May 9; furthermore it contained a warning that all such persons found in the prohibited area would be liable to punishment under the March 21, 1942 Act of Congress. Consequently, the only order in effect touching the petitioner's being in the area on May 30, 1942, the date specified in the information against him, was the May 3 order which prohibited his remaining there, and it was that same order, which he stipulated in his trial that he had violated, knowing of its existence. There is therefore no basis for the argument that on May 30, 1942, he was subject to punishment, under the March 27 and May 3 orders, whether he remained in or left the area.

It does appear, however, that on May 9, the effective date of the exclusion order, the military authorities had

already determined that the evacuation should be effected by assembling together and placing under guard all those of Japanese ancestry, at central points, designated as "assembly centers," in order "to insure the orderly evacuation and resettlement of Japanese voluntarily migrating from Military Area No. 1, to restrict and regulate such migration." Public Proclamation No. 4, 7 Fed. Reg. 2601. And on May 19, 1942, eleven days before the time petitioner was charged with unlawfully remaining in the area, Civilian Restrictive Order No. 1, 8 Fed. Reg. 982, provided for detention of those of Japanese ancestry in assembly or relocation centers. It is now argued that the validity of the exclusion order cannot be considered apart from the orders requiring him, after departure from the area, to report and to remain in an assembly or relocation center. The contention is that we must treat these separate orders as one and inseparable; that, for this reason, if detention in the assembly or relocation center would have illegally deprived the petitioner of his liberty, the exclusion order and his conviction under it cannot stand.

We are thus being asked to pass at this time upon the whole subsequent detention program in both assembly and relocation centers, although the only issues framed at the trial related to petitioner's remaining in the prohibited area in violation of the exclusion order. Had petitioner here left the prohibited area and gone to an assembly center we cannot say either as a matter of fact or law that his presence in that center would have resulted in his detention in a relocation center. Some who did report to the assembly center were not sent to relocation centers, but were released upon condition that they remain outside the prohibited zone until the military orders were modified or lifted. This illustrates that they pose different problems and may be governed by different principles. The lawfulness of one does not necessarily determine the lawfulness of the others. This is made clear

when we analyze the requirements of the separate provisions of the separate orders. These separate requirements were that those of Japanese ancestry (1) depart from the area; (2) report to and temporarily remain in an assembly center; (3) go under military control to a relocation center there to remain for an indeterminate period until released conditionally or unconditionally by the military authorities. Each of these requirements, it will be noted, imposed distinct duties in connection with the separate steps in a complete evacuation program. Had Congress directly incorporated into one Act the language of these separate orders, and provided sanctions for their violations, disobedience of any one would have constituted a separate offense. Cf. *Blockburger* v. *United States,* 284 U. S. 299, 304. There is no reason why violations of these orders, insofar as they were promulgated pursuant to Congressional enactment, should not be treated as separate offenses.

The *Endo* case, *post,* p. 283, graphically illustrates the difference between the validity of an order to exclude and the validity of a detention order after exclusion has been effected.

Since the petitioner has not been convicted of failing to report or to remain in an assembly or relocation center, we cannot in this case determine the validity of those separate provisions of the order. It is sufficient here for us to pass upon the order which petitioner violated. To do more would be to go beyond the issues raised, and to decide momentous questions not contained within the framework of the pleadings or the evidence in this case. It will be time enough to decide the serious constitutional issues which petitioner seeks to raise when an assembly or relocation order is applied or is certain to be applied to him, and we have its terms before us.

Some of the members of the Court are of the view that evacuation and detention in an Assembly Center were inseparable. After May 3, 1942, the date of Exclusion

Order No. 34, Korematsu was under compulsion to leave the area not as he would choose but via an Assembly Center. The Assembly Center was conceived as a part of the machinery for group evacuation. The power to exclude includes the power to do it by force if necessary. And any forcible measure must necessarily entail some degree of detention or restraint whatever method of removal is selected. But whichever view is taken, it results in holding that the order under which petitioner was convicted was valid.

It is said that we are dealing here with the case of imprisonment of a citizen in a concentration camp solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States. Our task would be simple, our duty clear, were this a case involving the imprisonment of a loyal citizen in a concentration camp because of racial prejudice. Regardless of the true nature of the assembly and relocation centers—and we deem it unjustifiable to call them concentration camps with all the ugly connotations that term implies—we are dealing specifically with nothing but an exclusion order. To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. Korematsu was not excluded from the Military Area because of hostility to him or his race. He *was* excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders—as inevitably it must—determined that they should have the power to do just this. There was evidence of disloyalty on the part of some, the military authorities considered that the need for

action was great, and time was short. We cannot—by availing ourselves of the calm perspective of hindsight—now say that at that time these actions were unjustified.

Affirmed.

MR. JUSTICE FRANKFURTER, concurring.

According to my reading of Civilian Exclusion Order No. 34, it was an offense for Korematsu to be found in Military Area No. 1, the territory wherein he was previously living, except within the bounds of the established Assembly Center of that area. Even though the various orders issued by General DeWitt be deemed a comprehensive code of instructions, their tenor is clear and not contradictory. They put upon Korematsu the obligation to leave Military Area No. 1, but only by the method prescribed in the instructions, *i. e.,* by reporting to the Assembly Center. I am unable to see how the legal considerations that led to the decision in *Hirabayashi* v. *United States,* 320 U. S. 81, fail to sustain the military order which made the conduct now in controversy a crime. And so I join in the opinion of the Court, but should like to add a few words of my own.

The provisions of the Constitution which confer on the Congress and the President powers to enable this country to wage war are as much part of the Constitution as provisions looking to a nation at peace. And we have had recent occasion to quote approvingly the statement of former Chief Justice Hughes that the war power of the Government is "the power to wage war successfully." *Hirabayashi* v. *United States, supra* at 93; and see *Home Bldg. & L. Assn.* v. *Blaisdell,* 290 U. S. 398, 426. Therefore, the validity of action under the war power must be judged wholly in the context of war. That action is not to be stigmatized as lawless because like action in times of peace would be lawless. To talk about a military order that expresses an allowable judgment of war needs by those entrusted with the duty of conducting war as "an

unconstitutional order" is to suffuse a part of the Constitution with an atmosphere of unconstitutionality. The respective spheres of action of military authorities and of judges are of course very different. But within their sphere, military authorities are no more outside the bounds of obedience to the Constitution than are judges within theirs. "The war power of the United States, like its other powers . . . is subject to applicable constitutional limitations", *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146, 156. To recognize that military orders are "reasonably expedient military precautions" in time of war and yet to deny them constitutional legitimacy makes of the Constitution an instrument for dialectic subleties not reasonably to be attributed to the hard-headed Framers, of whom a majority had had actual participation in war. If a military order such as that under review does not transcend the means appropriate for conducting war, such action by the military is as constitutional as would be any authorized action by the Interstate Commerce Commission within the limits of the constitutional power to regulate commerce. And being an exercise of the war power explicitly granted by the Constitution for safeguarding the national life by prosecuting war effectively, I find nothing in the Constitution which denies to Congress the power to enforce such a valid military order by making its violation an offense triable in the civil courts. Compare *Interstate Commerce Commission* v. *Brimson,* 154 U. S. 447; 155 U. S. 3, and *Monongahela Bridge Co.* v. *United States,* 216 U. S. 177. To find that the Constitution does not forbid the military measures now complained of does not carry with it approval of that which Congress and the Executive did. That is their business, not ours.

MR. JUSTICE ROBERTS.

I dissent, because I think the indisputable facts exhibit a clear violation of Constitutional rights.

This is not a case of keeping people off the streets at night as was *Hirabayashi* v. *United States,* 320 U. S. 81,

nor a case of temporary exclusion of a citizen from an area for his own safety or that of the community, nor a case of offering him an opportunity to go temporarily out of an area where his presence might cause danger to himself or to his fellows. On the contrary, it is the case of convicting a citizen as a punishment for not submitting to imprisonment in a concentration camp, based on his ancestry, and solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States. If this be a correct statement of the facts disclosed by this record, and facts of which we take judicial notice, I need hardly labor the conclusion that Constitutional rights have been violated.

The Government's argument, and the opinion of the court, in my judgment, erroneously divide that which is single and indivisible and thus make the case appear as if the petitioner violated a Military Order, sanctioned by Act of Congress, which excluded him from his home, by refusing voluntarily to leave and, so, knowingly and intentionally, defying the order and the Act of Congress.

The petitioner, a resident of San Leandro, Alameda County, California, is a native of the United States of Japanese ancestry who, according to the uncontradicted evidence, is a loyal citizen of the nation.

A chronological recitation of events will make it plain that the petitioner's supposed offense did not, in truth, consist in his refusal voluntarily to leave the area which included his home in obedience to the order excluding him therefrom. Critical attention must be given to the dates and sequence of events.

December 8, 1941, the United States declared war on Japan.

February 19, 1942, the President issued Executive Order No. 9066,[1] which, after stating the reason for issuing the

[1] 7 Fed. Reg. 1407.

order as "protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities," provided that certain Military Commanders might, in their discretion, "prescribe military areas" and define their extent, "from which any or all persons may be excluded, and with respect to which the right of any person to enter, remain in, or leave shall be subject to whatever restrictions" the "Military Commander may impose in his discretion."

February 20, 1942, Lieutenant General DeWitt was designated Military Commander of the Western Defense Command embracing the westernmost states of the Union,—about one-fourth of the total area of the nation.

March 2, 1942, General DeWitt promulgated Public Proclamation No. 1,[2] which recites that the entire Pacific Coast is "particularly subject to attack, to attempted invasion . . . and, in connection therewith, is subject to espionage and acts of sabotage." It states that "as a matter of military necessity" certain military areas and zones are established known as Military Areas Nos. 1 and 2. It adds that "Such persons or classes of persons as the situation may require" will, by subsequent orders, "be excluded from all of Military Area No. 1" and from certain zones in Military Area No. 2. Subsequent proclamations were made which, together with Proclamation No. 1, included in such areas and zones all of California, Washington, Oregon, Idaho, Montana, Nevada and Utah, and the southern portion of Arizona. The orders required that if any person of Japanese, German or Italian ancestry residing in Area No. 1 desired to change his habitual residence he must execute and deliver to the authorities a Change of Residence Notice.

San Leandro, the city of petitioner's residence, lies in Military Area No. 1.

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[2] 7 Fed. Reg. 2320.

On March 2, 1942, the petitioner, therefore, had notice that, by Executive Order, the President, to prevent espionage and sabotage, had authorized the Military to exclude him from certain areas and to prevent his entering or leaving certain areas without permission. He was on notice that his home city had been included, by Military Order, in Area No. 1, and he was on notice further that, at sometime in the future, the Military Commander would make an order for the exclusion of certain persons, not described or classified, from various zones including that in which he lived.

March 21, 1942, Congress enacted [3] that anyone who knowingly "shall enter, remain in, leave, or commit any act in any military area or military zone prescribed . . . by any military commander . . . contrary to the restrictions applicable to any such area or zone or contrary to the order of . . . any such military commander" shall be guilty of a misdemeanor. This is the Act under which the petitioner was charged.

March 24, 1942, General DeWitt instituted the curfew for certain areas within his command, by an order the validity of which was sustained in *Hirabayashi* v. *United States, supra.*

March 24, 1942, General DeWitt began to issue a series of exclusion orders relating to specified areas.

March 27, 1942, by Proclamation No. 4,[4] the General recited that "it is necessary, in order to provide for the welfare and to insure the orderly evacuation and resettlement of Japanese *voluntarily migrating* from Military Area No. 1, to restrict and regulate such migration"; and ordered that, as of March 29, 1942, "all alien Japanese and persons of Japanese ancestry who are within the limits of Military Area No. 1, be and they are hereby

[3] 56 Stat. 173.

[4] 7 Fed. Reg. 2601.

prohibited from leaving that area for any purpose until and to the extent that a future proclamation or order of this headquarters shall so permit or direct." [5]

No order had been made excluding the petitioner from the area in which he lived. By Proclamation No. 4 he was, after March 29, 1942, confined to the limits of Area No. 1. If the Executive Order No. 9066 and the Act of Congress meant what they said, to leave that area, in the face of Proclamation No. 4, would be to commit a misdemeanor.

May 3, 1942, General DeWitt issued Civilian Exclusion Order No. 34 [6] providing that, after 12 o'clock May 8, 1942, all persons of Japanese ancestry, both alien and non-alien, were to be excluded from a described portion of Military Area No. 1, which included the County of Alameda, California. The order required a responsible member of each family and each individual living alone to report, at a time set, at a Civil Control Station for instructions to go to an Assembly Center, and added that any person failing to comply with the provisions of the order who was found in the described area after the date set would be liable to prosecution under the Act of March 21, 1942, *supra*. It is important to note that the order, by its express terms, had no application to persons within the bounds "of an established Assembly Center pursuant to instructions from this Headquarters . . ." The obvious purpose of the orders made, taken together, was to drive all citizens of Japanese ancestry into Assembly Centers within the zones of their residence, under pain of criminal prosecution.

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[5] The italics in the quotation are mine. The use of the word "voluntarily" exhibits a grim irony probably not lost on petitioner and others in like case. Either so, or its use was a disingenuous attempt to camouflage the compulsion which was to be applied.

[6] 7 Fed. Reg. 3967.

The predicament in which the petitioner thus found himself was this: He was forbidden, by Military Order, to leave the zone in which he lived; he was forbidden, by Military Order, after a date fixed, to be found within that zone unless he were in an Assembly Center located in that zone. General DeWitt's report to the Secretary of War concerning the programme of evacuation and relocation of Japanese makes it entirely clear, if it were necessary to refer to that document,—and, in the light of the above recitation, I think it is not,—that an Assembly Center was a euphemism for a prison. No person within such a center was permitted to leave except by Military Order.

In the dilemma that he dare not remain in his home, or voluntarily leave the area, without incurring criminal penalties, and that the only way he could avoid punishment was to go to an Assembly Center and submit himself to military imprisonment, the petitioner did nothing.

June 12, 1942, an Information was filed in the District Court for Northern California charging a violation of the Act of March 21, 1942, in that petitioner had knowingly remained within the area covered by Exclusion Order No. 34. A demurrer to the information having been overruled, the petitioner was tried under a plea of not guilty and convicted. Sentence was suspended and he was placed on probation for five years. We know, however, in the light of the foregoing recitation, that he was at once taken into military custody and lodged in an Assembly Center. We further know that, on March 18, 1942, the President had promulgated Executive Order No. 9102 [7] establishing the War Relocation Authority under which so-called Relocation Centers, a euphemism for concentration camps, were established pursuant to cooperation between the military authorities of the Western Defense Command and the Relocation Authority, and that the petitioner has

[7] 7 Fed. Reg. 2165.

been confined either in an Assembly Center, within the zone in which he had lived or has been removed to a Relocation Center where, as the facts disclosed in *Ex parte Endo* (*post*, p. 283) demonstrate, he was illegally held in custody.

The Government has argued this case as if the only order outstanding at the time the petitioner was arrested and informed against was Exclusion Order No. 34 ordering him to leave the area in which he resided, which was the basis of the information against him. That argument has evidently been effective. The opinion refers to the *Hirabayashi* case, *supra,* to show that this court has sustained the validity of a curfew order in an emergency. The argument then is that exclusion from a given area of danger, while somewhat more sweeping than a curfew regulation, is of the same nature,—a temporary expedient made necessary by a sudden emergency. This, I think, is a substitution of an hypothetical case for the case actually before the court. I might agree with the court's disposition of the hypothetical case.[8] The liberty of every American citizen freely to come and to go must frequently, in the face of sudden danger, be temporarily limited or suspended. The civil authorities must often resort to the expedient of excluding citizens temporarily from a locality. The drawing of fire lines in the case of a conflagration, the removal of persons from the area where a pestilence has broken out, are familiar examples. If the exclusion worked by Exclusion Order No. 34 were of that nature the *Hirabayashi* case would be authority for sustaining it.

[8] My agreement would depend on the definition and application of the terms "temporary" and "emergency." No pronouncement of the commanding officer can, in my view, preclude judicial inquiry and determination whether an emergency ever existed and whether, if so, it remained, at the date of the restraint out of which the litigation arose. Cf. *Chastleton Corp.* v. *Sinclair,* 264 U. S. 543.

But the facts above recited, and those set forth in *Ex parte Endo, supra,* show that the exclusion was but a part of an over-all plan for forceable detention. This case cannot, therefore, be decided on any such narrow ground as the possible validity of a Temporary Exclusion Order under which the residents of an area are given an opportunity to leave and go elsewhere in their native land outside the boundaries of a military area. To make the case turn on any such assumption is to shut our eyes to reality.

As I have said above, the petitioner, prior to his arrest, was faced with two diametrically contradictory orders given sanction by the Act of Congress of March 21, 1942. The earlier of those orders made him a criminal if he left the zone in which he resided; the later made him a criminal if he did not leave.

I had supposed that if a citizen was constrained by two laws, or two orders having the force of law, and obedience to one would violate the other, to punish him for violation of either would deny him due process of law. And I had supposed that under these circumstances a conviction for violating one of the orders could not stand.

We cannot shut our eyes to the fact that had the petitioner attempted to violate Proclamation No. 4 and leave the military area in which he lived he would have been arrested and tried and convicted for violation of Proclamation No. 4. The two conflicting orders, one which commanded him to stay and the other which commanded him to go, were nothing but a cleverly devised trap to accomplish the real purpose of the military authority, which was to lock him up in a concentration camp. The only course by which the petitioner could avoid arrest and prosecution was to go to that camp according to instructions to be given him when he reported at a Civil Control Center. We know that is the fact. Why should we set up a figmentary and artificial situation instead of addressing ourselves to the actualities of the case?

These stark realities are met by the suggestion that it is lawful to compel an American citizen to submit to illegal imprisonment on the assumption that he might, after going to the Assembly Center, apply for his discharge by suing out a writ of habeas corpus, as was done in the *Endo* case, *supra*. The answer, of course, is that where he was subject to two conflicting laws he was not bound, in order to escape violation of one or the other, to surrender his liberty for any period. Nor will it do to say that the detention was a necessary part of the process of evacuation, and so we are here concerned only with the validity of the latter.

Again it is a new doctrine of constitutional law that one indicted for disobedience to an unconstitutional statute may not defend on the ground of the invalidity of the statute but must obey it though he knows it is no law and, after he has suffered the disgrace of conviction and lost his liberty by sentence, then, and not before, seek, from within prison walls, to test the validity of the law.

Moreover, it is beside the point to rest decision in part on the fact that the petitioner, for his own reasons, wished to remain in his home. If, as is the fact, he was constrained so to do, it is indeed a narrow application of constitutional rights to ignore the order which constrained him, in order to sustain his conviction for violation of another contradictory order.

I would reverse the judgment of conviction.

MR. JUSTICE MURPHY, dissenting.

This exclusion of "all persons of Japanese ancestry, both alien and non-alien," from the Pacific Coast area on a plea of military necessity in the absence of martial law ought not to be approved. Such exclusion goes over "the very brink of constitutional power" and falls into the ugly abyss of racism.

In dealing with matters relating to the prosecution and progress of a war, we must accord great respect and con-

sideration to the judgments of the military authorities who are on the scene and who have full knowledge of the military facts. The scope of their discretion must, as a matter of necessity and common sense, be wide. And their judgments ought not to be overruled lightly by those whose training and duties ill-equip them to deal intelligently with matters so vital to the physical security of the nation.

At the same time, however, it is essential that there be definite limits to military discretion, especially where martial law has not been declared. Individuals must not be left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support. Thus, like other claims conflicting with the asserted constitutional rights of the individual, the military claim must subject itself to the judicial process of having its reasonableness determined and its conflicts with other interests reconciled. "What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions." *Sterling* v. *Constantin,* 287 U. S. 378, 401.

The judicial test of whether the Government, on a plea of military necessity, can validly deprive an individual of any of his constitutional rights is whether the deprivation is reasonably related to a public danger that is so "immediate, imminent, and impending" as not to admit of delay and not to permit the intervention of ordinary constitutional processes to alleviate the danger. *United States* v. *Russell,* 13 Wall. 623, 627–8; *Mitchell* v. *Harmony,* 13 How. 115, 134–5; *Raymond* v. *Thomas,* 91 U. S. 712, 716. Civilian Exclusion Order No. 34, banishing from a prescribed area of the Pacific Coast "all persons of Japanese ancestry, both alien and non-alien," clearly does not meet that test. Being an obvious racial discrimination, the

order deprives all those within its scope of the equal protection of the laws as guaranteed by the Fifth Amendment. It further deprives these individuals of their constitutional rights to live and work where they will, to establish a home where they choose and to move about freely. In excommunicating them without benefit of hearings, this order also deprives them of all their constitutional rights to procedural due process. Yet no reasonable relation to an "immediate, imminent, and impending" public danger is evident to support this racial restriction which is one of the most sweeping and complete deprivations of constitutional rights in the history of this nation in the absence of martial law.

It must be conceded that the military and naval situation in the spring of 1942 was such as to generate a very real fear of invasion of the Pacific Coast, accompanied by fears of sabotage and espionage in that area. The military command was therefore justified in adopting all reasonable means necessary to combat these dangers. In adjudging the military action taken in light of the then apparent dangers, we must not erect too high or too meticulous standards; it is necessary only that the action have some reasonable relation to the removal of the dangers of invasion, sabotage and espionage. But the exclusion, either temporarily or permanently, of all persons with Japanese blood in their veins has no such reasonable relation. And that relation is lacking because the exclusion order necessarily must rely for its reasonableness upon the assumption that *all* persons of Japanese ancestry may have a dangerous tendency to commit sabotage and espionage and to aid our Japanese enemy in other ways. It is difficult to believe that reason, logic or experience could be marshalled in support of such an assumption.

That this forced exclusion was the result in good measure of this erroneous assumption of racial guilt rather than

bona fide military necessity is evidenced by the Commanding General's Final Report on the evacuation from the Pacific Coast area.[1] In it he refers to all individuals of Japanese descent as "subversive," as belonging to "an enemy race" whose "racial strains are undiluted," and as constituting "over 112,000 potential enemies . . . at large today" along the Pacific Coast.[2] In support of this blanket condemnation of all persons of Japanese descent, however, no reliable evidence is cited to show that such individuals were generally disloyal,[3] or had generally so conducted themselves in this area as to constitute a special menace to defense installations or war industries, or had otherwise by their behavior furnished reasonable ground for their exclusion as a group.

Justification for the exclusion is sought, instead, mainly upon questionable racial and sociological grounds not

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[1] Final Report, Japanese Evacuation from the West Coast, 1942, by Lt. Gen. J. L. DeWitt. This report is dated June 5, 1943, but was not made public until January, 1944.

[2] Further evidence of the Commanding General's attitude toward individuals of Japanese ancestry is revealed in his voluntary testimony on April 13, 1943, in San Francisco before the House Naval Affairs Subcommittee to Investigate Congested Areas, Part 3, pp. 739–40 (78th Cong., 1st Sess.):

"I don't want any of them [persons of Japanese ancestry] here. They are a dangerous element. There is no way to determine their loyalty. The west coast contains too many vital installations essential to the defense of the country to allow any Japanese on this coast. . . . The danger of the Japanese was, and is now—if they are permitted to come back—espionage and sabotage. It makes no difference whether he is an American citizen, he is still a Japanese. American citizenship does not necessarily determine loyalty. . . . But we must worry about the Japanese all the time until he is wiped off the map. Sabotage and espionage will make problems as long as he is allowed in this area. . . ."

[3] The Final Report, p. 9, casts a cloud of suspicion over the entire group by saying that "while it was *believed* that *some* were loyal, it was known that many were not." (Italics added.)

ordinarily within the realm of expert military judgment, supplemented by certain semi-military conclusions drawn from an unwarranted use of circumstantial evidence. Individuals of Japanese ancestry are condemned because they are said to be "a large, unassimilated, tightly knit racial group, bound to an enemy nation by strong ties of race, culture, custom and religion." [4] They are claimed to be given to "emperor worshipping ceremonies" [5] and to "dual citizenship." [6] Japanese language schools and allegedly pro-Japanese organizations are cited as evidence of possible group disloyalty,[7] together with facts as to

[4] Final Report, p. vii; see also pp. 9, 17. To the extent that assimilation is a problem, it is largely the result of certain social customs and laws of the American general public. Studies demonstrate that persons of Japanese descent are readily susceptible to integration in our society if given the opportunity. Strong, The Second-Generation Japanese Problem (1934); Smith, Americans in Process (1937); Mears, Resident Orientals on the American Pacific Coast (1928); Millis, The Japanese Problem in the United States (1942). The failure to accomplish an ideal status of assimilation, therefore, cannot be charged to the refusal of these persons to become Americanized or to their loyalty to Japan. And the retention by some persons of certain customs and religious practices of their ancestors is no criterion of their loyalty to the United States.

[5] Final Report, pp. 10–11. No sinister correlation between the emperor worshipping activities and disloyalty to America was shown.

[6] Final Report, p. 22. The charge of "dual citizenship" springs from a misunderstanding of the simple fact that Japan in the past used the doctrine of *jus sanguinis*, as she had a right to do under international law, and claimed as her citizens all persons born of Japanese nationals wherever located. Japan has greatly modified this doctrine, however, by allowing all Japanese born in the United States to renounce any claim of dual citizenship and by releasing her claim as to all born in the United States after 1925. See Freeman, "Genesis, Exodus, and Leviticus: Genealogy, Evacuation, and Law," 28 Cornell L. Q. 414, 447–8, and authorities there cited; McWilliams, Prejudice, 123–4 (1944).

[7] Final Report, pp. 12–13. We have had various foreign language schools in this country for generations without considering their ex-

certain persons being educated and residing at length in Japan.[8] It is intimated that many of these individuals deliberately resided "adjacent to strategic points," thus enabling them "to carry into execution a tremendous program of sabotage on a mass scale should any considerable number of them have been inclined to do so."[9] The need for protective custody is also asserted. The report refers without identity to "numerous incidents of violence" as well as to other admittedly unverified or cumulative incidents. From this, plus certain other events not shown to have been connected with the Japanese Americans, it is concluded that the "situation was fraught with danger to the Japanese population itself" and that the general public "was ready to take matters into its own hands."[10] Finally, it is intimated, though not directly

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istence as ground for racial discrimination. No subversive activities or teachings have been shown in connection with the Japanese schools. McWilliams, Prejudice, 121–3 (1944).

[8] Final Report, pp. 13–15. Such persons constitute a very small part of the entire group and most of them belong to the Kibei movement—the actions and membership of which are well known to our Government agents.

[9] Final Report, p. 10; see also pp. vii, 9, 15–17. This insinuation, based purely upon speculation and circumstantial evidence, completely overlooks the fact that the main geographic pattern of Japanese population was fixed many years ago with reference to economic, social and soil conditions. Limited occupational outlets and social pressures encouraged their concentration near their initial points of entry on the Pacific Coast. That these points may now be near certain strategic military and industrial areas is no proof of a diabolical purpose on the part of Japanese Americans. See McWilliams, Prejudice, 119–121 (1944); House Report No. 2124 (77th Cong., 2d Sess.), 59–93.

[10] Final Report, pp. 8–9. This dangerous doctrine of protective custody, as proved by recent European history, should have absolutely no standing as an excuse for the deprivation of the rights of minority groups. See House Report No. 1911 (77th Cong., 2d Sess.) 1–2. Cf. House Report No. 2124 (77th Cong., 2d Sess.) 145–7. In this

charged or proved, that persons of Japanese ancestry were responsible for three minor isolated shellings and bombings of the Pacific Coast area,[11] as well as for unidentified radio transmissions and night signalling.

The main reasons relied upon by those responsible for the forced evacuation, therefore, do not prove a reasonable relation between the group characteristics of Japanese Americans and the dangers of invasion, sabotage and espionage. The reasons appear, instead, to be largely an accumulation of much of the misinformation, half-truths and insinuations that for years have been directed against Japanese Americans by people with racial and economic prejudices—the same people who have been among the foremost advocates of the evacuation.[12] A military judg-

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instance, moreover, there are only two minor instances of violence on record involving persons of Japanese ancestry. McWilliams, What About Our Japanese-Americans? Public Affairs Pamphlets, No. 91, p. 8 (1944).

[11] Final Report, p. 18. One of these incidents (the reputed dropping of incendiary bombs on an Oregon forest) occurred on Sept. 9, 1942—a considerable time after the Japanese Americans had been evacuated from their homes and placed in Assembly Centers. See New York Times, Sept. 15, 1942, p. 1, col. 3.

[12] Special interest groups were extremely active in applying pressure for mass evacuation. See House Report No. 2124 (77th Cong., 2d Sess.) 154–6; McWilliams, Prejudice, 126–8 (1944). Mr. Austin E. Anson, managing secretary of the Salinas Vegetable Grower-Shipper Association, has frankly admitted that "We're charged with wanting to get rid of the Japs for selfish reasons. . . . We do. It's a question of whether the white man lives on the Pacific Coast or the brown men. They came into this valley to work, and they stayed to take over. . . . They undersell the white man in the markets. . . . They work their women and children while the white farmer has to pay wages for his help. If all the Japs were removed tomorrow, we'd never miss them in two weeks, because the white farmers can take over and produce everything the Jap grows. And we don't want them back when the war ends, either." Quoted by Taylor in his article "The People Nobody Wants," 214 Sat. Eve. Post 24, 66 (May 9, 1942).

ment based upon such racial and sociological considerations is not entitled to the great weight ordinarily given the judgments based upon strictly military considerations. Especially is this so when every charge relative to race, religion, culture, geographical location, and legal and economic status has been substantially discredited by independent studies made by experts in these matters.[13]

The military necessity which is essential to the validity of the evacuation order thus resolves itself into a few intimations that certain individuals actively aided the enemy, from which it is inferred that the entire group of Japanese Americans could not be trusted to be or remain loyal to the United States. No one denies, of course, that there were some disloyal persons of Japanese descent on the Pacific Coast who did all in their power to aid their ancestral land. Similar disloyal activities have been engaged in by many persons of German, Italian and even more pioneer stock in our country. But to infer that examples of individual disloyalty prove group disloyalty and justify discriminatory action against the entire group is to deny that under our system of law individual guilt is the sole basis for deprivation of rights. Moreover, this inference, which is at the very heart of the evacuation orders, has been used in support of the abhorrent and despicable treatment of minority groups by the dictatorial tyrannies which this nation is now pledged to destroy. To give constitutional sanction to that inference in this case, however well-intentioned may have been the military command on the Pacific Coast, is to adopt one of the cruelest of the rationales used by our enemies to destroy the dignity of the individual and to encourage and open the door to discriminatory actions against other minority groups in the passions of tomorrow.

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[13] See notes 4–12, *supra*.

No adequate reason is given for the failure to treat these Japanese Americans on an individual basis by holding investigations and hearings to separate the loyal from the disloyal, as was done in the case of persons of German and Italian ancestry. See House Report No. 2124 (77th Cong., 2d Sess.) 247–52. It is asserted merely that the loyalties of this group "were unknown and time was of the essence." [14] Yet nearly four months elapsed after Pearl Harbor before the first exclusion order was issued; nearly eight months went by until the last order was issued; and the last of these "subversive" persons was not actually removed until almost eleven months had elapsed. Leisure and deliberation seem to have been more of the essence than speed. And the fact that conditions were not such as to warrant a declaration of martial law adds strength to the belief that the factors of time and military necessity were not as urgent as they have been represented to be.

Moreover, there was no adequate proof that the Federal Bureau of Investigation and the military and naval intelligence services did not have the espionage and sabotage situation well in hand during this long period. Nor is there any denial of the fact that not one person of Japanese ancestry was accused or convicted of espionage or sabotage after Pearl Harbor while they were still free,[15] a fact which is some evidence of the loyalty of the vast majority of these individuals and of the effectiveness of the established methods of combatting these evils. It

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[14] Final Report, p. vii; see also p. 18.

[15] The Final Report, p. 34, makes the amazing statement that as of February 14, 1942, "The very fact that no sabotage has taken place to date is a disturbing and confirming indication that such action will be taken." Apparently, in the minds of the military leaders, there was no way that the Japanese Americans could escape the suspicion of sabotage.

seems incredible that under these circumstances it would have been impossible to hold loyalty hearings for the mere 112,000 persons involved—or at least for the 70,000 American citizens—especially when a large part of this number represented children and elderly men and women.[16] Any inconvenience that may have accompanied an attempt to conform to procedural due process cannot be said to justify violations of constitutional rights of individuals.

I dissent, therefore, from this legalization of racism. Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life. It is unattractive in any setting but it is utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States. All residents of this nation are kin in some way by blood or culture to a foreign land. Yet they are primarily and necessarily a part of the new and distinct civilization of the United States. They must accordingly be treated at all times as the heirs of the American experiment and as entitled to all the rights and freedoms guaranteed by the Constitution.

MR. JUSTICE JACKSON, dissenting.

Korematsu was born on our soil, of parents born in Japan. The Constitution makes him a citizen of the United States by nativity and a citizen of California by

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[16] During a period of six months, the 112 alien tribunals or hearing boards set up by the British Government shortly after the outbreak of the present war summoned and examined approximately 74,000 German and Austrian aliens. These tribunals determined whether each individual enemy alien was a real enemy of the Allies or only a "friendly enemy." About 64,000 were freed from internment and from any special restrictions, and only 2,000 were interned. Kempner, "The Enemy Alien Problem in the Present War," 34 Amer. Journ. of Int. Law 443, 444–46; House Report No. 2124 (77th Cong., 2d Sess.), 280–1.

residence. No claim is made that he is not loyal to this country. There is no suggestion that apart from the matter involved here he is not law-abiding and well disposed. Korematsu, however, has been convicted of an act not commonly a crime. It consists merely of being present in the state whereof he is a citizen, near the place where he was born, and where all his life he has lived.

Even more unusual is the series of military orders which made this conduct a crime. They forbid such a one to remain, and they also forbid him to leave. They were so drawn that the only way Korematsu could avoid violation was to give himself up to the military authority. This meant submission to custody, examination, and transportation out of the territory, to be followed by indeterminate confinement in detention camps.

A citizen's presence in the locality, however, was made a crime only if his parents were of Japanese birth. Had Korematsu been one of four—the others being, say, a German alien enemy, an Italian alien enemy, and a citizen of American-born ancestors, convicted of treason but out on parole—only Korematsu's presence would have violated the order. The difference between their innocence and his crime would result, not from anything he did, said, or thought, different than they, but only in that he was born of different racial stock.

Now, if any fundamental assumption underlies our system, it is that guilt is personal and not inheritable. Even if all of one's antecedents had been convicted of treason, the Constitution forbids its penalties to be visited upon him, for it provides that "no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted." But here is an attempt to make an otherwise innocent act a crime merely because this prisoner is the son of parents as to whom he had no choice, and belongs to a race from which there is no way to resign. If Congress in peace-time legislation should

enact such a criminal law, I should suppose this Court would refuse to enforce it.

But the "law" which this prisoner is convicted of disregarding is not found in an act of Congress, but in a military order. Neither the Act of Congress nor the Executive Order of the President, nor both together, would afford a basis for this conviction. It rests on the orders of General DeWitt. And it is said that if the military commander had reasonable military grounds for promulgating the orders, they are constitutional and become law, and the Court is required to enforce them. There are several reasons why I cannot subscribe to this doctrine.

It would be impracticable and dangerous idealism to expect or insist that each specific military command in an area of probable operations will conform to conventional tests of constitutionality. When an area is so beset that it must be put under military control at all, the paramount consideration is that its measures be successful, rather than legal. The armed services must protect a society, not merely its Constitution. The very essence of the military job is to marshal physical force, to remove every obstacle to its effectiveness, to give it every strategic advantage. Defense measures will not, and often should not, be held within the limits that bind civil authority in peace. No court can require such a commander in such circumstances to act as a reasonable man; he may be unreasonably cautious and exacting. Perhaps he should be. But a commander in temporarily focusing the life of a community on defense is carrying out a military program; he is not making law in the sense the courts know the term. He issues orders, and they may have a certain authority as military commands, although they may be very bad as constitutional law.

But if we cannot confine military expedients by the Constitution, neither would I distort the Constitution to approve all that the military may deem expedient. That is

what the Court appears to be doing, whether consciously or not. I cannot say, from any evidence before me, that the orders of General DeWitt were not reasonably expedient military precautions, nor could I say that they were. But even if they were permissible military procedures, I deny that it follows that they are constitutional. If, as the Court holds, it does follow, then we may as well say that any military order will be constitutional and have done with it.

The limitation under which courts always will labor in examining the necessity for a military order are illustrated by this case. How does the Court know that these orders have a reasonable basis in necessity? No evidence whatever on that subject has been taken by this or any other court. There is sharp controversy as to the credibility of the DeWitt report. So the Court, having no real evidence before it, has no choice but to accept General DeWitt's own unsworn, self-serving statement, untested by any cross-examination, that what he did was reasonable. And thus it will always be when courts try to look into the reasonableness of a military order.

In the very nature of things, military decisions are not susceptible of intelligent judicial appraisal. They do not pretend to rest on evidence, but are made on information that often would not be admissible and on assumptions that could not be proved. Information in support of an order could not be disclosed to courts without danger that it would reach the enemy. Neither can courts act on communications made in confidence. Hence courts can never have any real alternative to accepting the mere declaration of the authority that issued the order that it was reasonably necessary from a military viewpoint.

Much is said of the danger to liberty from the Army program for deporting and detaining these citizens of Japanese extraction. But a judicial construction of the due process clause that will sustain this order is a far more

subtle blow to liberty than the promulgation of the order itself. A military order, however unconstitutional, is not apt to last longer than the military emergency. Even during that period a succeeding commander may revoke it all. But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes. All who observe the work of courts are familiar with what Judge Cardozo described as "the tendency of a principle to expand itself to the limit of its logic."[1] A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image. Nothing better illustrates this danger than does the Court's opinion in this case.

It argues that we are bound to uphold the conviction of Korematsu because we upheld one in *Hirabayashi* v. *United States*, 320 U. S. 81, when we sustained these orders in so far as they applied a curfew requirement to a citizen of Japanese ancestry. I think we should learn something from that experience.

In that case we were urged to consider only the curfew feature, that being all that technically was involved, because it was the only count necessary to sustain Hirabayashi's conviction and sentence. We yielded, and the Chief Justice guarded the opinion as carefully as language

[1] Nature of the Judicial Process, p. 51.

will do. He said: "Our investigation here does not go beyond the inquiry whether, in the light of all the relevant circumstances preceding and attending their promulgation, the challenged orders and statute *afforded a reasonable basis for the action taken in imposing the curfew.*" 320 U. S. at 101. "We decide only the issue as we have defined it—we decide only that the *curfew order* as applied, and at the time it was applied, was within the boundaries of the war power." 320 U. S. at 102. And again: "It is unnecessary to consider whether or to what extent *such findings would support orders differing from the curfew order.*" 320 U. S. at 105. (Italics supplied.) However, in spite of our limiting words we did validate a discrimination on the basis of ancestry for mild and temporary deprivation of liberty. Now the principle of racial discrimination is pushed from support of mild measures to very harsh ones, and from temporary deprivations to indeterminate ones. And the precedent which it is said requires us to do so is *Hirabayashi.* The Court is now saying that in *Hirabayashi* we did decide the very things we there said we were not deciding. Because we said that these citizens could be made to stay in their homes during the hours of dark, it is said we must require them to leave home entirely; and if that, we are told they may also be taken into custody for deportation; and if that, it is argued they may also be held for some undetermined time in detention camps. How far the principle of this case would be extended before plausible reasons would play out, I do not know.

I should hold that a civil court cannot be made to enforce an order which violates constitutional limitations even if it is a reasonable exercise of military authority. The courts can exercise only the judicial power, can apply only law, and must abide by the Constitution, or they cease to be civil courts and become instruments of military policy.

Of course the existence of a military power resting on force, so vagrant, so centralized, so necessarily heedless of the individual, is an inherent threat to liberty. But I would not lead people to rely on this Court for a review that seems to me wholly delusive. The military reasonableness of these orders can only be determined by military superiors. If the people ever let command of the war power fall into irresponsible and unscrupulous hands, the courts wield no power equal to its restraint. The chief restraint upon those who command the physical forces of the country, in the future as in the past, must be their responsibility to the political judgments of their contemporaries and to the moral judgments of history.

My duties as a justice as I see them do not require me to make a military judgment as to whether General DeWitt's evacuation and detention program was a reasonable military necessity. I do not suggest that the courts should have attempted to interfere with the Army in carrying out its task. But I do not think they may be asked to execute a military expedient that has no place in law under the Constitution. I would reverse the judgment and discharge the prisoner.

WALLACE CORPORATION *v.* NATIONAL LABOR RELATIONS BOARD.

NO. 66. CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.*

Argued November 15, 16, 1944.—Decided December 18, 1944.

1. The findings of the National Labor Relations Board in an unfair labor practice proceeding that labor organization "A", which the Board had previously certified as collective bargaining representative, had been set up, maintained and used by the employer to frustrate the threatened unionization of its plant by labor organiza-

*Together with No. 67, *Richwood Clothespin & Dish Workers' Union* v. *National Labor Relations Board*, also on certiorari to the Circuit Court of Appeals for the Fourth Circuit.

tion "B", and that the closed-shop contract between A and the employer had been entered into by the employer with knowledge that A intended to use the contract as a means of bringing about the discharge of employees who were members of B by denying them membership in A, were supported by the evidence and supported the Board's order requiring the employer to disestablish A, to cease and desist from giving effect to the closed-shop contract, and to reinstate with back pay employees found to have been discharged because of their affiliation with B, and because of their failure to belong to A, as required by the closed-shop contract. P. 251.

2. Having found that there was a subsequent unfair labor practice, the Board was justified in considering evidence as to the employer's conduct both before and after the settlement agreement and certification. P. 255.
3. Although the proviso of § 8 (3) of the National Labor Relations Act permits closed-shop agreements, it was nevertheless an unfair labor practice for the employer to execute a closed-shop agreement with knowledge that A intended to deny membership to B employees because of their former affiliation with B. P. 255.
4. A labor organization which has been selected as bargaining representative under the National Labor Relations Act becomes the agent of all the employees, charged with the responsibility of representing their interests fairly and impartially. P. 255.
5. The employer was not compelled by law to enter into a contract under which it knew that discriminatory discharges would occur; and the record discloses that there was more which the employer could and should have done to prevent the discriminatory discharges even after the contract was executed. P. 256.

141 F. 2d 87, affirmed.

CERTIORARI, 322 U. S. 721, to review a decree granting enforcement of an order of the National Labor Relations Board, 50 N. L. R. B. 138.

Mr. R. Walston Chubb, with whom *Mr. Lyle M. Allen* was on the brief, for petitioner in No. 66.

Mr. M. E. Boiarsky, with whom *Mr. C. S. Rhyne* was on the brief, for petitioner in No. 67.

Mr. Alvin J. Rockwell, with whom *Solicitor General Fahy, Messrs. Robert L. Stern, Marcel Mallet-Provost,* and *Miss Ruth Weyand* were on the brief, for respondent.

MR. JUSTICE BLACK delivered the opinion of the Court.

In an attempt to settle a labor dispute at the plant of petitioner company, an agreement approved by the Board was signed by a C. I. O. union, an Independent union, and the company. At a consent election held pursuant to this agreement, Independent won a majority of the votes cast,[1] and was certified by the Board as bargaining representative. The company then signed a union shop contract with Independent, with knowledge—so the Board has found—that Independent intended, by refusing membership to C. I. O. employees, to oust them from their jobs. Independent refused to admit C. I. O. men to membership and the company discharged them.

In a subsequent unfair labor practice proceeding the Board found that (1) Independent had been set up, maintained, and used by the petitioner to frustrate the threatened unionization of its plant by the C. I. O., and (2) the union shop contract was made by the company with knowledge that Independent intended to use the contract as a means of bringing about the discharge of former C. I. O. employees by denying them membership in Independent. The Board held that the conduct of the company in both these instances constituted unfair labor practices. It entered an order requiring petitioner to disestablish Independent, denominated by it a "company union"; to cease and desist from giving effect to the union shop contract between it and Independent; and to reinstate with back pay forty-three employees, found to have been discharged because of their affiliation with the C. I. O., and because of their failure to belong to Independent, as required by the union shop contract.[2] The Circuit Court of Appeals ordered enforcement of the

[1] Of 207 eligible employees, 98 voted for Independent, 83 for the C. I. O., and 26 did not vote.

[2] 50 N. L. R. B. 138.

Order.[3] We granted certiorari because of the importance to the administration of the Act of the questions involved. 322 U. S. 721.

The Board's findings if valid support the entire order. This is so because § 8 (3) of the Act[4] does not permit such a contract to be made between a company and a labor organization which it has "established, maintained, or assisted." [5] The Board therefore is authorized by the Act to order disestablishment of such unions and to order an employer to renounce such contracts.[6] Nor can the company, if the Board's findings are well-grounded, defend its discharge of the C. I. O. employees on the ground that the contract with Independent required it to do so. It is contended that the Board's findings are not supported by substantial evidence. As shown by its analysis, the Board gave careful consideration to the evidence before it relating to the unfair labor practices which occurred both before and after the settlement agreement and the certification. The Circuit Court of Appeals unreservedly affirmed the Board's findings, and we find ample substantiating evidence in the record to justify that affirmance. We need therefore but briefly refer to the circumstances leading to the Board's order.

The findings of the Board establish the fact of an abiding hostility on the part of the company to any recognition of a C. I. O. union. This hostility we must take it extended to any employee who did or who might affiliate

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[3] 141 F. 2d 87.

[4] Section 8 (3) contains a proviso to the effect that nothing in the Act "shall preclude an employer from making an agreement with a labor organization (*not established, maintained, or assisted by any action defined in this Act as an unfair labor practice*) to require as a condition of employment membership therein. . . ." (Italics added.)

[5] *Labor Board* v. *Electric Vacuum Cleaner Co.*, 315 U. S. 685, 694.

[6] *I. A. of M.* v. *Labor Board*, 311 U. S. 72, 81–2; *Labor Board* v. *Falk Corp.*, 308 U. S. 453, 461.

himself with the C. I. O. union. The company apparently preferred to close down this one of its two plants rather than to bargain collectively with the C. I. O. It publicly proclaimed through one of its foremen that ". . . the ones that did not sign up with the C. I. O. didn't have anything to worry about . . . the company would see that they was taken care of." The settlement agreement plainly implied that the old employees could retain their jobs with the company simply by becoming members of whichever union would win the election. Nevertheless, the company entered into an agreement with Independent which inevitably resulted in bringing about the discharge of a large bloc of C. I. O. men and their president.

The contract was executed after notice to the company by the business manager of Independent that Independent must have the right to refuse membership to old C. I. O. employees who might jeopardize its majority. This business manager, who had himself originally been recommended to Independent by a company employee, wrote the company, prior to the making of the contract, that Independent insisted upon a closed-shop agreement because it wanted a "legal means of disposing of any present employees" who might affect its majority, and "who are unfavorable to our interests." The contract further significantly provided that the company would be released from the clause requiring it to retain in its employ union men only, if Independent should lose its majority and the C. I. O. win it.[7]

Neither the Board nor the court below found that the company engaged in a conspiracy to bring about the dis-

[7] The contract reads: "It is mutually agreed by both parties hereto that should the Union at any time become affiliated in any way with any labor organization or federation having membership or local union affiliations in more than one town outside of the City of Richwood, West Virginia, this clause (E) of Article I shall immediately become null and void, . . ."

charge of former C. I. O. members. Both of them, however, have found that the contract was signed with knowledge on the part of the Company that Independent proposed to refuse to admit them to membership and thus accomplish the very same purpose. By the plan carried out the company has been able to achieve that which the Board found was its object from the beginning, namely, to rid itself of C. I. O. members, categorized by its foreman as "agitators."

It is contended that the Board's finding as to company domination has no support in the evidence because the evidence as to company domination antedated the settlement and certification, and hence was improperly admitted. The argument is that the Board cannot go behind the settlement and certification. The petitioner does not argue that any language appearing in the Labor Relations Act denies this power to the Board, but relies upon general principles on which the judicial rule governing estoppel is based. Only recently we had occasion to note that the differences in origin and function between administrative bodies and courts "preclude wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of courts." *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 143. With reference to the attempted settlement of disputes, as in the performance of other duties imposed upon it by the Act, the Board has power to fashion its procedure to achieve the Act's purpose to protect employees from unfair labor practices. We cannot, by incorporating the judicial concept of estoppel into its procedure, render the Board powerless to prevent an obvious frustration of the Act's purposes.

To prevent disputes like the one here involved, the Board has from the very beginning encouraged compro-

mises and settlements.[8] The purpose of such attempted settlements has been to end labor disputes, and so far as possible to extinguish all the elements giving rise to them. The attempted settlement here wholly failed to prevent the wholesale discard of employees as a result of their union affiliations. The purpose of the settlement was thereby defeated. Upon this failure, when the Board's further action was properly invoked, it became its duty to take fresh steps to prevent frustration of the Act. To meet such situations the Board has established as a working rule the principle that it ordinarily will respect the terms of a settlement agreement approved by it.[9] It has consistently gone behind such agreements, however, where subsequent events have demonstrated that efforts at adjustment have failed to accomplish their purpose, or where there has been a subsequent unfair labor practice.[10] We

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[8] Apparently more than 50% of all cases before it have been adjusted under its supervision. See First Annual Report of the National Labor Relations Board (1936), pp. 30–31; Second Annual Report (1937), pp. 15–17; Third Annual Report (1938), pp. 20–22; Fourth Annual Report (1939), pp. 19–22; Fifth Annual Report (1940), pp. 14, 16–18, 20, 26; Sixth Annual Report (1941), pp. 14–15, 25, 26, 27, 29; Seventh Annual Report (1942), pp. 22–25, 28–30, 80–86; Eighth Annual Report (1943), pp. 20–23, 91, 92.

[9] Matter of Corn Products Refining Co., 22 N. L. R. B. 824, 828–829; Matter of Wickwire Brothers, 16 N. L. R. B. 316, 325–326; Matter of Godchaux Sugars, 12 N. L. R. B. 568, 576–579; Matter of Shenandoah-Dives Mining Co., 11 N. L. R. B. 885, 888; cf. Matter of Locomotive Finished Material Co., 52 N. L. R. B. 922, 927.

[10] Matter of Locomotive Finished Material Co., *supra*, 926–928; Matter of Chicago Casket Co., 21 N. L. R. B. 235, 252–256; Matter of Harry A. Halff, 16 N. L. R. B. 667, 679–682; cf. Matter of Wickwire Brothers, *supra*. The courts have approved the Board's practice in this respect. *Labor Board* v. *Phillips Gas & Oil Co.*, 141 F. 2d 304, 305–6 (C. C. A. 3); *Labor Board* v. *Hawk & Buck Co.*, 120 F. 2d 903, 904–5 (C. C. A. 5); *Labor Board* v. *Thompson Products*, 130 F. 2d 363, 366–67 (C. C. A. 6); *Canyon Corp.* v. *Labor Board*, 128 F. 2d 953, 955–956 (C. C. A. 8); *Sperry Gyroscope Co.* v. *Labor Board*, 129

think this rule adopted by the Board is appropriate to accomplish the Act's purpose with fairness to all concerned. Consequently, since the Board correctly found that there was a subsequent unfair labor practice, it was justified in considering evidence as to petitioner's conduct, both before and after the settlement and certification.

The company denies the existence of a subsequent unfair labor practice. It attacks the Board's conclusion that it was an unfair labor practice to execute the union shop contract with knowledge that Independent at that time intended to deny membership to C. I. O. employees because of their former affiliations with the C. I. O. It admits that had there been no union shop agreement, discharge of employees on account of their membership in the C. I. O. would have been an unlawful discrimination contrary to § 8 (3) of the Act. But the proviso in § 8 (3) permits union shop agreements. It follows therefore, the company argues, that, inasmuch as such agreements contemplate discharge of those who are not members of the contracting union, and inasmuch as the company has no control over admission to union membership, the contract is valid and the company must discharge non-union members, regardless of the union's discriminatory purpose, and the company's knowledge of such purpose. This argument we cannot accept.

The duties of a bargaining agent selected under the terms of the Act extend beyond the mere representation of the interests of its own group members. By its selection as bargaining representative, it has become the agent of all the employees, charged with the responsibility of representing their interests fairly and impartially. Otherwise, employees who are not members of a selected union at the time it is chosen by the majority would be

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F. 2d 922, 931 (C. C. A. 2). See *Warehousemen's Union* v. *Labor Board,* 121 F. 2d 84, 92–94 (App. D. C.) cert. den. 314 U. S. 674.

left without adequate representation. No employee can be deprived of his employment because of his prior affiliation with any particular union. The Labor Relations Act was designed to wipe out such discrimination in industrial relations. Numerous decisions of this Court dealing with the Act have established beyond doubt that workers shall not be discriminatorily discharged because of their affiliation with a union. We do not construe the provision authorizing a closed shop contract as indicating an intention on the part of Congress to authorize a majority of workers and a company, as in the instant case, to penalize minority groups of workers by depriving them of that full freedom of association and self-organization which it was the prime purpose of the Act to protect for all workers. It was as much a deprivation of the rights of these minority employees for the company discriminatorily to discharge them in collaboration with Independent as it would have been had the company done it alone. To permit it to do so by indirection, through the medium of a "union" of its own creation, would be to sanction a readily contrived mechanism for evasion of the Act.

One final argument remains. The company, it is said, bargained with Independent because it was compelled to do so by law. The union shop contract to which the company at first objected, but into which it entered against the advice of counsel, was the result of that bargaining. The company, it is pointed out, persistently though unsuccessfully sought to persuade Independent to admit C. I. O. workers as members of Independent. Hence, we are told, the company did all in its power to prevent the discharges and should not be held responsible for them. Two answers suggest themselves: First, that the company was not compelled by law to enter into a contract under which it knew that discriminatory discharges of its employees were bound to occur; second, the record discloses that

there was more the company could and should have done to prevent these discriminatory discharges even after the contract was executed. Immediately after the discharge of this large group of employees, the Labor Board complained to the company. The company appealed in writing to Independent's business manager to admit the men to membership, and thus make possible their reinstatement. This appeal was rejected. The Board then called to the company's attention our decision in *Labor Board* v. *Electric Vacuum Cleaner Co.*, 315 U. S. 685, asserting that under its authority the men had been illegally discharged and should be reinstated. In subsequent correspondence, the Board suggested to the company that if it should later be required to reinstate the discharged employees, it would have only itself to blame, since it had voluntarily dispensed with their services. It insisted that the company was taking a needless risk of liability because if the Board should hear charges and dismiss them, the men could then be discharged, but if on the other hand, the Board should sustain the complaint, the discharged employees "would have retained their positions and your client would have no further liability because of their wrongful discharge." The Board's representative at that time wrote the company, "I again beseech you to return them to work pending a decision by the National Labor Relations Board on this question."

It follows from what we have said that we affirm the judgment of the court below approving the order of the Board in its entirety.

Affirmed.

MR. JUSTICE JACKSON, dissenting.

A more complete statement of the facts than is found in the Court's opinion is necessary to disclose the reasons why the CHIEF JUSTICE, MR. JUSTICE ROBERTS, MR. JUSTICE FRANKFURTER, and I dissent.

The Wallace Manufacturing Company employs about 200 employees and makes clothespins and similar wood products at Richwood, a small community in West Virginia. In July 1941 a union affiliated with the C. I. O., which after the practice of the Court's opinion we will call the C. I. O., began to organize these employees, and the Company engaged in counter measures. Without detailing the evidence or considering the merits of the Company's objections we will assume that the Company during this period was guilty of unfair labor practices.

On September 25, the C. I. O. called a strike. About October 2, the Independent union, one of the petitioners here, came into being. On October 10, 1941, the C. I. O. filed charges with the Labor Board, alleging among other things that the Company had violated the Act by sponsoring the formation of the Independent. Again, without weighing the evidence or the objections of the Company or of the Independent, we will assume that the Company was guilty.

On October 14, the Independent demanded recognition as bargaining representative of the employees, and on October 31, it filed with the Labor Board a petition for investigation and certification of it as the representative of the Company's employees.

The Board, however, did not proceed on either the complaint or the request for certification. Instead, as the Government states, "During the ensuing two and one-half months, representatives of petitioner [the company], the Board, and the two unions engaged in negotiations looking toward settlement of the entire controversy, including disposition of the Union's charge and the Independent's petition." Again, without considering the Company's or the Independent's objection or evidence, we will assume that during this two and a half months the Company engaged in unfair labor practices. The strike was proceeding, however, with much bitterness and some

violence. On December 30, the strike then being in its fourth month, the C. I. O. by telegram offered, with the approval of the Labor Board, to enter into a consent election "with you and your Company Union, on the condition that when we prove a majority and become the exclusive bargaining agency for all your employees, that as a condition of employment all eligible employees must become members of Local Union 129, U. C. W. O. C." The closed-shop proposal was thus first brought forward by the C. I. O. On January 13, the C. I. O. and the Independent and the Company signed an agreement that the plant should be opened, that everyone should return to work, that the Company would not in any way influence its employees for or against either union, and that the unions would not exercise any coercion. The Company agreed to recognize as exclusive bargaining agent whichever union was proved by a vote conducted by the Board to represent a majority of its employees and to start negotiations immediately after the result of the election was determined and to grant a union shop. All parties are agreed that they employed "union shop" as the equivalent of "closed shop." There is no finding and no evidence that at the time the company entered into this obligation it had any foreknowledge as to which union would win or what the practice of either as to admission of members would be, nor is there any evidence that either union had decided upon any policy in anticipation of victory. There is no charge, no finding, and no evidence that the Company has not performed its part of this agreement scrupulously.

The parties took this agreement to the office of the Board's regional manager and on January 19 two agreements were drawn: one by which the C. I. O. withdrew the charges of domination and other charges; and the other for a consent election to determine the employees' choice of representative. Both of these agreements, after

signature by all the parties, were approved in writing by the Regional Director, acting on behalf of the National Labor Relations Board and with full knowledge of the agreement that the Company would give to the winner a closed shop.[1]

The employees, without distinction as to union affiliation, all returned to work. The election was held January 30, under the auspices of the Board. Of the 186 valid votes cast, the Independent received 98, the C. I. O. 83, and 5 votes were cast for neither. The C. I. O. filed no objections, and the Board on February 4 certified the Independent as the exclusive bargaining agent for the employees in the plant.

Thereupon the Company bargained with the certified representative, as it was required by law to do. The evidence is uncontradicted that the Company was reluctant still to enter into a closed-shop agreement. The Independent, however, insisted that the Company perform the contract by which the strike had been settled. It stated its position in a letter in which it said: "The 'Closed Shop' will, therefore, give us some control in preventing the hiring of additional employees who are unfavorable to our interests and who would further jeopardize our majority. It would also provide us with a legal means of disposing of any present employees, including Harvey Dodrill whom

[1] The Board has declared its policy with respect to consent elections as follows: "However, the Board does not ordinarily order elections in the presence of unremedied unfair labor practices, whether merely alleged or already found by the Board, unless the labor organization which instituted the charges has agreed in advance that it will not rely upon the unfair labor practices as a basis for objecting to the conduct or results of the election. The Board orders an election only when it is satisfied, after considering all evidence, respecting the employer's compliance with a prior order concerning unfair labor practices, that 'an election free from all employer compulsions, restraints and interference, can be held.'" Eighth Annual Report (1943) 49.

our members have declared by unanimous ballot that they will not work with, whose presence in the plant is unfavorable to our interests because those who are so unfavorable will not be permitted to become members of our organization and without such membership they would not be permitted to work in the plant under a closed shop contract which we respectfully insist that we *must* have."

This is the first knowledge it is claimed the Company had or should have had of the Independent's adoption of an exclusionary policy toward its rivals. The Company yielded, considering the union's membership policy as something it could not interfere with, and the closed-shop contract was signed. It required that all present and future employees should become members of the Independent within ten days of the date of the contract or from the date of hiring. The contract and notice of the closed-shop arrangement were posted in the plant. On March 18, forty-three employees were dismissed, on demand of the Independent, as not eligible for employment because of non-membership in it. Later it appeared that twelve such dismissed employees never made application for membership in the Independent, and thirty-one members who had applied for membership had been rejected because when their applications came before the meeting in regular course they did not receive the number of ballots necessary under its by-laws to elect to membership. Whether the Company knew that they had applied for membership and had been rejected is disputed, but again we resolve the doubt against the Company and assume that the superintendent knew this fact at the time of discharge.

There is no dispute, however, that when Mr. Wallace, the president of the company, learned of the discharge he attempted to persuade the Independent to allow these employees to be reinstated. On March 20, 1942, he wrote to the business agent of the Independent a letter. The Board has not found that it was not written in good faith.

To the contrary, counsel for the Board with commendable candor stated that there is no evidence and that he made no contention that it was other than a good-faith statement of the Company's position. Among other things it says, "When our Mr. Christmas talked to you on March 9th, you will recall that he appealed to you to see that the closed shop clause, which your Union insisted be included in the working agreement, should not be used in any way to unfairly prevent any person from working who wanted to work. We realize, of course, that the contract does not give the Company the right to tell the Union who to admit as members, and for that reason Mr. Christmas' talk with you and mine over the telephone could only be directed to the sense of fairness which we believe exists in the minds of your members.

"Entirely aside from the fact that having to lay off this large number of experienced people will badly cripple our production which is urgently needed, we feel that it is indeed a sad situation where, account of some individual differences of opinion, people who have perhaps been friends and neighbors for many years cannot work together. I will appreciate your advising me what can be done."

The Regional Director of the Board was notified of the discharges and, as the Court's opinion states, he did urge the Company to disregard its closed-shop contract and re-employ nonmembers of the certified union. The Company's counsel reminded him that he had expressed concern about the closed-shop provision to the Regional Director when it was being negotiated, and that the Director had replied that he probably "would have to agree to it as the C. I. O. certainly would have insisted upon it if they had prevailed in the election." The Company insisted that "membership in the union is beyond the Company's control" and that unless the union relented it would stand by the closed-shop contract. The Company sug-

gested, however, to the Independent that it conduct interviews with those it had rejected and reconsider them individually. The Union by unanimous vote rejected the suggestion. The Regional Director of the Board also wrote to the head of the Independent about the individuals discharged "because they were not members of your union. It develops that your union is unwilling to accept them into membership. I need not remind you of the seriousness of these charges." The Board representatives were unable to persuade the union to accept the rejected members nor the Company to repudiate its agreement.

At the opening of the hearing before the examiner July 9, 1942, the Company declared it was "ready to take any steps which are necessary to the end that these people be put back to work, as it has been throughout, since this agreement was entered into." It suggested that the attorney for the Board and the attorney for the Independent work out a settlement. The Board's attorney expressed "to the representative of the Company my thanks for the suggestion." Adjournment was taken and counsel for the union went from Summerville, the place of hearing, to Richwood and called a meeting of the Independent union. The Board attorney's objection kept further developments out of the record except that he stated, "I am willing to let the record show that Mr. Ritchie [attorney for the Independent] made me a proposition which I was unable to accept and that I made him one which he was unable to accept." The case therefore proceeded against the Company.

The Board did not find any unfair labor practice on the part of the Company between the date of the settlement agreement and the election. In fact, it refused to accept the recommendation of the trial examiner for such a finding, saying that "such interference, if any, was too trivial," was known to the C. I. O., which made no objection to the certification, and had come to the knowledge of the Re-

gional Director prior to the election. "Nevertheless, he proceeded with the election, found it to be a fair one, and certified the Independent."

No unfair labor practices at any time after the settlement agreement are found or charged against the employer except the making and performing of the closed-shop agreement. The Board states its position as follows: "The issue remains whether, by entering into the closed-shop contract with the Independent with knowledge that the Independent intended to exclude employees from membership and by discharging employees denied membership in the Independent, as set forth above, the respondent violated the Act. The respondent contends that it was bound to enter into a closed-shop contract by the terms of the election agreement between the respondent, the Union, and the Independent, and urges the Board to regard the discharges as proper since made pursuant to the closed-shop contract.

"We do not agree. An employer may not enter into a closed-shop contract which to his knowledge is designed to operate as an instrument for effecting discrimination against his employees solely because of their prior union activities. The proviso in Section 8 (3) of the Act permits an employer to enter into an agreement with the duly designated representative of his employees, requiring membership in that organization as a condition of employment. It is true that under the terms of the election agreement the respondent was bound to execute a union-shop contract with the victorious union. It by no means follows, however, that the respondent was also bound by the election agreement to acquiesce in a scheme to penalize employees whose choice of representatives was not that of the majority; nor can the proviso in Section 8 (3) be thought to countenance such a result. . . .

". . . The facts in the case make it apparent that the respondent [Company] was put on notice that its [Inde-

pendent's] real purpose was to bar from future employment with the respondent persons who had adhered to the charging Union in the election campaign. While the tripartite agreement of January 13, 1942, may have been valid when made, performance of its terms did not require the respondent knowingly to become a party to the Independent's plan to eliminate from respondent's pay roll employees solely because of their past union activities. On the contrary, when this unlawful scheme became known to it, the respondent not only had a right to abrogate the tripartite agreement, but also was under an affirmative obligation to do so. . . . Under these circumstances, the closed-shop agreement cannot be deemed a defense, but a discriminatory device to insure perpetuation of the Independent and thus deprive employees of their statutory right to select bargaining representatives."

Holding that execution and performance of the closed-shop agreement after the settlement and certification by the Board were "unfair labor practices," the Board held them effective also to revive the old charges settled by the agreements and election and it went back to those events to find grounds on which to hold that the employer dominates the Independent.

Accordingly it ordered that the Company disestablish and withdraw all recognition from the Independent as representative of any of its employees. It forbade "any continuation, renewal, or modification of the existing contract [which] would perpetuate the conditions which have deprived employees" of their jobs; it ordered the Company to cease giving effect to any contract between it and the Independent or to any modification or extension thereof. It also ordered that the Company "offer the aforesaid 43 employees immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and to make them whole for any loss of pay they may have suffered."

The underlying question is, in the language of the Board's brief, "Whether petitioner by entering into and discharging employees pursuant to the terms of the closed-shop contract with the Independent violated Section 8 (3) and (1) of the Act." It is one of importance far beyond this little company and its two hundred employees.

Section 8 (3) makes it an unfair labor practice for an employer, by discrimination, to encourage or discourage membership in any labor organization. If it ended there it would of course outlaw any closed shop, for the very essence of the closed shop is that the employer discriminates in employment to require membership in a particular union. To validate discrimination in such circumstances a proviso follows that no law of the United States "shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees. . . ."

At the time this closed-shop agreement was made the Board had certified the Independent as representative of the employees. Under § 8 it would have been an unfair labor practice had the Company refused to bargain with it. The Board made the certification, without objection by the defeated C. I. O. and with full knowledge that the Company was bound in law and in good faith to give the certified union a closed-shop contract. We do not say, and it is not necessary now to decide, that the Board has no power to protect minorities at this stage of the proceedings. We do not mean to preclude the power of the Board, when the contract settling the strike, withdrawing charges against the company, and consenting to an election with a closed shop to the winner was brought to the Board, to have refused to dismiss charges and undertake an election unless each union agreed that, if it won

a closed shop, it would open the union to membership from the losers on terms the Board deemed fair. Since no one could tell who would win, this would in any event have been an impartial arrangement. Even after the Independent won, the Board before certifying it might perhaps properly have made conditions as to reasonable terms to the defeated. But the Board made no conditions or reservations of the sort. Instead, it takes the position, and the Court is holding, that such conditions must be imposed on the union by the employer. He must see that the union with which he has been ordered to bargain makes proper terms for admission into that certified union of its former enemies and rivals. We think that the decision to that effect is not only unauthorized by Congress, but is utterly at war with the hands-off requirements which the law lays upon the employer, and that this decision is at war with one of the basic purposes of labor in its struggle to obtain this Act and of Congress in enacting it.

Of course the closed shop is well known in labor relations. Its essential philosophy is that once the employees have chosen their representative union, it is entitled to bargain for the employer's help to maintain its control. Other employer aids to a dominant union, such as the check-off, are also conceded to unions by bargaining on behalf of a majority when they would not be at all permissible for the employer to use in the first place to influence the workmen to choose a particular union because he favored it. But the idea of the closed shop is that, while these acts of influence or pressure on workmen are unfair when exerted by the employer in his own interest, they are fair and lawful when enforced by him as an instrument of the union itself. A closed shop is the ultimate goal of most union endeavor, and not a few employers have found it a stabilizer of labor relations by putting out of their shops men who were antagonistic to the dominant union, thus ending strife for domination. It puts the employ-

ment office under a veto of the union, which uses its own membership standards as a basis on which to exclude men from employment.

Neither the National Labor Relations Act nor any other Act of Congress expressly or by implication gives to the Board any power to supervise union membership or to deal with union practices, however unfair they may be to members, to applicants, to minorities, to other unions, or to employers. This may or may not have been a mistake, but it was no oversight. We suppose that there is no right which organized labor of every shade of opinion in other matters would unite more strongly in demanding than the right of each union to control its own admissions to membership. Each union has insisted on its freedom to fix its own qualifications of applicants, to determine the vote by which individual admissions will be granted, to prescribe the initiation or admission fees, to fix the dues, to prescribe the duties to which members must be faithful and to decide when and why they may be expelled or disciplined. The exclusion of those whose loyalty is to a rival union or hostile organization is one of the most common and most understandable of practices, designed to defend the union against undermining, spying, and discord, and possible capture and delivery over to a rival. Some unions have battled to exclude Communists, some racketeers, and all to exclude those deemed disloyal to their purposes. See *Williams* v. *Quill*, 277 N. Y. 1, 7, 12 N. E. 2d 547; *Miller* v. *Ruehl*, 166 Misc. 479, 2 N. Y. S. 2d 394.

There are those who think that the time has come when unions should be denied this control over their own affairs. However this may be, we only know that Congress has included no such principle expressly in the Act. If the Board should attempt to exercise it as we have suggested by way of a condition on its conducting an election or making a certification, a question of its statutory power

to do so might arise, on which we express no opinion. It would at least be a forthright exercise of power over the unions by the Board itself acting in the public interest and would not require an employer to engage in interference with union affairs in direct violation of the Act.

But the Court is deciding not only that without authority of Congress the admission practices of a labor organization having a closed shop may be policed, but also, contrary as we think to the Act, that the employer is empowered and required to do the policing. This we think defies both the express terms and the philosophy of the Act. The letter of the Act makes it a forbidden practice for an employer to "interfere with" or "restrain" employees in the "right to self-organization." We assume this employer knew the Independent would exercise its power over admission privileges to some extent to protect itself against infiltration of hostile elements. The Board must have known it, too. And both must have known the C. I. O. would, also, if it won. However, the Independent has not indiscriminately excluded all who were against it in the election. The C. I. O. had 83 votes; all but 43 of these voters seem to have been admitted to the Independent, and 12 of those never applied, making 31 apparently rejected. In view of the bitterness and duration of the strike, involving some shooting, it is not strange that good will did not descend on the victors at once. The Board may have expected more moderation when it conducted the consent election and certified the Independent. There is nothing to show that the Company did not, too. When it was found how harshly the Independent had behaved, the Company did try persuasion to get the union leaders to relent—the Company's own interests were to get back more of its experienced employees. How it could have done more without breaking both faith and the law, the Court does not point out, and we do not know.

Of course, if the employer in a closed shop is to be responsible for the discriminations or unfairness of the union, he must have a right to be informed about its admissions. If, in collective bargaining, a union asked a closed shop, the employer would have to demand to know the rules and practices about admission, the fees, the by-laws, the method of electing members. If he should demand this as a condition of collective bargaining, we should expect the Board to hold him guilty of unfair practices, and we have no doubt it would ask this Court to sustain it. Yet here the sole ground of penalizing this employer is that he did not do just that. Should the employer have made the union admit all of its former enemies? If not, by what standard could he allow it to select? Must it also be made to admit even those who would not sign applications or pay initiation fees claimed to be too onerous? The employer is required to reinstate with back pay a dozen who never even asked to join the certified union. But neither the Court nor the Board says what the employer should have required the union to adopt as an admission policy.

The statute expressly permits a closed shop. It can be denied only when the certified union is "established, maintained, or assisted" by unfair labor practices of the employer. But the statute cannot mean that the making and performance of a closed-shop contract in itself is an unfair practice which invalidates a closed shop. To so interpret it would be to believe the Congress by this provision was perpetrating a hoax. But if it means that the union can have a closed shop and the employer will supervise its membership, it is a strange contradiction in an Act whose chief purpose was to sterilize the employers and to free workmen of the influence they exerted through control of the right to work.

We can quite understand, and we do not mean to criticize, the motives which animated the Board. We are deal-

ing here with an industry located in a small community where opportunities for other employment are probably not plentiful. It is not unlikely that denial of the right to work for this company will keep these men from earning a livelihood in a place they long have lived. In so far as the Board has been stirred by concern for individual and minority protection against arbitrary union action, we both understand and sympathize with their concern. The employer is the only one it can lay hands on, and the temptation is great to use him to protect minority rights in the labor movement. This and the other cases before us give ground for belief that the labor movement in the United States is passing into a new phase. The struggle of the unions for recognition and rights to bargain, and of workmen for the right to join without interference, seems to be culminating in a victory for labor forces. We appear now to be entering the phase of struggle to reconcile the rights of individuals and minorities with the power of those who control collective bargaining groups. We have joined in the opinion in *Steele* v. *Louisville & Nashville R. Co., ante,* p. 192. That case arose under the Railway Labor Act, which contains no authorization whatever for a closed shop, on the contrary forbids the discrimination underlying the adoption of a closed shop, and deals with an industry and a labor group which never has had or sought a closed shop. But here we deal with a minority which the statute has subjected to closed-shop practices. Whether the closed shop, with or without the closed union, should or should not be permitted without supervision is in the domain of policy-making, which it is not for this Court to undertake. Neither do we find any authority in the National Labor Relations Board to undertake it.

It happens to be an independent that won here. But counsel for the Board assured us on argument that this is not a one-way policy to require independent unions to admit their enemies. It would, as we understand it,

have been applied in the same manner if the C. I. O. had won and had excluded some Independent members—on suspicion, perhaps, that they were company spies. The obstacle that this decision will interpose to all future bargaining for closed shops is likely to be felt by C. I. O. and A. F. of L. unions many times as often as by independents.

Of course it is the employer who is penalized here, and on shallow and superficial examination it may seem like another victory for labor. The employer must pay many thousands of dollars for hours unworked, because it performed reluctantly but in good faith its closed-shop agreement made under authority of Congress and with knowledge and encouragement of the Board, and with the approval and instigation of the C. I. O. union whose members now gain back pay by its repudiation. We think this cannot be justified as an unfair labor practice outlawed by Congress. That resistance to closed-shop unions will likely be stiffened if employers must underwrite the fairness of closed-shop unions to applicants and members, and that a good deal labor has fought for may be jeopardized if the price of obtaining it is to have the union policed by the employer, are considerations beyond our concern. We can only view this as a very unfair construction of the statute to the employer and one not warranted by anything Congress has directed or authorized.

UNITED STATES *v.* JOHNSON ET AL., DOING BUSINESS AS UNITED STATES DENTAL CO., ET AL.

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

No. 43. Argued November 8, 1944.—Decided December 18, 1944.

1. A prosecution for using the mails for sending dentures in violation of the Federal Denture Act—which Act contains no specific provision relative to the venue of prosecutions thereunder—can not be had in the district to which the dentures were sent but only in the district from which they were sent. P. 277.
2. Such construction of the Federal Denture Act, though not required by the compulsions of Article III, § 2 of the Constitution and of the Sixth Amendment, is more consonant with the considerations of historic experience and policy which underlie those safeguards in the Constitution regarding the trial of crimes. P. 275.
3. Questions of venue in criminal cases are not merely matters of formal legal procedure; they raise deep issues of public policy in the light of which legislation must be construed. P. 276.
4. *Armour Packing Co.* v. *United States*, 209 U. S. 56, distinguished. P. 276.

53 F. Supp. 596, affirmed.

APPEAL under the Criminal Appeals Act from a judgment quashing an information for violation of the Federal Denture Act.

Mr. W. Marvin Smith, with whom *Solicitor General Fahy* and *Assistant Attorney General Tom C. Clark* were on the brief, for the United States.

Mr. H. Albert Young, with whom *Mr. Alexander Jamison* was on the brief, for appellees.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This case concerns the construction of the Federal Denture Act of 1942, 56 Stat. 1087, 18 U. S. C. § 420 (f) (g)

(h) (Supp. 1943), which provides that ". . . it shall be unlawful, in the course of the conduct of a business of constructing or supplying dentures from casts or impressions sent through the mails or in interstate commerce, to use the mails or any instrumentality of interstate commerce for the purpose of sending or bringing into . . ." a State or Territory any denture the cast of which was taken by a person not licensed to practice dentistry in the State into which the denture is sent. An information, filed October 4, 1943, in the District Court for the District of Delaware, charged that appellees put into the mails at Chicago for delivery in Houston, Delaware, dentures in violation of the Delaware laws pertaining to dental practice, and thereby violated the Federal Denture Act. The information was quashed on the ground that prosecution of appellees could only be had where the illegal dentures were deposited. 53 F. Supp. 596. A second information, adding counts alleging transmission into and delivery in Delaware, was quashed by entry of a formal order referring to the court's earlier opinion.[1] The Government has appealed directly to this Court under the Criminal Appeals Act. 34 Stat. 1246, as amended, 18 U. S. C. § 682 (Supp. 1943).

Must these appellees be tried in the Northern district of Illinois or may they be tried in the district of any State through which the dentures were carried including Delaware, the place of delivery? Has Congress authorized such discretion in the enforcement of this Act? If it has, there is an end to the matter, for Congress may constitutionally make the practices which led to the Federal Denture Act triable in any federal district through which an offending denture is transported. *Armour Packing Co.* v.

[1] We are concerned only with this latter information, but the court's opinion, delivered in connection with the first information, gave its reasons for quashing both informations.

United States, 209 U. S. 56. An accused is so triable, if a fair reading of the Act requires it. But if the enactment reasonably permits the trial of the sender of outlawed dentures to be confined to the district of sending, and that of the importer to the district into which they are brought, such construction should be placed upon the Act. Such construction, while not required by the compulsions of Article III, § 2 of the Constitution and of the Sixth Amendment, is more consonant with the considerations of historic experience and policy which underlie those safeguards in the Constitution regarding the trial of crimes.

Aware of the unfairness and hardship to which trial in an environment alien to the accused exposes him, the Framers wrote into the Constitution that "The Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed . . ." Article III, § 2, cl. 3. As though to underscore the importance of this safeguard, it was reinforced by the provision of the Bill of Rights requiring trial "by an impartial jury of the State and district wherein the crime shall have been committed." Sixth Amendment. By utilizing the doctrine of a continuing offense, Congress may, to be sure, provide that the locality of a crime shall extend over the whole area through which force propelled by an offender operates. Thus, an illegal use of the mails or of other instruments of commerce may subject the user to prosecution in the district where he sent the goods, or in the district of their arrival, or in any intervening district. Plainly enough, such leeway not only opens the door to needless hardship to an accused by prosecution remote from home and from appropriate facilities for defense. It also leads to the appearance of abuses, if not to abuses, in the selection of what may be deemed a tribunal favorable to the prosecution.

These are matters that touch closely the fair administration of criminal justice and public confidence in it, on which it ultimately rests. These are important factors in any consideration of the effective enforcement of the criminal law. They have been adverted to, from time to time, by eminent judges; and Congress has not been unmindful of them. Questions of venue in criminal cases, therefore, are not merely matters of formal legal procedure. They raise deep issues of public policy in the light of which legislation must be construed. If an enactment of Congress equally permits the underlying spirit of the constitutional concern for trial in the vicinage to be respected rather than to be disrespected, construction should go in the direction of constitutional policy even though not commanded by it.

It is significant that when Congress desires to give a choice of trial, it does so by specific venue provisions giving jurisdiction to prosecute in any criminal court of the United States through which a process of wrongdoing moves. Such was the situation in *Armour Packing Co.* v. *United States, supra.* The offense there was under the Elkins Act for the transportation of goods at illegal freight rates, and Congress specifically provided for prosecution in any district "through which the transportation may have been conducted." 32 Stat. 847, as amended, 49 U. S. C. § 41 (1).

In the Federal Denture Act Congress did not make provision for trial in any district through which the goods were shipped. The absence of such a provision would in itself be significant. Its significance is enhanced when it appears that the attention of Congress was directed by the Postmaster General to the desirability of authority for a discretionary trial either at the place of shipment or at the place of receipt. He wrote to the Chairman of the House Committee on Interstate and Foreign Commerce "that consideration should be given to the advisability of having

the measure provide for prosecution of violators in the jurisdiction where the material is caused to be delivered as well as in the jurisdiction from which it is sent." Hearings before Subcommittee of House Committee on Interstate and Foreign Commerce on H. R. 5674, 77th Cong., 2d Sess. (1942) p. 3. And the Committee also invited the viewpoint of representatives of the Department of Justice "on the language of the bill." *Id.* at 28. In view of the keen awareness of enforcing officials as well as that of the members of the Committee on Interstate Commerce of the problems raised by venue in criminal trials, it is inadmissible to suggest either oversight on the part of Congress in failing to make provision for choice of venue or to make the cavalier assumption that that which is specifically provided for in other enactments—*i. e.*, trial in more than one district—was authorized but through parsimony of language left unexpressed in the Federal Denture Act.

The absence of a venue provision such as that which Congress wrote into the Elkins Act is far more rationally explained by due regard to the difference between the offenses under the Elkins and the Federal Denture Acts respectively. The venue provision under the Elkins Act underlines the offense defined by that Act, which was not the illegal sending or the bringing of goods but their "transportation." That—transportation—is inescapably a process, a continuing phenomenon. The Federal Denture Act did not make "transportation" the offense. It proscribed the use of the mails for "the purpose of sending or bringing into any State" unlawful dentures. The Act thereby hit two types of violators—the sender and the unlicensed dentist who brings in dentures from without. It is a reasonable and not a strained construction to read the statute to mean that the crime of the sender is complete when he uses the mails in Chicago, and the crime of the unlicensed dentist in California or Florida or Delaware, who orders the dentures from Chicago, is committed in the

State into which he brings the dentures. As a result, the trial of the sender is restricted to Illinois and that of the unlicensed dentist to Delaware or Florida or California. The illicit sender in Chicago cannot be hauled for trial across the continent, and, conversely, the unlicensed dentist cannot be compelled to stand trial in Chicago.

The large policy back of the constitutional safeguards counsels against the unrestricted construction for which the Government contends when Congress has not commanded it; and no considerations of expediency require it. Prosecutions of federal crimes are under the general supervision of the Attorney General of the United States; United States Attorneys do not exercise autonomous authority. The vindication of the Federal Denture Act therefore does not depend upon the willingness of some local United States Attorney to prosecute on behalf of a local victim. While it might facilitate the Government's prosecution in a case like this to have its witnesses near the place of trial, there must be balanced against the inconvenience of transporting the Government's witnesses to trial at the place of the sender the serious hardship of defending prosecutions in places remote from home (including the accused's difficulties, financial and otherwise, see R. S. § 878, 28 U. S. C. § 656, of marshalling his witnesses), as well as the temptation to abuses, already referred to, in the administration of criminal justice. Inasmuch as the statute permits and does not forbid this construction, the judgment below should be affirmed.

Affirmed.

MR. JUSTICE MURPHY, concurring.

I join in the opinion of the Court and believe that the judgment should be affirmed.

Congress has the constitutional power to fix venue at any place where a crime occurs. Our problem here is to

determine, in the absence of a specific venue provision, where the crime outlawed by the Federal Denture Act occurred for purposes of venue.

The Act prohibits the use of the mails for the purpose of sending or bringing into any state certain prohibited articles. It is undisputed that when a defendant places a prohibited article in the mails in Illinois for the purpose of sending it into Delaware he has completed a statutory offense. Hence he is triable in Illinois. But to hold that the statutory crime also encompasses the receipt of the prohibited article in Delaware, justifying a trial at that point, requires an implication that I am unwilling to make in the absence of more explicit Congressional language.

Very often the difference between liberty and imprisonment in cases where the direct evidence offered by the government and the defendant is evenly balanced depends upon the presence of character witnesses. The defendant is more likely to obtain their presence in the district of his residence, which in this instance is usually the place where the prohibited article is mailed. The inconvenience, expense and loss of time involved in transplanting these witnesses to testify in trials far removed from their homes are often too great to warrant their use. Moreover, they are likely to lose much of their effectiveness before a distant jury that knows nothing of their reputations. Such factors make it difficult for me to conclude, where Congress has not said so specifically, that we should construe the Federal Denture Act as covering more than the first sufficient and punishable use of the mails insofar as the sender of a prohibited article is concerned. The principle of narrow construction of criminal statutes does not warrant interpreting the "use" of the mails to cover all possible uses in light of the foregoing considerations.

MR. JUSTICE REED, dissenting.

The statute under consideration condemns the "use" of "the mails or any instrumentality of interstate commerce for the purpose of sending or bringing into any State or Territory" any denture which has been made without compliance with the laws of that State or Territory, relating to the furnishing of such appliances. The Court narrowly interprets the term "use" to condemn as criminal only the first use of the mails; in this way the Court restricts venue for prosecution to Illinois for trial of an offender who mails a denture in Illinois which is subsequently delivered through "use" of the mails in Delaware. We think, however, that the statute condemns and makes criminal any use of the mails for the prohibited purpose. Under this interpretation the appellees' use of the mails is punishable in Delaware and the dismissal of the information in this case should be reversed.

The venue of a crime may be fixed at any place where the acts denounced as crimes occur.[1] There is no disagreement as to this rule of law. The Court reaches its conclusion upon venue under the Federal Denture Act not upon any compulsion of Constitution or statute but because a restriction of the venue to the place of mailing seemed to it more consonant with the underlying purposes of the Constitutional provisions as to venue. These purposes are thought, as the Court expresses it, to include a trial in an environment which is not alien to the accused.

We think the Court misapprehends the purpose of the Constitutional provisions. We understand them to as-

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[1] Constitution of the United States, Art. III, § 2, cl. 3; Sixth Amendment. *Armour Packing Co.* v. *United States*, 209 U. S. 56, 73–77; *Salinger* v. *Loisel*, 265 U. S. 224, 232–235; *Horner* v. *United States*, No. 1, 143 U. S. 207, 213; *In re Palliser*, 136 U. S. 257, 265; *Hyde* v. *Shine*, 199 U. S. 62, 78; *Haas* v. *Henkel*, 216 U. S. 462, 473.

sure a trial in the place where the crime is committed and not to be concerned with the domicile of the criminal nor with his familiarity with the environment of the place of trial. *Haas* v. *Henkel,* 216 U. S. 462. Indeed in the present information nothing appears as to residence or domicile of the accused or as to their place of business.

Congress by its specification of the precise acts denounced as crimes fixes venue at the place where those acts are committed. Our inquiry, then, must be directed to a determination of what constitutes the crime denounced by the Denture Act. The statute condemns as unlawful the "use" of the "mails or any instrumentality of interstate commerce for the purpose of sending or bringing into any State" the prohibited dentures. It is not the deposit of the article or its delivery which is forbidden but the use of the transportation facilities. The sending or bringing of the dentures is not denounced as a substantive crime apart from the use of mails or instrumentalities to accomplish the purpose. The crime consists of the use of the mails to send a prohibited denture "into" or bring it "into" another state. The language leads us to the conclusion that a use for the prohibited purpose occurs at whatever place the proscribed denture is handled by the mails or an instrumentality of commerce.

The "use" for the "purpose" results in a continuous offense.[2] Since the offense is committed wherever the mails or the instrumentalities of interstate commerce are used for the purpose of sending or bringing the denture into a state contrary to the statute and the act has no provision otherwise limiting the place of trial, the venue is at what-

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[2] Cf. *United States* v. *Kissel,* 218 U. S. 601; *Hyde* v. *United States,* 225 U. S. 347, 360–67; *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 250; *In re Snow,* 120 U. S. 274; Clark & Marshall, Crimes (4th Ed.), § 504 (d); Wharton Criminal Law (12th Ed.), § 338. See also *In re Richter,* 100 F. 295, 298; *Morris* v. *United States,* 229 F. 516, 521.

ever place these acts are committed. One of the places in the present case is Delaware "into" which the dentures were brought by appellees' use of the mails in that state.[3] If this analysis is correct, there was no occasion for Congress to follow the suggestion as to venue of the Postmaster General to which the Court refers.

The title of the act indicates that it is directed at practices thought to lead to dental disorders and "to prevent the circumvention of certain State or Territorial laws regulating the practice of dentistry." 56 Stat. 1087. These state laws regulated the fabrication of prosthetic dental appliances. From the hearings[4] it is clear that the purpose of Congress was to protect the public against the evils of ill-fitting dental appliances by restricting interstate commerce to dental appliances which were approved by licensed practitioners of the state into which the appliances were brought. Such was declared to be its purpose by the report of the Senate Committee. S. Rep. No. 1779, 77th Cong., 2d Sess., p. 1. As the injury would occur normally at the place of delivery and as the act is designed to protect only those states which have laws regulating the furnishing of appliances by unlicensed practitioners, Congress would naturally enact legislation which might punish violations in the state of delivery.

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[3] Cf. *Armour Packing Co.* v. *United States*, 209 U. S. 56, 72–74; *United States* v. *Midstate Co.*, 306 U. S. 161, 165; and see *United States* v. *Lombardo*, 241 U. S. 73, 77; *United States* v. *Freeman*, 239 U. S. 117, and *In re Palliser*, 136 U. S. 257. The latter two cases illustrate the difference between a continuous offense and one begun in one state and completed in another. Compare Judicial Code, § 42, 28 U. S. C. § 103, with § 3237 of H. R. 5450, 78th Cong., 2d Sess.

[4] Hearing before a Subcommittee of the House Committee on Interstate and Foreign Commerce, February 3 and 4, 1942, 77th Cong., 2d Sess., on H. R. 5674; Hearing before a Subcommittee of the Senate Committee on Interstate Commerce, July 15, 16, 17 and 20, 1942, 77th Cong., 2d Sess., on S. 2371.

The prosecuting officers of that state would be most interested in enforcement and would best understand the scope of the laws of the state of delivery. Congress would not wish to leave immune shipments from foreign countries. Cf. *United States* v. *Freeman,* 239 U. S. 117.

The CHIEF JUSTICE, MR. JUSTICE DOUGLAS and MR. JUSTICE RUTLEDGE join in this dissent.

EX PARTE MITSUYE ENDO.

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

No. 70. Argued October 12, 1944.—Decided December 18, 1944.

1. The War Relocation Authority, whose power over persons evacuated from military areas derives from Executive Order No. 9066, which was ratified and confirmed by the Act of March 21, 1942, was without authority, express or implied, to subject to its leave procedure a concededly loyal and law-abiding citizen of the United States. P. 297.
2. Wartime measures are to be interpreted as intending the greatest possible accommodation between the Constitutional liberties of the citizen and the exigencies of war. P. 300.
3. The sole purpose of the Act of March 21, 1942 and Executive Orders Nos. 9066 and 9102 was the protection of the war effort against espionage and sabotage. P. 300.
4. Power to detain a concededly loyal citizen may not be implied from the power to protect the war effort against espionage and sabotage. P. 302.
5. The power to detain a concededly loyal citizen or to grant him a conditional release can not be implied as a useful or convenient step in the evacuation program. P. 302.
6. The Act of March 21, 1942 and Executive Orders Nos. 9066 and 9102 afford no basis for keeping loyal evacuees of Japanese ancestry in custody on the ground of community hostility. P. 302.
7. The District Court having acquired jurisdiction upon an application for habeas corpus, and there being within the district one responsible for the detention and who would be an appropriate

respondent, the cause was not rendered moot by the removal of the applicant to another circuit pending appeal from a denial of the writ, and the District Court has jurisdiction to issue the writ. *United States* v. *Crystal,* 319 U. S. 755, distinguished. P. 305.

On appeal from an order of the District Court denying a writ of habeas corpus, the Circuit Court of Appeals certified questions to this Court, which, under Judicial Code § 239, ordered the entire record sent up.

Mr. James C. Purcell, with whom *Mr. Wayne M. Collins* was on the brief, for Mitsuye Endo.

Solicitor General Fahy, with whom *Assistant Attorney General Wechsler* and *Messrs. Edward J. Ennis, Ralph F. Fuchs,* and *John L. Burling* were on the brief, for the United States.

Mr. Wayne M. Collins filed a brief on behalf of the Northern California Branch of the American Civil Liberties Union; and *Messrs. Osmond K. Fraenkel, Edwin Borchard, Charles Horsky, Arthur DeHon Hill, Winthrop Wadleigh, Harold Evans, William Draper Lewis,* and *Thomas Raeburn White* on behalf of the American Civil Liberties Union, as *amici curiae,* in support of Mitsuye Endo.

Mr. Justice Douglas delivered the opinion of the Court.

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

Mitsuye Endo, hereinafter designated as the appellant, is an American citizen of Japanese ancestry. She was

evacuated from Sacramento, California, in 1942, pursuant to certain military orders which we will presently discuss, and was removed to the Tule Lake War Relocation Center located at Newell, Modoc County, California. In July, 1942, she filed a petition for a writ of habeas corpus in the District Court of the United States for the Northern District of California, asking that she be discharged and restored to liberty. That petition was denied by the District Court in July, 1943, and an appeal was perfected to the Circuit Court of Appeals in August, 1943. Shortly thereafter appellant was transferred from the Tule Lake Relocation Center to the Central Utah Relocation Center located at Topaz, Utah, where she is presently detained. The certificate of questions of law was filed here on April 22, 1944, and on May 8, 1944, we ordered the entire record to be certified to this Court. It does not appear that any respondent was ever served with process or appeared in the proceedings. But the United States Attorney for the Northern District of California argued before the District Court that the petition should not be granted. And the Solicitor General argued the case here.

The history of the evacuation of Japanese aliens and citizens of Japanese ancestry from the Pacific coastal regions, following the Japanese attack on our Naval Base at Pearl Harbor on December 7, 1941, and the declaration of war against Japan on December 8, 1941 (55 Stat. 795), has been reviewed in *Hirabayashi* v. *United States,* 320 U. S. 81. It need be only briefly recapitulated here. On February 19, 1942, the President promulgated Executive Order No. 9066, 7 Fed. Reg. 1407. It recited that "the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities, as defined in Section 4, Act of April 20, 1918, 40 Stat. 533, as amended by the Act of No-

vember 30, 1940, 54 Stat. 1220, and the Act of August 21, 1941, 55 Stat. 655 (U. S. C., Title 50, Sec. 104)."

And it authorized and directed

"the Secretary of War, and the Military Commanders whom he may from time to time designate, whenever he or any designated Commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion. The Secretary of War is hereby authorized to provide for residents of any such area who are excluded therefrom, such transportation, food, shelter, and other accommodations as may be necessary, in the judgment of the Secretary of War or the said Military Commander, and until other arrangements are made, to accomplish the purpose of this order."

Lt. General J. L. De Witt, Military Commander of the Western Defense Command, was designated to carry out the duties prescribed by that Executive Order. On March 2, 1942, he promulgated Public Proclamation No. 1 (7 Fed. Reg. 2320) which recited that the entire Pacific Coast of the United States

"by its geographical location is particularly subject to attack, to attempted invasion by the armed forces of nations with which the United States is now at war, and, in connection therewith, is subject to espionage and acts of sabotage, thereby requiring the adoption of military measures necessary to establish safeguards against such enemy operations."

It designated certain Military Areas and Zones in the Western Defense Command and announced that certain persons might subsequently be excluded from these areas.

On March 16, 1942, General De Witt promulgated Public Proclamation No. 2 which contained similar recitals and designated further Military Areas and Zones. 7 Fed. Reg. 2405.

On March 18, 1942, the President promulgated Executive Order No. 9102 which established in the Office for Emergency Management of the Executive Office of the President the War Relocation Authority. 7 Fed. Reg. 2165. It recited that it was made "in order to provide for the removal from designated areas of persons whose removal is necessary in the interests of national security." It provided for a Director and authorized and directed him to "formulate and effectuate a program for the removal, from the areas designated from time to time by the Secretary of War or appropriate military commander under the authority of Executive Order No. 9066 of February 19, 1942, of the persons or classes of persons designated under such Executive Order, and for their relocation, maintenance, and supervision."

The Director was given the authority, among other things, to prescribe regulations necessary or desirable to promote effective execution of the program.

Congress shortly enacted legislation which, as we pointed out in *Hirabayashi* v. *United States, supra,* ratified and confirmed Executive Order No. 9066. See 320 U. S. pp. 87–91. It did so by the Act of March 21, 1942 (56 Stat. 173) which provided:

"That whoever shall enter, remain in, leave, or commit any act in any military area or military zone prescribed, under the authority of an Executive order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander, shall, if it appears that he knew or should

have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty of a misdemeanor and upon conviction shall be liable to a fine of not to exceed $5,000 or to imprisonment for not more than one year, or both, for each offense."

Beginning on March 24, 1942, a series of 108 Civilian Exclusion Orders [1] were issued by General De Witt pursuant to Public Proclamation Nos. 1 and 2. Appellant's exclusion was effected by Civilian Exclusion Order No. 52, dated May 7, 1942. It ordered that "all persons of Japanese ancestry, both alien and non-alien" be excluded from Sacramento, California,[2] beginning at noon on May 16, 1942. Appellant was evacuated to the Sacramento Assembly Center on May 15, 1942, and was transferred from there to the Tule Lake Relocation Center on June 19, 1942.

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[1] Civilian Exclusion Orders Nos. 1 to 99 were ratified by General De Witt's Public Proclamation No. 7 of June 8, 1942 (7 Fed. Reg. 4498) and Nos. 100 to 108 were ratified by Public Proclamation No. 11 of August 18, 1942. 7 Fed. Reg. 6703.

[2] By Public Proclamation No. 4, dated March 27, 1942 (7 Fed. Reg. 2601) General De Witt had ordered that all persons of Japanese ancestry who were within the limits of Military Area No. 1 (which included the City of Sacramento) were prohibited "from leaving that area for any purpose until and to the extent that a future proclamation or order of this headquarters shall so permit or direct."

Prior to this Proclamation a system of voluntary migration had been in force under which 4,889 persons left the military areas under their own arrangements. Final Report, Japanese Evacuation from the West Coast (1943), p. 109. The following reasons are given for terminating that program:

"Essentially, the objective was twofold. First, it was to alleviate tension and prevent incidents involving violence between Japanese migrants and others. Second, it was to insure an orderly, supervised, and thoroughly controlled evacuation with adequate provision for the protection of the persons of evacuees as well as their property." Final Report, *supra*, p. 105.

On May 19, 1942, General De Witt promulgated Civilian Restrictive Order No. 1 (8 Fed. Reg. 982) and on June 27, 1942, Public Proclamation No. 8. 7 Fed. Reg. 8346. These prohibited evacuees from leaving Assembly Centers or Relocation Centers except pursuant to an authorization from General De Witt's headquarters. Public Proclamation No. 8 recited that "the present situation within these military areas requires as a matter of military necessity" that the evacuees be removed to "Relocation Centers for their relocation, maintenance and supervision," that those Relocation Centers be designated as War Relocation Project Areas, and that restrictions on the rights of the evacuees to enter, remain in, or leave such areas be promulgated. These restrictions were applicable to the Relocation Centers within the Western Defense Command [3] and included both of those in which appellant has been confined—Tule Lake Relocation Center at Newell, California and Central Utah Relocation Center at Topaz, Utah. And Public Proclamation No. 8 purported to make any person who was subject to its provisions and who failed to conform to it liable to the penalties prescribed by the Act of March 21, 1942.

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[3] Six War Relocation Centers and Project Areas were established within and four outside the Western Defense Command. See Final Report, *supra*, note 2, Part VI. Each one which was outside the Western Defense Command was designated as a military area by the Secretary of War in Public Proclamation No. WD1, dated August 13, 1942. That proclamation provided that all persons of Japanese ancestry in those areas were required to remain there unless written authorization to leave was obtained from the Secretary of War or the Director of the War Relocation Authority. 7 Fed. Reg. 6593. It recited that the United States was subject to "espionage and acts of sabotage, thereby requiring the adoption of military measures necessary to establish safeguards against such enemy operations emanating from within as well as from without the national boundaries." And it also purported to make any person who was subject to its provisions and who failed to obey it liable to the penalties prescribed by the Act of March 21, 1942.

By letter of August 11, 1942, General De Witt authorized the War Relocation Authority [4] to issue permits for persons to leave these areas. By virtue of that delegation [5] and the authority conferred by Executive Order No. 9102, the War Relocation Authority was given control over the ingress and egress of evacuees from the Relocation Centers where Mitsuye Endo was confined.[6]

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[4] The letter of August 11, 1942, is printed in the Final Report, *supra*, note 2, p. 530. It recited that the delegation of authority was made pursuant to provisions of Public Proclamation No. 8, dated June 27, 1942. Later General De Witt described the supervision of Relocation Centers by the War Relocation Authority as follows:

"The initial problem was one of security—the security of the Pacific Coast. The problem was met by evacuation to Assembly Centers followed by a transfer to Relocation Centers. The latter phase—construction, supply, equipment of Relocation Centers and the transfer of evacuees from Assembly to Relocation Centers had been accomplished by the Army. (While the Commanding General was made responsible for this latter phase of the program, in so doing, he was accomplishing a mission of the War Relocation Authority rather than strictly an Army mission.) The second problem—national in scope—essentially a social-economic problem, was primarily for solution by the War Relocation Authority, an agency expressly created for that purpose."

Final Report, *supra*, note 2, p. 246.

On February 16, 1944, the President by Executive Order No. 9423 transferred the War Relocation Authority to the Department of the Interior. 9 Fed. Reg. 1903. The Secretary of the Interior by Administrative Order No. 1922, dated February 16, 1944, authorized the Director to perform under the Secretary's supervision and direction the functions transferred to the Department by Executive Order No. 9423.

[5] And see the delegation of authority contained in the Secretary of War's Proclamation WD1 of August 13, 1942, *supra*, note 3, respecting Relocation Centers outside the Western Defense Command.

[6] The Commanding General retained exclusive jurisdiction over the release of evacuees for the purpose of employment, resettlement, or residence within Military Area No. 1 and the California portion of Military Area No. 2. See Final Report, *supra*, note 2, p. 242. As to the Relocation Centers situated within the evacuated zone, the Com-

The program of the War Relocation Authority is said to have three main features: (1) the maintenance of Relocation Centers as interim places of residence for evacuees; (2) the segregation of loyal from disloyal evacuees; (3) the continued detention of the disloyal and so far as possible the relocation of the loyal in selected communities.[7] In connection with the latter phase of its work the War Relocation Authority established a procedure for obtaining leave from Relocation Centers. That procedure, so far as indefinite leave[8] is concerned, presently provides[9] as follows:

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manding General regulated "the conditions of travel and movement through the area." *Id.*

"The Commanding General recognized fully that one of the principal responsibilities of War Relocation Authority was properly to control ingress and egress at Relocation Centers. The exercise of such control by Army authorities would have been tantamount to administering the Centers themselves. While the Commanding General retained exclusive control to regulate and prohibit the entry or movement of any Japanese in the evacuated areas, he delegated fully the authority and responsibility to determine entry to and departure from the Center proper." *Id.*

[7] The functioning of Relocation Centers is described in the Final Report, *supra,* note 2, Part VI and in Segregation of Loyal and Disloyal Japanese in Relocation Centers, Sen. Doc. No. 96, 78th Cong., 1st Sess., pp. 4–25.

[8] Provision was also made for group-leave (or seasonal-work leave) and short term leave not to exceed 60 days. See Sen. Doc. No. 96, *supra,* note 7, p. 17.

[9] The first leave procedure was contained in Administrative Instruction No. 22, dated July 20, 1942. It provided in short that any citizen of Japanese ancestry who had never resided or been educated in Japan could apply for a permit to leave the Relocation Center if he could show that he had a specific job opportunity at a designated place outside the Relocation Center and outside the Western Defense Command. Every permittee was said to remain in the "constructive custody" of the military commander in whose jurisdiction the Relocation Center was located. The permit could be revoked by the Director and the permittee required to return to the Relocation Center

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Application for leave clearance is required. An investigation of the applicant is made for the purpose of ascertaining "the probable effect upon the war program and upon the public peace and security of issuing indefinite leave" to the applicant.[10] The grant of leave clearance does not authorize departure from the Relocation Center. Application for indefinite leave must also be made. Indefinite leave may be granted under 14 specified conditions.[11] For example, it may be granted (1) where the applicant proposes to accept an employment offer or an offer of support that has been investigated and approved by the Authority; or (2) where the applicant does not intend to work but has "adequate financial resources to take care of himself" and a Relocation Officer has investigated and approved "public sentiment at his proposed destination," or (3) where the applicant has made arrangements to live at a hotel or in a private home approved by a Relo-

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if the Director found that the revocation was necessary "in the public interest." The Regulations of September 26, 1942, provided more detailed procedures for obtaining leave. See 7 Fed. Reg. 7656. Administrative Instruction No. 22 was revised November 6, 1942. It was superseded as a supplement to the Regulations by the Handbook of July 20, 1943. The Regulations of September 26, 1942 were revised January 1, 1944. See 9 Fed. Reg. 154.

[10] Handbook, § 60.6.6. Nine factors are specified each of which is "regarded by intelligence agencies as sufficient to warrant a recommendation that leave clearance be denied unless there is an adequate explanation." § 60.10.2. These include, among others, a failure or refusal to swear unqualified allegiance to the United States and to forswear any form of allegiance to the Japanese Emperor or any other foreign government, power, or organization; a request for repatriation or expatriation whether or not subsequently retracted; military training in Japan; employment on Japanese naval vessels; three trips to Japan after the age of six, except in the case of seamen whose trips were confined to ports of call; an organizer, agent, member, or contributor to specified organizations which intelligence agencies consider subversive.

[11] Handbook, § 60.4.3.

cation Officer while arranging for employment; or (4) where the applicant proposes to accept employment by a federal or local governmental agency; or (5) where the applicant is going to live with designated classes of relatives.

But even if an applicant meets those requirements, no leave will issue when the proposed place of residence or employment is within a locality where it has been ascertained that "community sentiment is unfavorable" or when the applicant plans to go to an area which has been closed by the Authority to the issuance of indefinite leave.[12] Nor will such leave issue if the area where the applicant plans to reside or work is one which has not been cleared for relocation.[13] Moreover, the applicant agrees to give the Authority prompt notice of any change of employment or residence. And the indefinite leave which is granted does not permit entry into a prohibited military area, including those from which these people were evacuated.[14]

Mitsuye Endo made application for leave clearance on February 19, 1943, after the petition was filed in the Dis-

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[12] *Id.*

[13] *Id.* The War Relocation Authority also recommends communities in which an evacuee will be accepted, renders aid in finding employment opportunities, and provides cash grants, if needed, to assist the evacuee in reaching a specified destination and in becoming established there. The Authority has established eight area offices and twenty-six district offices to help carry out the relocation program.

[14] Sec. 60.4.8 of the Handbook provides:

"Before any indefinite leave permitting any entry into or travel in a prohibited military area may issue, a written pass or authorization shall be procured for the applicant from the appropriate military authorities and an escort shall be provided if required by the military authorities. Such pass or authorization may be procured through the Assistant Director in San Francisco, or in the case of the Manzanar Relocation Center through the commanding officer of the military police at the center to the extent authorized by the Western Defense Command."

trict Court. Leave clearance [15] was granted her on August 16, 1943. But she made no application for indefinite leave.[16]

Her petition for a writ of *habeas corpus* alleges that she is a loyal and law-abiding citizen of the United States, that no charge has been made against her, that she is being unlawfully detained, and that she is confined in the Relocation Center under armed guard and held there against her will.

It is conceded by the Department of Justice and by the War Relocation Authority that appellant is a loyal and law-abiding citizen. They make no claim that she is detained on any charge or that she is even suspected of disloyalty. Moreover, they do not contend that she may

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[15] The leave clearance stated that it did not authorize departure from the Relocation Center. It added:

"You are eligible for indefinite leave for the purpose of employment or residence in the Eastern Defense Command as well as in other areas; provided the provisions of Administrative Instruction No. 22, Rev., are otherwise complied with. The Provost Marshal General's Dept. of the War Department has determined that you, Endo Mitsuye are not at this time eligible for employment in plants and facilities vital to the war effort."

[16] The form of a citizen's indefinite leave is as follows:

"This is to certify that ..... a United States citizen, who has submitted to me sufficient proof of such citizenship, residing within ..... Relocation Area, is allowed to leave such area on ..... 19.., and subject to the terms of the regulations of the War Relocation Authority relating to the issuance of leave for departure from a relocation area and subject to restrictions ordered by the United States Army, and subject to any special conditions or restrictions set forth on the reverse side hereof, to enjoy leave of indefinite duration."

One of the grounds given by the District Court for denial of the petition for writ of *habeas corpus* was the failure of appellant to exhaust her administrative remedies. The Solicitor General and the War Relocation Authority do not invoke that rule here, since the issue which appellant poses is the validity of the regulations under which the administrative remedy is prescribed.

be held any longer in the Relocation Center. They concede that it is beyond the power of the War Relocation Authority to detain citizens against whom no charges of disloyalty or subversiveness have been made for a period longer than that necessary to separate the loyal from the disloyal and to provide the necessary guidance for relocation. But they maintain that detention for an additional period after leave clearance has been granted is an essential step in the evacuation program. Reliance for that conclusion is placed on the following circumstances.

When compulsory evacuation from the West Coast was decided upon, plans for taking care of the evacuees after their detention in the Assembly Centers, to which they were initially removed, remained to be determined. On April 7, 1942, the Director of the Authority held a conference in Salt Lake City with various state and federal officials including the Governors of the intermountain states. "Strong opposition was expressed to any type of unsupervised relocation and some of the Governors refused to be responsible for maintenance of law and order unless evacuees brought into their States were kept under constant military surveillance." [17] Sen. Doc. No. 96, *supra,* note 7, p. 4. As stated by General De Witt in his report to the Chief of Staff:

"Essentially, military necessity required only that the Japanese population be removed from the coastal area and dispersed in the interior, where the danger of action in concert during any attempted enemy raids along the coast, or in advance thereof as preparation for a full scale attack, would be eliminated. That the evacuation program necessarily and ultimately developed into one of complete Federal supervision, was due primarily to the

[17] Cf. the account of the meeting by General De Witt in the Final Report, *supra,* note 2, pp. 243–244.

fact that the interior states would not accept an uncontrolled Japanese migration."
Final Report, *supra,* note 2, pp. 43–44. The Authority thereupon abandoned plans for assisting groups of evacuees in private colonization and temporarily put to one side plans for aiding the evacuees in obtaining private employment.[18] As an alternative the Authority "concentrated on establishment of Government-operated centers with sufficient capacity and facilities to accommodate the entire evacuee population." Sen. Doc. No. 96, *supra,* note 7, p. 4. Accordingly, it undertook to care for the basic needs of these people in the Relocation Centers, to promote as rapidly as possible the permanent resettlement of as many as possible in normal communities, and to provide indefinitely for those left at the Relocation Centers. An effort was made to segregate the loyal evacuees from the others. The leave program which we have discussed was put into operation and the resettlement program commenced.[19]

It is argued that such a planned and orderly relocation was essential to the success of the evacuation program; that but for such supervision there might have been a

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[18] And see the Fourth Interim Report of the Tolan Committee, H. R. Rep. No. 2124, 77th Cong., 2d Sess., p. 18.

[19] There were 108,503 evacuees transferred to Relocation Centers. Final Report, *supra,* note 2, p. 279. As of July 29, 1944, there were 28,911 on indefinite leave and 61,002 in the Relocation Centers other than Tule Lake. It was sought to assemble at Tule Lake those whose disloyalty was deemed to be established and those who persisted in a refusal to say they would be willing to serve in the armed forces of the United States on combat duty wherever ordered and to swear unqualified allegiance to the United States and forswear any form of allegiance to the Japanese Emperor or any other foreign government, power or organization. This group, together with minor children, totaled 18,684 on July 29, 1944. And see Hearings, Subcommittee on the National War Agencies Appropriation Bill for 1945, p. 611.

dangerously disorderly migration of unwanted people to unprepared communities; that unsupervised evacuation might have resulted in hardship and disorder; that the success of the evacuation program was thought to require the knowledge that the federal government was maintaining control over the evacuated population except as the release of individuals could be effected consistently with their own peace and well-being and that of the nation; that although community hostility towards the evacuees has diminished, it has not disappeared and the continuing control of the Authority over the relocation process is essential to the success of the evacuation program. It is argued that supervised relocation, as the chosen method of terminating the evacuation, is the final step in the entire process and is a consequence of the first step taken. It is conceded that appellant's detention pending compliance with the leave regulations is not directly connected with the prevention of espionage and sabotage at the present time. But it is argued that Executive Order No. 9102 confers power to make regulations necessary and proper for controlling situations created by the exercise of the powers expressly conferred for protection against espionage and sabotage. The leave regulations are said to fall within that category.

First. We are of the view that Mitsuye Endo should be given her liberty. In reaching that conclusion we do not come to the underlying constitutional issues which have been argued. For we conclude that, whatever power the War Relocation Authority may have to detain other classes of citizens, it has no authority to subject citizens who are concededly loyal to its leave procedure.

It should be noted at the outset that we do not have here a question such as was presented in *Ex parte Milligan,* 4 Wall. 2, or in *Ex parte Quirin,* 317 U. S. 1, where the jurisdiction of military tribunals to try persons according to the law of war was challenged in *habeas corpus* pro-

ceedings. Mitsuye Endo is detained by a civilian agency, the War Relocation Authority, not by the military. Moreover, the evacuation program was not left exclusively to the military; the Authority was given a large measure of responsibility for its execution and Congress made its enforcement subject to civil penalties by the Act of March 21, 1942. Accordingly, no questions of military law are involved.

Such power of detention as the Authority has stems from Executive Order No. 9066. That order is the source of the authority [20] delegated by General De Witt in his letter of August 11, 1942. And Executive Order No. 9102 which created the War Relocation Authority purported to do no more than to implement the program authorized by Executive Order No. 9066.

We approach the construction of Executive Order No. 9066 as we would approach the construction of legislation in this field. That Executive Order must indeed be considered along with the Act of March 21, 1942, which ratified and confirmed it (*Hirabayashi* v. *United States, supra,* pp. 87–91) as the Order and the statute together laid such basis as there is for participation by civil agencies of the federal government in the evacuation program. Broad powers frequently granted to the President or other executive officers by Congress so that they may deal with the exigencies of wartime problems have been sustained.[21] And the Constitution when it committed to the Executive and to Congress the exercise of the war power necessarily gave them wide scope for the exercise of judgment and

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[20] Insofar as Public Proclamation No. WD1, dated August 13, 1942, *supra,* note 3, might be deemed relevant, it is not applicable here since the Relocation Centers with which we are presently concerned were within the Western Defense Command.

[21] See, for example, *United States* v. *Chemical Foundation,* 272 U. S. 1, 12; *United States* v. *Curtiss-Wright Corp.,* 299 U. S. 304; *Yakus* v. *United States,* 321 U. S. 414; *Bowles* v. *Willingham,* 321 U. S. 503.

discretion so that war might be waged effectively and successfully. *Hirabayashi* v. *United States, supra,* p. 93. At the same time, however, the Constitution is as specific in its enumeration of many of the civil rights of the individual as it is in its enumeration of the powers of his government. Thus it has prescribed procedural safeguards surrounding the arrest, detention and conviction of individuals. Some of these are contained in the Sixth Amendment, compliance with which is essential if convictions are to be sustained. *Tot* v. *United States,* 319 U. S. 463. And the Fifth Amendment provides that no person shall be deprived of liberty (as well as life or property) without due process of law. Moreover, as a further safeguard against invasion of the basic civil rights of the individual it is provided in Art. I, § 9 of the Constitution that "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." See *Ex parte Milligan, supra.*

We mention these constitutional provisions not to stir the constitutional issues which have been argued at the bar but to indicate the approach which we think should be made to an Act of Congress or an order of the Chief Executive that touches the sensitive area of rights specifically guaranteed by the Constitution. This Court has quite consistently given a narrower scope for the operation of the presumption of constitutionality when legislation appeared on its face to violate a specific prohibition of the Constitution.[22] We have likewise favored that interpretation of legislation which gives it the greater chance of surviving the test of constitutionality.[23] Those

[22] *Stromberg* v. *California,* 283 U. S. 359; *Lovell* v. *Griffin,* 303 U. S. 444; *Hague* v. *C. I. O.,* 307 U. S. 496; *Schneider* v. *State,* 308 U. S. 147; *Cantwell* v. *Connecticut,* 310 U. S. 296.

[23] *United States* v. *Shreveport Grain & Elevator Co.,* 287 U. S. 77, 82; *Interstate Commerce Commission* v. *Oregon-Washington R. & N. Co.,* 288 U. S. 14, 40; *Ashwander* v. *Tennessee Valley Authority,* 297

analogies are suggestive here. We must assume that the Chief Executive and members of Congress, as well as the courts, are sensitive to and respectful of the liberties of the citizen. In interpreting a wartime measure we must assume that their purpose was to allow for the greatest possible accommodation between those liberties and the exigencies of war. We must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used.

The Act of March 21, 1942, was a war measure. The House Report (H. Rep. No. 1906, 77th Cong., 2d Sess., p. 2) stated, "The necessity for this legislation arose from the fact that the safe conduct of the war requires the fullest possible protection against either espionage or sabotage to national defense material, national defense premises, and national defense utilities." That was the precise purpose of Executive Order No. 9066, for, as we have seen, it gave as the reason for the exclusion of persons from prescribed military areas the protection of such property "against espionage and against sabotage." And Executive Order No. 9102 which established the War Relocation Authority did so, as we have noted, "in order to provide for the removal from designated areas of persons whose removal is necessary in the interests of national security." The purpose and objective of the Act and of these orders are plain. Their single aim was the protection of the war effort against espionage and sabotage. It is in light of that one objective that the powers conferred by the orders must be construed.

Neither the Act nor the orders use the language of detention. The Act says that no one shall "enter, re-

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U. S. 288, 348; *Labor Board* v. *Jones & Laughlin Corp.*, 301 U. S. 1, 30; *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337, 351–352.

main in, leave, or commit any act" in the prescribed military areas contrary to the applicable restrictions. Executive Order No. 9066 subjects the right of any person "to enter, remain in, or leave" those prescribed areas to such restrictions as the military may impose. And apart from those restrictions the Secretary of War is only given authority to afford the evacuees "transportation, food, shelter, and other accommodations." Executive Order No. 9102 authorizes and directs the War Relocation Authority "to formulate and effectuate a program for the removal" of the persons covered by Executive Order No. 9066 from the prescribed military areas and "for their relocation, maintenance, and supervision." And power is given the Authority to make regulations "necessary or desirable to promote effective execution of such program." Moreover, unlike the case of curfew regulations (*Hirabayashi* v. *United States, supra*), the legislative history of the Act of March 21, 1942, is silent on detention. And that silence may have special significance in view of the fact that detention in Relocation Centers was no part of the original program of evacuation but developed later to meet what seemed to the officials in charge to be mounting hostility to the evacuees on the part of the communities where they sought to go.

We do not mean to imply that detention in connection with no phase of the evacuation program would be lawful. The fact that the Act and the orders are silent on detention does not of course mean that any power to detain is lacking. Some such power might indeed be necessary to the successful operation of the evacuation program. At least we may so assume. Moreover, we may assume for the purposes of this case that initial detention in Relocation Centers was authorized. But we stress the silence of the legislative history and of the Act and the Executive Orders on the power to detain to emphasize that any such authority which exists must be implied. If there is to be

the greatest possible accommodation of the liberties of the citizen with this war measure, any such implied power must be narrowly confined to the precise purpose of the evacuation program.

A citizen who is concededly loyal presents no problem of espionage or sabotage. Loyalty is a matter of the heart and mind, not of race, creed, or color. He who is loyal is by definition not a spy or a saboteur. When the power to detain is derived from the power to protect the war effort against espionage and sabotage, detention which has no relationship to that objective is unauthorized.

Nor may the power to detain an admittedly loyal citizen or to grant him a conditional release be implied as a useful or convenient step in the evacuation program, whatever authority might be implied in case of those whose loyalty was not conceded or established. If we assume (as we do) that the original evacuation was justified, its lawful character was derived from the fact that it was an espionage and sabotage measure, not that there was community hostility to this group of American citizens. The evacuation program rested explicitly on the former ground not on the latter as the underlying legislation shows. The authority to detain a citizen or to grant him a conditional release as protection against espionage or sabotage is exhausted at least when his loyalty is conceded. If we held that the authority to detain continued thereafter, we would transform an espionage or sabotage measure into something else. That was not done by Executive Order No. 9066 or by the Act of March 21, 1942, which ratified it. What they did not do we cannot do. Detention which furthered the campaign against espionage and sabotage would be one thing. But detention which has no relationship to that campaign is of a distinct character. Community hostility even to loyal evacuees may have been (and perhaps still is) a serious problem. But if au-

thority for their custody and supervision is to be sought on that ground, the Act of March 21, 1942, Executive Order No. 9066, and Executive Order No. 9102, offer no support. And none other is advanced.[24] To read them that broadly would be to assume that the Congress and the President intended that this discriminatory action should

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[24] It is argued, to be sure, that there has been Congressional ratification of the detention of loyal evacuees under the leave regulations of the Authority through the appropriation of sums for the expenses of the Authority. 57 Stat. 533, P. L. 139, 78th Cong., 1st Sess., approved July 12, 1943 and 58 Stat. 545, P. L. 372, 78th Cong., 2d Sess., approved June 28, 1944. It is pointed out that the regulations and procedures of the Authority were disclosed in reports to the Congress and in Congressional hearings. See, for example, Sen. Doc. No. 96, *supra*, note 7; Report and Minority Views of the Special Committee on Un-American Activities on Japanese War Relocation Centers, H. Rep. No. 717, 78th Cong., 1st Sess., pp. 23–26; Hearings, Subcommittee of the Senate Military Affairs Committee on S. 444, 78th Cong., 1st Sess., pp. 45–46; Japanese War Relocation Centers, Subcommittee Report on S. 444 and S. 101 and 111, 78th Cong., 1st Sess., pp. 4–5 *et seq.* And it is shown that the leave program of the Authority was mentioned both in the House and Senate committee hearings on the 1944 Appropriation Act (Hearings, Subcommittee of the House Committee on Appropriations, National War Agencies Appropriation Bill for 1944, 78th Cong., 1st Sess., pp. 698, 699, 710; Hearings of the Senate Subcommittee on Appropriations, National War Agencies Appropriation Bill for 1944, 78th Cong., 1st Sess., p. 382) and on the floor of the House prior to passage of the 1944 Act. 89 Cong. Rec. pp. 5983–5985. Congress may of course do by ratification what it might have authorized. *Swayne & Hoyt* v. *United States*, 300 U. S. 297, 301–302. And ratification may be effected through appropriation acts. *Isbrandtsen-Moller Co.* v. *United States*, 300 U. S. 139, 147; *Brooks* v. *Dewar*, 313 U. S. 354, 361. But the appropriation must plainly show a purpose to bestow the precise authority which is claimed. We can hardly deduce such a purpose here where a lump appropriation was made for the overall program of the Authority and no sums were earmarked for the single phase of the total program which is here involved. Congress may support the effort to take care of these evacuees without ratifying every phase of the program.

be taken against these people wholly on account of their ancestry even though the government conceded their loyalty to this country. We cannot make such an assumption. As the President has said of these loyal citizens: "Americans of Japanese ancestry, like those of many other ancestries, have shown that they can, and want to, accept our institutions and work loyally with the rest of us, making their own valuable contribution to the national wealth and well-being. In vindication of the very ideals for which we are fighting this war it is important to us to maintain a high standard of fair, considerate, and equal treatment for the people of this minority as of all other minorities." Sen. Doc. No. 96, *supra,* note 7, p. 2.

Mitsuye Endo is entitled to an unconditional release by the War Relocation Authority.

Second. The question remains whether the District Court has jurisdiction to grant the writ of *habeas corpus* because of the fact that while the case was pending in the Circuit Court of Appeals appellant was moved from the Tule Lake Relocation Center in the Northern District of California where she was originally detained to the Central Utah Relocation Center in a different district and circuit.

That question is not colored by any purpose to effectuate a removal in evasion of the *habeas corpus* proceedings. It appears that appellant's removal to Utah was part of a general segregation program involving many of these people and was in no way related to this pending case. Moreover, there is no suggestion that there is no one within the jurisdiction of the District Court who is responsible for the detention of appellant and who would be an appropriate respondent. We are indeed advised by the Acting Secretary of the Interior [25] that if the writ

[25] In a letter dated October 13, 1944 to the Solicitor General and filed here.

issues and is directed to the Secretary of the Interior or any official of the War Relocation Authority (including an assistant director whose office is at San Francisco, which is in the jurisdiction of the District Court), the corpus of appellant will be produced and the court's order complied with in all respects. Thus it would seem that the case is not moot.

In *United States ex rel. Innes* v. *Crystal,* 319 U. S. 755, the relator challenged a judgment of court martial by *habeas corpus.* The District Court denied his petition and the Circuit Court of Appeals affirmed that order. After that decision and before his petition for certiorari was filed here, he was removed from the custody of the Army to a federal penitentiary in a different district and circuit. The sole respondent was the commanding officer. Only an order directed to the warden of the penitentiary could effectuate his discharge and the warden as well as the prisoner was outside the territorial jurisdiction of the District Court. We therefore held the cause moot. There is no comparable situation here.

The fact that no respondent was ever served with process or appeared in the proceedings is not important. The United States resists the issuance of a writ. A cause exists in that state of the proceedings and an appeal lies from denial of a writ without the appearance of a respondent. *Ex parte Milligan, supra,* p. 112; *Ex parte Quirin,* 317 U. S. 1, 24.

Hence, so far as presently appears, the cause is not moot and the District Court has jurisdiction to act unless the physical presence of appellant in that district is essential.

We need not decide whether the presence of the person detained within the territorial jurisdiction of the District Court is prerequisite to filing a petition for a writ of *habeas corpus.* See *In re Boles,* 48 F. 75; *Ex parte Gouyet,* 175 F. 230, 233; *United States* v. *Day,* 50 F. 2d 816, 817;

United States v. *Schlotfeldt,* 136 F. 2d 935, 940. But see *Tippitt* v. *Wood,* 140 F. 2d 689, 693. We only hold that the District Court acquired jurisdiction in this case and that the removal of Mitsuye Endo did not cause it to lose jurisdiction where a person in whose custody she is remains within the district.

There are expressions in some of the cases which indicate that the place of confinement must be within the court's territorial jurisdiction in order to enable it to issue the writ. See *In re Boles, supra,* p. 76; *Ex parte Gouyet, supra; United States* v. *Day, supra; United States* v. *Schlotfeldt, supra.* But we are of the view that the court may act if there is a respondent within reach of its process who has custody of the petitioner. As Judge Cooley stated in *In the Matter of Samuel W. Jackson,* 15 Mich. 417, 439–440:

"The important fact to be observed in regard to the mode of procedure upon this writ is, that it is directed to, and served upon, not the person confined, but his jailer. It does not reach the former except through the latter. The officer or person who serves it does not unbar the prison doors, and set the prisoner free, but the court relieves him by compelling the oppressor to release his constraint. The whole force of the writ is spent upon the respondent;"

And see *United States* v. *Davis,* 5 Cranch C. C. 622, Fed. Cas. No. 14,926; *Ex parte Fong Yim,* 134 F. 938; *Ex parte Ng Quong Ming,* 135 F. 378, 379; *Sanders* v. *Allen,* 100 F. 2d 717, 719; *Rivers* v. *Mitchell,* 57 Ia. 193, 195, 10 N. W. 626; *People* v. *New York Asylum,* 57 App. Div. 383, 384, 68 N. Y. S. 279; *People* v. *New York Asylum,* 58 App. Div. 133, 134, 68 N. Y. S. 656. The statute upon which the jurisdiction of the District Court in *habeas corpus* proceedings rests (Rev. Stat. § 752, 28 U. S. C. § 452) gives it power "to grant writs of habeas corpus for the purpose of

an inquiry into the cause of restraint of liberty."[26] That objective may be in no way impaired or defeated by the removal of the prisoner from the territorial jurisdiction of the District Court. That end may be served and the decree of the court made effective if a respondent who has custody of the prisoner is within reach of the court's process even though the prisoner has been removed from the district since the suit was begun.[27]

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

Reversed.

MR. JUSTICE MURPHY, concurring.

I join in the opinion of the Court, but I am of the view that detention in Relocation Centers of persons of Japanese ancestry regardless of loyalty is not only unauthorized by Congress or the Executive but is another example of the unconstitutional resort to racism inherent in the entire evacuation program. As stated more fully in my

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[26] The entire section provides:

"The several justices of the Supreme Court and the several judges of the circuit courts of appeal and of the district courts, within their respective jurisdictions, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty. A circuit judge shall have the same power to grant writs of habeas corpus within his circuit, that a district judge has within his district; and the order of the circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had."

The last clause was added by § 6 of the Act of February 13, 1925, 43 Stat. 940. But we find no indication that it was added to change the scope of jurisdiction in habeas corpus proceedings. On its face it is no more than a recording requirement.

[27] Cf. Rule 45 (1) of this Court which provides: "Pending review of a decision refusing a writ of habeas corpus, the custody of the prisoner shall not be disturbed."

dissenting opinion in *Korematsu* v. *United States, ante,* p. 233, racial discrimination of this nature bears no reasonable relation to military necessity and is utterly foreign to the ideals and traditions of the American people.

Moreover, the Court holds that Mitsuye Endo is entitled to an unconditional release by the War Relocation Authority. It appears that Miss Endo desires to return to Sacramento, California, from which Public Proclamations Nos. 7 and 11, as well as Civilian Exclusion Order No. 52, still exclude her. And it would seem to me that the "unconditional" release to be given Miss Endo necessarily implies "the right to pass freely from state to state," including the right to move freely into California. *Twining* v. *New Jersey,* 211 U. S. 78, 97; *Crandall* v. *Nevada,* 6 Wall. 35. If, as I believe, the military orders excluding her from California were invalid at the time they were issued, they are increasingly objectionable at this late date, when the threat of invasion of the Pacific Coast and the fears of sabotage and espionage have greatly diminished. For the Government to suggest under these circumstances that the presence of Japanese blood in a loyal American citizen might be enough to warrant her exclusion from a place where she would otherwise have a right to go is a position I cannot sanction.

MR. JUSTICE ROBERTS.

I concur in the result but I cannot agree with the reasons stated in the opinion of the court for reaching that result.

As in *Korematsu* v. *United States, ante,* p. 214, the court endeavors to avoid constitutional issues which are necessarily involved. The opinion, at great length, attempts to show that neither the executive nor the legislative arm of the Government authorized the detention of the relator.

1. With respect to the executive, it is said that none of the executive orders in question specifically referred to detention and the court should not imply any authoriza-

tion of it. This seems to me to ignore patent facts. As the opinion discloses, the executive branch of the Government not only was aware of what was being done but in fact that which was done was formulated in regulations and in a so-called handbook open to the public. I had supposed that where thus overtly and avowedly a department of the Government adopts a course of action under a series of official regulations the presumption is that, in this way, the department asserts its belief in the legality and validity of what it is doing. I think it inadmissible to suggest that some inferior public servant exceeded the authority granted by executive order in this case. Such a basis of decision will render easy the evasion of law and the violation of constitutional rights, for when conduct is called in question the obvious response will be that, however much the superior executive officials knew, understood, and approved the conduct of their subordinates, those subordinates in fact lacked a definite mandate so to act. It is to hide one's head in the sand to assert that the detention of relator resulted from an excess of authority by subordinate officials.

2. As the opinion states, the Act of March 21, 1942, said nothing of detention or imprisonment, nor did Executive Order No. 9066 of date February 19, 1942, but I cannot agree that when Congress made appropriations to the Relocation Authority, having before it the reports, the testimony at committee hearings, and the full details of the procedure of the Relocation Authority were exposed in Government publications, these appropriations were not a ratification and an authorization of what was being done. The cases cited in footnote No. 24 of the opinion do not justify any such conclusion. The decision now adds an element never before thought essential to congressional ratification, namely, that if Congress is to ratify by appropriation any part of the programme of an executive agency the bill must include a specific item referring to that portion of the programme. In other words, the court

will not assume that Congress ratified the procedure of the authorities in this case in the absence of some such item as this in the appropriation bill:—"For the administration of the conditional release and parole programme in force in relocation centers." In the light of the knowledge Congress had as to the details of the programme, I think the court is unjustified in straining to conclude that Congress did not mean to ratify what was being done.

3. I conclude, therefore, that the court is squarely faced with a serious constitutional question,—whether the relator's detention violated the guarantees of the Bill of Rights of the federal Constitution and especially the guarantee of due process of law. There can be but one answer to that question. An admittedly loyal citizen has been deprived of her liberty for a period of years. Under the Constitution she should be free to come and go as she pleases. Instead, her liberty of motion and other innocent activities have been prohibited and conditioned. She should be discharged.

INDUSTRIAL ADDITION ASSOCIATION *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 118. Argued December 13, 1944.—Decided January 2, 1945.

1. In § 1141 of the Internal Revenue Code, relating to review of decisions of the Tax Court, the terms "jurisdiction" and "venue" have their usually accepted meaning. P. 314.
2. By § 1141 (a) all of the Circuit Courts of Appeals and the United States Court of Appeals for the District of Columbia are given jurisdiction to review decisions of the Tax Court, that is, power to act judicially upon a petition for review. P. 314.
3. By § 1141 (b) (1) one of the courts of appeals is designated as the court of proper venue, that is, the place where the petition will be heard. P. 314.

4. The objection that the petition is filed in the wrong circuit, being one to venue, may be waived by the Government; and this it did here by stipulating that the case be heard in the court of appeals designated by the parties. P. 314.

   (a) The stipulation is not required to be filed within three months of the decision of the Tax Court. P. 314.

   (b) *Nash-Breyer Motor Co.* v. *Burnet,* 283 U. S. 483, distinguished. P. 315.

5. Petitioner filed a petition for review in the court below within the three months' period allowed for that purpose by § 1142. That court was not the court of proper venue under § 1141 (b) (1). More than three months after the decision of the Tax Court, the parties made and filed a stipulation to have the case heard in the court below. *Held,* the court below on filing of the petition had jurisdiction, and on the filing of the stipulation was the court of proper venue. Dismissal of the petition for want of jurisdiction was therefore improper. P. 315.

141 F. 2d 636, reversed.

CERTIORARI, *post,* p. 690, to review a judgment dismissing for want of jurisdiction a petition for review of a decision of the Tax Court, 1 T. C. 378.

Mr. F. A. Berry for petitioner.

Assistant Attorney General Samuel O. Clark, Jr., with whom *Solicitor General Fahy, Messrs. Sewall Key, J. Louis Monarch,* and *Miss Melva M. Graney* were on the brief, for respondent.

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

In this case petitioner, deeming itself exempt from income and excess profits taxes, failed to file any tax returns for the years 1932 to 1936 inclusive. The Commissioner assessed petitioner for the taxes for those years, with penalties, and the Tax Court has sustained the assessment as to the income taxes and attendant penalties. Petitioner, within the three months allowed for that purpose by § 1142 of the Internal Revenue Code, sought review of the

Tax Court's decision by a petition for review filed with the Court of Appeals for the Sixth Circuit.

By § 1141 (a) of the Internal Revenue Code, entitled "Jurisdiction," the Circuit Courts of Appeals and the Court of Appeals for the District of Columbia are given "exclusive jurisdiction to review the decisions" of the Tax Court. Subsection (b) (1), entitled "Venue," provides that "such decisions may be reviewed by the Circuit Court of Appeals for the circuit in which is located the collector's office to which was made the return of the tax in respect to which the liability arises or, if no return was made, then by the United States Court of Appeals for the District of Columbia." Since petitioner filed no return, the Court of Appeals for the District of Columbia was the court of proper venue under this subsection. If petitioner had made a return, it would have been required to file it with a collector whose office was within the sixth circuit, that of the court below; in that event, that court would have been the court of proper venue. The Code provides further, in subsection (b) (2): "Notwithstanding the provisions of paragraph 1, such decisions may be reviewed by any Circuit Court of Appeals . . . which may be designated by the Commissioner and the taxpayer by stipulation in writing."

The Commissioner suggested to petitioner that as it had filed no returns for the years in question and no written stipulation had been entered into as permitted by subsection (b) (2), the Circuit Court of Appeals for the Sixth Circuit was without "jurisdiction." In response to this suggestion, petitioner and the Commissioner, after the expiration of the three months period in which a petition for review could be filed, entered into such a written stipulation, designating the Court of Appeals for the Sixth Circuit as the court to review the decision of the Tax Court. The stipulation reserved to the Commissioner the right to challenge its timeliness and legal effect.

The Court of Appeals for the Sixth Circuit, on the Commissioner's motion, dismissed the petition for review for want of jurisdiction. 141 F. 2d 636. We granted certiorari to resolve an asserted conflict of the decision below with that of the Court of Appeals for the Fifth Circuit in *Wegener* v. *Commissioner,* 119 F. 2d 49. The question presented is whether the court below had jurisdiction of the petition for review of the decision of the Tax Court, notwithstanding petitioner's failure to file the stipulation during the three months period, within which review of the Tax Court's decision could be sought.

The use in juxtaposition, in the statute, of the terms "jurisdiction" and "venue" marks a significant distinction. On the one hand, the statute confers power on the Circuit Courts of Appeals generally, to act judicially on petitions for review presented to them—which is "jurisdiction." On the other, such of those courts as are specified by the statute, or the stipulation which it authorizes, are designated as the place where, for convenience of the courts or parties or both, the petition will be heard—which is "venue." [1] Want of jurisdiction, unlike want of venue, may not be cured by consent of the parties; but when the court has jurisdiction, it has power to decide the case brought before it, even though the court having venue is one sitting in another circuit. *General Investment Co.* v. *Lake Shore & M. S. R. Co.,* 260 U. S. 261, 272–273; *Burnrite Coal Co.* v. *Riggs,* 274 U. S. 208, 211–212; *General Electric Co.* v. *Marvel Co.,* 287 U. S. 430, 434–435; *Neirbo Co.* v. *Bethlehem Corp.,* 308 U. S. 165, 167–168; *Freeman* v. *Bee Machine Co.,* 319 U. S. 448, 453. The right to have a cause heard in the court of the proper venue may be lost unless seasonably asserted; and in that event, the court of

[1] See *Peoria & P. U. R. Co.* v. *United States,* 263 U. S. 528, 535–536, where this Court explained the same distinction made in the Urgent Deficiencies Act, 38 Stat. 219, 28 U. S. C. §§ 41 (28), 43.

trial having jurisdiction but not the proper venue may render a judgment binding on the parties. *General Investment Co.* v. *Lake Shore & M. S. R. Co., supra,* 272; *Commercial Casualty Co.* v. *Consolidated Stone Co.,* 278 U. S. 177, 179; *Freeman* v. *Bee Machine Co., supra,* 453. The government may waive objections to venue, just as any other litigant may, *United States* v. *Hvoslef,* 237 U. S. 1, 12; *Thames & Mersey Ins. Co.* v. *United States,* 237 U. S. 19, 24–25; *Peoria & P. U. R. Co.* v. *United States,* 263 U. S. 528, 535–536, and here such waiver, by stipulation, is contemplated by § 1141 (b) (2).

We have no reason to suppose that the terms "jurisdiction" and "venue" were used in the statute in other than their usually accepted meaning, and no convincing reason has been advanced why that meaning should not be accepted here. Unless these plain terms are to be disregarded, all the Circuit Courts of Appeals are given jurisdiction to review decisions of the Tax Court upon a petition for review, that is, power to act judicially upon the petition. *Peoria & P. U. R. Co.* v. *United States, supra,* 535–536. Consequently when in this case petitioner filed its petition with the Court of Appeals for the Sixth Circuit, that court did not lack power to proceed with the cause, although the court of proper venue was the Court of Appeals for the District of Columbia, as prescribed by § 1141 (b) (1). The parties were free to waive this defect of venue, by filing the stipulation in compliance with subsection (b) (2), designating the court below as the one to act upon the petition, which was already before it and of which it then had jurisdiction.

The government urges that the stipulation here did not comply with § 1141 (b) (2), since it was not filed within three months of the decision of the Tax Court. But § 1141 (b) (2) does not by its terms place any time limitation upon the filing of the stipulation. The government relies

on the three months limitation in § 1142, which is in terms applicable only to the filing of the petition for review. The petition here was filed within three months in a court having jurisdiction, and we see no reason to import into the stipulation provision, § 1141 (b) (2), a time limitation which it does not contain.

It is true, as the government argues, that dismissal for want of the proper venue, of a petition for review pending in a Court of Appeals, controls the jurisdiction of the court. But in such a case jurisdiction is controlled only by terminating it. Here the case was not dismissed before want of venue was supplied by stipulation in the manner authorized by the statute. This imposed on the court the duty to exercise its jurisdiction in deciding the case.

The government relies, as did the court below, on our decision in *Nash-Breyer Motor Co.* v. *Burnet,* 283 U. S. 483. When that case arose, the provision in the applicable Revenue Act for choice of venue by stipulation of the parties, did not permit them to stipulate for review in any circuit, but limited their choice to two specified circuits. The parties in that case stipulated for review of a decision of the Board of Tax Appeals in a circuit not authorized by the statute, and thus did not conform to the statutory venue requirement. We sustained the action of the Court of Appeals in dismissing the petition for review on the ground that the court was not bound to exercise its jurisdiction where the proper venue was in another court, saying, p. 487: "The restriction on the power of the parties to stipulate as to venue would be meaningless if they could waive it without the consent of the court." In this case the stipulation conforms to the statute, and is without the infirmity found to be fatal in the *Nash-Breyer* case.

Here the court acquired jurisdiction of the cause under the statute by the timely filing of the petition for review, and the parties were authorized by § 1141 (b) (2) to stip-

ulate that the review should be had in that court. On filing the stipulation the cause was then pending in the court having venue, as well as jurisdiction, and the case was improperly dismissed.

Reversed.

COFFMAN *v.* BREEZE CORPORATIONS, INC. ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

No. 71. Argued December 7, 1944.—Decided January 2, 1945.

1. A bill of complaint by a patent owner against licensees, seeking an adjudication of unconstitutionality of the Royalty Adjustment Act and an injunction against the licensees from complying with the Act and orders issued pursuant thereto, but seeking no recovery of royalties alleged to be due from the licensees, *held* to state no cause of action in equity and to present no case or controversy within the judicial power of the United States as defined by § 2 of Article III of the Constitution. P. 321.
2. In the circumstances disclosed by the record and for purposes of the present suit, the constitutionality of the Act is without legal significance and can involve no justiciable question unless and until the complainant seeks recovery of the royalties, and then only if the Act is relied on as a defense. P. 324.
3. The declaratory judgment procedure is available in the federal courts only when an actual case or controversy is involved, and may not be used to secure merely an advisory opinion. P. 324.
4. The Court will not pass upon the constitutionality of legislation in a suit which is not adversary, or upon the complaint of one who fails to show that he is injured by its operation, or until it is necessary to do so to preserve the rights of the parties. P. 324.

55 F. Supp. 501, affirmed.

APPEAL from the dismissal by a District Court of three judges of the complaint in a suit by a patent owner against his licensees, challenging the constitutionality of the Royalty Adjustment Act. The United States had been permitted to intervene.

Messrs. James D. Carpenter, Jr. and *John G. Buchanan,* with whom *Mr. William H. Eckert* was on the brief, for appellant.

Assistant Attorney General Shea, with whom *Solicitor General Fahy* and *Messrs. Paul A. Freund* and *Jerome H. Simonds* were on the brief, for the United States, appellee.

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

The question is whether this suit, brought in the District Court by appellant, a patent owner, to enjoin his licensees from paying accrued royalties to the Government under the Royalty Adjustment Act of October 31, 1942, 56 Stat. 1013, 35 U. S. C. Supp. III, §§ 89–96, and attacking the constitutionality of the Act, was rightly dismissed for want of equity jurisdiction and for want of a justiciable case or controversy.

Appellant brought the present suit in the District Court for New Jersey, joining as defendants Federal Laboratories, Inc., a Delaware corporation, and appellee Breeze Corporations, Inc., a New Jersey corporation. Federal was not served with process and did not appear, and the cause has proceeded against appellee Breeze alone. The case being one in which the constitutionality of an Act of Congress is challenged and in which a preliminary and final injunction is asked restraining "the enforcement, operation, or execution of, or setting aside, in whole or in part" of an Act of Congress on the ground of its unconstitutionality, a court of three judges was convened to hear the cause pursuant to § 3 of the Act of August 24, 1937, 50 Stat. 752, 28 U. S. C. § 380 (a).[1]

[1] The District Court of three judges was rightly convened, although the suit was brought against private parties not public officers. Unlike § 266 of the Judicial Code, 28 U. S. C. § 380, the Act of August 24, 1937 does not restrict its requirement for the assembly of a dis-

Appellee Breeze answered. Upon appropriate proceedings had under 50 Stat. 751, 28 U. S. C. § 401, the United States was permitted to intervene as a party. Thereupon the District Court granted the Government's motion to dismiss the suit for want of equity jurisdiction and of a justiciable case or controversy. 55 F. Supp. 501. The case comes here on appeal under § 3 of the Act of August 24, 1937, c. 754, 50 Stat. 752, 28 U. S. C. § 380 (a), authorizing direct appeals to this Court in a case where a district court of three judges convened pursuant to the section has

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trict court of three judges to suits against public officers. See *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co.*, 292 U. S. 386. Section 3 of the Act of 1937 directs that a court of three judges is to be convened whenever an interlocutory or permanent injunction is sought "suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any Act of Congress" upon the ground that it is repugnant to the Constitution. This language appears to have been taken from the Urgent Deficiencies Act of 1913, 28 U. S. C. § 47. Its choice of language, differing from that of § 266 of the Judicial Code, must be taken to be deliberate. See *Jameson & Co.* v. *Morgenthau*, 307 U. S. 171, 173.

Here the injunction sought would restrain appellee from payment of the royalties into the Treasury as required by the Act of Congress and would thus restrain the "operation" or "execution" of the statute. Like interpretation has been given to the like language of the Urgent Deficiencies Act of 1913. See *Lambert Run Coal Co.* v. *B. & O. R. Co.*, 258 U. S. 377; *Venner* v. *Michigan Central R. Co.*, 271 U. S. 127.

Garment Workers' Union v. *Donnelly Co.*, 304 U. S. 243, is to be distinguished from the present case. There an injunction was sought against a labor union for violation of the anti-trust laws, the plaintiff appellee contending that the Norris-LaGuardia Act, 47 Stat. 70, 29 U. S. C. § 101, was inapplicable or, if applicable, unconstitutional. This Court held that a district court of three judges was unauthorized by § 3 of the 1937 Act, since the contention with respect to the Norris-LaGuardia Act was not an application for an injunction within the meaning of § 3, but merely an anticipation of a defense going to the jurisdiction of the court. Even though the Norris-LaGuardia Act were applicable, it could not, if unconstitutional, operate as a defense, and no case was made for an injunction.

entered "judgment granting or denying, after notice and hearing, an interlocutory or permanent injunction in such case."

The facts appear from the pleadings and by stipulation, and are admitted for the purposes of the motion. Appellant, the owner of a United States patent covering an improvement upon a device for use in starting a combustion motor, and shells for use with the device, entered into an agreement licensing Federal to manufacture and sell the patented device at a royalty of 6% of the licensee's selling price of the device and its parts. At some time before July 1937, appellee Breeze acquired all of Federal's outstanding shares of capital stock and has since controlled its business and policies. In 1937 it entered into a contract, since renewed and continued with Federal, whereby the latter engaged Breeze as its exclusive "sales agent and distributor" to manufacture and sell the patented device. Breeze began the manufacture and sale of the patented device, and from the allegations of the bill of complaint it appears, inferentially at least, that it has been engaged to some extent, not disclosed, in supplying the War and Navy Departments with the patented device under government contracts.

The Royalty Adjustment Act provides that whenever a patented device is "manufactured, used, [or] sold . . . for the United States" under a license stipulating for payment of royalties "believed to be unreasonable or excessive" by the head of the government agency concerned, he "shall give written notice of such fact to the licensor and to the licensee." It provides that within a reasonable time thereafter the head of the agency "shall by order fix and specify such rates or amounts of royalties, if any, as he shall determine are fair and just, taking into account the conditions of wartime production." The Act directs the licensee, after the effective date of the notice, not to "pay to

the licensor, nor charge directly or indirectly to the United States a royalty, if any, in excess of that specified in said order on account of such manufacture, use, sale or other disposition."

The Act deprives the licensor of "any remedy . . . against the licensee for the payment of any additional royalty remaining unpaid." It provides that his "sole and exclusive remedy, except as to the recovery of royalties fixed in said order" is a suit against the United States "to recover such sum, if any, as, when added to the royalties fixed and specified in such order, shall constitute fair and just compensation to the licensor for the manufacture, use, sale, or other disposition of the licensed invention for the United States, taking into account the conditions of wartime production." By § 7 the Act is made applicable "to all royalties directly or indirectly charged or chargeable to the United States" which "have not been paid to the licensor prior to the effective date of the notice," as well as to royalties accruing upon all articles delivered after the effective date. By § 4 any reduction in royalties authorized by the Act is to "inure to the benefit of the Government by way of a corresponding reduction in the contract price to be paid . . . or by way of refund if already paid to the licensee."

Pursuant to § 1 of the Act the Navy Department on February 24, 1943, gave notice to appellant, appellee Breeze and Federal that the royalties provided for by the license contract "now being paid directly or indirectly" under contracts in which Federal or Breeze "is either a prime contractor or a subcontractor are believed to be unreasonable or excessive." The notice directed that, until a royalty adjustment order should be issued under the Act, "no royalties should be paid on account of the manufacture, use, [or] sale . . . for the United States" of the patented device. A similar notice was given by the War Depart-

ment to the same parties on March 3, 1943. In December, 1943, the War and Navy Departments issued royalty adjustment orders under § 1 of the Act, purporting to reduce to specified amounts, declared to be "fair and just," the royalties accruing on the manufacture and sale of the patented device for the War and Navy Departments, with maximum royalties of $50,000 per year commencing January 1, 1943. The orders further directed Federal and Breeze to pay to the Treasurer of the United States "the balance in excess" of the royalty payments authorized by the orders "which were due to Licensor and were unpaid on the effective date" of the notice, or which might thereafter become due to the licensor.

According to the bill of complaint there are large amounts due and owing to appellant as royalties under its license contract with Federal and the contract between Federal and Breeze. It also appears that appellant has brought a separate suit in the United States District Court for New Jersey against Breeze and Federal for an accounting for the royalties said to be due to appellant, in which Breeze alone was served by process and has appeared and answered. The cause is at issue, and the court has ruled that appellant recover all royalties which have accrued or may accrue to the date of trial.

The answer of appellee Breeze in the present suit denies that it owes any royalties to appellant. It alleges that whether the Royalty Adjustment Act is valid or invalid is a matter which is immaterial to appellee for the reason that it owes appellant no money as royalties or otherwise. In the present suit appellant asks no judgment for the recovery of the royalties alleged to be due from Federal and appellee Breeze. It seeks only an adjudication that the Royalty Adjustment Act and the orders purporting to be made in conformity to it are unconstitutional as applied to appellant, and asks an injunction restraining Breeze and

Federal from complying with the Act and the orders by paying any part of the royalties into the Treasury or to any person other than appellant.

We agree with the conclusion of the District Court below that appellant's bill of complaint states no cause of action in equity and presents no case or controversy within the judicial power of the United States as defined by § 2 of Article III of the Constitution.

The only rights asserted as the basis for the relief sought by appellant are derived from the license agreements. Those agreements, so far as now appears and as we assume for present purposes, are contractual obligations to pay the stipulated royalties. As they accrue, the royalties become simple debts recoverable in an action at law, or possibly, where the accounts are complicated, in a proceeding for an accounting such as appellant has already begun in its separate suit pending in the District Court of New Jersey. *Kirby* v. *Lake Shore & M. S. R. Co.*, 120 U. S. 130; *United States* v. *Old Settlers*, 148 U. S. 427, 465.

Appellant does not in the present suit bring to our attention any facts showing or tending to show that a suit to recover a money judgment for the royalties would not afford complete and adequate relief without resort to an equitable remedy. In such a suit if appellee Breeze is obligated by the contracts in question to pay the royalties to appellant, it can discharge that obligation only by payment of the amount due, or by setting up the Royalty Adjustment Act as a defense. Compliance with the duty under the Act to pay into the Treasury the royalties withheld from appellant would operate by the terms of the Act as a discharge of the obligation to pay appellant. If that defense were offered, the constitutional validity of these provisions of the Act would be a justiciable issue in the case, since upon its adjudication would depend appellant's right of recovery.

But whether the provisions of the Act be valid or invalid appellant shows no ground for equitable relief. If valid they would be a defense, and appellant would be entitled to no relief other than that afforded by the suit against the Government authorized by § 2 of the Act. If invalid, appellant's right to recover remains unimpaired. The sufficiency of the defense may be as readily tested in a suit at law to recover the royalties as by the present suit in equity to enjoin payment of the royalties into the Treasury. In either case appellant would receive all the relief to which it shows itself entitled.

The obligation to pay royalties, as we have said, appears to be no more than a debt. There is no contention that it is a fiduciary obligation to turn an earmarked fund over to appellant. The complaint does not indicate that if appellee is not enjoined it will pay the royalties into the Treasury, or, if it does, that appellee will be unable to respond to a judgment in appellant's favor. Appellant thus fails to assert any right of recovery at law in the present suit or to show that its remedy available at law is so inadequate as to entitle it to ask an equitable remedy. Judicial Code, § 267 (28 U. S. C. § 384); *Boise Artesian Water Co.* v. *Boise City,* 213 U. S. 276, 283; *Pusey & Jones Co.* v. *Hanssen,* 261 U. S. 491, 497; *Hurley* v. *Kincaid,* 285 U. S. 95, 105; *Schoenthal* v. *Irving Trust Co.,* 287 U. S. 92, 94.

So far as the present suit seeks a declaratory judgment or an injunction restraining payment of the royalties into the Treasury, it raises no justiciable issue. Appellant asserts in the present suit no right to recover the royalties. It asks only a determination that the Royalty Adjustment Act is unconstitutional and, if so found, that compliance with the Act be enjoined, an issue which appellee by its answer declines to contest. If contested the validity of the Act would be an issue which, so far as it could ever

become material, would properly arise only in a suit to recover the royalties, where it could be appropriately decided.

In the circumstances disclosed by the record and for purposes of the present suit, the constitutionality of the Act is without legal significance and can involve no justiciable question unless and until appellant seeks recovery of the royalties, and then only if appellee relies on the Act as a defense. The prayer of the bill of complaint that the Act be declared unconstitutional is thus but a request for an advisory opinion as to the validity of a defense to a suit for recovery of the royalties. Appellee could have made such a defense but does not appear to have done so in the pending accounting suit and does not assert its validity here. The bill of complaint thus fails to disclose any ground for the determination of any question of law or fact which could be the basis of a judgment adjudicating the rights of the parties.

The declaratory judgment procedure is available in the federal courts only in cases involving an actual case or controversy, *Nashville, C. & St. L. R. Co.* v. *Wallace,* 288 U. S. 249, 258–264; *Aetna Life Ins. Co.* v. *Haworth,* 300 U. S. 227, 239–240, where the issue is actual and adversary, *Chicago & Grand Trunk R. Co.* v. *Wellman,* 143 U. S. 339; *South Spring Gold Co.* v. *Amador Gold Co.,* 145 U. S. 300, 301, and it may not be made the medium for securing an advisory opinion in a controversy which has not arisen. *New Jersey* v. *Sargent,* 269 U. S. 328; *United States* v. *West Virginia,* 295 U. S. 463; *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 324; *Anniston Manufacturing Co.* v. *Davis,* 301 U. S. 337, 355; *Electric Bond & Share Co.* v. *S. E. C.,* 303 U. S. 419, 443.

In any case, the Court will not pass upon the constitutionality of legislation in a suit which is not adversary, *Chicago & Grand Trunk R. Co.* v. *Wellman, supra; Bartemeyer* v. *Iowa,* 18 Wall. 129, 134–35; *Atherton Mills* v.

Johnston, 259 U. S. 13, 15, or upon the complaint of one who fails to show that he is injured by its operation, *Tyler* v. *The Judges,* 179 U. S. 405; *Hendrick* v. *Maryland,* 235 U. S. 610, 621, or until it is necessary to do so to preserve the rights of the parties. *Liverpool, N. Y. & P. S. S. Co.* v. *Commissioners,* 113 U. S. 33, 39; *Burton* v. *United States,* 196 U. S. 283, 295; *Abrams* v. *Van Schaick,* 293 U. S. 188; *Wilshire Oil Co.* v. *United States,* 295 U. S. 100.

Affirmed.

COFFMAN *v.* FEDERAL LABORATORIES, INC. ET AL.

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

No. 485. Argued December 7, 1944.—Decided January 2, 1945.

Decided upon the authority of *Coffman* v. *Breeze Corporations, Inc.,* *ante,* p. 316.
Affirmed.

APPEAL from an order of a District Court of three judges, convened pursuant to 28 U. S. C. § 380 (a), denying an injunction and striking portions of the bill of complaint. The United States had been allowed to intervene.

Messrs. James D. Carpenter, Jr. and *John G. Buchanan,* with whom *Mr. William H. Eckert* was on the brief, for appellant.

Assistant Attorney General Shea, with whom *Solicitor General Fahy* and *Messrs. Paul A. Freund* and *Jerome H. Simonds* were on the brief, for the United States, appellee.

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

This is a companion case to *Coffman* v. *Breeze Corporations, ante,* p. 316.

Like that case the present suit was brought by appellant against Federal Laboratories, Inc. and Breeze Corporations, Inc. to secure among other things an adjudication of the constitutional validity of the Royalty Adjustment Act of Congress of October 31, 1942, 56 Stat. 1013, 35 U. S. C. Supp. III, §§ 89–96. It sought also to enjoin defendants from paying over to the Treasury of the United States royalties alleged to be due upon the license agreements involved in the Breeze suit, as required by the notices and orders of the War and Navy Departments served upon appellant and the defendants pursuant to the Act.

In addition, the bill of complaint alleges that the defendants owe royalties to appellant under the license agreements, for which it prays an accounting. By way of anticipation of the defense that the Royalty Adjustment Act and the notices and orders of the War and Navy Departments require appellee to pay the royalties into the Treasury, appellant sets up the unconstitutionality of the Act.

A district court of three judges was convened to hear the cause as required by the Act of August 24, 1937, 50 Stat. 752, 28 U. S. C. § 380 (a), and the United States was allowed to intervene as a party in accordance with § 1 of the Act. 50 Stat. 751, 28 U. S. C. § 401. The District Court, on motion of the Government, dismissed so much of the bill of complaint as sought an adjudication of the constitutional validity of the Royalty Adjustment Act and of the notice and orders issued under it. It struck from the bill of complaint the anticipatory allegations that the Royalty Adjustment Act and the orders with respect to the royalties owing appellant are unconstitutional and void, and it struck the prayer of the bill for an injunction.

For the reasons stated in our opinion in the *Breeze* case we hold that appellant has shown no ground for equitable relief by way of injunction. The allegations of unconstitutionality of the Royalty Adjustment Act and the orders were pleaded only as supporting the prayer for an

injunction and were therefore properly stricken with that prayer. The allegations are not essential to or a proper part of the cause of action for an accounting and recovery of the royalties alleged to be due.

Since the allegations were stricken, appellee Federal has answered setting up as a separate defense the royalty adjustment orders prohibiting payment of the royalties to appellant. Upon that issue appellant will be free to contest the constitutional validity of the orders. The judgment below is accordingly

Affirmed.

McCULLOUGH *v.* KAMMERER CORPORATION ET AL.

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

No. 46. Argued December 11, 1944.—Decided January 2, 1945.

Since the only question for the review of which certiorari was granted in this case is one which was not properly raised, litigated, or passed upon below, the writ is dismissed. P. 328.

138 F. 2d 482, dismissed.

CERTIORARI, 322 U. S. 766, to review the affirmance of a decree for the plaintiffs, respondents here, in a suit for infringement of a patent, 39 F. Supp. 213. See also 143 F. 2d 595.

Mr. A. W. Boyken, with whom *Messrs. R. Welton Whann* and *Robert M. McManigal* were on the brief, for petitioner.

Mr. Leonard S. Lyon, with whom *Mr. Frederick S. Lyon* was on the brief, for respondents.

Solicitor General Fahy and *Assistant Attorney General Berge* filed a brief on behalf of the United States, as *amicus curiae,* in support of petitioner.

PER CURIAM.

In this case both the District Court and the Circuit Court of Appeals for the Ninth Circuit have held valid and infringed the Reilly and Stone Patent, No. 1,625,391, of April 19, 1927, for a pipe cutting tool, of which patent respondent Kammerer Corporation is assignee. The patent expired on April 18, 1944, only damage for infringement is involved, and there is no conflict of decision with respect to the patent. This Court granted certiorari only because the petition for certiorari presented as a ground of defense to the suit, that respondent Kammerer Corporation had licensed to respondent Baash-Ross Tool Company the use of the patented device in suit, by an agreement which stipulated for restrictions on such use which are asserted to be unauthorized by the patent monopoly, contrary to public policy, and unlawful.

On oral argument and submission of the cause it appears that although petitioner by its amended answer alleged generally that respondents "do not come into . . . court with clean hands," the answer made no mention of the restrictions contained in the license agreement. The District Court made no findings of fact or law with respect to them. On appeal to the Circuit Court of Appeals petitioner assigned no error with reference to them and the Circuit Court of Appeals did not consider them, saying: "We affirm the judgments of the District Court, considering here only the appellant's claim of error." 138 F. 2d 482.

Thus the only question for which we granted certiorari is one not properly raised, litigated or passed upon below. *Duignan* v. *United States,* 274 U. S. 195, 200; *Burnet* v. *Commonwealth Improvement Co.,* 287 U. S. 415, 418; *Zellerbach Paper Co.* v. *Helvering,* 293 U. S. 172, 182; *United States* v. *Classic,* 313 U. S. 299, 329. The grounds

asserted for the allowance of certiorari are inadequately supported by the record, and the writ is therefore

Dismissed.

CITY OF CLEVELAND *v.* UNITED STATES ET AL.

NO. 68. APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.*

Argued December 6, 1944.—Decided January 2, 1945.

1. Under § 266 of the Judicial Code, the jurisdiction of a district court of three judges was properly invoked to hear and determine a suit to restrain county and municipal officials from assessing and collecting allegedly unconstitutional taxes, where such officials were acting in the interest of the State and pursuant to a state law of statewide application. P. 332.
2. The United States Housing Act of September 1, 1937, providing for the use of federal funds and credit to improve housing conditions, was a valid exercise of the power of Congress to provide for the general welfare. Const., Art. I, § 8, cl. 1. P. 333.
3. It was within the power of Congress to exempt from state taxation property acquired and owned by the United States, or an instrumentality thereof, pursuant to the United States Housing Act. P. 333.

52 F. Supp. 906, affirmed.

143 Ohio St. 251, 55 N. E. 2d 265, reversed.

APPEALS, in Nos. 68 and 69, from a decree of a district court of three judges enjoining assessment and collection of state taxes; and, in No. 388, from a judgment sustaining the denial of an application for exemption from a state tax.

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*Together with No. 69, *Boyle, County Treasurer of Cuyahoga County, et al.* v. *United States et al.*, also on appeal from the District Court of the United States for the Northern District of Ohio—argued December 6, 1944; and No. 388, *Federal Public Housing Authority (formerly United States Housing Authority)* v. *Guckenberger, Auditor, Hamilton County, et al.*, on appeal from the Supreme Court of Ohio—argued December 6, 7, 1944.

Mr. Joseph F. Smith argued the cause (*Mr. Robert M. Morgan* entered an appearance) for appellant in No. 68. *Mr. Ralph W. Edwards,* with whom *Mr. Frank T. Cullitan* was on the brief, for appellants in No. 69.

Mr. C. Watson Hover, with whom *Messrs. Carson Hoy* and *Frank M. Gusweiler* were on the brief, for Guckenberger; and *Mr. Walter K. Sibbald* was on a brief for Skirvin, appellees in No. 388.

Mr. Robert L. Stern, with whom *Solicitor General Fahy, Assistant Attorney General Littell,* and *Messrs. Vernon L. Wilkinson* and *David L. Krooth* were on the briefs, for appellees in Nos. 68 and 69 and appellant in No. 388.

By special leave of Court, *Mr. Francis M. Thompson* for the Ohio Real Estate Association, as *amicus curiae* in Nos. 68 and 69, urging reversal; and *Mr. Francis T. Bartlett* for the Cincinnati Metropolitan Housing Authority, as *amicus curiae* in No. 388, urging reversal.

Mr. Justice Roberts delivered the opinion of the Court.

These appeals present the same question of substantive law and will be dealt with in a single opinion.

In No. 68 the appellees sought an injunction against the taxing officials of Cuyahoga County, Ohio, and those of the City of Cleveland, to restrain them from attempting to assess and collect taxes, pursuant to the laws of Ohio, on lands acquired by condemnation and owned by the appellees in the city and county. A preliminary injunction was issued but, pursuant to stipulation, the court proceeded at once to hear the case on the merits, and entered a final injunction.[1]

[1] 52 F. Supp. 906.

The lands involved were acquired by the United States by condemnation under the National Recovery programme for low-cost housing projects. The Federal Public Housing Authority then erected low-cost dwelling units which were leased to Cleveland Metropolitan Housing, a State of Ohio authority. The latter has sublet the units to tenants for residence purposes.

The appellant contended that the United States Housing Act of September 1, 1937,[2] is unconstitutional because Congress has no power under the Constitution to establish low-cost housing projects.

A majority of the court below held the federal statute authorized by the Constitution.[3] Its reasoning was that even though the evils of bad housing are local in their origin, their effect may become so widespread as to create a menace to the national welfare and that Congress is empowered to deal with the subject in that aspect. The dissenting judge was of the view that the project amounted merely to an embarkation by the federal Government in a private business and that the Government could not do this in such a way as to immunize the property employed from normal state taxation to support local police and other services required by the community of which the housing project forms a part.

In No. 69 the appellees sought and were awarded an injunction against the collection of local taxes under like circumstances.

In No. 388 the United States Housing Authority applied for exemption from local property taxes pursuant to the law of Ohio,[4] in respect of a housing project in Cincinnati. The real estate had been purchased by the United States and devoted to a low-cost housing project pursuant to the

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[2] 42 U. S. C. 1401 ff.

[3] Art. I, § 8, Cl. 1.

[4] Ohio General Code, §§ 5616, 5570–1.

federal statute.[5] The application was denied. Appeal was taken to the Supreme Court of Ohio.[6] The denial was affirmed on the grounds that no exemption was permitted by the constitution and statutes of the State and that refusal of the claimed exemption was consistent with the federal Constitution.[7] An appeal to this court was perfected.

Nos. 68 and 69 were heard and decided by a district court of three judges pursuant to § 266 of the Judicial Code.[8] The appellants insist that they do not act as officers of the State in the enforcement or execution of any state statute in collecting the taxes in question, and that § 266 therefore confers no jurisdiction on a three-judge court to hear the cause. We overrule this contention.

The section is inapplicable to suits challenging local ordinances or statutes having only local application.[9] But these cases involve state law the application of which is state-wide.[10] If the taxing officials were, in these instances, though acting under such a law, doing so as local officials and on behalf of the locality and not as officers of the State, the section is inapplicable to suits to restrain them.[11] Here, however, the officials were enforcing state laws embodying a state-wide concern and in the State's interest, and in such a case § 266 is applicable.[12] The jurisdiction of a court of three judges was properly invoked.

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[5] *Supra,* note 2.

[6] Pursuant to §§ 1464, 1464–1 Ohio General Code (1942 Supp.).

[7] 143 Ohio St. 251; 55 N. E. 2d 265.

[8] 28 U. S. C. 380.

[9] *Ex parte Collins,* 277 U. S. 565; *Ex parte Public National Bank,* 278 U. S. 101; *Rorick* v. *Board of Commissioners,* 307 U. S. 208.

[10] See Ohio General Code §§ 5328, 5351.

[11] *Ex parte Collins, supra; Ex parte Public National Bank, supra.*

[12] *Spielman Motor Co.* v. *Dodge,* 295 U. S. 89; *Rorick* v. *Board of Commissioners, supra,* 212.

Little need be said concerning the merits. Section 1 of the Housing Act [13] declares a policy to promote the general welfare of the Nation by employing its funds and credit to assist the States and their political subdivisions to relieve unemployment and safeguard health, safety and morals of the Nation's citizens by improving housing conditions. Section 5 [14] provides in part, "The Authority, including but not limited to its franchise, capital, reserves, surplus, loans, income, assets, and property of any kind, shall be exempt from all taxation now or hereafter imposed by the United States or by any State, county, municipality, or local taxing authority." Section 13 authorizes agreements by the Authority to pay annual sums, not exceeding taxes which would otherwise be paid, in lieu of taxes.[15]

Challenge of the power of Congress to enact the Housing Act must fail.[16] And Congress may exempt property owned by the United States or its instrumentality from state taxation in furtherance of the purposes of the federal legislation. This is settled by such an array of authority that citation would seem unnecessary.[17]

The judgments in Nos. 68 and 69 are affirmed and that in No. 388 is reversed.

Nos. 68 and 69 affirmed.
No. 388 reversed.

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[13] 42 U. S. C. 1401.

[14] 42 U. S. C. 1405 (e).

[15] 42 U. S. C. 1413.

[16] *United States* v. *Butler,* 297 U. S. 1, 64–67; *Steward Machine Co.* v. *Davis,* 301 U. S. 548, 586; *Helvering* v. *Davis,* 301 U. S. 619, 640.

[17] See, e. g. *Van Brocklin* v. *Tennessee,* 117 U. S. 151; *Pittman* v. *Home Owners' Loan Corp.,* 308 U. S. 21; *Federal Land Bank* v. *Bismarck Lumber Co.,* 314 U. S. 95.

GEORGIA HARDWOOD LUMBER CO. *v.* COMPANIA DE NAVEGACION TRANSMAR, S. A., OWNER OF THE S. S. KOTOR.

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

No. 180. Argued December 14, 1944.—Decided January 2, 1945.

1. Under § 8 (c) of the Act of February 13, 1925, which provides that no appeal to a Circuit Court of Appeals shall be allowed "unless application therefor be duly made within three months," and which is applicable to admiralty proceedings, the District Court has discretion, where within the three months' period a notice of appeal is filed in the office of the clerk of the court and the intention to appeal is apparent, to treat the notice of appeal as an application for allowance of an appeal; and the action of the District Court in so treating a notice of appeal as an application for allowance of an appeal in this case was not an abuse of discretion. P. 336.
2. Where the appeal statute merely requires that an application for appeal be made within the prescribed time, the allowance may be made subsequently. P. 337.

141 F. 2d 652, affirmed.

CERTIORARI, *post*, p. 692, to review the reversal of a decree dismissing a libel in admiralty.

Mr. John Tilney Carpenter for petitioner.

Mr. Wilbur E. Dow, Jr., with whom *Mr. William G. Symmers* was on the brief, for respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This is an admiralty case here on certiorari from the Circuit Court of Appeals for the Fifth Circuit. A single question is presented. Petitioner claims that the appeal from the District Court to the Circuit Court of Appeals

was not properly taken. Since the Rules of Civil Procedure do not apply to proceedings in admiralty,[1] the question is whether the requirements of § 8 (c) of the Act of February 13, 1925, 43 Stat. 936, 940, 28 U. S. C. § 230, were met. That section provides:

"No writ of error or appeal intended to bring any judgment or decree before a circuit court of appeals for review shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree."

A final decree dismissing the libel was entered on April 20, 1943. On July 6, 1943, the libellant issued a notice of appeal, served it on respondent's proctors and obtained their acceptance. It filed the notice of appeal in the office of the clerk of the District Court on July 12, 1943. Nothing else was done within the three months' period except to consult the district judge on the amount of the appeal bond. The assignment of errors and the appeal bond were filed July 21st. A formal petition for appeal was filed on August 12th and allowed the 13th. On August 30th the district judge entered an order which treated the notice of appeal filed July 12th as an application for allowance of the appeal and granted it. That order recited that the libellant had assumed that the clerk would present the notice of appeal to the judge for an allowance, that the judge knew within the three months' period of libellant's intention to appeal and would have granted it if he had been so requested, though he assumed a formal allowance was not necessary. The Circuit Court of Appeals held that the notice of appeal filed July 12th was sufficient as an application for an appeal and that the failure to allow it within the three months' period was not fatal. 141 F. 2d 652.

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[1] Rule 81 (a) (1).

We agree with the Circuit Court of Appeals. Application for an allowance of the appeal was of course necessary. *Alaska Packers Assn.* v. *Pillsbury,* 301 U. S. 174; *Wells* v. *United States,* 318 U. S. 257, 260. But the law does not prescribe the form in which an application for allowance of an appeal must be cast. We cannot say that the trial judge abused his discretion in treating the notice of appeal as an application for an allowance. It was properly filed with the clerk of the District Court.[2] *Stefler* v. *United States,* 319 U. S. 38, 40. The intention to appeal was apparent. Only a formal request was lacking. In other instances, where the scope of review was not affected, comparable irregularities in perfecting an appeal have been disregarded in the interests of justice. *Taylor* v. *Voss,* 271 U. S. 176, 182, and cases cited. We do not suggest that the mere filing of a notice of appeal must be taken as adequate. Desirable practice indicates that explicit instead of implied application for an allowance should be made in order to avoid litigation. We hold, however, that there is discretion to treat the notice of appeal as such an application.

Alaska Packers Assn. v. *Pillsbury, supra,* does not require a different result. In that case an appeal was sought to be perfected simply by filing a notice of appeal. But it did not appear that an appeal was ever allowed. The Court held that an appeal must be applied for and allowed.

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[2] We therefore have a different question from that presented in *Reconstruction Finance Corp.* v. *Prudence Group,* 311 U. S. 579, 582, where a notice of appeal was filed in the District Court but the appeal had to be allowed by the Circuit Court of Appeals.

Here the appeal could be allowed either by the trial judge or by a judge of the Circuit Court of Appeals. *Alaska Packers Assn.* v. *Pillsbury, supra; McCrone* v. *United States,* 307 U. S. 61, 65; *The Tietjen & Lang No. 2,* 143 F. 2d 711, 712; Judicial Code, § 132, 28 U. S. C. § 228.

It stressed the importance of the allowance in screening out improper or premature appeals and in making certain that security for costs was provided in appropriate cases. 301 U. S. p. 177. We adhere to that decision. Under this statute an allowance of an appeal is essential. *McCrone* v. *United States,* 307 U. S. 61. We only point out that the *Alaska Packers* case did not involve the question presented here, i. e., whether a notice of appeal may suffice as an application for an allowance. Nor did it involve the further question whether the allowance must be made within the three months' period. We held in *Reconstruction Finance Corp.* v. *Prudence Group,* 311 U. S. 579, that a requirement of the Bankruptcy Act that certain appeals "be taken to and allowed by the circuit court of appeals" within a prescribed time was satisfied where the application was timely but the allowance of the appeal came later. Otherwise "the existence of the right to appeal would be subject to contingencies which no degree of diligence by an appellant could control." 311 U. S. at 582. That result is even more plainly indicated under the present statute. *The Tietjen & Lang No. 2,* 143 F. 2d 711. For where, as here, a statute merely requires that an application for an appeal be made within a prescribed time, the allowance may be granted subsequently. *Cardona* v. *Quinones,* 240 U. S. 83.

Affirmed.

SINGER ET AL. *v.* UNITED STATES.

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

No. 30. Argued November 9, 10, 1944.—Decided January 2, 1945.

1. The conspiracy clause of § 11 of the Selective Training and Service Act of 1940, 54 Stat. 885, is not limited to conspiracies to "hinder or interfere in any way by force or violence" with the administration of the Act, but embraces all conspiracies to violate the Act. P. 340.
2. The offense of conspiracy under § 11 of the Selective Training and Service Act, unlike that under § 37 of the Criminal Code, does not require an overt act. P. 340.
3. The principle of strict construction does not require that a criminal statute be given its narrowest possible meaning. P. 341.
4. Where another interpretation is permissible, a statute should not be given a construction which makes it redundant. P. 344.
5. As to a petitioner who died since the grant of a writ of certiorari to review a judgment of conviction, the writ is dismissed and the cause is remanded to the District Court for such disposition as law and justice require. P. 346.

141 F. 2d 262, affirmed.

CERTIORARI, 322 U. S. 720, to review the affirmance of judgments of conviction for conspiracy to violate the Selective Training and Service Act. See 49 F. Supp. 912.

Messrs. John W. Cragun and *William Stanley* submitted for petitioners.

Mr. James M. McInerney argued the cause, and *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Messrs. Robert S. Erdahl, Ralph F. Fuchs,* and *Leon Ulman* were on the brief, for the United States.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioners are father and son. They and one Walter Weel were indicted in one count charging a conspiracy to

aid Willard I. Singer in evading service in the armed forces. No overt act was alleged. A demurrer to the indictment was overruled which claimed that an overt act was necessary. Petitioners were tried before a jury, found guilty and sentenced. Petitioner Willard I. Singer received a sentence of one year and a day; petitioner Martin H. Singer received a suspended sentence and was placed on probation for two years. Motions in arrest of judgment and for a new trial were denied. 49 F. Supp. 912. The judgments of conviction were affirmed by the Circuit Court of Appeals. 141 F. 2d 262. The case is here on a petition for a writ of certiorari which we granted, limited to the question whether the conspiracy charged constitutes an offense under § 11 of the Selective Training and Service Act of 1940, 54 Stat. 885, 894–895, 50 U. S. C. App. § 311.

The relevant part of § 11 reads as follows:

"Any person charged as herein provided with the duty of carrying out any of the provisions of this Act, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said Act, rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate as to the fitness or unfitness or liability or nonliability of himself or any other person for service under the provisions of this Act, or rules, regulations, or directions made pursuant thereto, or who otherwise evades registration or service in the land or naval forces or any of the requirements of this Act, or who knowingly counsels, aids, or abets another to evade registration or service in the land or naval forces or any of the

requirements of this Act, or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act, or any person or persons who shall knowingly hinder or interfere in any way by force or violence with the administration of this Act or the rules or regulations made pursuant thereto, *or conspire to do so,* shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment . . ." (Italics added.)

The section does not require an overt act for the offense of conspiracy. It punishes conspiracy "on the common law footing." *Nash* v. *United States,* 229 U. S. 373, 378. Hence the indictment is sufficient if the words "or conspire to do so" extend to all conspiracies to commit offenses against the Act. It is insufficient if the conspiracy clause is limited to conspiracies to "hinder or interfere in any way by force or violence" with the administration of the Act. If it is so limited then it would have been necessary to sustain the indictment under § 37 of the Criminal Code, 18 U. S. C. § 88, which requires the commission of an overt act.[1] See *United States* v. *Rabinowich,* 238 U. S. 78, 86.

Though the matter is not free from doubt, we think the conspiracy clause of § 11 is not limited but embraces all conspiracies to violate the Act. That is the view of the Court of Appeals for the Second Circuit (*United States* v.

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[1] That section provides:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both."

O'Connell, 126 F. 2d 807) as well as the court below. We think that construction is grammatically permissible and conforms with the legislative scheme.

Seven offenses precede the conspiracy clause. Each is set off by a comma. A comma also precedes the conspiracy clause and separates it from the force and violence provision just as the latter is separated by a comma from the clause which precedes it. The punctuation of the sentence indicates that the disjunctive conspiracy clause is the last independent clause of a series not a part of the preceding clause. A subject of "conspire" must be supplied however the conspiracy clause is read. It is true that the subject must be plural and that the subject of each of the preceding clauses is singular except "any person or persons" in the force and violence clause. But it does not follow that the conspiracy clause is hitched solely to the preceding clause. When read as applicable to all the substantive offenses, the verb "conspire" is proper since some of the subjects would be singular and some plural.

A question remains concerning the word "so." The structure of the sentence as a whole suggests that the reference is to all the offenses previously enumerated. The seven offenses which precede the conspiracy clause are substantive offenses. Each carries the same penalty and is punishable in the same manner. The conspiracy clause comes last and is separated from the preceding one by a comma. If the word "so" is read restrictively, then one type of conspiracy is set apart for special treatment. If our construction is taken, a rational scheme results with the same maximum penalties throughout—all types of conspiracies being treated equally, just as the substantive offenses are treated alike. No persuasive reason has been advanced why the words "conspire to do so" should not carry their natural significance. The principle of strict construction of criminal statutes does not mean that they

must be given their narrowest possible meaning. *United States* v. *Giles,* 300 U. S. 41, 48.

The legislative history throws only a little light on this problem of the construction of § 11. What appears is a brief statement by Senator Sheppard, Chairman of the Senate Committee on Military Affairs, who explained the bill on the floor of the Senate. He stated that the section which later became § 11 of the present Act "contains the penalty provisions of the bill, which are substantially the same as those of the World War act. Experience with the World War provisions shows that they worked satisfactorily in providing the necessary protection." 86 Cong. Rec. 10095. The Selective Draft Act of 1917, 40 Stat. 76, 50 U. S. C. App. § 201 *et seq.,* contained no conspiracy provision. And the penalties prescribed for the substantive offenses were milder than those contained in the present Act.[2] Conspiracies to commit nonviolent offenses were prosecuted under § 37 of the Criminal Code which, as we have noted, requires an overt act.[3] Conspiracies involving the use of force were prosecuted under § 6 of the Criminal Code, 35 Stat. 1089, 18 U. S. C. § 6, which punishes conspiracies "by force to prevent, hinder, or delay the execution of any law of the United States."[4] Sec. 37 of the Criminal Code provides a pun-

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[2] The 1917 Act punished various substantive offenses of the kind covered by § 11 of the present Act by imprisonment for not more than one year. See §§ 5 and 6.

[3] See *United States* v. *McHugh,* 253 F. 224; *Anderson* v. *United States,* 269 F. 65; *O'Connell* v. *United States,* 253 U. S. 142; *Goldman* v. *United States,* 245 U. S. 474.

[4] *See Enfield* v. *United States,* 261 F. 141; *Reeder* v. *United States,* 262 F. 36. But see *Haywood* v. *United States,* 268 F. 795.

Conspiracies were also prosecuted under § 4 of the Espionage Act of June 15, 1917, 40 Stat. 217, 219, 41 Stat. 1359, 50 U. S. C. § 34, which like § 37 of the Criminal Code requires an overt act. See *Frohwerk* v. *United States,* 249 U. S. 204; *Pierce* v. *United States,* 252 U. S. 239. But that section is applicable only in time of war and

ishment of not more than two years' imprisonment or a fine of $10,000 or both. Sec. 6 of the Criminal Code provides a punishment of not more than six years' imprisonment or a $5,000 fine, or both. Sec. 11 of the present Act provides imprisonment for not more than five years or a fine of $10,000 or both. Both § 37 and § 6 of the Criminal Code were in force when the present Act was adopted. The addition of the conspiracy clause of § 11 was a departure from the 1917 Act and a substantial departure at that. Moreover, the "World War provisions" which, according to Senator Sheppard, had provided "the necessary protection" were certainly not the provisions of the 1917 Act alone but the conspiracy statutes as well. Hence, we do not take his statement to mean that the penalty provisions of § 11 are substantially the same as those contained in the 1917 Act. We read his somewhat ambiguous comments as indicating that he was comparing the provisions of § 11 with the provisions of the 1917 Act plus the provisions of other statutes which were employed in enforcing that Act. Thus Senator Sheppard's statement suggests that § 11 was designed to catalogue the various offenses against the Act.[5] It suggests that the purpose of including a conspiracy clause in § 11 was to furnish a single basis for prosecuting all conspiracies to commit offenses against the Act. That results in punishments for some conspiracies being increased. But there was likewise an increase in the penalties for substantive offenses.

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hence was not operative when the present Act became the law on September 16, 1940.

[5] Whether, as assumed in *United States* v. *Offutt*, 127 F. 2d 336, there may be conspiracies to violate § 11 which can still be prosecuted under § 37 of the Criminal Code is a question we do not reach.

If only one of the statutes is applicable to a conspiracy to violate § 11, the latter under which petitioners were convicted is controlling, as it is a later statute prescribing precise penalties for specified offenses. *Callahan* v. *United States*, 285 U. S. 515, 518.

Yet under our interpretation the sanctions provided by § 11 are substantially the same as the sum of the various sanctions provided for the enforcement of the 1917 Act.

The United States suggests that if the conspiracy clause of § 11 is construed so as to apply only to conspiracies to obstruct the Act by force and violence it would merely duplicate § 6 of the Criminal Code and have no effect except to decrease the maximum imprisonment for the offense from six years to five. It is said in reply, however, that under the earlier Act it was uncertain whether conspiracies contemplating the use of force in interfering with its administration could be prosecuted under § 6 of the Criminal Code. Cf. *Reeder* v. *United States,* 262 F. 36, with *Haywood* v. *United States,* 268 F. 795, 799. And it is argued from that fact that the conspiracy clause of § 11 was added to dispel the uncertainty. That is left to conjecture. Though we assume that it was a reason for adding a conspiracy clause to § 11, we cannot conclude that the conspiracy clause which was fashioned is so limited. And where another interpretation is wholly permissible, we would be reluctant to give a statute that construction which makes it wholly redundant. Only a clear legislative purpose should lead to that result here.

Nor do we find force in the suggestion that the conspiracy clause was added merely to fill in gaps left by § 6 of the Criminal Code which covers only conspiracies to obstruct by force "the execution of any law of the United States." It is said that *United States* v. *Eaton,* 144 U. S. 677, established as a principle of federal criminal law that a provision which only punishes violations of a "law" does not cover violations of rules or regulations made in conformity with that law. It is therefore argued that § 6 of the Criminal Code does not embrace violations of rules or regulations and that § 11 filled that gap by adding "rules or regulations" to the force and violence clause. Here

again the legislative history leaves that question wholly to conjecture. *United States* v. *Eaton* turned on its special facts, as *United States* v. *Grimaud,* 220 U. S. 506, 518–519, emphasizes. It has not been construed to state a fixed principle that a regulation can never be a "law" for purposes of criminal prosecutions. It may or may not be, depending on the structure of the particular statute. The *Eaton* case involved a statute which levied a tax on oleomargarine and regulated in detail oleomargarine manufacturers. Sec. 5 of the statute provided for the keeping of such books and records as the Secretary of the Treasury might require. But it provided no penalty for non-compliance. Other sections, however, laid down other requirements for manufacturers and prescribed penalties for violations. Sec. 20 gave the Secretary the power to make "all needful regulations" for enforcing the Act. A regulation was promulgated under § 20 requiring wholesalers to keep a prescribed record. The prosecution was for non-compliance with that regulation. Sec. 18 imposed criminal penalties for failure to do any of the things "required by law." The Court held that the violation of the regulation promulgated under § 20 was not an offense. It reasoned that since Congress had prescribed penalties for certain acts but not for the failure to keep books the omission could not be supplied by regulation. And Congress had not added criminal sanctions to the rules promulgated under § 20 of that Act. The situation here is quite different. Sec. 11 of the present Act makes it a crime to do specified acts, either by way of omission or commission, in violation of the Act or the rules or regulations issued under it. Thus it is a felony for a person to "fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act." Sec. 11 is therefore a law of the United States which imposes criminal sanctions for disobedience of the selective service regulations. Since Congress has made the violation

of regulations a felony, it can hardly be contended that those regulations are not a "law" for the purposes of § 6 of the Criminal Code. But though we assume that *United States* v. *Eaton* was a reason for adding a conspiracy clause to § 11, we cannot assume that the one which was added had the narrow scope suggested. Whatever the reason, words mean what they say. And if we give the words "conspire to do so" their natural meaning, we do not make the Act a trap for the innocent.

We have been advised that Martin H. Singer died on October 1, 1944. The writ is accordingly dismissed as to him (*Menken* v. *Atlanta,* 131 U. S. 405; *United States* v. *Johnson,* 319 U. S. 503, 520) and the cause is remanded to the District Court for such disposition as law and justice require. *United States* v. *Pomeroy,* 152 F. 279, rev'd 164 F. 324; *United States* v. *Dunne,* 173 F. 254.

The judgment as respects Willard I. Singer is

Affirmed.

MR. JUSTICE FRANKFURTER, dissenting.

In the past, to soften the undue rigors of the criminal law, courts frequently employed canons of artificial construction to restrict the transparent scope of criminal statutes. I am no friend of such artificially restrictive interpretations. Criminal statutes should be given the meaning that their language most obviously invites unless authoritative legislative history or absurd consequences preclude such natural meaning. There are surely deep considerations of policy why the scope of criminal condemnation should not be extended by a strained reading. The natural reading of the conspiracy provision of § 11 of the Selective Service Act of 1940 [1] confines its ap-

[1] 54 Stat. 885, 894, 50 U. S. C. App. § 311. "Any person charged as herein provided with the duty of carrying out any of the provisions of this Act, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform

plication to the immediately preceding clause which punishes "any person or persons who shall knowingly hinder or interfere in any way by force or violence with the administration of this Act or the rules or regulations made pursuant thereto." Since no absurd consequences preclude the indicated natural reading of this criminal statute and since all available extraneous aids confirm the rendering which the text invites, I think it should be given it.

It is difficult for me to believe that if one were reading § 11 without consciousness of the problem now before us and merely as a matter of English one would make the "so" in the phrase "conspire to do so" relate back to all that is contained in the twenty-two preceding lines rather than to the "force or violence" clause immediately preceding. The structure of the sentence, grammar, and clarity of expression combine to attribute to the phrase

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such duty, and any person charged with such duty, or having and exercising any authority under said Act, rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate as to the fitness or unfitness or liability or nonliability of himself or any other person for service under the provisions of this Act, or rules, regulations, or directions made pursuant thereto, or who otherwise evades registration or service in the land or naval forces or any of the requirements of this Act, or who knowingly counsels, aids, or abets another to evade registration or service in the land or naval forces or any of the requirements of this Act, or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act, or any person or persons who shall knowingly hinder or interfere in any way by force or violence with the administration of this Act or the rules or regulations made pursuant thereto, or conspire to do so, shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment . . ."

"to do so" a limited reference instead of making "so" carry the burden of the whole paragraph as antecedent. Good sense reinforces these textual considerations. It is made an offense to conspire to violate not only the seven substantive offenses enumerated by Congress but also the multitudinous "rules and regulations." There is an obvious difference between conspiracies to violate by force and violence any rule issued under the Act and a mere unexecuted arrangement between two people peacefully to escape one of such rules.

All extraneous aids confirm rather than contradict this construction.

The only authoritative legislative commentary we have on § 11 is the statement by Senator Sheppard, Chairman of the Committee on Military Affairs, in a formal speech expounding the various provisions of the Act. There is every reason to believe that Senator Sheppard's speech had behind it the authority of those who framed this legislation and who were cognizant of the prior legislation upon which they were building. Senator Sheppard stated that § 11 "contains the penalty provisions of the bill, which are substantially the same as those of the World War act. Experience with the World War provisions shows that they worked satisfactorily in providing the necessary protection." 86 Cong. Rec. 10095. It is to be noted that Senator Sheppard spoke of the "World War provisions" and thereby evidently had in mind the various enactments available for dealing with interferences with the raising of an army.

In its arsenal of punishment the Government had provisions dealing specifically with conspiracies affecting the recruiting of an army as well as the all-comprehending conspiracy statute outlawing conspiracies to commit any offense against the United States—an old enactment known to every tyro of federal law since Reconstruction days (R. S. § 5440, Act of March 2, 1867). What then

were the specific conspiracy provisions which were "substantially" drawn upon for this war from the legislation of the First World War? (a) Section 6 of the Criminal Code, 18 U. S. C. § 6, punished conspiracies "by force to prevent, hinder, or delay the execution of any law of the United States . . ." with a fine of $5,000 or imprisonment for six years or both. No overt act was required for prosecution for this conspiracy. (b) Section 4 of the Espionage Act, 40 Stat. 217, 219, 50 U. S. C. § 34, outlawed conspiracies to violate §§ 2 and 3 of the Espionage Act, to be punished by a fine of $10,000, imprisonment for twenty years or both. Section 4 required an overt act. This section survived the last war but was not, however, operative when the Selective Service Act was enacted because it applies only "when the United States is at war."

If the conspiracy clause in § 11 is confined to offenses involving force or violence, the provisions as to conspiracy remain substantially the same under the 1940 Act as they were during the last war. Conspiracies to commit nonviolent offenses—that is, conspiracies to commit the range of substantive offenses, some of them rather minor in character, contained in § 11—are of course still punishable under the general conspiracy provision, to wit § 37 of the Criminal Code, as was the situation during the last war. Offenses of violence which fell within § 6 of the Criminal Code in 1917 are now included within § 11, neither of which requires an overt act. The punishment for these conspiracies of violence is substantially similar—a $5,000 fine and six years imprisonment under § 6 and a $10,000 fine and five years imprisonment under § 11. Senator Sheppard's desire for penalties "which are substantially the same as . . . the World War provisions" would thus appear to be accomplished.

But the Government urges that if § 11 of the 1940 Act merely hits a conspiracy to do an act of violence, the

conspiracy clause will be redundant in that it will accomplish nothing except to increase the limit of the fine from $5,000 to $10,000 and to decrease the allowable imprisonment from six years to five years. This argument wholly overlooks two important changes effected by the conspiracy provision of the 1940 Act. The cases had raised doubt whether § 6 of the Criminal Code was properly applicable to conspiracies to violate by force the Draft Act. Compare *Reeder* v. *United States,* 262 F. 36, cert. denied, 252 U. S. 581, with *Haywood* v. *United States,* 268 F. 795, 799, cert. denied, 256 U. S. 689. By specific inclusion of a conspiracy provision in the Selective Service Act, instead of leaving it to the generality of § 6 of the Criminal Code, the doubt was completely eliminated. That in itself saves the conspiracy provision from mere redundancy, for it gives it, as a matter of law enforcement, an important function.

The Government also fails to take into account that the conspiracy provision of § 11 added considerably to the scope of § 6—that the net of § 11 would catch many offenders left free by § 6 of the Criminal Code. The latter merely reaches conspiracies to obstruct by force the operation of "any law of the United States." For more than half a century, ever since *United States* v. *Eaton,* 144 U. S. 677, it has been the settled principle of federal criminal law that a provision merely punishing violation of a "law" does not cover violations of rules or regulations made in conformity with that law. See *United States* v. *Grimaud,* 220 U. S. 506, 518–519. Section 6, therefore, does not cover violations of rules or regulations. Section 11 of the 1940 Act made an important addition in that it punishes conspiracies to interfere forcibly not merely "with the administration of this Act" but also with "the rules or regulations made pursuant thereto."

United States v. *Eaton* is not a judicial sport. It is the application of a principle which has been undeviatingly

applied by this Court—most recently in *Viereck* v. *United States,* 318 U. S. 236, 241—and upon the basis of which Congress legislates. *In re Kollock,* 165 U. S. 526; *United States* v. *Grimaud, supra; United States* v. *George,* 228 U. S. 14. The principle is that a crime is defined by Congress, not by an executive agency. See *United States* v. *Smull,* 236 U. S. 405, 409. "Where the charge is of crime, it must have clear legislative basis." *United States* v. *George, supra,* at 22. It is only when Congress in advance prescribes criminal sanctions for violations of authorized rules that violations of such rules can be punished as crimes. It is this far-reaching distinction which, it was pointed out in the *Grimaud* case, put on one side the doctrine of the *Eaton* case, where violation of rules and regulations was not made criminal, and on the other side legislation such as that enforced in the *Grimaud* case where Congress specifically provided that *"any violation of the provisions of this act or such rules and regulations* [of the Secretary of Agriculture] *shall be punished."* (Italics added by Mr. Justice Lamar.) *United States* v. *Grimaud, supra,* at 515. Congress consciously gave an effect to the conspiracy clause of § 11 which is absent from that of § 6 of the Criminal Code.

There is another strong ground for concluding that the draftsmen of the Selective Service Act did not intend by its dubious language to extend the conspiracy provision beyond violent attempts and to sweep into this clause all conspiracies to violate the Act or any of its regulations. Whenever Congress desires to make a conspiracy provision apply to a whole series of substantive offenses, it does so explicitly. Either the conspiracy provision is set off in a separate section or subsection made applicable to all preceding sections, or else clear words of reference to "any provision" or "any of the acts made unlawful" are employed. See National Stolen Property Act, § 7, 53 Stat. 1178, 1179, 18 U. S. C. § 418a; Farm Credit Act, § 64 (f),

48 Stat. 257, 269, 12 U. S. C. § 1138 (f); Sherman Act, §§ 1–3, 26 Stat. 209, as amended, 15 U. S. C. §§ 1–3; Act of July 31, 1861, R. S. § 1980, 8 U. S. C. § 47. The absence of such explicitness in the Selective Service Act is a strong indication that no such sweeping scope was intended.

A statute defining specific crimes presents to courts a very different duty of construction than do regulatory enactments wherein Congress recites a broad policy in light of which the specific provisions of the regulatory scheme must be construed. In the latter situation, a particular provision of a statute derives meaning from the broad policy expressed. See *Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177, 194. In a criminal statute like the one now under review language defining the crime is self-contained—there is no background of broad policy to guide the duty of giving such language its easy, most natural meaning.

In the past, decisions undoubtedly worked hard to narrow the scope of a criminal statute. It is against the whole tenor of reading a criminal statute to work hard to give it the broadest possible scope. The responsibility of Congress for manifesting its will is ill served by easy-going judicial construction of criminal statutes.

These views call for reversal of the judgment.

MR. JUSTICE ROBERTS, MR. JUSTICE MURPHY and MR. JUSTICE RUTLEDGE join in this dissent.

UNITED STATES *v.* WADDILL, HOLLAND & FLINN, INC. ET AL.

CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 65. Argued November 10, 1944.—Decided January 2, 1945.

1. Under R. S. § 3466, claims of the United States against an insolvent debtor who has made an assignment for the benefit of creditors, *held* entitled to priority over liens here asserted under Virginia law by a landlord for rent and by a municipality for taxes. P. 355.
2. Whether a lien created by state statute is of such character as to bring it within a claimed exception to the priority of the United States under R. S. § 3466 is a federal question. P. 356.

182 Va. 351, 28 S. E. 2d 741, reversed.

CERTIORARI, 322 U. S. 722, to review the affirmance of a decree determining the priority of payment of claims of creditors.

Mr. Paul A. Sweeney, with whom *Solicitor General Fahy, Assistant Attorney General Shea* and *Mr. Walter J. Cummings, Jr.* were on the brief, for the United States.

Mr. Rutledge C. Clement for Waddill, Holland & Flinn, Inc., respondent.

MR. JUSTICE MURPHY delivered the opinion of the Court.

The issue here is whether, in a state proceeding under a general assignment for benefit of creditors, Section 3466 of the Revised Statutes, 31 U. S. C. § 191, gives priority to a claim of the United States over a landlord's lien and a municipal tax lien.

Mrs. Oeland Roman, the assignor, operated a restaurant in Danville, Virginia, on premises leased from respondent Waddill, Holland & Flinn, Inc. On June 19, 1941, she executed a general deed of assignment to a trustee for

the benefit of creditors, specifically conveying all personal property, fixtures and equipment used by her in the conduct of the restaurant and located on the premises. This property remained on the premises until sold by the trustee on July 12, 1941. After deduction of appropriate administrative expenses, a sum of $1,407.29 remained. Four creditors claimed priority of payment from this amount.

(1) The United States claimed the sum of $1,559.63, plus interest, representing certain unpaid federal unemployment compensation taxes and a debt arising out of a Federal Housing Administration transaction.

(2) The Virginia Unemployment Compensation Commission made a tax claim of $66.38, plus interest. The Commission's claim, however, was conceded to be subordinate to that of the United States and need not be further considered here.

(3) The City of Danville claimed $300.55 as personal property taxes still unpaid. On July 2, 1941, the City Collector distrained on all of the property on the leased premises.

(4) The landlord, Waddill, Holland & Flinn, Inc., claimed $1,500.00 for six months' rent due and to become due. The assignor's lease from this firm ran for five years beginning January 1, 1937, at a monthly rental of $250.00. On July 1, 1941, twelve days after the deed of assignment was executed, the firm obtained the issuance of a distress warrant for 3 2/5 months' past due rent and an attachment for 2 3/5 months' future installments of rent. On the same day, the firm levied the warrant and attachment on the assignor's property located on the leased premises.

The trustee under the general assignment filed a petition in the Corporation Court of Danville, reciting the various claims and requesting advice as to the proper distribution. That court held that the landlord was entitled to priority in payment over the claims of the United States and the

Virginia Unemployment Compensation Commission but that its claim was subordinate to that of the City of Danville for taxes in the sum of $222.31. On appeal by the United States, the Supreme Court of Appeals of Virginia affirmed this order of distribution. 182 Va. 351, 28 S. E. 2d 741. We granted certiorari because of the importance of the problems raised and because of asserted conflict with this Court's decisions in *New York* v. *Maclay,* 288 U. S. 290, and *United States* v. *Texas,* 314 U. S. 480.

Section 3466 of the Revised Statutes provides in pertinent part that "the debts due to the United States shall be first satisfied" whenever any person indebted to the United States is insolvent or, "not having sufficient property to pay all his debts, makes a voluntary assignment thereof." We hold that this statute clearly subordinates the claims of both the landlord and the municipality to that of the United States. The judgment of the court below must accordingly be reversed.

The words of § 3466 are broad and sweeping and, on their face, admit of no exception to the priority of claims of the United States. *Thelusson* v. *Smith,* 2 Wheat. 396, 425; *United States* v. *Texas, supra,* 484. But this Court in the past has recognized that certain exceptions could be read into this statute. The question has not been expressly decided, however, as to whether the priority of the United States might be defeated by a specific and perfected lien upon the property at the time of the insolvency or voluntary assignment. *Conard* v. *Atlantic Insurance Co.,* 1 Pet. 386, 441, 444; *Brent* v. *Bank of Washington,* 10 Pet. 596, 611, 612; *Spokane County* v. *United States,* 279 U. S. 80, 95; *United States* v. *Knott,* 298 U. S. 544, 551; *New York* v. *Maclay, supra,* 293, 294; *United States* v. *Texas, supra,* 485, 486. It is within this suggested exception that the landlord and the municipality seek to bring themselves. Once again, however, we do not reach a decision as to whether such an exception is permissible for we do not

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believe that the asserted liens of the landlord and the municipality were sufficiently specific and perfected on the date of the voluntary assignment to cast any serious doubt on the priority of the claim of the United States.

The landlord rests its claim upon certain provisions of the Virginia Code of 1936. Sections 5519 and 5523 authorize a landlord to levy distress for six months' rent upon "any goods of the lessee . . . found on the premises, or which may have been removed therefrom not more than thirty days. . . . for not more than six months' rent if the premises are in a city or town." Section 5524 provides that the goods of the tenant on leased premises in a city or town may not be removed by a lienor or purchaser, nor taken under legal process, save "on the terms of paying to the person entitled to the rent so much as is in arrear, and securing to him so much as is to become due," not to exceed six months' rent. Other sections provide for officers making the distress under warrant from a justice, founded upon an affidavit of the person claiming the rent, and for such officers to make returns of their actions and proceedings upon such warrants. Provisions are also made for legal proceedings looking toward the possession and sale of the property to satisfy the debt.

The Supreme Court of Appeals of Virginia has here held that these sections "give the landlord a lien which is fixed and specific, and not one which is merely inchoate, and that such a lien exists independent of the right of distress or attachment, which are merely remedies for enforcing it." 182 Va. at 363, 28 S. E. 2d at 746. It has also held that such a lien "relates back to the beginning of the tenancy," 182 Va. at 364, 28 S. E. 2d at 746, thus giving it force and effect on date of the voluntary assignment. These interpretations of the Virginia statutes, as propositions of state law, are binding. But it is a matter of federal law as to whether a lien created by state statute is sufficiently specific and perfected to raise questions as to

the applicability of the priority given the claims of the United States by an act of Congress. If the priority of the United States is ever to be displaced by a local statutory lien, federal courts must be free to examine the lien's actual legal effect upon the parties. A state court's characterization of a lien as specific and perfected, however conclusive as a matter of state law, cannot operate by itself to impair or supersede a long-standing Congressional declaration of priority. *Field* v. *United States,* 9 Pet. 182, 201; *United States* v. *Oklahoma,* 261 U. S. 253, 260; *Spokane County* v. *United States, supra,* 90.

Tested by its legal effect under Virginia law, the landlord's lien in this instance appeared to serve "merely as a *caveat* of a more perfect lien to come." *New York* v. *Maclay, supra,* 294. As of the date of the voluntary assignment, it was neither specific nor perfected. It gave the landlord only a general power over unspecified property rather than an actual interest in a definitive portion or portions thereof.

Specificity was clearly lacking as to the lien on June 19, 1941, the date of the assignment. On that day it was still uncertain whether the landlord would ever assert and insist upon its statutory lien. Until that was done it was impossible to determine the particular six months' rent, or a proportion thereof, upon which the lien was based. The lien did not relate to any particular six months' rent but could attach only for the rent which might be due at or after the time when the lien was asserted. *Wades* v. *Figgatt,* 75 Va. 575, 582. And if it were asserted at a time when the tenancy had terminated or would terminate within six months of the date to which rent had been fully paid, the lien could only cover less than six months' rent. Conceivably the amount of rent due or to become due was uncertain on the day of the assignment. The landlord may have been mistaken as to the rental rate or as to payments previously made and the tenant may have been entitled

to a set-off. See *Allen* v. *Hart,* 18 Gratt. (59 Va.) 722, 737; *Hancock* v. *Whitehall Tobacco Co.,* 100 Va. 443, 447, 41 S. E. 860. Moreover, while the lien legally attached to all such property as might be on the premises when the lien was asserted or within thirty days prior to distraint, the landlord could distrain goods only to the extent necessary to satisfy the rent justly believed to be due, the tenant possessing an action for damages for excessive distraint. Va. Code § 5783; *Fishburne* v. *Engledove,* 91 Va. 548, 22 S. E. 354; *Gurfein* v. *Howell,* 142 Va. 197, 128 S. E. 644. Thus until the extent of the lien was made known by the landlord and until some steps had been taken to distrain or attach sufficient property to satisfy the lien, it was impossible to specify the goods actually and properly subject to the lien. Some of the goods on the premises may have been subject to mortgages or liens which attached before the goods were brought on the premises, in which case the landlord's lien would be inferior. Va. Code § 5523. And if other goods were removed after the date of the voluntary assignment but more than thirty days before the distraint or attachment, the right of distraint and attachment as to those goods would disappear. Va. Code § 5523; *Dime Deposit Bank* v. *Wescott,* 113 Va. 567, 75 S. E. 179. These factors compel the conclusion that neither the rent secured by the lien nor the property subject to the lien was sufficiently specific and ascertainable on the day of the voluntary assignment to fall within the terms of the suggested exception.

Nor was the statutory lien perfected as a matter of actual fact, regardless of how complete it may have been as a matter of state law. The tenant was divested of neither title nor possession by the silent existence of the landlord's statutory lien on the date of the assignment. Only after the lien was actually asserted and an attachment or a distraint leveled, enabling the landlord to satisfy his claim out of the seized goods, could it be argued that such goods

severed themselves from the general and free assets of the tenant from which the claims of the United States were entitled to priority of payment. Prior to that time, the lien operated to do no more than prevent the removal of goods from the premises by certain classes of persons, Va. Code § 5524, and give the landlord priority in distribution under state law provided that the goods remained on the premises. Such a potential, inchoate lien could not disturb the clear command of § 3466 of the Revised Statutes. Something more than a "*caveat* of a more perfect lien to come" was necessary.

The lien of the City of Danville stands in no better position insofar as the claim of the United States is concerned. The municipality contends that it assessed taxes on specific items of furniture and equipment pursuant to annual levies made by the city council and that a lien attached to such property on January 1, 1941, by operation of state law. It claims that this lien attached before the claim of the United States was acquired and hence had priority.

Under Virginia law, however, a municipal tax confers a lien on personal property which enables the city to follow it wherever it may be taken only if the assessment is specifically made on such property. *Drewry* v. *Baugh & Sons,* 150 Va. 394, 400, 401, 143 S. E. 713; *Chambers* v. *Higgins,* 169 Va. 345, 351, 352, 193 S. E. 531. The Corporation Court of Danville recognized that the city had not made such an assessment in this case since it held that assessment of the furniture and equipment as a unit was sufficient to satisfy this rule "so long as they remained on the premises where the owner's business was conducted." It realized that if this property unit were separated or removed from the premises different results would follow. Unless and until distraint was levied, which in this case occurred thirteen days after the voluntary assignment, it was uncertain whether the furniture and equipment would remain intact as a unit on the premises and hence be sub-

ject to the tax lien. If such property had been removed, distraint could then have been levied on other undetermined property of the tenant. At least until actual distraint, therefore, there was no certainty as to the property subject to the lien and no transfer of title or possession relative to any property. Such a lien cannot be said to be so explicit and perfected on the date of the voluntary assignment as to fall within the claimed exception to the priority of the United States.

Reversed.

MR. JUSTICE JACKSON is of opinion that the judgment should be affirmed for the reasons stated by the Supreme Court of Appeals of Virginia.

UNITED STATES *v.* ROSENWASSER, DOING BUSINESS AS PERFECT GARMENT CO.

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

No. 106. Argued December 12, 1944.—Decided January 2, 1945.

The Fair Labor Standards Act of 1938 is applicable to employees compensated on a piece rate basis, and employers of such employees are subject to the criminal provisions of the Act. P. 361.

Reversed.

APPEAL under the Criminal Appeals Act from a judgment sustaining a demurrer as to certain counts of an information charging violations of the Fair Labor Standards Act.

Mr. Ralph F. Fuchs, with whom *Solicitor General Fahy, Messrs. Douglas B. Maggs, Joseph I. Nachman,* and *Miss Bessie Margolin* were on the brief, for the United States.

Mr. Victor Behrstock submitted for appellee.

MR. JUSTICE MURPHY delivered the opinion of the Court.

This is a direct appeal from a judgment of the District Court for the Southern District of California. That court sustained appellee's demurrer to an information charging violations of the minimum wage, overtime and record-keeping provisions of the Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U. S. C. § 201 *et seq.* This was done on the ground that the Act is inapplicable where employees are compensated at piece rates, as is the case in appellee's garment business. We are thus met with the clear issue of whether the Act covers piece rate employees so as to subject their employers to its criminal provisions.

Neither the policy of the Act nor the legislative history gives any real basis for excluding piece workers from the benefits of the statute. This legislation was designed to raise substandard wages and to give additional compensation for overtime work as to those employees within its ambit, thereby helping to protect this nation "from the evils and dangers resulting from wages too low to buy the bare necessities of life and from long hours of work injurious to health." Sen. Rep. No. 884 (75th Cong., 1st Sess.) p. 4; *United States* v. *Darby,* 312 U. S. 100. No reason is apparent why piece workers who are underpaid [1] or who work long hours do not fall within the spirit or intent of this statute, absent an explicit exception as to them. Piece rate and incentive systems were widely prevalent in the United States at the time of the passage of

[1] The Government points out that United States Department of Labor statistics show that 25.5% to 48.5% of the unskilled workers paid under the piece rate or incentive systems in six industries (boot and shoe, knitted outerwear, knitted underwear, seamless hosiery, full fashioned hosiery and work and knit gloves) received less than 30 cents an hour at approximately the time of the passage of the Act.

this Act[2] and we cannot assume that Congress meant to discriminate against the many workers compensated under such systems. Certainly the evils which the Act sought to eliminate permit of no distinction or discrimination based upon the method of employee compensation and none is evident from the legislative history.

The plain words of the statute give an even more unmistakable answer to the problem. Section 6 (a) of the Act provides that "every employer" shall pay to "each of his employees who is engaged in commerce or in the production of goods for commerce" not less than specified minimum "rates," which at present are "not less than 30 cents an hour." Section 7 (a) provides that "no employer" shall employ "any of his employees" for longer than specified hours in any week without paying overtime compensation "at a rate not less than one and one-half times the regular rate at which he is employed." The term "employee" is defined in § 3 (e) to include "any individual employed by an employer," with certain exceptions not here pertinent being specified in § 13, and the term "employ" is defined in § 3 (g) to include "to suffer or permit to work."

A broader or more comprehensive coverage of employees within the stated categories would be difficult to frame.

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[2] The Government further points out that large percentages of workers are paid on a straight piece basis in the following industries: boot and shoe, boot and shoe cut stock and findings, hosiery, knit goods, hat industries, gloves, cigar, furniture, leather and meat packing. It also states that studies made in 1935, covering a cross-section of industry including 631 manufacturing establishments employing 700,699 wage earners, indicated that 22.1% were employed at straight piece rates and an additional 21.6% on some premium or bonus system. Another study made in 1939 revealed that 61.6% of the workers in 300 companies studied were paid according to an incentive system. National Industrial Conference Board, Studies in Personnel Policy, No. 19, Some Problems in Wage Incentive Administration, p. 11, Table 4.

The use of the words "each" and "any" to modify "employee," which in turn is defined to include "any" employed individual, leaves no doubt as to the Congressional intention to include all employees within the scope of the Act unless specifically excluded.[3] And "each" and "any" employee obviously and necessarily includes one compensated by a unit of time, by the piece or by any other measurement.[4] A worker is as much an employee when paid by the piece as he is when paid by the hour. The time or mode of compensation, in other words, does not control the determination of whether one is an employee within the meaning of the Act and no court is justified in reading in an exception based upon such a factor. When combined with the criminal provisions of §§ 15 and 16, the unrestricted sweep of the term "employee" serves to inform employers with definiteness and certainty that they are criminally liable for willful violations of the Act in relation to their piece rate employees as well as to their employees compensated by other methods. See *United States* v. *Darby, supra,* 125, 126.

The fact that § 6 (a) speaks of a minimum rate of pay "an hour," while § 7 (a) refers to a "regular rate" which we have defined to mean "the hourly rate actually paid for the normal, non-overtime workweek," *Walling* v. *Helmerich*

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[3] Sen. Rep. No. 884 (75th Cong., 1st Sess.) p. 6, states that the term " 'employee' is defined to include *all* employees. . . ." (Italics added.) Senator Black said on the floor of the Senate that the term "employee" had been given "the broadest definition that has ever been included in any one act." 81 Cong. Rec. 7657.

[4] The Act of June 26, 1940, c. 432, § 3, 54 Stat. 615, added § 6 (a) (5) to the Fair Labor Standards Act. This new section makes provision for establishing minimum piece rates by regulation or order for homework in Puerto Rico and the Virgin Islands. This is evidence of a Congressional intent to include workers of this type within the Act and a recognition that without this special provision homeworkers in Puerto Rico and the Virgin Islands paid by the piece would be subject to the ordinary statutory provisions relating to minimum wages.

& Payne, 323 U. S. 37, 40, does not preclude application of the Act to piece workers. Congress necessarily had to create practical and simple measuring rods to test compliance with the requirements as to minimum wages and overtime compensation. It did so by setting the standards in terms of hours and hourly rates. But other measures of work and compensation are not thereby voided or placed outside the reach of the Act. Such other modes merely must be translated or reduced by computation to an hourly basis for the sole purpose of determining whether the statutory requirements have been fulfilled. *Overnight Motor Co.* v. *Missel,* 316 U. S. 572, 579; *Walling* v. *Helmerich & Payne, supra,* 40. These hourly standards are not so phrased as reasonably to mislead employers into believing that the Act is limited to employees working on an hourly wage scale. Nor can a court rightly use these standards as a basis for cutting off the benefits of the Act from employees paid by other units of time or by the piece. If that were permissible, ready means for wholesale evasion of the Act's requirements would be provided.

It follows that the court below erred in sustaining appellee's demurrer to the information. Its judgment is

Reversed.

MR. JUSTICE ROBERTS dissents.

McKENZIE, TRUSTEE IN BANKRUPTCY, *v.* IRVING TRUST CO.

CERTIORARI TO THE COURT OF APPEALS OF NEW YORK.

No. 188. Argued December 14, 1944.—Decided January 8, 1945.

1. The purpose of the Assignment of Claims Act of October 9, 1940, 54 Stat. 1029, is the protection of the Government and not the regulation of equities of claimants as between themselves. P. 369.
2. For the purpose of determining whether a transfer is a preference under § 60a of the Bankruptcy Act, that section provides that the transfer shall be deemed to have been made "when it became so far perfected that no bona fide purchaser from the debtor and no creditor could thereafter have acquired any rights in the property so transferred superior to the rights of the transferee therein." Since, in the absence of any controlling federal statute, a creditor or bona fide purchaser could acquire rights in the property transferred by the debtor only by virtue of state law, § 60a thus adopts state law as the rule of decision for determining the effectiveness of a transfer and the time when a transfer is deemed to have been made or perfected. P. 370.
3. In determining in this case that the transfer of a check was completed not later than when the debtor endorsed and mailed the check to its assignee—rather than when the assignee received the check and credited the proceeds upon an antecedent debt—the state court applied the proper test under § 60a, and its conclusion that under state law the transfer was perfected more than four months before bankruptcy is accepted. Hence the transfer was not a preference within the meaning of § 60a. P. 371.
4. In this proceeding by the trustee to set aside an alleged preference, the court can not adjudicate upon the present record the claim of a surety whose claim, if it has one, is adverse and superior to that of the trustee in bankruptcy and the other creditors, and who is not a party to the suit. P. 372.
5. Under the federal rule, a subsequent assignee is entitled to retain assigned moneys which it receives without notice of a prior assignment. *Martin* v. *National Surety Co.*, 300 U. S. 588, distinguished. P. 373.

292 N. Y. 347, 55 N. E. 2d 192, affirmed.

CERTIORARI, *post*, p. 687, to review the affirmance of a judgment which dismissed a cause of action in a complaint by the trustee in bankruptcy seeking to set aside an alleged preference.

Mr. David Morgulas, with whom *Messrs. M. Carl Levine* and *Albert Foreman* were on the brief, for petitioner.

Mr. William A. Onderdonk for respondent.

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

Petitioner, trustee in bankruptcy of Graves-Quinn Corporation, the debtor, brought this suit in the Supreme Court of New York to recover the sum of $150,000 paid by the debtor to respondent, its creditor. The payment was alleged to be an unlawful preference under § 60a of the Bankruptcy Act, 11 U. S. C. § 96. Respondent moved for summary judgment under Rule 113 of the New York Rules of Civil Practice, on the ground that the transfer did not occur within four months of bankruptcy, and hence was not a preference under § 60a. The Supreme Court of New York denied the motion, but the Appellate Division of the Supreme Court reversed, dismissing the complaint. 266 App. Div. 599, 42 N. Y. S. 2d 551. The New York Court of Appeals affirmed, 292 N. Y. 347, 55 N. E. 2d 192, holding that the transfer was not made within four months of bankruptcy.

We granted certiorari on a petition raising questions important to the administration of the Bankruptcy Act, only one of which we find it necessary to decide. That question is whether a check, made payable to the bankrupt and endorsed and mailed by it to respondent more than four months before bankruptcy, but received by respondent and credited upon the bankrupt's antecedent debt within the four months, is, by the applicable law, a

transfer within the four months period, within the meaning of § 60a.

In September, 1940, the Graves-Quinn Corporation, later adjudicated a bankrupt, entered into a contract with the United States, acting through the War Department, for the construction of military housing. The required payment and performance bond was given by a surety to the Government, and at the same time, October 2, 1940, the surety took from the debtor as security an assignment of all sums payable on the contract.

Beginning in October, 1940, respondent, a trust company, made loans from time to time to the debtor to finance its operations under the government contract. It was agreed that the loans were to be repaid from the money to be received under the contract. On November 20, 1940, the debtor executed and on November 22 delivered to respondent a written assignment of these moneys to become due. The assignment was made without at that time giving the notices and procuring the consent of the Secretary of War, which, by the Assignment of Claims Act of October 9, 1940, 54 Stat. 1029, amending R. S. § 3477, 31 U. S. C. § 203, were required in order to give validity to the assignment.[1]

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[1] Section 3477 of the Revised Statutes, 31 U. S. C. § 203, declares that the assignment of any claim upon the Government shall be "absolutely null and void" unless made after the allowance of the claim and the issue of a warrant for its payment. But by the amendment of October 9, 1940, it was provided that such assignments of claims in excess of $1,000 for money due or to become due from an agency or department of the Government upon contracts entered into with the Government before the date of the amendment should be valid when made to a bank or trust company upon notice to the surety on the contractor's bond, and to certain specified officers of the Government, including the contracting officer or head of the department concerned, and upon consent of the head of that agency or department.

On November 27, 1940, after the assignment, the Government delivered to the debtor its check for $155,865.50 as a progress payment then due upon the contract. The debtor on that date endorsed the check and mailed it to respondent, accompanied by its own check for the sum of $150,000, made payable to respondent and drawn upon the debtor's account with respondent. On November 28th, which was exactly four months before the petition in bankruptcy was filed on March 28, 1941, respondent received the checks and credited $150,000 of the proceeds of the government check on four promissory notes of the debtor, aggregating $150,000.

On November 27 respondent sent to the Secretary of War its assignment of the sums due and to become due on the contract, and on December 2, gave the other notices required by the statute regulating assignments of claims against the United States. On December 5, the assignment was approved by the Secretary of War, and on that date the conditions of a valid assignment, prescribed by the statute, had been fully satisfied.

By § 60a of the Bankruptcy Act "a transfer . . . of any of the property of a debtor to . . . a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing by or against him of the petition in bankruptcy . . ., the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class" is declared to be an unlawful preference. Only a single issue was raised by respondent's motion for summary judgment, whether the debtor's transfer to respondent of $150,000 of the progress payment by the Government was made and perfected more than four months before the petition in bankruptcy was filed.

The Court of Appeals resolved this question in respondent's favor upon two independent grounds. One is that

while the assignment was not perfected until December 5, 1940, within the four months period, when the necessary notices had been given and consent obtained, the assignment was to be regarded as then retroactively validated as of its date of November 22, 1940, which was more than four months before the bankruptcy. The other ground is that the transfer became complete on the debtor's endorsement and mailing of the government check to respondent on November 27, more than four months before the bankruptcy.

As we sustain the judgment on the second ground we have no occasion to consider the first or to express any opinion upon it. For the purpose of determining the adequacy of the second ground, it is unnecessary to consider the effect of the assignment upon the right of respondent, as an assignee, to demand payment from the Government or the assignor of the amounts due on the contract. For here the payment was made by the Government to the assignor, which paid it to respondent before the assignment was validated by the requisite notices and consent. The provisions of the statute governing assignments of claims against the Government are for the protection of the Government and not for the regulation of the equities of the claimants as between themselves. *Martin* v. *National Surety Co.*, 300 U. S. 588, 594–595. Here, the payment having been made to the contractor and by it delivered to respondent before the assignment was perfected, the Government's obligation was discharged; and the situation was no different than it would have been if no assignment had been made. The question is thus presented whether the endorsement and mailing of the check to respondent operated as a transfer on the date of mailing, rather than on the date of its receipt, so that the transfer was made and perfected before the four months period.

What constitutes a transfer and when it is complete within the meaning of § 60a of the Bankruptcy Act is

necessarily a federal question, since it arises under a federal statute intended to have uniform application throughout the United States. *Prudence Corp.* v. *Geist,* 316 U. S. 89, 95, and cases cited; *Steele* v. *Louisville & Nashville R. Co.,* 323 U. S. 192, 204. The statute provides its own definitions. Section 1 (30) of the Bankruptcy Act declares that " 'transfer' shall include the sale and every other . . . mode . . . of disposing of or of parting with property . . . or with the possession thereof . . ." And § 60a provides that a "transfer shall be deemed to have been made at the time when it became so far perfected that no bona fide purchaser from the debtor and no creditor could thereafter have acquired any rights in the property so transferred superior to the rights of the transferee therein . . ."

In the absence of any controlling federal statute, a creditor or bona fide purchaser could acquire rights in the property transferred by the debtor, only by virtue of a state law. And hence § 60a's "apparent command is to test the effectiveness of a transfer, as against the trustee, by the standards which applicable state law would enforce against a good faith purchaser." *Corn Exchange Bank* v. *Klauder,* 318 U. S. 434, 436–7. See also *Benedict* v. *Ratner,* 268 U. S. 353, 359, and cases cited. Section 60a in this respect, as do numerous other federal statutes, see *Davies Warehouse Co.* v. *Bowles,* 321 U. S. 144, 155–156, and note 20, and cases cited, thus adopts state law as the rule of decision. The state standards which control the effectiveness of a transfer likewise determine the precise time when a transfer is deemed to have been made or perfected.

As we have seen, § 1 (30) includes in the term "transfer" "every . . . mode of . . . parting with property . . . or with the possession thereof." When the debtor endorsed the government check and placed it in the mails,

he parted with the possession and intended to part with the property in it, at a time (before the four months' period) when the transfer of the property to respondent would not be an unlawful preference. Whether the transfer was perfected on mailing the check thus turns on a question of state law, to which the highest court of the state has here given an authoritative answer.[2] The Court of Appeals recognized that only such a "parting with property" in the check, as would preclude the debtor from transferring any interest in the check to a creditor or bona fide purchaser, would perfect the transfer to respondent within the meaning of § 60a. The court also recognized that in this respect state law controlled decision. It found it unnecessary to consider whether a creditor or bona fide purchaser could have obtained rights in the $150,000, prior to the endorsement and mailing of the government check on November 27, since it thought that the "delivery of the

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[2] The endorsement and mailing of the government check took place in Boston, Massachusetts. There is no contention that the substantive law of Massachusetts determines the legal effect of these acts, nor that that law differs from the law of New York. Hence it is unnecessary to decide whether the problem of choice of law under § 60a is to be resolved by federal standards, or whether that section also adopts the conflict of laws rules of the forum. If the former be the case, it would be necessary for this Court to determine whether the New York Court of Appeals should have followed Massachusetts law; and if so this Court would be under the duty of making an independent investigation of the Massachusetts law. Cf. *Barber* v. *Barber*, 323 U. S. 77, 81; *Adam* v. *Saenger*, 303 U. S. 59, 64, and cases cited. But if the statute adopts the local conflict of laws rules, the present case would turn on New York law, even though the applicable rule adopted by New York were the same as the substantive law of Massachusetts. For "Even where the state of the forum adopts and applies as its own the law of the state where the injury was inflicted, the extent to which it shall apply in its own courts a rule of law of another state is itself a question of local law of the forum." See *Magnolia Petroleum Co.* v. *Hunt*, 320 U. S. 430, 445, and cases cited.

moneys to the assignee was complete" at that time.[3] The state court having applied the proper test under § 60a, we accept its conclusion that the transfer was made more than four months before bankruptcy.

Petitioner, relying on *Martin* v. *National Surety Co., supra,* argues that as a matter of federal law the surety company, which is a creditor, has rights to the proceeds of the government contract, superior to those of respondent, and sufficient to require respondent to relinquish the payment made to it. It does not appear that the surety has made any such claim. The surety, whose claim, if it has one, is adverse and superior to that of petitioner and the other creditors, is not a party to this suit. The affidavits submitted on the motion for summary judgment do not frame any such issue, and we are not pointed to any allegation in them that any amount is due and owing from the bankrupt to the surety. Hence the claim, if it exists, is not one which could be adjudicated here.

In any event the affidavits fail to establish the asserted priority of the surety over respondent. The surety did not perfect its assignment by giving the notices and procuring the consent required by the statute. It did not receive the proceeds of the contract here in question. They were paid to respondent which does not appear to have

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[3] The Court of Appeals said, 292 N. Y. 347, 358–359: "The test under the statute as amended in 1938 is, as I have said, whether no '*bona fide* purchaser from the debtor and no creditor could thereafter have acquired any rights in the property so transferred superior to the rights of the transferee therein.' The 'standards which applicable state law would enforce against a good faith purchaser' or against a creditor must be applied here. . . . It is unnecessary to decide . . . whether a purchaser for value or a creditor could have obtained any rights in the moneys until they were paid to the contractor and the check mailed to the [respondent] on November 27th. It seems clear that at least from that time the transfer was perfected. . . . [From] the time that the check was deposited in the mail . . ., delivery of the moneys to the assignee was complete."

had any notice of the prior assignment of the surety. Under the federal rule, respondent is entitled to retain the assigned money which it received without notice of the prior assignment to the surety. *Judson* v. *Corcoran,* 17 How. 612; cf. *Salem Trust Co.* v. *Manufacturers' Co.,* 264 U. S. 182, 192–193. The *Martin* case does not control here, since the subsequent assignee in that case took with notice of an earlier assignment and as part of an obviously fraudulent scheme. These facts, which were sufficient in that case to require that the subsequent assignee relinquish the transferred funds, are lacking here. Hence it is unnecessary to consider whether, as the Court of Appeals held, the trustee is without standing to assert alleged rights of the surety.

Affirmed.

MR. JUSTICE BLACK dissents.

UNITED STATES *v.* GENERAL MOTORS CORP.

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

No. 76. Argued November 16, 17, 1944.—Decided January 8, 1945.

In proceedings to determine the measure of just compensation required by the Fifth Amendment to be made to a leaseholder where the Government has taken, for part of the unexpired term of a lease, the occupancy of a warehouse which was equipped for and used in the leaseholder's business, *held:*

1. The value of the occupancy is to be ascertained not by treating what has been taken as an empty warehouse to be leased for a long term, but by what would be the market rental value of the building on a lease by the long-term tenant to a temporary occupant. P. 381.

The long-term rental value is admissible as evidence of the market rental value of the temporary occupancy.

2. The reasonable cost of removing the leaseholder's stored property and preparing the space for occupancy by the Government—including labor, materials, transportation, and possibly the cost of

temporary storage and returning the goods to the premises—may be proved, not as independent items of damage but as elements affecting the price which would be asked and paid for temporary occupancy. P. 383.

3. The leaseholder is entitled to compensation for the destruction, damage or depreciation in value of fixtures and permanent equipment, not as part of but in addition to the value of the occupancy. P. 383.

140 F. 2d 873, affirmed.

CERTIORARI, 322 U. S. 722, to review a judgment which, on an appeal by the company, reversed a judgment in a condemnation proceeding.

Mr. Vernon L. Wilkinson, with whom *Solicitor General Fahy, Assistant Attorney General Littell,* and *Miss Wilma C. Martin* were on the brief, for the United States.

Mr. John Thomas Smith for respondent.

Mr. Philip S. Ehrlich filed a brief on behalf of the Zellerbach Paper Co., as *amicus curiae,* supporting respondent.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

This case is one of first impression in this court. It presents a question on which the decisions of federal courts are in conflict.[1] The problem involved is the ascertainment of the just compensation required by the Fifth Amendment of the Constitution, where, in the exercise of

[1] Compare with the decision below, 140 F. 2d 873, *Gershon Bros. Co.* v. *United States,* 284 F. 849; *National Laboratory & Supply Co.* v. *United States,* 275 F. 218; *United States* v. *Entire Fifth Floor,* 54 F. Supp. 258; *United States* v. *Improved Premises,* 54 F. Supp. 469; *United States* v. *Certain Parcels of Land,* 54 F. Supp. 561; *United States* v. *0.64 Acres of Land,* 54 F. Supp. 562; *United States* v. *Building Known as 651 Brannan Street,* 55 F. Supp. 667; *Wm. Wrigley Jr. Co.* v. *United States,* 75 Ct. Cls. 569; *Howard Co.* v. *United States,* 81 Ct. Cls. 646.

the power of eminent domain, temporary occupancy of a portion of a leased building is taken from a tenant who holds under a long term lease.

Section 201 of Tit. II of the Second War Powers Act of March 27, 1942,[2] provides, in part, that the Secretary of War may cause proceedings to be instituted, in any court having jurisdiction, to acquire, by condemnation, any real property, temporary use thereof, or other interest therein which shall be deemed necessary for military or other war purposes. The Act provides further that, on or after the filing of the condemnation petition, immediate possession may be taken and the property may be occupied, used, or improved.

In 1928 the respondent leased a one-story warehouse building in Chicago for a term of twenty years, for the storage and distribution of automobile parts, and fitted the premises for this use. In 1942 the United States became subtenants of a portion of the floor space in the building. There remained in the possession of the respondent some 93,000 square feet. In the spring of 1942 the Secretary of War requested the Attorney General to institute proceedings for condemnation of the occupancy of the remaining space for a term ending June 30, 1943. Pursuant to the request, the United States, June 8, 1942, filed a petition in the District Court for an order condemning such temporary use and granting the Government the right of immediate possession, use, and improvement for military purposes. On the same day the court entered an order declaring the property condemned for a term ending June 30, 1943, and granting the United States the right of immediate possession. The order was served on the respondent and shortly thereafter it began removing its personal property from the area and dismantling and demolishing bins and fixtures, so that the space was available for government use by June 19.

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[2] c. 199, 56 Stat. 176, 177, 50 U. S. C. App. § 632.

At the trial for the ascertainment of the compensation due the respondent, the attorney for the Government, after proving the authority for the taking, called a real estate expert who gave his opinion that the fair rental value of the space was 35 cents per year per square foot. The Government then rested.

The respondent called expert witnesses who testified that, in their opinion, the fair rental value was 43 cents per square foot, and a witness was permitted to testify that the rent paid by the respondent to its landlord had varied during the years 1940 to 1942, inclusive, from 41.9 to 43.24 cents.

The respondent then offered to prove various items of cost caused by removal of the contents. These consisted, *inter alia,* of salaries of employes engaged in the work, compensation due employes put out of work by the removal, wages of janitors and watchmen for the protection of the building during the moving, the cost of shipping the contents of the building to other points, compensation to executives and employes whose time was required in connection with the moving of the property, freight and haulage charges, rental of storage space for articles moved out, the value of the bin equipment destroyed and the estimated original cost of the installation of fixed equipment completely lost as a result of the dismantling of the area. The court sustained an objection to the offer. The jury awarded compensation in a lump sum at a rate of approximately 40 cents per square foot for the term of one year.[3]

[3] After judgment had been entered on the verdicts, the court, on the Government's motion, opened the judgment and permitted the Government to amend its petition for condemnation to describe the interest taken as "a term for years . . . expiring June 30, 1943, renewable for additional yearly periods thereafter . . . at the election of the Secretary of War," on specified notice of intent so to renew. The court then entered a new judgment awarding the amount of the verdict to respondent and retaining jurisdiction for the ascertain-

The respondent appealed to the Circuit Court of Appeals, assigning as error the refusal of its offer of proof. That court might have sustained the District Court's ruling on the ground that respondent was not entitled to prove certain of the expenditures and losses in question as independent items of damages additional to the value of the interest taken by condemnation. The court, however, considering substance rather than form, by a vote of 2 to 1, reversed the judgment, holding that items of actual loss which were the direct and necessary result of the respondent's exclusion from the leased area might be proved, not as independent items but as elements to be considered in arriving at the sum which would be just compensation for the interest which the Government condemned. The cause was remanded for trial in accordance with the ruling of the Circuit Court of Appeals. We think we should review that ruling inasmuch as it is fundamental to the further conduct of the case. The correctness of the decision of the court below depends upon the scope and meaning of the constitutional provision: "nor shall private property be taken for public use, without just compensation," which conditions the otherwise unrestrained power of the sovereign to expropriate, without compensation, whatever it needs.

The critical terms are "property," "taken" and "just compensation." It is conceivable that the first was used in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. On the other hand, it may have been employed

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ment of further compensation for damage to the property, if any, beyond ordinary wear and tear, due to the Government's occupancy. We do not understand that these facts alter the question before us. The case now presented involves only the original taking for one year. If, on remand, the case be treated as involving the Government's option of renewal, the additional value of that interest must be included in the compensation awarded. We express no opinion as to the Government's power to condemn service, such as the furnishing of heat and light.

in a more accurate sense to denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. In point of fact, the construction given the phrase has been the latter.[4] When the sovereign exercises the power of eminent domain it substitutes itself in relation to the physical thing in question in place of him who formerly bore the relation to that thing, which we denominate ownership. In other words, it deals with what lawyers term the individual's "interest" in the thing in question. That interest may comprise the group of rights for which the shorthand term is "a fee simple" or it may be the interest known as an "estate or tenancy for years," as in the present instance. The constitutional provision is addressed to every sort of interest the citizen may possess.

In its primary meaning, the term "taken" would seem to signify something more than destruction, for it might well be claimed that one does not take what he destroys. But the construction of the phrase has not been so narrow. The courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking. Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking.[5]

But it is to be observed that whether the sovereign substitutes itself as occupant in place of the former owner, or destroys all his existing rights in the subject matter, the Fifth Amendment concerns itself solely with the "property," i. e., with the owner's relation as such to the physical thing and not with other collateral interests which may be incident to his ownership.

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[4] Lewis, Eminent Domain, 3d Ed., §§ 63, 64.

[5] See, e. g., *United States* v. *Welch*, 217 U. S. 333; *Richards* v. *Washington Terminal Co.*, 233 U. S. 546.

In the light of these principles it has been held that the compensation to be paid is the value of the interest taken. Only in the sense that he is to receive such value is it true that the owner must be put in as good position pecuniarily as if his property had not been taken. In the ordinary case, for want of a better standard, market value, so called, is the criterion of that value. In some cases this criterion cannot be used either because the interest condemned has no market value or because, in the circumstances, market value furnishes an inappropriate measure of actual value.

In the trial of this case the parties presented evidence of the market value of the occupancy of bare floor space for the term taken. The respondent's offer to prove additional items for which it claimed compensation was overruled. The award was therefore limited to the market value of the occupancy of a vacant building. The question is whether any other element of value inhered in the interest taken.

The sovereign ordinarily takes the fee. The rule in such a case is that compensation for that interest does not include future loss of profits, the expense of moving removable fixtures and personal property from the premises, the loss of good-will which inheres in the location of the land, or other like consequential losses which would ensue the sale of the property to someone other than the sovereign. No doubt all these elements would be considered by an owner in determining whether, and at what price, to sell. No doubt, therefore, if the owner is to be made whole for the loss consequent on the sovereign's seizure of his property, these elements should properly be considered. But the courts have generally held that they are not to be reckoned as part of the compensation for the fee taken by the Government.[6] We are not to be taken as departing

[6] *Bothwell* v. *United States,* 254 U. S. 231; *Mitchell* v. *United States,* 267 U. S. 341; *Mullen Benevolent Corp.* v. *United States,* 290 U. S. 89; Orgel, Valuation under Eminent Domain, Chap. V, pp. 220–252.

from the rule they have laid down, which we think sound. Even where state constitutions command that compensation be made for property "taken or damaged" for public use, as many do, it has generally been held that that which is taken or damaged is the group of rights which the so-called owner exercises in his dominion of the physical thing, and that damage to those rights of ownership does not include losses to his business or other consequential damage.[7]

The question posed in this case then is, shall a different measure of compensation apply where that which is taken is a right of temporary occupancy of a building equipped for the condemnee's business, filled with his commodities, and presumably to be reoccupied and used, as before, to the end of the lease term on the termination of the Government's use? The right to occupy, for a day, a month, a year, or a series of years, in and of itself and without reference to the actual use, needs, or collateral arrangements of the occupier, has a value. The value of that interest is affected, of course, by the kind of building to be occupied, by its location, by its susceptibility to various uses, by its conveniences, or the reverse, and by many other factors which go to set the value of the occupancy. These were taken into consideration in fixing the market value of the floor space taken, as if that space were bare and in the market for rent.

While, as has been said, the Government's power to take for a short period, and to demand possession of the space taken freed of all equipment or personal property therein, cannot be denied, three questions emerge which are not presented when what is taken is a fee interest in land. They are: 1. Is the long-term rental value the sole measure of the value of such short-term occupancy carved out of the long term? 2. If the taking necessitates the removal

[7] Orgel, *op. cit.*, p. 253.

of personal property stored in the building in conformity to the normal use of such a building, is the necessary expense of the removal to be considered in computing compensation? 3. If a tenant's equipment and fixtures are taken or destroyed, or reduced in value, by the Government's action, must it compensate for the value thus taken or destroyed in addition to paying the rental value of the occupancy?

1. If the Government need only pay the long-term rental of an empty building for a temporary taking from the long-term tenant a way will have been found to defeat the Fifth Amendment's mandate for just compensation in all condemnations except those in which the contemplated public use requires the taking of the fee simple title. In any case where the Government may need private property, it can devise its condemnation so as to specify a term of a day, a month, or a year, with optional contingent renewal for indefinite periods, and with the certainty that it need pay the owner only the long-term rental rate of an unoccupied building for the short term period, if the premises are already under lease or, if not, then a market rental for whatever minimum term it may choose to select, fixed according to the usual modes of arriving at rental rates. And this, though the owner may be damaged by the ouster ten, a score, or perhaps a hundred times the amount found due him as "fair rental value." In the present case the respondent offered to prove that the actual expense of moving its property exceeded $46,000, and the loss due to destruction and removal of fixtures and fixed equipment exceeded $31,000, in addition to its continuing liability to pay rent for the year of approximately $40,000; whereas the award was $38,597.86. If such a result be sustained we can see no limit to utilization of such a device; and, if there is none, the Amendment's guaranty becomes, not one of just compensation for what is taken, but an instrument of confiscation fictionalizing "just compensation"

into some such concept as the common law idea of a peppercorn in the law of seizin or the later one of "value received" in that of contractual consideration. If the value to be paid in a case like the present is confined, as matter of law, to the long-term rental of bare space, the owner will not be secure, either in his rights of property, or in his right to just compensation as a substitute for it, when the Government takes it for the use and benefit of all. Here the use of a warehouse for a short time was taken. The property might have been the General Motors factory. Or several plants. Or a modest store or home. Whatever of property the citizen has the Government may take. When it takes the property, that is, the fee, the lease, whatever he may own, terminating altogether his interest, under the established law it must pay him for what is taken, not more; and he must stand whatever indirect or remote injuries are properly comprehended within the meaning of "consequential damage" as that conception has been defined in such cases. Even so the consequences often are harsh. For these whatever remedy may exist lies with Congress.

It is altogether another matter when the Government does not take his entire interest, but by the form of its proceeding chops it into bits, of which it takes only what it wants, however few or minute, and leaves him holding the remainder, which may then be altogether useless to him, refusing to pay more than the "market rental value" for the use of the chips so cut off. This is neither the "taking" nor the "just compensation" the Fifth Amendment contemplates. The value of such an occupancy is to be ascertained, not by treating what is taken as an empty warehouse to be leased for a long term, but what would be the market rental value of such a building on a lease by the long-term tenant to the temporary occupier. The case should be retried on this principle. In so ruling we do not suggest that the long-term rental value may not be shown

as bearing on the market rental value of the temporary occupancy taken. It may be evidence of the value of what is taken but it is not the criterion of value in such a case as this.

2. Some of the elements which would certainly and directly affect the market price agreed upon by a tenant and a sublessee in such an extraordinary and unusual transaction would be the reasonable cost of moving out the property stored and preparing the space for occupancy by the subtenant. That cost would include labor, materials, and transportation. And it might also include the storage of goods against their sale or the cost of their return to the leased premises. Such items may be proved, not as independent items of damage but to aid in the determination of what would be the usual—the market—price which would be asked and paid for such temporary occupancy of the building then in use under a long-term lease. The respondent offered detailed proof of amounts actually and necessarily paid for these purposes. We think that the proof should have been received for the purpose and with the limitation indicated.[8] Proof of such costs as affecting market value is to be distinguished from proof of value peculiar to the respondent, or the value of good-will or of injury to the business of the respondent which, in this case, as in the case of the condemnation of a fee, must be excluded from the reckoning.

3. For fixtures and permanent equipment destroyed or depreciated in value by the taking, the respondent is entitled to compensation. An owner's rights in these are no

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[8] *Patterson* v. *Boston*, 23 Pick. (Mass.) 425; *Getz* v. *Philadelphia & Reading R. Co.*, 105 Pa. 547; *Philadelphia & Reading R. Co.* v. *Getz*, 113 Pa. 214, 6 A. 356; *McMillin Printing Co.* v. *Pittsburgh, C. & W. R. Co.*, 216 Pa. 504, 65 A. 1091; *North Coast R. Co.* v. *Kraft Co.*, 63 Wash. 250, 115 P. 97; *National Laboratory & Supply Co.* v. *United States*, 275 F. 218.

less property within the meaning of the Fifth Amendment than his rights in land and the structures thereon erected. And it matters not whether they were taken over by the Government or destroyed, since, as has been said, destruction is tantamount to taking.[9] This is true whether the fixtures and equipment would be considered such as between vendor and vendee,[10] or as a tenant's trade fixures.[11] In respect of them, the tenant whose occupancy is taken is entitled to compensation for destruction, damage or depreciation in value.[12] And since they are property distinct from the right of occupancy such compensation should be awarded not as part of but in addition to the value of the occupancy as such.

The judgment of the Circuit Court of Appeals, as modified by this opinion, is

Affirmed.

The CHIEF JUSTICE, MR. JUSTICE FRANKFURTER and MR. JUSTICE MURPHY took no part in the consideration or decision of this case.

MR. JUSTICE DOUGLAS, concurring in part.

I agree that respondent is entitled to compensation for fixtures and permanent equipment destroyed or depreciated in value by the taking. I likewise agree that re-

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[9] *Supra,* Note 5.

[10] *Jackson* v. *New York,* 213 N. Y. 34, 106 N. E. 758.

[11] *Matter of City of New York,* 66 Misc. Rep. 488, 122 N. Y. S. 321; *Matter of Wilcox,* 165 App. Div. 197, 151 N. Y. S. 141; *Bales* v. *Wichita Midland Valley R. Co.,* 92 Kan. 771, 141 P. 1009; *Matter of City of New York,* 219 App. Div. 27, 219 N. Y. S. 353; *Matter of City of New York,* 256 N. Y. 236, 176 N. E. 377; *In re Widening of Gratiot Ave.,* 294 Mich. 569, 293 N. W. 755; cf. *Pause* v. *Atlanta,* 98 Ga. 92, 26 S. E. 489.

[12] *United States* v. *Seagren,* 50 F. 2d 333; *Matter of City of New York,* 118 App. Div. 865, 103 N. Y. S. 908; *St. Louis* v. *St. Louis, I. M. & S. R. Co.,* 266 Mo. 694, 182 S. W. 750; *People* v. *Ganahl Lumber Co.,* 10 Cal. 2d 501, 75 P. 2d 1067; and cases cited in Note 11.

spondent is entitled to a further increase in its award. The award granted is less than the rental which it is under a continuing obligation to pay the lessor. The United States is occupying the premises and paying about 40¢ a square foot while respondent continues to pay 42¢ to the landlord. In these special circumstances it is difficult to see how a lessee receives that just compensation to which he is entitled unless the United States pays the full rental. It would indeed be a novel rule of law which allowed the Government to oust a person from a portion of his leasehold, occupy the premises, but pay only a part of the rent, leaving the balance to be paid by him who though ousted holds the balance of the term. But I do not believe we should allow the cost of removing personal property from the premises to be reflected in the award. If this were a fee interest which was being condemned, we would exclude all such expenses from the award. Consequential losses or injuries resulting from the taking are not compensable under the Fifth Amendment. *Mitchell* v. *United States,* 267 U. S. 341; *United States* v. *Miller,* 317 U. S. 369, 376; *United States* v. *Powelson,* 319 U. S. 266, 281–283. It takes an Act of Congress to make them so. We should adhere to that rule. If we allow consequential damages to be shown here, I do not see how we can refuse such an offer of proof when a 10-year lease, a 99-year lease, or a fee interest is condemned. If cost of moving is relevant to market price in one case, I cannot say it is irrelevant in the other. And if one type of consequential damage is relevant to market price, I do not see why almost any type may not be. If we allow the offer of proof in the present case, the result will be to let consequential damages in under a new guise. If we take that step we demonstrate that hard cases do indeed make bad law. We give the Constitution an interpretation which promises swollen verdicts which no Act of Congress can cure.

MR. JUSTICE BLACK joins in this opinion.

HARTFORD-EMPIRE CO. ET AL. *v.* UNITED STATES.

NO. 2. APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.*

Argued November 15, 16, 17, 18, 1943. Reargued October 9, 10, 1944.—Decided January 8, 1945.

1. The conclusion that the corporate appellants and certain individual appellants agreed, conspired and combined to monopolize, and did restrain and monopolize, interstate and foreign commerce, by acquiring patents covering the manufacture of glassmaking machinery and by excluding others from a fair opportunity to engage in commerce in such machinery and in the manufacture and distribution of glass products, in violation of the antitrust laws, is supported by the findings and the evidence. Sherman Act, §§ 1 and 2; Clayton Act, § 3. Pp. 401–403.

(a) The conclusion that one of the corporate appellants had not abandoned the unlawful conspiracy—in view of its subsequent conduct and its continuing to share in the fruits of the conspiracy—is supported by the evidence. P. 407.

(b) The decree against four of the individual appellants, who were directors and officers of a corporation as to which the complaint was dismissed, must be reversed because the allegations of the bill are insufficient to support a decree against them; the findings do not support the decree as to them; the refusal of findings requested by the Government exculpates them of participation in the conspiracy; and the proofs fail to connect them with the conspiracy. P. 403.

(c) Use by the corporate appellants of their joint patent position to allocate fields of manufacture and to maintain prices of unpatented glassware violated the antitrust laws. P. 406.

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*Together with No. 3, *Corning Glass Works et al.* v. *United States;* No. 4, *Owens-Illinois Glass Co. et al.* v. *United States;* No. 5, *Hazel-Atlas Glass Co. et al.* v. *United States;* No. 6, *Thatcher Manufacturing Co. et al.* v. *United States;* No. 7, *Lynch Corporation et al.* v. *United States;* No. 8, *Ball Brothers Co. et al.* v. *United States;* No. 9, *Glass Container Association of America, Inc. et al.* v. *United States;* No. 10, *Collins* v. *United States;* and No. 11, *Fulton et al.* v. *United States,* also on appeals from the District Court of the United States for the Northern District of Ohio.

2. Upon consideration of objections to provisions of the decree of the District Court enjoining violations of the antitrust laws, the decree is vacated and the cause is remanded for further proceedings in conformity with the opinion of this Court. Pp. 408, 435.

(a) A decree enjoining violations of the antitrust laws may not impose penalties in the guise of preventing future violations. P. 409.

(b) A decree of injunction against violations of the antitrust laws must not be so vague as to put the whole conduct of the defendants' business at the peril of a summons for contempt; must not enjoin all possible breaches of the law; and must not withdraw from the defendants the protection of the law of the land. P. 410.

(c) The acts restrained by a decree of injunction must be described specifically therein and not by reference to the bill of complaint. P. 410.

(d) Though useful *pendente lite*, the receivership and the impounding of funds, ordered in the case of one of the corporate appellants, were not necessary to the prescription of appropriate relief. The receivership should be terminated and the impounded funds disposed of as herein directed. P. 411.

(e) Out of the royalties paid in by lessees of one of the corporate appellants, the latter should receive compensation on a *quantum meruit* basis for services which it rendered to the lessees. P. 411.

(f) Provisions of the decree requiring each of the appellants to abstain forever from leasing patented glassmaking machinery, and compelling each of them if he desires to distribute patented machinery to sell the machine which embodies the patent to everyone who applies, at a price to be fixed by the court, are confiscatory in effect and are unwarranted. P. 412.

(g) Provisions of the decree enjoining each of the appellants from engaging in the distribution of glassmaking machinery or in the distribution of glassware in interstate commerce unless he agrees (1) to grant royalty-free licenses under patents now owned; (2) to grant licenses at reasonable royalties under after-acquired patents; and (3) to make available to any licensee, at cost plus a reasonable profit, all drawings and patterns relating to the machinery or methods used in the manufacture of glassware embodied in the licensed inventions, are confiscatory in effect and are unwarranted. P. 413.

(h) For violations of the Sherman Act arising from the use of patent licenses, agreements, and leases, the decisions of this Court in *Morton Salt Co.* v. *Suppiger Co.*, 314 U. S. 488, and *B. B. Chemi-*

cal Co. v. *Ellis,* 314 U. S. 495, do not authorize forfeiture of the patents. P. 415.

(i) A provision of the decree which is vague and would be difficult of application, and which seems not to be addressed to any practice indulged in or threatened by any of the appellants, should be modified or eliminated. P. 418.

(j) The corporate appellants should be enjoined from further prosecution of infringement suits pending at the time this suit was brought; any alleged infringers who are willing to take nondiscriminatory and nonrestrictive licenses at standard royalties should be released; and the patent owner should be denied damages and profits which it might have claimed for past infringement. But the decree should be without prejudice to future infringement suits against persons refusing to take licenses after the date of the decree. The decree should not forbid any defendant from seeking recovery for infringement, occurring after the date of the final decree, of patents not covering feeders, formers, stackers, lehrs or processes or methods applicable to any of them. P. 419.

(k) License agreements between the corporate appellants which are consistent with the views here expressed should be allowed to stand; those found to be inconsistent should be ordered reformed; and the appellants should be enjoined from altering the agreements, or any hereafter made in like terms, without the approval of the court. P. 420.

(l) The decree should permit any corporate appellant, acting alone, to lease or sell patented machinery or license the use of patents, if it so elects, provided always that no discrimination is practiced and that no restrictive conditions be attached save with the approval of the court. P. 420.

(m) The decree should order dedication to the public of a patent which one of the corporate appellants, to be free from the possible threat of suit for infringement, had acquired by assignment from another. P. 421.

(n) A provision of the decree enjoining certain restrictive provisions in license agreements should be amended to permit any appellant, corporate or individual, to retain and refuse to license, to use and refuse to license, or to license with restrictions, any patent hereafter applied for or acquired, except those applicable to feeders, formers, stackers and lehrs and processes and methods applicable thereto. P. 424.

(o) A provision of the decree requiring court approval of "any agreement between any of the defendants" and "of any license

agreement made pursuant to this judgment" is too broad. If retained, it should be restricted to lease or license agreements and agreements respecting patents and trade practices, production, and trade relations. P. 424.

(p) A provision of the decree enjoining individual appellants from ownership of securities or evidence of indebtedness of more than one corporation in the industry should be modified to prohibit acquisition of stocks or bonds of any corporate appellant by any other such appellant, and to prohibit any individual appellant from acquiring a measure of control, through ownership of stocks or bonds or otherwise, in a company competing with that with which he is officially connected or in a subsidiary or affiliate of such competing company. P. 425.

(q) As to certain individual appellants who own substantial amounts of stock of two of the corporate appellants, a period longer than two years should be allowed for divestiture of the stock of one or the other of the corporate appellants; and a proviso depriving them of the right to vote the stock of one company or the other, or to trustee the stock of one of the corporations, if both stocks are held longer than the term fixed, would be appropriate. P. 426.

(r) A provision of the decree enjoining individual appellants from holding an office or directorship in more than one corporation which manufactures and sells glassware or manufactures or distributes glassmaking machinery should be limited to such relationships in competing companies. P. 426.

(s) Provisions of the decree enjoining acquisition by any of the corporate appellants of the business or assets of any other corporation (other than a subsidiary), and by any individual appellant of the business or assets of corporations other than that of which he is an officer or director, should be limited to acquisition of the business or assets of competing companies. P. 426.

(t) The appellant trade association, which had been an important instrument of restraint and monopoly, should be ordered dissolved, and the corporate defendants restrained for a period of five years from forming or joining any such association. P. 428.

(u) An injunction binding the corporate appellants, their officers, agents and employees, is sufficient to constrain the individual appellants so long as they remain in official relations, and to bind their successors; it is unnecessary to enjoin the individual appellants as individuals. P. 428.

(v) A requirement that all trade information be given to the public is disapproved. P. 429.

(w) The injunction should permit, as here indicated, usual business transactions not related to violations of the antitrust laws. P. 430.

(x) A provision of the decree which in effect prohibits the acquisition by any appellant of any patent, or of a restricted license under any patent, is inappropriate. P. 431.

(y) The decree may properly restrain agreements and combinations whereby patents are applied for and acquired to prevent others from obtaining patents on improvements which might affect royalties on basic patents; but the decree may not prohibit corporate appellants from applying for patents covering their own inventions in the art of glassmaking. P. 432.

(z) A provision of the decree enjoining each of the appellants from applying for a patent "with the intention of not making use of the invention within four years" from date of issue can not be sustained. P. 432.

(aa) The owner of a patent is under no obligation to use the patent or to grant its use to others. P. 432.

(bb) A provision of the decree requiring the corporate appellants to submit to surveillance by the Department of Justice and to furnish information with respect to their business should be modified as was a similar provision in *United States* v. *Bausch & Lomb Co.*, 321 U. S. 707. P. 433.

(cc) Where individual appellants have offended against the antitrust laws by acting solely on behalf of, or in the name of, a corporate appellant, the decree need not run against them as individuals. P. 434.

(dd) A provision of the decree requiring one of the corporate appellants to cancel certain agreements which excluded the parties named from entering the glass container business for a period of years, which restrictions have already been released, is unnecessary. P. 435.

46 F. Supp. 541, modified.

APPEALS under the Expediting Act from a decree enjoining violations of the antitrust laws.

Mr. John T. Cahill, with whom *Messrs. Thurlow M. Gordon, Stuart S. Wall, Jerrold G. Van Cise, James M. Carlisle,* and *E. J. Marshall* were on the brief, for appel-

lants in No. 2. *Mr. Thurlow M. Gordon,* on the original argument, and *Mr. Boykin C. Wright,* on the reargument, with whom *Messrs. George Nebolsine, Halsey Sayles, Paul H. Fox, Thomas E. Harris,* and *John W. Nields* were on the brief, for appellants in No. 3. *Mr. Robert T. Swaine,* with whom *Messrs. Lloyd T. Williams, Henry A. Middleton, George B. Turner, Nestor S. Foley, Roy T. Parker, Jr., E. P. Wood, Albert R. Connelly,* and *Frederick H. Wood* were on the brief, for appellants in No. 4. *Mr. Stephen H. Philbin,* with whom *Mr. Joseph D. Stecher* was on the brief, for appellants in No. 5. *Mr. Ralph Emery* argued the cause on the original argument and submitted on the reargument for appellants in No. 6. *Mr. Lehr Fess,* with whom *Mr. Frank S. Lewis* was on the brief, for appellants in No. 7. *Mr. E. W. McCallister,* with whom *Messrs. Carl F. Schaffer, A. M. Bracken,* and *Wilber Owen* were on the brief, for appellants in No. 8. *Mr. Luther Day,* with whom *Messrs. Rufus S. Day* and *Thomas O. Nevison* were on the brief, for appellants in No. 9. *Mr. Fred E. Fuller,* with whom *Messrs. George D. Welles, Fred A. Smith,* and *Hugh C. McLaughlin* were on the brief, for appellants in Nos. 10 and 11.

Assistant Attorney General Cox and *Mr. Samuel S. Isseks,* with whom *Solicitor General Fahy, Assistant Attorney General Berge,* and *Messrs. Lawrence S. Apsey, Robert L. Stern, Edward H. Levi, Philip Marcus, Lawrence C. Kingsland, Victor H. Kramer,* and *Seymour D. Lewis* were on the brief, for the United States.

Briefs of *amici curiae* were filed by *Mr. Walter H. Buck* on behalf of certain medium sized glass manufacturing companies, urging reversal in part; and by *Mr. Arnold Boyd* on behalf of the Knox Glass Companies, urging affirmance.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

These are appeals from a decree [1] awarding an injunction against violations of §§ 1 and 2 of the Sherman Act, as amended,[2] and § 3 of the Clayton Act.[3] Two questions are presented. Were violations proved? If so, are the provisions of the decree right?

The complaint named as defendants 12 corporations and 101 individuals associated with them as officers or directors. It was dismissed as to 3 corporations and 40 individuals. The corporations are the leaders in automatic glassmaking machinery and in the glassware industry. The charge is that all the defendants agreed, conspired, and combined to monopolize, and did monopolize and restrain interstate and foreign commerce by acquiring patents covering the manufacture of glassmaking machinery, and by excluding others from a fair opportunity freely to engage in commerce in such machinery and in the manufacture and distribution of glass products. The gravamen of the case is that the defendants have cooperated in obtaining and licensing patents covering glassmaking machinery, have limited and restricted the use of the patented machinery by a network of agreements, and have maintained prices for unpatented glassware.

The trial lasted 112 days. The court filed an opinion of 160 pages, 628 findings of fact and 89 conclusions of law, and entered a decree covering 46 printed pages and comprising 60 numbered paragraphs. The printed record contains over 16,500 pages. An opinion of reasonable length must deal in summary fashion with the facts disclosed by the proofs and leave much of the detailed his-

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[1] 46 F. Supp. 541.

[2] 15 U. S. C. §§ 1 and 2.

[3] 15 U. S. C. § 14.

tory of the transactions to be gleaned from the opinion below.

In 1912 Hartford-Fairmont Company was organized to combine the activities of two existing companies interested in glass manufacture with those of a group of engineers who desired to obtain and exploit patents for automatic glassmaking machinery. The defendant Corning Glass Works was, at that time, engaged primarily in the production and distribution of incandescent bulbs, sign and optical ware, heat-resisting ware and other specialty glassware. Its field may be defined roughly as the pressed and blown field, or the noncontainer field. It has not made, and does not now make, containers save a limited amount of tumblers. In 1909 persons interested in Corning organized Empire Machine Company as a patent holding and developing company.

The defendant Owens-Illinois Glass Company (hereinafter called Owens) is a large manufacturer of glass. Mr. Owens of that company produced the first fully automatic machine for blowing bottles, which is known as a suction type machine. He was interested in companies engaged in developing and manufacturing this type of machine and exercising the rights represented by the Owens and related patents. From about 1904 the Owens group followed the policy of granting exclusive licenses, in limited fields, for the manufacture of glassware by the suction process. Owens itself was, and is, mainly interested in what is known as narrow neck container ware. Prior to the Owens inventions glassmaking had been largely a hand process. Thereafter, due to Owens' restrictive licensing policy, many glass manufacturers were threatened with extinction unless some other competing machine could be devised. Ultimately a process, called suspended gob feeding, was invented, which was more economical for certain ware than the suction process, and could be

applied in the manufacture of diversified glassware. The introduction of the gob feeder machine threatened Owens' domination of the glass machinery field and Owens, in self-protection, obtained patents and patent rights on gob feeders and licensed some companies for their use.

Hartford-Fairmont was interested in the development of the gob feeder. It applied for some patents and acquired others. In the meantime, it licensed gob feeder machinery, as Owens had done with the suction machine, by restricting its use to the manufacture of specified ware. Empire owned certain patent applications which were in interference with Hartford-Fairmont gob feeder applications.

June 30, 1916, Hartford-Fairmont and Empire made an agreement whereby Empire was given an exclusive license to use Hartford-Fairmont's patents for pressed and blown glassware and Hartford-Fairmont was given an exclusive license to use Empire's patents for production of containers. Thus Corning obtained exclusive rights, under the patents, for Corning's line of ware,—pressed and blown glass,—and Hartford obtained the patent rights of both companies in respect of other glassware. Negotiations led to agreements, October 6, 1922, whereby Hartford-Empire (hereinafter called Hartford) was formed and took over all assets of Hartford-Fairmont and of Empire relating to glass machinery. Empire received 43% of the stock of the company and Corning retained approximately the same exclusive interest that Empire had enjoyed under the 1916 agreement. Hartford retained approximately the same rights it had obtained from Empire in 1916 subject to a shop right in Corning which has not been exercised. Empire was dissolved in 1941.

After 1916 Hartford-Fairmont (and its successor Hartford) and Owens were competitors in the gob feeding field; their applications were in interference in the Patent Office with each other and with those of other applicants; and

they were in litigation. As a result of negotiations for a settlement of their disputes, they entered into an agreement April 9, 1924, whereby Owens granted Hartford an exclusive license under Owens' patents for gob feeder and forming machines and Hartford granted Owens a nonexclusive, nonassignable, and nondivisible license to make and use machines and methods embodying patents then or thereafter owned or acquired by Hartford for the manufacture of glassware, but Owens was not to sell or license gob feeding machinery and was excluded from the pressed and blown field previously reserved to Corning. Owens was to receive one-half of Hartford's divisible income from licenses over and above $600,000 per annum. Owens retained a veto power on Hartford's granting new licenses on machines embodying Owens' inventions. This provision was eliminated in 1931. The agreement left Owens in full control of its patented suction process.

As soon as the agreement had been made, Hartford and Owens combined to get control of all other feeder patents. In this endeavor they pooled the efforts of their legal staffs and contributed equally to the purchase of patents and the expenses of litigation.

While patent claims upon applications controlled by Hartford and Owens were pending in the Patent Office, Hartford purchased, under the joint arrangement, certain feeder patents and applications belonging to outsiders, and persons to whom feeders had been sold or licensed by such outsiders were persuaded to take licenses from Hartford. As a result of Hartford's and Owens' joint efforts in connection with patent applications and purchases of applications and patents of others, Hartford obtained what it considered controlling patents on gob feeders in 1926.

Hazel-Atlas Glass Company (hereinafter called Hazel) was second to Owens in the manufacture and sale of glass containers. It had been using feeders of its own design

and manufacture. To build up further patent control, to discourage use of machinery not covered by their patents, and to influence glassmakers to take licenses under Hartford's inventions, Hartford and Owens desired that Hazel should become a partner-licensee. In 1924 they negotiated with Hazel to this end and offered to return to Hazel a substantial portion of any royalties it would have to pay as a licensee. No agreement was reached and Hartford brought infringement suits against Hazel and its subsidiaries. One Circuit Court of Appeals decided favorably to Hazel; another favorably to Hartford. Shortly after the latter decision, Hartford and Owens, in order to buttress the patent situation, persuaded Hazel to make a settlement.

As of June 1, 1932, Hartford, Owens, and Hazel executed a series of agreements. Hartford licensed Hazel under Hartford's patents, excluding from the license the pressed and blown field reserved to Corning and with restrictions against sale or license by Hazel to anyone else. Hazel licensed Hartford under all its glass machinery patents, present and future, to January 3, 1945. Hazel paid Hartford $1,000,000 and agreed to pay Hartford royalties, and Hartford agreed that Hazel and Owens should each receive one-third of Hartford's net income from royalties and license fees over and above $850,000 per annum. Hartford and Owens readjusted their contractual status to conform it to the agreements with Hazel. Owens maintained control of its own suction inventions. It confirmed to Hazel its existing rights under earlier agreements to use these. Owens obtained an option either to purchase, or to become licensee, of any suction inventions controlled by Hartford and agreed, in event of such acquisition, to permit Hazel to use them. Owens and Hazel had the option, on notice, to terminate their contracts with Hartford but agreed mutually to protect each other in such event. The result of this combination was that

resistance to Hartford's licensing campaign disappeared and practically the entire industry took licenses from Hartford.

Thatcher Manufacturing Company, a large manufacturer of milk bottles, early obtained an exclusive license to manufacture them on the Owens suction machine. In 1920 Thatcher secured the exclusive right to manufacture milk bottles on Hartford's paddle needle feeder and milk bottle forming machine. It pressed for like rights under Hartford's later device, the single feeder. Though refusing the grant, Hartford assured Thatcher that it would be given every consideration in the grant of further licenses. By a supplemental agreement of December 1, 1925, Hartford, in view of its "moral obligation" to Thatcher, agreed to pay and, until January 1, 1936, allowed Thatcher a rebate on a certain portion of Thatcher's production, and, in 1928, agreed to give Thatcher the refusal of any exclusive license on feeders and formers for production of milk bottles. In 1936 a new agreement was made whereby Hartford agreed that, so long as Thatcher manufactured 750,000 gross per annum, Hartford would grant no other license for manufacture of milk bottles.

Ball Brothers, the largest manufacturer of domestic fruit jars, had used machines of its own design as well as the Owens suction machines under license, but had never taken any license from Hartford. In 1933 Ball took a license from Hartford, obtaining all the residual rights of Hartford for the manufacture of fruit jars, and, *inter alia,* granted Hartford an option to take licenses on all Ball's patents for glass machinery then owned or thereafter acquired. After discussion as to the rights of Hazel and Owens to manufacture fruit jars, it was proposed that they be limited by written agreement, Hazel to 300,000 gross and Owens to 100,000 gross annually. It was decided not to have a written agreement but both have generally kept within these limits. When the complaint

was filed Ball Brothers manufactured approximately 54.5% of all the fruit jars manufactured and sold in the United States, Hazel 17.6%, Owens 6.4%, and an outsider, using a machine on which the patents had expired, 21.5%.

In granting licenses under the pooled patents Hartford always reserved the rights within Corning's field. Further, it not only limited its licensees to certain portions of the container field but, in many instances, limited the amount of glassware which might be produced by the licensee and, in numerous instances, as a result of conferences with Owens, Hazel, Thatcher and Ball, refused licenses to prevent overstocking the glassware market and to "stabilize" the prices at which such ware was sold.

In the automatic manufacture of glassware, other machines are used in connection with the feeders. These are known as forming machines, stackers, and lehrs. The purpose of Hartford and Owens, participated in by the other three large manufacturers mentioned, was that there should be gathered into the pool patents covering and monopolizing these adjunct machines so that automatic glass manufacture, without consent of the parties to the pool, would become difficult if not impossible.

Several forming machines not covered by Hartford patents were on the market. Without going into detail, it is sufficient to say that, by purchases of patents and manufacturing plants, and by an agreement with Hartford's principal competitor, Lynch Manufacturing Company, the field was divided between Hartford and Lynch under restrictions which gave Hartford control. In the upshot it became impossible to use Hartford feeders with any other forming machine than one licensed by Hartford or used by its consent, and, as respects stackers and lehrs, Hartford attained a similar dominant status.

In 1935 certain new agreements were made. Though the 1932 agreement between Hartford and Hazel was sub-

stantially unaffected, the contract relationships between Hartford and Owens were altered. The latter surrendered its right to one-third of Hartford's divisible royalty and license income in consideration of Hartford's promise to pay $2,500,000 in quarterly instalments. Owens extended the term of Hartford's license under certain Owens inventions and Hartford granted Owens a royalty-free, nonexclusive license under all Hartford's suction patents for the life of the patents, excluding, however, glassware in Corning's field. Other unimportant changes were made in existing contracts. Owens and Hazel thereupon amended their agreements so as to protect Hazel in event the contract relations between Owens and Hartford should be altered.

Owens insists that, by the 1935 agreements, it terminated all its relations with others which could violate the antitrust statutes. But the 1935 agreements left Hartford in undisputed control of the gob feeder field, and Owens in like control of the suction field. And they evidently relied on the situation which had been built up, their mutual interests, and other factors, as sufficient to guarantee continuance of existing restraints and monopolies without the necessity of formal contracts. The District Court found Owens did not abandon the conspiracy in 1935 and there is evidence to support the conclusion.

In 1919 the Glass Container Association of America was formed. Prior to 1933 its members produced 82% of the glass containers made in the United States and since have produced 92%. Since 1931 (except while the National Industrial Recovery Act was in force) the Association has had a statistical committee of seven, on which Owens, Hazel, Thatcher, and, since 1933, Ball were represented. These appellants also were represented in the Board of Directors. Hartford, though not a member, has closely cooperated with the officers of the association in efforts to discourage outsiders from increasing produc-

tion of glassware and newcomers from entering the field. The court below, on sufficient evidence, has found that the association, through its statistical committee, assigned production quotas to its members and that they and Hartford were zealous in seeing that these were observed.

In summary, the situation brought about in the glass industry, and existing in 1938, was this: Hartford, with the technical and financial aid of others in the conspiracy, had acquired, by issue to it or assignment from the owners, more than 600 patents. These, with over 100 Corning controlled patents, over 60 Owens patents, over 70 Hazel patents, and some 12 Lynch patents, had been, by cross-licensing agreements, merged into a pool which effectually controlled the industry. This control was exercised to allot production in Corning's field to Corning, and that in restricted classes within the general container field to Owens, Hazel, Thatcher, Ball, and such other smaller manufacturers as the group agreed should be licensed. The result was that 94% of the glass containers manufactured in this country on feeders and formers were made on machinery licensed under the pooled patents.

The District Court found that invention of glassmaking machinery had been discouraged, that competition in the manufacture and sale or licensing of such machinery had been suppressed, and that the system of restricted licensing had been employed to suppress competition in the manufacture of unpatented glassware and to maintain prices of the manufactured product. The findings are full and adequate and are supported by evidence, much of it contemporary writings of corporate defendants or their officers and agents.

In 1938 the Temporary National Economic Committee investigated the glassmaking industry. Many of the facts disclosed in this record were developed. Subsequently this suit was brought and, in pretrial conferences, the Government stated its view as to the terms of agree-

ments and the practices it deemed illegal. The principal corporate appellants had made some alterations in their arrangements and, after institution of suit,—and on occasions up to submission of the case on the proofs,—made further modifications on their own responsibility, and without concurrence of the appellee or the judge, in an effort to remedy alleged illegal conditions.

As a consequence, when the case stood for decision, the situation was as follows: The restrictions in the 1935 agreement between Hartford and Owens were removed, the exclusive provision, and the exclusions of the manufacture of certain glassware embodied in the 1935 agreements between Owens and Hazel were waived by Owens. Ball had surrendered its residual exclusive right for fruit jars and released a claim against Hartford thereunder for $425,000 in consideration of Hartford surrendering its option to acquire any Ball feeder inventions. Hartford withdrew the exclusive features of all its licenses of glass machinery. Hartford retained dominance of the gob feeder field. Owens, although its basic patent had expired, continued, by virtue of improvement patents, to dominate the suction field. Owens, Lynch, and Hartford were the leaders, if not altogether dominant in the forming machine field.

In July 1939 the Association changed the nature of its statistical reports which the court found were in reality assignments of quotas, and professed to have abandoned a voluntary exchange of statistical data which had previously taken place at committee or general meetings. It then adopted a form of statistical statement eliminating all forecasts and confined its reports to past performances of the members.

We affirm the District Court's findings and conclusions that the corporate appellants combined in violation of the Sherman Act, that Hartford and Lynch contracted in violation of the Clayton Act, and that the individual ap-

pellants with exceptions to be noted participated in the violations in their capacities as officers and directors of the corporations.

Certain individual appellants insist that the finding that they were parties to the conspiracy must be set aside. In No. 10, Isaac J. Collins appeals from that portion of the decree which adjudges him a party to the conspiracy and grants relief against him, and, in No. 11, Fulton, Fisher, and Dilworth challenge their inclusion in the decree.

When suit was instituted Collins was president of, and Fulton, Fisher, and Dilworth were officially connected with, Anchor Hocking Glass Company. All had been officers, directors, and stockholders of companies which Anchor Hocking absorbed. Anchor Hocking is, and its predecessors were, manufacturers of glassware. None were holders of machine patents or in the glass machine business. In the bill of complaint the charges against individuals were made by alleging that a company, and certain individual defendants connected with it, had become parties to the conspiracy. The bill charged that in 1937 Anchor Hocking and certain defendants, being its officers and directors, joined the conspiracy. The appellants in question were named as amongst these Anchor Hocking defendants and were not elsewhere in the bill specifically charged with otherwise participating in the conspiracy.

At the close of the Government's case motions were made to dismiss the bill as to Anchor Hocking and all the directors and officers of that company, including Collins, Fulton, Fisher, and Dilworth, on the ground that the Government had failed to prove any participation by them in the alleged conspiracy. The court granted the motion with respect to all of them except Collins. Thereupon these defendants withdrew and did not participate further in the trial. Some months later, on a motion of the Government for rehearing of the order of

dismissal, the court refused to alter its order with respect to Anchor Hocking or the defendants associated with it, save only Fulton, Fisher, and Dilworth. As to them, it granted rehearings and restored them as defendants of record. When the findings and conclusions were entered these appellants were named as participants in the conspiracy and were included in the injunctions embodied in various sections of the decree.

We think the decree against them must be reversed for want of allegations in the bill sufficient to support a decree against them; because the findings made do not support the decree as to them; because the refusal of findings requested by the Government exculpates them of participation in the conspiracy; and, finally, because the proofs fail to connect them with it.

Fulton, Fisher, and Dilworth each hold stock of Hartford which they acquired many years ago. A company in which they were interested owned Hartford stock and pledged it under a mortgage. The company got into difficulties, the mortgage was in default, and they and others took over the pledged Hartford stock for cash so as to put the company in funds to refinance its mortgage.

The three appellants are amongst the two hundred or more stockholders of Hartford. The bill does not, and could not, charge them in their capacity as stockholders of Hartford, as parties to the conspiracy, and they are not to be enjoined by reason of their stock holdings in Hartford.

As we have said, they were officers and directors of certain predecessor companies taken over by Anchor Hocking, which were not charged in the bill as participants in the conspiracy. Anchor Hocking was so charged and these appellants and other individuals were charged in the bill to have been, and then to be, officers and directors participating in the direction and management of Anchor Hocking. The complaint adds: "Such individual defend-

ants have approved, authorized, ordered, and done some or all the acts herein alleged to have been performed by defendant Anchor Hocking." They are not otherwise specifically charged with participating in the conspiracy. It would seem, therefore, that when Anchor Hocking was found not to have participated the only basis for charging them disappeared. Moreover, the Government's proofs went no farther than to show that these appellants acted in the business affairs of Anchor Hocking. There is no proof that they conspired or cooperated with other companies parties to the conspiracy, or with other individuals who were officers and directors of such corporations. The only findings as to all are to the effect that they have been officers and directors of Anchor Hocking and its predecessors, and stockholders of Hartford and, as to one, that, in addition, as a Hartford-Fairmont stockholder, he signed the agreement in 1922 for the formation of Hartford-Empire. The Government requested the court to find, with respect to them, a number of facts which, if found, would have connected them with the conspiracy. The court refused the requests. Nowhere in the findings or in the opinion is any reason given why these appellants should be included in the injunction. As to them, the decree must be reversed.

Anchor Hocking was a licensee of Hartford machinery. The appellant Collins thought the royalty charged was excessive and complained repeatedly about it; and, believing that his company was free to make glass of any character on any kind of machinery, he complained about the exclusive features of the license. He repeatedly aroused the resentment of Hartford and some of the other participants in the conspiracy by his assertion of the purpose to use machinery and to manufacture glassware in ways they thought contrary to his company's rights as a licensee. There were even discussions as to

whether the company should be sued. This evidence is uncontradicted.

Collins is a stockholder of Hartford. He acquired his original stock interest in the same way that Fulton, Fisher, and Dilworth did. In 1926 he was elected a director, and remained such until 1937, when he resigned. This was prior to the T. N. E. C. hearing in which the Hartford licensing system was investigated and prior to the institution of suit. There is no evidence or finding of any reasonable likelihood that he will resume the directorship. Moreover, the bill charges that Anchor Hocking and the individuals connected with it entered the conspiracy in 1937.

The bill does not charge Collins with any act as officer or director of, or as participant in the direction and management of, Hartford. The only charge against him is in respect of his connection with Anchor Hocking. The evidence is that Collins was an irregular attendant at directors' meetings of Hartford; that he was not on any committee of the board which had direct contact with the management and patent affairs of Hartford; that he did not know of the preferred terms under which Owens and Hazel were licensed by Hartford until the matter was disclosed in the T. N. E. C. hearings and then criticized the arrangement. There is no evidence that, as a director of Hartford, he knew, approved, or voted in favor of any of the actions taken pursuant to the conspiracy. On the contrary, the evidence is uncontradicted that he repeatedly advocated more liberal licensing by Hartford and thought its royalties too high. As in the case of the other appellants mentioned, the Government requested findings of fact which, if made, would have spelled out a connection between Collins and the other conspirators but these were refused by the judge. Collins is found to have been, and still to be, a member of the Association's

statistical committee, but the bill does not charge him individually with any conduct in that relation. Of course, any injunction against the Association and its officers and agents will bind him so long as he remains in that relationship. Two other findings as to his activities as a director of Hartford, and as president of General Glass Company, touch matters as to which the bill of complaint is silent and concerning which the evidence is not persuasive of participation in any conspiracy charged or proved. We are of opinion that as to Collins, the bill should be dismissed.

I

Little need be said concerning the legal principles which vindicate the District Court's findings and conclusions as to the corporate appellants and the individual appellants who as officers or directors participated in the corporate acts which forwarded the objects of the conspiracy. As was said in *Standard Sanitary Mfg. Co.* v. *United States,* 226 U. S. 20, 49:

"Rights conferred by patents are indeed very definite and extensive, but they do not give any more than other rights an universal license against positive prohibitions. The Sherman law is a limitation of rights, rights which may be pushed to evil consequences and therefore restrained."

The difference between legitimate use and prohibited abuse of the restrictions incident to the ownership of patents by the pooling of them is discussed in *Standard Oil Co.* v. *United States,* 283 U. S. 163. Application of the tests there announced sustains the District Court's decision. It is clear that, by cooperative arrangements and binding agreements, the appellant corporations, over a period of years, regulated and suppressed competition in the use of glassmaking machinery and employed their

joint patent position to allocate fields of manufacture and to maintain prices of unpatented glassware.

The explanations offered by the appellants are unconvincing. It is said, on behalf of Hartford, that its business, in its inception, was lawful and within the patent laws; and that, in order to protect its legitimate interests as holder of patents for automatic glass machinery, it was justified in buying up and fencing off improvement patents, the grant of which, while leaving the fundamental inventions untouched, would hamper their use unless tribute were paid to the owners of the so-called improvements which, of themselves, had only a nuisance value.

The explanation fails to account for the offensive and defensive alliance of patent owners with its concomitant stifling of initiative, invention, and competition.

Nor can Owens' contention prevail that it long ago abandoned any cooperation with the other corporate defendants and has been free of any trammel to unrestricted competition either in the machinery or glass field. Owens remained active in the association. It remained dominant in the suction field. It continued in close touch with Hartford and with other large manufacturers of glassware who were parties to the conspiracy. The District Court was justified in finding that the mere cancellation of the written word was not enough, in the light of subsequent conduct, to acquit Owens of further participation in the conspiracy.

Individual appellants, except Collins, Fulton, Fisher, and Dilworth, who were officers or directors of corporate appellants each did one or more acts, such as negotiating, voting for, or executing agreements which constituted steps in the progress of the conspiracy. To this extent they participated in violations of the statutes. Some were more active and played a more responsible role than others.

II

The Government sought the dissolution of Hartford. The court, however, decided that a continuance of certain of Hartford's activities would be of advantage to the glass industry and denied, for the time being, that form of relief. The court was of opinion, however, that the long series of transactions and the persistent manifestations of a purpose to violate the antitrust statutes required the entry of a decree which would preclude the resumption of unlawful practices. It was faced, therefore, with the difficult problem of awarding an injunction which would insure the desired end without imposing punishments or other sanctions for past misconduct, a problem especially difficult in view of the status and relationship of the parties.

At the trial the Government stated that in this suit it was not attacking the validity of any patent or claiming any patent had been awarded an improper priority.

At the time of the District Court's decision, Hartford had reduced the royalties of all its licensees to its then schedule of standard royalties so that all stood on an equal basis so far as license fees were concerned. Government counsel did not assert, or attempt to prove, that these royalties were not reasonable in amount.

Owens, as respects suction invention licenses, had removed all restrictive clauses; Hartford had done the same with respect to all its glass machinery licenses and so had Hartford and Lynch with respect to forming machine licenses. At the moment, therefore, no licensee was restricted either as to kind or quantity of glassware it might manufacture by use of the patented machines, and no patent owner was restricted by formal agreement as to the use or licensing of its patents.

Just before the trial, Hartford conveyed three patents to Corning and complaint was made of this transaction.

Corning paid a substantial sum for the transfer, evidently to prevent Hartford's obstructing Corning's free and untrammeled use of its own patents. Two of the assigned patents have expired and Corning professes its willingness to dedicate the third to the public.

The association had ceased to allot quotas amongst the glass manufacturers or to furnish advance information or make recommendations to its members. The licensing system of Hartford remained that of leasing machinery built for it embodying the patented inventions. Rentals consisted of standard royalties on production. Under this system Hartford rendered a service in the repair, maintenance, and protection of the machines, which is valuable, if not essential, to the users. This was the status with which the court had to deal.

The applicable principles are not doubtful. The Sherman Act provides criminal penalties for its violation, and authorizes the recovery of a penal sum in addition to damages in a civil suit by one injured by violation. It also authorizes an injunction to prevent continuing violations by those acting contrary to its proscriptions. The present suit is in the last named category and we may not impose penalties [4] in the guise of preventing future violations. This is not to say that a decree need deal only with the exact type of acts found to have been committed [5] or that the court should not, in framing its decree, resolve all doubts in favor of the Government,[6] or may not prohibit acts which in another setting would be unobjectionable. But, even so, the court may not create, as to the defendants, new duties, prescription of which is the function of Congress, or place the defendants, for the future, "in a different class than other people," as the Govern-

[4] *Standard Oil Co.* v. *United States,* 221 U. S. 1, 77–78.

[5] *Ethyl Gasoline Corp.* v. *United States,* 309 U. S. 436, 461.

[6] *Local 167* v. *United States,* 291 U. S. 293, 299.

ment has suggested. The decree must not be "so vague as to put the whole conduct of the defendants' business at the peril of a summons for contempt"; enjoin "all possible breaches of the law"; [7] or cause the defendants hereafter not "to be under the protection of the law of the land." [8] With these principles in mind we proceed to examine the terms of the decree entered. No reference will be made to paragraphs as to which the appellants do not object if any decree is to be entered, nor to those concerning which we think objection is not well founded.

The decree must be modified to eliminate the appellants Collins, Dilworth, Fulton, and Fisher.

Paragraph 1 (D) should be modified to limit its coverage to the United States, and clause (a) should be stricken as too indefinite for enforcement.

The Government concedes that paragraph 5 should be modified to confine to heat-resistant ware the adjudication that Corning, Hartford, and Empire, and the individual defendants associated with each, have monopolized and attempted to monopolize trade in violation of § 2 of the Sherman Act. This involves exclusion from the paragraph of reference to laboratory, paste mold, and electrical ware. To comport with the record the phrase "ovenware" should be substituted for "heat-resistant ware."

The Government also agrees to the elimination of paragraph 9, which generally enjoins the appellants from violations "as charged in the complaint." This concession is required by statute, by the Rules of Civil Procedure, and by our decisions.[9]

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[7] *Swift & Co.* v. *United States*, 196 U. S. 375, 396; *Labor Board* v. *Express Publishing Co.*, 312 U. S. 426, 433, 435–6.

[8] *New York, N. H. & H. R. Co.* v. *Interstate Commerce Comm'n*, 200 U. S. 361, 404; *Standard Oil Co.* v. *United States, supra*, 80.

[9] Rule 65 (d), 28 U. S. C. A. following § 723c; § 19 of the Clayton Act, 38 Stat. 738, 28 U. S. C. § 383; *Swift & Co.* v. *United States*, 196 U. S. 375, 396, 401.

The court appointed a receiver for Hartford *pendente lite*. By paragraphs 10 to 20 of the final decree it continued him in office and gave directions as to his administration of Hartford's affairs, including certain actions to be taken to effectuate features of the decree affecting Hartford's business and licenses, which will later be described, and meantime to continue the receipt of royalties under existing licenses, these to be repaid to the licensees on the decree becoming final. The court also ordered the impounding of the sums payable by Hazel to Hartford, and by Hartford to Hazel, under the 1932 agreement, until the decree should become final. Ball Brothers was ordered to pay into court the $425,000 received from Hartford pursuant to the amendment, August 1, 1940, of Ball's feeder license agreement, but no disposition of the fund was directed (Paragraph 44). Corning was directed to pay into court the moneys received by it from Hartford in connection with the amending agreements of September 23 and December 1, 1940, and that fund is held by the clerk pending the further order of the court (Paragraph 45–A).

While useful for the preservation of rights pending the determination of this litigation, in the light of what is hereafter said as to the substantive provisions of the decree, the receivership and the impounding of funds were not necessary to the prescription of appropriate relief. The receivership should be wound up and the business returned to Hartford. The royalties paid to the receiver by Hartford's lessees may, unless the District Court finds that Hartford has, since the entry of the receivership decree, violated the antitrust laws, or acted contrary to the terms of the final decree as modified by this opinion, be paid over to Hartford. In any event Hartford should receive out of these royalties compensation on a *quantum meruit* basis, for services rendered to lessees. The other funds paid into court and impounded in the registry should be repaid to those who paid them into court.

Paragraphs 21, 22, and 23 apply to the corporate defendants and to any of the individual defendants who shall hereafter engage in the business of distributing glassware machinery. They forbid any disposition or transfer of possession of such machinery by any means other than an outright sale, and require Hartford to offer in writing to sell each of the present lessees all the machinery now under lease to such lessee at a reasonable price to be fixed in consideration of the fees and royalties heretofore paid, any dispute as to price to be settled by the court. All of the corporate defendants and the individual defendants are required, if they engage in the business of distributing glassmaking machinery, to file a writing with the court agreeing to offer, and to continue to offer, to sell any machinery used in the manufacture of glassware to any applicant at reasonable and equal prices and upon reasonable and equal terms and conditions.

All of the appellants attack these provisions. A common ground is that this court has held that the lease of a patented machine is a lawful method of exercising the exclusive patent right of practicing or using the invention,[10] and that effective relief may be afforded without destroying the appellants' property rights in the patents they own.

Hazel, Thatcher, and Ball object to the injunction directed to them on the ground that none of them has ever been in the business of selling, licensing, or distributing such machinery. The Government replies that the injunction is intended only to prevent them from again

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[10] *United States* v. *United Shoe Machinery Co.*, 247 U. S. 32; *United Shoe Machinery Corp.* v. *United States*, 258 U. S. 451, 462. In this case the court divided on the question of the legality of certain terms of the leases in question, but the dissenting justices did not suggest that a lease was not an appropriate method of exercising rights under the patent. Cf. *International Business Machines Corp.* v. *United States*, 298 U. S. 131.

setting up a patent pool and monopolizing the patented inventions. The decree should enjoin the defendants from setting up such a pool or combining or hereafter agreeing to monopolize the glass machinery or the glassware industry, as we think it does in other paragraphs. But the decree as entered requires that each of the defendants must hereafter forever abstain from leasing a patented machine, no matter what the date of the invention, and compels each of them if he desires to distribute patented machinery to sell the machine which embodies the patent to everyone who applies, at a price to be fixed by the court. The injunction as drawn is not directed at any combination, agreement or conspiracy. It binds every defendant forever irrespective of his connection with any other or of the independence of his action.

Paragraph 24 enjoins each of the corporate and individual appellants from engaging in the distribution of machinery used in glass manufacture or in the distribution of glassware in interstate commerce unless each files with the court an agreement (a) to license, without royalty or charge of any kind, and for the life of all patents, any applicant to make, to have made for it, and to use any number of machines and methods embodied in inventions covered by any patent or patent application now owned or controlled by such defendant; (b) to license, at a reasonable royalty (to be fixed by the court, in case of dispute) any applicant to make, have made for it, and to use any number of machines and methods in the manufacture of glassware embodying inventions covered by patents hereafter applied for or owned or controlled by any defendants; (c) to make available to any licensee, under "(a)" and "(b)," at cost, plus a reasonable profit, all drawings and patterns "relating to the machinery or methods used in the manufacture of glassware" em-

bodied in the licensed inventions (with immaterial exceptions).

Since the provisions of paragraphs 21 to 24 inclusive, in effect confiscate considerable portions of the appellants' property, we think they go beyond what is required to dissolve the combination and prevent future combinations of like character. It is to be borne in mind that the Government has not, in this litigation, attacked the validity of any patent or the priority ascribed to any by the Patent Office, nor has it attacked, as excessive or unreasonable, the standard royalties heretofore exacted by Hartford. Hartford has reduced all of its royalties to a uniform scale and has waived and abolished and agreed to waive and abolish all restrictions and limitations in its outstanding leases so that every licensee shall be at liberty to use the machinery for the manufacture of any kind or quantity of glassware comprehended within the decree. Moreover, if licenses or assignments by any one of the corporate defendants to any other still contain any offensive provision, such provision can, by appropriate injunction, be cancelled, so that the owner of each patent will have unrestricted freedom to use and to license, and every licensee equally with every other will be free of restriction as to the use of the leased or licensed machinery, method or process, or the articles manufactured thereon or thereunder.

It is suggested that there is not confiscation since Hartford might, with the later consent of the court, sell its patents. Under the decree as entered below nothing can be obtained by Hartford for the use of its patents and we cannot speculate as to what might be the ultimate adjustments made by the trial court in the decree.

If, as suggested, some of Hartford's patents were improperly obtained, or if some of them were awarded a priority to which the invention was not entitled, avenues

are open to the Government to raise these questions and to have the patents cancelled. But if, as we must assume on this record, a defendant owns valid patents, it is difficult to say that, however much in the past such defendant has abused the rights thereby conferred, it must now dedicate them to the public.

That a patent is property, protected against appropriation both by individuals and by government, has long been settled.[11] In recognition of this quality of a patent the courts, in enjoining violations of the Sherman Act arising from the use of patent licenses, agreements, and leases, have abstained from action which amounted to a forfeiture of the patents.[12]

The Government urges that such forfeiture is justified by our recent decisions in *Morton Salt Co.* v. *G. S. Suppiger Co.*, 314 U. S. 488, and *B. B. Chemical Co.* v. *Ellis*, 314 U. S. 495. But those cases merely apply the doctrine that, so long as the patent owner is using his patent in violation of the antitrust laws, he cannot restrain infringement of it by others. We were not there concerned with the problem whether, when a violation of the antitrust laws was to be restrained and discontinued, the court could, as part of the relief, forfeit the patents of those who had been guilty of the violation. Lower federal courts

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[11] *James* v. *Campbell*, 104 U. S. 356, 357, 358; *Hollister* v. *Benedict & Burnham Mfg. Co.*, 113 U. S. 59, 67; *Wm. Cramp & Sons Co.* v. *International Curtis Marine Co.*, 246 U. S. 28, 39–40; *United States* v. *Dubilier Condenser Corp.*, 289 U. S. 178, 189.

[12] See *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20. Decrees and Judgments in Federal Antitrust Cases (1918) p. 265; *United States* v. *Motion Picture Patents Co.*, 225 F. 800, appeal dismissed 247 U. S. 524. Decrees and Judgments in Federal Antitrust Cases (1918) pp. 379–380; *United Shoe Machinery Corp.* v. *United States*, 258 U. S. 451; *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436; *United States* v. *Univis Lens Co.*, 316 U. S. 241.

have rightly refused to extend the doctrine of those cases to antitrust decrees by inserting forfeiture provisions.[13]

Legislative history is also enlightening upon this point. Repeatedly since 1908 legislation has been proposed in Congress to give the courts power to cancel a patent which has been used as an instrument to violate antitrust laws.[14] Congress has not adopted such legislation. The temporary National Economic Committee recommended imposition of such a penalty for violation of antitrust laws.[15] But its recommendation was not adopted by Congress.

The Government suggests that certain earlier decisions under the Sherman Act, by analogy, support these portions of the decree.[16] The cases cited, however, do not sustain the suggestion. In all of them the court refrained from ordering compulsory dealing with the assets of the defendant without compensation and, in most of them, the decrees merely called for rearrangement of ownership, not for its destruction.

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[13] *American Lecithin Co.* v. *Warfield Co.*, 105 F. 2d 207, 211; *Novadel-Agene Corp.* v. *Penn*, 119 F. 2d 764, 766–7; *Sylvania Industrial Corp.* v. *Visking Corp.*, 132 F. 2d 947, 958; *Universal Sewer Pipe Corp.* v. *General Construction Co.*, 42 F. Supp. 132, 134; *American Lecithin Co.* v. *Warfield Co.*, 42 F. Supp. 270, 272.

[14] H. R. 20388, 60th Cong., 1st Sess. (1908); H. R. 11796, 61st Cong., 1st Sess. (1909); H. R. 2930, 62d Cong., 1st Sess. (1911); H. R. 16828, 62d Cong., 2d Sess. (1912); H. R. 23417, as amended, 62d Cong., 2d Sess. (1912); H. R. 1700, 63d Cong., 1st Sess. (1913); H. R. 14865, 63d Cong., 2d Sess. (1914); S. 2783, 70th Cong., 2d Sess. (1928); S. 2491, 77th Cong., 2d Sess. (1942).

[15] Final Report and Recommendations of the Temporary National Economic Committee, Sen. Doc. No. 35, pp. 36–7 (1941), 77th Cong., 1st Sess. See also Preliminary Report Sen. Doc. No. 95, pp. 16–17 (1939), 76th Cong., 1st Sess.

[16] *United States* v. *American Tobacco Co.*, 221 U. S. 106; *United States* v. *Terminal Railroad Association*, 224 U. S. 383; *United States* v. *Great Lakes Towing Co.*, 217 F. 656, appeal dismissed 245 U. S. 675; *United States* v. *New England Fish Exchange*, 258 F. 732; *United States* v. *Pullman Co.*, 50 F. Supp. 123.

Under paragraph 24 (b) a defendant hereafter acquiring a patent cannot set the price for its use by others, elect to use it himself and refuse to license it, or to retain it and neither use nor license it. These are options patent owners have always enjoyed.[17]

Congress was asked as early as 1877, and frequently since, to adopt a system of compulsory licensing of patents.[18] It has failed to enact these proposals into law. It has also rejected the proposal that a patentee found guilty of violation of the antitrust laws should be compelled, as a penalty, to license all his future inventions at reasonable royalties.[19] The Temporary National Economic Committee recommended congressional adoption of such a system,[20] but Congress took no action to that end.

Paragraph 24 (a) of the decree should be modified to permit the reservation of reasonable royalties and its provisions should be restricted to feeders, formers, stackers and lehrs and patents covering these or improvements of them, or methods or processes used in connection with them.

Paragraph 24 (b) should be limited in respect of future applications and resulting patents or patents hereafter acquired by assignment, to those covering feeders, formers, stackers and lehrs, or parts thereof or improvements thereon, and methods and processes involved in their con-

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[17] *Paper Bag Patent Case,* 210 U. S. 405, 424; *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.,* 243 U. S. 502, 510, 514; *Crown Die & Tool Co.* v. *Nye Tool & Machine Works,* 261 U. S. 24, 34–35.

[18] H. R. 8776, 62d Cong., 1st Sess. (1911); S. 2116, 62d Cong., 1st Sess. (1911); H. R. 26185, 62d Cong., 2d Sess. (1912); S. 2303, 77th Cong., 2d Sess. (1942); S. 2730, 77th Cong., 2d Sess. (1942); H. R. 1371, 78th Cong., 1st Sess. (1943); cf. S. 300, 45th Cong., 1st Sess. (1877).

[19] S. 2783, 70th Cong., 2d Sess. (1928).

[20] Final Report and Recommendations of the Temporary National Economic Committee, Senate Doc. No. 35, pp. 36–7 (1941), 77th Cong., 1st Sess.

struction and operation. For example, if Ball or Thatcher should procure a patent on a bottle-capping machine or for a composition of glass, there is no reason to compel a license to Hartford or Hazel or anyone else. Other paragraphs of the decree preclude a misuse of the patent in violation of the antitrust laws.

Paragraph 24 (c) should be deleted.

Paragraph 25 restrains all the corporate and individual appellants, whenever regularly engaged in the manufacture of glassware for interstate commerce, from discrimination "by means of wholly exclusive or partially exclusive requirement contracts" "or otherwise" against any such manufacture, present or prospective; or in the filling of orders for machinery on the basis of the size of the order or credit rating of the customer, if he is willing to pay cash, his standing in the industry or otherwise; and from conspiring with any other person or corporation to obstruct or delay the furnishing of any such machinery.

The earlier portion of the paragraph is vague and would be difficult of application. It seems not to be addressed to any practice indulged in or threatened by any of the appellants. It should, therefore, be modified or eliminated. The last five lines of the paragraph are appropriate although the matters covered by them are apparently embraced in other portions of the decree.

Thatcher and Ball insist that no such injunction should be directed to them for the reason that they are not now, and never have been, in the business of owning machinery patents or selling or licensing glassmaking machinery. We think, however, in view of the fact that they have been found to have conspired with Hartford and the other appellants in denying and obstructing competitors from obtaining machinery, the injunction, modified as suggested, may stand against them.

Paragraph 26 enjoins all of the corporate appellants, and all of the individuals associated with them, until the

entry of a finding by the court on the petition of any defendant that the consequences of the conduct of the defendants in violation of the antitrust laws have been fully dissipated, from the following acts: (a) bringing, maintaining, or taking any action in any suit for infringement of any patent owned or controlled or hereafter issued on pending applications covering glassware machinery; (b) attempting to interfere, by suit or otherwise, with the possession of any machinery owned, or claimed to be owned, by any appellant which is in the possession of any licensee except sale to the licensee pursuant to paragraph 21; (c) attempting to collect royalties or license fees for the use of any inventions covered by existing patents or applications for patents for glassware machinery.

Since paragraphs 21 to 24 (a) inclusive are to be eliminated, this paragraph, which is ancillary to them, should also be deleted from the decree, but in view of the nature of the conspiracy found, an injunction should go against the further prosecution of all infringement suits pending at the date this suit was brought. Hartford and the other corporate defendants mentioned in paragraph 24 should be required to lease or license glassmaking machinery of the classes each now manufactures to any who may desire to take licenses (under patents on such machinery or on improvements, methods or processes applicable thereto), at standard royalties and without discrimination or restriction, and if at the time of entry of the decree there are any alleged infringers who are willing to take such licenses they should be released, and the patent owner deprived of all damages and profits which it might have claimed for past infringement. The decree should, however, be without prejudice to the future institution of any suit or suits for asserted infringements against persons refusing to take licenses under any of the presently licensed inventions arising out of their use after the date of the decree. The decree should not forbid any

defendant from seeking recovery for infringement, occurring after the date of the final decree, of patents not covering feeders, formers, stackers, lehrs or processes or methods applicable to any of them.

Paragraph 27 cancels all outstanding agreements between corporate appellants, including all modifications made prior to or pending trial. This is consonant with the terms of the earlier paragraphs which require corporate appellants to license all inventions involved, royalty free, and to sell machines embodying such inventions.

In view of what we have already said about these earlier paragraphs, the license agreements as modified by the parties and in accordance with the views here expressed, should be allowed to stand. As has been noted, these are all at uniform royalties, and all without restrictions or discriminatory features. We do not understand that, as modified, any of these agreements is attacked as containing improper or unlawful provisions. If, however, any of them is found still to embody provisions inconsistent with the form of relief we have outlined, its reformation should be decreed. The appellants should be enjoined from hereafter altering these agreements, or any hereafter made in like terms, without the approval of the court. If the existing royalties are excessive these may be reduced to a fair and reasonable basis. The decree should permit any corporate appellant, acting alone, to lease or sell patented machinery or license the use of patents, if it so elects, provided always that no discrimination be practiced and that no restrictive conditions be attached (except as stated in connection with paragraph 29) save with the approval of the court.

A word should be said with respect to the effect of this paragraph in cancelling the agreement of September 23, 1940, between Hartford-Empire and Corning, and the assignment of three patents to Corning pursuant thereto.

It will be recalled that, prior to the trial, Corning and Hartford cancelled the 1916 and 1922 agreements which the court found illegal and which the decree ordered cancelled notwithstanding the parties' prior action. Further, Corning was given an unrestricted license by Hartford which will require the payment of increased royalties by Corning for use of Hartford's inventions. In consideration of the cancellation of the agreements, Hartford agreed to pay Corning $1,125,000, in installments, and to transfer to Corning three patents owned by Hartford. The decree orders these payments impounded, but makes no disposition of the impounded fund. It also requires Corning to reassign the patents to Hartford.

Two of the patents have expired. The reason for Corning's desire to obtain title to the patents was that two of them were alleged to conflict with certain features of Corning's ribbon machine [21] although the claim was always contested and never established. These are the two expired patents. The third was alleged to infringe upon a feature of a Corning patented machine known as a turret chain machine. Continued ownership of the patent by Hartford would constitute a threat against the use by Corning of the machine. The assigned patent will expire six years before Corning's patent on the turret chain machine. Naturally Corning desired to be free from the possible threat of infringement suits. It does not appear that the ownership of this patent by Corning would tend to perpetuate or create any improper monopoly or patent pool. In any event, Corning has agreed, if such danger is found to exist, to dedicate the patent to the public, since all it desires is to be free of restraint on the part of Hartford in the use of its turret chain machine. Such dedication should be ordered.

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[21] There is no claim that the ribbon machine patent was ever part of a combination of patents.

In the light of these facts, the settlement made by Hartford and Corning ought not to be set aside nor ought the payment to be made by Hartford to Corning thereunder be enjoined. The money paid into court by Corning should be returned to it.

The paragraph orders cancellation of the agreements of June 30, 1916 between Hartford-Fairmont and Empire, and that of October 26, 1922 between Hartford, Corning and others. These have been cancelled, but the decree should enjoin their reinstatement, or the making of like contracts in the future.

Paragraph 28 orders cancellation of all Hartford machinery leases now outstanding and requires that each lessee be offered a new license (without royalty, pursuant to paragraph 24) and offered the right to purchase all of the machinery now held under lease (as required by paragraph 23). In view of what has been said this provision should not stand.

Paragraph 29 enjoins the insertion or enforcement of any provision in any agreement heretofore or hereafter made by any of the appellants which (a) directly or indirectly limits or restricts (1) the type or kind of product, whether glassware or any other, which can be produced on machines or equipment or by processes embodying inventions licensed under patents or patent applications, (2) the use of the product so produced, (3) the character, weight, color, capacity, or composition of the product, (4) the quantity, (5) the market, either as to territory or customers in or to which the product may be sold or distributed, (6) the price or terms of sale or other disposition of the product, or (7) the use of the machinery or equipment distributed or the inventions licensed in connection with any other machinery or equipment, or the use of it in any specified plant or locality; (b) authorizes termination of the license for unauthorized use; (c) provides that the licensee shall not contest the validity of

any patent or patents of the licensor; (d) provides that improvements by the licensee on machinery leased and sold shall become the property of the lessor; (e) provides that rights to improvements and inventions covering licensed machinery or processes or methods shall become the exclusive property of the lessor or vendor; or (f) grants to any licensee a preferential position by lower rates of royalty, by different provisions of licensing, leasing, or sale, by exclusive licensing, rebate, discounts or requiring a share in net or gross income, or by any other means.

The paragraph now covers every kind of invention and every patent, present or future, in any field if owned or controlled or distributed by an appellant.

The injunction will stop all inventions or acquirement of patents in any field by any appellant unless for its own use in its business, for it sets such limitations upon the reward of a patent as to make it practically worthless except for use by the owner. It is unlimited in time. It is not limited to any joint action or conspiracy violative of the antitrust laws; it covers inventions in every conceivable field.

The Government now agrees that this injunction should be limited to glassmaking machinery and glassware as defined in paragraph 1 of the decree of the District Court.

The corporate appellants have amended, or agreed to amend, existing leases and licenses to remove all such restrictions as are enjoined.[22] We have already said that the decree should enforce conformity of all lease and license agreements to this standard, and forbid the reinstatement or embodiment of any such restrictions in existing

[22] The Government calls attention to findings which show that though Hartford advised certain licensees of the removal of restrictions in their licenses, these licensees have not formally accepted the more liberal terms. Hartford can be enjoined from enforcing the restrictions if that is found necessary.

or future agreements relating to the machinery, methods or processes respecting feeders, formers, stackers or lehrs or involved in their use, covered by patents now owned or applied for or those hereafter acquired by any corporate appellant.

Paragraph 29 should be amended to permit any appellant, corporate or individual, to retain and refuse to license, to use and refuse to license, or to license with restrictions, any patent hereafter applied for or acquired except those applicable to feeders, formers, stackers and lehrs and processes and methods applicable thereto. Its restraints should be limited as we have indicated those of paragraph 24 (b) should be limited.

Paragraph 30 applies all the terms of paragraph 29 to agreements hereafter made between any of the defendants. This should be modified to conform to the alterations to be made in paragraph 29.

Paragraph 31 requires court approval of "any agreement between any of the defendants" and "of any license agreement made pursuant to this judgment." This is too sweeping. The provision is without limit of time and not terminable upon fulfilment of any condition. Many of the individual defendants are employees of one of the corporate defendants. An employment contract could not be made with such an one without court approval. Nor can any defendant enter into the most innocent and usual business transaction with any other, however unrelated to the conspiracy, without similar approval. This paragraph, if retained, should be restricted in application to lease or license agreements and agreements respecting patents and trade practices, production and trade relations.

By paragraph 33 each of the individual defendants is enjoined from "holding, controlling, directly or indirectly, or through corporations, agents, trustees, representatives, or nominees, any of the issued and outstanding capital stock, bonds, or other evidences of indebtedness of more

than one corporation engaged either in the manufacture and sale of glassware or in the manufacture or distribution of machinery used in the manufacture of glassware or in both. . . ." The individual defendants thus enjoined are officers and directors of the corporate defendants. The purpose of dealing with stock ownership is to prevent aggregation of control to the end of establishing a monopoly or stifling competition. The ownership of a few, or even a few hundred, shares of stock of a glass manufacturing company not in competition with the company of which a defendant happens to be a director or officer can have no tendency towards such a result. Many food packers and makers of proprietary articles manufacture part or all of the glassware in which their goods are sold. The decree would require all of the defendants, at their peril, to part with any stock which they own in such a concern and to refrain from buying any. Owens is in the glass container business. It has never manufactured pressed or blown ware or light bulbs, yet the decree would forbid any defendant connected with Owens from investing in any concern manufacturing these articles. It is unnecessary to multiply instances of the broad sweep of the paragraph.

Moreover, the injunction is against ownership of bonds of any such company. It is difficult to see how such ownership in any reasonable amount by any of the individuals in question could tend towards a violation of the Sherman Act. The phrase "evidence of indebtedness" is also used. This would indicate complete prohibition against making a loan however reasonable, or however proper the purpose, evidenced by a promissory note.

The decree should be modified to prohibit acquisition of stocks or bonds of any corporate appellant by any other such appellant, and to prohibit only the acquisition of a measure of control through ownership of stocks or bonds or otherwise, by any individual in a company competing

with that with which he is officially connected or a subsidiary or affiliate of such competing company.

The appellants Falck, Houghton, Houghton Jr. and Levis own substantial amounts of stock of Corning and of Hartford. By the decree they are required to divest themselves of their stock in the one or the other within two years from the date of the judgment. In view of the effect of the decree on Hartford, it may prove difficult for these defendants to comply within the period stated without severe loss. We are of opinion that a longer time should be allowed and that an alternative provision would be appropriate depriving these defendants of the right to vote the stock of one company or the other or to trustee the stock of one of the corporations if both stocks are held longer than the term fixed.

Paragraph 34 which deals with present holdings of individual appellants should be revised to comport with the views expressed as to paragraph 33.

Paragraph 35 enjoins each individual defendant from holding, at the same time, an office or directorship in more than one corporation which manufactures and sells glassware or manufactures or distributes glassmaking machinery. The injunction is not limited to directorships in more than one of the defendant corporations. The same comment applies as has been made with respect to paragraph 33. There may be many instances when the normal freedom to act as a director of more than one company will in no wise conflict with the policies of the antitrust laws or tend to the fostering of practices which those laws forbid. The same considerations apply to paragraph 36–A and 36–B, which should be limited to the acquisition of the business or assets of a competing corporation by a corporate defendant, and by any officer of a corporate defendant, of the business or all the assets of a competing concern, unless the acquisition is approved by the court.

Paragraphs 37 to 39 are directed at the Glass Container Association, its officers, directors, employes and members. The District Court has found that from 1928 to 1937 the association, through the instrumentality of its statistical committee, on which the principal corporate defendants were represented, furnished forecasts of probable future production of each of the glass manufacturers concerned and that these forecasts were communicated at meetings of the association by one manufacturer to another so that there was general knowledge amongst the members of the forecasted future production of each of them. These forecasts, the court found, were treated by the corporate appellants and their officers as in fact quotas, deviation from such quotas was discouraged, and it was the general understanding that each manufacturer should restrict his production to accord with his quota. The court further found that the association, working in close cooperation with Hartford, which was not a member, endeavored to discourage expansion of the industry and to prevent increased competition through the entry of new units into the various fields of manufacture of glass containers.

The court, in its opinion, indicates that it does not find it necessary to dissolve the association and further indicates that it may serve a valuable purpose to the industry "as a statistical and research body" and in the promotion of better methods of manufacture and distribution.

The injunctions entered in paragraphs 37 to 39, inclusive, compel the association to abolish its statistical committee and to refrain from establishing any committee with similar functions; enjoin it from retaining any of its present officers or board of directors who are defendants and also directors, officers or employes of any defendant corporation, and order it to submit to the Attorney General and to the court the names of directors or officers to be elected or appointed to succeed present incumbents. The association is enjoined from electing,

employing, or continuing in office or employment, anyone who is, at the time, an officer, director, agent or employe of the corporate appellants, and is required to amend its charter and by-laws to prevent such employment.

We think the injunction as respects the association, while leaving it in existence, practically destroys its functioning, even as an innocent trade association for what have been held lawful ends.[23] The association has undoubtedly been an important instrument of restraint and monopoly. It may be made such again, and detection and prevention and punishment for such resumption of violations of law may be difficult if not impossible. In the light of the record, we think it better to order its dissolution, and to provide that the corporate defendants be restrained for a period of five years from forming or joining any such trade association, and that thereafter they may apply for leave to do so, and have such leave on showing to the court that the purposes and activities of the proposed body will not be violative of law.

Paragraph 40 is a general injunction against future conduct. It is designed to prevent combinations, in violation of the antitrust statutes. It names each corporate defendant "and the individual defendants associated therewith" meaning the officers and directors of each who are found to have participated in the conspiracy. But an injunction binding the corporate defendants, their officers, agents and employes, is sufficient to constrain the individual defendants so long as they remain in official relation, and to bind their successors. It is unnecessary to enjoin them personally, when that relation is severed.

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[23] See *Maple Flooring Manufacturers Association* v. *United States*, 268 U. S. 563, 582, 583; *Cement Manufacturers Protective Association* v. *United States*, 268 U. S. 588, 606; *Appalachian Coals* v. *United States*, 288 U. S. 344, 374; *Sugar Institute* v. *United States*, 297 U. S. 553, 598.

Sub-paragraph (1) prohibits combining with any other defendant or with any other manufacturer or "seller" of glassware or glass machinery. The appellants object to the inclusion of the word "seller," claiming that the use of this term may preclude normal business arrangements with agents and consignees. We shall later indicate the proviso we think necessary in this connection. We are of opinion that the sub-paragraph should be amended by exscinding the phrase "its directors, officers, agents, and employees" in both clauses, and inserting the words "whether a natural person, partnership or corporation" after the word "glassware" appearing in the last line of the printed draft of the decree furnished this court by the appellants.

Sub-paragraph (b) should be amended by inserting the word "a" between "of" and "manufacturers" (which should be in the singular) in the first line of the same draft, deleting the words "or effect thereof" in the sixth line and inserting in lieu thereof "of such ascertainment, estimate or forecast" and by inserting in the next line between the words "persuade" and "any" the words "or agree with".

Sub-paragraph (c) should be amended to substitute in the sixth line of the same draft for "or where" the word "with" and for "or effect is" the words "or agreement".

Sub-paragraph (d) should be deleted. The requirement that all trade information be given to the public would render the assembly of it for the information of members useless and indeed detrimental to competition. The inclusion of such a provision in an antitrust decree has been disapproved by this court.

Paragraph (2) should be modified by adding at the end "in the distribution of glassware or machinery for the manufacture of glassware".

Paragraph (3) which deals with distribution of data concerning the business of glassmaking and glass ma-

chinery distribution is approved with these alterations: after the word "otherwise" in the seventh line of the draft there should be inserted the words "pursuant to any agreement or understanding or with the purpose or intent" and there should be deleted the words "in such form or manner as to indicate"; after the word "machinery" in the next to last line, the sentence should read, "shall limit his or its output to any production quota or shall adhere or conform to any price".

In order to permit usual business transactions not related to violations of the antitrust statutes there should be added at the end of paragraph 40 a proviso that nothing in the paragraph is to be construed to forbid normal business transactions of any of the corporate defendants with its selling agents or consignees, persons or corporations rendering services to it, or customers; or to prohibit transactions with citizens or corporations of foreign nations; or to prevent any defendant from availing of the benefits of the Webb-Pomerene Act, the Small Business Mobilization Act or (save as elsewhere in the decree provided) of the benefits of the patent laws.

Paragraphs 41 and 42 are duplications of other provisions of the decree. They should be deleted.

Paragraph 51 enjoins all defendants from directly or indirectly acquiring, otherwise than through direct issue from the patent office, any patent, patent application, or exclusive rights thereunder, covering any invention embodied or employed in a machine or process used, or to be used, in glassware manufacture ("whether or not the machine or process embodying or employing the invention covered by the patent can be used without infringing another patent or patents") which constitutes or employs, in whole or in part, a method, means, or process to obtain results in the glassmaking art which is identical with, similar or alternative to, those obtained or obtainable by the machinery, methods, or processes embody-

ing inventions covered by patents then owned or controlled by any defendant, except non-exclusive rights or patents on inventions of its or his employes or those of a subsidiary, made during the time of employment.

The scope of the provision is not clear. Whether it applies to an improvement upon an existing patented invention seems doubtful. Perhaps it does not prevent an owner of a patent upon a feeder from acquiring one upon a former, or an owner of a patent upon a stacker from acquiring one upon a lehr, but, as the provision is framed, this is not clear. The injunction seems in effect to forbid acquisition by any defendant of any patent right in any glassmaking field, for most of the corporate defendants, and perhaps some of the individuals, now own some such patent.

It is clear, however, that the paragraph enjoins all acquisition of patent rights other than non-exclusive licenses. In this respect, it is the reverse of paragraph 29 which outlaws all grants except unrestricted non-exclusive licenses. It will be noted that the injunction runs against each defendant individually and is not applicable to joint acquisitions or to combinations or agreements respecting acquisition. It seems to prohibit the acquisition of any patent, or of a restricted license under any patent by any defendant. In this respect the paragraph is inappropriate to restrain future violations of the antitrust statutes. The paragraph should be deleted.

Paragraph 52 deals with the problem of suppressed or unworked patents. Much is said in the opinion below, and in the briefs, about the practice of the appellants in applying for patents to "block off" or "fence in" competing inventions. In the cooperative effort of certain of the appellants to obtain dominance in the field of patented glassmaking machinery, many patents were applied for to prevent others from obtaining patents on improvements which might, to some extent, limit the return in the way

of royalty on original or fundamental inventions. The decree should restrain agreements and combinations with this object. But it is another matter to restrain every defendant, for the indefinite future, from attempting to patent improvements of machines or processes previously patented and then owned by such defendant. This paragraph is, in our judgment, too broad. In effect it prohibits several of the corporate defendants from applying for patents covering their own inventions in the art of glassmaking. For reasons elsewhere elaborated it cannot be sustained. It should be limited as we have suggested that paragraphs 24 (b) and 29 be limited. In addition, it enjoins every defendant from applying for a patent "with the intention of not making commercial use of the invention within four years" from issue of the patent and makes the failure commercially to use the invention *prima facie* proof of the absence (*sic*) of such intention.[24] This provision is also legislative rather than remedial. Unless we are to overturn settled principles the paragraph in question must be eliminated.

A patent owner is not in the position of a quasi-trustee for the public or under any obligation to see that the public acquires the free right to use the invention. He has no obligation either to use it or to grant its use to others. If he discloses the invention in his application so that it will come into the public domain at the end of the 17-year period of exclusive right he has fulfilled the only obligation imposed by the statute.[25] This has been settled doctrine

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[24] The Government suggests that the paragraph should be revised to read: "with the intention of never making commercial use of the inventions covered thereby, provided that failure to make such use within four years from the date of issuance of patents thereon shall be deemed *prima facie* proof of the presence of such intention at the time of the filing or prosecution of such applications."

[25] *United States* v. *Bell Tel. Co.*, 167 U. S. 224, 249; *Continental Paper Bag Co.* v. *Eastern Paper Bag Co.*, 210 U. S. 405, 424, 429, 430.

since at least 1896. Congress has repeatedly been asked, and has refused, to change the statutory policy by imposing a forfeiture [26] or by a provision for compulsory licensing [27] if the patent is not used within a specified time. The governing rule is quoted in *Chapman* v. *Wintroath,* 252 U. S. 126, at 137:

" 'A party seeking a right under the patent statutes may avail himself of all their provisions, and the courts may not deny him the benefit of a single one. These are questions not of natural but of purely statutory right. Congress, instead of fixing seventeen, had the power to fix thirty years as the life of a patent. No court can disregard any statutory provisions in respect to these matters on the ground that in its judgment they are unwise or prejudicial to the interests of the public.' *United States* v. *American Bell Telephone Co.,* 167 U. S. 224, 247."

Paragraph 55 requires submission to certain investigations by the Department of Justice and the furnishing of information with respect to the business of the corporate defendants in the future. It should be modified to accord with our opinion in *United States* v. *Bausch & Lomb Co.,* 321 U. S. 707, which involved a similar provision.

A word should be said concerning the inclusion in many paragraphs of the decree, and in many of the injunctions imposed, of various individual defendants who in the past have acted as, and who at present are, officers or directors of the corporate defendants. They offended against

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[26] H. R. 13876, 62d Cong., 1st Sess. (1911); H. R. 22203, 62d Cong., 2d Sess. (1912); S. 3297, 67th Cong., 2d Sess. (1922); H. R. 6864, 75th Cong., 1st Sess. (1937).

[27] S. 3325, 67th Cong., 2d Sess. (1922); S. 3474, 69th Cong., 1st Sess. (1926); S. 705, 70th Cong., 1st Sess. (1927); S. 203, 71st Cong., 1st Sess. (1929); S. 22, 72d Cong., 1st Sess. (1931); S. 290, 73d Cong., 1st Sess. (1933); S. 383, 74th Cong., 1st Sess. (1935); S. 2491, 77th Cong., 2d Sess. (1942).

the antitrust laws by acting on behalf of, or in the name of, a corporate defendant. There are no findings, and we assume there is no evidence, that any of them have applied for, owned, dealt in, and licensed patents appertaining to the glassware art. Nor is there evidence or finding that, as individuals acting for their own account, any of them, as a principal, has entered into any of the arrangements found unlawful by the court. Despite these facts, in practically every instance where a corporate defendant is restrained from described action or conduct, these individuals, as individuals, are likewise restrained. Any injunction addressed to a corporate defendant may, as various sections of the decree do, include its officers and agents. If the individual defendants are officers or agents they will be comprehended as such by the terms of the injunction. If any of them cease to be such, no reason is apparent why he may not proceed, like other individuals, to prosecute whatever lawful business he chooses free of the restraint of an injunction. On the other hand, if new officers and directors take the places of these defendants, such new agents will automatically come under the terms of the injunction. There is no apparent necessity for including them individually in each paragraph of the decree which is applicable to the corporate defendants whose agreements and cooperation constitute the gravamen of the complaint. That these individuals may have rendered themselves liable to prosecution [28] by virtue of the provisions of § 14 of the Clayton Act [29] is beside the point,

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[28] *United States* v. *Socony-Vacuum Oil Co.*, 23 F. Supp. 937, affirmed 310 U. S. 150.

[29] 38 Stat. 736; 15 U. S. C. § 24. "That whenever a corporation shall violate any of the penal provisions of the antitrust laws, such violation shall be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have authorized, ordered, or done any of the acts constituting in whole or in part such violation, and such violation shall be deemed a misdemeanor . . ."

since relief in equity is remedial, not penal. These considerations, however, do not apply to the provisions of paragraphs 3 to 7 and 33 to 35 inclusive, as the same are to be modified.

Paragraph 42 requires Ball to cancel certain agreements with the Knox Glass Bottle Company and Underwood, and with Brockway Machine Bottle Company and Robert L. Warren, which excluded the parties named from entering the glass container business for periods of years. As it appears without contradiction that these restrictions have already been released by Ball, the paragraph seems unnecessary.

The judgment of the District Court is reversed as to the appellants in Nos. 10 and 11; its decision that the appellants in the other appeals have violated the antitrust laws and should be enjoined from future similar violations is affirmed, but the decree entered is vacated and the cause is remanded for further proceedings in conformity to this opinion.

MR. JUSTICE DOUGLAS, MR. JUSTICE MURPHY and MR. JUSTICE JACKSON took no part in the consideration or decision of this case.

MR. JUSTICE BLACK, dissenting in part.

I agree with the Court's judgment insofar as it sustains the decree of the District Judge.

I cannot, however, agree to many of the modifications of that decree. These appellants have violated the antitrust laws. The District Court's decree, taken as a whole, is an effective remedy, admirably suited to neutralize the consequences of such violations, to guard against repetition of similar illegal activities, and to dissipate the unlawful aggregate of economic power which arose out of, and fed upon, monopolization and restraints. *United States* v. *Crescent Amusement Co.*, 323 U. S. 173. Many

of this Court's modifications seriously impair the decree and frustrate its purposes.

It would probably serve no useful purpose to state at length the reasons which justify the District Court's decree, since they are set forth clearly and well in its opinion. In particular, however, it is my belief that any reasonable assurance that these appellants will not continue to violate the anti-trust law requires that we leave intact the District Court's decree insofar as it (1) provides for appointment of a receiver and the impounding of Hartford's royalties (Paragraphs 10–20 of the Decree); (2) requires that glassware machines should be disposed of by outright sale rather than by leases (Paragraphs 21, 22, 23); (3) requires that patents, already owned, be licensed royalty free; (4) prohibits the restrictive licensing practices which the appellants so effectively used to create and maintain their monopoly (Paragraph 29); (5) enjoins the appellants from the practice of obtaining patents for the purpose of "fencing in" and "blocking off" new inventions, (Paragraph 52).

The District Court's opinion in my judgment laid a careful and well-reasoned foundation establishing the necessity for every one of these Paragraphs. It would be difficult to add to what the court there said. It is sufficient for me to say only a few words.

The District Court found that these defendants started out in 1916 to acquire a monopoly on a large segment of the glass industry. Their efforts were rewarded by complete success. They have become absolute masters of that domain of our public economy. They achieved this result largely through the manipulation of patents and licensing agreements. They obtained patents for the express purpose of furthering their monopoly. They utilized various types of restrictions in connection with leasing those patents so as to retain their dominance in that industry. The history of this country has perhaps never witnessed a more completely successful economic tyranny

over any field of industry than that accomplished by these appellants. They planned their monopolistic program on the basis of getting and keeping and using patents, which they dedicated to the destruction of free competition in the glass container industry. Their declared object was "To block the development of machines which might be constructed by others . . ." and "To secure patents on possible improvements of competing machines, so as to 'fence in' those and prevent their reaching an improved state." These patents were the major weapons in the campaign to subjugate the industry; they were also the fruits of appellants' victory. The restoration of competition in the glass container industry demands that appellants be deprived of these weapons. The most effective way to accomplish this end is to require, as the District Court did, that these patents be licensed royalty free.

The decree of the court below was well fashioned to prevent a continuation of appellants' monopolistic practices. The decree as modified leaves them free, in a large measure, to continue to follow the competition-destroying methods by which they achieved control of the industry. In fact, they have received much milder treatment from this Court than they anticipated. This is shown by a memorandum of one of Hartford's officers made in 1925. That memorandum which discussed plans for suppression of a number of competitors, with particular reference to possible prosecutions under the Sherman Act, read in part as follows:

"Of course, the court might order that we transfer the entire Federal licensing business to some other party and turn over to that party the Federal patents. This, of course, would simply restore to a certain extent the existing situation and establish a competitor. . . . I . . . do not see much danger of having any of these deals upset. . . . If they are upset, I still believe that by that time, we will be in a better position even with such dissolution than we would be otherwise; and I see no danger whatso-

ever of any criminal liability because the cases are necessarily so doubtful in the matter of law that they could never get any jury to convict and I doubt if any prosecuting officer would ever attempt any criminal action. Criminal action in cases of this sort, so far, has practically been nonexistent."

I would sustain the decree of the District Court, for the reasons it gave, in all of the paragraphs mentioned.

MR. JUSTICE RUTLEDGE, dissenting in part.

With MR. JUSTICE BLACK, in whose opinion I join, I concur in the Court's judgment to the extent that it sustains the District Court's findings and decree. But, with two exceptions, I dissent from the more important revisions made in the decree.

In anti-trust injunction suits the court's function is twofold, to determine liability and to fashion the remedy to fit the fault. Perhaps in some cases the two things may be treated substantially independently. More often they are so interwoven that separation becomes impossible, if other than warped justice is done. This case is of the latter sort. But the Court's modifications largely disregard this fact.

The story involves a quarter of a century of Sherman Act violation.[1] Necessarily it has been sketched here only in outline. The bare bones of the history show, as rarely has been done, the combination's expanding scope, the corresponding growth of design, the varied, but often devious and ruthless methods, as well as the ultimate total

[1] The District Court found ". . . that there has not only been a violation of the anti-trust laws, beginning with the first agreement between Hartford and Empire in 1916, but I am convinced that this violation of the laws was as deliberate as any that I can find in a review of anti-trust cases." 46 F. Supp. 541, 552–553. Hartford and Lynch were also found guilty of contracting in violation of the Clayton Act.

success of this long adventure in monopoly and unlawful restraint of trade.[2] Without the color supplied by detail, however, the excursion's true character is hardly half revealed. The full effect cannot now be given. It appears in the District Court's careful and restrained opinion, 46 F. Supp. 541, buttressed in every conclusion, nearly every page, from writings accumulated, while the combination grew, in the files of the principal participants,[3] and in other published documents.[4]

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[2] Sixteen pages of the trial court's opinion are given to a summary of manifestations of conscious guilt. The instance cited in the opinion of Mr. Justice Black is illustrative. See also text *infra* at note 10. The methods employed ranged from suggestions for "cooperation" to the division of fields within the industry and the squeeze-out of rivals, ruthlessly and constantly through the system of licensing and leasing which the court found was "the greatest abuse." Cf. text *infra* at note 15. Hazel-Atlas was a hold-out until the "three-way partnership" agreement of 1932. The long story showing how that company finally was brought "within the family" is particularly interesting in disclosing the methods used in bringing a rival to book.

[3] Characterizing the case as "primarily documentary," though also noting the "reticence of some of the key witnesses to disclose what plainly was within their knowledge as principal actors in the main conferences that occurred over a period of time," the court stated: ". . . in this case, the men who planned and directed the proceedings under scrutiny, from 1916 down to the time of the filing of the complaint herein, left behind them numerous exchanges of letters and many memoranda executed contemporaneously with the happening of the main events and designed for the information of their contemporaries, their boards of directors, or for their successors in office. It is hard to imagine a case in which a court would have more first-hand information of what the parties did and intended than in the case at bar." (P. 553.)

[4] See the reports of the Temporary National Economic Committee, the disclosures of which were largely responsible for the institution of this proceeding. Investigation of Concentration of Economic Power, Sen. Doc. No. 95, 76th Cong., 1st Sess. (1939); *ibid.*, Sen. Doc. No. 35, 77th Cong., 1st Sess. (1941); *ibid.*, Monograph No. 31, Hamilton, Patents and Free Enterprise, 76th Cong., 3d Sess., Senate Committee Print (1941).

This emphasis upon the complete picture, in color and detail, is pertinent to liability. It bears even more directly on the quantity and character of relief required to uproot the combination's destructive and unlawful effects. Without this view, many of the decree's provisions, cast in dry legal terms, denuded of the life and history which brought them forth, seem drastic. With it, they take a wholly different aspect.

One may start, with the Court, upon the basic idea that, in such a proceeding, the decree's function is not to impose sheer "punishment" for past misconduct, but is rather to devise effective measures to prevent its repetition and dissipate its consequences. This does not mean, however, that there is any clear, sharp line which can be drawn on the crux of past and future between punishment and prevention or dissipation; or that this difference should be translated into the implicit assumptions which seem to underlie the Court's extensive revisions of the decree and thereby strip it in great part of effectiveness. The assumptions relate to the respective functions of trial and appellate courts in framing the decree as well as to the criteria by which are to be gauged the quantity and quality of relief needed to be effective.

It seems to be implied from the number, character and detail of the revisions that it is the business of this Court to rewrite the decree, substituting its own judgment for that of the District Court when there is difference concerning the wisdom or need of a particular revision. A supporting notion, apparently, is that the "equity" procedure to enforce the Act is hedged with the same limitations non-statutory equity has placed about its action as a system of private remedial litigation. Both these ideas have backing in a third misconception, that men who have misused their property, and acquired much of it, by violating the Sherman Act, are free for the future to continue using it as are other owners who have committed no such

offense; and that consequently the appropriate relief affecting such use is the least restriction which possibly will prevent repetition of past violations. Cf., however, *United States* v. *Union Pacific R. Co.*, 226 U. S. 470, 477. Except upon these assumptions, the Court's major revisions of the decree cannot be justified.

Shortly, in my view it is not this Court's business to fashion or rewrite the decree. Where the trial court, with obvious care and judgment, has devised measures it deems essential to protect the public interest and we agree they may be sufficient, our modifications by watering them down should stop with directions to eliminate provisions contrary to law or those we can say amount to an abuse of discretion. *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 185. Changes imposing greater restrictions should be made only when the decree is insufficient to accomplish the protection required. *Ibid.* The reasons which thus ordinarily restrict the scope of appellate review have magnified force in anti-trust proceedings. Their complex character usually requires, as in this case, months or years for the trial court's consideration. With its maximum attention, this Court cannot possibly attain the same detailed familiarity with the cause. Nor can it frame at long distance, with the same assurance, a decree adequate for the necessity.

The so-called equitable character of the proceeding does not nullify this inherent limitation upon appellate judicial action. Nor does it justify an attitude which would circumscribe the suit or the relief with the limitations courts of equity traditionally have put around their action in private litigation. The anti-trust injunction suit is in form "a proceeding in equity." In substance, it is a public prosecution, with civil rather than criminal sanctions, for vindication of public right and for redress and prevention of public injury. To regard the fashioning of appropriate relief in such a suit as identical with the same

function in private litigation is to disregard at once the former's statutory origin, its public character, and the public interest it protects. The equitable garb of the proceeding therefore does not determine or conceal its true character. Nor does it limit the required relief merely to what will prevent repetition of the illegal conduct by which the combination has been formed, its property acquired, and its dominating position secured.

The contrary view ignores the momentum inherent in such a combination. The power, and much of the property, now aggregated in the combination's hands and those of its principal participants, was gathered by unlawful methods, at the expense of the public and competitors.[5] Presumably neither power nor property could have been accumulated by lawful means. Nor can they now together be transferred legally to another. The loosened restrictions of this Court's revision may be sufficient to prevent, for the future, further acts of the character and having the effects of the past violations. But the pool has acquired more than 800 patents, which control the industry, of which Hartford alone holds more than 600. Its members, including Hartford, are not compelled to disgorge any of these, or prohibited to acquire others.

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[5] Referring to the defendants' argument "that the price of glassware to the consumer has not increased," the District Court's opinion stated (p. 620): "But again this is not a good defense if there have been violations of the law. Moreover, the history of the case shows the great extent to which automatic machinery has come into use within the past forty years. It is natural to assume that the cost of production would decrease with the great influx of automatic machinery. Evidently the defendants managed to retain this saving in the cost of production by means of the conspiracy herein, which is manifested by the large profits in the industry. The benefits certainly were not passed on to the public." Previously the court had found that, "Dominance over the entire industry is today so complete that at any time within the choice of Hartford and Owens prices to the consumer of glassware may arbitrarily be raised beyond all reason." (P. 619.)

Many of the patents, and certainly the cherished "patent position," [6] were secured only by virtue of the illegal conduct. Whatever benefits may flow from these patents and the patent position thus created are inevitably the consequences of that conduct.[7] Merely to throw off the illegal practices, such as restricted and discriminatory licensing, cannot reach those consequences. Every dollar hereafter, as well as heretofore, secured from licenses on the patents illegally aggregated in the combination's hands is money to which the participants are not entitled by virtue of the patent laws or others. It is the immediate product of the conspiracy. To permit these patents to remain in the guilty hands, as sources of continuing lucrative revenue, not only does not deprive their owners of the fruit of their misconduct. Rather it secures to them its continued benefits. The pool may no longer utilize illegal methods. It, and the constituent members, will continue to enjoy the preferred competitive position

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[6] Illustrative of the combination's purpose in this respect is Levis' report to Owens' board of directors in November, 1929: "Our negotiations with Hartford-Empire Company and others, so far as our patent situation and royalty income is [*sic*] concerned, should be to attempt to secure a position whereby we pay no royalty on any item we produce and we attempt to have all others pay royalty on every item they produce, we participating with any one else in the royalties they receive."

[7] With reference to the contention that the amendments made by the defendants in their contract relations, without the court's knowledge, between the filing of the complaint in 1939 and the closing of testimony over two years later, the court said: "Men cannot, by illegal means, erect an illegal structure—a structure of dominance and control over an industry vital to the welfare of the public—and then, by destroying the illegal means by which the structure has been erected, take the position that they have reformed, that they have adopted a new course of conduct, and that they should go on their way unmolested by the law—as long as the illegal structure and its adverse effects upon the public remain." (P. 618.)

which their conduct has given them and to use both that position and the ill-gotten patents, together with the patent position, to derive trade advantage over rivals and gain from the public which the patent laws of themselves never contemplated and the anti-trust laws, in my opinion, forbid.[8]

These considerations were before the District Court's mind when it devised the decree. Concluding its opinion, that court made a "statement of the principles to be followed" in framing the decree which throws light particularly upon its considered views of the relief required. It stated, with undisputed evidence[9] to sustain its conclusion:

"The court believes that no half-way measures will suffice. There has been a deliberate violation of the law, and it is the duty of the court to do what he can to make certain that these violations of the law will cease and will not be resumed in the future and that competition will be restored in the industry. The record discloses that some of the individual defendants anticipated legal action by the Government, and went ahead in spite of that and violated the law. They also tried to anticipate the remedies that might be applied and did what they could to forestall the effect of such remedies and retain the bene-

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[8] Cf. notes 13 and 17 *infra*.

[9] Throughout the litigation the facts have been substantially undisputed in consequence of the documentary and conclusive character of the proofs. Cf. note 3 *supra*. The dispute has been primarily over the inferences to be drawn from the facts, the defendants contending, in the words of the District Court (p. 615), that "any control that may exist over the production and marketing of unpatented glassware is but the result of a normal exercise of the patent privilege," with like contention, of course, concerning the production and licensing of glassmaking machinery. The contention merely poses the basic question of law in the case.

fits of their unlawful actions. The court intends to make certain that this does not occur." [10] (P. 620.) The Government had requested the dissolution of Hartford, keystone of the combination.[11] In view of controlling authorities relating to violations not less extensive or more clearly proved,[12] it hardly could be said, and this Court's opinion does not say, that if dissolution of Hartford had been ordered, this would have constituted an abuse of discretion. The District Court did not deny that remedy. Rather it reserved the question for later determination, undertaking meanwhile a milder remedy. In its own words, referring to the Government's request for dissolution, the opinion stated:

"The court, however, is *first* going to make an attempt to avoid that, *if it is possible to do so* and at the same time restore competition to the industry. *If this cannot be worked out* to the satisfaction of the court, *dissolution will be ordered.*" (Emphasis added.)

"The first step to be taken is the immediate appointment of a receiver or receivers of Hartford. The court is going to deny any stay from the appointment of such receivers. It is believed to be absolutely necessary that the receivers take over the management of Hartford forthwith." (P. 620.)

Among the reasons assigned for this action were, first, important changes made by Hartford without the court's

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[10] Cf. notes 2 and 13.

[11] Unless, in fact, this were Corning, which since 1922 has owned, or controlled, 43 per cent of Hartford's stock. According to the District Court, Corning "in practical effect had sufficient control over Hartford to dictate the policies of Hartford in accordance with Corning's wishes." (P. 557.)

[12] *Standard Oil Co.* v. *United States,* 221 U. S. 1; *United States* v. *American Tobacco Co.,* 221 U. S. 106.

knowledge during pendency of the suit, involving heavy financial obligations of Hartford "for the advancement of the interests of the companies involved," including the transfer of three important patents to Corning which the court felt was "for the obvious purpose of continuing Corning's monopolies regardless of the outcome of this suit";[13] second, to prevent any further abuse of the patent privileges of Hartford and any further violation of the law, since "under the circumstances disclosed by the evidence, the court feels that this can only be done through court officers"; and, third, to conserve the assets of Hartford and preserve the status quo. Pending appeal, therefore, and final determination of the cause, the receivers were directed to take over Hartford's management, continue operation under its existing contracts and agreements for licensing and for leasing its machines, and to receive, set aside and earmark the funds received from licensees, holding them for return to the licensees if the court's decree should be affirmed. Finally, the receivers were to remain in control "until the court is satisfied that the abuses and violations of the law have ceased, until the orders of the court have been carried out, and until the court is satisfied that there no longer remains a reasonable probability that these practices will be resumed. If, after the expiration of a reasonable time, it appears

[13] The trial court's conclusions concerning these changes, cf. text *infra* at note 14, may be considered in the light of the other evidence showing consciousness of violation, with anticipation of remedial action, cf. note 2 *supra*, and of practices by which domination obtained under patents was maintained after they had expired, e. g., Hartford's refusal to license others than Corning to make heat-resistant ware and oven ware on its feeders after Corning's patents on glass composition for these wares had expired in 1936. (P. 556.) Cf. also Owens' continued domination of the suction field, noted in this Court's opinion, by use of improvement patents after its basic patent had expired.

to the court that the steps he is now taking are insufficient to restore a free and competitive status to the industry, the receivers shall be ordered to submit a plan or plans for the dissolution of Hartford." (P. 621.)

From this portion of the opinion it is perfectly clear that the District Court has made no final decision concerning the dissolution of Hartford, as it was and still is entitled to do; and that it regarded the receivership as a necessary alternative to granting that relief at once. No other conclusion can be drawn than that the court, if compelled to choose between dissolution and permitting Hartford then to continue under its own management, unhesitatingly would have decreed its dissolution. The court in so many words stated, with reasons to support its view, that Hartford's management could not be trusted to carry out the terms of its decree, to refrain from further patent abuses and violations of the law, but on the contrary already had taken steps to circumvent, in part, whatever remedy might be imposed.[14]

Receiverships generally are to be avoided, if possible. But there are times when they remain essential. If in any circumstances they are so, it would seem to be in these. Yet this Court's judgment directing termination declares, in the face of the District Court's findings and the evidence which clearly sustains them, that the receivership, though useful to preserve the status quo pending decision here, was "not necessary to the prescription of appropriate relief" and should be wound up, and that the business should be returned to Hartford. This is not merely a decision that the receivership was not justified "in the light of what is hereafter said as to the substantive provisions of the decree." It is a substitution of this Court's judgment for that of the District Court on the

[14] Cf. note 13 *supra.*

question of dissolution of Hartford, which it reserved, foreclosing it from decision. It is likewise a substitution of this Court's judgment for that of the District Court on the question whether "the abuses and violations of the law have ceased," also reserved for future decision, and whether the management of Hartford, in the face of the evidence and the findings, can be trusted now to carry out the terms of the decree or were worthy of that trust when the decree was entered. All this, in advance of determination of the facts, which this Court cannot ascertain, on which the decision of these questions must turn.

Such an invasion of the trial court's function, it seems to me, perverts both that function and our own. If that court's findings, justifying the receivership and the reservation of decision on dissolution, were contrary to the law or the evidence, that should be demonstrated and declared. If they constituted an abuse of judicial discretion, the nature and character of the abuse should be pointed out. If they were neither, this Court goes beyond its province by substituting its own long-distance judgment for the immediately informed view of the District Court and in precluding it from judgment, upon issues rightly to be determined by it, in the first instance, whatever the standard which governs review, and in the circumstances rightly reserved by it for future decision. The action of the District Court in appointing receivers should be affirmed and, upon remand of the cause, its power should be unfettered to retain them pending its finding of the conditions specified in its opinion and decree for restoring the business of its owners or, in the alternative, to decree dissolution of Hartford, within a reasonable time.

This Court's more important revisions of the "permanent steps" taken by the District Court may be noticed shortly. The latter's opinion declared (p. 621): "The

most important question is with respect to the licensing and lease system now used by Hartford. The court believes that this is the greatest abuse. It is through the licensing and lease system that Hartford retains control over and dominates the industry." [15] The court stated its view that "there will be further abuses in the future as long as there is a semblance of that system remaining. It is the opinion of the court that this entire system must be abolished." Accordingly it required for future distribution "outright sale at reasonable prices" in place of the leasing of machines, with that method's obvious danger of repossession in case the lessee should fail to observe practices established by the lessors, tacitly or otherwise. The court also required the licensing, royalty free, of existing patents upon glassmaking machinery.

In my opinion both measures were fully justified by the findings and the evidence. The leasing of patented machinery or instruments lends itself particularly to the creation and maintenance of monopoly and to the extension of monopolistic effects far beyond the life and scope of the controlling patent or patents.[16] The holder of a patent who observes the law is entitled to exercise his rights of ownership through lease as well as sale. When, however, he uses his patent right, by the device of leasing, to acquire a monopolistic position stronger than the patent allows, and on being called to halt is not compelled to dispose of the patent, he subjects himself to whatever

[15] Cf. note 2 *supra*.

[16] Cf. the statement, in 1922, of V. M. Dorsey to A. D. Falck, of Corning: "F. G. Smith, in private, suggested to me the most revolutionary theory, which he will no doubt talk to you about, viz., putting out the feeders very much like telephones are installed, that is, with an installation charge with a flat royalty plus royalties on production above a given amount. I think it has much to be commended. It would certainly put the pirates out of business quickly."

measures are required to prevent continuance of the practice in the future and to uproot the illegal position and advantage he thus obtains. In my opinion the District Court's finding that further abuses would continue, especially in view of the dangers inherent in the right of repossession, justified its prohibition of the further use of the leasing system.

The requirement of licensing of existing patents, royalty free, would present greater difficulty if the violation had not been so gross and so long continued. But because it was both, and because the evidence shows a long course of using patents and patent position illegally to acquire other patents and consolidate still stronger positions, it is impossible now to determine what patents members of the combination may have acquired illegally. The certainty is, however, that many were so acquired.[17] Since the pool and its members are not required to dispose of the patents, any revenues now received by them from the existing patents are the result, and inevitably will continue to be the result, of the owners' violation of the law. To permit the continued collection of royalties would be to perpetuate, for the lives of the patents, the illegal consequences of the violations. That the court is bound, in equity, and by the statute, not to do.

It is said, however, that the Government has not asked, in this suit, for cancellation of the existing patents and that this provision of the decree amounts to that. The defendants, it is true, cannot derive royalties from them under the terms of the decree, if they continue to distribute machinery and glassware in interstate commerce. If this is drastic, it is because the violation was drastic and there is no other way now, short of dissolution or cancellation,

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[17] Cf. note 7 *supra*, and the instances cited from Exhibit 76 in the District Court's opinion, 46 F. Supp. 541, 604–606, which caused it to raise the question why criminal prosecution had not been instituted.

to cut off its continuing effects of disadvantage to the public and the industry or of benefit to the violators. The court, seeking to avoid dissolution, had the duty to apply a remedy equally adequate. *United States* v. *Terminal Railroad Association,* 224 U. S. 383, 409. It could not do this, if the pool were left a continuing source of revenue to the violators and of burden to the public. Accordingly it required the agreement for license, royalty free. Since cancellation was not required in terms, it does not follow merely from the royalty free provision that the effect will be the same or that the defendants will not have the benefit of other incidents of ownership which may be exercised without perpetuating the unlawful consequences of the past misuse, such as realizing the value of the patents by sale, made upon proper application with the court's approval.[18]

This Court's revisions of the decree in these respects load upon the industry and the consuming public continuing charges in favor of those who have violated both the anti-trust statutes and the patent laws, a burden which will not end until the last of the illegally aggregated patents has expired, if then. They both foreclose dissolution and forbid the only other remedies equally adequate. So to perpetuate the unlawful consequences of violation will not discourage, it can only encourage setting the law at naught.

From what has been said it follows, of course, that the court properly impounded Hartford's revenues from leasing and licensing arrangements and that these should now be returned to the sources whence received. Again,

[18] Even a disposition so guarded would realize for the owner the fruit of his wrongdoing in the case of patents illegally acquired and integrated in the pool. But it would terminate the continuing benefit to him and the possibility of his further misusing the patent to the public harm.

contrary to the Court's implicit assumption, the mere fact that during this period there were no new violations does not mean there were not continuing effects of former ones.

The modifications made in paragraph 29, relating to restrictive licensing, should not go beyond restricting the paragraph to glass products and glass machinery, as the Government now concedes should be done. The provisions of the decree concerning the "fencing" and "blocking" of patents should stand, in view of the proven abuses in applying for patents merely to prevent others from obtaining them. Other revisions are too numerous to mention specifically, except two. I concur in the elimination of the individual defendants, Collins, Fulton, Fisher, and Dilworth, from the restrictions of the decree, for the reasons stated in the Court's opinion. I concur also in the modification which requires the dissolution of the Glass Container Association, since the terms of the decree substantially accomplish this and the District Court expressly found the association had been "a breeding place for many of the illegal practices established herein."

The case presents again the fundamental problem of accommodating the provisions of the patent laws to those of the anti-trust statutes. Basically these are opposed in policy, the one granting rights of monopoly, the other forbidding monopolistic activities. The patent legislation presents a special case, the anti-trust legislation the nation's general policy. Whether the one or the other is wise is not for us to determine. But their accommodation is one we must make, within the limits allowed to the judicial function, when the issue is presented.

The general policy has been to restrict the right of the patent-holder rigidly within the terms of his grant and, when he overreaches its boundary, to deny him the usual protections of the holder of property. That this ordi-

narily has been done in infringement suits[19] or suits for cancellation does not qualify the fact or the policy. On the other hand, the anti-trust statutes have received a broad construction and corresponding enforcement, where violation has been clearly shown. When the patent-holder so far overreaches his privilege as to intrude upon the rights of others and the public protected by the anti-trust legislation, and does this in such a way that he cannot further exercise the privilege without also trespassing upon the rights thus protected, either his right or the other person's, and the public right, must give way. It is wholly incongruous in such circumstances to say that the privilege of the trespasser shall be preserved and the rights of all others which he has transgressed shall continue to give way to the consequences of his wrongdoing.

This is substantially what the defendants have sought in this proceeding and this Court's revision of the decree has granted in large measure. So inverted an idea of equity, or of the law, cannot stand. In a machine age, dominated so widely by patents, the effect can be no other than largely to nullify the anti-trust laws. There may be instances in which a patent holder, guilty of violating those statutes, can so separate his violation and its continuing effects from further full exercise of his patent right that he may become entitled to a form of relief which will permit this. Unless we are to disregard entirely the findings and conclusions of the District Court, supported by overwhelming evidence, this is not such a case.

The Court's major modifications, in my opinion, emasculate the decree.

MR. JUSTICE BLACK joins in this dissent.

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[19] Cf. *Morton Salt Co.* v. *Suppiger Co.*, 314 U. S. 488; *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U. S. 661.

NATIONAL METROPOLITAN BANK *v.* UNITED STATES.

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

No. 161. Argued December 13, 14, 1944.—Decided January 8, 1945.

1. Rights and liabilities on commercial paper issued by the Government are to be determined by federal rather than local law; and, in the absence of an applicable Act of Congress, the governing rules must be fashioned by the federal courts. P. 456.
2. The Government is entitled to recover payments made to a collecting bank on government checks on which the bank had expressly guaranteed prior endorsements but on which the endorsements of the payees were forged; and recovery was not barred by the negligent failure of the Government to detect the fraud of a government clerk who, over a period of 28 months, had fraudulently procured issuance of the checks upon forged vouchers. *United States* v. *Chase National Bank*, 252 U. S. 485, distinguished. P. 457.
3. Negligence of a drawer-drawee in failing to discover fraud prior to a guaranty of the genuineness of prior endorsements does not absolve the guarantor from liability where the prior endorsements have been forged. P. 459.

142 F. 2d 474, affirmed.

CERTIORARI, *post*, p. 692, to review the affirmance of a judgment for the United States in a suit against the bank to recover payments made on government checks.

Mr. George C. Gertman for petitioner.

Mr. David L. Kreeger, pro hac vice, with whom *Solicitor General Fahy, Assistant Attorney General Shea,* and *Messrs. Paul A. Sweeney* and *W. Leavenworth Colby* were on the brief, for the United States.

MR. JUSTICE BLACK delivered the opinion of the Court.

One Foley, a civilian clerk in the Paymaster's office of the Marine Corps, procured the issuance of 144 govern-

ment checks, duly signed by the authorized disbursing officials, by forging pay and travel mileage vouchers in the names of living Marine Corps officers. These forgeries occurred during a period of twenty-eight months, beginning shortly before July 14, 1936, and ending November 16, 1938. The checks were drawn on the United States Treasury payable to the order of the officers and delivered to Foley for distribution to them. Foley forged their endorsements, added his own name as second endorser, and deposited or cashed the checks at the Anacostia Bank. That bank, without investigating the genuineness of the payees' signatures, endorsed the checks and transmitted them to the petitioner bank, which collected on them from the government. Both banks specifically guaranteed prior endorsements. About November 21, 1938, the government discovered the fraud and the forgeries, and on December 8th formally demanded repayment from the petitioner. Repayment was refused. On August 11, 1942, the government brought this suit in the District Court to recover the payments made. The complaint contained two counts, one for breach of express warranty, and one for money paid under a mistake of fact. The bank filed an answer in which it admitted that it had collected the moneys for the account of the Anacostia Bank after presenting the checks to the government with its stamped endorsement guaranteeing prior endorsements. As defense it set up the following: (1) the endorsement did not amount to a guaranty of the payee's signature; (2) issuance of the checks by the government was a warranty that they were not "fictitious," but genuine and issued for a valuable consideration, and this warranty was breached; (3) the government's disbursing agencies neglected properly to supervise and examine the transactions both before and after the first and succeeding checks were issued, thereby delaying discovery of the fraud, and this neglect, not the bank's guaranty,

caused the government's loss. The District Court granted the government's motion for judgment on the pleadings, and the Court of Appeals affirmed, 142 F. 2d 474, on the authority of its own prior decision in *Washington Loan & Trust Co.* v. *United States,* 134 F. 2d 59 (1943). Because of a conflict with *United States* v. *First National Bank,* 138 F. 2d 681, (C. C. A. 7, 1943), we granted certiorari.

Only recently, in *Clearfield Trust Co.* v. *United States,* 318 U. S. 363, we had occasion to consider rights and liabilities of the government which stem from the issuance and circulation of its commercial paper. Our conclusion was that legal questions involved in controversies over such commercial papers are to be resolved by the application of federal rather than local law and that, in the absence of an applicable Act of Congress, federal courts must fashion the governing rules. Some of the questions petitioner argues here are foreclosed by the *Clearfield* decision. There we held that presentation of a government check to it for payment with an express guaranty of prior endorsements amounts to a warranty that the signature of the payee was not forged, but genuine. Breach of that warranty, we said, by presenting a check on which the payee's signature is a forgery, gives the government a right to recover from the guarantor when payment is made. The checks in the instant case were presented to the government by the bank bearing forged endorsements of the payee's name, and a specific guaranty by the bank. Under the *Clearfield* rule, therefore, the government should recover, unless other principles here invoked exempt it from liability.

It is contended that had it not been for negligence of the government's administrative officers in detecting the frauds of its clerk, some, if not all, of the checks would not have been issued, and that neither the government nor the bank would have suffered any loss. The answer

alleged facts which, if true, did show negligence in failing to discover the frauds, and since judgment was entered on the pleadings without trial, we must treat the case as though negligence in this respect had been established. This question as to the effect of the drawer-drawee's negligence prior to a specific guaranty of endorsements was not directly involved in our *Clearfield* case; it was an issue in *United States* v. *National Exchange Bank,* 214 U. S. 302, a case on which we largely drew for the principles announced in the *Clearfield* decision. In the latter case, we pointed out that the *National Exchange Bank* case stood for the rule that prompt discovery of fraud was not a condition precedent to suit in cases like this. The *National Exchange Bank* case presented a situation where 194 government checks had been issued over a period of ten years as a result of forged vouchers. There, as here, proper examination and supervision by government officials would have uncovered the frauds and thereby prevented or reduced the loss. The collecting bank defended there, as here, on the ground that the government's failure to discover the fraud should absolve the collecting bank from liability. This Court, applying the general law merchant, rejected the defense. The rule there applied, as pointed out by the court below in *Washington Loan & Trust Co.* v. *United States, supra,* has been almost unanimously accepted by state and federal courts. No persuasive reasons have been suggested to us why it should not be accepted as the general federal rule.

Rejection of the defense of the government's negligence here set up does not, as petitioner argues, conflict with this Court's holding in *United States* v. *Chase National Bank,* 252 U. S. 485. In that case the government brought suit against a bank to recover payment it made of a government draft which was itself a forgery. The name of the payee was also forged. Recovery was denied because the

instrument was a forgery. The holding rested on a long established exception to the general rule under which one who presents and collects a valid commercial instrument with a forged endorsement can be compelled to repay. The reason for the exception is that a drawee is required to be familiar with a drawer's signature; if therefore the drawee pays to an innocent presenter on a forged drawer's signature, it has been held that the drawee's right to the money is not superior to that of the innocent presenter. *Price* v. *Neal*, 3 Burr. 1354. This exception is not applicable here because the signatures of the drawer on these checks were genuine while those in the Chase National Bank controversy were forged. The fact that these checks were induced by fraud does not bring them within the reasoning of the Chase National Bank rule.

There is nothing here to support the petitioner's contention that the government's conduct in issuing the checks prompted it to guarantee the payee's endorsement. Such a guarantee no more results from the issuance of government checks than any other checks. Government regulations concerning payment of its commercial paper point the other way. Treasury Regulations have made guarantee of prior endorsements a prerequisite to payment. 31 C. F. R. 202.33. This guaranty was a protection which the government sought not only as to checks which were issued in due course for a valuable consideration, but as to checks which might have been irregularly issued. That the administrative officers failed fully to perform their duty is no reason why the government should be deprived of the advantage of a guarantee independently made by one who was not under compulsion of any kind to make it. No equitable principles require that one who, for his own reasons, guarantees a payee's signature after issuance of a check, shall be relieved of his voluntarily assumed obligation because others who owed the government obligations had previously defaulted in their obligations.

We do not say that there may not be some circumstances, not now before us, under which the government might be precluded from recovery because of conduct of a drawer prior to a guaranty of endorsement. We do hold that negligence of a drawer-drawee in failing to discover fraud prior to a guaranty of the genuineness of prior endorsements does not absolve the guarantor from liability in cases where the prior endorsements have been forged.

Affirmed.

MR. JUSTICE DOUGLAS concurs in the result.

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

FORD MOTOR CO. *v.* DEPARTMENT OF TREASURY OF INDIANA ET AL.

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

No. 75. Argued December 7, 1944.—Decided January 8, 1945.

1. A suit against the Department of Treasury of the State of Indiana and individuals constituting the "Board of the Department of Treasury," brought pursuant to § 64–2614 of Burns' Indiana Statutes Annotated (1943 Replacement) for a refund of taxes alleged to have been illegally collected, *held* a suit against the State, in respect of which the State had not consented to the jurisdiction of the federal district court. P. 463.
2. Where a suit is in essence one for the recovery of money from the State, the State is the real party in interest and is entitled to invoke its sovereign immunity from suit, even though individual officials are nominal defendants. P. 464.
3. The Eleventh Amendment denies to the federal courts authority to entertain a suit brought by private parties against a State without the State's consent. P. 464.
4. Interpretation of § 64–2614 as authorizing suits for refunds of taxes only in state courts accords with the legislative policy of the State. P. 466.

5. The contention that the suit is against the State and in contravention of the Eleventh Amendment is considered by this Court though urged here for the first time in this proceeding. P. 467.
6. Neither the attorney general nor any other administrative or executive officer of the State was authorized by state law to waive the State's immunity in this proceeding. P. 468.

141 F. 2d 24, vacated.

CERTIORARI, 322 U. S. 721, to review the affirmance of a judgment denying recovery in a suit for a refund of state taxes alleged to have been illegally collected.

Mr. Merle H. Miller for petitioner.

Messrs. Winslow Van Horne and *John J. McShane,* Deputy Attorneys General of Indiana, with whom *Mr. James A. Emmert,* Attorney General, was on the brief, for respondents.

MR. JUSTICE REED delivered the opinion of the Court.

This writ brings here for review an action by petitioner, a non-resident foreign manufacturing corporation, against the respondents, the department of treasury of the State of Indiana and M. Clifford Townsend, Joseph M. Robertson and Frank G. Thompson, the Governor, Treasurer and Auditor, respectively, of the State of Indiana, who "together" constituted the board of the department of treasury.[1] Petitioner seeks a refund of gross income taxes paid to the department and measured by sales claimed by the state to have occurred in Indiana.[2] Jurisdiction of the United States District Court is founded on allegations of the violation of Article I, § 8, the Commerce Clause, and

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[1] We need not consider the present status of the board of the department of treasury as § 64–2614, Burns, Indiana Stat. Ann. (1943 Replacement), provides for suit against the "department." See Indiana Acts, 1933, ch. 4, § 13; Indiana Acts, 1941, ch. 4 and ch. 13, §§ 2, 8; *Tucker* v. *State,* 218 Ind. 614, 35 N. E. 2d 270.

[2] Burns, Indiana Stat. Ann. § 64–2602 (1943 Replacement).

the Fourteenth Amendment of the Constitution. The state statutory procedure for obtaining a refund which petitioner followed is set forth in § 64–2614 (a) of the Indiana statutes.[3]

The District Court denied recovery. The Circuit Court of Appeals affirmed.[4] Certiorari was granted[5] on peti-

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[3] Section 64–2614 (a) of Burns, Indiana Stat. Ann. (1943 Replacement) provides:

"If any person considers that he has paid to the department for any year an amount which is in excess of the amount legally due from him for that year under the terms of this act, he may apply to the department, by verified petition in writing, at any time within three (3) years after the payment for the annual period for which such alleged overpayment has been made, for a correction of the amount so paid by him to the department, and for a refund of the amount which he claims has been illegally collected and paid. In such petition, he shall set forth the amount which he claims should be refunded, and the reasons for such claim. The department shall promptly consider such petition, and may grant such refund, in whole or in part, or may wholly deny the same. If denied in whole or in part, the petitioner shall be forthwith notified of such action of the department, and of its grounds for such denial. The department may, in its discretion, grant the petitioner a further hearing with respect to such petition. Any person improperly charged with any tax provided for under the terms of this act, and required to pay the same, may recover any amount thus improperly collected, together with interest, in any proper action or suit against the department in any court of competent jurisdiction; and the circuit or superior court of the county in which the taxpayer resides or is located shall have original jurisdiction of action to recover any amount improperly collected: Provided, however, That no court shall entertain such a suit, unless the taxpayer shall show that he has filed a petition for refund with the department, as hereinabove provided, within one (1) year prior to the institution of the action: Provided, further, That no such suit shall be entertained until the expiration of six (6) months from the time of filing such petition for refund with the department, unless in the meantime, the department shall have notified the petitioner, in writing, of the denial of such petition. . . ."

[4] *Ford Motor Co.* v. *Department of Treasury*, 141 F. 2d 24.

[5] 322 U. S. 721.

tioner's assertion of error in that the Circuit Court of Appeals decided an important question of local law probably in conflict with an applicable decision of the Supreme Court of Indiana. *Department of Treasury* v. *International Harvester Co.*, 221 Ind. 416, 47 N. E. 2d 150. As we conclude that petitioner's action could not be maintained in the federal court, we do not decide the merits of the issue.

Petitioner's right to maintain this action in a federal court depends, first, upon whether the action is against the State of Indiana or against an individual. Secondly, if the action is against the state, whether the state has consented to be sued in the federal courts. Recently these questions were discussed in *Great Northern Insurance Co.* v. *Read*, 322 U. S. 47.

In that case this Court held that as the suit was against a state official as such, through proceedings which were authorized by statute to compel him to carry out with state funds the state's agreement to reimburse moneys illegally exacted under color of the tax power, the suit was one against the state. We said that such a suit was clearly distinguishable from actions against a tax collector to recover a personal judgment for money wrongfully collected under color of state law. 322 U. S. 47, 50–51. Where relief is sought under general law from wrongful acts of state officials, the sovereign's immunity under the Eleventh Amendment does not extend to wrongful individual action, and the citizen is allowed a remedy against the wrongdoer personally. *Atchison, T. & S. F. R. Co.* v. *O'Connor*, 223 U. S. 280; cf. *Matthews* v. *Rodgers*, 284 U. S. 521, 528. Where, however, an action is authorized by statute against a state officer in his official capacity and constituting an action against the state, the Eleventh Amendment operates to bar suit except in so far as the statute waives state immunity from suit. *Smith* v.

Reeves, 178 U. S. 436; *Great Northern Insurance Co.* v. *Read,* 322 U. S. 47.

We are of the opinion that petitioner's suit in the instant case against the department and the individuals as the board constitutes an action against the State of Indiana. A state statute prescribed the procedure for obtaining refund of taxes illegally exacted, providing that a taxpayer first file a timely application for a refund with the state department of treasury.[6] Upon denial of such claim, the taxpayer is authorized to recover the illegal exaction in an action against the "department." Judgment obtained in such action is to be satisfied by payment "out of any funds in the state treasury." [7] This section clearly provides for an action against the state, as opposed to one against the collecting official individually. No state court decision has been called to our attention which would indicate that a different interpretation of this statute has been adopted by state courts.

Petitioner's suit in the federal District Court is based on § 64–2614 (a) of the Indiana statutes and therefore constitutes an action against the state, not against the collecting official as an individual. Petitioner brought its action in strict accord with § 64–2614 (a). The action is against the state's department of treasury. The complaint carefully details compliance with the provisions of § 64–2614 (a) which require a timely application for refund to the department as a prerequisite to a court action authorized in the section. It is true the petitioner in the present proceeding joined the Governor, Treasurer and Auditor of the state as defendants, who "together constitute the Board of Department of Treasury of the State of Indiana." But, they were joined as the collective repre-

[6] See note 3 *supra,* § 64–2614 (a).

[7] Burns, Indiana Stat. Ann. § 64–2614 (b) (1943 Replacement).

sentatives of the state, not as individuals against whom a personal judgment is sought. The petitioner did not assert any claim to a personal judgment against these individuals for the contested tax payments. The petitioner's claim is for a "refund," not for the imposition of personal liability on individual defendants for sums illegally exacted. We have previously held that the nature of a suit as one against the state is to be determined by the essential nature and effect of the proceeding. *Ex parte Ayers,* 123 U. S. 443, 490–99; *Ex parte New York,* 256 U. S. 490, 500; *Worcester County Trust Co.* v. *Riley,* 302 U. S. 292, 296–98. And when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants. *Smith* v. *Reeves, supra; Great Northern Insurance Co.* v. *Read, supra.* We are of the opinion, therefore, that the present proceeding was brought in reliance on § 64–2614 (a) and is a suit against the state.

It remains to be considered whether the State of Indiana has consented to this action against it in the federal court.

The Eleventh Amendment provides that: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." This express constitutional limitation denies to the federal courts authority to entertain a suit brought by private parties against a state without its consent. *Hans* v. *Louisiana,* 134 U. S. 1, 10; *Ex parte New York,* 256 U. S. 490, 497; *Missouri* v. *Fiske,* 290 U. S. 18, 25; *United States* v. *U. S. Fidelity & Guaranty Co.,* 309 U. S. 506, 512; *Great Northern Insurance Co.* v. *Read, supra; State* v. *Mutual Life Ins. Co.,* 175 Ind. 59, 71, 93 N. E. 213; *Hogston*

v. *Bell,* 185 Ind. 536, 548, 112 N. E. 883. While the state's immunity from suit may be waived, *Clark* v. *Barnard,* 108 U. S. 436, 447; *Gunter* v. *Atlantic Coast Line,* 200 U. S. 273; *Missouri* v. *Fiske,* 290 U. S. 18, 24, there is nothing to indicate authorization of such waiver by Indiana in the present proceeding.

Section 64-2614 (a) authorizes "action or suit against the department in any court of competent jurisdiction; and the circuit or superior court of the county in which the taxpayer resides or is located shall have original jurisdiction of action to recover any amount improperly collected." In the *Read* case we construed a similar provision of an Oklahoma tax refund statute as a waiver of state immunity from suit in state courts only. 322 U. S. 47, 54. As was said in that case: "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. . . . 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." Cf. *United States* v. *Shaw,* 309 U. S. 495, 501. Section 64-2614 does not contain any clear indication that the state intended to consent to suit in federal courts.[8] The provision in

[8] Section 60-310, Burns, Indiana Stat. Ann. (1943 Replacement), (Acts, 1941, ch. 27, § 1, p. 64), provides for the creation of a state board of finance. This section reads, in part, as follows: "Such board may sue, and be sued in its name, in any action, and in any court having jurisdiction, whenever necessary to accomplish the purposes of this act."

It does not appear that the right to sue the department of treasury for erroneous tax payments, which was granted by § 64-2614 (a), Burns, Indiana Stat. Ann. (1943 Replacement) (see Acts, 1937, ch.

this section which vests original jurisdiction of suits for refund in the "circuit or superior court of the county in which the taxpayer resides or is located" indicates that the state legislature contemplated suit in the state courts.[9] Moreover, this interpretation of § 64–2614 (a) to authorize suits only in state courts accords with the state legislative policy. Indiana has adopted a liberal policy toward general contract claimants but confines their suits against the state to state courts.[10]

It remains to be considered whether the attorney general for the State of Indiana in his conduct of the present proceeding has waived the state's immunity from suit. The state attorney general is authorized to represent the state in actions brought under the Indiana refund statute.[11] He appeared in the federal District Court and the

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117, § 14, pp. 631–32) has been repealed or transferred to the state board of finance by the Acts, 1941, ch. 27, or otherwise.

If it is held by Indiana that the state's consent to be sued for the recovery of taxes was covered by § 60–310 rather than by § 64–2614 (a), we should be of the opinion, until otherwise advised by Indiana adjudications, that the consent was limited to suits in the state courts.

Chapter 27 of the Acts of 1941, which creates the state board of finance, apparently invests the board with control over public funds rather than with the collection and refund of taxes.

[9] Reference to a particular state court in a California statute similar to § 64–2614 was held to warrant an inference that the state legislature consented to suit against the state in a state court only. See *Smith* v. *Reeves,* 178 U. S. 436, 441.

[10] Burns, Indiana Stat. Ann. § 4–1501 (1933), provides:

"Any person or persons having or claiming to have a money demand against the state of Indiana, arising, at law or in equity, out of contract, express or implied, . . . may bring suit against the state therefor in the superior court of Marion County, Indiana, . . . and jurisdiction is hereby conferred upon said superior court of Marion County, Indiana, to hear and determine such action . . ."

[11] Section 64–2614 (c) provides:

"It shall be the duty of the attorney-general to represent the department, and/or the state of Indiana, in all legal matters or litigation,

Circuit Court of Appeals and defended the suit on the merits. The objection to petitioner's suit as a violation of the Eleventh Amendment was first made and argued by Indiana in this Court. This was in time, however. The Eleventh Amendment declares a policy and sets forth an explicit limitation on federal judicial power of such compelling force that this Court will consider the issue arising under this Amendment in this case even though urged for the first time in this Court.

It is conceded by the respondents that if it is within the power of the administrative and executive officers of Indiana to waive the state's immunity, they have done so in this proceeding. The issue thus becomes one of their power under state law to do so. As this issue has not been determined by state courts,[12] this Court must resort to the general policy of the state as expressed in its Constitution, statutes and decisions. Article 4, § 24 of the Indiana Constitution provides:

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either criminal or civil, relating to the enforcement, construction, application and administration of this act, upon the order and under the direction of the department."

[12] *State ex rel. Woodward* v. *Smith*, 85 Ind. App. 56, 152 N. E. 836, is the only Indiana decision which has come to our attention as involving the authority of state executive or administrative officials to consent to suit against the state. In that case plaintiff sued to foreclose a mortgage on certain land and joined the State of Indiana as defendant in order to obtain cancellation of a prior judgment lien on this property in favor of the state. The defendant state filed a cross-complaint for affirmative relief seeking satisfaction of its lien. The intermediate state court held that since the state appeared, pleaded to the merits and filed a cross-complaint for affirmative relief, it thereby consented that it might be made a party to determine the priority of its lien. This case involves an application of the well-accepted principle that when a sovereign sues for affirmative relief, it is deemed to have waived its sovereign immunity as to the issues presented by its affirmative claim. *State* v. *Portsmouth Savings Bank*, 106 Ind. 435, 7 N. E. 379.

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"Provision may be made, by general law, for bringing suit against the State, as to all liabilities originating after the adoption of this Constitution; but no special act authorizing such suit to be brought, or making compensation to any person claiming damages against the State, shall ever be passed."

We interpret this provision as indicating a policy prohibiting state consent to suit in one particular case in the absence of a general consent to suit in all similar causes of action. Since the state legislature may waive state immunity only by general law, it is not to be presumed in the absence of clear language to the contrary, that they conferred on administrative or executive officers discretionary power to grant or withhold consent in individual cases. Nor do we think that any of the general or special powers conferred by statute on the Indiana attorney general to appear and defend actions brought against the state or its officials can be deemed to confer on that officer power to consent to suit against the state in courts when the state has not consented to be sued.[13] State court de-

[13] Section 4–1504, Burns, Indiana Stat. Ann. (1933) authorizes the state attorney general to represent the state in actions brought against it under § 4–1501, see note 10, *supra;* it provides:

"It shall be the duty of the attorney-general of state, in person or by deputy, to defend and represent the interests of the state in said superior court of Marion County, Indiana, and also in the Supreme Court on appeal."

Section 49–1902 provides generally:

"Such attorney-general shall prosecute and defend all suits that may be instituted by or against the state of Indiana, the prosecution and defense of which is not otherwise provided for by law, whenever he shall have been given ten (10) days' notice of the pendency thereof by the clerk of the court in which such suits are pending, and whenever required by the governor or a majority of the officers of state, in writing, to be furnished him within a reasonable time; and he shall represent the state in all criminal cases in the Supreme Court, and shall defend all suits brought against the state officers in their official relations, except suits brought against them by the state; and

cisions construe strictly the statutory powers conferred on the Indiana state attorney general and hold that he exercises only those powers "delegated" to him by statute and does not possess the powers of an attorney general at "common law." [14] It would seem, therefore, that no properly authorized executive or administrative officer of the state has waived the state's immunity to suit in the federal courts.

Gunter v. *Atlantic Coast Line,* 200 U. S. 273, is not applicable to the instant case since it involved a taxpayer's ancillary suit to enjoin South Carolina tax officials from collecting taxes in violation of an earlier decision of this Court upholding the validity of a state agreement to exempt the taxpayer's property. *Humphrey* v. *Pegues,* 16 Wall. 244. The *Pegues* case involved a suit against the state in the person of its tax officials, the state attorney general appearing for the state and arguing the case on the merits, no issue of sovereign immunity being raised. In the *Gunter* proceeding, brought over twenty

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he shall be required to attend to the interests of the state in all suits, actions or claims in which the state is or may become interested in the Supreme Court of this state."

Section 64–2614 (c) specifically authorizes him to represent the state in actions brought under the provisions of § 64–2614 (a) under which petitioner's suit is brought. See note 11, *supra.*

[14] *State ex rel. Bingham* v. *Home Brewing Co.,* 182 Ind. 75, 87–95, 105 N. E. 909; *Julian* v. *State,* 122 Ind. 68, 23 N. E. 690. Various lower federal court decisions have held that a state attorney general cannot waive state immunity from suit. *Deseret Water, Oil & Irr. Co.* v. *California,* 202 F. 498; *Title Guaranty & Surety Co.* v. *Guernsey,* 205 F. 91; *O'Connor* v. *Slaker,* 22 F. 2d 147; *Dunnuck* v. *Kansas State Highway Commission,* 21 F. Supp. 882. The United States Attorney General has been held to be without power to waive the sovereign immunity of the United States. *Stanley* v. *Schwalby,* 162 U. S. 255, 269–70; cf. *United States* v. *Shaw,* 309 U. S. 495, 501.

See *Richardson* v. *Fajardo Sugar Co.,* 241 U. S. 44, where, without consideration of any limitations on his powers, we held that the attorney general of Puerto Rico could waive its sovereign immunity.

years later, defendant South Carolina attacked the validity of the *Pegues* judgment on the ground that in that proceeding the state had not consented to be sued. This Court held the *Pegues* judgment was res judicata and binding on the state because the South Carolina statutes conferred on the state officials and the attorney general power there to "stand in judgment for the state," 200 U. S. at 285, 286–87. The state's submission to the court was authorized by statute, not by the unauthorized consent of an official. *Farish* v. *State Banking Board,* 235 U. S. 498, 512. No distinction was drawn between federal and state courts. Reliance was placed on contemporaneous administrative interpretation of the state statutes, absence of any legislative action repudiating the attorney general's conduct of the case and the failure of the state government in all its departments, for more than twenty years, to assert any right in conflict with the *Pegues* adjudication. Administrative construction by a state of its statutes of consent has influence in determining our conclusions. *Great Northern Insurance Co.* v. *Read, supra.*

As we indicated in the *Read* case, the construction given the Indiana statute leaves open the road to review in this Court on constitutional grounds after the issues have been passed upon by state courts. The advantage of having state courts pass initially upon questions which involve the state's liability for tax refunds is illustrated by the instant case where petitioner sued in a federal court for a refund only to urge on certiorari that the federal court erred in its interpretation of the state law applicable to the questions raised.

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 consent by the state to this suit.

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

WILLIAMS *v.* KAISER, WARDEN.

CERTIORARI TO THE SUPREME COURT OF MISSOURI.

No. 102. Argued December 12, 1944.—Decided January 8, 1945.

In a petition to the Supreme Court of Missouri for a writ of habeas corpus, the petitioner, confined in a state penitentiary under a 15-year sentence for robbery by means of a deadly weapon (a capital offense in Missouri), alleged that prior to his conviction he requested the aid of counsel but that none was appointed; that he did not waive his constitutional right to the aid of counsel; that he was incapable of making his own defense adequately and as a consequence was compelled to plead guilty. The court allowed the petitioner to proceed *in forma pauperis* but denied the petition for failure to state a cause of action. *Held:*

1. The petitioner's right to counsel was a right protected by the Fourteenth Amendment of the Federal Constitution. P. 473.

2. Whether the federal right of the petitioner was infringed is for this Court to determine. P. 473.

3. The petition having been denied without requiring the State to answer and without giving the petitioner an opportunity to prove his allegations, and the allegations of the petition being not inconsistent with the recitals of the accompanying certified copy of the sentence and judgment, this Court treats the allegations of the petition as true. P. 474.

4. The petition sufficiently alleged a deprivation of due process of law in violation of the Fourteenth Amendment. *Powell* v. *Alabama*, 287 U. S. 45. P. 474.

5. In the absence of evidence to the contrary, it will be presumed that when a defendant requests counsel he is without counsel and without funds to retain counsel. P. 474.

6. Although a judgment based on a plea of guilty, like other judgments, may not be set aside lightly on collateral attack, a judgment based on a plea of guilty to a capital offense by a defendant who requested but was not granted counsel, and who was incapable adequately of making his own defense, stands on a different footing. P. 474.

7. The nature of the offense charged against the petitioner emphasized the need of counsel. P. 474.

8. The right of the petitioner to challenge the validity of the judgment of conviction on the constitutional ground of denial of

his right to counsel can not be defeated by his failure to take an appeal from that judgment. P. 477.

9. Since the state grounds here advanced to sustain the denial of the petition are insubstantial, the denial is assumed to have been on the ground that the petition stated no cause of action based on the federal right. P. 478.

Reversed.

CERTIORARI, 322 U. S. 725, to review an order denying a petition for a writ of habeas corpus.

Mr. John Raeburn Green, with whom *Mr. Keith L. Seegmiller* was on the brief, for petitioner.

Mr. Robert J. Flanagan, Assistant Attorney General of Missouri, with whom *Mr. Roy McKittrick,* Attorney General, was on the brief, for respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioner pleaded guilty to an indictment charging him with robbery by means of a deadly weapon. The Circuit Court of Iron County, Missouri, found him guilty and sentenced him to the state penitentiary, where he is now confined, for a term of fifteen years on May 28, 1940. In April, 1944, he filed a petition for a writ of *habeas corpus* in the Supreme Court of Missouri. After reciting the foregoing facts concerning his conviction he further alleges in his petition:

"Prior to his conviction and sentence, as aforesaid, the petitioner requested the aid of counsel. At the time of his conviction and sentence, as aforesaid, the petitioner was without the aid of counsel, the Court did not make an appointment of counsel, nor did petitioner waive his constitutional right to the aid of counsel, and he was incapable adequately of making his own defense, in consequence of which he was compelled to plead guilty."

And he contends that he was deprived of counsel contrary to the requirements of the due process clause of the Four-

teenth Amendment. The Supreme Court of Missouri allowed petitioner to proceed *in forma pauperis* but denied the petition for the reason that it "fails to state a cause of action." The case is here on a petition for a writ of certiorari which we granted because of the substantial nature of the constitutional question which is raised.

Missouri has a statute which requires a court on request to assign counsel to a person unable to employ one and who is charged with a felony. Rev. Stat. 1939, § 4003. The Missouri Supreme Court did not indicate the reasons for its denial of the petition beyond the statement that the petition failed to state a cause of action. Whatever the grounds of that decision it is binding on us insofar as state law is concerned. *Smith* v. *O'Grady,* 312 U. S. 329. But the right to counsel in cases of this type is a right protected by the Fourteenth Amendment of the federal Constitution. The question whether that federal right has been infringed is not foreclosed here, even though the action of the state court was on the ground that its statute requiring the appointment of counsel was not violated. *Powell* v. *Alabama,* 287 U. S. 45, 59–60. And Missouri has not suggested in the argument before this Court that it provides a remedy other than *habeas corpus* for release from a confinement under a judgment of conviction obtained as a result of an unconstitutional procedure. Neither in the briefs nor in oral argument did Missouri suggest that its *habeas corpus* procedure (see Rev. Stat. 1939, §§ 1590, 1621, 1623) is not available in this situation.[1]

The petition for *habeas corpus* was denied without requiring the State to answer or without giving petitioner an opportunity to prove his allegations. And the allega-

[1] It is available to challenge the constitutionality of the statute on which the judgment of conviction rests. *Ex parte Smith,* 135 Mo. 223, 36 S. W. 628; *Ex parte Taft* v. *Shaw,* 284 Mo. 531, 538–539, 225 S. W. 457; *Ex parte McKean,* 338 Mo. 597, 600, 92 S. W. 2d 141.

tions contained in the petition are not inconsistent with the recitals of the certified copy of the sentence and judgment which accompanied the petition and under which petitioner is confined. Hence we must assume that the allegations of the petition are true. *Smith* v. *O'Grady, supra.* Read in that light we think the petition makes a *prima facie* showing of denial of the constitutional right. The Missouri Supreme Court has ruled that when a defendant requests counsel it will be "presumed," in absence of evidence to the contrary (*State* v. *Steelman*, 318 Mo. 628, 631, 300 S. W. 743), that he was "without counsel and that he lacked funds to employ them." *State* v. *Williams,* 320 Mo. 296, 306, 6 S. W. 2d 915. We indulge the same presumption. Certainly it may be reasonably inferred from that request and from the further allegation that as a result of the court's failure to appoint counsel petitioner was "compelled to plead guilty," that he was unable to employ counsel to present his defense because he was without funds. Like other judgments, a judgment based on a plea of guilty is not of course to be lightly impeached in collateral proceedings. See *Johnson* v. *Zerbst,* 304 U. S. 458, 468–469. But a plea of guilty to a capital offense made by one who asked for counsel but could not obtain one and who was "incapable adequately of making his own defense" stands on a different footing. Robbery in the first degree (Rev. Stat. 1939, § 4450) by means of a deadly weapon is a capital offense in Missouri. Rev. Stat. 1939, § 4453. The law of Missouri has important distinctions between robbery in the first degree, robbery in the second degree, grand larceny, and petit larceny.[2] These involve technical requirements of the indictment or information, the kind of evidence required

[2] Thus one indicted for robbery in the first degree cannot be convicted of robbery in the second degree but may be convicted of larceny. *State* v. *Jenkins,* 36 Mo. 372; *State* v. *Davidson,* 38 Mo. 374; *State* v. *Brannon,* 55 Mo. 63.

for conviction,[3] the instructions necessary to define the several elements of the crime,[4] and the various defenses which are available. These are a closed book to the average layman. These considerations underscore what was said in *Powell* v. *Alabama, supra,* p. 69: "Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect." Those observations are as pertinent in connection with the accused's plea as they are in the conduct of a trial. The decision to plead guilty is a decision to allow a judgment of conviction to be entered without a hearing—a decision which is irrevocable and which forecloses any possibility of establishing innocence. If we assume that petitioner committed a crime, we cannot know the degree of prejudice which the denial of counsel caused. See *Glasser* v. *United States,* 315 U. S. 60, 75–76. Only counsel could discern from the facts whether a plea of not guilty to the offense charged or a

[3] See *State* v. *White,* 326 Mo. 1000, 34 S. W. 2d 79.

[4] See *State* v. *Brown,* 104 Mo. 365, 16 S. W. 406; *State* v. *Woodward,* 131 Mo. 369, 33 S. W. 14; *State* v. *McLain,* 159 Mo. 340, 60 S. W. 736.

plea of guilty to a lesser offense would be appropriate.[5] A layman is usually no match for the skilled prosecutor whom he confronts in the court room. He needs the aid of counsel lest he be the victim of overzealous prosecutors, of the law's complexity, or of his own ignorance or bewilderment.

These are reasons why the right to counsel is "fundamental." *Powell* v. *Alabama, supra,* p. 70; *Grosjean* v. *American Press Co.,* 297 U. S. 233, 243–244; *Avery* v. *Alabama,* 308 U. S. 444, 447. They indicate the protection which the individual needs when charged with crime. Prompt and expeditious detection and punishment of crime are necessary for the protection of society. But that may not be done at the expense of the civil rights of the citizen. Law enforcement need not be inefficient when accommodated to the constitutional guarantees of the individual.

Powell v. *Alabama, supra,* p. 71, held that at least in capital offenses "where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law." It follows from our construction of this petition that if the allegations are taken as true, petitioner was denied due process of law. It may well be that these allegations will turn out to be specious and unfounded. But they are sufficient under the rule

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[5] "Robbery in the first degree without the use of a dangerous and deadly weapon is included in the charge of robbery by means of such weapon. Larceny is also so included, and where the charge is robbery and there is evidence of a larcenous taking of property but the element of force such as to constitute the offense of robbery is wanting there should be an instruction submitting larceny." *State* v. *Craft,* 338 Mo. 831, 843, 92 S. W. 2d 626. And see *State* v. *Weinhardt,* 253 Mo. 629, 161 S. W. 1151.

of *Powell* v. *Alabama* to establish a deprivation of due process of law if their verity is determined. See *Cochran* v. *Kansas,* 316 U. S. 255. Cf. *Walker* v. *Johnston,* 312 U. S. 275.

As we have said, Missouri does not claim that *habeas corpus* is not available in this type of case or that under Missouri law there is some procedure other than *habeas corpus* available to petitioner in which he may challenge the judgment of conviction on constitutional grounds. Missouri, however, does contend that the denial of counsel could have been challenged by petitioner by an appeal, that no appeal was taken, and that no extraordinary circumstances are shown which excuse that failure. Heretofore we have not considered a failure to appeal an adequate defense to *habeas corpus* in this type of case. *Smith* v. *O'Grady, supra.* Under these circumstances the failure to appeal only emphasizes the need of counsel. If an appeal were made such a requirement, the denial of counsel would in and of itself defeat the very right which the Constitution sought to protect.

It is suggested, moreover, that for all we know the denial of the petition by the Supreme Court of Missouri rested on adequate state grounds. It is a well established principle of this Court that before we will review a decision of a state court it must affirmatively appear from the record that the federal question was presented to the highest court of the State having jurisdiction and that its decision of the federal question was necessary to its determination of the cause. *Honeyman* v. *Hanan,* 300 U. S. 14, 18; *Lynch* v. *New York,* 293 U. S. 52. And where the decision of the state court might have been either on a state ground or on a federal ground and the state ground is sufficient to sustain the judgment, the Court will not undertake to review it. *Klinger* v. *Missouri,* 13 Wall. 257, 263; *Wood Mowing & Reaping Machine Co.* v. *Skinner,* 139 U. S. 293, 297; *Allen* v. *Arguimbau,* 198 U. S. 149,

154–155; *Lynch* v. *New York, supra.* We adhere to those decisions. But it is likewise well settled that if the independent ground was not a substantial or sufficient one, "it will be presumed that the State court based its judgment on the law raising the Federal question, and this court will then take jurisdiction." *Klinger* v. *Missouri, supra,* p. 263; *Johnson* v. *Risk,* 137 U. S. 300, 307; *Lawrence* v. *State Tax Commission,* 286 U. S. 276, 282–283. Thus in *Maguire* v. *Tyler,* 8 Wall. 650, and in *Neilson* v. *Lagow,* 12 How. 98, 110, it was contended that the judgments rested on adequate state grounds. In neither was there an opinion of the state court. The Court examined the record, found the state grounds not substantial or sufficient, and reversed the judgments on the federal question.[6] We think the principle of those cases is applicable here. The petition establishes on its face the deprivation of a federal right. The denial of the petition on the grounds that it fails to state a cause of action strongly suggests that it was denied because there was no cause of action based on the federal right. And when we search for an independent state ground to support the denial, we find none. The Attorney General of Missouri only goes so far as to say that the petition did not state facts sufficient to justify the appointment of counsel under the Missouri statute. But as we have seen, the allegations in the petition seem sufficient under the rule laid down by the Supreme Court of Missouri in *State* v. *Williams, supra.* And Missouri suggests no other state ground which

[6] In the following cases the Court without benefit of an opinion of the state court examined the pleadings, found substantial state grounds on which the judgment might have rested, and dismissed the writ. *Johnson* v. *Risk, supra; Allen* v. *Arguimbau, supra; Bachtel* v. *Wilson,* 204 U. S. 36; *Adams* v. *Russell,* 229 U. S. 353; *Cuyahoga River Power Co.* v. *Northern Realty Co.,* 244 U. S. 300, 303; *Lynch* v. *New York, supra; Woolsey* v. *Best,* 299 U. S. 1; *McGoldrick* v. *Gulf Oil Corp.,* 309 U. S. 2.

might be the basis of the decision.[7] That is to say, the only state grounds which have been advanced in support of the decision below appear to be insubstantial. We can only assume therefore that the denial by the Supreme Court of Missouri was for the reason that the petition stated no cause of action based on the federal right. That seems to us to be the fair intendment of the language which it used if we put to one side, as we must, the insubstantial state grounds which have been advanced in explanation of the denial. If perchance the Supreme Court of Missouri meant that some reason of state law precludes a decision of the federal question, that question is not foreclosed by this decision. Cf. *State Tax Commission* v. *Van Cott,* 306 U. S. 511; *Minnesota* v. *National Tea Co.,* 309 U. S. 551. But on the present state of the record before us, we do not see what more petitioner need do to establish the federal right on which his petition is based.

Reversed.

MR. JUSTICE FRANKFURTER, dissenting.

At the request of one charged with a felony and unable to employ counsel, Missouri requires its courts to assign counsel. In *State* v. *Williams,* 320 Mo. 296, 6 S. W. 2d 915, a defendant on trial for a capital offense requested the court to assign counsel, and the court accordingly appointed two lawyers for his defense. After a plea of guilty and the imposition of a death sentence, an appeal was taken from a denial of a motion in arrest of judgment

[7] It is stated that the petition does not allege facts which show that petitioner was denied a fair trial, that he was ignorant, that he was innocent, or that the court was prejudiced. But it is not apparent how the addition of any such allegations to the petition would be relevant to petitioner's cause of action based on the constitutional right to counsel. We are not referred to any Missouri law which would make them relevant.

on the ground that the trial court violated the Missouri statute in that the record did not show that the judge had ascertained the inability of the accused to employ counsel before appointing them. The Missouri Supreme Court held that the absence of such a specific finding did not constitute a violation of the Missouri statutes. "The record shows that it was upon defendant's request that the court assigned him counsel. Having requested the court to assign counsel, it will then be presumed that defendant was without counsel and that he lacked funds to employ them." 320 Mo. at 306. The court thus rejected the frivolous claim that by giving the accused what he asked for, counsel not of his choice had been forced on him. That decision can hardly serve as a springboard for concluding in this case that the Supreme Court of Missouri violated the Constitution of the United States in finding that the record did not show that the trial court, in denying the present defendant's request for the assignment of counsel, denied him rights under the law of Missouri as well as the United States Constitution. To be sure, the Missouri Supreme Court did not write an opinion in support of its conclusion that the petitioner's writ for *habeas corpus* "fails to state a cause of action." There is nothing significant about that, and it does not affect the basis or scope of this Court's review of state court decisions. During its 1942 judicial year the Supreme Court of Missouri disposed of 300 cases by opinion and 217 cases without opinion; during its 1942 judicial year this Court disposed of 218 cases by opinion and 146 cases without opinion (apart from dispositions of petitions for *certiorari*). If the determination by the Missouri court can reasonably be justified on failure to comply with a requirement of Missouri law, then it must be so justified. And the record here plainly allows the inference that the petitioner did not meet the procedural requirements of Missouri law for relief by *habeas corpus*. If a decision

of a state court can rest on a state ground, it is our duty to conclude that it does so rest; it is our duty not to assume that the state court rejected a claim under the United States Constitution.

From the beginning, such has been the principle governing our review of state court decisions. In cases coming here from the state courts, this Court has no power to pass on questions of state law; it can review a state court decision only insofar as that raises a question of federal law; and it can only then pass on the federal question if a decision on federal law was necessary for the judgment rendered by the state court. This historic distribution of judicial authority as between the state courts and this Court was confirmed and reinforced during the Reconstruction period when the influences toward expansion of federal jurisdiction were at floodtide. *Murdock* v. *Memphis,* 20 Wall. 590.[1]

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[1] "The rules which govern the action of this court in cases of this sort are well settled. Where it appears by the record that the judgment of the State court might have been based either upon a law which would raise a question of repugnancy to the Constitution, laws, or treaties of the United States, or upon some other independent ground; and it appears that the court did, in fact, base its judgment on such independent ground, and not on the law raising the Federal question, this court will not take jurisdiction of the case, even though it might think the position of the State court an unsound one. But where it does not appear on which of the two grounds the judgment was based, then, if the independent ground on which it might have been based was a good and valid one, sufficient of itself to sustain the judgment, this court will not assume jurisdiction of the case; but if such independent ground was not a good and valid one, it will be presumed that the State court based its judgment on the law raising the Federal question, and this court will then take jurisdiction." *Klinger* v. *Missouri,* 13 Wall. 257, 263.

These settled principles were very recently again summarized in a *per curiam* opinion in *Southwestern Bell Tel. Co.* v. *Oklahoma,* 303 U. S. 206, 212–213:

"We have repeatedly held that it is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must

These sound like dry rules of technical jurisdiction. In fact they express an important phase of due regard for our federal constitutional system. State courts are no less under duty to observe the United States Constitution than is this Court. To be sure, authority is vested in this Court to see to it that that duty is observed. But to assume disobedience instead of obedience to the Law of the Land by the highest courts of the States is to engender friction between the federal and state judicial systems, to weaken the authority of the state courts and the administration of state laws by encouraging unmeritorious resorts to this Court, and wastefully to swell the dockets of this Court.

This case gives point to the importance of adhering to the principles that govern our review of state decisions. Nothing is a more fundamental characteristic of a civilized society than those securities which safeguard a fair trial for one accused of crime. Those assurances were written into the Federal Constitution even against State action by the Due Process Clause of the Fourteenth Amendment. A central safeguard is the opportunity for an accused to have adequate facilities for presenting his defense. But a full half century before the United States Constitution made this requirement of the States, Missouri, while yet a Territory, provided for the assistance

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appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause; that the federal question was actually decided or that the judgment as rendered could not have been given without deciding it. *De Saussure* v. *Gaillard*, 127 U. S. 216, 234; *Johnson* v. *Risk*, 137 U. S. 300, 306, 307; *Wood Mowing & Reaping Machine Co.* v. *Skinner*, 139 U. S. 293, 295, 297; *Whitney* v. *California*, 274 U. S. 357, 360, 361; *Lynch* v. *New York*, 293 U. S. 52, 54."

of counsel for accused in need. Digest of the Laws of Missouri Territory, 1818, Crimes and Misdemeanors § 35. There is nothing to warrant the assumption that the Supreme Court of Missouri was unmindful of the exactions of its own historic law or of the extent to which that is now embedded in the Due Process Clause. On the contrary, every assumption must be indulged that that court was mindful of the right which may be claimed by an indigent accused to have a lawyer's aid for his defense. But it may also have been mindful of the requirement of her law that a trial judge be reasonably convinced that an accused is in need of counsel.

Of course this Court will not withhold its reviewing power over a decision of a state court by presuming that the state court founded its decision on a wholly untenable basis of local law. See, *e. g., Neilson* v. *Lagow,* 12 How. 98, 109–111. But nothing in the record before us precludes the assumption that the Missouri Supreme Court found a local inadequacy in the petition for a writ of *habeas corpus.* If the Missouri Supreme Court had in fact refused to grant the writ of *habeas corpus* because it concluded that there was not a sufficient allegation by petitioner that he had need for counsel, certainly this Court would not reject that as an inadequate state ground. And if that would have furnished an adequate state ground, we must assume that it did, instead of attributing to the Supreme Court of Missouri a flagrant violation of the Constitution. If the Missouri Supreme Court enforces its requirement that an accused make manifest his need for appointed counsel and if Missouri enforces this requirement even with procedural strictness against those convicted of felonies years after their sentence, it is not for us to be hypercritical in denying to the highest tribunal of a State what it may conceive to be its duty to see to it

that the great writ of *habeas corpus* is not abused [2] and that the administration of criminal justice is not needlessly weakened by astute devices. While the petition in this case was signed by Williams alone, it bears every evidence of having been drawn by one aware of the relevant legal issues and skilled in legal drafting.

If, perchance, we were to interpret erroneously the decision of the Supreme Court of Missouri in finding that the present writ failed to state a cause of action because it was wanting in requirements of Missouri law, no real harm will have been done. By proper application to the state court, the ambiguity of the present record may be removed by showing, if indeed such be the fact, that the Missouri Supreme Court necessarily rejected a federal claim here reviewable. See *Whitney* v. *California,* 269 U. S. 530; 274 U. S. 357, 360–362; *Lynch* v. *New York,* 293 U. S. 52; *Honeyman* v. *Hanan,* 300 U. S. 14. Or, another petition for a writ of *habeas corpus* making the necessary allegations would quickly reveal whether the Supreme Court of Missouri flagrantly disregarded a law of Missouri older than the State itself, let alone a right sanctioned by the Constitution of the United States. Petitioner is now represented by able and devoted counsel who would quickly enough bring to light any such disregard. Certainly we ought not to attribute illegality to the Supreme Court of Missouri when the assumption of

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[2] "We are dealing with a writ antecedent to statute, and throwing its root deep into the genius of our common law. . . . It is perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement. It is of immemorial antiquity, an instance of its use occurring in the thirty-third year of Edward I. It has through the ages been jealously maintained by Courts of Law as a check upon the illegal usurpation of power by the Executive at the cost of the liege." *Secretary of State For Home Affairs* v. *O'Brien* [1923] A. C. 603, 609.

obedience to its own traditions lies so readily on the surface of this record.

The petition should be dismissed for want of jurisdiction.

MR. JUSTICE ROBERTS joins in this opinion.

TOMKINS *v.* MISSOURI.

CERTIORARI TO THE SUPREME COURT OF MISSOURI.

No. 64. Argued December 12, 1944.—Decided January 8, 1945.

In a petition to the Supreme Court of Missouri for a writ of habeas corpus, the petitioner, confined in a state penitentiary for life upon his plea of guilty to a charge of murder in the first degree, alleged that he was not represented by counsel, that the court did not make an effective appointment of counsel, that he did not waive his constitutional right to counsel, that he was ignorant of his right to demand counsel, and that he was incapable adequately of making his own defense. The court allowed the petitioner to proceed *in forma pauperis* but denied the petition for failure to state a cause of action. *Held:*

1. The allegations of the petition are here assumed to be true. *Williams* v. *Kaiser, ante,* p. 471. P. 487.

2. A request for counsel by one accused of a capital offense, who is unable to employ counsel and incapable adequately of making his own defense, is unnecessary; it is the duty of the court in such case to appoint counsel. P. 487.

3. That the petition in such a case as this is not drawn with precision and clarity is not fatal, where the substance of the claim is plain. P. 487.

4. The nature of the offense charged against the petitioner—who could have been found guilty of murder in the first or second degree or of manslaughter, with varying penalties—emphasized the need of counsel. P. 488.

5. The petition sufficiently alleged a deprivation of the right to counsel in violation of the Fourteenth Amendment. *Powell* v. *Alabama,* 287 U. S. 45. P. 489.

Reversed.

CERTIORARI, 322 U. S. 725, to review an order denying a petition for a writ of habeas corpus.

Mr. John Raeburn Green, with whom *Mr. Keith L. Seegmiller* was on the brief, for petitioner.

Mr. Robert J. Flanagan, Assistant Attorney General of Missouri, with whom *Mr. Roy McKittrick,* Attorney General, was on the brief, for respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This case is a companion case to *Williams* v. *Kaiser, ante,* p. 471. It, too, is a petition for a writ of *habeas corpus* here on certiorari to the Missouri Supreme Court. It is alleged in the petition that petitioner in 1934 was charged with murder in the first degree, pleaded guilty to the charge, and was convicted and sentenced to the state penitentiary for life where he is presently confined. The petition was filed in 1944. The other salient facts alleged are as follows:

"The petitioner states that in the proceedings in said Circuit Court of Pemiscot County, Missouri, he was not represented by counsel, the Court did not make an effective appointment of counsel, the petitioner did not waive his constitutional right to the aid of counsel, and he was ignorant of his right to demand counsel in his behalf, and he was incapable adequately of making his own defense."

And he contends that he was deprived of counsel contrary to the requirements of the due process clause of the Fourteenth Amendment. Here, as in the *Williams* case, the Supreme Court of Missouri allowed petitioner to proceed *in forma pauperis* but denied the petition for the reason that it "fails to state a cause of action." The petition for *habeas corpus* was denied without requiring the State to answer or without giving petitioner an opportunity to

prove his allegations. And the allegations contained in the petition do not appear to be inconsistent with the recitals of the certified copy of the sentence and judgment which accompanied the petition and under which petitioner is confined. Hence, we must assume here, as in the *Williams* case, that the allegations of the petition are true.

Powell v. *Alabama,* 287 U. S. 45, 71, held that at least in capital cases "where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law." Under that test a request for counsel is not necessary.[1] One must be assigned to the accused if he is unable to employ one and is incapable adequately of making his defense.

The petition is not drawn with the desirable precision and clarity. But we can hardly demand of a layman and pauper who draws his petition behind prison walls the skill of one trained in the law. If we were to take that course, we would compound the injury caused by the original denial of counsel. A deprivation of the constitutional right of counsel should not be readily inferred from vague allegations. But where the substance of the claim is clear, we should not insist upon more refined allegations than paupers, ignorant of their right of counsel and incapable of making their defense, could be expected to supply.

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[1] As noted in the *Williams* case, the Missouri statute governing the appointment of counsel (Rev. Stat. 1939, § 4003) employs the language "arraigned upon an indictment for a felony." The prosecution in this case was upon an information. But it seems that the Supreme Court of Missouri applies the statute in that situation as well. See *State* v. *Terry,* 201 Mo. 697, 100 S. W. 432; *State* v. *Steelman,* 318 Mo. 628, 300 S. W. 743.

If this petition is read in that light, it satisfies the requirements of *Powell* v. *Alabama*. One who was not represented by counsel, who did not waive his right to counsel and who was ignorant of his right to demand counsel is one of the class which the rule of *Powell* v. *Alabama* was designed to protect. Certainly when we read these allegations with the further assertion in the record that petitioner was at no time prior to conviction allowed to consult with an attorney, the conclusion is irresistible that petitioner was unable to employ counsel either because he was without funds or because he was deprived of the opportunity.

The nature of the charge emphasizes the need for counsel. Under Missouri law one charged with murder in the first degree may be found guilty of that offense, of murder in the second degree, or of manslaughter. Rev. Stat. 1939, §§ 4376, 4844. The punishments for the offenses are different. §§ 4378, 4391. The differences between them are governed by rules of construction meaningful to those trained in the law but unknown to the average layman.[2] The defenses cover a wide range.[3] And the ingredients of the crime of murder in the first degree as distinguished from the lesser offenses are not simple but ones over which

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[2] In *State* v. *Burrell*, 298 Mo. 672, 680, 252 S. W. 709, it was held that "where there is willful killing with malice aforethought, that is, with malice and premeditation, but not deliberation, or in a cool state of blood, the offense is murder in the second degree. Nor can any homicide be murder in the second degree unless the act causing death was committed with malice aforethought, that is, with malice and premeditation. Where there is a willful killing without deliberation and not with malice aforethought, the offense is manslaughter."

[3] Self-defense and insanity are defenses. Rev. Stat. 1939, § 4049. Justifiable or excusable homicide is a defense (*id.* § 4381) as those terms are defined. *Id.* §§ 4379, 4380.

skilled judges and practitioners have disagreements.[4] The guiding hand of counsel is needed lest the unwary concede that which only bewilderment or ignorance could justify or pay a penalty which is greater than the law of the State exacts for the offense which they in fact and in law committed.

Here, as in the *Williams* case, the allegations of the petition may turn out to be wholly specious. But they are sufficient to establish a *prima facie* case of deprivation of the constitutional right. The other objections raised by Missouri have been answered in our opinion in the *Williams* case.

Reversed.

MR. JUSTICE ROBERTS and MR. JUSTICE FRANKFURTER think the writ should be dismissed for the reasons set forth in their dissent in *Williams* v. *Kaiser, ante,* p. 479.

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[4] "The law presumes the killing was murder in the second degree, in the absence of proof of attendant circumstances which tend to raise the killing to murder in the first degree or to reduce it to manslaughter." *State* v. *Henke,* 313 Mo. 615, 638, 285 S. W. 392. As to the necessity on certain evidence to give instructions on a lesser offense than murder in the first degree, see *State* v. *Warren,* 326 Mo. 843, 33 S. W. 2d 125; *State* v. *Wright,* 337 Mo. 441, 85 S. W. 2d 7; *State* v. *Jackson,* 344 Mo. 1055, 130 S. W. 2d 595.

WESTERN UNION TELEGRAPH CO. *v.* LENROOT, CHIEF OF CHILDREN'S BUREAU, UNITED STATES DEPARTMENT OF LABOR.

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

No. 49. Argued November 8, 9, 1944.—Decided January 8, 1945.

1. The legislative history of the child labor provisions of the Fair Labor Standards Act of 1938 is inconclusive as to whether the Act was intended to reach such child labor as is here involved. P. 500.
2. Section 12 (a) of the Fair Labor Standards Act of 1938, which provides that "no producer . . . shall ship or deliver for shipment in commerce any goods produced in an establishment . . . in or about which . . . any oppressive child labor has been employed . . .," *held* inapplicable to a company engaged in the transmission in interstate commerce of telegraph messages. P. 501 *et seq.*

   (a) Transmission of telegraph messages is not production of goods, within § 12 (a). As used in § 3 (j) of the Act, which defines "produced" as meaning, *inter alia*, "handled" or "worked on," the words "handled" and "worked on" include every kind of incidental operation preparatory to putting goods into the stream of commerce, but do not include such handling or working on as accomplishes the interstate transit or movement in commerce itself. P. 504.

   (b) The word "ship," used in the Act in its ordinary meaning, is inapplicable to telegraph messages. P. 506.

   (c) The recoil on the public interest which would ensue is persuasive that the Act did not contemplate application of its indirect sanctions to the telegraph company. P. 507.

141 F. 2d 400, reversed.

CERTIORARI, 322 U. S. 719, to review the affirmance of a decree of injunction, 52 F. Supp. 142, restraining alleged violations of the child labor provisions of the Fair Labor Standards Act of 1938.

Mr. Francis R. Stark for petitioner.

Mr. Douglas B. Maggs, with whom *Solicitor General Fahy* and *Messrs. Robert L. Stern* and *Archibald Cox* were on the brief, for respondent.

MR. JUSTICE JACKSON delivered the opinion of the Court.

A decree of the District Court in substance restrains the Western Union Telegraph Company from transmitting messages in interstate commerce until for thirty days it has ceased employment of messengers under the age of sixteen years and of certain others between the ages of sixteen and eighteen. This was thought to be required by the Fair Labor Standards Act of 1938. The Circuit Court of Appeals affirmed, and we granted certiorari. 322 U. S. 719.

The Western Union Telegraph Company collects messages in communities of origin and dispatches them by electrical impulses to places of destination where they are distributed. Messengers are employed in both collection and distribution. A little under 12 per cent of the messenger force is under sixteen years of age, and about 0.0033 per cent are from sixteen to eighteen years of age, engaged in the operation of motor vehicles, scooters, and telemotors. These messengers are employed only in localities where the law of the state permits it. It is not denied that both groups are engaged in oppressive child labor as defined by the Federal Act,[1] if it applies. Whether it does so apply is the only issue here.

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[1] " 'Oppressive child labor' means a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer (other than a parent or a person standing in place of a parent employing his own child or a child in his custody under the age of sixteen years in an occupation other than manufacturing or mining) in any occupation, or (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Chief of the Children's Bureau in the Department of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being . . ." 29 U. S. C. § 203 (l), June 25, 1938, c. 676, § 3 (l), 52 Stat. 1061.

I

It is conceded that the Act does not directly prohibit the employment of these messengers, because it contains no prohibition against employment of child labor in conducting interstate commerce.[2] It is conceded, too, that language appropriate directly to forbid this employment was proposed to Congress and twice rejected.

The major events of the recorded legislative history of this Act so far as relevant were as follows: After the President's labor message of May 24, 1937 (House Doc. No. 255, 75th Cong., 1st Sess., p. 2) reminded Congress that "A self-respecting and self-supporting democracy can plead no justification for the existence of child labor," bills carefully drawn to carry out his recommendations were introduced in the Senate by Senator Black and in the House by Representative Connery. These bills expressly and comprehensively prohibited the employment of child labor either in interstate commerce or in production of goods intended for shipment in interstate commerce, as well as prohibiting shipment of goods made by child labor.[3] When the Black bill came to vote in the

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[2] The Act provides: "After the expiration of one hundred and twenty days from the date of enactment of this Act, no producer, manufacturer, or dealer shall ship or deliver for shipment in commerce any goods produced in an establishment situated in the United States in or about which within thirty days prior to the removal of such goods therefrom any oppressive child labor has been employed . . ." § 12 (a), 29 U. S. C. § 212 (a).

[3] "Sec. 7. It shall be unlawful for any person, directly or indirectly—

"(1) to transport or cause to be transported in interstate commerce, or to aid or assist in transporting, or obtaining transportation in interstate commerce for, or to ship or deliver or sell in interstate

Senate, however, all of its child-labor provisions were stricken, and the provisions of another bill recommended by the Committee on Interstate Commerce were substituted.[4] This prohibited the shipment in interstate com-

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commerce, or to ship or deliver or sell with knowledge that shipment or delivery or sale thereof in interstate commerce is intended, any unfair goods; or

"(2) to employ under any substandard labor conditions any employee engaged in interstate commerce or in the production of goods intended for transportation or sale in violation of clause (1) of this section." This was the provision in the bill S. 2475 as reported, respectively, by the Senate Committee on Education and Labor, July 6, 1937, and by the House Committee on Labor, August 6, 1937. "Unfair goods" was defined to mean goods produced by any substandard labor condition, and the latter was defined to include child labor. §§ 2 (a) (11) and (15).

[4] This was S. 2226, reported in Sen. Rep. No. 726, 75th Cong., 1st Sess. It was incorporated into the Black bill July 31, 1937, 81 Cong. Rec. 7949–51. It provided: "Sec. 4 [§ 27 in the amended Black bill]. It shall be unlawful for any person who—

"(a) has produced goods, wares, or merchandise in any State or Territory, wholly or in part through the use of child labor, on or after January 1, 1938; or

"(b) has taken delivery of such goods, wares, or merchandise in any State or Territory with notice of their character whether by purchase or on consignment, as commission merchant, agent for forwarding or other purposes, or otherwise,

to transport or cause to be transported, in any manner or by any means whatsoever, or aid or assist in obtaining transportation for or in transporting such goods, wares, or merchandise in interstate or foreign commerce or to sell such goods, wares, or merchandise for shipment in interstate or foreign commerce or with knowledge that shipment thereof in interstate or foreign commerce is intended." Other provisions subjected child-labor-made goods to the laws of the states into which they were shipped regardless of their interstate character, forbade transportation into states in violation of their laws, and forbade shipment in interstate commerce of goods not labelled

merce of goods made by child labor, but it did not prohibit the use of it in carrying on the commerce itself. Thus the Senate deleted a direct prohibition of the employment under question here. But the House, in turn, struck out all of the child labor provisions of the Senate bill and substituted those of the Connery bill,[5] which was a counterpart of the Black bill. This was much amended, but as passed at length it contained a provision forbidding child labor in interstate commerce "in any industry affecting commerce" and a prohibition of shipment of child-labor-made goods.[6] The Senate, however, did not agree to the House bill, but meanwhile had passed as a separate measure its own child-labor bill as recommended by the Interstate Commerce Committee.[7] This did not prohibit child labor in interstate commerce. In this posture the Fair Labor Standards bill went to conference. The Conference Report says that the Committee "adopts the child labor provisions of the House amendment, with one exception. In view of the omission from the conference agreement of the principle of section 6 of the House

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as to their child-labor character. The bill represented the view that several methods of circumventing *Hammer* v. *Dagenhart* should be tried at the same time, in case any should be held invalid.

[5] See S. 2475 as reported by House Committee on Labor, August 6, 1937, H. R. Rep. 1452, 75th Cong., 1st Sess.

[6] "Sec. 10. (a). No producer, manufacturer, or dealer shall ship or deliver for shipment in commerce any goods produced in an establishment situated in the United States in or about which within 30 days prior to the removal of such goods therefrom any oppressive child labor has been employed . . .

"(b) No employer engaged in commerce in any industry affecting commerce shall employ any employee under any oppressive child-labor condition." 83 Cong. Rec. 7441; passed, *id.* at 7450 (75th Cong., 3d Sess.).

[7] S. 2226, identical with the child-labor provisions previously incorporated by the Senate in the Black bill in lieu of the latter's child-labor provisions. See note 4, *supra*. 81 Cong. Rec. 9320.

amendment, subsection (b) of section 10 of the House amendment has been omitted." [8] The formula covering every employer "in commerce in an industry affecting commerce" had been employed in the wage and hour as well as the child-labor provisions of the House bill, and § 6 conferred on the Secretary of Labor the power to decide whether an industry was one "affecting commerce." With the elimination of this delegation to the Secretary, the formula was changed in the wage and hour provisions, making them apply to "every employee engaged in commerce or in the production of goods for commerce." Instead of making a corresponding change in the child-labor section, the conference committee dropped the whole clause. No reason for this different treatment of the child-labor section was given.

No controversy appears to have arisen on the floor of Congress as to inclusion of a direct prohibition applicable to interstate commerce. On the contrary, the advocates of the different versions passed by the Senate and House seem to have overlooked the fact that one contained the prohibition and the other did not; controversy was chiefly over whether the Act should simply re-enact the method of the 1916 Act, which had been held unconstitutional, or should hedge by including labelling and other remedies which might have a better chance of being upheld, whether state-issued age certificates should be utilized, how much discretion should be vested in the Department of Labor, and whether particular goods only or all goods from a particular establishment should be excluded from commerce.[9] So far as coverage was concerned, all proponents were aware that any of the suggested versions

[8] Conference Report, H. R. Rep. No. 2738, 75th Cong., 3d Sess., 32.

[9] See 82 Cong. Rec. 1411–14, 1597–98, 1691–95, 1780–83, 1822; 83 Cong. Rec. 7399–7400.

of legislation would reach only a small fraction of existing child labor,[10] and the chief concern seems to have been

[10] See, *e. g.*, Joint Hearings on Fair Labor Standards, Senate Committee on Labor and House Committee on Education and Labor, 75th Cong., 1st Sess., 382–84; Hearings on Regulation of Child Labor, Senate Committee on Interstate Commerce, 75th Cong., 1st Sess., 60; remarks of Representative Schneider of the House Committee on Education and Labor, 82 Cong. Rec. 1823, 83 Cong. Rec. 7401. The Chief of the Children's Bureau of the Department of Labor presented to the Senate Interstate Commerce Committee figures, based on the 1930 Census, showing the distribution by occupations of child workers between 10 and 15 years:

Occupation	*Number*	*Per cent*
Agriculture	469,497	70.4
Manufacturing and mechanical industries	68,266	10.2
Trade	49,615	7.4
Domestic and personal service	46,145	7.0
Clerical occupations	16,803	2.5
Transportation	8,717	1.3
Extraction of minerals	1,184	0.2
Other (includes public and professional service, forestry, and fishing)	6,891	1.0

Hearings, *supra*, p. 60.

Comparable figures based on the 1940 Census (but for the age group 14–17) are as follows:

Occupation	*Number*	*Per cent*
Agriculture, forestry, fishing	459,966	54.3
Mining	2,769	0.3
Construction	10,476	1.2
Manufacturing	104,023	12.3
Transportation, communication, and other public utilities	12,103	1.4
Trade	109,687	13.0
Personal services	109,628	13.0
Amusement, recreation, and related services	13,013	1.6
Professional and related services	12,128	1.4
Other	12,944	1.5

Pamphlet, *1940 Census Data on Employment and School Attendance of Minors 14 through 17 Years of Age* (Dept. of Labor, Children's Bureau, 1943) 14.

Since agriculture was expressly excluded (and this was true of all

to eliminate child labor in mining and manufacturing industries shipping goods in interstate commerce,[11] which

versions of child-labor legislation reported to the House and Senate), the child labor clearly covered by the "producing goods for commerce" formula was at most 12–15%, and most of the remainder was in occupations clearly not covered by that formula, such as local retailing and service industries. In this light, the omission of the one or two percent in nonproducing interstate commerce industries, even if deliberate, would not have been incongruous.

The following exchange during the Senate Interstate Commerce Committee hearings is also of interest, in view of the Senate's rejection of the Black-Connery child-labor provisions in favor of the Commerce Committee proposal:

"Miss LENROOT. . . . There has been a decided shift in the employment of children between the ages of 14 and 16 years from factories to miscellaneous occupations in trade and service industries, which would not be covered by any of the bills now pending before this committee, and which involve very often employment of children for long hours at very low wages.

The CHAIRMAN. Let me ask you this question right there: Do you think newsboys should be prohibited from working? I propound that question to you because it has been put up to me.

Miss LENROOT. I think under any powers that I can see that Congress has or that it may be construed to have now, it would be very difficult if not impossible to bring newsboys in.

The CHAIRMAN. But do you think they should be prohibited from such employment?

Miss LENROOT. I think if Congress had broad power to legislate on the subject of child labor it would be desirable to work out some standard which would be somewhat different from factory employment.

Senator MINTON. In other words, you think it is improper to use newsboys on the streets to sell newspapers?

Miss LENROOT. Under a certain age, and under certain conditions; yes. I would make the age somewhat lower than the age for factory employment, however."

Hearings, *supra*, p. 43.

[11] Thus Senator Wheeler, one of the authors of the measure adopted by the Senate, said, "We are trying to give you something of a practical nature that can be passed, that will perhaps not go as far as some of us would like to see it go, but something which we can uphold as constitutional, that will affect child labor, stop it, and prevent it ef-

was the most objectionable use of child labor.[12] This had been the only object of the earlier legislation which had been held unconstitutional; neither the Act of 1916,[13] held unconstitutional in *Hammer* v. *Dagenhart*, 247 U. S. 251, nor the Act of 1919,[14] held unconstitutional in *Bailey* v. *Drexel Furniture Co.*, 259 U. S. 20, had prohibited child labor in interstate commerce, but both applied only to child labor in mines, quarries, mills, canneries, workshops, factories, and manufacturing establishments.

Both parties contend on the basis of legislative history that the omission of a direct prohibition was deliberate; the Company arguing that it was unwanted, the Government that it was believed superfluous. We think that dis-

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fectively in the factories, particularly in the sweatshops and southern textile mills." "We want to keep them out of the factories where they are being exploited and are in competition with men and in competition with women who need work." Joint Hearings, *supra*, note 10, pp. 33–34, 36. Representative Schneider, who was apparently in charge of the child-labor provisions of the Labor Committee's bill on the floor, reminded the members that although the bill went as far as it could, "the child labor that is used *in the production of articles for interstate commerce* constitutes only 25 percent of nonagricultural child labor that exists today," and hence ratification of the child-labor amendment was still essential. 82 Cong. Rec. 1823 (italics supplied). And Senator Thomas, who was one of the Senate managers in the conference which produced the final bill, interpreted the result of the compromise as follows in his report to the Senate: "Neither House nor Senate yielded its convictions, but both Houses obtained their common objective, which was to abolish traffic in interstate commerce in the products of child labor and in the products of underpaid and overworked labor." 83 Cong. Rec. 9163.

[12] See generally the hearings preceding the enactment of the Child Labor Act of 1916. Hearings on H. R. 8234, House Committee on Labor, 64th Cong., 1st Sess.; Hearings on H. R. 8234, Senate Committee on Interstate Commerce, 64th Cong., 1st Sess.

[13] Act of Sept. 1, 1916, c. 432, § 1, 39 Stat. 675.

[14] Act of Feb. 24, 1919, c. 18, § 1200, 40 Stat. 1057, 1138.

passionate reading will not disclose what either advocate sees in this history.

It is nowhere stated that Congress did, and no reason is stated or is obvious why Congress should, purposely leave untouched child labor employed directly in interstate commerce. It is true that no opponent of child labor appeared to want to strike at all of it. Agriculture, which accounts for from one-half to two-thirds of it, was expressly exempted. Child actors, almost negligible in number, were exempted. Telegraph messengers, so far as the evidence reveals, although a familiar form of child labor, were in no one's mind in connection with this prohibition, although the peculiarities of that service were recognized in allowing them under certain conditions to be employed at lower than minimum wages under the Act.[15] But whether a majority of Congress, had this question come to its attention, would have regarded messenger service as more like agriculture in being a relatively inoffensive type of child labor or as more like mining and manufacturing, considered more harmful, is a question on which we have no information whatever.

On the other hand, we find nothing to sustain the Government's position that "the omission resulted from the realization that the indirect sanction of forbidding interstate shipment, coupled with broad statutory definitions" would be construed to eliminate child labor from interstate commerce. No such realization appears in any com-

[15] "The Administrator, . . . shall by regulations or by orders provide for (1) the employment of learners, of apprentices, and of messengers employed exclusively in delivering letters and messages, . . . at such wages lower than the minimum wage applicable under section 6 and subject to such limitations as to time, number, proportion, and length of service as the Administrator shall prescribe . . ." § 14, 29 U. S. C. § 214.

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mittee report, in the speech of any sponsor of the bills, nor in debate either on the part of those supporting or of those opposing the bills. The only explanation advanced for the hypothesis that Congress deliberately chose indirection instead of forthright prohibition is an assumption that there were doubts of its constitutional power to enact direct legislation. It is true that in *Hammer* v. *Dagenhart,* 247 U. S. 251, this Court had held that an earlier attempt to exclude from interstate commerce products of mines and mills that employed child labor was an invalid attempt to reach employment matters within the control of the states. But even the prevailing opinion in that case expressly conceded that Congress had ample power to control the means by which interstate commerce is carried on. 247 U. S. at 272. There was never a holding or an intimation in this or any other decision of this Court that a direct prohibition of child labor in interstate commerce would not be sustained. Restrictive interpretation in this field reached its maximum in *Hammer* v. *Dagenhart.* It was decided by a closely divided Court and at the time this bill was pending it was undermined by later decisions and was thought to be marked, even then, for consignment to the limbo of overruled cases, a prediction that was shortly fulfilled. *United States* v. *Darby,* 312 U. S. 100. Moreover, the purpose of the proponents of this Act to challenge the decision in *Hammer* v. *Dagenhart* and require this Court to re-examine its soundness is manifest in many ways. It can hardly be supposed that Congress, while reasserting a power once denied to it, feared to exercise directly a power often conceded and never denied.

Our search of legislative history yields nothing to support the Company's contention that Congress did not want to reach such child labor as we have here. And it yields no more to support the Government's contention that Congress wanted to forego direct prohibition in favor of

indirect sanctions. Indeed, we are unable to say that elimination of the direct prohibitions from the final form of the bill was purposeful at all or that it did not happen from sheer inadvertence, due to concentration on more vital and controversial aspects of the legislation. The most that we can make of it is that no definite policy either way appears in reference to such an employment as we have in this case, no legislative intent is manifest as to the facts of this case which we should strain to effectuate by interpretation. Of course, if by fair construction the indirect sanctions of the Act apply to this employment, courts may not refuse to enforce them merely because we cannot understand why a simpler and more direct method was not used. But we take the Act as Congress gave it to us, without attempting to conform it to any notions of what Congress would have done if the circumstances of this case had been put before it.

II

The Government brought this action to reach indirectly child labor in interstate commerce by bringing it under the prohibition of § 12 (a) of the Act, which so far as material reads "no producer, manufacturer, or dealer shall ship or deliver for shipment in commerce any goods produced in an establishment situated in the United States in or about which within thirty days prior to the removal of such goods therefrom any oppressive child labor has been employed." Violation of this command is a crime (§§ 15 and 16) punishable by a fine and imprisonment, and threatened violations may be restrained by injunction. The Government in this case sought injunction. Its complaint charges the Western Union with a violation in that "defendant has been engaged in shipping telegraph messages in interstate commerce and in delivering telegraph messages for shipment in interstate commerce, the said goods having been produced in its said establishments in

or about which the aforesaid minors were employed, suffered, and permitted to work within thirty (30) days prior to the removal of said goods therefrom."

Contention that this section is applicable to the Western Union is predicated on three steps, viz.: telegrams are "goods" within its meaning; the Company "produces" these goods within the Act because it "handles" them; and transmission is "shipment" within its terms. If it can maintain all three of these positions, the Government is entitled to an injunction; if it fails in any one, admittedly the effort to bring the employment under the Act must fail.

The Government says messages are "goods" because the Act defines "goods" as therein used to include among other things "articles or subjects of commerce of any character." § 3 (i). Of course, statutory definitions of terms used therein prevail over colloquial meanings. *Fox* v. *Standard Oil Co.,* 294 U. S. 87, 95. It was long ago settled that telegraph lines when extending through different states are instruments of commerce and messages passing over them are a part of commerce itself. *Western Union Telegraph Co.* v. *James,* 162 U. S. 650, 654. That "ideas, wishes, orders, and intelligence" are "subjects" of the interstate commerce in which telegraph companies engage has also been held. *Western Union Tel. Co.* v. *Pendleton,* 122 U. S. 347, 356; cf. *Associated Press* v. *Labor Board,* 301 U. S. 103, 128. It is unnecessary to decide whether electric impulses into which the words of the message are transformed are "goods" within the Act (cf. *Utah Power & Light Co.* v. *Pfost,* 286 U. S. 165; *Fisher's Blend Station* v. *State Tax Commission,* 297 U. S. 650; *Electric Bond & Share Co.* v. *Securities & Exchange Commission,* 303 U. S. 419), since the complaint is not based on "shipment" of impulses as "goods" but only of messages. We think telegraphic messages are clearly "subjects of com-

merce" and hence that they are "goods" under this Act, as alleged in the complaint.

The next inquiry is whether the Western Union Telegraph Company is a producer of these goods within the Act. Congress has laid down a definition that as used in the Act " 'produced' means produced, manufactured, mined, handled, or in any other manner worked on . . ." § 3 (j). The Company, says the Government, not only "handles" the message but "works on" it.

The Government contends that in defining "produced" the statute intends "handled" or "worked on" to mean not only handling or working on in relation to producing or making an article ready to enter interstate transit, but also includes the handling or working on which accomplishes the interstate transit or movement in commerce itself. If this construction is adopted, every transporter, transmitter, or mover in interstate commerce is a "producer" of any goods he carries. But the statute, while defining "produced" to mean "handled" or "worked on" has not defined "handled" or "worked on." These are terms of ordinary speech and mean what they mean in ordinary intercourse in this context. They serve a useful purpose when read to relate to all steps, whether manufacture or not, which lead to readiness for putting goods into the stream of commerce. One who packages a product, or bottles a liquid, or labels, or performs any number of tasks incidental to preparing for shipment might otherwise escape the Act, for in a sense he neither manufactures, produces, or mines the goods. We are clear that "handled" or "worked on" includes every kind of incidental operation preparatory to putting goods into the stream of commerce.

If we go beyond this and assume that handling for transit purposes is handling in production, we encounter results which we think Congress could not have intended.

The definitions of this Act apply to the wage and hour provisions, as well as to the child labor provisions. Section 15 (a) makes it unlawful to transport or ship goods in the production of which any employee was employed in violation of the wage and hour provisions. But it makes this exception: "except that no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods *not produced by such common carrier.*" (Italics supplied.) This recognizes a distinction between handling in transportation and producing, which is entirely put to naught by the Government's contention that by definition everyone who handles goods in carriage is thereby made a producer. The exception then is as if it read "the Act shall impose no liability on a common carrier for carrying goods that it does not carry." One would not readily impute such an absurdity to Congress; nor can we assume, contrary to the statute, that "produced" means one thing in one section and something else in another. To construe those words to mean that handling in carriage or transmission in commerce makes one a producer makes one of these results inevitable. Congress, we think, did not intend to obliterate all distinction between production and transportation. Its artificial definition, if construed to mean that "handling" and "worked on" catches up into the category of production every step in putting the subject of commerce in a state to enter commerce, is a sensible and useful one, not at odds with any other section of the Act. We think the Government has not established its contention that the Western Union is a "producer" of telegraph messages.

A third inquiry remains. Has the Company engaged in "shipping telegraph messages in interstate commerce and in delivering telegraph messages for shipment" as alleged? The learned trial court said, "More troublesome

is the question whether the defendant 'shipped' goods in commerce." But he concluded on the basis of our decisions that the defendant was a "carrier of messages" to be compared to a railroad as a "carrier of goods," citing *Telegraph Co.* v. *Texas,* 105 U. S. 460, 464, *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.,* 96 U. S. 1. He thought "ship" synonymous with "transport" and "convey" and hence held that the Company was "shipping" messages.

The Circuit Court of Appeals, although it sustained the injunction, took a contrary view of the nature of the enterprise. It analyzed the technology of transmitting messages. The message, it said, never leaves the originating office. It is only a text for sending electrical impulses "which are not only not the sender's message, but would be totally incomprehensible to him or to the addressee, if either could perceive them." It said, "From the foregoing it is at once apparent that there is not the least similarity between what the defendant does and the transportation of goods by a common carrier. Thus it cut the ground from under the Government's only allegation of violation: i. e., that the Company is engaged in "shipping" messages. It advanced this theory, apparently, to answer the Company's contention that if it was likened to a carrier, as the District Court thought, it was entitled to the benefit of the carrier's exemption in § 15 (a) (1). We do not think it is necessary for us to resolve the interesting but baffling inquiry as to precisely what, if anything, moves across state lines in the telegraphic process. In its practical aspects, which concern the public, transmission of messages is too well known to require analysis; and in its scientific aspects, which interest the physicist, it is too little known to permit of it.

The statute applies the indirect sanctions of the Act only to those who "ship" subjects of commerce. It does not, however, define "ship." The Government says, "The

verb 'ship' is an imprecise word meaning little more than to send or to transport." The term, not being artificially defined by statute, is from the ordinary speech of people. Its imprecision to linguists and scholars may be conceded. But if it is common in the courts, the market places or the schools of the country to speak of shipping a telegram or receiving a shipment of telegrams, we do not know of it, nor are examples of such usage called to our attention. Nor, if one departs from the complaint in the case and adopts the theory of the Court of Appeals, do we think either scientist or layman would ever speak of "shipping" electrical impulses. The fact is that to sustain the complaint we must supply an artificial definition of "ship," one which Congress had power to enact, but did not. We do not think "ship" in this Act applies to intangible messages, which we do not ordinarily speak of as being "shipped."

Another consideration convinces us that this Act did not contemplate its application by indirection to such a situation as we have in hand. Its indirect sanctions are well adapted to the producer, miner, manufacturer, or handler in preparation for commerce. They become clumsy and self-defeating when applied to telegraph companies, railroads, interstate news agencies, and the like, as this decree demonstrates. The Western Union is not forbidden by the decree to employ child labor, nor could it be, for it is not so forbidden by the Act. As construed by the courts below, what is prohibited is the sending of telegrams—so long as it employs child labor and for a period of thirty days after it quits. This, as the Company observes, is a sanction that the Court could not permit to become effective. A suspension of telegraphic service for any period of time would be intolerable. Of course, the Government says, the Company could escape its effect except for the thirty-day period by discharging some

twelve per cent of its messengers, who are under age but whom neither the Court nor Congress has forbidden it to employ. It also suggests that the thirty-day period may be absorbed in delays. Or, it says, the District Court or Circuit Court of Appeals "may properly stay the injunction further in order to permit the transmission of messages until petitioner has a reasonable time to comply."

Of course literal compliance could be made only by ceasing to send messages, since that is all the decree does or could command. But the Company could and probably would avoid doing what the decree orders, by doing what it does not and cannot order: viz., discharging the under-age part of its messenger force. This, however, would leave the thirty-day period after our mandate becomes final and goes down, during which the courts must stay the force of the injunction, either candidly or by dilatory tactics, or the Company, by continuing service to the public, would be in contempt. Even if this were done, courts cannot stay the provisions under which the sending of messages during such period is made criminal. We may suppose the Government would not actually prosecute. But that is only because the sanctions of the Act, if applied to such a situation, are so impractical that a violation adjudged by us to be proven by stipulation of the parties as to the facts would be waived. We think if Congress contemplated application of this Act to the Western Union it would have provided sanctions more suitable than to forbid telegrams to be sent by the only Company equipped on a nation-wide scale to serve the public in sending them. Nor will we believe without more express terms than we find here that Congress intended the courts to issue an injunction which as a practical matter they would have to let become a dead letter, or enforce at such cost to the public, if a defendant proved

stubborn and recalcitrant. If the indirect sanctions of this Act were literally to be applied to great agencies of transportation and communication, the recoil on the public interest would be out of all proportion to the evil sought to be remedied.

However, the indirect sanction of cutting one's goods off from the interstate market is one which can be applied to producers, as we have defined them herein, effectively and without injury to the public interest. If such a producer using child labor is refused facilities to transport his goods, competitors usually come in, needs are still supplied, and only the offender suffers. These indirect sanctions can practically and literally be applied to the miner and the manufacturer with no substantial recoil on the public interest, and with no gestures by the courts that they cannot follow through to punish disobedience.

Ascertainment of the intention of Congress in this situation is impossible. It is to indulge in a fiction to say that it had a specific intention on a point which never occurred to it. Had the omission of a direct prohibition of this employment been called to its attention, it might well have supplied it, for any reason we can see. Congress of course has the right to be indirect where it could be direct and to be obscure and confusing where it could be clear and simple. But had it determined to reach this employment, we do not think it would have done so by artifice in preference to plain terms. It is admitted that it is beyond the judicial power of innovation to supply a direct prohibition by construction. We think we should not try to reach the same result by a series of interpretations so far-fetched and forced as to bring into question the candor of Congress as well as the integrity of the interpretative process. After all, this law was passed as the rule by which employers and workmen must order their daily lives. To translate this Act by a process of inter-

pretation into an equivalent of the bills Congress rejected is, we think, beyond the fair range of interpretation. Declining that, we cannot sustain the Government's bill of complaint.

Reversed.

MR. JUSTICE MURPHY, dissenting.

By reading into the Fair Labor Standards Act an exception that Congress never intended or specified, this Court has today granted the Western Union Telegraph Company a special dispensation to utilize the channels of interstate commerce while employing admittedly oppressive child labor. Such a result is reached, to borrow the words of the majority opinion, "by a series of interpretations so far-fetched and forced as to bring into question the candor of Congress as well as the integrity of the interpretative process."

The opinion of the Court demonstrates that the legislative history of the Fair Labor Standards Act is inconclusive insofar as the failure to insert a provision directly prohibiting child labor in interstate commerce is concerned. But that factor is neither determinative nor even significant in the setting of this case. The issue is not whether the child labor provisions of § 12 (a) apply to a company solely engaged in interstate commerce or in the transporting of goods in such commerce. Rather the crucial problem is whether Western Union, in preparing messages for transmission in interstate commerce, may fairly be said to be a "producer" of "goods" which it "ships" in interstate commerce so as to come within the purview of § 12 (a). That Western Union may also be the interstate transmitter of messages is beside the point; it is enough if it is a producer of goods destined for interstate shipment. Indeed, § 15 (a) (1) expressly envisages just such a situation. It provides in part that no common carrier shall be liable under this Act "for the transporta-

tion in commerce in the regular course of its business of any goods not produced by such common carrier," thereby recognizing that if a carrier is actually the "producer" of the "goods" it transports it may be visited with the liabilities of § 12 (a).

In approaching the problem of whether Western Union is a producer of goods shipped in interstate commerce we should not be unmindful of the humanitarian purposes which led Congress to adopt § 12 (a). Oppressive child labor in any industry is a reversion to an outmoded and degenerate code of economic and social behavior. In the words of the Chief Executive, "A self-supporting and self-respecting democracy can plead no justification for the existence of child labor. . . . All but the hopelessly reactionary will agree that to conserve our primary resources of man power, Government must have some control over . . . the evil of child labor. . . ." Message of the President to Congress, May 24, 1937, House Doc. No. 255 (75th Cong., 1st Sess.) p. 2. Congress sought in § 12 (a) to translate these sentiments from rhetoric to law. That it may not have done so to the full limits of its constitutional power is not of controlling significance here. It matters only that courts should not disregard the legislative motive in interpreting and applying the statutory provisions that were adopted. If the existence of oppressive child labor in a particular instance falls within the obvious intent and spirit of § 12 (a), we should not be too meticulous and exacting in dealing with the statutory language. To sacrifice social gains for the sake of grammatical perfection is not in keeping with the high traditions of the interpretative process.

The language of § 12 (a), when viewed realistically and with due regard for its purpose, compels the conclusion that Western Union has been guilty of a violation of the child labor provisions. Oppressive child labor condi-

tions are admitted and the only issue concerns the application of the words "goods," "producer" and "ships" to the activities of Western Union.

1. The opinion of the majority concedes that telegraphic messages are "subjects of commerce," *Gibbons* v. *Ogden,* 9 Wheat. 1, 229–230, and hence are "goods" as defined in § 3 (i) of the Act.

2. The majority holds, however, that Western Union is not a "producer" of goods, even though the term "produced" is defined in § 3 (j) to include "handled, or in any manner worked on." It further holds that the words "handled" or "worked on" refer only to incidental operations preparatory to putting goods in the stream of commerce and that they cannot relate to a "handling" or "working on" which accomplishes the interstate movement in commerce itself (which is said to characterize Western Union's activities). Even if we assume that this distinction is correct, however, it does not preclude Western Union from being described as a "producer." Contrary to the view expressed in the majority opinion, the Government does not ground its case in this respect on a claim that mere transportation of goods by a carrier such as Western Union constitutes a "handling" or "working on" so as to make that carrier a producer. The contention, rather, is that Western Union employees, *prior to the introduction of the messages into interstate commerce,* "work on" and "handle" the messages. And that contention would seem to be justified by the facts.

Before the messages actually move in commerce, Western Union employees aid in the composition of the messages, write them on blanks, mark the written messages, transform them into electric impulses and perform numerous other incidental tasks. In a very real and literal sense, therefore, they "handle" and "work on" a message before it enters the channels of interstate commerce. The unique-

ness of Western Union insofar as it acts also as the interstate carrier of these messages does not negative the fact that it actually processes and hence "produces" the messages as a preface to that interstate transit.

3. Finally, the majority does not think that the verb "ship" is applicable to the transmission either of electrical impulses or intangible messages and hence Western Union does not "ship" goods in commerce within the meaning of § 12 (a). As a matter of linguistic purism, this conclusion is not without reasonableness. But proper respect for the legislative intent and the interpretative process does not demand fastidious adherence to linguistic purism. This Court does not require that Congress spell out all types of "goods" or "subjects of commerce" that move in interstate commerce; no more should it require that Congress spell out every verb that may be in usage as to various goods or subjects of commerce. If the verb actually used by Congress may fairly be interpreted to cover the particular situation in a manner not at variance with the intent and spirit of the statute, no sound rule of law forbids such an interpretation.

As a matter of fact, it is unnecessary to strain reality in order to apply the verb "ship" to the transmission of telegraph messages. The verb is defined by competent authority to mean "to transport, or commit for transportation." Webster's New International Dictionary (2d Ed.). This Court itself has referred to telegraph companies as engaged in "transportation" of messages. *Western Union Tel. Co.* v. *Texas,* 105 U. S. 460, 464. Since messages are "goods" and since Western Union is the "producer" of them, there is no difficulty in saying that it "ships" or "transports" the messages in commerce when its employees send them across state lines.

Such an interpretation and application of the clear statutory words are not only realistic but are in obvious

accord with the statutory policy of eliminating oppressive child labor in industries transporting goods and subjects of commerce across state lines. The natural ease with which these words fit the activities of Western Union adds weight to the conclusion that § 12 (a) covers just such a situation as this. There is nothing in the statute or in its legislative background to suggest that telegraph companies are exempt and the consistent administrative attitude has been that no such exemption exists. Child Labor Regulation No. 3, issued by the Chief of the Children's Bureau, U. S. Department of Labor, May 8, 1939; Wage and Hour Field Instructions, June 4, 1942. It is indisputable that the evils of oppressive child labor allow no distinction in favor of the employment of telegraph messengers of tender years. Cf. *United States* v. *Rosenwasser,* 323 U. S. 360. Indeed, the reference to messengers in § 14 of the Act is evidence of an awareness by Congress that the Act would reach such persons. If Congress found it necessary to provide in § 14 for certain exceptions as to minimum wages for messengers, it seems clear that Congress thought that all other appropriate provisions of the Act applied to all messengers absent specific exceptions. Moreover, even § 14 makes no distinction between messengers working in and about manufacturing establishments shipping goods in commerce, who presumably still come within the provisions of § 12 (a) under the majority's view, and those employed by telegraph companies. Under these circumstances we are not justified in delineating an exception to § 12 (a) that Congress itself did not see fit to make explicitly.

A word need be said about the Court's fear of enforcing § 12 (a) against Western Union. Pursuant to the Congressional mandate, the trial court enjoined Western Union from transmitting or delivering for transmission in commerce "telegraph or other messages or any other

goods" produced by it in any establishment in or about which within 30 days prior to the transmission there shall have been employed any oppressive child labor. It is said, however, that this is a sanction that we dare not permit to become effective since the suspension of telegraphic service for 30 days would be intolerable. Such a sanction is said to be well adapted to the producer, miner, manufacturer or handler but clumsy and self-defeating when applied to telegraph companies, railroads and the like. Convinced by these considerations that the Act did not contemplate its application to this situation, the Court proceeds to carve out a judicial exception to § 12 (a) for all interstate carriers.

However much we may dislike the imposition of Congressional sanctions against a particular industry or field of endeavor, the judicial function does not allow us to disregard that which Congress has plainly and constitutionally decreed and to formulate exceptions which we think, for practical reasons, Congress might have made had it thought more about the problem. To read in exceptions based upon the nature or importance of the particular industry or corporation is dangerous precedent. If the suspension of telegraphic service for 30 days is so intolerable as to justify lifting the burden of § 12 (a) from the shoulders of Western Union, can it not be argued with equal fervor that a 30-day injunction against interstate shipments by an airplane manufacturer, a munitions plant or some other industry vital to a war or peace time economy would be likewise intolerable? What valid distinction in this respect is there between interstate carriers and manufacturers or producers? Moreover, are we to examine the competitive situation or degree of importance of a particular company to determine the amount of intolerableness which a suspension of interstate transportation might engender? These and countless other legis-

lative problems present themselves when we embark upon a course of fashioning exceptions to a statute according to our own conceptions of appropriateness of the sanctions of an Act. Such a course is an open invitation to wholesale veto of valid and reasonable legislative provisions by means of judicial refusal to apply statutory enforcement measures. Adherence to the sound rule that inequities and hardships arising from statutory sanctions are for Congress rather than the courts to remedy by way of amendment to the statute is desirable and necessary in such a situation.

We are charged with the duty of interpreting and applying acts of Congress in accordance with the legislative intent. Courts are not so impotent that they cannot perform that duty and, at the same time, grant stays or other appropriate relief in the public interest should the occasion demand it. See *Standard Oil Co.* v. *United States,* 221 U. S. 1, 81; *United States* v. *American Tobacco Co.,* 221 U. S. 106, 187, 188. Thus if the injunction is granted here against Western Union, we will have vindicated to that extent the public policy against oppressive child labor. If a 30-day suspension of telegraph messages would unduly harm the public interest, a stay of the mandate or of the injunction can be granted until at least 30 days have elapsed during which no oppressive child labor has been employed by Western Union. Thus by fashioning remedies through injunctions and stays we can aid in the elimination of oppressive child labor without undue hardship on the public. This can and should be done without abdicating our judicial function and assuming the role of the legislature.

MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS and MR. JUSTICE RUTLEDGE join in this dissent.

THOMAS *v.* COLLINS, SHERIFF.

APPEAL FROM THE SUPREME COURT OF TEXAS.

No. 14. Argued May 1, 1944. Reargued October 11, 1944.—Decided January 8, 1945.

1. A statute of Texas requires labor organizers to register with and procure an organizer's card from a designated state official before soliciting memberships in labor unions. While a state court order restraining the appellant from violating the statute was in effect, he made a speech before an assemblage of workers. At the end of his speech he urged his hearers generally to join a union, and also asked an individual by name to become a member. Appellant was sentenced to a fine and imprisonment for contempt. *Held:*

   (a) Upon the record, the penalty for contempt must be treated as having been imposed in respect of both the general and the specific invitations, and the judgment of contempt must be affirmed as to both or neither. P. 528.

   On the question whether a restriction could be sustained in respect of the appellant's solicitation of the individual, if considered separately, the Court expresses no opinion.

   (b) As applied in this case, the statute imposed a previous restraint upon appellant's rights of free speech and free assembly, in violation of the First and Fourteenth Amendments of the Federal Constitution. P. 532.

   (c) A requirement that one register before making a public speech to enlist support for a lawful movement is incompatible with the guaranties of the First Amendment. P. 540.

2. The task of drawing the line between the freedom of the individual and the power of the State is more delicate than usual where the presumption supporting legislation is balanced by the preferred position of the freedoms secured by the First Amendment. P. 529.

3. Restriction of the liberties guaranteed by the First Amendment can be justified only by clear and present danger to the public welfare. P. 530.

4. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not in itself suffice

to sustain a restriction of the liberties guaranteed by the First Amendment. P. 530.

5. Freedom of speech and of the press, and the rights of the people peaceably to assemble and to petition for redress of grievances, are cognate rights. P. 530.
6. The First Amendment's safeguards are not inapplicable to business or economic activity. P. 531.
7. State regulation of labor unions, whether aimed at fraud or other abuses, must not infringe constitutional rights of free speech and free assembly. P. 532.

141 Tex. 591, 174 S. W. 2d 958, reversed.

APPEAL from a judgment in a habeas corpus proceeding which sustained the commitment of the appellant for contempt.

Messrs. Lee Pressman and *Ernest Goodman,* with whom *Mr. Eugene Cotton* was on the brief, on the original argument, and *Mr. Lee Pressman,* with whom *Mr. Ernest Goodman* was on the brief, on the reargument, for appellant.

Mr. Fagan Dickson, Assistant Attorney General of Texas, with whom *Mr. Grover Sellers,* Attorney General, was on the brief, for appellee.

By special leave of Court, on the reargument, *Mr. Alvin J. Rockwell,* with whom *Solicitor General Fahy* and *Miss Ruth Weyand* were on the brief, for the United States, as *amicus curiae,* contending that the provisions of the state law are inconsistent with the National Labor Relations Act.

Briefs were filed by *Mr. Nathan Witt* on behalf of the National Federation for Constitutional Liberties, and by *Messrs. Arthur Garfield Hays* and *Paul O'Dwyer* on behalf of the American Civil Liberties Union, as *amici curiae,* urging reversal.

MR. JUSTICE RUTLEDGE delivered the opinion of the Court.

The appeal is from a decision of the Supreme Court of Texas which denied appellant's petition for a writ of habeas corpus and remanded him to the custody of appellee, as sheriff of Travis County. 141 Tex. 591, 174 S. W. 2d 958. In so deciding the court upheld, as against constitutional and other objections, appellant's commitment for contempt for violating a temporary restraining order issued by the District Court of Travis County. The order was issued *ex parte* and in terms restrained appellant, while in Texas, from soliciting members for or memberships in specified labor unions and others affiliated with the Congress of Industrial Organizations, without first obtaining an organizer's card as required by House Bill No. 100, c. 104, General and Special Laws of Texas, Regular Session, 48th Legislature (1943). After the order was served, appellant addressed a mass meeting of workers and at the end of his speech asked persons present to join a union. For this he was held in contempt, fined and sentenced to a short imprisonment.

The case has been twice argued here. Each time appellant has insisted, as he did in the state courts, that the statute as it has been applied to him is in contravention of the Fourteenth Amendment, as it incorporates the First, imposing a previous restraint upon the rights of freedom of speech and free assembly, and denying him the equal protection of the laws. He urges also that the application made of the statute is inconsistent with the provisions of the National Labor Relations Act, 49 Stat. 449, and other objections which need not be considered. For reasons to be stated we think the statute as it was applied in this case imposed previous restraint upon appellant's rights of free speech and free assembly and the judgment must be reversed.

The pertinent statutory provisions, §§ 5 and 12, are part of Texas' comprehensive scheme for regulating labor unions and their activities. They are set forth in the margin.[1]

[1] Sec. 5. "All labor union organizers operating in the State of Texas shall be required to file with the Secretary of State, before soliciting any members for his organization, a written request by United States mail, or shall apply in person for an organizer's card, stating (a) his name in full; (b) his labor union affiliations, if any; (c) describing his credentials and attaching thereto a copy thereof, which application shall be signed by him. Upon such applications being filed, the Secretary of State shall issue to the applicant a card on which shall appear the following: (1) the applicant's name; (2) his union affiliation; (3) a space for his personal signature; (4) a designation, 'labor organizer'; and, (5) the signature of the Secretary of State, dated and attested by his seal of office. Such organizer shall at all times, when soliciting members, carry such card, and shall exhibit the same when requested to do so by a person being so solicited for membership."

Sec. 12. "The District Courts of this State and the Judges thereof shall have full power, authority and jurisdiction, upon the application of the State of Texas, acting through an enforcement officer herein authorized, to issue any and all proper restraining orders, temporary or permanent injunctions, and any other and further writs or processes appropriate to carry out and enforce the provisions of this Act. Such proceedings shall be instituted, prosecuted, tried and heard as other civil proceedings of like nature in said Courts."

The Act also requires unions to file annual reports containing specified names and addresses, a statement of income and expenditure with the names of recipients, and copies of all contracts with employers which include a check-off clause. It prohibits charging dues which "will create a fund in excess of the reasonable requirements of such union," demanding or collecting any fee for the privilege to work and provides for liberal construction to prevent "excessive initiation fees." All officers, agents, organizers and representatives must be elected by at least a majority vote. Aliens and felons (unless restored to citizenship) cannot be "officers, officials . . . or labor organizers."

Additional enforcement provisions are found in § 11. A civil penalty not exceeding $1,000 is imposed "if any labor union violates any provision of this Act," to be recovered in a suit in the name of the State, instituted by authorized officers. Violation of the statute by a union

I

The facts are substantially undisputed. The appellant, Thomas, is the president of the International Union U. A. W. (United Automobile, Aircraft and Agricultural Implements Workers) and a vice president of the C. I. O. His duties are manifold, but in addition to executive functions they include giving aid and direction in organizing campaigns and by his own statement soliciting members, generally or in particular instances, for his organizations and their affiliated unions. He receives a fixed annual salary as president of the U. A. W., resides in Detroit, and travels widely through the nation in performing his work.

O. W. I. U. (Oil Workers Industrial Union), a C. I. O. affiliate, is the parent organization of many local unions in Texas, having its principal office in Fort Worth. One of these is Local No. 1002, with offices in Harris County and membership consisting largely of employees of the Humble Oil & Refining Company's plant at Bay Town, Texas, not far from Houston. During and prior to September, 1943, C. I. O. and O. W. I. U. were engaged in a campaign to organize the employees at this plant into Local No. 1002, after an order previously made by the National Labor Relations Board for the holding of an election. As part of the campaign a mass meeting was arranged for the evening of September 23, under the

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officer or labor organizer is made a misdemeanor, punishable by fine of not over $500 or confinement in the county jail for not to exceed 60 days, or both.

By § 2 (c), "'labor organizer' shall mean any person who for a pecuniary or financial consideration solicits memberships in a labor union or members for a labor union." Under the interpretation promulgated by the Secretary of State, "Any person who solicits memberships for a union and receives remuneration therefor, will be considered a 'labor organizer' . . . Solicitation of memberships as an incident to other duties for which a salary is paid will be considered solicitation for remuneration."

auspices of O. W. I. U., at the city hall in Pelly, Harris County, near the Bay Town plant. Wide publicity was given to the meeting beforehand. Arrangements were made for Thomas to come to Texas to address it and wide notice was given to his announced intention of doing so.

Thomas arrived in Houston the evening of September 21. He testified without contradiction that his only object in coming to Houston was to address this meeting, that he did not intend to remain there afterward and that he had return rail reservations for leaving the State within two days. At about 2:30 o'clock on the afternoon of Thursday, September 23, only some six hours before he was scheduled to speak, Thomas was served with the restraining order and a copy of the fiat.

These had been issued *ex parte* by the District Court of Travis County (which sits at Austin, the state capital, located about 170 miles from Houston) on the afternoon of September 22, in a proceeding instituted pursuant to § 12 by the State's attorney general. The petition for the order shows on its face it was filed in anticipation of Thomas' scheduled speech.[2] And the terms of the order show that it was issued in anticipation of the meeting and the speech.[3]

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[2] The petition recites the time and place of the mass meeting, that Thomas was scheduled to speak and would solicit members for the union at the meeting without an organizer's card. The recitals were based on an alleged previous announcement by him of intention to do these things, which at the hearing he denied having made. The petition stated there was "not sufficient time before the defendant makes the threatened speech" for notice to be served and returned and concludes with a prayer for the restraining order.

[3] The order repeated substantially the recitals of the petition, concerning the meeting, Thomas' scheduled speech and intention to solicit members, as grounds for its issuance appearing from "the sworn petition and statements of counsel," and enjoined Thomas from soliciting memberships in and members for Local No. 1002 and any other union affiliated with the C. I. O., while in Texas, without first obtaining an organizer's card.

Upon receiving service, Thomas consulted his attorneys and determined to go ahead with the meeting as planned. He did so because he regarded the law and the citation as a restraint upon free speech and free assembly in so far as they prevented his making a speech or asking someone to join a union without having a license or organizer's card at the time.

Accordingly, Thomas went to the meeting, arriving about 8:00 p. m., and, with other speakers, including Massengale and Crossland, both union representatives, addressed an audience of some 300 persons. The meeting was orderly and peaceful. Thomas, in view of the unusual circumstances, had prepared a manuscript originally intended, according to his statement, to embody his entire address. He read the manuscript to the audience. It discussed, among other things, the State's effort, as Thomas conceived it, to interfere with his right to speak and closed with a general invitation to persons present not members of a labor union to join Local No. 1002 and thereby support the labor movement throughout the country. As written, the speech did not address the invitation to any specific individual by name or otherwise.[4] But Thomas testified that he added, at the conclusion of the written speech, an oral solicitation of one Pat

[4] According to the report of the speech given in the record, it refers to Thomas' invitation to speak at the meeting, his acceptance, and his intention to discuss why workers should join the union and to urge those present to do so. After stating he had learned, on arrival, that his right to make such a speech was questioned, he said: "I didn't come here to break the law. I came here to make this speech and to ask you to join the union. But since the issue has arisen I don't want anybody to say that I'm evading it . . . to have an opening to get out without making a test of this law. . . . Therefore as Vice President of the C. I. O. and as a union man, I earnestly ask those of you who are not now members of the Oil Workers International Union to join now. I solicit you to become a member of the union of your fellow workers and thereby join hands with labor throughout this country in all industries. . . ."

O'Sullivan, a nonunion man in the audience whom he previously had never seen.[5]

After the meeting Thomas, with two of the other union speakers, was arrested and taken before a justice of the peace. Complaints were filed in criminal proceedings, presumably pursuant to § 11. Thomas was released on bond, returned to his hotel, and the next morning left for Dallas. There he learned an attachment for his arrest had been issued at Austin by the Travis County District Court, pursuant to the attorney general's motion filed that morning in contempt proceedings for violation of the temporary restraining order.[6]

On the evening of September 24, Thomas went to Austin for the hearing upon the temporary injunction set for the morning of the 25th. At this time he appeared and moved for dismissal of the complaint, for dissolution of the temporary restraining order, and to quash the contempt proceeding. The motions were denied and, after hearing, the court ordered the temporary injunction to issue. It also rendered judgment holding Thomas in contempt for vio-

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[5] Thomas testified his invitation to O'Sullivan was as follows: "I said, 'Pat O'Sullivan, I want you to join the Oil Workers Union. I have some application cards here, and I would like to have you sign one.' I went on from there and I asked everybody in the crowd who was not a member of the organization to come up and if it was necessary I would personally sign him to these application cards."

Thomas' account of what occurred at the meeting is subtantiated by the testimony of Jesse Owens, Assistant Attorney General of Texas, who was present.

[6] The motion recited that Thomas "(1) . . . did at said time and place solicit Pat O'Sullivan . . . to join a local union" of O. W. I. U. and "(2) At said time and place . . . did *openly and publicly solicit an audience of approximately 300 persons* . . . to then and there join and become members" of O. W. I. U., charged that "*the acts of R. J. Thomas above alleged were* in open and flagrant violation" of the court's order and writ and alleged that "*said acts* constitute contempt of this court and should be punished by appropriate order." (Emphasis added.)

lating the restraining order and fixed the penalty at three days in jail and a fine of $100. Process for commitment thereupon issued and was executed. Application to the supreme court for the writ of habeas corpus was made and granted, the cause was set for hearing in October, and Thomas was released on bond, all on September 25. Thereafter, an amended application in habeas corpus was filed, hearing on the cause was had, judgment was rendered sustaining the commitment, a motion for rehearing was overruled, and the present appeal was perfected. Argument followed here at the close of the last term, with reargument at the beginning of the present one to consider questions upon which we desired further discussion.

II

The Supreme Court of Texas, deeming habeas corpus an appropriate method for challenging the validity of the statute as applied,[7] sustained the Act as a valid exercise of the State's police power, taken "for the protection of the general welfare of the public, and particularly the laboring class," with special reference to safeguarding laborers from imposture when approached by an alleged organizer. The provision, it was said, "affects only the right of one to engage in the business as a paid organizer, and not the mere right of an individual to express his views on the merits of the union." The court declared the Act "does not require a paid organizer to secure a license," but makes mandatory the issuance of the card "to all who come within the provisions of the Act upon their

[7] The court reviewed the contempt commitment over appellee's strenuous jurisdictional objections. Since the state court has determined the validity of the statute and its application in the habeas corpus proceeding, as against the objections on federal constitutional grounds, those questions are properly here on this appeal. *Bryant* v. *Zimmerman*, 278 U. S. 63. The State concedes this.

good-faith compliance therewith." Accordingly it held that the regulation was not unreasonable.

The court conceded however that the Act "interferes to a certain extent with the right of the organizer to speak as the paid representative of the union." Nevertheless, it said, "such interferences are not necessarily prohibited by the Constitution. The State under its police power may enact laws which interfere indirectly and to a limited extent with the right of speech or the liberty of the people where they are reasonably necessary for the protection of the general public." Accordingly, it likened the instant prohibition to various other ones imposed by state or federal legislation upon "the right of one to operate or speak as the agent of another," including securities salesmen, insurance agents, real estate brokers, etc. And various decisions of this Court and others [8] were thought to support the conclusion that the Act "imposes no previous general restraint upon the right of free speech. . . . It merely requires paid organizers to register with the Secretary of State before beginning to operate as such."

III

Appellant first urges that the application of the statute amounted to the requirement of a license "for the simple act of delivering an address to a group of workers." He says the act penalized "was simply and solely the act of addressing the workers on the . . . benefits of unionism, and concluding the address with a plea to the audience generally and to a named worker in the audience to join a union." He points out that he did not parade on the streets, did not solicit or receive funds, did not "sign up"

[8] *Cantwell* v. *Connecticut,* 310 U. S. 296; *Cox* v. *New Hampshire,* 312 U. S. 569; *City of Manchester* v. *Leiby,* 117 F. 2d 661.

workers,[9] engaged in no disturbance or breach of the peace, and that his sole purpose in going to Texas and his sole activity there were to make the address including the invitations which he extended at the end. There is no evidence that he solicited memberships or members for a union at any other time or occasion or intended to do so. His position necessarily maintains that the right to make the speech includes the right to ask members of the audience, both generally and by name, to join the union.

Appellant also urges more broadly that the statute is an invalid restraint upon free expression in penalizing the mere asking a worker to join a union, without having procured the card, whether the asking takes place in a public assembly or privately.

Texas, on the other hand, asserts no issue of free speech or free assembly is presented. With the state court, it says the statute is directed at business practices, like selling insurance, dealing in securities, acting as commission merchant, pawnbroking, etc., and was adopted "in recognition of the fact that something more is done by a labor organizer than talking." [10]

Alternatively, the State says, § 5 would be valid if it were framed to include voluntary, unpaid organizers and if no element of business were involved in the union's activity. The statute "is a registration statute and nothing more," and confers only "ministerial and not discretionary powers" upon the Secretary of State. The requirement accordingly is regarded as one merely for previous identification, valid within the rule of *City of Manchester* v.

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[9] However, the record shows he offered to sign the application blanks or cards "if it was necessary." Cf. note 5 *supra*.

[10] "He acts for an alleged principal and collects money for the principal, or if he does not actually collect fees and dues in person, he makes it possible for his principal to collect them. He purports to act for a labor union in establishing a contractual relation. . . ." The statements are taken from the brief.

Leiby, 117 F. 2d 661, and the dictum of *Cantwell* v. *Connecticut,* 310 U. S. 296, 306.[11]

In accordance with their different conceptions of the nature of the issues, the parties would apply different standards for determining them. Appellant relies on the rule which requires a showing of clear and present danger to sustain a restriction upon free speech or free assembly.[12] Texas, consistently with its "business practice" theory, says the appropriate standard is that applied under the commerce clause to sustain the applications of state statutes regulating transportation made in *Hendrick* v. *Maryland,* 235 U. S. 610; *Clark* v. *Paul Gray, Inc.,* 306 U. S. 583; and *California* v. *Thompson,* 313 U. S. 109.[13] In short, the State would apply a "rational basis" test,

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[11] "Without doubt a State may protect its citizens *from fraudulent solicitation* by requiring a stranger in the community, before permitting him publicly *to solicit funds* for any purpose, to establish his identity and his authority to act for the cause which he purports to represent," (emphasis added) citing for comparison *Lewis Publishing Co.* v. *Morgan,* 229 U. S. 288, 306–310; *Bryant* v. *Zimmerman,* 278 U. S. 63, 72. Cf. text *infra* at note 23.

[12] Cf. *Schenck* v. *United States,* 249 U. S. 47; Mr. Justice Holmes dissenting in *Abrams* v. *United States,* 250 U. S. 616, 624 and in *Gitlow* v. *New York,* 268 U. S. 652, 672; *Bridges* v. *California,* 314 U. S. 252. A recent statement is that made in *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624, 639: "The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect."

[13] According to the brief, "The analogy is that *interstate commerce like freedom of religion, speech and press* is protected from undue burdens imposed by the States, yet the States still have authority to impose regulations which are reasonable in relation to the subject." (Emphasis added.)

appellant one requiring a showing of "clear and present danger."

Finally, as the case is presented here, Texas apparently would rest the validity of the judgment exclusively upon the specific individual solicitation of O'Sullivan, and would throw out of account the general invitation, made at the same time, to all nonunion workers in the audience.[14] However, the case cannot be disposed of on such a basis. The Texas Supreme Court made no distinction between the general and the specific invitations.[15] Nor did the District Court. The record shows that the restraining order was issued in explicit anticipation of the speech and to restrain Thomas from uttering in its course any language which could be taken as solicitation.[16] The motion for the fiat in contempt was filed and the fiat itself was is-

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[14] The argument, both at the bar and in the brief, has been indefinite in this respect. It has neither conceded nor unequivocally denied that the sentence was imposed on account of both acts. Nevertheless the State maintains that the invitation to O'Sullivan in itself is sufficient to sustain the judgment and sentence and that nothing more need be considered to support them.

[15] That the court regarded the violation as consisting of both acts appears from the statement in the opinion that Thomas "violated the terms of the injunction by soliciting members for said union without having first registered . . ." The plural could have been used only if the general platform plea were considered as being one of the violations restrained and punished.

[16] The *ex parte* petition for the order was founded solely upon the allegation, based only upon rumor as later appeared from Thomas' uncontradicted testimony, that he intended to address the meeting and in the course of his speech generally to solicit nonunion men present to join the union. Cf. note 2 *supra*. When the petition was filed and the restraining order was issued and served, it was not possible to specify anticipated individual solicitations and consequently only anticipated general ones could be and were relied upon. The order therefore must be taken to have been intended to reach exactly what it was requested to get at. Cf. note 3 *supra;* and text *infra* at note 20 ff.

sued on account of both invitations.[17] The order adjudging Thomas in contempt was in general terms, finding that he had violated the restraining order, without distinction between the solicitations set forth in the petition and proved as violations.[18] The sentence was a single penalty. In this state of the record it must be taken that the order followed the prayer of the motion and the fiat's recital, and that the penalty was imposed on account of both invitations. The judgment therefore must be affirmed as to both or as to neither. Cf. *Williams* v. *North Carolina,* 317 U. S. 287, 292; *Stromberg* v. *California,* 283 U. S. 359, 368. And it follows that the statute, as it was applied, restrained and punished Thomas for uttering, in the course of his address, the general as well as the specific invitation.

IV

The case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the

[17] The motion after reciting the solicitation of O'Sullivan and adding that Thomas "did openly and publicly solicit an audience of approximately 300 persons . . . ," claimed both acts as being "in open and flagrant violation of the order of this court" and as contempt, and sought punishment for them.

[18] The order made the usual formal recitals concerning the previous proceedings, the parties' appearance and the court's "having heard the pleadings and evidence." It then, without stating the particular acts in which the contempt consisted, cf. note 17 *supra,* found generally that Thomas "did in Harris County, Texas, on the 23d day of September A. D. 1943, violate this court's temporary restraining order heretofore issued injoining and restraining him . . . from soliciting members to join" the O. W. I. U. without obtaining an organizer's card, adjudged him guilty of contempt "for the violation of the law and of the order of this court on the 23d day of September, A. D. 1943," and assessed the punishment as stated above.

usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. Cf. *Schneider* v. *State,* 308 U. S. 147; *Cantwell* v. *Connecticut,* 310 U. S. 296; *Prince* v. *Massachusetts,* 321 U. S. 158. That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice. Compare *United States* v. *Carolene Products Co.,* 304 U. S. 144, 152–153.

For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger.[19] The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation. Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation. It is therefore in our tradition to allow the widest room for discussion, the narrowest range for its restriction, particularly when this right is exercised in conjunction with peaceable assembly. It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights, cf. *De Jonge* v. *Oregon,* 299 U. S. 353, 364, and therefore are united in the First Article's assurance. Cf. 1 Annals of Congress 759–760.

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[19] Cf. note 12 *supra.*

This conjunction of liberties is not peculiar to religious activity and institutions alone. The First Amendment gives freedom of mind the same security as freedom of conscience. Cf. *Pierce* v. *Society of Sisters,* 268 U. S. 510; *Meyer* v. *Nebraska,* 262 U. S. 390; *Prince* v. *Massachusetts,* 321 U. S. 158. Great secular causes, with small ones, are guarded. The grievances for redress of which the right of petition was insured, and with it the right of assembly, are not solely religious or political ones. And the rights of free speech and a free press are not confined to any field of human interest.

The idea is not sound therefore that the First Amendment's safeguards are wholly inapplicable to business or economic activity. And it does not resolve where the line shall be drawn in a particular case merely to urge, as Texas does, that an organization for which the rights of free speech and free assembly are claimed is one "engaged in business activities" or that the individual who leads it in exercising these rights receives compensation for doing so. Nor, on the other hand, is the answer given, whether what is done is an exercise of those rights and the restriction a forbidden impairment, by ignoring the organization's economic function, because those interests of workingmen are involved or because they have the general liberties of the citizen, as appellant would do.

These comparisons are at once too simple, too general, and too inaccurate to be determinative. Where the line shall be placed in a particular application rests, not on such generalities, but on the concrete clash of particular interests and the community's relative evaluation both of them and of how the one will be affected by the specific restriction, the other by its absence. That judgment in the first instance is for the legislative body. But in our system where the line can constitutionally be placed presents a question this Court cannot escape answering independently, whatever the legislative judgment, in the

light of our constitutional tradition. *Schneider* v. *State,* 308 U. S. 147, 161. And the answer, under that tradition, can be affirmative, to support an intrusion upon this domain, only if grave and impending public danger requires this.

That the State has power to regulate labor unions with a view to protecting the public interest is, as the Texas court said, hardly to be doubted. They cannot claim special immunity from regulation. Such regulation however, whether aimed at fraud or other abuses, must not trespass upon the domains set apart for free speech and free assembly. This Court has recognized that "in the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. . . . Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society." *Thornhill* v. *Alabama,* 310 U. S. 88, 102–103; *Senn* v. *Tile Layers Protective Union,* 301 U. S. 468, 478. The right thus to discuss, and inform people concerning, the advantages and disadvantages of unions and joining them is protected not only as part of free speech, but as part of free assembly. *Hague* v. *C. I. O.,* 307 U. S. 496. The Texas court, in its disposition of the cause, did not give sufficient weight to this consideration, more particularly by its failure to take account of the blanketing effect of the prohibition's present application upon public discussion and also of the bearing of the clear and present danger test in these circumstances.

V

In applying these principles to the facts of this case we put aside the broader contentions both parties have made and confine our decision to the narrow question

whether the application made of § 5 in this case contravenes the First Amendment.

The present application does not involve the solicitation of funds or property. Neither § 5 nor the restraining order purports to prohibit or regulate solicitation of funds, receipt of money, its management, distribution, or any other financial matter. Other sections of the Act deal with such things.[20] And on the record Thomas neither asked nor accepted funds or property for the union at the time of his address or while he was in Texas. Neither did he "take applications" for membership, though he offered to do so "if it was necessary"; or ask anyone to join a union at any other time than the occasion of the Pelly mass meeting and in the course of his address.

Thomas went to Texas for one purpose and one only—to make the speech in question. Its whole object was publicly to proclaim the advantages of workers' organization and to persuade workmen to join Local No. 1002 as part of a campaign for members. These also were the sole objects of the meeting. The campaign, and the meeting, were incidents of an impending election for collective bargaining agent, previously ordered by national authority pursuant to the guaranties of national law. Those guaranties include the workers' right to organize freely for collective bargaining. And this comprehends whatever may be appropriate and lawful to accomplish and maintain such organization. It included, in this case, the right to designate Local No. 1002 or any other union or agency as

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[20] See note 1 *supra*. According to the State's concession, Thomas might have made speeches "lauding unions and unionism" throughout Texas without violating the statute or the order. And at each address he could have taken a collection or sought and received contributions for the union, or for himself, without running afoul their prohibitions; that is, always if in doing so he avoided using words of invitation to unorganized workers to join a C. I. O. union.

the employees' representative. It included their right fully and freely to discuss and be informed concerning this choice, privately or in public assembly. Necessarily correlative was the right of the union, its members and officials, whether residents or nonresidents of Texas and, if the latter, whether there for a single occasion or sojourning longer, to discuss with and inform the employees concerning matters involved in their choice. These rights of assembly and discussion are protected by the First Amendment. Whatever would restrict them, without sufficient occasion, would infringe its safeguards. The occasion was clearly protected. The speech was an essential part of the occasion, unless all meaning and purpose were to be taken from it. And the invitations, both general and particular, were parts of the speech, inseparable incidents of the occasion and of all that was said or done.

That there was restriction upon Thomas' right to speak and the rights of the workers to hear what he had to say, there can be no doubt. The threat of the restraining order, backed by the power of contempt, and of arrest for crime, hung over every word. A speaker in such circumstances could avoid the words "solicit," "invite," "join." It would be impossible to avoid the idea. The statute requires no specific formula. It is not contended that only the use of the word "solicit" would violate the prohibition. Without such a limitation, the statute forbids any language which conveys, or reasonably could be found to convey, the meaning of invitation. That Thomas chose to meet the issue squarely, not to hide in ambiguous phrasing, does not counteract this fact. General words create different and often particular impressions on different minds. No speaker, however careful, can convey exactly his meaning, or the same meaning, to the different members of an audience. How one might "laud unionism," as the State and the State Supreme Court concede Thomas was free to do, yet in these circumstances not imply an invitation,

is hard to conceive. This is the nub of the case, which the State fails to meet because it cannot do so. Workingmen do not lack capacity for making rational connections. They would understand, or some would, that the president of U. A. W. and vice president of C. I. O., addressing an organization meeting, was not urging merely a philosophic attachment to abstract principles of unionism, disconnected from the business immediately at hand. The feat would be incredible for a national leader, addressing such a meeting, lauding unions and their principles, urging adherence to union philosophy, not also and thereby to suggest attachment to the union by becoming a member.

Furthermore, whether words intended and designed to fall short of invitation would miss that mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.

Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim. He must take care in every word to create no impression that he means, in advocating unionism's most central principle, namely, that workingmen should unite for collective bargaining, to urge those present to do so. The vice is not merely that invitation, in the circumstances shown here, is speech. It is also that its prohibition forbids or restrains discussion which is not or may not be invitation. The sharp line cannot be drawn surely or securely. The effort to observe it could not be free speech, free press,

or free assembly, in any sense of free advocacy of principle or cause. The restriction's effect, as applied, in a very practical sense was to prohibit Thomas not only to solicit members and memberships, but also to speak in advocacy of the cause of trade unionism in Texas, without having first procured the card. Thomas knew this and faced the alternatives it presented. When served with the order he had three choices: (1) to stand on his right and speak freely; (2) to quit, refusing entirely to speak; (3) to trim, and even thus to risk the penalty. He chose the first alternative. We think he was within his rights in doing so.

The assembly was entirely peaceable, and had no other than a wholly lawful purpose. The statements forbidden were not in themselves unlawful, had no tendency to incite to unlawful action, involved no element of clear and present, grave and immediate danger to the public welfare. Moreover, the State has shown no justification for placing restrictions on the use of the word "solicit." We have here nothing comparable to the case where use of the word "fire" in a crowded theater creates a clear and present danger which the State may undertake to avoid or against which it may protect. *Schenck* v. *United States,* 249 U. S. 47. We cannot say that "solicit" in this setting is such a dangerous word. So far as free speech alone is concerned, there can be no ban or restriction or burden placed on the use of such a word except on showing of exceptional circumstances where the public safety, morality or health is involved or some other substantial interest of the community is at stake.

If therefore use of the word or language equivalent in meaning was illegal here, it was so only because the statute and the order forbade the particular speaker to utter it. When legislation or its application can confine labor leaders on such occasions to innocuous and abstract discussion of the virtues of trade unions and so becloud even this

with doubt, uncertainty and the risk of penalty, freedom of speech for them will be at an end. A restriction so destructive of the right of public discussion, without greater or more imminent danger to the public interest than existed in this case, is incompatible with the freedoms secured by the First Amendment.

We do not mean to say there is not, in many circumstances, a difference between urging a course of action and merely giving and acquiring information. On the other hand, history has not been without periods when the search for knowledge alone was banned. Of this we may assume the men who wrote the Bill of Rights were aware. But the protection they sought was not solely for persons in intellectual pursuits. It extends to more than abstract discussion, unrelated to action. The First Amendment is a charter for government, not for an institution of learning. "Free trade in ideas" means free trade in the opportunity to persuade to action, not merely to describe facts. Cf. *Abrams* v. *United States,* 250 U. S. 616, 624, and *Gitlow* v. *New York,* 268 U. S. 652, 672, dissenting opinions of Mr. Justice Holmes. Indeed, the whole history of the problem shows it is to the end of preventing action that repression is primarily directed and to preserving the right to urge it that the protections are given.

Accordingly, decision here has recognized that employers' attempts to persuade to action with respect to joining or not joining unions are within the First Amendment's guaranty. *Labor Board* v. *Virginia Electric & Power Co.,* 314 U. S. 469. Decisions of other courts have done likewise.[21] When to this persuasion other things are added which bring about coercion, or give it that character, the

[21] *Labor Board* v. *Ford Motor Co.,* 114 F. 2d 905 (C. C. A.); *Labor Board* v. *American Tube Bending Co.,* 134 F. 2d 993 (C. C. A.); compare *Texas & N. O. R. Co.* v. *Brotherhood of Clerks,* 281 U. S. 548, 568.

limit of the right has been passed.[22] Cf. *Labor Board* v. *Virginia Electric & Power Co., supra.* But short of that limit the employer's freedom cannot be impaired. The Constitution protects no less the employees' converse right. Of course espousal of the cause of labor is entitled to no higher constitutional protection than the espousal of any other lawful cause. It is entitled to the same protection.

VI

Apart from its "business practice" theory, the State contends that § 5 is not inconsistent with freedom of speech and assembly, since this is merely a previous identification requirement which, according to the state court's decision, gives the Secretary of State only "ministerial, not discretionary" authority.

How far the State can require previous identification by one who undertakes to exercise the rights secured by the First Amendment has been largely undetermined. It has arisen here chiefly, though only tangentally, in connection with license requirements involving the solicitation of funds, *Cantwell* v. *Connecticut, supra;* cf. *Schneider* v. *State,* 308 U. S. 147; *Largent* v. *Texas,* 318 U. S. 418, and other activities upon the public streets or in public places, cf. *Lovell* v. *Griffin,* 303 U. S. 444; *Hague* v. *C. I. O.,* 307 U. S. 496, or house-to-house canvassing, cf. *Schneider* v. *State, supra.* In these cases, however, the license requirements were for more than mere identification or previous registration and were held invalid because they vested discretion in the issuing authorities to censor the activity involved. Nevertheless, it was indicated by

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[22] *Labor Board* v. *Trojan Powder Co.,* 135 F. 2d 337 (C. C. A.); *Labor Board* v. *New Era Die Co.,* 118 F. 2d 500; cf. *Labor Board* v. *Friedman-Harry Marks Clothing Co.,* 301 U. S. 58; *International Association of Machinists* v. *Labor Board,* 311 U. S. 72. Compare *Texas & N. O. R. Co.* v. *Brotherhood of Clerks,* 281 U. S. 548.

dictum in *Cantwell* v. *Connecticut,* 310 U. S. 296, 306,[23] that a statute going no further than merely to require previous identification would be sustained in respect to the activities mentioned. Although those activities are not involved in this case, that dictum and the decision in *Bryant* v. *Zimmerman,* 278 U. S. 63, furnish perhaps the instances of pronouncement or decision here nearest this phase of the question now presented.

As a matter of principle a requirement of registration in order to make a public speech would seem generally incompatible with an exercise of the rights of free speech and free assembly. Lawful public assemblies, involving no element of grave and immediate danger to an interest the State is entitled to protect, are not instruments of harm which require previous identification of the speakers. And the right either of workmen or of unions under these conditions to assemble and discuss their own affairs is as fully protected by the Constitution as the right of businessmen, farmers, educators, political party members or others to assemble and discuss their affairs and to enlist the support of others.

We think the controlling principle is stated in *De Jonge* v. *Oregon,* 299 U. S. 353, 365. In that case this Court held that, "consistently with the Federal Constitution, peaceable assembly for lawful discussion cannot be made a crime." And "those who assist in the conduct of such meetings cannot be branded as criminals on that score. The question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices under which the meeting is held but as to its purpose; not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects. If the persons assembling have committed crimes elsewhere, if they have formed or are

[23] Cf. note 11 *supra.*

engaged in a conspiracy against the public peace and order, they may be prosecuted for their conspiracy or other violation of valid laws. But it is a different matter when the State, instead of prosecuting them for such offenses, seizes upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge."

If the exercise of the rights of free speech and free assembly cannot be made a crime, we do not think this can be accomplished by the device of requiring previous registration as a condition for exercising them and making such a condition the foundation for restraining in advance their exercise and for imposing a penalty for violating such a restraining order. So long as no more is involved than exercise of the rights of free speech and free assembly, it is immune to such a restriction. If one who solicits support for the cause of labor may be required to register as a condition to the exercise of his right to make a public speech, so may he who seeks to rally support for any social, business, religious or political cause. We think a requirement that one must register before he undertakes to make a public speech to enlist support for a lawful movement is quite incompatible with the requirements of the First Amendment.

Once the speaker goes further, however, and engages in conduct which amounts to more than the right of free discussion comprehends, as when he undertakes the collection of funds or securing subscriptions, he enters a realm where a reasonable registration or identification requirement may be imposed. In that context such solicitation would be quite different from the solicitation involved here. It would be free speech plus conduct akin to the activities which were present, and which it was said the State might regulate, in *Schneider* v. *State, supra,* and *Cantwell* v. *Connecticut, supra.* That, however, must be

done, and the restriction applied, in such a manner as not to intrude upon the rights of free speech and free assembly. In this case the separation was not maintained. If what Thomas did, in soliciting Pat O'Sullivan, was subject to such a restriction, as to which we express no opinion, that act was intertwined with the speech and the general invitation in the penalty which was imposed for violating the restraining order. Since the penalty must be taken to have rested as much on the speech and the general invitation as on the specific one, and the former clearly were immune, the judgment cannot stand.

As we think the requirement of registration, in the present circumstances, was in itself an invalid restriction, we have no occasion to consider whether the restraint as imposed goes beyond merely requiring previous identification or registration.[24] Nor do we undertake to determine

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[24] In securing the detailed information § 5 requires, cf. note 1 *supra,* the Secretary of State has established an administrative routine for compliance, which includes a form of application requiring the applicant to state: (1) his name; (2) his address; (3) his labor union affiliations ("specify definitely and fully"); (4) that "as evidence of my authority to act as Labor Organizer for the labor union with which I am connected, I am furnishing the following credentials"; (5) a copy of such credentials; (6) that he is a citizen of the United States of America; (7) whether he has ever been convicted of a felony in Texas or in any other State; and (a) if so, the nature of the offense and the State in which conviction was had; (b) whether his rights of citizenship have been fully restored; and (c) by what authority.

The Secretary of State testified that cards were issued as of course if the application blanks were properly filled in. But in his interpretative statement, issued to the general public, he said: "*In the absence of mistake, fraud or misrepresentation* with respect to securing same, it is considered that the Secretary of State has no discretion in the granting of an 'organizer's card,' and that the applicant will be entitled to same upon compliance with the Act. *It will be required,* however, that the applicant *show a bona fide affiliation* with an existing labor union." (Emphasis added.) Precisely what "credentials" or evidence in con-

the validity of § 5 in any other application than that made upon the facts of this case. Neither do we ground our decision upon other contentions advanced in the briefs and argument. Upon the reargument attention was given particularly to the questions whether and to what extent the prohibitions of § 5, or their application in this case, are consistent with the provisions of the National Labor Relations Act. Both the parties and the Government, which has appeared as *amicus curiae,* have advanced contentions on this issue independent of those put forward upon the question of constitutionality. Since a majority of the Court do not agree that § 5 or its present application conflicts with the National Labor Relations Act, our decision rests exclusively upon the grounds we have stated for finding that the statute as applied contravenes the Constitution.

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nection with the felony inquiry or showing of bona fide affiliation will satisfy the Secretary is not made clear on the record. And, according to the Texas court's decision, "all who come within the provisions of the Act *upon their good-faith compliance* therewith" are entitled to receive the card. (Emphasis added.) Compliance under the decision, it would seem, requires the Secretary to determine the good faith of the application, and thus the sufficiency of the authority to act for the union represented. Whether, in some instances at least, these determinations would go beyond "merely ministerial" action and require the exercise of discretion, or the time required to comply, by completing the routine, would so add to the burden that these things might amount to undue previous restraint or censorship, where mere registration or previous identification might not do so, need not be determined.

From the time the Act became effective in August, 1943, until the the date of trial, September 25, 1943, 223 labor organizers' cards were issued. During that period 40 or 50 applications for cards were returned to the applicants for failure to fill in the information requested or to sign the application or to attach credentials. Of those all but 15 or 20 have been resubmitted and cards were granted. No application has been "positively denied" since the Act became effective.

The restraint is not small when it is considered what was restrained. The right is a national right, federally guaranteed. There is some modicum of freedom of thought, speech and assembly which all citizens of the Republic may exercise throughout its length and breadth, which no State, nor all together, nor the Nation itself, can prohibit, restrain or impede. If the restraint were smaller than it is, it is from petty tyrannies that large ones take root and grow. This fact can be no more plain than when they are imposed on the most basic rights of all. Seedlings planted in that soil grow great and, growing, break down the foundations of liberty.

In view of the disposition we make of the cause, it is unnecessary to rule upon the motion appellee has filed to require appellant to furnish security for his appearance to serve the sentence.

The judgment is

Reversed.

MR. JUSTICE DOUGLAS, concurring.

The intimation that the principle announced in this case serves labor alone and not an employer has been adequately answered in the opinion of the Court in which I join. But the emphasis on such cases as *Labor Board* v. *Virginia Electric & Power Co.*, 314 U. S. 469, and *Virginia Electric & Power Co.* v. *Labor Board*, 319 U. S. 533, to prove that discrimination exists moves me to add these words. Those cases would be relevant here if we were dealing with legislation which regulated the relations between unions and their members. Cf. *Steele* v. *Louisville & Nashville R. Co.*, *ante*, p. 192. No one may be required to obtain a license in order to speak. But once he uses the economic power which he has over other men and their jobs to influence their action, he is doing more than exercising the freedom of speech protected by the First Amend-

ment. That is true whether he be an employer or an employee. But as long as he does no more than speak he has the same unfettered right, no matter what side of an issue he espouses.

MR. JUSTICE BLACK and MR. JUSTICE MURPHY join in this opinion.

MR. JUSTICE JACKSON, concurring.

As frequently is the case, this controversy is determined as soon as it is decided which of two well-established, but at times overlapping, constitutional principles will be applied to it. The State of Texas stands on its well-settled right reasonably to regulate the pursuit of a vocation, including—we may assume—the occupation of labor organizer. Thomas, on the other hand, stands on the equally clear proposition that Texas may not interfere with the right of any person peaceably and freely to address a lawful assemblage of workmen intent on considering labor grievances.

Though the one may shade into the other, a rough distinction always exists, I think, which is more shortly illustrated than explained. A state may forbid one without its license to practice law as a vocation, but I think it could not stop an unlicensed person from making a speech about the rights of man or the rights of labor, or any other kind of right, including recommending that his hearers organize to support his views. Likewise, the state may prohibit the pursuit of medicine as an occupation without its license, but I do not think it could make it a crime publicly or privately to speak urging persons to follow or reject any school of medical thought. So the state to an extent not necessary now to determine may regulate one who makes a business or a livelihood of soliciting funds or memberships for unions. But I do not think it can prohibit one,

even if he is a salaried labor leader, from making an address to a public meeting of workmen, telling them their rights as he sees them and urging them to unite in general or to join a specific union.

This wider range of power over pursuit of a calling than over speech-making is due to the different effects which the two have on interests which the state is empowered to protect. The modern state owes and attempts to perform a duty to protect the public from those who seek for one purpose or another to obtain its money. When one does so through the practice of a calling, the state may have an interest in shielding the public against the untrustworthy, the incompetent, or the irresponsible, or against unauthorized representation of agency. A usual method of performing this function is through a licensing system.

But it cannot be the duty, because it is not the right, of the state to protect the public against false doctrine. The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion. In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us. *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624. Nor would I. Very many are the interests which the state may protect against the practice of an occupation, very few are those it may assume to protect against the practice of propagandizing by speech or press. These are thereby left great range of freedom.

This liberty was not protected because the forefathers expected its use would always be agreeable to those in authority or that its exercise always would be wise, temperate, or useful to society. As I read their intentions, this liberty was protected because they knew of no other

way by which free men could conduct representative democracy.[1]

The necessity for choosing collective bargaining representatives brings the same nature of problem to groups of organizing workmen that our representative democratic processes bring to the nation. Their smaller society, too, must choose between rival leaders and competing policies. This should not be an underground process. The union of which Thomas is the head was one of the choices offered to these workers, and to me it was in the best American tradition that they hired a hall and advertised a meeting, and that Thomas went there and publicly faced his labor constituents. How better could these men learn what they might be getting into? By his public appearance and speech he would disclose himself as a temperate man or a violent one, a reasonable leader that well-disposed workmen could follow or an irresponsible one from whom they might expect disappointment, an earnest and understanding leader or a self-seeker. If free speech anywhere serves a useful social purpose, to be jealously guarded, I should think it would be in such a relationship.

But it is said that Thomas urged and invited one and all to join his union, and so he did. This, it is said, makes the speech something else than a speech; it has been found

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[1] Woodrow Wilson put the case for free speech in this connection aptly: "I have always been among those who believed that the greatest freedom of speech was the greatest safety, because if a man is a fool, the best thing to do is to encourage him to advertise the fact by speaking. It cannot be so easily discovered if you allow him to remain silent and look wise, but if you let him speak, the secret is out and the world knows that he is a fool. So it is by the exposure of folly that it is defeated; not by the seclusion of folly, and in this free air of free speech men get into that sort of communication with one another which constitutes the basis of all common achievement." Address at the Institute of France, Paris, May 10, 1919. 2 Selected Literary and Political Papers and Addresses of Woodrow Wilson (1926) 333.

by the Texas courts to be a "solicitation" and therefore its immunity from state regulation is held to be lost. It is not often in this country that we now meet with direct and candid efforts to stop speaking or publication as such. Modern inroads on these rights come from associating the speaking with some other factor which the state may regulate so as to bring the whole within official control. Here, speech admittedly otherwise beyond the reach of the states is attempted to be brought within its licensing system by associating it with "solicitation." Speech of employers otherwise beyond reach of the Federal Government is brought within the Labor Board's power to suppress by associating it with "coercion" or "domination." Speech of political malcontents is sought to be reached by associating it with some variety of "sedition." Whether in a particular case the association or characterization is a proven and valid one often is difficult to resolve. If this Court may not or does not in proper cases inquire whether speech or publication is properly condemned by association, its claim to guardianship of free speech and press is but a hollow one.

Free speech on both sides and for every faction on any side of the labor relation is to me a constitutional and useful right. Labor is free to turn its publicity on any labor oppression, substandard wages, employer unfairness, or objectionable working conditions. The employer, too, should be free to answer, and to turn publicity on the records of the leaders or the unions which seek the confidence of his men. And if the employees or organizers associate violence or other offense against the laws with labor's free speech, or if the employer's speech is associated with discriminatory discharges or intimidation, the constitutional remedy would be to stop the evil, but permit the speech, if the two are separable; and only rarely and when they are inseparable to stop or punish speech or publication.

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But I must admit that in overriding the findings of the Texas court we are applying to Thomas a rule the benefit of which in all its breadth and vigor this Court denies to employers in National Labor Relations Board cases. Cf. *Labor Board* v. *Virginia Electric & Power Co.*, 314 U. S. 469, 479; *Virginia Electric & Power Co.* v. *Labor Board*, 319 U. S. 533; *Trojan Powder Co.* v. *Labor Board*, 135 F. 2d 337, cert. denied, 320 U. S. 768; *Labor Board* v. *American Tube Bending Co.*, 134 F. 2d 993, cert. denied, 320 U. S. 768; *Elastic Stop Nut Corp.* v. *Labor Board*, 142 F. 2d 371, cert. denied, *post*, p. 722. However, the remedy is not to allow Texas improperly to deny the right of free speech but to apply the same rule and spirit to free speech cases whoever the speaker.

I concur in the opinion of MR. JUSTICE RUTLEDGE that this case falls in the category of a public speech, rather than that of practicing a vocation as solicitor. Texas did not wait to see what Thomas would say or do. I cannot escape the impression that the injunction sought before he had reached the state was an effort to forestall him from speaking at all and that the contempt is based in part at least on the fact that he did make a public labor speech.

I concur in reversing the judgment.

MR. JUSTICE ROBERTS.

The right to express thoughts freely and to disseminate ideas fully is secured by the Constitution as basic to the conception of our government. A long series of cases has applied these fundamental rights in a great variety of circumstances.[1] Not until today, however, has it been ques-

[1] *Stromberg* v. *California*, 283 U. S. 359; *Near* v. *Minnesota*, 283 U. S. 697; *Grosjean* v. *American Press Co.*, 297 U. S. 233; *De Jonge* v. *Oregon*, 299 U. S. 353; *Herndon* v. *Lowry*, 301 U. S. 242; *Lovell* v. *Griffin*, 303 U. S. 444; *Hague* v. *C. I. O.*, 307 U. S. 496; *Schneider* v. *Irvington*, 308 U. S. 147; *Thornhill* v. *Alabama*, 310 U. S. 88; *Carl-*

tioned that there was any clash between this right to think one's thoughts and to express them and the right of people to be protected in their dealings with those who hold themselves out in some professional capacity by requiring registration of those who profess to pursue such callings. Doctors and nurses, lawyers and notaries, bankers and accountants, insurance agents and solicitors of every kind in every State of this Union have traditionally been under duty to make some identification of themselves as practitioners of their calling. The question before us is as to the power of Texas to call for such registration within limits precisely defined by the Supreme Court of that State in sustaining the statute now challenged. The most accurate way to state the issue is to quote the construction which that Court placed upon the Texas statute and the exact limits of its requirement:

"A careful reading of the section of the law here under consideration will disclose that it does not interfere with the right of the individual lay members of unions to solicit others to join their organization. It does not affect them at all. It applies only to those organizers who for a pecuniary or financial consideration solicit such membership. It affects only the right of one to engage in the business as a paid organizer, and not the mere right of an individual to express his views on the merits of the union. Furthermore, it will be noted that the Act does not require a paid organizer to secure a license, but merely requires him to register and identify himself and the union for which he proposes to operate before being permitted

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son v. *California,* 310 U. S. 106; *Cantwell* v. *Connecticut,* 310 U. S. 296; *American Federation of Labor* v. *Swing,* 312 U. S. 321; *Bridges* v. *California,* 314 U. S. 252; *Bakery Drivers Local* v. *Wohl,* 315 U. S. 769; *Martin* v. *Struthers,* 319 U. S. 141; *Taylor* v. *Mississippi,* 319 U. S. 583; *Cafeteria Employees Union* v. *Angelos,* 320 U. S. 293. Compare *Murdock* v. *Pennsylvania,* 319 U. S. 105; *Douglas* v. *Jeannette,* 319 U. S. 157; *Board of Education* v. *Barnette,* 319 U. S. 624; *Follett* v. *McCormick,* 321 U. S. 573.

to solicit members for such union. The Act confers no unbridled discretion on the Secretary of State to grant or withhold a registration card at his will, but makes it his mandatory duty to accept the registration and issue the card to all who come within the provisions of the Act upon their good-faith compliance therewith."

The record discloses that Texas, in the exercise of her police power, has adopted a statute regulating labor unions. With many of its provisions we are not presently concerned. The constitutional validity of but a single section is drawn in question. That section requires every "labor union organizer" (defined by the Act as a person "who for a pecuniary or financial consideration solicits memberships in a labor union or members for a labor union") to request, in writing, of the Secretary of State, or personally to apply to the Secretary for an "organizer's card," before soliciting members for his organization, and to give his name, his union affiliation, and his union credentials.[2] The Secretary is then to issue to him a card showing his name and affiliation, which is to be signed by him and also signed and sealed by the Secretary of State, and is to bear the designation "labor organizer." It is made the duty of the organizer to carry the card and, on request, to exhibit it to any person he solicits.

The Act makes violation the basis of criminal prosecution and authorizes injunctions to prevent threatened disregard of its provisions. In this instance both procedures were followed, but there is before us only the validity of an injunction and the sanction imposed for refusal to obey it.

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[2] A section of the Act forbids an alien or a convicted felon whose civil rights have not been restored to act as a labor organizer, but these provisions were not here invoked or applied and nothing in this case turns on them. There is no occasion to discuss them until they are drawn in question. And in addition, § 15 of the Act contains a sweeping severability clause.

As always, it is important to reach the precise question presented. One path to this end is to note what is not involved.

First, no point is made of the circumstance that the appellant's proposed activity was enjoined in advance. Counsel at our bar asserted the constitutional vice lay in the prohibition of the statute and that vice would preclude arrest and conviction for violation, no less than injunction against the denounced activity.

Secondly, the appellant does not contend that he was other than a "labor organizer" within the meaning of the Act. In fact he is an officer of a union and not employed specifically as an organizer or solicitor of memberships. He might well have questioned the application of the law to him, or to a public address made by him in his official capacity, but he refrained, obviously because he wished to test the Act's validity and so, in effect, stipulated that its sweep included him, and his conduct on the occasion in question.

Thirdly, the appellant does not contend that, in attempting to identify solicitors and preclude solicitation without identification, the statute either in terms, or as construed and applied, reaches over into the realm of public assembly, of public speaking, of argument or persuasion. Aware that the State proposed to invoke the statute against him, he made sure that the bare right he asserted to solicit without compliance with its requirement should not be clouded by confusion of that right with the others mentioned. In his address, therefore, he was at pains to state that he then and there solicited members of the audience to join a named union; and to make assurance of violation doubly sure, he solicited a man by name and offered him a membership application, which the man then and there signed.

Fourthly, the Act and the injunction which he disobeyed say nothing of speech; they are aimed at a trans-

action,—that of solicitation of members for a union. This, and this only, is the statutory object which is said to render it unconstitutional.

We are now in a position accurately to state the appellant's contention. He asserts that, under the Constitutional guarantees, there is a sharp distinction between business rights and civil rights; that in *discussion* of labor problems, and equally in *solicitation* of union membership, civil rights are exercised; that labor organizations are the only effective means whereby employes may exercise the guaranteed civil rights, and that, consequently, *any* interference with the right to solicit membership in such organizations is a prohibited abridgment of these rights, even though the Act applies only to paid organizers.

The argument then seeks to draw a distinction between this case and those in which we have sustained registration of persons who desire to use the streets or to solicit funds; urges that the burden the Act lays on labor organizations is substantial and seriously hampering and is not intended to prevent any "clear and present danger" to the State.

Stripped to its bare bones, this argument is that labor organizations are beneficial and lawful; that solicitation of members by and for them is a necessary incident of their progress; that freedom to solicit for them is a liberty of speech protected against state action by the Fourteenth Amendment and the National Labor Relations Act, and hence Texas cannot require a paid solicitor to identify himself. I think this is the issue and the only issue presented to the courts below and decided by them, and the only one raised here. The opinion of the court imports into the case elements on which counsel for appellant did not rely; elements which in fact counsel strove to eliminate in order to come at the fundamental challenge to any requirement of identification of a labor organizer.

The position taken in the court's opinion that in some way the statute interferes with the right to address a meeting, to speak in favor of a labor union, to persuade one's fellows to join a union, or that at least its application in this case does, or may, accomplish that end is, in my judgment, without support in the record.

We must bear in mind that the appellant himself was persuaded that merely to make the speech he had come to Texas to deliver would not violate the Act, and that he, therefore, determined, in order to preclude all doubt as to violation, to solicit those present to join the union. And, for the same purpose, he further specifically solicited an individual.

He had not been enjoined from making a speech, nor from advocating union affiliation. The injunction, in terms, forbade "soliciting membership in Local Union No. 1002 . . ." or "memberships in any other labor union" without first obtaining a card. The information on which the citation for contempt was based charged (1) that he solicited Pat O'Sullivan to join a local union on September 23; (2) that on the same day he openly and publicly solicited an audience of some three hundred persons to join the Oil Workers International Union. The uncontradicted evidence is that, with application blanks in his hand, he said: "I earnestly urge and solicit all of you that are not members of your local union to join your local unions. I do that in the capacity of Vice-President of C. I. O."

The text of the speech put in evidence by the appellant does not differ materially. It runs: "as Vice-President of the C. I. O. and as a union man, I earnestly ask those of you who are not now members of the Oil Workers International Union to join now. I solicit you to become a member of the union of your fellow workers . . ."

The judgment in the contempt proceeding states only that the court "finds that the defendant . . . did . . .

violate this court's temporary restraining order heretofore issued injoining and restraining him, the said R. J. Thomas, from soliciting members to join the Oil Workers International Union . . ."

In his petition to the State Supreme Court for *habeas corpus,* the appellant did not suggest that, under the guise of preventing him from soliciting, he was held in contempt for making an address. The opinion of that court states that the complaint charged appellant with engaging "in soliciting members for a certain labor union"; with violating the injunction issued "by soliciting members for said union"; and adds: "*Relator's counsel in his argument before this Court conceded the existence of necessary factual basis for the judgment in the contempt proceedings.*" (Italics supplied.) Thus it appears that below, as here, the challenge was not against the form or content of the pleadings or the order; not that Texas was trying to enjoin appellant from making a speech, but that it could not regulate solicitation.

In construing the statute, the court below said: "It applies only to those organizers who for a pecuniary or financial consideration solicit such membership." Thus it excluded all questions as to the right of speech and assembly as such.

In his motion for a rehearing below, the appellant advanced no contention that the judgment was directed at his speech as such.

In his statement as to jurisdiction filed in this court he said: "Appellant delivered his speech to the meeting attended largely by workers of the Humble Oil Company *and* solicited the audience in general and one Pat O'Sullivan in particular to join the Oil Workers International Union." (Italics supplied.)

In his statement of points to be relied on in this court, he stated he would urge that the Act is unconstitutional because it "imposes a previous general restraint upon the

exercise of appellant's right of free speech by prohibiting appellant from *soliciting workers to join a union,*" without obtaining an organizer's card. And again that it violated other Constitutional provisions "in requiring appellant to obtain a license (organizer's card) before *soliciting workers to join a union.*" (Italics supplied.)

Nowhere in the document is there any suggestion that the statute is intended, or has been applied, to restrain or restrict the freedom to speak, save only as speech is an integral part of the transaction of paid solicitation of men to join a union.

Since its requirements are not obviously burdensome, we cannot void the statute as an unnecessary or excessive exercise of the State's police power on any *a priori* reasoning. The State Supreme Court has found that conditions exist in Texas which justify and require such identification of paid organizers as the law prescribes. There is not a word of evidence in the record to contradict these conclusions. In the absence of a showing against the need for the statute this court ought not incontinently to reject the State's considered views of policy.

The judgment of the court below that the power exists reasonably to regulate solicitation, and that the exercise of the power by the Act in question is not unnecessarily burdensome, is not to be rejected on abstract grounds. No fee is charged. The card may be obtained by mail. To comply with the law the appellant need only have furnished his name and affiliation, and his credentials. The statute nowise regulates, curtails, or bans his activities.

We are asked then, on this record, to hold, without evidence to support such a conclusion, and as a matter of judicial notice, that Texas has no *bona fide* interest to warrant her law makers in requiring that one who engages, for pay, in the business of soliciting persons to join unions shall identify himself as such. That is all the law requires.

We should face a very different question if the statute attempted to define the necessary qualifications of an organizer; purported to regulate what organizers might say; limited their movements or activities; essayed to regulate time, place or purpose of meetings; or restricted speakers in the expression of views. But it does none of these things.

It is suggested that the Act is to be distinguished from legislation regulating the use of the streets or the solicitation of money. As respects the former, I think our decision in *Cox* v. *New Hampshire,* 312 U. S. 569, and that of the Circuit Court of Appeals in *City of Manchester* v. *Leiby,* 117 F. 2d 661, are indistinguishable in principle, and the court below properly so held. If one disseminating news for his own profit may rightfully be required to identify himself, so may one who, for profit, solicits persons to join an organization.

As respects the second, I see no reason to limit what was said in *Cantwell* v. *Connecticut,* 310 U. S. 296, 305, to solicitation of money. The solicitation at which the Texas Act is aimed may or may not involve the payment of initiation fees or dues to the solicitor. But, in any case, it involves the assumption of business and financial liability by him who is persuaded to join a union. The transaction is in essence a business one. Labor unions are business associations; their object is generally business dealings and relationships as is manifest from the financial statements of some of the national unions. Men are persuaded to join them for business reasons, as employers are persuaded to join trade associations for like reasons. Other paid organizers, whether for business or for charity, could be required to identify themselves. There is no reason why labor organizers should not do likewise. I think that if anyone pursues solicitation as a business for profit, of members for any organization, religious, secular or business, his calling does not bar the State from

requiring him to identify himself as what he is,—a paid solicitor.

We may deem the statutory provision under review unnecessary or unwise, but it is not our function as judges to read our views of policy into a Constitutional guarantee, in order to overthrow a state policy we do not personally approve, by denominating that policy a violation of the liberty of speech. The judgment should be affirmed.

The CHIEF JUSTICE, MR. JUSTICE REED and MR. JUSTICE FRANKFURTER join in this opinion.

UNITED STATES *v.* TOWNSLEY.

CERTIORARI TO THE COURT OF CLAIMS.

No. 134. Argued December 12, 1944.—Decided January 15, 1945.

1. Section 23 of the Independent Offices Appropriation Act, 1935, so far as it provides for overtime compensation for services in excess of 40 hours per week, applies to Government employees of the Panama Canal whose compensation is fixed on a monthly basis. P. 565.
2. In the case of an employee whose normal work week was six 8-hour days, overtime compensation was properly computed by multiplying the employee's monthly salary by twelve and dividing the result by fifty-two to ascertain his weekly salary; then dividing the weekly salary by five to obtain his pay for an 8-hour day; and then multiplying the number of weeks in which he had worked a sixth day by the daily wage plus one-half. P. 573.

101 Ct. Cls. 237, affirmed.

CERTIORARI, *post*, p. 686, to review a judgment for the plaintiff in a suit to recover overtime compensation.

Mr. Enoch E. Ellison, with whom *Solicitor General Fahy*, *Assistant Attorney General Shea*, and *Mr. Julian R. Wilheim* were on the brief, for the United States.

Mr. Herman J. Galloway, with whom *Mr. Fred W. Shields* was on the brief, for respondent.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The parties agree that the principal question presented is whether Section 23 of the Independent Offices Appropriation Act, 1935,[1] in so far as it provides for overtime compensation for services in excess of 40 hours per week, applies to Government employes of the Canal Zone whose compensation is fixed on a monthly basis. The Court of Claims answered in the affirmative.[2] If we take the same view, a subsidiary inquiry is whether that court adopted the right method for calculating the overtime compensation.

The section, in full, is:

"The weekly compensation, minus any general percentage reduction which may be prescribed by Act of Congress, for the several trades and occupations, which is set by wage boards or other wage-fixing authorities, shall be reestablished and maintained at rates not lower than necessary to restore the full weekly earnings of such employees in accordance with the full-time weekly earnings under the respective wage schedules in effect on June 1, 1932: *Provided,* That the regular hours of labor shall not be more than forty per week; and all overtime shall be compensated for at the rate of not less than time and one half."

Between March 28, 1934, and August 31, 1939, the respondent was employed by the Panama Canal successively as operator, chief operator, and master of a dredge, and was paid on a monthly basis at rates fixed by the Governor of the Canal Zone upon recommendation of a wage board. The respondent's normal work week consisted of six 8-hour days. He retired August 29, 1939, and then, for the

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[1] Act of March 28, 1934, c. 102, 48 Stat. 522; 5 U. S. C. 673c.

[2] 101 Ct. Cls. 237.

first time, asserted that under the Act he was entitled to compensation at the rate of time and one-half for all hours worked in excess of 40 per week. In prosecution of his claim he instituted this suit March 14, 1940.

The Court of Claims held that he was engaged in one of the "trades and occupations" whose compensation "is set by wage boards or other wage-fixing authorities" covered by the Act. We think this conclusion is right and do not understand the petitioner now to contest it. The court further held that the statute embraced those employes of the Canal Zone whose wages are paid on a monthly basis. This the Government contests, relying on the words of the Act, on administrative practice and on legislative history. A statement of the background of the legislation and its application seems necessary to decision.

In 1923 Congress adopted the "Classification Act" [3] classifying the employment and fixing the compensation for different classes of employes of certain departments of the Government. It excluded from the terms of the Act certain occupations, including apprentices, helpers or journeymen in a recognized trade or craft and skilled or semi-skilled laborers, among others. Admittedly, certain employes of the Panama Canal, including the respondent, were not covered by this Act. Their compensation was to be fixed by the President, or by his authority, under the Act of August 24, 1912;[4] specifically it was set by the Governor of the Panama Canal on the advice of a wage board.

The Act of March 28, 1934, with which we are here concerned, was the last of the so-called Economy Acts intended to decrease expenses by reduction of compensation

[3] 42 Stat. 1488 (5 U. S. C. 661, *et seq.*).

[4] c. 390, 37 Stat. 561, 48 U. S. C. 1305.

and suspension of privileges of federal employes. By the first such Act, approved June 30, 1932,[5] a regular schedule of reduction of salaries, by a system of furloughs or reduction of the work week, was established.

By the Act of March 20, 1933,[6] Congress superseded the furlough system and provided for a reduction, not to exceed 15%, in the compensation of all employes. By the Act of March 28, 1934, this reduction was cut to 10% for a portion of the fiscal year 1934, and to 5% for the fiscal year 1935. Possible reductions in compensation imposed on federal employes were not, however, limited to those prescribed in the cited statutes. Men were discharged and rehired in lower classifications at the lower wages applicable and were furloughed without pay, in order to keep within appropriations.

When the bill which became the Act of March 28, 1934 was under consideration, a representative of a labor organization appeared before a subcommittee of the Senate Committee on Appropriations and advocated legislation to prohibit certain discriminatory reductions in the wages of per diem Navy Yard workers. He pointed to the continuance of the practice of furloughing them one day in each two weeks, thus reducing the hours worked to 40 per week, and showed that this, in addition to the 15% reduction of pay required by the economy act then in force, actually cut their base pay over 22%. He also complained of other practices which had the effect of reducing their compensation. He expressed the fear that if Congress abolished the 15% level cut, wage boards would at once take action to reduce existing wage scales. He proposed a provision which would prohibit reduction of wages below the wage scales which were in effect June 1, 1932, but sug-

[5] 47 Stat. 382.

[6] 48 Stat. 8, 13.

gested no provision concerning hours of work or overtime pay. The draft he submitted was not embodied in the bill as reported.

Senator Thomas offered the present § 23 on the floor of the Senate, stating merely [7] "this amendment is offered to help the employees in the navy yards, the arsenals, the Panama Canal Zone, the Government Printing Office, and the Bureau of Engraving and Printing. It simply proposes to put them back on the same status they occupied in July of 1932 . . . the amendment adopted this afternoon restores their pay cut, it is true, provided that amendment remains in the law. This amendment proposes to give the employees of these several bureaus an increase in their pay even though they do not have to work an increased number of hours. At the present time they work 40 hours and get 44 hours' pay. Under the amendment it is possible that the board that has control of these employees will let them work 40 hours and they will possibly get 48 hours' pay, provided they get an increase of their hourly pay."

The amendment was adopted without further reference to it in either House of Congress. The President vetoed the bill, which was passed over his veto. On that occasion a Senator inquired whether certain language in the President's veto message referred to the provisions of § 23 and the reply was that the Senator interrogated did not know whether this was so. We shall shortly see that the section did substantially more than Senator Thomas stated in his brief explanation.

Prior to the effective date of the Act, the respondent's regular hours of work were 48 per week, though he was often required to work 52. Shortly after § 23 became law, the Governor of the Panama Canal requested the Comp-

[7] 78 Cong. Rec. 2977.

troller General to decide whether the section applied to employes of the Canal and whether it required payment of overtime to certain classes of employes, including the class to which respondent belonged. The Comptroller General ruled that the section was applicable to employes paid by the month as well as to those paid by the hour.[8] He did not directly rule on the right of monthly employes to be paid for overtime but his opinion indicates the view that they were not to be so paid since he stated: ". . . no change in the monthly or annual rate of compensation other than that required to pay a rate not lower than the rate per annum or per month paid June 1, 1932, less any applicable percentage reductions, would be authorized. That is to say, they are to receive the same monthly or annual compensation although their regular hours of duty may be reduced."

Notwithstanding this ruling, the Governor attempted to reduce the monthly employes' compensation by putting them on an hourly basis. This he did by dividing the monthly salary paid June 1, 1932, by 224, the number of hours he estimated they worked per month made up of eight hours per day for six days per week, sixteen hours per month for occasional overtime and an allowance for occasional work on Sundays and holidays. This computation showed they had been worked 52 hours per week. Having thus ascertained what he deemed their hourly wages, he added 20% to the hourly wage, so that they would receive the same amount for a 40-hour week as they would theretofore have received for a 48-hour week, despite the fact that they had been working and had been paid for more than 48 hours according to his computation of their prior hourly earnings. The net result was substantially to reduce their monthly earnings. After complaint by the employes, the Governor submitted

[8] See 14 Comp. Gen. 158.

his action to the Comptroller General and requested reconsideration of the earlier decision.[9] That official reaffirmed his prior decision and disapproved the recomputation of monthly wages which the Governor had adopted. He ruled that the proper procedure was "to continue the payment of the same monthly rates of compensation even though there may have been a reduction in the number of hours per week and no overtime compensation is authorized," and added that "This is the general rule that has been adopted under the 40-hour week statutory provision for all employees paid on a monthly or annual basis." The Governor's submission and the Comptroller General's ruling make it clear that both understood that employes paid on a monthly basis could not be regularly worked more than 40 hours a week. Several passages in his decisions also indicate that the Comptroller General was of opinion that monthly employes should not be paid overtime. The rulings were definitely that employes whose weekly wages would be reduced by reducing their work hours must have those wages restored to the 1932 wage level, and that employes who had not had their weekly wages cut because they were paid by the month and were worked 52 hours per week should not have their wages cut as a result of § 23 by the reduction of their work week to 40 hours.

Apparently relying on the Comptroller General's statement that employes on a monthly wage basis were not entitled to overtime, the Governor continued to work the respondent 48 hours a week but paid him no overtime. This in spite of his knowledge that the 40-hour week limitation was also applicable to the respondent if other parts of § 23 were so applicable. In his second submission to the Comptroller General he stated his understanding of the latter's decision that monthly employes

[9] See 14 Comp. Gen. 165.

could not be worked more than 40 hours a week. There is no evidence that the question of the legality of working the respondent overtime without paying him for it was ever submitted to the Comptroller General.

It seems evident that the Governor's action cannot be justified. If § 23 applied in the case of the respondent, his work week should have been 40 hours. If, in spite of § 23, his monthly stipend covered every day and every hour of the month whether service was rendered or not, as the Comptroller General had said, so that respondent could not be paid for overtime, then he should not have been regularly worked overtime.

With this outline of the situation, we are brought to a consideration of the Government's contention that § 23 has no application to the respondent's compensation.

We turn first to the suggestion that the expressions "weekly compensation" and "weekly earnings" control all of the provisions of the section and that hence both the affirmative provisions and the prohibition contained in the proviso apply only to those employes who receive weekly wages. As the record, however, fails to indicate that any of the Government employes were paid by the week, it is said that the term "weekly" was used as a method of adjusting the wages of per hour or per diem employes because a 40-hour work week could easily be calculated in their case as the measure of weekly work and compensation whereas it could not so readily be applied to monthly employes. But we think this suggestion does not comport either with the provisions or the obvious purpose of the legislation. The section commanded not only that wages reduced as a result of furloughs and uncompensated overtime should be reestablished but also that, for the future, such wages should be maintained at the June 1, 1932, level, subject only to the applicable percentage reductions provided by the Economy Acts. It sought to forbid indirect reduction of wages by the pro-

vision that a work week should consist of 40 hours and that overtime, at one and one-half the regular hourly pay, should be paid for any hours worked beyond that weekly limit. As the test of what should constitute overtime was more conveniently calculated by using a work week, and the hours worked during any week, it was quite natural that Congress should use the phrases "weekly compensation" and "weekly earnings" in setting a floor under wages.[10]

If the Government is right, § 23 had no application to respondent and those in like case and the Governor could have maintained a 52-hour work week at the old rate of pay or could have cut the work week with a corresponding reduction in pay. The result would be, as the court below pointed out, that an Act of Congress, on its face applicable to all employes, including monthly employes, which declared that the weekly wages of employes "shall be reestablished and maintained at rates not lower than" the 1932 rate would for the first time have authorized the cutting of the wages of monthly employes below the 1932 level while the wages of all others were being restored to that level. As we have seen, the Comptroller General ruled that such a cut in respondent's pay was "in contravention of the plain terms of the statute."

We are clear that the Comptroller General was right in ruling that the statute applied not only to per diem or hourly employes but also to employes paid on a monthly basis, such as respondent, whose compensation was fixed by a wage board. We are also clear that, on the face of the statute, if the Governor, in the teeth of the statutory provision, worked such employees more than 40 hours a week, the overtime provision of § 23 required payment

[10] Compare *Overnight Motor Co.* v. *Missel,* 316 U. S. 572; *Walling* v. *Helmerich & Payne,* 323 U. S. 37; *St. John* v. *Brown,* 38 F. Supp. 385; *Allen* v. *Moe,* 39 F. Supp. 5; *Nelson* v. *St. Joseph & G. I. R. Co.,* 199 Mo. App. 635, 205 S. W. 870.

at one and one-half straight time pay for the extra hours worked.

The Government seeks to avoid such a construction of the Act by invoking asserted administrative practice and legislative history. It relies heavily on the statement made to the subcommittee, to which we have heretofore referred. With respect to this statement, we think it enough to say that the spokesman was complaining about discriminations against employes paid by the day or the hour but he nowhere suggests the propriety of distinguishing between such employes and those paid on a monthly basis but worked more than 40 hours per week. He advocates setting the June 1, 1932, standard as a minimum subject only to percentage reductions provided by the Economy Act. He envisages the fact that if the work week is reduced to 40 hours and the June 1932 standard is thus reestablished, the result will be an increase in wages to the employes concerned. The considerations of equity on which he relies apply quite as much to employes paid by the month as to those paid by the day or hour. Moreover, as above stated, the draft he submitted was not adopted. On the contrary, one differently worded became § 23 of the statute.

The Government next relies on the fact that, prior to the adoption of § 23, no overtime was paid to employes who were on a monthly or annual basis. But, as we shall see, the full application of the principle of a work week limited to specified hours, and payment of overtime for extra hours, was gradually adopted by the Congress, and the fact that the old practice was abolished piecemeal can have little weight in determining whether, as respects the employes embraced in its terms, § 23 abolished the distinction amongst those embraced in trades and occupations whose compensation was fixed by wage boards. Moreover, the section essayed to deal only with a special class of employes whose working conditions are more

nearly comparable to those of men employed in private industry. They may, therefore, have been valid reason for establishing, as respects all of these employes, a different rule from that generally followed in Government departments.

The Government also relies on the prior practice in the Canal Zone, but we think this inconclusive. By the Act of August 24, 1912,[11] the President was empowered to appoint employes of the Canal Zone. The Act provided that "the compensation of such persons shall be fixed by the President, or by his authority, until such time as Congress may by law regulate the same" (§ 4). By Executive Order of February 2, 1914, the President established overtime for per diem and hourly workers but forbade overtime for those paid on a monthly or annual basis. Congress did undoubtedly legislate further on the subject in § 23 of the Act of 1934. The administrative practice prior to the adoption of the section is, therefore, of no moment.

The Governor's attempt to reduce the compensation of the respondent by working him overtime and not paying him for his overtime, in the teeth of the statute and the Comptroller General's ruling, certainly cannot be accorded weight in construing the statute.

The Government produced at the trial of the case in the court below certain letters from the Navy Department, the Government Printing Office, and the Bureau of Engraving and Printing of the Treasury Department stating that they had interpreted § 23 as applying only to per diem and hourly employes, and that no overtime had been paid to employes working on a monthly or yearly basis. These letters do not state, however, that these branches regularly worked such employes overtime, as did the Governor of the Canal Zone, without paying for overtime work.

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[11] *Supra* Note 4.

Such evidence as there is in the record would seem to indicate the contrary.

The Secretary of the Navy submitted certain questions respecting § 23 to the Comptroller General immediately after the enactment of the section. One was whether per annum or per month employes who worked in excess of 40 hours a week "because of an extraordinary emergency" should be paid overtime. The Comptroller answered in the negative, referring to his decision rendered the Government Printing Office [12] in which he said that the regular hours of work of employes on an annual basis were required by § 23 to be fixed at not to exceed 40 per week. In the same opinion rendered to the Public Printer he had ruled that such employes were not entitled to overtime. There is no evidence that the Secretary of the Navy or the Public Printer conceived that they could work per annum and per month employes more than 40 hours a week without extra compensation except in cases of extraordinary emergency or that they ever pursued a practice like that of the Governor of the Panama Canal. It would seem, therefore, that the hours of monthly paid mechanical employes in the departments in question were reduced to 40 without any pay cut. Such action would be in accordance with the rulings of the Comptroller General. Thus the administrative construction of the Governor seems to stand alone and in contradiction to that of other heads of departments and offices of the Government, and, in this respect, worked a discrimination against the respondent and those in his class as contrasted with other employes who stood in the same relation. Certain it is that the Comptroller General never ruled that the standard of 40 hours a week with overtime could be disregarded in practice.

Finally, the Government argues that related legislation indicates Congress did not intend § 23 to apply to em-

[12] 13 Comp. Gen. 265.

ployes paid by the month or by the year. We think, however, that, on analysis, the course of legislation, considered as a whole, fails to sustain the contention. As we have said, adoption of the principle of limitation of working time and extra pay for overtime, in respect of Government employment, has been of gradual development.

As early as 1883 Congress authorized the Public Printer to pay extra prices in accordance with the customs of the trade and the justice of the case for extra work ordered in emergencies, performed on Sundays or legal holidays or at night, if performed by other than regular night forces.[13] It is assumed that the employes embraced in this legislation were paid per diem or per hour. The provision for payment of overtime in the Public Printer's office has been continued in the successive statutes.[14]

In 1888 Congress prescribed an 8-hour day with payment for overtime for letter carriers of the United States Postal Service,[15] who receive annual salaries.

In 1911 provision was made for overtime pay of employes of the Customs Service required by the nature of their service to work after 5 P. M.[16] Such overtime pay was to be reimbursed the Government by the steamship companies whose business required such services.

In 1919 the Secretary of Agriculture was authorized to pay employes of the Bureau of Animal Industry, employed in industrial establishments in the inspection of meat, for overtime work.[17] Here again the Government was to be reimbursed by the establishment which required the working of overtime, but the compensation paid the inspectors was on an annual salary basis.

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[13] Act of January 13, 1883, 22 Stat. 402.

[14] See 44 U. S. C. 40.

[15] Act of May 24, 1888, 25 Stat. 157; cf. *United States* v. *Post,* 148 U. S. 124. See also 39 U. S. C. 117.

[16] Act of Feb. 13, 1911, § 5, 36 Stat. 901. See *United States* v. *Myers,* 320 U. S. 561.

[17] Act of July 24, 1919, 41 Stat. 241, 7 U. S. C. 394.

In 1940 an Act was passed [18] making the regular working hours of the Navy Department and the Coast Guard, and their field services "eight hours a day or forty hours per week" during the period of the national emergency. The Act set a different method of paying the overtime to monthly, per diem, hourly and piecework employes than that applied to employes paid by the year, but it is to be noted that the 40-hour week and the overtime rate of one and one-half times the regular rate was applied to monthly employes.

The Government lays great stress on a report of the Committee on Naval Affairs reporting this legislation to the Senate.[19] In that report the Committee said, referring to the 40-hour per week limit, and the payment for overtime: "In this regard, the provision for the payment of compensation [for overtime] to per annum and per month employees is a departure from the practice heretofore followed. . . ." A similar statement was made in the House report.[20] The difficulty that arises in giving weight to these statements of the Congressional Committees is that the facts already recited show the reports were wrong in fact and apparently were based upon an inaccurate statement which was credited by the Committees.

In the same year Congress passed another Act on the subject of overtime.[21] In this it was provided: "notwithstanding the provisions of any other law, compensation for employment in excess of forty hours in any administrative workweek computed at a rate not less than one and one-half times the regular rate is hereby authorized to be paid at such places and to such monthly,

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[18] Act of June 28, 1940, 54 Stat. 676, 678. This Act expired June 30, 1942.

[19] S. Rep. No. 1863, 76th Cong., 3d Sess., pp. 11–12.

[20] H. Rep. No. 2257, 76th Cong., 3d Sess., pp. 3–4.

[21] Act of October 21, 1940, 54 Stat. 1205. This Act expired June 30, 1942.

per diem, hourly, and piecework employees of the field services of the War Department and the field services of the Panama Canal whose wages are set by wage boards or other wage fixing authorities, . . ."

Such light as we gain from the discussion in Congress indicates that Congress already understood that overtime was payable to certain employes of the Panama Canal by virtue of § 23 of the Act of 1934, but that it was desired to extend the limitation of hours per week and the payment of overtime to employes of the field services of the Army and the field services of the Panama Canal. Thus, in the debate, Mr. Ramspeck, of the House Committee on Civil Service, said: [22]

"The Secretary of War and the Assistant Secretary of War . . . say that they have the legal authority now to pay overtime to certain employees of the War Department in the arsenals and at the Panama Canal, but as to others they have not this authority and this creates a bad administrative situation. They have recommended this bill, which has passed the Senate, and it is my understanding we have given the same authority to the Navy Department as to the Navy yards."

Finally, in 1942, by Joint Resolution, Congress provided for overtime pay for Government employes generally [23] including employes of Government-owned or controlled organizations and those of the District of Columbia whose positions are subject to the Classification Act of 1923. The resolution embodies a proviso excluding "those whose wages are fixed on a daily or hourly basis and adjusted from time to time in accordance with prevailing rates by wage boards or similar administrative authority serving the same purpose, . . ." From this proviso the Government argues that Congress believed that up to that time

[22] 86 Cong. Rec. 13557.

[23] 56 Stat. 1068.

those whose monthly compensation was fixed by wage boards had not been entitled to overtime and that the resolution granted it to them for the first time. Whatever Congress may have thought or intended in respect of the proviso, we cannot ignore the fact that § 23 of the Act of March 28, 1934, on its face, applied to such monthly employes, that the Comptroller had so ruled, and that, so far as appears, the departments concerned had acted with that understanding, save only the Governor of the Panama Canal who, although so advised, had acted in the teeth of the statute.

The same misapprehension with respect to the effect and administration of the Act of 1934 seems to have prevailed when the War Overtime Pay Act of 1943 [24] was adopted. That Act, by a sweeping provision, granted overtime pay to all civil employes of the Government and all employes of Government-owned or controlled corporations, except those in the Government Printing Office and the Tennessee Valley Authority. It specifically included *officers* and employes whose wages are fixed on a monthly or yearly basis by wage boards or similar authorities, and excluded employes whose wages are fixed on a daily or hourly basis by wage boards.

We think this summary of the legislation on the subject is not conclusive or even strongly persuasive as an aid to the construction of the Act under consideration as of the time when Congress adopted it. It seems that there was no very clear and general policy with respect to the payment of overtime until the exigencies of the war called for compensation of Government employes as a class on a basis similar to that adopted in private industry. When the time came to make such general provision, the more or less haphazard dealing with the subject theretofore seems not to have been clearly in mind.

[24] Act of May 7, 1943, 57 Stat. 75, § 1.

We conclude that the Court of Claims properly held that § 23 applies in respondent's case and that he is entitled to recover for the overtime he was required to work.

We reach then the question whether the court adopted the correct method of calculating the overtime compensation. The respondent submitted a computation whereby he multiplied his monthly salary by twelve and divided the result by fifty-two to ascertain his weekly salary. He divided the weekly salary by five to obtain his daily pay for an 8-hour day for each week that he had worked a sixth day. He took the number of weeks in which he had worked a sixth day and multiplied that number by the ascertained daily wage, plus one-half. The Government argued in the court below, and argues in this court, that the monthly wage of the respondent covered every day of the month because the Government hired his full time. As a result, it is said, his daily pay should be one-thirtieth of his monthly pay.[25] In this view, he has been paid straight time not only for the five days, or the forty hours, he should have been worked under § 23 but also for the sixth day he was required to serve. The result is that he should be granted only additional half pay for the sixth day of each week. But, according to this contention, the respondent will already have been overpaid for, according to the argument, he has been paid straight time for the seventh day of each week although he only worked six days and has, therefore, received additional overtime pay for the sixth day. The court below approved the respondent's method of reckoning and we think its decision correct. After the adoption of § 23 the respondent was in

[25] The Government relies on the Act of June 30, 1906, 34 Stat. 763, 5 U. S. C. 84. That statute, however, was not addressed to the problem of a standard work week of a limited number of hours and the calculation of overtime for hours worked in excess of the limit.

effect hired for a work week of forty hours, or a five-day week, and his daily wage was to be determined on that basis. He has not been paid for the sixth day of each week and should recover straight time and one-half for the sixth day. This computation accomplishes this, and there is authority for resort to it.[26]

The judgment is

Affirmed.

MR. JUSTICE MURPHY concurs in the result.

The CHIEF JUSTICE, MR. JUSTICE JACKSON and MR. JUSTICE RUTLEDGE dissent.

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

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

No. 335. Argued January 5, 1945.—Decided January 15, 1945.

1. Whether the railroad's failure to provide the locomotive with a light on the rear, as required by rules prescribed by the Interstate Commerce Commission pursuant to the Boiler Inspection Act, proximately contributed to the death of the decedent in this case—though if the light had been provided it would have been obscured by the cars which the locomotive was pushing in reverse—was a question for the jury. P. 578.
2. The District Court correctly charged the jury in this case that their verdict should be for the plaintiff if they found that the back-up movement was unusual and unexpected, that it was made without adequate warning to the decedent, and that failure to give adequate warning was the proximate cause of the injury. P. 579.
3. In a suit against a railroad under the Federal Employers' Liability Act for a death resulting from negligence, an amendment of the complaint alleging a violation of the Boiler Inspection Act, *held* not barred by the three years' limitation of the Federal Employers' Liability Act. P. 580.

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[26] See *St. John* v. *Brown; Allen* v. *Moe, supra,* Note 10.

4. The claim asserted by the amended complaint arose out of the same conduct, transaction and occurrence set forth in the original complaint; there was therefore no departure. Rule 15 (c) of the Rules of Civil Procedure. P. 581.
5. The District Court properly refused to set aside the verdict for the plaintiff in this case. P. 581.

142 F. 2d 718, reversed.

CERTIORARI, *post*, p. 689, to review the reversal of a judgment for the plaintiff in a suit under the Federal Employers' Liability Act.

Mr. J. Vaughan Gary for petitioner.

Mr. Collins Denny, Jr., with whom *Messrs. Thomas W. Davis* and *J. M. Townsend* were on the brief, for respondent.

MR. JUSTICE BLACK delivered the opinion of the Court.

Petitioner's husband was killed while in the performance of his duties as an employee of respondent railroad. She filed suit under the Federal Employers Liability Act, 45 U. S. C. § 51 *et seq.*, alleging that her husband's death was caused by the negligent operation of a railroad car which struck and killed him, and because of respondent's failure to provide him a reasonably safe place to work. The District Court directed a verdict in favor of the railroad and the Circuit Court of Appeals affirmed. 128 F. 2d 420. We reversed, holding that there was sufficient evidence of the railroad's negligence to require submission of the case to the jury. *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 68, 73. On remand, petitioner amended her complaint in the District Court, over respondent's objection, by charging that, in addition to the negligence previously alleged, the decedent's death was caused by the railroad's violation of the Federal Boiler Inspection Act, 45 U. S. C. § 22 *et seq.*, and Rules and Regulations prescribed by the Interstate Commerce Commission pursuant to the provi-

sions of that Act. The jury returned a verdict in favor of petitioner, and the District Court refused to set it aside. The Circuit Court of Appeals reversed, 142 F. 2d 718, and certiorari was granted because of the importance of questions involved relating to the administration and enforcement of the Federal Employers Liability Act and the Federal Boiler Inspection Act.

Here, as in the Circuit Court of Appeals, respondent has again argued that the evidence of negligence charged in the original complaint was insufficient to justify submission of the case to the jury. Slight variations in the evidence presented at the two trials are said to require a different conclusion than that which we reached on the first review of this case.

As to this contention of respondent, the Circuit Court of Appeals said on the second appeal that

"Since the evidence at the second trial in respect to the movement of the cars was substantially the same as at the first, this decision [i. e. our decision in 318 U. S. 54] required the District Judge notwithstanding the opposition of the defendant to submit the case to the jury. Our duty upon this appeal to affirm the judgment . . . would have been equally clear if the plaintiff had been content at the second trial to rest upon the legal theory outlined in the opinion of the Supreme Court; but the plaintiff amended the complaint by specifying a new item of negligence which was submitted to the jury as an alternative ground for recovery. Since the verdict for the plaintiff was general and did not specify the ground on which it rested, it becomes necessary for us to determine whether there was sufficient evidence to justify the submission of this new theory to the jury over the defendant's objection."

We reaffirm our previous holding that the evidence justified submission to the jury of the issues raised by the original allegations of negligence.

The Circuit Court of Appeals, however, held that there was no evidence that the alleged violation of the Boiler Inspection Act was "the proximate cause of the accident in whole or in part," and that the District Court should therefore have directed that this issue be found in favor of the railroad. The complaint alleged, in this respect, that the decedent's death was caused by violation of Rules and Regulations prescribed by the Interstate Commerce Commission pursuant to the provisions of the Federal Boiler Inspection Act. That Act broadly authorizes the Commission to prescribe standards "to remove unnecessary peril to life or limb." [1] The complaint alleged a violation of Rule 131 of the Commission, which reads as follows:

"*Locomotives used in yard service.*—Each locomotive used in yard service between sunset and sunrise shall have two lights, one located on the front of the locomotive and one on the rear, each of which shall enable a person in the cab of the locomotive under the conditions, including visual capacity, set forth in rule 129, to see a dark object such as there described for a distance of at least 300 feet ahead and in front of such headlight; and such headlights must be maintained in good condition."

The locomotive which pushed backwards the string of cars one of which struck and killed the deceased was operated in violation of the literal words of this Regulation. It was being used in "yard service" at respondent's Clopton Yards "between sunset and sunrise." There was no light on the rear of the locomotive, which was moving in reverse towards the deceased.[2]

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[1] *Lilly* v. *Grand Trunk Western R. Co.*, 317 U. S. 481, 486; *United States* v. *B. & O. R. Co.*, 293 U. S. 454.

[2] The contention is made that since this locomotive was used in road service as well as yard service the Rule should be held inapplicable to it as a matter of law. Such a narrow interpretation of the

It was for the jury to determine whether the failure to provide this required light on the rear of the locomotive proximately contributed to the deceased's death. The ruling of the court below that it was not a proximate cause was based on this reasoning: The general railroad practice in yard movements is to push cars attached to the rear of an engine; no express regulation of the Commission prohibits this; in the instant case the cars attached to the engine necessarily would have obscured any light on the rear of that engine; the light so obscured would not have enabled the engineer to see 300 feet backwards so as to avoid injuring the deceased nor would the light have been visible to the deceased standing at or near the track ahead of the backward movement. Therefore, the court concluded, the failure to furnish the light was not proximately related to the death of Tiller.

Assuming, without deciding, that the railroad could consistently with Rule 131 obscure the required light on the rear of the engine, it does not follow that, as a matter of law, failure to have the light did not contribute to Tiller's death. The deceased met his death on a dark night, and the diffused rays of a strong headlight even though directly obscured from the front, might easily have spread

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Regulation would be wholly out of keeping with the liberal construction which we have constantly said must be given to this and the Safety Appliance Act, 45 U. S. C. A., § 1 *et seq.* *Lilly* v. *Grand Trunk Western R. Co.*, *supra*, 486.

We think the court's charge to the jury on this point was consistent with a proper interpretation of the rule. That charge was:

"If the jury believes from the evidence that the road engine, on the night Mr. Tiller was injured, in making the movements it made in said yard was being used by the defendant to classify its cars and make up its train, then the said engine was then being used in yard service. On the other hand, if the jury believes from the evidence that the said road engine was backing into slow siding for the purpose of getting out of the way of the yard engine so that said yard engine could classify cars and make up trains, then said locomotive in making said movement was not being used in yard service."

themselves so that one standing within three car-lengths of the approaching locomotive would have been given warning of its presence, or at least so the jury might have found. The backward movement of cars on a dark night in an unlit yard was potentially perilous to those compelled to work in the yard. *Tennant* v. *Peoria & P. U. R. Co.*, 321 U. S. 29, 33. And "The standard of care must be commensurate to the dangers of the business." *Tiller* v. *Atlantic Coast Line R. Co., supra,* 67.

An additional ground of the reversal of this cause by the Circuit Court of Appeals was that part of the District Court's charge to the jury set out in the margin.[3] It instructed the jury that if they believed that the back-up movement was an unusual and unexpected one, and a departure from the general practice in making up that particular train, and that Tiller had no reasonable cause to believe that such a movement would be made, it became the duty of the defendant to give him adequate warning of that movement and if the jury found that the defendant failed to perform this duty, and that failure was the proximate cause of the injury, its verdict should be for the plaintiff. The original complaint alleged this as one of the grounds of negligence. The Circuit Court of Appeals held that there was substantial testimony to support a finding that the movement was an unusual one.

[3] "The Court charges the jury that if you believe from the evidence that Mr. Tiller was struck while the engine and cars of the defendant were making a back-up movement on the night of March 20th, 1940; that such movement was an unusual and an unexpected one and a departure from the general practice followed in making up train No. 209; that Mr. Tiller on the occasion in question was working on or near the slow siding without knowing or having reasonable cause to believe that such a movement would be made, then it became and was the duty of the defendant in making such movement to give adequate warning of the same, and if the jury believe from the evidence that the defendant failed to perform such duty and as a proximate result of such failure, Mr. Tiller received the injuries from which he died, then the jury should return a verdict for the plaintiff."

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Nevertheless, because no railroad rule or custom prohibited such an unusual movement, because some of the evidence showed that the same movement had been performed on other occasions, and because Tiller was familiar with the local situation, the Circuit Court of Appeals held that the railroad owed no duty to warn him of such an unusual movement. We cannot say that a jury could not reasonably find negligence from the evidence which showed such an unprecedented departure from the usual custom and practice in backing cars, without giving "adequate warning of the movement." Compare *Toledo, St. L. & W. R. Co.* v. *Allen,* 276 U. S. 165, 171.[4] The charge of the District Court in this respect was correct.

Respondent seeks to support the Circuit Court's reversal of the cause on the ground that the District Court erroneously permitted petitioner to amend her original complaint. The injury occurred March 21, 1940. Suit was filed under the Federal Employers Liability Act on January 17, 1941. The amendment alleging violation of the Boiler Inspection Act was filed June 1, 1943, which was more than three years after the death. Federal Employers Liability Act, § 6, provides that a suit under that Act must be commenced within three years after injury. The contention is that the three-year limitation statute provided in the Federal Employers Liability Act barred the amendment which rested on the Boiler Inspection Act.

We are of the opinion that the amendment was properly permitted. Section 15 (c) of the Federal Rules of

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[4] See *Chesapeake & Ohio R. Co.* v. *De Atley,* 241 U. S. 310; *Chesapeake & Ohio R. Co.* v. *Peyton,* 253 F. 734 (C. C. A. 4); *Ferringer* v. *Crowley Oil & Mineral Co.,* 122 La. 441, 47 So. 763; *Louisville & Nashville R. Co.* v. *Asher's Adm'r,* 178 Ky. 67, 198 S. W. 548; *Director General* v. *Hubbard's Adm'r,* 132 Va. 193, 111 S. E. 446; 2 Shearman & Redfield on Negligence (rev. ed.), 566, 607; cf. *Davis* v. *Philadelphia & Reading R. Co.,* 276 F. 187.

Civil Procedure provides that "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading." The original complaint in this case alleged a failure to provide a proper lookout for deceased, to give him proper warning of the approach of the train, to keep the head car properly lighted, to warn the deceased of an unprecedented and unexpected change in the manner of shifting cars. The amended complaint charged the failure to have the locomotive properly lighted. Both of them related to the same general conduct, transaction and occurrence which involved the death of the deceased. There was therefore no departure. The cause of action now, as it was in the beginning, is the same—it is a suit to recover damages for the alleged wrongful death of the deceased. "The effect of the amendment here was to facilitate a fair trial of the existing issues between plaintiff and defendant." *Maty* v. *Grasselli Co.*, 303 U. S. 197, 201. There is no reason to apply a statute of limitations when, as here, the respondent has had notice from the beginning that petitioner was trying to enforce a claim against it because of the events leading up to the death of the deceased in the respondent's yard.[5]

We find no error in the District Court's disposition of the case. The judgment of the Circuit Court of Appeals is reversed and that of the District Court is affirmed.

Reversed.

The Chief Justice and Mr. Justice Roberts are of the opinion that the judgment of the Circuit Court of Appeals should be affirmed.

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[5] See *Friederichsen* v. *Renard*, 247 U. S. 207; *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62; *United States* v. *Powell*, 93 F. 2d 788, 790.

F. W. FITCH CO. *v.* UNITED STATES.

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

No. 181. Argued December 13, 1944.—Decided January 15, 1945.

1. Under § 603 of the Revenue Act of 1932, which imposed on toilet preparations sold by manufacturers or producers an excise tax of a stated percentage of the selling price, *held* that advertising and selling expenses were not excludable from the selling price in computing the tax. P. 584.
2. In computing the selling price for purposes of the tax levied by § 603 of the Revenue Act of 1932, § 619 (a) provides on certain conditions for the exclusion of "A transportation, delivery, insurance, installation, or other charge . . ." *Held* that the term "other charge" does not embrace advertising and selling expenses. P. 584.
3. By the rule of *ejusdem generis,* applicable here since it does not conflict with the general purpose of the statute, the term "other charge" in § 619 (a) is limited to expenses similar in character to those incurred for transportation, delivery, insurance, and installation—all of which are incurred subsequent to the preparation of an article for shipment and are not included in the manufacturer's f. o. b. selling price. P. 585.
4. The construction here given the Act accords with the consistent administrative construction and is required by accepted rules of statutory construction. P. 586.
5. It is not for the courts to afford relief from such inequalities and discriminations as inevitably result where a flat tax is measured by wholesale selling prices. P. 586.
6. Section 619 (b) of the Revenue Act of 1932 is inapplicable where sales were made at wholesale, and does not require a different result from that here reached. P. 587.

141 F. 2d 380, affirmed.

CERTIORARI, *post,* p. 690, to review the reversal of a judgment for the taxpayer, 52 F. Supp. 292, in a suit for a tax refund.

Mr. Arnold F. Schaetzle, with whom *Mr. James M. Stewart* was on the brief, for petitioner.

Mr. Andrew D. Sharpe, with whom *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key* and *J. Louis Monarch* were on the brief, for the United States.

Messrs. Joseph H. Choate, Jr. and *Maurice Léon* filed a brief as *amici curiae,* urging reversal.

Mr. Justice Murphy delivered the opinion of the Court.

Section 603 of the Revenue Act of 1932, c. 209, 47 Stat. 169, 261, Internal Revenue Code § 3401, imposes on toilet preparations sold by manufacturers or producers an excise tax equivalent to stated percentages "of the price for which so sold." Petitioner was subject to this tax from October 1, 1936, to June 30, 1939, and has sought a refund of a portion of the tax paid on the ground that its selling and advertising expenses should have been excluded from the selling prices in computing the tax. The District Court after trial upheld this claim and awarded a refund, 52 F. Supp. 292, but the court below reversed that judgment, 141 F. 2d 380. The alleged conflict with the decisions of the Circuit Court of Appeals for the Seventh Circuit in *Campana Corp.* v. *Harrison,* 114 F. 2d 400, and *Campana Corp.* v. *Harrison,* 135 F. 2d 334, led us to grant certiorari.

The controversy here centers about § 619 (a) of the Act, which provides for the inclusion and exclusion of certain items in computing the selling price for purposes of the tax levied by § 603 as well as various other sections. Section 619 (a) states that, in computing the sales price,

". . . there shall be included any charge for coverings and containers of whatever nature, and any charge incident to placing the article in condition packed ready for shipment, but there shall be excluded the amount of tax imposed by this title, whether or not stated as a separate

charge. A transportation, delivery, insurance, installation, or other charge (not required by the foregoing sentence to be included) shall be excluded from the price only if the amount thereof is established to the satisfaction of the Commissioner, in accordance with the regulations."

Petitioner contends that advertising and selling expenses fall within the term "other charge" appearing in the last sentence of § 619 (a) and hence are excludable in determining the selling price for tax purposes. This claim, however, is refuted by both the spirit and the letter of this statutory provision.

Congress sought in the Revenue Act of 1932 to use the manufacturer's or wholesaler's selling price, rather than the retail price, as the measure of the excise taxes imposed by § 603. 75 Cong. Rec. 11383, 11657. Section 619 (a) was designed to lay down specific rules for determining this selling price, especially in relation to costs incurred after the article itself had been manufactured. It provides for the use of the manufacturer's or producer's f. o. b. price at the factory or place of production. In essence, all manufacturing and other charges incurred prior to the actual shipment of an article and reflected separately or otherwise in the f. o. b. wholesale price are to be included in the sale price underlying the tax, while all charges incurred subsequent thereto are to be excluded. Hence any additional charge which a purchaser would not be required to pay if he accepted delivery of the article at the factory or place of production may be so excluded. See H. Rep. No. 708 (72d Cong., 1st Sess.) p. 37; S. Rep. No. 665, Part 3 (72d Cong., 1st Sess.) p. 3; H. Conf. Rep. No. 1492 (72d Cong., 1st Sess.) p. 22.

Advertising and selling expenses incurred by a manufacturer such as petitioner clearly fall within the class of charges which Congress intended to be included in the tax base. Regardless of whether we consider such ex-

penses technically as manufacturing costs, it is obvious that they are incurred prior to the actual shipment of articles to wholesale purchasers and that they enter into the composition of the wholesale selling price. Even if the purchaser accepts delivery at the factory, he pays for the advertising and selling expenses. Thus they must be included in the taxable sales price.

The inclusion of these expenses is plainly warranted by the language of § 619 (a). Pre-shipment charges relative to coverings, containers and placing an article in condition for shipment are specifically included in the determination of the selling price. But a subsequent "transportation, delivery, insurance, installation, or other charge" is to be excluded if properly established. In the setting of this case, no rule of reason or grammar justifies placing advertising and selling expenses within the meaning of this exclusionary sentence.

To begin with, advertising and selling expenses are obviously not comparable to the specified charges for transportation, delivery, insurance or installation—all of which are incurred subsequent to the preparation of an article for shipment and are not included in the manufacturer's f. o. b. selling price. Hence advertising and selling expenses cannot be encompassed by the term "other charge" unless that term be taken to include charges entirely dissimilar to those specified. This term, however, was understood by its framers to mean "like charges" or "similar charges" to those specifically enumerated in the same sentence. H. Rep. No. 708 (72d Cong., 1st Sess.) p. 37; S. Rep. No. 665, Part 3 (72d Cong., 1st Sess.) p. 3; H. Conf. Rep. No. 1492 (72d Cong., 1st Sess.) p. 22. When this fact is added to the general intent of Congress to include all costs or charges incurred prior to shipment, the applicability of the *ejusdem generis* rule to the term "other charge" becomes clear. This rule, which appro-

priately may be invoked here since it does not conflict with the general purpose of the statute, compare *Securities & Exchange Commission* v. *Joiner Corp.*, 320 U. S. 344, 350, 351, with *Smith* v. *Davis*, 323 U. S. 111, limits the "other charge" to expenses similar in character to those incurred for transportation, delivery, insurance and installation. Since advertising and selling expenses arise prior to shipment and are necessarily components of the f. o. b. selling price, the term "other charge" cannot cover them.[1] They must be included in the tax base. Such has been the consistent administrative construction of the statute, G. C. M. 21114, 1939–1 Cum. Bull. 351, 353. And such is the result made necessary by the accepted rules of statutory construction.[2]

It is argued that this conclusion results in a discrimination against a manufacturer who indulges in his own advertising and selling campaigns in favor of one whose products are advertised by his customers and that Congress could not have intended such a discrimination. But this discrimination, to the extent that it may exist, is an unavoidable consequence of an excise tax based on the

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[1] The parenthetical matter following the term "other charge" in the last sentence of § 619 (a)—"(not required by the foregoing sentence to be included)"—is not significant in this case. It serves simply to provide that, to the extent that the provisions for inclusion and exclusion may overlap, the former shall control.

[2] Section 3 (a) of the Revenue Act of 1939, 53 Stat. 862, 863, Internal Revenue Code § 3401, excluded from the sale price "a transportation, delivery, insurance, or other charge, *and the wholesaler's salesmen's commissions and costs and expenses of advertising and selling.*" (Italics added.) Section 3 (b) made this amendment prospective only and hence § 3 (a) cannot be taken as a Congressional declaration that the advertising and selling expenses were intended to be excluded from the selling price under the Revenue Act of 1932. On the contrary, the very fact that Congress found it necessary in 1939 to exclude such expenses specifically is persuasive evidence that prior thereto advertising and selling expenses were not meant to be excluded.

wholesale selling price. Such cost factors as labor, materials and advertising naturally vary among competing manufacturers; different costs and different methods of doing business in turn may cause the wholesale selling prices to lack uniformity. And if these prices are taxed without adjustment for differing cost factors, tax inequalities and discriminations inevitably result. But where, as here, a flat tax is placed on the wholesale selling prices and no statutory provisions are made for relief from the resulting natural tax inequalities, courts are powerless to supply it themselves by imputing to Congress an unexpressed intent to achieve tax uniformity among manufacturers selling at wholesale.[3]

Finally, petitioner urges that § 619 (b) must also be considered in order to ascertain the true Congressional intent and in order to give § 619 (a) its proper construction. But § 619 (b) merely provides that where the manufacturer sells at retail, on consignment or otherwise than through an arm's length transaction, the tax shall be based upon a figure determined by the Commissioner with reference to the prices at which similar articles are sold in the ordinary course of trade. Inasmuch as petitioner's sales were made at wholesale, § 619 (b) has no direct application to this case. But it does serve to emphasize the failure of Congress to make similar provisions for tax equalization under § 619 (a) where the manufacturer's sales are at wholesale. It cannot, however, vary the plain intent and language of § 619 (a) and Congres-

[3] Congress has subsequently realized that the excise tax on the wholesale selling price created tax inequalities among manufacturers. In § 552 of the Revenue Act of 1941, 55 Stat. 687, 718, Congress substituted a retail excise tax for the manufacturer's excise tax on toilet preparations. The reasons assigned for the change were that under the earlier law "evasion is substantial and inequitable competitive situations are created." H. Rep. No. 1040 (77th Cong., 1st Sess.), p. 33.

sional statements[4] relating to the desirability of eliminating discriminations against manufacturers making retail sales cannot be taken as evidence of a desire to prevent the natural inequalities that result when a tax is placed on the wholesale selling price.

Affirmed.

MR. JUSTICE ROBERTS concurs in the result.

PENNSYLVANIA RAILROAD CO. ET AL. *v.* UNITED STATES ET AL.

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

No. 182. Argued January 11, 1945.—Decided January 29, 1945.

1. Section 15 (4) (b) of the Interstate Commerce Act empowers the Interstate Commerce Commission to establish a through route which would require a carrier to short-haul itself where such route is needed in order to provide "adequate, and more efficient or more economic, transportation." *Held* that, in determining whether the proposed through route is needed in order to provide "adequate, and more efficient or more economic, transportation," the Commission may consider the interests of the shipper as well as those of the carrier. P. 592.
2. The order of the Interstate Commerce Commission requiring the establishment of through routes was supported by the findings and the evidence. P. 593.

54 F. Supp. 381, affirmed.

APPEAL from a decree of a district court of three judges refusing to set aside an order of the Interstate Commerce Commission, 255 I. C. C. 333.

Mr. Joseph F. Eshelman, with whom *Messrs. R. Aubrey Bogley, Francis R. Cross, Wm. Pepper Constable, John Dickinson, H. C. Barron, Charles Clark, A. B. Enoch, P. F. Gault, Thomas P. Healy, H. H. Larimore, A. H.*

[4] See H. Rep. No. 708 (72d Cong., 1st Sess.), pp. 32–33; 75 Cong. Rec. 5693, 5694.

Lossow, L. H. Strasser and *Carson L. Taylor* were on the brief, for appellants.

Mr. Robert L. Pierce, with whom *Solicitor General Fahy, Assistant Attorney General Berge, Messrs. Walter J. Cummings, Jr., Daniel W. Knowlton* and *Edward M. Reidy* were on the brief, for the United States and the Interstate Commerce Commission, and *Mr. C. R. Hillyer* for D. A. Stickell & Sons, Inc., appellees.

Mr. Justice Roberts delivered the opinion of the Court.

This is an appeal from a decree [1] of a District Court of three judges dismissing the petition of the appellants, thirteen trunk line railroads, for an injunction annulling an order of the Interstate Commerce Commission,[2] which required the railroads to establish and maintain two through routes.

The Commission's order was made after hearing upon a complaint of D. A. Stickell & Sons, Inc., a manufacturer of mixed feeds at Hagerstown, Md. This concern obtains its inbound raw material of grain and grain products, etc., from manufacturing plants located in so-called central territory. These are mixed and the mixed aggregate moves from the plant at Hagerstown to points eastward, but principally to the so-called Del-Mar-Va Peninsula, a portion of Delaware, Maryland, and Virginia, which is served solely by the Pennsylvania Railroad. Hagerstown lies on the main line of the Western Maryland Railway. The Pennsylvania serves it by a branch line running from Harrisburg, Pa., to Winchester, Va., and the Baltimore & Ohio by a branch line running north from its main line at Weverton, Maryland. The railroads accord transit

[1] 54 F. Supp. 381.

[2] Stickell & Sons *v.* Alton R. Co., 255 I. C. C. 333.

facilities at Hagerstown whereby Stickell may receive the inbound materials, mix them, and ship the products to destination on a through rate plus a transit charge as if the movement had been a through one from origin to destination. The handling of freight moving over the Pennsylvania Railroad will illustrate the problem. The so-called back-haul, or out-of-line haul, required to reach Hagerstown from the Pennsylvania's main line is 74.5 miles in each direction and the additional charge for it is 4.5 cents per cwt., or about 17% of the through rate. Interchange and switching operations to reach the Stickell plant are performed by the Western Maryland and the Pennsylvania absorbs these charges. The Commission's order established two new through routes which included the Western Maryland, the line which serves the Stickell plant. Both reduced the Pennsylvania's line haul to that portion of the routes eastward of York, Pa., or Fulton Junction (Baltimore), Maryland, in respect of shipments to the Del-Mar-Va Peninsula, thus depriving the Pennsylvania of a long haul from points west of Pittsburgh, Pa., through Harrisburg, Pa.

The gravamen of Stickell's complaint before the Commission was that the back-hauls involved in existing routes delayed its shipments and, while the charge for such back-hauls was reasonable, the addition of this charge to the through rate cut into its margin of profit, which is small. These factors, it claimed, deprived it of its rightful competitive relation to other manufacturers of mixed feed.

The Commission's authority to grant relief is bottomed on § 15 (3) and (4) of the Interstate Commerce Act as amended.[3] The subsection first mentioned authorizes the Commission, when it deems it to be "necessary or desirable in the public interest" to establish through routes and

[3] 49 U. S. C. § 15 (3) (4).

joint rates. The succeeding subsection is a limitation on the Commission's power, derived in part from earlier enactments, prohibiting the Commission from requiring a line-haul carrier to short-haul itself as a participant in a prescribed through route. The earlier part of the paragraph retains the prohibition against short hauling but contains exceptions, one of which, designated (b), is "unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: . . ." The principal controversy in the cause turns on the proper interpretation of the quoted exemption from the general prohibition of through routes which involve short hauling. There are certain subsidiary issues which will be noticed.

The opposing views of the parties may be summarized. The appellants argue that the phrase "adequate, and more efficient or more economic, transportation" refers to carrier operations and expense and has no reference to the broader public interest which embraces service to shippers and the rates they pay. The appellees urge that the phrase comprehends the adequacy of service, its cost to the shipper, and the convenience, efficiency, and cost of the carriers' operations. The Commission took the latter view. In its decision it purported to consider all these elements and, on appraisal of them, concluded the two routes it prescribed were justified by § 15 (4). The court below sustained the Commission. We think its judgment was right.

Without reciting in detail the statutory history, which is given in full in the opinion below, it will suffice to say that the Commission originally construed the short-haul provision of the Interstate Commerce law as protecting only the haul of the originating carrier. In *United States* v. *Missouri Pacific R. Co.*, 278 U. S. 269, this construction

was overruled. Decision was handed down after the Commission had made an order on an earlier complaint of Stickell, similar to the order here involved;[4] but, after this court's decision, the Commission set aside the order in conformity to our opinion. Several unsuccessful attempts were thereupon made to induce Congress to repeal the short-haul prohibition. When the 1940 amendment to the Interstate Commerce Act was on its passage, the short-haul prohibition was eliminated by the Senate. The House retained the provision without change.

In conference § 15 (4) was amended by permitting the Commission to require a carrier to short-haul itself under the conditions specified in the language we have quoted. Thus the two sections—15 (3) and (4)—since 1940 have provided that the Commission may establish a through route if found to be "in the public interest" but may not establish such a route which requires a carrier to short-haul itself unless it finds that the route will provide adequate, and more efficient or more economic, transportation. The appellants suggest that if the latter phrase be construed as the Commission has construed it the two sections taken together will be redundant for subsection (3) permits the establishment of a through route only if it is in the public interest, and the short-haul provision may be disregarded only if so to do would be in the public interest. But we think this is not a fair construction of the statute. It is conceivable that the Commission might refuse to establish many through routes as not required in the public interest where short hauling is not involved. On the other hand, if the Commission is asked to abrogate the general rule with regard to the short-haul, the statute says it must have regard to several matters. The first of these is adequacy of transportation. The expression would seem to apply only to the interest of the

[4] Stickell & Sons *v.* Western Maryland R. Co., 146 I. C. C. 609.

shipping public. The second and third matters to be considered are efficient and economic transportation. These expressions may well embrace both shippers' and carriers' interests. Congress had a purpose in amending the provision, and we think the Commission was not in error in construing the language used as evincing an intent that both interests should be considered and a fair balance found.

The appellants refer to legislative history, to the policy declared in the Interstate Commerce legislation, to the definition of transportation in the statute, and other aids to construction, in support of their argument. These were, in our view, adequately discussed by the court below. We have considered them but they do not persuade us that the Commission and the District Court were wrong in their interpretation of § 15 (4).

The appellants contend that even if the Commission was right in its interpretation of its statutory authority, its over-all conclusion is not supported by evidence or by the subsidiary findings. The claim is that the Commission did not make findings that the expense and inconvenience to the carriers concerned of rendering services over routes involving four, five, or six railroads, with the consequent interchange of traffic, would not be inordinately expensive and burdensome, and they point to certain evidence offered before the Commission which they say the Commission ignored. In the court below the same contention was considered and overruled. True, the Commission's findings are not sharp and clear on the point, but the matter was not ignored and the Commission's decision refers to it. We are unable to say that there was not sufficient in the record before the Commission, and in its findings, to justify the conclusion that the Commission, as it says it did, weighed the evidence and found that the balance was in favor of the order made.

Judgment affirmed.

CITY BANK FARMERS TRUST CO. (FORMERLY FARMERS LOAN & TRUST CO.), ADMINISTRATOR, *v.* McGOWAN, COLLECTOR OF INTERNAL REVENUE.

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

No. 294. Argued January 4, 1945.—Decided January 29, 1945.

1. Section 302 (c) of the Revenue Act of 1926, as amended, which, for the purpose of the federal estate tax, requires inclusion, in the gross estate of a decedent, of any interest in property of which "the decedent has at any time made a transfer . . . in contemplation of . . . his death," *held* applicable to a transfer of property of an incompetent person, effected by order of a court acting in lieu of the incompetent. P. 598.
2. A transfer is "in contemplation of death," within the meaning of § 302 (c), where the thought of death is the impelling cause of the transfer. *United States* v. *Wells*, 283 U. S. 102. P. 599.
3. Where by court order annual allowances were made out of the surplus income of an incompetent person, over seventy years of age and incurably insane, to descendants who would inherit the incompetent's property, and where the dominating reason for the allowances was that the beneficiaries would eventually divide the estate, *held* that the annual allowances—to the extent that they exceeded an amount which the incompetent, for some years prior to adjudication of incompetency, had regularly allowed—were made "in contemplation of death," within the meaning of § 302 (c). P. 599.
4. Allowances made by court order out of the surplus income of an incompetent person to collateral relations, who would inherit no part of the incompetent's property and who were in need of funds for their maintenance and support, *held* not made "in contemplation of death" within the meaning of § 302 (c). P. 600.

142 F. 2d 599, reversed in part.

CERTIORARI, *post*, p. 689, to review the affirmance of a judgment, 43 F. Supp. 790, which allowed recovery in part in a suit for refund of federal estate taxes.

Messrs. James Lloyd Derby and *J. Seymour Montgomery, Jr.*, with whom *Messrs. Frederick P. King* and *John K. Watson* were on the brief, for petitioner.

Assistant Attorney General Samuel O. Clark, Jr., with whom *Solicitor General Fahy, Messrs. Sewall Key, J. Louis Monarch, Carlton Fox* and *Chester T. Lane* were on the brief, for respondent.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

This case presents an issue of importance arising under § 302 (c) of the Revenue Act of 1926, as amended,[1] which requires inclusion, in the gross taxable estate of a decedent, of any interest in property of which the "decedent has at any time made a transfer . . . in contemplation of . . . his death . . ." More specifically, the inquiry is whether the section reaches allowances out of the income of an incompetent person.

Helen Hall Vail died in 1935 intestate. For nine years she had been incurably insane. In 1926 an adjudication of incompetency was entered by the Supreme Court of the State of New York, and a committee was appointed to care for her property, which consisted of income-producing realty and personalty. In addition, she was in receipt of the income of a trust. During the period of five years prior to the adjudication her annual income from all sources had averaged $300,000. She was over 70 years of age but in good physical health. She had a living daughter and three grandsons, children of a deceased daughter. Application was made to the court to make allowances out of income to Mrs. Vail's issue and to a brother and sisters. The court referred the matter to a referee before whom it was shown that she had, over a period of years, allowed

[1] Internal Revenue Code § 811 (c), 26 U. S. C. § 811 (c).

each of her daughters $6,000, and one of her sisters $500, per annum, and had made gifts to her daughters, but not with regularity. As she was confined in an institution, her total needs, including maintenance and taxes, did not exceed $50,000 per annum. Accumulated income in the hands of the committee amounted to over $750,000.

The court, on the basis of the referee's report, entered an order which, after reciting that Mrs. Vail had made no will, that the daughter and grandchildren, or their issue, would, upon her death, be her only heirs at law and next of kin, and the only persons entitled to share in her estate, and that, if she were in possession of her mental faculties, "she would desire that the allowance hereinafter fixed be made . . ., and would make such allowances to such persons out of her property," directed the committee to pay yearly, in quarterly installments, $50,000 to the living daughter and $50,000 to the guardian of the children of the deceased daughter, $2,000 each to all but one of the brother and sisters; and $3,000 to the remaining sister.

Some six years later an application was made for an increase in the allowance. The matter was again referred for hearing and, on the coming in of the referee's report showing that accumulated income in Mrs. Vail's account had increased to over $1,000,000, that income had averaged, for over five years, approximately $395,000 per annum, and, after paying allowances and all expenses, the surplus averaged about $191,000 a year, the court made an order reciting that she was then 77 years of age and incurable, enumerated the issue who would be entitled to her estate at death, that she had no will, and that if she were competent she would have desired that the sums named in the earlier decree be augmented, raised the allowances to the daughters and to the grandchildren collectively to $75,000, retroactive to the date of the original order. It was never claimed, and is not contended, that the next of kin needed any such allowances for their maintenance

and support in their station in life. It is conceded that the brother and sisters to whom allowances were made were destitute and in need of maintenance.

At Mrs. Vail's death the allowances theretofore paid totaled $1,377,866.67. The Commissioner of Internal Revenue included the sum in the decedent's gross estate and determined a deficiency. The petitioner, as administrator, paid the sum demanded, claimed a refund and, on denial, instituted this action in the District Court. That court, upon consideration of the record of the proceedings in the Supreme Court of New York, found that the total of the allowances was properly included in the decedent's gross estate, except so much as represented annual payments to the daughter and the grandchildren's guardian of $6,000 each and $500 per annum of the gifts to collaterals, and entered judgment accordingly.[2] The Circuit Court of Appeals, by a divided court, affirmed the judgment.[3] We granted certiorari.

The Supreme Court of New York is empowered by statute to act as representative of the State, as *parens patriae,* in caring for the persons and the estates of its incompetent citizens. That court may grant allowances out of income only if it determines that the incompetent would probably have granted such allowances himself had he been sane. The court does not, in any proper sense, act as the incompetent's agent. In the exercise of the power the primary consideration is that the incompetent's property shall not be wasted but preserved against the possibility of restoration to sanity. On these propositions the parties are in accord.

The petitioner urges that the present case is not within the terms of the statute and that, in enacting § 302, Congress did not contemplate any such contingency as that

[2] 43 F. Supp. 790.

[3] 142 F. 2d 599.

here involved. It insists that Mrs. Vail made no transfer but, if any was made, the court made it; that she had and could have no motive in respect of the gift. In addition, it urges that, under the State law, the court's control over the estate ceases at the incompetent's death, and the court cannot make a will for her or in any wise interfere with the devolution of her estate. Hence, it concludes that to suggest the court sanctioned transfers of a testamentary character is to assume that it exceeded its powers. Such an assumption, so petitioner says, ought not to be indulged. On the contrary, it should be presumed that the court acted within its granted powers; that is, authorized transfers *inter vivos,* with no testamentary motive.

The Government, on the other hand, takes the position that nothing in the law of New York, and no authority cited by the petitioner, precludes the State court from making an allowance in contemplation of death if, upon the record made, the court, placing itself in the incompetent's position on the supposition that she were sane and competent, concludes that she would have made the transfers. And, it adds, that what was done by the Supreme Court in this case was not appealed and is now beyond correction, if erroneous, and that the records and orders evince an understanding that the certainty of continuance of disability until death, the fact of intestacy, and the natural expectations of the distributees under the intestate laws were prevalent factors in moving the court to make the orders in question, and characterize the court's action as taken in contemplation of death. The Government says that, as the court was required to, and did, act as the decedent would have acted if competent, this case is not outside the terms of § 302 (c) but, on the contrary, in contemplation of law, the decedent did make the transfers in question.

The issue is a narrow one. Literally Mrs. Vail neither made the transfers nor did she have any motive with re-

spect to them. But a court stood in her place and unquestionably had the function of effectuating a transfer of her property and of determining what motive or purpose would have actuated her had she been competent to act. It seems to us that it is sticking in the bark to say that, in the circumstances, the transfers are not within the section because Congress did not add a phrase to the effect that where a court made the transfer, acting in lieu of the incompetent owner, such a transfer should be governed by the statute.

We hold, therefore, that where, as in New York, the court is to substitute itself as nearly as may be for the incompetent, and to act upon the same motives and considerations as would have moved her, the transfer is, in legal effect, her act and the motive is hers.

This being so, the only remaining question is whether the proof was sufficient to overcome the presumption arising from the Commissioner's determination that the transfers were made in contemplation of death. The applicable test is that stated in *United States* v. *Wells,* 283 U. S. 102. This is whether the thought of death is the impelling cause of the transfer. As respects the descendants of Mrs. Vail, it would seem clear enough that there was no dominant motive for the transfer other than the thought that, as they would inherit her estate, and as there was a large accumulation of unneeded income, they might as well receive substantial portions now as await her death to enjoy their inheritance. The fact that these beneficiaries did not stand in need of the money, the fact that the increase granted at the second hearing was made retroactive, and that the past instalments were paid in a lump sum, the arguments of counsel in both hearings that the only reason for granting the allowances to Mrs. Vail's descendants was that they inevitably would divide her estate amongst them, and the recitals of the court orders, to which reference has been made, all go to confirm, rather than to undermine, the Commissioner's determination.

We think the District Court was right in holding that, to the extent of $6,000 per annum, which was the sum Mrs. Vail, when competent, had regularly allowed each of her daughters, the transfers fall without the terms of § 302 (c), but that the balance of the payments to her descendants falls within its sweep.

A different question is presented respecting the allowances to collaterals. It appears that they were in need of funds for their maintenance and support, and it is obvious that no payments to them could be on account of any share of their sister's intestate estate. The allowances have the color of current payments for support and they were authorized because the court concluded that, if sane and cognizant of the situation, Mrs. Vail would have made them. These considerations lead to the conclusion that the Commissioner's determination concerning them is rebutted and that they should not have been included in the decedent's gross estate. To the extent indicated the judgment of the Circuit Court of Appeals is reversed.

So ordered.

BLAIR *v.* BALTIMORE & OHIO RAILROAD CO.

CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

No. 265. Argued January 2, 3, 1945.—Decided January 29, 1945.

1. In this suit under the Federal Employers' Liability Act to recover damages for personal injuries alleged to have resulted from negligence of the employer in failing to provide adequate equipment and sufficient competent help, and from negligence of fellow servants, the evidence was sufficient to go to the jury on the issue of negligence, and the issue should be determined by the jury and not by the court. P. 604.
2. In determining whether there was negligence, the employer's conduct may be viewed as a whole, especially where the several elements from which negligence might be inferred are so closely interwoven as to form a single pattern and where each imparts character to the others. P. 604.

3. Under the circumstances of this case, where the employee recognized the danger in the manner of moving heavy pipe but was commanded to go ahead, he can not be held to have assumed the risk. P. 605.
4. It is unnecessary in this case to consider whether the amendment of the Employers' Liability Act which abolished the defense of assumption of risk is applicable to causes of action which arose prior to the effective date of the amendment. P. 605.

349 Pa. 436, 37 A. 2d 736, reversed.

CERTIORARI, *post,* p. 688, to review a judgment which, upon appeals from orders of the trial court, denied recovery in a suit under the Federal Employers' Liability Act.

Mr. J. Thomas Hoffman for petitioner.

Mr. Charles J. Margiotti argued the cause, and *Mr. Vincent M. Casey* was on the brief, for respondent.

MR. JUSTICE BLACK delivered the opinion of the Court.

A jury in the Common Pleas Court of Allegheny County, Pennsylvania, awarded the petitioner a verdict for $12,000 damages for personal injuries in his action against the respondent railroad under the Federal Employers' Liability Act, 45 U. S. C., § 51 *et seq.* That Act authorizes an employee to recover for such injuries if they result "in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its . . . appliances . . . or other equipment." The complaint set out in great detail the events leading to the injury and alleged that the injury was the result of the defendant's negligence in failing, under the circumstances narrated, to provide petitioner with reasonably suitable tools and appliances, a reasonably safe place in which to work, reasonably sufficient and competent help to do the work, and the negligence of the respondent's employees who assisted him in doing the work. Respondent moved for judgment notwithstanding the verdict on the ground

that there was no evidence to prove any negligence on its part. This motion was denied. Although the trial judge thought the verdict was "just and reasonable," respondent's motion for new trial was granted, on the ground that while the testimony was sufficient to support a finding that the negligence of respondent's employees contributed to the injury, it was not sufficient to show that the injury resulted from defendant's failure to provide adequate equipment, or sufficient and competent help. Both parties appealed to the Pennsylvania Supreme Court, which reversed, holding that petitioner had assumed the risk of injury by remaining in the employment and that there was no evidence to support negligence in any respect. 349 Pa. 436, 37 A. 2d 736.

To deprive railroad "workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them." *Bailey* v. *Central Vermont R. Co.*, 319 U. S. 350, 354. Because important rights under the Act were involved, we granted certiorari.

Despite conflicting evidence, there was sufficient evidence to justify the jury in finding that the injury was inflicted under these circumstances. Petitioner's duties were to load and unload inbound and outbound freight. In unloading a car standing at the platform adjacent to respondent's warehouse, petitioner came to three 10-inch seamless steel tubes, approximately 30 feet long and weighing slightly more than a thousand pounds each. The pipes were greased and slick. The petitioner went to his superior, informed him that the pipes were too heavy for him to move and suggested that it was not customary for the railroad to unload pipes of this kind at its warehouse, but to send the car directly to the consignee's place of business where it had proper equipment for unloading heavy material. This suggestion was rejected and petitioner was then told to get Mr. Miller, the car inspector, and Mr. Fanno, the section man, to help him unload.

Petitioner's insistence that the three could not unload the heavy pipes was overridden, and he was then told to go ahead and do the work or they "would get somebody else that would." Under these circumstances, petitioner undertook to unload the pipes and carry them through the warehouse to place in the consignee's truck which had backed up to the warehouse platform on the opposite side from the railroad car. The best equipment available for moving the pipes was a "nose truck" of the kind commonly used in railroad stations to move freight and luggage. It was about five feet long and two feet high, consisting of a flat metal frame, with an upright flange and two wheels at one end and wheelbarrow handles at the other. The problem was to balance three greased, 1000-pound, 30-foot steel tubes on this truck, move them across two platforms through the warehouse and place them in the consignee's truck. The men took the nose truck into the car, managed to get the first pipe lengthwise on it, worked it through the car door to the platform over a steel bridge connecting the car and the platform, and then carried it to the waiting truck. Petitioner held one handle of the nose truck with one hand and the steel tube with the other. Miller occupied the same position as to the other handle and the pipe. Fanno held the pipe and the truck at its wheel end. They were all necessarily crouching, since the truck was only two feet high when moved in a level position, as it had to be, to keep the tube from slipping off. The first tube was successfully moved. While they were attempting to move the second tube in the same manner, it slipped. Fanno and Miller released their holds, but petitioner did not. The heavy tube in slipping caused the truck to kick back resulting in petitioner's injury.

In the petitioner's four-year service this was the first occasion that such heavy pipe had been moved at the warehouse. Fanno, aged 60, and Miller, aged 68, had never before assisted petitioner in such a movement; their duties were entirely different. The evidence indi-

cated that the immediate cause of the greasy pipe's slipping as it did was either (1) an uneven place on the warehouse floor due to its having sunken in; or (2) pushing the nose truck against the standing company truck with such force as to make the tube move with great suddenness. The fact that Fanno and Miller released their grips after it began to slip also contributed to the suddenness and force of the kickback of the nose truck which caused the petitioner's injury.

We think there was sufficient evidence to submit to the jury the question of negligence posed by the complaint. The duty of the employer "becomes 'more imperative' as the risk increases." *Bailey* v. *Central Vermont R. Co.*, 319 U. S. 350, 352, 353. See also *Tiller* v. *Atlantic Coast Line*, 318 U. S. 54, 67. The negligence of the employer may be determined by viewing its conduct as a whole. *Union Pacific R. Co.* v. *Hadley*, 246 U. S. 330, 332, 333. And especially is this true in a case such as this, where the several elements from which negligence might be inferred are so closely interwoven as to form a single pattern, and where each imparts character to the others.

The nature of the duty which the petitioner was commanded to undertake, the dangers of moving a greased, 1000-pound steel tube, 30 feet in length, on a 5-foot truck, the area over which that truck was compelled to be moved, the suitableness of the tools used in an extraordinary manner to accomplish a novel purpose, the number of men assigned to assist him, their experience in such work and their ability to perform the duties and the manner in which they performed those duties—all of these raised questions appropriate for a jury to appraise in considering whether or not the injury was the result of negligence as alleged in the complaint. We cannot say as a matter of law that the railroad complied with its duties in a reasonably careful manner under the circumstances here, nor

that the conduct which the jury might have found to be negligent did not contribute to petitioner's injury "in whole or in part." Consequently we think the jury, and not the court, should finally determine these issues.

The court below, however, thought that the plaintiff should not recover because he had assumed the risk of this danger. It is to be noted that at the time this case was tried Congress had passed an act which completely abolished the defense of assumption of risk. 53 Stat. 1404. *Tiller* v. *Atlantic Coast Line, supra.* We need not consider whether this statute applies to this case, since we are of opinion that it cannot be held as a matter of law that the petitioner assumed the risks incident to moving the steel tubes.

It is true that the petitioner undertook to do the work after he had complained to the company that the pipe should not be moved in the manner it was. But he was commanded to go ahead by his superior. Under these circumstances it cannot be held as a matter of law that he voluntarily assumed all the risks of injury. The court below cited by way of comparison its holding in a former decision, *Guerierro* v. *Reading Co.*, 346 Pa. 187, 29 A. 2d 510. There it had announced the rule that an employee has a duty to quit his job rather than to do something which he knows, or ought to know, is dangerous. This Court does not apply the doctrine of assumption of risk so rigorously. In *Great Northern R. Co.* v. *Leonidas,* 305 U. S. 1, we affirmed the judgment of the Supreme Court of Montana, 105 Mont. 302, 72 P. 2d 1007. In its opinion the Montana court stated: "We are not able to say that the hazard of carrying the [railroad] tie was so open and obvious that the plaintiff, as a matter of law, must be held to have assumed the risk of injury by yielding obedience to the command of the foreman." So here, we do not think that this petitioner can be held to have assumed

the risk by obeying the command of his employer's foreman to go on with his job. The judgment of the Supreme Court of Pennsylvania is reversed, and remanded to that court for proceedings not inconsistent with this opinion.

Reversed.

The CHIEF JUSTICE and MR. JUSTICE ROBERTS are of the opinion that the judgment should be affirmed.

WEILER *v.* UNITED STATES.

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

No. 340. Argued January 10, 11, 1945.—Decided January 29, 1945.

1. The Court adheres to the rule which bars a conviction of perjury on the uncorroborated testimony of a single witness. *Hammer* v. *United States,* 271 U. S. 620. P. 609.
2. In a prosecution for perjury, the federal district court erred in refusing the defendant's requested instruction to the effect that, in order to convict, the falsity of the statement made under oath must be established by the testimony of two independent witnesses or by one witness and corroborating circumstances. P. 610.
3. This Court is unable to say that the error of the district court in refusing the requested instruction was harmless. *Goins* v. *United States,* 99 F. 2d 147, distinguished. P. 611.

143 F. 2d 204, reversed.

CERTIORARI, *post,* p. 694, to review the affirmance of a conviction of perjury.

Messrs. Peter P. Zion and *Hirsh W. Stalberg* for petitioner.

Assistant Attorney General Wechsler argued the cause, and *Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Messrs. W. Marvin Smith, Robert S. Erdahl,* and *Miss Beatrice Rosenberg* were on the brief, for the United States.

MR. JUSTICE BLACK delivered the opinion of the Court.

This Court stated in *Hammer* v. *United States*, 271 U. S. 620, 626, that "The general rule in prosecutions for perjury is that the uncorroborated oath of one witness is not enough to establish the falsity of the testimony of the accused set forth in the indictment." The question here is whether it is reversible error to refuse to charge the jury to this effect.

The petitioner was convicted of perjury in a federal district court.[1] In a prior criminal proceeding for violation of Office of Price Administration regulations he had testified that he had neither bought nor had in his possession in March, 1942, certain automobile tires. He further testified that although he had signed a notarized letter in which he stated that he had purchased the tires, he was not in reality the purchaser, but had merely lent the money for their purchase, and had signed the letter as an accommodation. The jury acquitted him and he was then indicted for perjury. The indictment charged that his testimony with reference to the tire transaction was false. In the perjury trial the petitioner reiterated his former testimony as to the tire transaction. Several government witnesses gave testimony from which the jury could have found that petitioner was in fact the purchaser.

When the evidence was completed, petitioner requested the trial judge to give the following instruction to the jury:

"The Government must establish the falsity of the statement alleged to have been made by the defendant under oath, by the testimony of two independent witnesses or one witness and corroborating circumstances. Unless that has been done, you must find [the] defendant not guilty."

[1] 18 U. S. C. 231 defines the federal offense of perjury.

This instruction was refused, and the trial judge in his oral charge completely omitted any reference to the "two witness rule" in perjury cases. The petitioner was convicted, and the Circuit Court of Appeals affirmed on the ground that it was for the court to determine whether the quantitative rule of evidence in perjury had been satisfied, that it had been satisfied in this case, and that consequently the District Court had properly refused the requested charge. 143 F. 2d 204. Other Circuits have held that similar charges should be given. *Pawley* v. *United States,* 47 F. 2d 1024, 1026, (C. C. A. 9); *Allen* v. *United States,* 194 F. 664, 668, (C. C. A. 4).

In granting certiorari we limited review solely to the question of whether the trial court erred in denying this charge.

First. The government asks that we reexamine and abandon the rule which bars a conviction of perjury on the uncorroborated testimony of a single witness. The argument is that while this quantitative rule as particularly applied to perjury cases may have been suited to the needs of the 18th Century, it has long since outlived its usefulness, that it is an incongruity in our modern system of justice, and that it raises an unjustifiable barrier to convictions for perjury.

Our system of justice rests on the general assumption that the truth is not to be determined merely by the number of witnesses on each side of a controversy. In gauging the truth of conflicting evidence, a jury has no simple formulation of weights and measures upon which to rely. The touchstone is always credibility; the ultimate measure of testimonial worth is quality and not quantity. Triers of fact in our fact-finding tribunals are, with rare exceptions, free in the exercise of their honest judgment to prefer the testimony of a single witness to that of many.

The special rule which bars conviction for perjury solely upon the evidence of a single witness is deeply rooted in

past centuries.[2] That it renders successful perjury prosecution more difficult than it otherwise would be is obvious, and most criticism of the rule has stemmed from this result. It is argued that since effective administration of justice is largely dependent upon truthful testimony, society is ill-served by an "anachronistic" rule which tends to burden and discourage prosecutions for perjury. Proponents of the rule, on the other hand, contend that society is well-served by such consequence. Lawsuits frequently engender in defeated litigants sharp resentments and hostilities against adverse witnesses, and it is argued, not without persuasiveness, that rules of law must be so fashioned as to protect honest witnesses from hasty and spiteful retaliation in the form of unfounded perjury prosecutions.

The crucial role of witnesses compelled to testify in trials at law has impelled the law to grant them special considerations. In order that witnesses may be free to testify willingly, the law has traditionally afforded them the protection of certain privileges, such as, for example, immunity from suits for libel springing from their testimony.[3] Since equally honest witnesses may well have differing recollections of the same event, we cannot reject as wholly unreasonable the notion that a conviction for perjury ought not to rest entirely upon "an oath against an oath." The rule may originally have stemmed from quite different reasoning, but implicit in its evolution and continued vitality has been the fear that innocent witnesses might be unduly harassed or convicted in perjury prosecutions if a less stringent rule were adopted.

Whether it logically fits into our testimonial pattern or not, the government has not advanced sufficiently cogent reasons to cause us to reject the rule. As we said in *Hammer* v. *United States, supra,* 626–627, "The applica-

[2] Wigmore on Evidence (Third Edition) §§ 2030–2044.

[3] See also 8 Wigmore, *supra,* § 2195g.

tion of that rule in federal and state courts is well nigh universal. The rule has long prevailed, and no enactment in derogation of it has come to our attention. The absence of such legislation indicates that it is sound and has been found satisfactory in practice." [4]

Second. The court below held, and the government argues here, that it is solely the function of the judge finally to determine whether a single witness and sufficient corroborative evidence have been presented to sustain a conviction. Two elements must enter into a determination that corroborative evidence is sufficient: (1) that the evidence, if true, substantiates the testimony of a single witness who has sworn to the falsity of the alleged perjurious statement; (2) that the corroborative evidence is trustworthy. To resolve this latter question is to determine the credibility of the corroborative testimony, a function which belongs exclusively to the jury.[5] Thus, to permit the judge finally to pass upon this question would enable a jury to convict on the evidence of a single witness, even though it believed, contrary to the belief of the

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[4] After a careful study made by a joint Parliamentary Committee, looking to a codification of English criminal laws, it unanimously recommended and Parliament passed the following law:

"A person shall not be liable to be convicted of any offence against this Act, or of any offence declared by any other Act to be perjury or subornation of perjury, or to be punishable as perjury or subornation of perjury solely upon the evidence of one witness as to the falsity of any statement alleged to be false." Perjury Act, 1911, 1 & 2 Geo. V, c. 6, § 13, Public General Acts, 1st & 2nd Geo. V, 1911; Parliamentary Debates, Lords, Vol. VII, 1911, pp. 143–146; Reports from the Joint Select Committee of the House of Lords and the House of Commons on the Licensing (Consolidation) Bill and the Perjury Bill [H. L.], 1910, No. 321, p. 62. Cf. *State* v. *Storey*, 148 Minn. 398, 182 N. W. 613; *Marvel* v. *State*, 33 Del. 110, 131 A. 317.

[5] See *State* v. *Hill*, 223 N. C. 711, 28 S. E. 2d 100; *Brown* v. *State*, 101 Tex. Crim. Rep. 639, 644, 276 S. W. 929; *Clower* v. *State*, 151 Ark. 359, 236 S. W. 265; *Madden* v. *State*, 26 Okla. Cr. 251, 223 P. 716.

trial judge, that the corroborative testimony was wholly untrustworthy. Such a result would defeat the very purpose of the rule, which is to bar a jury from convicting for perjury on the uncorroborated oath of a single witness. It is the duty of the trial judge, when properly requested, to instruct the jury on this aspect of its function, in order that it may reach a verdict in the exercise of an informed judgment. Cf. *Bruno* v. *United States,* 308 U. S. 287. The refusal of the trial judge to instruct the jury as requested was error.

Third. It is argued that this error did not prejudice the defendant. We cannot say that it did not. The jury convicted without being instructed that more than the testimony of a single witness was required to justify their verdict. This was no mere "technical" error relating to the "formalities and minutiae" of the trial. *Bruno* v. *United States, supra,* 293, 294. We are not authorized to look at the printed record, resolve conflicting evidence, and reach the conclusion that the error was harmless because we think the defendant was guilty. That would be to substitute our judgment for that of the jury and, under our system of justice, juries alone have been entrusted with that responsibility. Nor are we compelled to conclude that this error was harmless because of our action in *Goins* v. *United States,* 306 U. S. 622, by which we left undisturbed a holding of the Circuit Court of Appeals that Goins, convicted for perjury, had not been prejudiced by the refusal of a charge on the two witness rule. *Goins* v. *United States,* 99 F. 2d 147. That case was decided on the basis of its own peculiar facts and cannot be extended to the facts of this one.

Reversed.

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UNITED STATES ET AL. *v.* PENNSYLVANIA RAILROAD CO. ET AL.

NO. 47. APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.*

Argued January 8, 9, 1945.—Decided January 29, 1945.

1. Under the Transportation Act of 1940, the Interstate Commerce Commission has authority, in connection with through rail-water routes, to require a railroad to interchange its cars with a water carrier and to abrogate a rule of an association of railroads prohibiting such interchange. Pp. 615, 619.
2. The authority of the Interstate Commerce Commission to require a railroad to interchange its cars with a water carrier extends to interstate movements over routes which are partly outside the territorial waters of the United States. Pp. 620, 622.
3. An order of the Interstate Commerce Commission fixing, as reasonable compensation for the use by a water carrier of cars of connecting railroads, $1.00 per car per day for such period as the cars are in the water carrier's actual possession, was supported by substantial evidence and is sustained. P. 623.

55 F. Supp. 473, reversed in part.

CROSS APPEALS from a judgment of a district court of three judges setting aside in part an order of the Interstate Commerce Commission.

Mr. Daniel W. Knowlton, with whom *Solicitor General Fahy, Assistant Attorney General Berge, Messrs. Walter J. Cummings, Jr., Edward M. Reidy* and *Robert L. Pierce* were on the brief, for the United States and the Interstate Commerce Commission, and *Mr. Parker McCollester,* with whom *Messrs. James D. Carpenter, Jr., H. H. Larimore, Duane E. Minard* and *Arthur T. Vanderbilt* were on the brief, for Forrest S. Smith, Trustee, et al., appellants in No. 47 and appellees in No. 48.

*Together with No. 48, *Pennsylvania Railroad Co. et al.* v. *United States et al.,* also on appeal from the District Court of the United States for the District of New Jersey.

Mr. John Vance Hewitt, with whom *Messrs. John A. Hartpence, Joseph F. Eshelman, R. Aubrey Bogley, David Asch, Charles Clark, Frank W. Gwathmey, Henry A. Jones, G. H. Muckley, J. P. Plunkett, Edward W. Wheeler* and *D. Lynch Younger* were on the brief, for the Pennsylvania Railroad Co. et al., appellees in No. 47 and appellants in No. 48.

MR. JUSTICE BLACK delivered the opinion of the Court.

Seatrain Lines, Inc., is a common carrier of goods by water. In 1929, its predecessor began to carry goods from Belle Chasse, Louisiana, to Havana, Cuba. Each of the vessels used was so constructed that it could carry a number of railroad cars, and special equipment was provided to hoist these cars from adjacent tracks on the docks and move them bodily into the vessels. It was thereby rendered unnecessary for goods carried to the ports in railroad cars to be unloaded from the cars and carried piecemeal into the vessels. This new method of transportation, so the Interstate Commerce Commission has found, was a great improvement over the old practice, less destructive to the goods, more economical and more efficient. 226 I. C. C. 7, 20–21. In 1932, Seatrain decided to initiate a new interstate service between Hoboken, N. J. and Belle Chasse, Louisiana, via Havana, Cuba, and thus entered into direct competition with the interstate transportation of freight by railroads. During the time Seatrain had limited its business to foreign transportation, i. e., Louisiana to Cuba, the non-competing railroads freely permitted it the use of their cars. Shortly after it began its interstate service, however, the following rule was promulgated by the American Railway Association:[1] "Cars

[1] Later the American Railway Association and other railroad organizations consolidated their activities under the name of the Association of American Railroads. The new Association adopted the same rule.

of railway ownership must not be delivered to a steamship, ferry or barge line for water transportation without permission of the owner filed with the Car Service Division." Thereafter, some railroads continued to permit Seatrain to use their cars but others, including the parties to this proceeding, refused to do so. No railroads "refused to permit delivery of their cars to any of the other eleven water lines listed in a circular of the Association as coming within the intendment of the rule." 206 I. C. C. 328, 337.

A complaint was filed with the Interstate Commerce Commission. Appropriate hearings were conducted and a series of findings and opinions were entered. The findings were that the sole object of the Association of Railroads' rule was to prevent diversion of traffic from the railroads to Seatrain; that Seatrain, as an interstate water carrier, was subject to the Commission's jurisdiction; that its interstate operations were in the public interest and of advantage to the convenience and commerce of the public; that the Commission had jurisdiction to require through rail-water interstate routes, and, where such through routes were established, to require railroads to interchange cars with water carriers, 195 I. C. C. 215; 206 I. C. C. 328. An initial order of the Commission required the railroads to establish certain through joint rail-water routes with Seatrain. Such through interstate routes together with joint rates were established. 226 I. C. C. 7; 243 I. C. C. 199. The Commission then heard evidence and found that a payment of $1.00 per day would be a reasonable amount for Seatrain to pay the railroads for their cars while they were in Seatrain's possession. 237 I. C. C. 97; 248 I. C. C. 109. Based on its findings the Commission ordered the railroads to abstain from observing and enforcing rules and practices which prohibited the interchange of their freight cars for transportation by Seatrain in interstate commerce.

The railroads promptly brought this action under 28 U. S. C. 41 (28), 47, to set aside the Commission's order. The District Court set aside the order insofar as it required railroads to interchange cars destined for carriage by Seatrain outside the territorial waters of the United States, but sustained it in all other respects. 55 F. Supp. 473. Both sides appealed directly to this Court as authorized by the Urgent Deficiencies Act of October 22, 1913, 28 U. S. C. 47, 47a, and § 238 of the Judicial Code, 28 U. S. C. 345, par. (4).

First. It is contended that the railroads are under no duty to deliver their cars to Seatrain and that the Interstate Commerce Commission is without authority to require them to do so. It has long been held, and it is not denied here, that since the passage of the Interstate Commerce Act, railroads may be compelled to establish through routes [2] and to interchange their cars with each other,[3] both subject to reasonable terms. Nor is it denied that the railroads are under a legal duty, enforceable by proper Commission orders, to establish through routes with connecting water carriers.[4] The narrow contention is that the power granted the Commission to require the establishment and operation of through rail-water routes does not empower it to require a railroad to interchange its cars with a water carrier. Since the Commission's order was entered after passage of the 1940 Transportation Act,

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[2] *St. Louis S. W. R. Co.* v. *United States,* 245 U. S. 136, 142–144.

[3] Missouri & Illinois Coal Co. *v.* Illinois Central R. Co., 22 I. C. C. 39, 44; *Chicago, R. I. & P. R. Co.* v. *United States,* 284 U. S. 80, 91, 101–102; cf. *St. Louis, S. W. R. Co.* v. *Arkansas,* 217 U. S. 136, 145–146.

[4] Such has long been the ruling of the Interstate Commerce Commission. Chattanooga Packet Co. *v.* Illinois Central R. Co., 33 I. C. C. 384, 391–392; Flour City S. S. Co. *v.* Lehigh Valley R. Co., 24 I. C. C. 179; Decatur Navigation Co. *v.* L. & N. R. Co., 31 I. C. C. 281, 288; Pacific Navigation Co. *v.* Southern Pacific Co., 31 I. C. C. 472, 479.

54 Stat. 898, the question must be decided under that Act. *Ziffrin, Inc.* v. *United States,* 318 U. S. 73, 78.

There is no language in the present Act which specifically commands that railroads must interchange their cars with connecting water lines. We cannot agree with the contention that the absence of specific language indicates a purpose of Congress not to require such an interchange. True, Congress has specified with precise language some obligations which railroads must assume. But all legislation dealing with this problem since the first Act in 1887, 24 Stat. 379, has contained broad language to indicate the scope of the law. The very complexities of the subject have necessarily caused Congress to cast its regulatory provisions in general terms. Congress has, in general, left the contents of these terms to be spelled out in particular cases by administrative and judicial action, and in the light of the Congressional purpose to foster an efficient and fair national transportation system. Cf. *Chicago, R. I. & P. R. Co.* v. *United States,* 274 U. S. 29, 36; *Interstate Commerce Commission* v. *Railway Labor Executives Assn.,* 315 U. S. 373, 376–377.

The 1940 Transportation Act is divided into three parts, the first relating to railroads, the second to motor vehicles, and the third to water carriers. That Act, as had each previous amendment of the original 1887 Act, expanded the scope of regulation in this field and correlatively broadened the Commission's powers. The interrelationship of the three parts of the Act was made manifest by its declaration of a "national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each." The declared objective was that of "developing, coordinating, and preserving a national transportation system by water, highway, and rail, . . . adequate to meet the needs of the commerce of the

United States . . ." Congress further admonished that "all of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy." 54 Stat. 899.

This policy cannot be carried out as to Seatrain's interstate carriage unless railroads interchange their cars with it. The particular type of service introduced by Seatrain, and found by the Commission to be qualitatively superior, cannot be rendered without the privilege of carrying the very railroad cars which carry freight to its ports. The "inherent advantages of this service" would be lost to the public without railroad car interchange.

Furthermore, the Act calls for "fair and impartial regulation." The railroad Association's rule however is constructed on the premise that the railroads can at their discretion determine which water carrier may, and which may not, transport their cars. Seatrain alone, of all the water carriers, according to the Commission's findings, has been refused car interchange. This means that the Association's rule, if valid, enables the railroads to decline to deal with Seatrain as it does with other carriers. As early as 1914, the Commission had declared that the Interstate Commerce Act, as then in effect, prohibited railroad practices which lent themselves to such purpose. The Commission said at that time:

"If the rail carriers are permitted to choose the particular boat lines with which they will establish through routes and joint rates, they will be able to dictate who shall operate on the water and who shall not, for a boat line which is accorded a monopoly of the through rail-and-water traffic will soon be able to drive its competitors out of business." Pacific Navigation Co. *v.* Southern Pacific Co., 31 I. C. C. 472, 479.

We cannot agree with the contention that the Commission has less power now to protect water carriers than it

had in 1914.[5] The 1940 Act was intended, together with the old law, to provide a completely integrated interstate

[5] This argument rests on a historical analysis of provisions in the original Act and later amendments which impose specific duties as to car interchanges. A detailed and clear narrative of the history appears in the opinion of the District Court. 55 F. Supp., *supra*, 479–483. In summary the argument is this. The original 1887 Act applying only to railroads, 24 Stat. 379, required in § 3, an "interchange of traffic" but did not specifically provide for an interchange of cars. The Hepburn Amendment of 1906, 34 Stat. 584, subjected water carriers to the Act so far as they connected with railroads in interstate commerce, defined transportation to include "cars" and "facilities," and made it the duty of railroads to establish through routes. The Mann-Elkins Amendment of 1910, 36 Stat. 539, 545, required carriers to make reasonable rules and regulations to provide for "exchange, interchange, and return of cars" used on through routes. The Esch Car Service Act of 1917, 40 Stat. 101, again required interchange of cars, and specifically gave the Commission power to establish rules to enforce the requirement. The Transportation Act of 1920, 41 Stat. 456, 476, omitted the exact language of the car interchange requirement which had appeared in the 1910 Mann-Elkins Amendment, but substituted for it §§ 1 (10) (11) (13) and (14) which contained more elaborate language imposing still more specific duties in this respect. These "car service" provisions were not changed by the 1940 Transportation Act. The Mann-Elkins and the Esch Car Service Amendments, however, had made the car interchange provisions applicable to every "carrier subject to the provisions of this Act." The 1920 Act made the car service provisions applicable to "carriers by railroad subject to this Act"; the 1940 Act made them applicable to a "carrier by railroad subject to this part." The argument is that these changes, made in the 1920 and carried into the 1940 Act, show a continuing purpose of Congress to deprive the Commission of the power to require interchange of cars with water carriers—to detract from its authority. But we have already had occasion to say that the 1920 Act "materially extends the jurisdiction of the Commission in respect of land and water transportation and the carriers engaged in it, whenever property may be or is transported in interstate commerce by rail and water by a common carrier or carriers . . ." *Chicago, R. I. & P. R. Co.* v. *United States*, 274 U. S. 29, 35. This conclusion as to the scope of the 1920 Act is fully justified by its history, 206 I. C. C. *supra*, 339–343. Consequently, the 1920 changes in the language of the car service requirements do not justify the narrow interpretation of the 1940 Act which is here urged.

regulatory system over motor, railroad, and water carriers. In the light of its declared policy, and because of its provisions hereafter noted, we think railroads are under a duty to provide interchange of cars with water carriers to the end that interstate commerce may move without interruption or delay. Cf. Flour City S. S. Co. *v.* Lehigh Valley R. Co., 24 I. C. C. 179, 184.

Sec. 1 (4) of Part I of the Act imposes a duty on railroads to establish reasonable through routes with other carriers, including water carriers, and to "provide reasonable facilities for operating such routes" [6] under "reasonable rules and regulations."

Sec. 3 (4) makes it the duty of railroads to "afford all reasonable, proper, and equal facilities for the interchange of traffic between their . . . lines and connecting lines, and for the . . . forwarding . . . of . . . property to and from connecting lines," and a "connecting line" is defined to include a water carrier.

Sec. 15 (3) supplements these sections by providing that the Commission may hold hearings, and "shall," if it deems it "necessary or desirable in the public interest, . . . establish through routes . . . and the terms and conditions under which such through routes shall be operated."

These sections provide sufficient authorization for the Commission's order. It was from its power to require through routes that the Commission originally derived its power to require interchange of railroad cars among connecting railroads.[7] Since a rail-water through route with Seatrain cannot function without an interchange of cars, the unquestioned power of the Commission to require establishment of such routes would be wholly fruitless, without the correlative power to abrogate the Association's rule which prohibits the interchange.

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[6] As to cars being "facilities," see § 1 (3) (a) of the Act, and *Assigned Car Cases*, 274 U. S. 564, 575, 580; *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422, 428.

[7] See note 3.

Second. It is contended, and the court below held, that if the Commission has power to require railroads to interchange cars with through route connecting water carriers, it is without power to do so if a route traverses, in part, foreign waters, as Seatrain's does. This contention basically rests on paragraphs (1) and (2) of § 1 of the Interstate Commerce Act, as amended by § 400 of the 1920 Act, 41 Stat. 474, left unchanged by Part I of the 1940 Act. The language relied upon in these paragraphs declares that the provisions of Part I, relating to railroads and their transportation, shall apply "only insofar as such transportation . . . takes place within the United States." Limiting language to the same effect is contained in the water carrier regulatory provisions of Part III of the 1940 Act.[8]

This Court has stated that the 1920 Act, containing this limiting clause, "applies to international commerce only in so far as the transportation takes place within the United States." *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.,* 283 U. S. 654, 660. The question in that case was as to joint through railroad rates over a railroad route partly in the United States and partly in Mexico. The Court further said as to this situation that "The Act does not empower the Commission to prescribe or regulate such rates." [9] In *St. Louis, B. & M. R. Co.* v. *Brownsville District,* 304 U. S. 295, this Court was called upon to consider

[8] Sec. 302 (i) (2) of the Act provides that the transportation subject to regulation is that ". . . partly by water and partly by railroad or motor vehicle, from a place in the State to a place in any other State; except that with respect to such transportation taking place partly in the United States and partly outside thereof, such terms shall include transportation by railroad or motor vehicle only insofar as it takes place within the United States . . ."

[9] Notwithstanding this, however, the Court held that where such joint rates were voluntarily fixed and charged by an American railroad, the Commission could, under the power given it by the 1920 Act, pass upon the reasonableness of the joint international rate.

whether, under the 1920 Act, there was a duty on the part of American railroads to furnish cars for transportation on a Mexican railroad. It was there held that in the absence of a discrimination against shippers, places, or classes of traffic within the United States, American railroads were "not bound by any law, regulation, or tariff to furnish cars for transportation in Mexico." These decisions simply meant that whatever power Congress might have to regulate the conduct of its domestic companies doing business abroad,[10] it had, by the limiting provisions of the 1920 Act, expressed its purpose not to empower the Commission with general authority to regulate rail transportation in foreign countries.

But these interpretations of the 1920 Act concerning rail transportation outside the United States are of dubious relevance to the instant case. For Congress has, in § 15 (3) of the 1940 Act, unequivocally granted to the Commission the power to establish through joint rail-water routes, and § 302 (i) (2) makes this power applicable to such routes "from a place in the United States to another place in the United States." [11] Cf. *Cornell Steamboat Co.* v. *United States,* 321 U. S. 634. The reason for this grant of authority to the Commission is apparent. It is well known that a substantial part of intercoastal and lake transportation among the states, in which American companies engage, traverses waters outside of the territorial limits of the United States. Foreign countries have not the same interest in this purely domestic carriage of goods as they have in controlling the movement of rail-

[10] See *Knott* v. *Botany Mills,* 179 U. S. 69; *Cunard S. S. Co.* v. *Mellon,* 262 U. S. 100, 129.

[11] The Commission denied Seatrain's petition insofar as it asked an order requiring railroads to interchange their cars for the purpose of handling freight to Cuba. 206 I. C. C. *supra,* 337; 248 I. C. C. *supra,* 118–119.

roads in their territory.[12] Such transportation must be regulated by this country if it is to be effectively regulated. Congress recognized this fact when it made special provision in § 15 (3) for the Commission to regulate water transportation from one to another place in the United States, even though that transportation took place "partly outside" the United States. It is this particular provision, made especially applicable to interstate *rail-water* transportation, by which the Commission's authority over such movements must be measured, rather than by the limiting clause of § 1, which is applicable to the Commission's power over *railroad* transportation. There is therefore nothing in the Act to deny the Commission the same power over interstate water-rail transportation which passes through foreign waters, as we have just held it enjoys where the transit is wholly within the territorial limits of the United States. We therefore hold that the order of the Commission requiring car interchanges was within its authority as to interstate movements which take place within or without the territorial waters of the United States.[13]

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[12] Section 1 (1) (a) of Part I of the Act which contains the general clause limiting the Act's application to railroad transportation within the United States, also declares its application to transportation "from any place in the United States *through a foreign country* to any other place in the United States." This latter clause, as the District Court recognized, 55 F. Supp. *supra,* 487, would have little meaning, if the limiting clause were given the interpretation for which the railroads here contend.

[13] We have not overlooked the argument that Congress intended to take away part of the Commission's power over car interchanges by repealing subdivision (b) of § 6 (13) of the Act to Regulate Commerce as amended, 37 Stat. 560, 568, which reads as follows: "To establish through routes and maximum joint rates between and over such rail and water lines, and to determine all the terms and conditions under which such lines shall be operated in the handling of the traffic embraced."

This repealed provision was substantially embodied in 15 (3) of the 1940 Act. We think Commissioner Eastman, then Chairman of

Third. The Commission found that $1.00 per car per day, to be paid to the car owners while Seatrain actually had cars in its possession, was a reasonable compensation. Although, in practice, cars brought to the ports must sometimes wait several days for Seatrain's sailing, the Commission did not require Seatrain to make per diem payments during this waiting period. It is contended that the Commission should require Seatrain to pay for the cars from the time they are made available to it; that the rate of compensation was too low; and that in both respects, the result is to require railroads to afford Seatrain the "free use" of their property, thereby imposing a burden upon the railroads which Congress neither did nor could have authorized. *Chicago, R. I. & P. R. Co.* v. *United States,* 284 U. S. 80, 97.

The questions thus raised depend upon a determination of facts. The findings of the Commission, discussed at length in its opinions, illustrate the complex nature of the facts involved. 237 I. C. C. 97, 101–102; 248 I. C. C. 109. Those facts need not be repeated here. The Commission not only had the benefit of the testimony offered in these proceedings, but was possessed of wide experience with the general problem of car hire. See e. g. Rules for Car-Hire Settlement, 160 I. C. C. 369. We have carefully examined the record and find substantial evidentiary support for the Commission's finding "that the current code of per diem rules governing the interchange of freight cars between the defendants above referred to and other rail carriers, including the current rate of $1 per day payable by Seatrain for such period as the cars are in its actual

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the Legislative Bureau, made an accurate statement when, in writing the Senate-House Conference Committee considering the 1940 Act, he stated that he did not object to the repeal of 13 (b) since "Other provisions of the bill adequately cover this matter." Omnibus Transportation Legislation, House Committee Print, 76th Congress, 3d Session, p. 23.

possession, would be reasonable for application to the interchange of cars between defendants and complainants for use by Seatrain." 248 I. C. C. at 119. This being true we sustain the Commission's order in this respect.[14]

We find no merit in any of the other contentions raised against the order of the Commission.

The judgment in No. 47 is reversed, and the judgment in No. 48 is affirmed.

It is so ordered.

MR. JUSTICE ROBERTS dissents.

OTIS & CO. *v.* SECURITIES & EXCHANGE COMMISSION ET AL.

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

No. 81. Argued November 17, 1944.—Decided January 29, 1945.

1. Whether a provision of a corporate charter granting the preferred stock a specified preference upon liquidation applies to a liquidation in a simplification pursuant to § 11 (b) (2) and (e) of the Public Utility Holding Company Act of 1935 is a question of federal law. P. 636.
2. A provision of a corporate charter granting the preferred stock a specified preference upon liquidation, adopted six years prior to the enactment of the Public Utility Holding Company Act of 1935, *held* inoperative in a simplification by liquidation under § 11 (b) (2) of that Act. P. 637.

Congress did not intend that its exercise of power to simplify holding-company systems should mature rights which were created without regard to the possibility of such exercise of power and which otherwise would mature only by voluntary action of stockholders or involuntarily through action of creditors.

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[14] It is to be noted that the Commission has not foreclosed future consideration of the car hire compensation problem, insofar as it may be involved in determining railroad rates or a proper division of through rail-water rates between Seatrain and the railroads. 248 I. C. C. 117; cf. *Chicago, R. I. & P. R. Co.* v. *United States, supra,* 97, 109, note 11.

3. *Continental Insurance Co.* v. *United States,* 259 U. S. 156, distinguished. P. 638.
4. In a liquidation pursuant to § 11 (b) (2) of the Public Utility Holding Company Act of 1935, allocation of the assets as between different classes of securities may be made without dollar valuation so long as each security holder in the order of his priority receives the equitable equivalent of rights surrendered. P. 639.

142 F. 2d 411, affirmed.

CERTIORARI, 322 U. S. 724, to review the affirmance of a judgment approving a plan for the liquidation and dissolution of a holding company pursuant to an order of the Securities & Exchange Commission under the Public Utility Holding Company Act of 1935.

Messrs. Arthur G. Logan and *Robert J. Bulkley* for petitioner.

Mr. Roger S. Foster, with whom *Solicitor General Fahy, Messrs. Morton S. Yohalem, David K. Kadane, Theodore L. Thau* and *John W. Christensen* were on the brief, for the Securities & Exchange Commission, and *Mr. Donald R. Richberg,* with whom *Mr. Clarence A. Southerland* was on the brief, for the United Light & Power Co., respondents.

MR. JUSTICE REED delivered the opinion of the Court.

An important although narrow legal point in the interpretation of the Public Utility Holding Company Act of 1935 [1] is involved in this case. This is whether a plan under § 11 (e) of that act may be "fair and equitable" to preferred stockholders within the meaning of those words as used in that section, which allows a participation by junior common stockholders in the distribution of the assets of a registered holding company, which is liquidated in compliance with § 11 (b) (2), before the senior preferred stockholders receive securities whose present value equals the preferred's full liquidation preferences.

[1] 49 Stat. 803.

The Securities and Exchange Commission approved the Plan, Holding Company Act Release No. 4215, April 5, 1943. The United States District Court of Delaware approved the Plan, 51 F. Supp. 217, and the Circuit Court of Appeals affirmed this action. This Court has jurisdiction under Judicial Code, § 240 and Section 25 of the Holding Company Act. Certiorari was granted because of the importance of the question raised in administration of the Act. 322 U. S. 724.

The United Light and Power Company, a Maryland corporation, is a registered holding company under the Act. § 5. It is the top holding company of a large system with twenty-four other corporate associates. § 2a (10). Its place in the system violates the prohibition of the Act against a registered holding company being a "holding company with respect to [any] of its subsidiary companies [§ 2a (8)] which itself has a subsidiary company which is a holding company." § 11 (b) (2). This prohibition is known as the "great-grandfather clause."

In proceedings for the simplification of the system, after finding that Power violated the great-grandfather clause, an order was entered on March 20, 1941, directing that Power be liquidated and dissolved.[2] The order authorized Power to submit to the Commission a plan for compliance with the order "on a basis which is fair and equitable to its security holders." Power with its registered holding company subsidiary, the United Light and Railways Company, a Delaware corporation, all of whose common stock was owned by Power, submitted such a plan and after examination by the Commission and modification it was approved by order of April 5, 1943. The Plan was held specifically to be fair and equitable to all security holders. By the application and order Railways' partici-

[2] The findings and opinion which led to this order are found in In the Matter of the United Light and Power Company, 8 S. E. C. 837.

pation in the Plan was accepted. Holding Company Act Release No. 4215. This is the order which is before us.

It approved the Plan for the liquidation and dissolution of Power as "necessary to effectuate the provisions of Section 11 (b) of the" Act.[3] It directed counsel for the Commission to apply to an appropriate federal court for an order enforcing the Plan.[4] The central feature of the Plan

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[3] "It shall be the duty of the Commission, as soon as practicable after January 1, 1938:

. . . . . .

"(2) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-company system. In carrying out the provisions of this paragraph the Commission shall require each registered holding company (and any company in the same holding-company system with such holding company) to take such action as the Commission shall find necessary in order that such holding company shall cease to be a holding company with respect to each of its subsidiary companies which itself has a subsidiary company which is a holding company. . . ." 49 Stat. 820–21, § 11 (b) (2).

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

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and the one here in issue was Power's proposed distribution of its assets to its preferred and common stockholders. Power's chief asset was its holdings of common stock in its subsidiary, Railways. It represented over $72,000,000 of its total gross assets of a little more than $81,000,000. All other property of Power which remained after the satisfaction of its obligations was to be distributed by Power to Railways. Thus this residual property of Power would inure to the benefit of Railways' new common stockholders, the former stockholders of Power.

Distribution of Power's common stock holdings in Railways was to be effected on the basis of 5 shares of Railways' common stock for one share of Power's preferred and one share of Railways' common for 20 shares of Power's common, an allocation of 94.52% to Power's preferred stockholders and 5.48% to Power's common stockholders. As Railways was the only company in the tier below Power of the holding company system, it would become by the dissolution of Power the top holding company and Power's preferred and common stockholders, by the distribution to them of all of Railways' common, would have in the aggregate the same rights in Railways and in the holding

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pany, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed." 49 Stat. 822, § 11 (e).

company system that Power had. The rights and preferences of Power's stockholders would of course disappear with the distribution of Railways' common and the dissolution of Power. As holders of Railways' single class of common, a new relationship of equality would arise between Power's preferred and common stockholders.

This order was preceded by an examination by the Commission into the situation of this holding company system.[5] For a clear understanding of the single issue as to whether, in the liquidation of a holding company by order of the Commission under § 11 (e), a participation by junior security holders in the assets is permissible before preferred security holders have received the entire liquidating preference secured to them by the company's charter, it is sufficient to state only the following facts about which there is no controversy between the litigants. Power is a solvent company. As of April 30, 1942, and there is no intimation that its condition has worsened, its balance sheet showed assets of $81,159,075 and liabilities of only $6,132,976, without consideration of its capital stock structure. Its principal asset, the Railways common stock heretofore referred to, has a book value in excess of the $72,000,000 plus at which it is carried on Power's balance sheet and an actual value which makes Power unquestionably solvent with large equity values in its stock.

Power has outstanding 600,000 shares of Class A Preferred. This preferred stock has a liquidation value of $100 per share or $60,000,000, plus arrearages of $38,700,000 as of December 31, 1942, or a total liquidating value ahead of the common, as of the time of the order,

[5] The details are fully covered in 8 S. E. C. 837 and Application 14, Release No. 4215.

of $98,700,000.[6] There are 2,421,192 shares of Class A common and 1,055,576 shares of Class B common.[7]

The Commission found the balance sheet value of all Railways' common on a pro forma corporate basis to be $77,954,874 and, when using a pro forma consolidated basis for the entire system, to be $81,554,330. On a capitalization of reasonably anticipated earnings of the system, the Commission was unable to find a value for Railways' common "which approaches $98,700,000.00." [8]

[6] Power's charter provides: "Upon the dissolution or liquidation of the corporation, whether voluntary or involuntary, the holders of the Class A Preferred stock shall be entitled to receive out of the net assets of the corporation, whether capital or surplus, for each share of such stock, one hundred dollars and a sum of money equivalent to all cumulative dividends on such share, both accrued and in arrears (whether or not the same shall have been declared or earned), including the full dividend for the then current quarterly period, before any payment is made to the holders of any stock other than the Class A Preferred stock. Any assets thereafter remaining shall be distributable among holders of stock other than the Class A Preferred stock in accordance with their rights at the time of the distribution."

The amended charter (1929) also contains the following:

"The Common Stock of the Company shall be subject to the rights of the holders of the Class A Preferred stock."

[7] The two classes are entitled to the same rights, except the B has votes. As there is no dispute before us as to the relative rights or priorities of the common, the two classes will be treated in this opinion as a single class of common.

[8] "In order to show a value of as much as $98,700,000, it would be necessary to capitalize 1942 consolidated net earnings applicable to the common stock of Railways (the highest earnings since 1931) at a rate of 6.9%, a times-earnings ratio of 14.5. Even if the most liberal estimate of earnings made by the management, in the amount of $7,000,000, be taken as the measure of prospective earning power, capitalization of such earnings at a rate producing a times-earnings ratio of 14.1 is necessary to reach an over-all value of $98,700,000." Release No. 4215, pp. 7–8.

The Commission illustrated the market valuation by times-earnings ratio by pointing out that for nine representative public utility holding companies it had averaged from a high of 12.5 in 1937 to a low of 5.1 in 1942 with 1943 at 7.1. *Id.*

If the liquidation preference of Power's preferred stock is applicable, under the Commission's conclusions on present valuations all of the Railways' common would go on distribution to Power's preferred. The Commission determined that the liquidation preference was not applicable and for these reasons.

The Commission's order of March 20, 1941, for the liquidation and dissolution of Power was a step in the simplification of the holding company system which simplification was enjoined by § 11 (b) (2) of the Act. Satisfaction of the great-grandfather clause might have been obtained in this or other holding company systems by an order for merger, consolidation or recapitalization between top holding companies or between associate companies in the lower tiers of the corporate hierarchy. Such procedure would avoid the liquidation of Power. Cf. *Windhurst* v. *Central Leather Co.*, 105 N. J. Eq. 621, 149 A. 36; *Porges* v. *Vadsco Sales Corp.*, 32 A. 2d 148, 151. The selection by the Commission of one method of system adjustment to accomplish simplification rather than another is an incident which ought not to affect rights. The exercise of legislative power by Congress through § 11 (b) (2) to accomplish simplification as a matter of public policy and the Commission's administration of the Act by dissolution of this particular company results in a type of liquidation which is entirely distinct from the "liquidation of the corporation, whether voluntary or involuntary" envisaged by the charter provisions of Power for preferences to the senior stock.[9]

This conclusion permitted the Commission to examine the investment values of the common and preferred stocks of Power. The rights of the preferred stock to $6 annual cumulative dividends in the going business [10] and to full priority in liquidation other than by operation of the Act were treated as factors in valuation rather than determi-

[9] Release No. 4215, pp. 9–12.

[10] 8 S. E. C. 842.

native of amounts payable in a traditional dissolution. Upon analysis of the Holding Company System's experience and upon an estimate of future earnings, the Commission assumed earnings of $6,185,000 annually which would be applicable to Railways' common and, as a consequence of the distribution, to Power's preferred and common stockholders. Since the annual preferred dividend requirements were $3,600,000, there appeared a balance of $2,585,000 available for the reduction of preferred stock arrearages of $38,700,000 as of December 31, 1942. The Commission noted that if all the assumed earnings materialized and were applied to liquidating the preferred current and deferred dividends, in approximately fifteen years the arrearages would be paid and the common would be in a position to receive dividends.[11] Furthermore, only by forced liquidation could the common stock be deprived of its possibility for future earnings. Only by means of forced liquidation and the receipt of all Railways' common, could Power's preferred gain a right to prospective earnings above its guaranteed dividends. The deferred dividends do not bear interest. While recognizing that the common stock participation was remote, the Commission determined that in its "over-all judgment" Power's common had a legitimate investment value of a proportion of 5.48 per cent of Power's assets to the preferred's value of 94.52 per cent. Such a conclusion is not "susceptible of mathematical demonstration," [12] any more than any other valuation of a utility's worth. The Commission determined this allocation was fair and equitable within § 11 (e).

Petitioner does not challenge the above allocation of values between the preferred and common stock of Power, if the Commission is correct in treating the stock rights

[11] Release No. 4215, p. 18.

[12] *Id.*, p. 19.

as though in a continuing enterprise instead of in liquidation. Petitioner relies upon the charter rights which on liquidation of Power give to the preferred $100 and the cumulated and accrued dividends. Note 6, *supra.* It relies upon the authorities of this and other courts which hold that under a full priority rule junior securities in bankruptcy or equity reorganizations may not participate in the assets until the rights of the holders of senior securities are satisfied in full.[13] Petitioner says:

"When the Plan, whatever the device used, contemplates the surrender of outstanding securities for new securities, either in the same or a different company, it is not 'fair and equitable' to force senior security holders to accept less than that which they are contractually entitled to receive."

To petitioner, no distinction is to be drawn between liquidation under bankruptcy or reorganization and liquidation under the Public Utility Holding Company Act by virtue of §§ 11 (b) (2) and 11 (e).

We reach the conclusion that the Securities and Exchange Commission applied the correct rule of law as to the rights of the stockholders inter sese. That is to say, when the Commission proceeds in the simplification of a holding company system, the rights of stockholders of a solvent company which is ordered by the Commission to distribute its assets among its stockholders may be evaluated on the basis of a going business and not as though a liquidation were taking place.

The manifest solvency of Power simplifies the problem of stockholders' rights with which we are here concerned.

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[13] *Northern Pacific R. Co.* v. *Boyd,* 228 U. S. 482; *Case* v. *Los Angeles Lumber Products Co.,* 308 U. S. 106; *Consolidated Rock Products Co.* v. *du Bois,* 312 U. S. 510; *Marine Properties* v. *Manufacturers Trust Co.,* 317 U. S. 78; *Ecker* v. *Western Pacific R. Corp.,* 318 U. S. 448; *Group of Investors* v. *Chicago, M., St. P. & P. R. Co.,* 318 U. S. 523.

The creditors are satisfied.[14] No possibility exists that simplification of structure is employed here to evade or nullify creditors' rights in reorganization or to take the place of traditional reorganization.[15]

Like the bankruptcy and reorganization statutes, the Public Utility Holding Company Act, in providing that plans for simplification be "fair and equitable," incorporates the principle of full priority in the treatment to be accorded various classes of security interests. This right to priority in assets which exists between creditors and stockholders, exists also between various classes of stockholders. When by contract as evidenced by charter provisions one class of stockholders is superior to another in its claim against earnings or assets, that superior position must be recognized by courts or agencies which deal with the earnings or assets of such a company. Fairness and equity require this conclusion. Even before our decision in *Case* v. *Los Angeles Lumber Products Co.* on November 6, 1939, recent federal cases had recognized this priority.[16] That has been their view since the *Case* decision, *In re Porto Rican American Tobacco Co.*, 112 F. 2d 655, 656–57. This is the rule applied by the Com-

[14] Creditors' contracts also have been declared subject to equitable adjustment in corporate reorganizations so long as they receive "full compensatory treatment" whether the reorganization is in bankruptcy (*Kansas City Terminal R. Co.* v. *Central Union Trust Co.*, 271 U. S. 445, 455; *Consolidated Rock Products Co.* v. *du Bois*, 312 U. S. 510, 528–30; *Group of Investors* v. *Chicago, M., St. P. & P. R. Co.*, 318 U. S. 523, 565–66) or in compliance with regulatory statutes. *Continental Ins. Co.* v. *United States*, 259 U. S. 156, 170–76. The full priority rule applies to reorganizations of solvent companies. *Consolidated Rock Products Co.* v. *du Bois*, 312 U. S. 510, 527.

[15] See In the Matter of Jacksonville Gas Company, Holding Company Act Release No. 3570, *In re Jacksonville Gas Co.*, 46 F. Supp. 852, 856.

[16] *In re New York Railways Corp.*, 82 F. 2d 739, 743–44; *In re National Food Products Corp.*, 23 F. Supp. 979, 985; *In re Utilities Power & Light Corp.*, 29 F. Supp. 763, 769.

mission in the simplification of corporate structure. The Commission recognizes and applies the doctrine of full priority by giving value to the rights of the preferred in a going concern rather than as if by sale and distribution. Its views are stated below.[17] The issue in this case is not whether full priority should be given to preferred over common stockholders but whether the priority which is established by the charter, note 6, is applicable to a simplification by liquidation under § 11 (b) (2) and (e). There is an argument that if the charter provision applies to this situation, it cannot be disregarded and that in such a liquidation "fair and equitable" would require the dis-

[17] "It is pointed out in Commissioner Healy's separate opinion that the words 'fair and equitable' embodied in Section 11 have a settled meaning, as determined by the courts, and that an application of the 'absolute priorities' doctrine must result in no distribution to Power's common stock in this case. But that is because he measures the rights of the preferred stock as they would be measured in bankruptcy cases, and not merely because he follows the 'absolute priorities' doctrine in determining the consequences of the measurement. In other words, we can agree with him when he says that absolute priorities must be respected, because we think that doctrine simply means that the common stock must not be accorded any participation unless the preferred stock has been fully compensated for its rights and priorities. But there the area of agreement stops, because he says further that the rights and priorities of the preferred stockholders are the same here as in bankruptcy cases, where their claims to liquidation preferences (including dividend arrearages) are treated as matured. In our view it would be unconscionable and contrary to the plain intention of Congress to so hold." Holding Company Act Release No. 4215, p. 12.

"Under the circumstances, fair and equitable compensation will be given to all of the claimants if their rights are measured not in terms of the situation created by the statute but rather in terms of the situation terminated by it—i. e., as though no liquidation were to take place. In this way, each class of stock will be accorded its proportionate share of the benefits to be gained from the elimination of a useless and expensive corporate entity and from the receipt of a security representing a more direct investment in the underlying assets and earnings of the system." *Id.*, p. 13.

tribution of assets only to the preferred. We do not reach that question. The point at issue is whether this charter provision applies.

The applicability of the charter provision under the Public Utility Holding Company Act of 1935 is a matter of federal law.[18]

When the President sent to Congress the report of the National Power Policy Committee which placed the suggestions of the Executive on holding companies before the legislative body, he said of the pending Public Utility Holding Company bill:

"Such a measure will not destroy legitimate business or wholesome and productive investment. It will not destroy a penny of actual value of those operating properties which holding companies now control and which holding company securities represent insofar as they have any value. On the contrary, it will surround the necessary reorganization of the holding company with safeguards which will in fact protect the investor." S. Rep. No. 621, 74th Cong., 1st Sess., p. 2.

That report urged the same care to investors:

"Simplification and reorganization of holding-company structures, making possible within a reasonable period the practical elimination of the holding company, should be conducted under the Commission's supervision over a period of time to prevent undue losses to security holders from investment dislocations." *Id.*, p. 60.

Of course, Congress would wish, in simplifying a holding company system capital structure, to preserve values to

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[18] *Jerome* v. *United States*, 318 U. S. 101, 104; *Wragg* v. *Federal Land Bank*, 317 U. S. 325, 328; *Chicago Board of Trade* v. *Johnson*, 264 U. S. 1, 10; *Sola Electric Co.* v. *Jefferson Co.*, 317 U. S. 173, 176; *Labor Board* v. *Hearst Publications*, 322 U. S. 111, 120, 129; *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, 366; *O'Brien* v. *Western Union Telegraph Co.*, 113 F. 2d 539, 541.

investors, not to destroy them.[19] Consequently, while giving the Commission power to compel the elimination of holding companies deemed uneconomic, it allowed the affected companies to propose plans to the Commission to effectuate the objects and the Commission to approve such plans when they were considered "fair and equitable." §§ 11 (b) (2) and (e), notes 3 and 4.

It may be that if the charter liquidation preference were held to cover this situation it would not frustrate the simplification of the holding company system, to the same degree that the gold clause agreements interfered with the power of Congress to regulate the gold content of the dollar. *Norman* v. *B. & O. R. Co.*, 294 U. S. 240, 306, *et seq.*, and cases cited. Distribution to preferred stockholders only with disregard of common's interest would eliminate Power and cure the system's present inconsistency with the great-grandfather clause. We think, however, the charter preference is inoperative in simplification under § 11 (b) (2). The provision having been adopted in 1929, six years prior to enactment of the Public Utility Holding Company Act, a "simplification" under this Act, having as an incident to it the dissolution of one company in a holding company system, was not an anticipated "liquidation" within the meaning of Power's charter provision. Enforcement of an overriding public policy should not have its effect visited on one class with a corresponding windfall to another class of security holders. Nor should common stock values be made to depend on whether the Commission, in enforcing compliance with the Act, resorts to dissolution of a particular company in the holding company system, or resorts instead to the devices of mer-

[19] "Such disposition as may be necessary can be accomplished by reorganization which will equitably redistribute securities among existing security holders." S. Rep. No. 621, 74th Cong., 1st Sess., p. 16; H. Rep. No. 1318, 74th Cong., 1st Sess., pp. 49–50.

ger or consolidation, which would not run afoul of a charter provision formulated years before adoption of the Act in question. The Commission in its enforcement of the policies of the Act should not be hampered in its determination of the proper type of holding company structure by considerations of avoidance of harsh effects on various stock interests which might result from enforcement of charter provisions of doubtful applicability to the procedures undertaken. Where pre-existing contract provisions exist which produce results at variance with a legislative policy which was not foreseeable at the time the contract was made, they cannot be permitted to operate. Compare *New York Trust Co.* v. *Securities & Exchange Commission,* 131 F. 2d 274; *In re Laclede Gas Light Co.,* 57 F. Supp. 997. The reason does not lie in the fact that the business of Power continues in another form. That is true of bankruptcy and equity reorganization. It lies in the fact that Congress did not intend that its exercise of power to simplify should mature rights, created without regard to the possibility of simplification of system structure, which otherwise would only arise by voluntary action of stockholders or, involuntarily, through action of creditors. We must assume that Congress intended to exercise its power with the least possible harm to citizens.

But it is said that such a conclusion is at variance with this Court's ruling in *Continental Insurance Co.* v. *United States,* 259 U. S. 156. In that case a liquidation of the Reading Company, a holder of interests in railroads and coal mines, was compelled by governmental prosecution so that it would not be operating in violation of the Sherman Anti-Trust Act or the Hepburn Act.[20] Its coal properties, corporate assets, were passed to a newly organized

[20] 259 U. S. 156 at 177; *United States* v. *Reading Co.,* 253 U. S. 26; 26 Stat. 209; 34 Stat. 584.

coal company, the value of whose stock, by negotiable certificates of interest, came into possession of Reading's old stockholders individually. The distribution gave equal participation in the coal properties to the common and preferred stock in accordance with the charter agreement as to assets on liquidation, pages 177–181. The common stock contended that as the value of the coal properties was surplus, all of the coal certificates should go to the common stockholders as in a continuing business. Thus, by its approval of the distribution, this Court handled the liquidation, which was forced by law, says petitioner, in accordance with the charter provisions and not as though it were a continuing business.

The *Continental* or *Reading* case turned, however, on the charter rights of the preferred to share equally with the common in earnings which had become assets, pages 179–80, not on whether a right to share was matured or varied by governmental action. Contrary to the situation in this present case, the charter provisions of the Reading Company were adopted with knowledge of the sanctions of the Sherman Act against monopoly. 259 U. S. 177 and 171. We do not feel constrained by its dealing with charter rights as in a normal liquidation to hold that where liquidation is adopted as a matter of administrative routine, the preferences are thereby matured.

As indicated earlier in this opinion, we have not undertaken to review the facts to determine whether the allocation of stock between the preferred and common is in proper proportion. That issue is not made. It was vigorously discussed by Commissioner Healy in the dissenting opinion. Holding Company Act Release 4215, p. 39 *et seq.* See Dodd, Holding Company Act Recapitalizations, 57 Harv. L. Rev. 295, 319. The allocation properly may be made without dollar valuation so long as "each security holder in the order of his priority receives

from that which is available for the satisfaction of his claim the equitable equivalent of the rights surrendered." *Group of Investors* v. *Chicago, M., St. P. & P. R. Co.*, 318 U. S. 523, 565; *Consolidated Rock Products Co.* v. *du Bois*, 312 U. S. 510, 529–30; *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448, 482; *Kansas City Terminal R. Co.* v. *Central Union Trust Co.*, 271 U. S. 445, 455.

As the parties have not challenged them, we have not considered in any way the constitutionality of the sections of the Holding Company Act involved.

Affirmed.

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

MR. CHIEF JUSTICE STONE, dissenting.

MR. JUSTICE ROBERTS, MR. JUSTICE FRANKFURTER and I think the judgment below should be reversed.

The United Light and Power Company, the subject of this litigation, is a holding company subject to provisions of the Public Utility Holding Company Act of August 26, 1935, 49 Stat. 803. It has $60,000,000 par value of Class A preferred stock, of which petitioner holds some shares, and two classes of common stock. The corporate charter provides:

"Upon the dissolution or liquidation of the corporation, whether voluntary or involuntary, the holders of the Class A Preferred stock shall be entitled to receive out of the net assets of the corporation, whether capital or surplus, for each share of such stock, one hundred dollars and a sum of money equivalent to all cumulative dividends on such share, both accrued and in arrears (whether or not the same shall have been declared or earned), including the full dividend for the then current quarterly period, before any payment is made to the holders of any stock other than the Class A Preferred stock."

The dividends on the preferred stock accrued and unpaid amount to $64.50 per share, and the total priority of the preferred stock as provided by the corporate charter is $98,700,000.

Sections 1 (c) and 11 (a) and (b) (2) of the Act authorize the Commission, after an examination of their corporate structures, "to compel the simplification of public-utility holding-company systems" and to require any such holding company "to take such action as the Commission shall find necessary in order that such holding company shall cease to be a holding company with respect to each of its subsidiary companies which itself has a subsidiary company which is a holding company." Section 11 (e) requires any plan of reorganization approved by the Commission to be "fair and equitable to the persons affected by such plan."

Acting under these provisions of § 11 the Commission has ordered that United be "liquidated and dissolved" as a step in the simplification of the holding company structure, so that United shall cease to be a holding company as commanded by § 11 (b) (2), and its stockholders shall become stockholders in its subsidiary, Railways Co. The Commission, in ordering dissolution and liquidation of the company, and providing for the distribution of its assets, found that the stipulated priority of the preferred stock is far in excess of the present value of the company's assets. It said that if the stipulated priority "is controlling, our inquiry must perforce be ended at this point in a decision that the preferred stock is entitled to all the assets of the corporation to the exclusion of the common."

Nevertheless, the Commission has ordered, and this Court sustains the order, that only 94.52% of the assets of the company be allocated to the preferred stock upon liquidation and 5.48% to the common. For purposes of liquidation the Commission measured the rights of the different classes of stockholders in terms of the estimated

value of their interests as though the liquidation which the Commission had ordered were not to take place and the corporation were to continue as a going concern. In short, in liquidating the corporation it determined, as the opinion of the Court declares, that in distributing the assets of the corporation among its stockholders the rights of the stockholders "may be evaluated on the basis of a going business and not as though a liquidation were taking place."

Peering into the future with almost clairvoyant percipience the Commission prophesied that if the company now being liquidated and dissolved were allowed to continue its operations it would, fifteen years hence, have paid all arrears of dividends on the preferred and would then be able to pay an estimated annual return on the common stock in excess of $2,500,000. This prophecy assumed average future earnings in excess of $6,000,000 a year, a sum which "actual earnings . . . have never in the past ten years exceeded . . ., except in 1942." This prognosis, the Commission thought, afforded justification for distributing the assets of the corporation upon its liquidation and dissolution, not according to the stipulated priority of the preferred stock upon liquidation, which is in fact taking place, or indeed in conformity to its priority right to current earnings if the company were to continue unliquidated. For by the Commission's order the preferred is required to surrender to the common what is the equivalent of more than 5% of its fixed priority right to the annual earnings from the assets of the company, which earnings of a "going business" would be required to satisfy dividends on the preferred before any payment of dividends on the common. The preferred stockholders are thus denied the priority for which they have stipulated on liquidation, and also the priority with respect to current earnings to which they would be entitled by virtue of their position as preferred stockholders if the company,

which has been in fact condemned to death by the Commission, is, as the Commission at the same time supposes, to be regarded as living and functioning as "a going business."

The judgment of the court below sustaining so extraordinary a result should, in our opinion, be reversed because the Commission, without authority in law and contrary to the command of the statute, has disregarded the plain terms of the corporate charter controlling priority of the preferred stock upon liquidation of the company whether voluntary or involuntary.

The opinion of the Court adopts for its support a ground which the Commission declined to adopt, and the decision of the Commission rested upon a second ground on which the Court appears not to rely. We think it clear that neither ground is supportable. The first is that the charter provision fixing the priority of the preferred stock in the event of "liquidation" was not intended to apply and is inapplicable to a "liquidation" like the present. For here, it is insisted, the liquidation, which has in fact been ordered and is being enforced, is nevertheless to be regarded as a fiction, and the interests of the different classes of stockholders are to be measured by resort to the fiction that they are continuing interests in a corporation which is not to be liquidated, but is to be continued as a going concern. The other ground, adopted by the Commission, is that if the charter provision does apply the Commission is free to override it by any plan of distribution which it finds to be "fair and equitable."

As to the first it is plain that the company is now being liquidated and dissolved; that the liquidation is involuntary; and that some of the corporation's assets are being distributed to the common stock before satisfaction of the stipulated priority of the preferred, and this with full knowledge of all concerned that the company is without assets to satisfy the priority. Since these are the precise

conditions on which the priority provision was, according to its terms, to operate, it is not apparent why this "liquidation" is not a "liquidation" within the meaning of the charter provision.

It is said that although the liquidation is involuntary, it is not within the charter provision, and that the stipulation for priority on liquidation may be disregarded because the Holding Company Act was enacted after the adoption of the charter, and hence the parties to the incorporation could not have contemplated a compulsory liquidation under its provisions. We find it difficult to suppose that a stockholder who stipulates for priority upon liquidation, whether voluntary or involuntary, is at all concerned with the particular source of the power which may compel the liquidation of his investment or with the purpose of its exercise. Unless words have lost their meaning, the stipulation for priority in this case cannot fairly be taken not to include any kind of a liquidation which would compel the surrender of the stockholder's investment and force him to sever his connection with the corporation in which he has invested.

When the preferred stock of the United was issued in 1929 there were numerous statutes, state and federal, which authorized liquidation and dissolution of corporations by government compulsion. See for example *Continental Insurance Co.* v. *United States,* 259 U. S. 156. It is the veriest fiction to say that investors in corporate securities at that time could not or did not consider the possibility of the addition of a single statute to this list, or that the stockholders of United by the stipulation for priority upon liquidation, voluntary or involuntary, intended to exclude from its operation any method of involuntary liquidation which would affect their interests. To conclude that the present stipulation for priority upon involuntary liquidation did not envisage a liquidation such as this one seems like saying that an insurance policy

payable on the death of the insured creates no obligation if the insured dies from a disease which was unknown when the policy was written.

We cannot assent to the proposition advanced by the Commission that even though the priority stipulation was intended to be applicable to any kind of an involuntary liquidation, including one such as the present, the Commission can nevertheless override it. Such provisions for priority in a corporate charter constitute a contract among the stockholders, which is entitled to constitutional protection, *Bedford* v. *Eastern Building & Loan Assn.*, 181 U. S. 227; *Hopkins Federal Savings & Loan Assn.* v. *Cleary*, 296 U. S. 315; *Treigle* v. *Acme Homestead Assn.*, 297 U. S. 189, 194–6, impairment of which is not lightly to be attributed to Congress. No constitutional issue is raised here, but we find no provision of the statute which purports to confer on the Commission, in the exercise of its power to liquidate a corporation, any authority to set aside a lawful stipulation in which the stockholders have joined fixing their relative rights in the event of liquidation.

On the argument of this case counsel for the respondent referred to the Commission's action in setting aside the contract as an exercise of its power to "remold" the contract. Whether this characterization of the Commission's action may be thought to render it more palatable to the preferred stockholders whose lawful contract has been set aside by the Commission, it is plain that in the absence of some controlling direction of the statute there are no circumstances here which call for the exercise of any implied power of the Commission or court to readjust or restate the rights of the stockholders without regard to their contract. There is no suggestion that the present stipulation is unlawful, oppressive or inequitable, or subject to any other infirmity; or that it is incapable of being carried out in the present liquidation to which it applies.

Hence there is no basis for the exercise of equity powers to adjust the rights of parties to a contract which has been set aside; or for the Commission's argument, which the Court of Appeals below seems to have sustained, 142 F. 2d 411, 419, that the action of the Commission is supportable as an exercise of the judicial power to make an equitable disposition of the rights of the parties to a frustrated contract. Cf. *New York Trust Co.* v. *Securities & Exchange Commission,* 131 F. 2d 274.

So far as the Commission has authority to liquidate any corporation, liquidation is only a step in the simplification of a holding company system or the elimination of an undesirable holding company, which are the avowed purposes of the Act. The Commission does not reveal how the distribution of the corporate assets, upon which the stockholders have agreed, would hamper the simplification or the elimination of the liquidated company; or how the different distribution ordered by the Commission would facilitate them. It seems wholly irrelevant to the achievement of these, which are the avowed purposes of the Act, whether the stockholders of the dissolved corporation share in its assets in one proportion or another. Neither the Commission, the public, nor the stockholders have any ground for complaint so long as the agreed priority rights to the distributed assets remain unaltered.

The Commission has found its authority for setting aside the priority stipulation in the requirement of § 11 (e) that the Commission must find that any plan it approves for elimination of a holding company is "fair and equitable." As we have already indicated, the Commission has said that it is "fair and equitable" to deprive preferred stockholders, in the event of liquidation, of the rights for which they have stipulated and paid in order to compensate the common stockholders for rights which they are said to have lost because of the liquidation. But such compensation of the common stockholders at the expense

of the preferred is contrary to the priority stipulation by which both are bound. The common stockholders, like the preferred, have no right not to have the company liquidated and are entitled to no compensation merely because it is liquidated. Their rights as stockholders cannot survive liquidation and dissolution of the company, and in that event and because of it and because of the stipulation neither can assert rights which they could enjoy only if the corporation were to continue as a going concern.

We can find no basis for saying that it is not fair and equitable, both in a technical as well as a general and non-technical sense, to require the stockholders to abide by their agreement in the very circumstances to which it was intended to apply, and where, as we have said, there is no contention that the contract when made was or is now oppressive, unfair, inequitable or illegal. But beyond this we think it is quite clear that the requirement of § 11 (e) that the plan be "fair and equitable," instead of furnishing authority for the deprivation of shareholders of their priority in liquidation, is a prohibition against it.

The phrase "fair and equitable" as applied to any form of corporate reorganization has long been recognized as signifying the requirement of the rule sanctioned by this Court in *Northern Pacific R. Co.* v. *Boyd,* 228 U. S. 482, and the many cases following it. The rule is that any arrangement or plan enforced without the consent of the parties affected by it, by which the subordinate rights and interests of stockholders are attempted to be secured at the expense of the prior rights of other security holders, is unfair and inequitable and will not be judicially sanctioned. See *Case* v. *Los Angeles Lumber Co.,* 308 U. S. 106, and cases cited. This rule is applicable with respect to the priorities of different classes of stockholders as well as to priorities between creditors and stockholders, and for the same reasons. *Case* v. *Los Angeles Lumber Co., supra,* 119, note 14.

In the *Los Angeles* case, *supra,* we held that the words "fair and equitable" had so long been recognized and applied as signifying this rule of priority among security holders in corporate reorganizations as to have become words of art, and that their adoption by § 77B of the Bankruptcy Act, as applicable to reorganizations under that section, must be taken to have incorporated the rule of the *Boyd* case in the statute, in the absence of any context requiring a contrary construction. We think no other construction of § 11 (e) of the present Act can be sustained. Neither the context of the statute nor the legislative history suggests any other. The Commission hints at no reason for not giving these terms of art, "fair and equitable," other than their long settled and hitherto accepted meaning.

The Commission justifies its departure from the rule here only by recurrence in its brief to the proposition that "the essence of the reorganization process is the remolding of contract rights and the substitution therefor of equitable equivalents." To this the answer is that the Commission in this case is liquidating and dissolving, not reorganizing, United, and that it is without authority in such a case more than in a reorganization to alter or disregard a contract fixing the priorities of stockholders, and that in depriving the preferred stockholders of their priority rights the Commission has substituted no equivalent for them, either legal or equitable. In fact it has substituted nothing for the priority rights which its order destroys.

The Gold Clause Cases, *Norman* v. *B. & O. R. Co.,* 294 U. S. 240, afford no analogy and lend no support to what is now adjudged. There Congress, with the authority of an express provision of the Constitution, explicitly altered existing contracts. Here Congress has commanded the Commission to respect contract rights by requiring that its action conform to the well defined meaning of the phrase "fair and equitable." Congress seems to have recognized that the stipulated priorities of stockholders were

not to be disturbed in liquidations ordered under the Public Utility Holding Company Act. The report of the Senate Committee (S. Rep. No. 621, 74th Cong., 1st Sess., p. 33) recommending the enactment of the present statute and proponents of the Bill (H. R. Rep. 1318, 74th Cong., 1st Sess., pp. 49–50; 79 Cong. Rec. 4607, 8432) repeatedly cited *Continental Insurance Co.* v. *United States, supra,* in which it was held that the distribution in a liquidation compelled by the enforcement of the Sherman and Hepburn Acts must preserve the stipulated priorities of the several classes of stockholders of the offending corporation.

The intimation that the priority stipulation can be disregarded in the present liquidation because the Commission could have effected the simplification of the holding company structure by merger, consolidation or recapitalization, is merely to say that such procedure would not involve liquidation, voluntary or involuntary, or, what comes to the same thing, that the preferred stockholders could not claim the protection of the priority stipulation in situations to which it does not and was not intended to apply. By buying preferred stock the preferred stockholders paid for the privilege of membership in the corporation and for participation in the fruits of the corporate enterprise, to continue, with full priority of dividends so long as the corporation should continue as a going concern. But in the event of liquidation they stipulated and paid for the specified priority over the common stockholders in the distribution of the net corporate assets. The preferred stockholders here assert only the rights to which that stock is entitled on liquidation by the terms of the priority stipulation. Calling the preferred stockholders' right of priority a "windfall" will not serve as an apology, explanation, or justification for the Commission's action in appropriating the priority of the preferred in order to give a windfall to the common. It is no answer to say that their claim on liquidation might have been avoided by not liquidating or to say, as the Commission has ordered, that they must

accept on liquidation less than their stipulated priority on liquidation and less than the rights to which they would have been entitled if the corporation had continued as a going concern.

The judgment should be reversed.

PRUDENCE REALIZATION CORPORATION *v.* FERRIS ET AL., TRUSTEES, ET AL.

CERTIORARI TO THE SUPREME COURT OF NEW YORK.

No. 137. Argued December 8, 11, 1944.—Decided January 29, 1945.

1. The bankruptcy court having closed a § 77B proceeding for the reorganization of an issue of mortgage participation certificates, without determining or retaining jurisdiction to determine the question of relative priority as between a guarantor and other holders, and having remitted the parties to "a court of competent jurisdiction" for the determination of that question, the state court as such a court properly determined the question in accordance with the law of the State. *Prudence Corp.* v. *Geist,* 316 U. S. 89, distinguished. Pp. 654–656.
2. No appeal having been taken from the bankruptcy court's failure to retain jurisdiction to determine the question of relative priority, the order confirming the plan of reorganization is res judicata. P. 654.

292 N. Y. 210, 54 N. E. 2d 367, affirmed.

CERTIORARI, *post,* p. 686, to review a determination of the relative rights of the parties in a distribution to creditors under a plan of reorganization.

Mr. Irving L. Schanzer, with whom *Mr. James F. Dealy* was on the brief, for petitioner.

Mr. Charles H. Kriger, with whom *Mrs. Henrietta Kriger* was on the brief, for Ferris et al., and *Mr. Eugene Blanc, Jr.,* with whom *Messrs. John Ross Delafield* and *Robert McC. Marsh* were on the brief, for City Bank Farmers Trust Co. et al., respondents.

Messrs. Roger S. Foster and *Milton V. Freeman* filed a brief on behalf of the Securities & Exchange Commission, as *amicus curiae,* urging affirmance.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This action was brought in one of the courts of the State of New York to adjudicate conflicting claims against property held to satisfy a mortgage debt. The immediate controversy arises out of the reorganization in a United States district court of a large New York guaranty company, another phase of which was before us in *Prudence Corp.* v. *Geist,* 316 U. S. 89.

Petitioner's predecessor, The Prudence Company, Inc., loaned money on real estate and issued guaranteed mortgage participation certificates. (For an exposition of the business details see *In re The Westover, Inc.,* 82 F. 2d 177.) The enterprise was on a vast scale, running into the hundreds of millions. Our immediate concern is with certificates of participation issued by Prudence in a bond and mortgage made by Burnside Improvement Company. Prudence guaranteed the certificate holders the payment of interest and principal when due or within eighteen months thereafter. Burnside, the mortgagor, defaulted in the payment of an instalment of principal due January, 1932. After this default, Prudence itself purchased, either directly from the holders or through a concealed brokerage account and usually at a discount, certificates aggregating $431,212.86, approximately 42% of the amount of outstanding certificates. In June, 1932, the mortgaged premises securing the Burnside certificates were conveyed to Amalgamated Properties, Inc., a wholly-owned subsidiary of Prudence.

In 1935 Prudence went into reorganization under § 77B of the Bankruptcy Act, 48 Stat. 912, and was adjudicated insolvent in 1938. As part of the Prudence proceed-

ings, Amalgamated, in 1936, filed a voluntary petition for reorganization, but the two were later severed. Thereafter, under a reorganization plan confirmed by the District Court, all the assets of Prudence, including the Burnside certificates reacquired by it, were transferred to petitioner, Prudence Realization Corporation.

In the Amalgamated proceeding Prudence claimed to participate in the mortgage on a parity with other Burnside certificate holders. The claim was opposed on the ground that Prudence, having defaulted on its guaranty, was not entitled to parity with other holders of certificates. The bankruptcy court neither decided this question of parity nor reserved it for decision. It "terminated and finally closed" the Amalgamated proceeding by confirming a plan which left the claim of participation by Prudence in the Burnside bond and mortgage for adjudication by a "Court of competent jurisdiction." There were provisions, with which we are not here concerned, for holding in escrow, pending such an adjudication, the share claimed by petitioner.

Thereafter, respondents, the trustees under the Burnside plan, and various certificate holders brought this action in the New York Supreme Court to determine petitioner's right to participate as holder of certificates acquired by the insolvent guarantor. Petitioner's claim for parity of treatment was denied, but this denial was reversed by the Appellate Division, 266 App. Div. 543, 42 N. Y. S. 2d 528, which in turn was reversed by the Court of Appeals. It held that state law governed and that New York subordinated the guarantor's certificates. 292 N. Y. 210, 54 N. E. 2d 367. We brought the case here because conflict with *Prudence Corp.* v. *Geist, supra,* was strongly pressed. Precise appreciation is therefore required of the record now before us compared with that on which the *Geist* decision was based.

In the *Geist* case, the claim of parity by the same petitioner arose in connection with different property and an-

other certificate issue, the Zo-Gale issue. In that case also the question of parity was not settled in the order of confirmation. But, while it was reserved for a court of competent jurisdiction, the confirmation order clearly indicated that the bankruptcy court was reserving jurisdiction in itself. "The court retains jurisdiction to hear and determine all questions arising under paragraph 7 of this order"—so ran the terms of the reservation of the parity question in the *Geist* case—and the trustees "are hereby granted leave to apply at any time at the foot of this order for such adjudication." The trustee, Geist, accordingly applied to the bankruptcy court for an order adjudicating the rights of the certificate holders and that court, "In the Matter of a Plan of Reorganization of Amalgamated Properties, Inc., Debtor, in Respect of the Zo-Gale First Mortgage Participation Certificates" issued an order to show cause. When the Amalgamated proceeding with respect to the Zo-Gale property was subsequently closed, the order provided that "these proceedings shall hereafter be treated as dismissed for all purposes, except the determination of the questions raised in the pending motion by A. Geist . . . for determination of the relative priorities . . ." The bankruptcy court had patently retained for decision the question affecting the distribution of the bankrupt's property, although in all other respects it had wound up the proceedings. "The bankruptcy act prescribes its own criteria for distribution to creditors . . . The court of bankruptcy is a court of equity to which the judicial administration of the bankrupt's estate is committed, . . . and it is for that court—not without appropriate regard for rights acquired under rules of state law—to define and apply federal law in determining the extent to which the inequitable conduct of a claimant in acquiring or asserting his claim in bankruptcy requires its subordination to other claims which, in other respects, are of the same class." *Prudence Corp.* v. *Geist, supra* at 95. Accordingly we held that the district court,

sitting as a bankruptcy court, was under duty to apply federal and not state law, and that, in the circumstances of the *Geist* case, there was "no agreement and no equitable basis for depriving the Prudence Company and its creditors of the benefits of the usual bankruptcy rule of equality." *Prudence Corp.* v. *Geist, supra* at 97.

This case is not the *Geist* case. Here the bankruptcy court neither considered the question of parity nor retained jurisdiction to consider it. The order of confirmation contained no provision for retention of jurisdiction to decide the parity question as did the *Geist* order. Nor did the closing of the reorganization reserve jurisdiction, as did the *Geist* closing order. The provisions for disposition of the impounded funds in case subordination be determined are much more elaborate than the *Geist* case discloses. In short, while the provisions for adjudication of the parity question in the *Geist* case clearly contemplated determination of it as part of the reorganization proceedings by the bankruptcy court itself, in the present case the bankruptcy court washed its hands of the problem and left the parties to litigate the question in another forum. For it is not questioned that the state court was a "Court of competent jurisdiction" for adjudicating the claim of parity.

To be sure, the Securities and Exchange Commission, as *amicus curiae,* suggests that the bankruptcy court was in error in failing to retain jurisdiction for determining this aspect of distribution. But the different treatment of the same problem by the same court in the *Geist* case and in this, together with acquiescence by the petitioner in the closing order without seeking a review of the nonretention of jurisdiction, give ground for believing that the arrangement was the product of bargaining between the parties. In any event, since no appeal was taken, it is not now open to find error by the bankruptcy court in failing to retain jurisdiction. The order confirming the plan of reorganiza-

tion is res judicata. *Chicot County Dist.* v. *Baxter State Bank*, 308 U. S. 371, 378.

But it is urged that although the bankruptcy court specifically refused to consider the rights of the parties and remitted them, plainly enough, to the state courts for their determination, the rights were to be determined in the state courts by federal law because the parties had passed through federal reorganization proceedings. In spite of an order of final termination, the authority of the bankruptcy court, it is argued, somehow continues to be effective. Despite the fact that neither the bankruptcy court nor the reorganization statute professes to alter rights unless disclosed in the plan or in an order, we are asked to recognize some enveloping cloud of amenability to the law governing bankruptcy proceedings.

We find no warrant in the statute for so holding. Section 77B, under which this reorganization was accomplished, provides in subsection (g) that upon confirmation "the provisions of the plan and of the order of confirmation shall be binding." The rights are thus fixed as the plan and the order provide and are not otherwise affected. Subsection (h) provides that upon final confirmation the debtor or its successor corporation "shall put into effect and carry out the plan and the orders of the judge relative thereto . . . and the property dealt with by the plan . . . shall be free and clear of all claims of the debtor, its stockholders and creditors, except such as may consistently with the provisions of the plan be reserved in the order confirming the plan . . ." The final decree, discharging the trustees and closing the case, "shall discharge the debtor from its debts and liabilities, and shall terminate and end all rights and interests of its stockholders, except as provided in the plan or as may be reserved as aforesaid." Here the court entered appropriate orders to secure the execution of the plan and the termination of the proceedings. But the relative priority of participation was passed

upon neither in the plan nor by the court. Instead, it was specifically reserved. And it was reserved for determination, as the parties saw fit to have it determined, by the New York courts without restriction by the federal adjudication. The parties were out of the federal bankruptcy court with their original rights modified by the terms of the reorganization plan. When they came before a New York court seeking a determination of their present rights, that court was obliged to ascertain whether any rights had been fixed by the reorganization plan and, if so, to enforce them. Rights not affected by the federal proceedings the New York court was free to decide according to New York law. The bankruptcy court had refused to fix the rights of the parties as to the participation of Prudence-owned Burnside participations, and expressly left them to be fixed by the New York court as a "Court of competent jurisdiction." Accordingly, it was for the New York Court of Appeals to define the governing New York law.

And since, in the circumstances of this case, New York law governs, we are not called upon to indicate, it hardly needs to be added, whether the result would be different were the federal rule for distribution to creditors applicable.

Affirmed.

MR. CHIEF JUSTICE STONE.

I concur in the result.

The relative priority of Prudence's participation in the bankrupt's estate in a 77B reorganization is a federal right governed by federal not state law. *Prudence Corp.* v. *Geist*, 316 U. S. 89, 95. As the reorganization plan did not purport to alter that right, but merely provided that it should be determined by a court of "competent jurisdiction," I cannot conclude that the adoption of the plan contemplated or effected the alteration of the federal right

by requiring it to be redefined in terms of the law of New York, or of any other jurisdiction, where the parties might happen to seek its adjudication.

The fact that a federal right is to be ascertained in a state rather than in a federal court does not make it any less the duty of the court to apply federal law. *Chesapeake & Ohio R. Co.* v. *Martin,* 283 U. S. 209, 212–213; *Awotin* v. *Atlas Exchange Bank,* 295 U. S. 209; *Brady* v. *Southern R. Co.,* 320 U. S. 476, 479, and cases cited; *Illinois Steel Co.* v. *Baltimore & Ohio R. Co.,* 320 U. S. 508, 511, and cases cited; *Steele* v. *Louisville & Nashville R. Co.,* 323 U. S. 192, 204. And a mere grant by the federal court of permission to the parties to litigate a federal question in a state court, is not a direction that the question be determined by state law, more than is a general statutory authorization for a suit in the state court on a federal right.

The state court has held that petitioner, the holder of mortgage participation certificates, is not entitled to share in the mortgage until the holders of other certificates, which petitioner has guaranteed, are paid in full. Its judgment should be affirmed, not because the plan called for determination of petitioner's rights in the bankrupt's estate by state rather than federal law, but because in the circumstances of this case the applicable federal law is the same as that which the state court has applied. Petitioner did not, as in the *Geist* case, acquire its interest in the mortgage as an original investment before it sold and guaranteed certificated shares in the mortgage, nor did it acquire its own certificates independently of the performance of its obligation as a guarantor of the certificates. Petitioner is here in the position of a subrogee of a claim whose payment it has guaranteed. For it acquired its claim to participate in the mortgage through performance of its guaranty, by purchase, after default, of the certificates of participation which it had guaranteed.

As we recognized in the *Geist* case, and were at pains to point out, 316 U. S., at p. 96, such a case is within the rule of *United States* v. *National Surety Co.*, 254 U. S. 73, 76; *Jenkins* v. *National Surety Co.*, 277 U. S. 258; *American Surety Co.* v. *Westinghouse Electric Co.*, 296 U. S. 133, "that a solvent guarantor or surety of an insolvent's obligation will not be permitted, either by taking indemnity from his principal or by virtue of his right of subrogation, to compete with other creditors payment of whose claims he has undertaken to assure, until they are paid in full."

MR. JUSTICE RUTLEDGE concurs in this opinion.

ROSENMAN ET AL., EXECUTORS, *v.* UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 207. Argued December 15, 1944.—Decided January 29, 1945.

Section 319 (b) of the Revenue Act of 1926, as amended by § 810 (a) of the Revenue Act of 1932, provides that a claim for refund of a federal estate tax "alleged to have been erroneously or illegally assessed or collected must be presented to the Commissioner within three years next after the payment of such tax." *Held:*

1. The period of limitations did not begin to run from the time of a remittance which in effect was a deposit and which the Collector placed in a suspense account to the credit of the estate. Pp. 661–662.

2. As to a balance of the remittance which was applied upon a deficiency subsequently assessed by the Commissioner, a claim for refund filed within three years of such application of the balance, though more than three years from the date of the original remittance, was timely. P. 661.

101 Ct. Cls. 437, 53 F. Supp. 722, reversed.

CERTIORARI, *post*, p. 691, to review a judgment denying in part a refund of federal estate taxes.

Mr. Charles Angulo for petitioners.

Mr. Chester T. Lane argued the cause, and *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key, Walter J. Cummings, Jr., Miss Helen R. Carloss* and *Mrs. Elizabeth B. Davis* were on the brief, for the United States.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This is an action upon a claim for refund of a federal estate tax, and the specific question before us is whether the claim was asserted too late. The matter is governed by § 319 (b) of the Revenue Act of 1926, 44 Stat. 9, 84, as amended by § 810 (a) of the Revenue Act of 1932, 47 Stat. 169, 282, 26 U. S. C. § 910, reading as follows:
"All claims for the refunding of the tax imposed by this title alleged to have been erroneously or illegally assessed or collected must be presented to the Commissioner within three years next after the payment of such tax. The amount of the refund shall not exceed the portion of the tax paid during the three years immediately preceding the filing of the claim, or if no claim was filed, then during the three years immediately preceding the allowance of the refund."

Petitioners are executors of the will of Louis Rosenman, who died on December 25, 1933. Under appropriate statutory authority, the Commissioner of Internal Revenue extended the time for filing the estate tax return to February 25, 1935. But there was no extension of the time for payment of the tax which became due one year after the decedent's death, on December 25, 1934. The day before, petitioners delivered to the Collector of Internal Revenue a check for $120,000, the purpose of which was thus defined in a letter of transmittal: "We are delivering to you herewith, by messenger, an Estate check

payable to your order, for $120,000, as a payment on account of the Federal Estate tax. . . . This payment is made under protest and duress, and solely for the purpose of avoiding penalties and interest, since it is contended by the executors that not all of this sum is legally or lawfully due." This amount was placed by the Collector in a suspense account to the credit of the estate. In the books of the Collector the suspense account concerns moneys received in connection with federal estate taxes and other miscellaneous taxes if, as here, no assessment for taxes is outstanding at the time. On February 25, 1935, petitioners filed their estate tax return according to which there was due from the estate $80,224.24. On March 28, 1935, the Collector advised petitioners that $80,224.24 of the $120,000 to their credit in the suspense account had been applied in satisfaction of the amount of the tax assessed under their return. On the basis of this notice, petitioners, on March 26, 1938, filed a claim for $39,775.76, the balance between the $120,000 paid by them under protest and the assessed tax of $80,224.24.

Upon completion, after nearly three years, of the audit of the return, the Commissioner determined that the total net tax due was $128,759.08. No appeal to the Board of Tax Appeals having been taken, a deficiency of $48,534.84 was assessed. The Collector thereupon applied the balance of $39,775.76 standing to the credit of petitioners in the suspense account in partial satisfaction of this deficiency, and on April 22, 1938, petitioners paid to the Collector the additional amount of $10,497.34, which covered the remainder of the deficiency plus interest. The Commissioner then rejected the petitioners' claim for refund filed in March of that year. On May 20, 1940, petitioners filed with the Collector a claim, based on additional deductions, for refund of $24,717.12. The claim was rejected on the ground, so far as now relevant, that the tax claimed to have been illegally exacted had been

paid more than three years prior to the filing of the claim, except as to the amount of $10,497.34 paid by petitioners in 1938. Petitioners brought this suit in the Court of Claims which held that recovery for the amount here in dispute was barred by statute, 53 F. Supp. 722. To resolve an asserted conflict of decisions in the lower courts we brought the case here.

Claims for tax refunds must conform strictly to the requirements of Congress. A claim for refund of an estate tax "alleged to have been erroneously or illegally assessed or collected must be presented to the Commissioner within three years next after the payment of such tax." On the face of it, this requirement is couched in ordinary English, and, since no extraneous relevant aids to construction have been called to our attention, Congress has evidently meant what these words ordinarily convey. The claim is for refund of a tax "alleged to have been erroneously or illegally assessed or collected," and the claim must have been filed "after the payment of such tax," that is, within three years after payment of a tax which according to the claim was erroneously or illegally collected. The crux of the matter is the alleged illegal assessment or collection, and "payment of such tax" plainly presupposes challenged action by the taxing officials.

The action here complained of was the assessment of a deficiency by the Commissioner in April 1938. Before that time there were no taxes "erroneously or illegally assessed or collected" for the collection of which petitioners could have filed a claim for refund. The amount then demanded as a deficiency by the Commissioner was, so the petitioners claimed, erroneously assessed. It is this erroneous assessment that gave rise to a claim for refund. Not until then was there such a claim as could start the time running for presenting the claim. In any responsible sense payment was then made by the application of the balance credited to the petitioners in the suspense account and by the ad-

ditional payment of $10,497.34 on April 22, 1938. Both these events occurred within three years of May 20, 1940, when the petitioners' present claim was filed.

But the Government contends "payment of such tax" was made on December 24, 1934, when petitioners transferred to the Collector a check for $120,000. This stopped the running of penalties and interest, says the Government, and therefore is to be treated as a payment by the parties. But on December 24, 1934, the taxpayer did not discharge what he deemed a liability nor pay one that was asserted. There was merely an interim arrangement to cover whatever contingencies the future might define. The tax obligation did not become defined until April 1938. And this is the practical construction which the Government has placed upon such arrangements. The Government does not consider such advances of estimated taxes as tax payments. They are, as it were, payments in escrow. They are set aside, as we have noted, in special suspense accounts established for depositing money received when no assessment is then outstanding against the taxpayer. The receipt by the Government of moneys under such an arrangement carries no more significance than would the giving of a surety bond. Money in these accounts is held not as taxes duly collected are held but as a deposit made in the nature of a cash bond for the payment of taxes thereafter found to be due. See Ruling of the Comptroller General, A–48307, April 14, 1933, 1 (1935) Prentice-Hall Tax Service, Special Reports, paragraph 45. Accordingly, where taxpayers have sued for interest on the "overpayment" of moneys received under similar conditions, the Government has insisted that the arrangement was merely a "deposit" and not a "payment" interest on which is due from the Government if there is an excess beyond the amount of the tax eventually assessed. See *Busser* v. *United States,* 130 F. 2d 537, 538; *Atlantic Oil Producing Co.* v. *United States,* 35 F. Supp.

766; *Moses* v. *United States,* 28 F. Supp. 817; *Chicago Title & Trust Co.* v. *United States,* 45 F. Supp. 323; *Estate of Rogers* v. *Commissioner,* 1942 Prentice-Hall B. T. A. Memorandum Decisions, paragraph 42,275. If it is not payment in order to relieve the Government from paying interest on a subsequently determined excess, it cannot be payment to bar suit by the taxpayer for its illegal retention. It will not do to treat the same transaction as payment and not as payment, whichever favors the Government. See *United States* v. *Wurts,* 303 U. S. 414.

Exaction of interest from the Government requires statutory authority, and it merely carries out the true nature of an arrangement such as this to treat it as an estimated deposit and not as a payment which, if in excess of what should properly have been exacted, entitled the taxpayer to interest as the return on the use that the Government has had of moneys that should not have been exacted. (We need not here consider the effect of the Current Tax Payment Act of 1943, § 4 (d), 57 Stat. 126, 140.) On the other hand, by allowing such a deposit arrangement, the Government safeguards collection of the assessment of whatever amount tax officials may eventually find owing from a taxpayer, while the taxpayer in turn is saved the danger of penalties on an assessment made, as in this case, years after a fairly estimated return has been filed. The construction which in our view the statute compels safeguards the interests of the Government, interprets a business transaction according to its tenor, and avoids gratuitous resentment in the relations between Treasury and taxpayer.

Reversed.

DECISIONS PER CURIAM, ETC., FROM OCTOBER 2, 1944, THROUGH JANUARY 29, 1945.*

No. 121. JONES *v.* CALIFORNIA. Appeal from the District Court of Appeals, 2d Appellate District, of California. October 9, 1944. *Per Curiam:* The appeal is dismissed for want of jurisdiction. § 237 (a), Judicial Code, as amended, 28 U. S. C., § 344 (a); *Memphis Gas Co.* v. *Beeler,* 315 U. S. 649, 650–651, and cases cited. Treating the papers whereon the appeal was allowed as a petition for writ of certiorari as required by § 237 (c) of the Judicial Code, as amended, 28 U. S. C., § 344 (c), certiorari is denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case. *Mr. Morris Lavine* for appellant. Reported below: 61 Cal. App. 2d 608, 143 P. 2d 726.

No. 378. COMMERCIAL CREDIT CO. *v.* O'BRIEN, COUNTY TREASURER, ET AL. Appeal from the Supreme Court of Montana. October 9, 1944. *Per Curiam:* The appeal is dismissed for want of jurisdiction. § 237 (a), Judicial Code, as amended, 28 U. S. C., § 344 (a); *Memphis Gas Co.* v. *Beeler,* 315 U. S. 649, 650–651, and cases cited. 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. The CHIEF JUSTICE took no part in the consideration or decision of this case. *Messrs. Newell W. Ellison, Duane R. Dills,* and *Charles A. Horsky* for appellant. *Mr. R. V. Bottomly* for appellees. Reported below: 115 Mont. 199, 146 P. 2d 637.

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*Decisions on applications for certiorari, *post,* pp. 685, 708; rehearing, *post,* p. 807; cases disposed of without consideration by the Court, *post,* p. 805.

No. 184. TAYLOR ET AL., TRUSTEES OF LAKE PLACID METHODIST CHURCH, *v.* PAYNE, ADMINISTRATRIX. Appeal from the Supreme Court of Florida. October 9, 1944. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. (1) *Campbell* v. *California,* 200 U. S. 87, 94, and cases cited; *Stebbins* v. *Riley,* 268 U. S. 137, 140, and cases cited; (2) *Murdock* v. *Pennsylvania,* 319 U. S. 105, 110, and cases cited; *Prince* v. *Massachusetts,* 321 U. S. 158, 166–169. *Mr. W. D. Bell* for appellants. *Mr. J. Thomas Gurney* for appellee. Reported below: 17 So. 2d 615.

No. 194. FINLAYSON ET VIR. *v.* TOWN OF MONTICELLO. Appeal from the Supreme Court of Florida. October 9, 1944. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Campbell* v. *Olney,* 262 U. S. 352; *North Laramie Land Co.* v. *Hoffman,* 268 U. S. 276, 283; *Utley* v. *St. Petersburg,* 292 U. S. 106; *Anderson National Bank* v. *Luckett,* 321 U. S. 233, 247. *Mr. Weldon G. Starry* for appellants. *Mr. Lawrence A. Truett* for appellee. Reported below: 154 Fla. 274, 17 So. 2d 84.

No. 211. MERCEDES REALTY, INC. *v.* STANDARD HOMESTEAD ASSOCIATION. Appeal from the Supreme Court of Louisiana. October 9, 1944. *Per Curiam:* The motion for leave to file statement as to jurisdiction is granted. The appeal is dismissed for want of a substantial federal question. *Rast* v. *Van Deman & Lewis Co.,* 240 U. S. 342, 357; *Fort Smith Light & Traction Co.* v. *Board of Improvement,* 274 U. S. 387, 391. *Mr. Moses C. Scharff* for appellant. Reported below: 205 La. 520, 17 So. 2d 811.

No. 244. DENNICK, ADMINISTRATOR, *v.* MIAMI SAVINGS & LOAN CO. Appeal from the Supreme Court of Ohio. October 9, 1944. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. *Hansberry* v. *Lee,* 311 U. S. 32, 41, 42–3, and cases cited. *Mr. Clifford R. Curtner* for appellant. Reported below: 143 Ohio St. 490, 55 N. E. 2d 795.

No. 311. OFFHOUSE ET AL. *v.* BOARD OF EDUCATION OF THE CITY OF PATERSON. Appeal from the Supreme Court of New Jersey. October 9, 1944. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Phelps* v. *Board of Education,* 300 U. S. 319, 323. *Mr. Jerome C. Eisenberg* for appellants. *Mr. John F. Evans* for appellee. Reported below: 131 N. J. L. 391, 36 A. 2d 884.

No. 355. TODARO *v.* NEW JERSEY. Appeal from the Court of Errors and Appeals of New Jersey. October 9, 1944. *Per Curiam:* The appeal is dismissed since the application in this case of New Jersey Rev. Stat., Tit. 2, Ch. 164, § 1, presents no substantial federal question. (1) *Wilson* v. *United States,* 162 U. S. 613, 619; (2) *Tot* v. *United States,* 319 U. S. 463, 470–72, and cases cited. *Mr. Frank B. Bozzo* for appellant. Reported below: 131 N. J. L. 430, 37 A. 2d 73.

No. 132. HANNA FURNACE CORP. *v.* UNITED STATES ET AL. Appeal from the District Court of the United States for the Western District of New York. October 9, 1944. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *United States* v. *Pan American Corp.,* 304 U. S. 156, 158; *United States* v. *Wabash R. Co.,* 321 U. S. 403. *Messrs. Ralph Ulsh, Harry D. Fenske,*

and *James McEvoy, Jr.* for appellant. *Solicitor General Fahy* and *Mr. Daniel W. Knowlton* for the United States et al., appellees. Reported below: 53 F. Supp. 341.

Nos. 274 and 275. NORTH COAST TRANSPORTATION CO. ET AL. *v.* UNITED STATES ET AL. Appeals from the District Court of the United States for the Northern District of California. October 9, 1944. *Per Curiam:* In No. 274 the appeal is dismissed. *Hudson & Manhattan R. Co.* v. *Jersey City,* 321 U. S. 755, and cases cited. In No. 275 the motions to affirm are granted and the judgment is affirmed. (1) *Chesapeake & Ohio R. Co.* v. *United States,* 283 U. S. 35, 42; (2) *United States* v. *Baltimore & Ohio R. Co.,* 293 U. S. 454, 465; (3) *Interstate Commerce Commission* v. *Jersey City,* 322 U. S. 503. *Messrs. John O. Moran, Frederick W. Mielke, Ferd J. Schaaf,* and *Fred C. Dorsey* for appellants. *Solicitor General Fahy, Messrs. Daniel W. Knowlton, Frank J. Hennessy,* and *Nelson Thomas* for the United States et al., *Mr. Arthur H. Glanz* for the West Coast Bus Lines, Ltd., and *Messrs. Jonathan C. Gibson* and *Russell B. James* for the National Trailways System et al., appellees. Reported below: 54 F. Supp. 448.

No. 401. THORNTON *v.* MISSISSIPPI. Appeal from the Supreme Court of Mississippi. October 9, 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. Forrest B. Jackson* for appellant. Reported below: 18 So. 2d 296.

No. 10, original. UNITED STATES *v.* WYOMING. October 9, 1944. The motion for leave to file the complaint is granted and process is ordered to issue returnable within 60 days.

No. —. EX PARTE GEORGE ACRET;
No. —. EX PARTE CARL MINGIONE; and
No. —. WILSON *v.* HINMAN. October 9, 1944. The motions for leave to file petitions for writs of mandamus are denied.

No. —. EX PARTE ANDREW BARNETT;
No. —. EX PARTE A. B. FARMER;
No. —. EX PARTE BOOKER T. GEORGE;
No. —. EX PARTE JOSEPH JACK GIASULLA;
No. —. EX PARTE ROBERT JONES;
No. —. EX PARTE BENJAMIN H. JONES;
No. —. EX PARTE JAMES RENO;
No. —. WHARTON *v.* RAGEN, WARDEN; and
No. —. EX PARTE BEN F. MASON. October 9, 1944. The motions for leave to file petitions for writs of habeas corpus are denied.

No. —. EX PARTE CHARLES CAULO; and
No. —. EX PARTE WILLIAM M. LEE. October 9, 1944. The motions for leave to file petitions for writs of habeas corpus are denied. Treating the papers as petitions for writs of certiorari, certiorari is denied.

No. —. EX PARTE ARTHUR E. FAKE. October 9, 1944. The motions for leave to file petitions for writs of habeas corpus and mandamus are denied.

No. —. Ex parte Raymond Paul Hile. October 9, 1944. The motion for leave to file petition for writ of habeas corpus and for other relief is denied.

No. —. Ex parte A. D. Young. October 9, 1944. The motion for leave to file petition for writ of habeas corpus is denied. The application for other relief is also denied.

No. —. Ex parte Percy Berry;
No. —. Ex parte Reuben S. Brewer;
No. —. Ex parte Harry Duncombe;
No. —. Ex parte James Dougherty;
No. —. Ex parte Joseph Jackson;
No. —. Ex parte Milton James; and
No. —. Ex parte Andrew Scott. October 9, 1944. The applications are denied.

No. —. Tinkoff et al. *v.* Gold, Trustee. October 9, 1944. The motion to set aside the order denying an extension of time within which to file petition for writ of certiorari is denied.

No. —. Ex parte Paul Bellenger;
No. —. McMillan *v.* United States; and
No. —. Ex parte Clarence B. Bernard. October 16, 1944. Applications denied.

No. —. Ex parte Albert W. Krause;
No. —. Ex parte Cecil L. Wright;
No. —. Ex parte Stanley B. Peplowski;

No. —. Ex parte Karl Klein;
No. —. Ex parte Charles E. Schramm; and
No. —. Ex parte Phillip Wallace and Frank Butler. October 16, 1944. The motions for leave to file petitions for writs of habeas corpus are denied.

No. —. In re Complaint of Ward M. Blanton. October 16, 1944. The complaint is dismissed.

No. —. In re Petition for Rule to Show Cause of Ward M. Blanton. October 16, 1944. Petition for rule to show cause denied.

No. —. Scheib *v.* Ragen, Warden. October 16, 1944. The motion for leave to file petition for writ of certiorari or habeas corpus is denied.

No. —. Baker *v.* United States. October 16, 1944. Petition denied.

No. —. Hadley *v.* United States. October 16, 1944. The motion for leave to file petition for writ of certiorari is denied.

No. —. Ex parte John A. Evans. October 16, 1944. The motion for leave to file petition for writ of mandamus or habeas corpus is denied.

No. —. Ex parte Edwin K. Atwood. October 16, 1944. The motion for leave to file petition for writ of mandamus, prohibition, or certiorari is denied.

No. —. Ex parte Ann H. P. Kent, for and on behalf of Tyler Kent. October 16, 1944. The motion for issuance of a subpoena is denied. The motion for oral argument is denied. The motion for leave to file petition for writ of mandamus is denied.

No. 6, original. Nebraska *v.* Wyoming et al. October 16, 1944. The report of the Special Master herein is received and ordered to be filed.

No. 9, original. Illinois *v.* Indiana et al. October 16, 1944. The motion of American Maize Products Co. to dismiss its cross claims is granted.

No. —. Ex parte Harry C. Alberts. October 16, 1944. The motion for leave to file petition for writ of mandamus is denied.

Nos. 54 and 55, October Term, 1943. Mercoid Corporation *v.* Mid-Continent Investment Co. et al. October 16, 1944. The motion to clarify and correct the opinion and mandates is denied.

No. —. Ex parte William Meyer; and

No. —. Ex parte Richard P. Allen. October 23, 1944. The motions for leave to file petitions for writs of habeas corpus are denied.

No. —. Ex parte Rudolph Dreksler. October 23, 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, certiorari is denied.

No. —. Ex parte Marshall Clark; and

No. —. Ex parte William Stafford. October 23, 1944. Applications denied.

No. —. Bugg *v.* United States. October 23, 1944. The motion for leave to file petition for writ of certiorari is denied.

No. —. Ex parte Percy Arthur Whistler; and

No. —. Marvich *v.* California. November 6, 1944. The motions for leave to file petitions for writs of habeas corpus are denied.

No. —. Curley *v.* Florida. Appeal from the Supreme Court of Florida. November 6, 1944. The motion for leave to docket the cause and file the record is denied for the reason that it appears from the papers presented that if the cause were docketed the appeal would have to be dismissed for want of a properly presented federal question.

No. 940, October Term, 1943. Ylagan *v.* United States. November 6, 1944. Application denied.

No. 41. McCarthy et al., Trustees of the Denver & Rio Grande Western Railroad Co., et al. *v.* Bruner. Certiorari, 322 U. S. 718, to the Supreme Court of Utah. Argued October 19, 1944. Decided November 13, 1944. *Per Curiam:* In this case, certiorari was granted upon a petition which urged that the Utah Supreme Court erred in affirming a judgment for the respondent upon the ground that a verdict could have been directed for respondent

upon the issues of negligence and contributory negligence. On oral argument and submission, it appears that these contentions are not decisive of the case, since the issues of negligence and contributory negligence were in fact submitted to the jury, and since petitioners' contentions, made after the granting of certiorari, that the trial court erred in instructing or failing to instruct the jury on these issues, are either insubstantial or not properly raised on the record. The writ of certiorari is therefore dismissed as improvidently granted. *Mr. W. Q. Van Cott,* with whom *Mr. P. T. Farnsworth, Jr.* was on the brief, for petitioners. *Mr. Parnell Black,* with whom *Messrs. Calvin W. Rawlings* and *Harold E. Wallace* were on the brief, for respondent. Reported below: 105 Utah 399, 142 P. 2d 649.

No. 450. BELDEN *v.* UNION CENTRAL LIFE INSURANCE CO.; and

No. 597. KOPLIN *v.* OHIO NATIONAL LIFE INSURANCE CO. Appeals from the Supreme Court of Ohio. November 13, 1944. *Per Curiam:* In each of these cases the motion to dismiss is granted and 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. *Petrie* v. *Nampa & Meridian Irrigation District,* 248 U. S. 154, 158. *Messrs. Charles F. Schnee* and *Robert Guinther* for appellants. *Messrs. Frank F. Dinsmore* and *Virgil D. Parish* for appellee in No. 450. *Mr. Virgil D. Parish* for appellee in No. 597. Reported below: 143 Ohio St. 329, 56 N. E. 2d 177.

No. 473. TURNER ET AL. *v.* UNITED STATES ET AL. Appeal from the District Court of the United States for the Middle District of North Carolina. November 13, 1944. *Per Curiam:* The motion to affirm is granted and the

judgment is affirmed. *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 480–81. *Mr. Edgar Watkins* for appellants. *Solicitor General Fahy* and *Mr. Daniel W. Knowlton* for appellees. Reported below: 56 F. Supp. 798.

No. 479. PUBLIC SERVICE COMMISSION (STATE DIVISION OF THE DEPARTMENT OF PUBLIC SERVICE OF NEW YORK) ET AL. *v.* UNITED STATES ET AL. Appeal from the District Court of the United States for the Southern District of New York. November 13, 1944. *Per Curiam:* On remand of the case of *City of Yonkers* v. *United States*, 320 U. S. 685, to the Interstate Commerce Commission for further findings, the Commission reopened the case, took further evidence, and made additional findings. Upon examination of the case now here on appeal we conclude that those findings are sufficient to support the order, and the evidence is sufficient to support the findings. The judgment is affirmed. *Messrs. John J. Broderick, Philip Halpern,* and *Horace M. Gray* for appellants. Reported below: 56 F. Supp. 351.

No. —. EX PARTE WILLIAM DAINARD; and

No. —. EX PARTE DORSEY MCMAHAN. November 13, 1944. The motions for leave to file petitions for writs of mandamus are denied.

No. —. EX PARTE LOUIS MOSKOVITZ;

No. —. EX PARTE WILLIAM H. ALEXANDER; and

No. —. EX PARTE JESSE BOWE. November 13, 1944. The motions for leave to file petitions for writs of habeas corpus are denied.

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No. —. DENICKE ET AL. *v.* UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT ET AL. November 13, 1944. The motion for leave to file petition for writ of mandamus is denied.

No. 424. UNITED STATES *v.* SHEARER. Appeal from the Court of Claims; and

No. 532. UNITED STATES *v.* SHEARER. On petition for writ of certiorari to the Court of Claims. November 20, 1944. *Per Curiam:* The appeal is dismissed for want of jurisdiction. Act of December 17, 1930; *Colgate* v. *United States,* 280 U. S. 43; *Assiniboine Indian Tribe* v. *United States,* 292 U. S. 606. Cf. *United States* v. *Goltra,* 312 U. S. 203, 204, n. 1. The petition for writ of certiorari is denied for the reason that application therefor was not made within the time provided by law. Act of December 17, 1930. *Solicitor General Fahy* for the United States. *Mr. Clarence B. Des Jardins* for Shearer. Reported below: 101 Ct. Cls. 196.

No. 461. CARTER *v.* GENERAL AMERICAN LIFE INSURANCE CO. Appeal from the Supreme Court of Indiana. November 20, 1944. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a properly presented federal question. Dissenting: MR. JUSTICE BLACK. *Mr. Z. Dallas Hicks* for appellant. *Mr. L. L. Bomberger* for appellee. Reported below: 222 Ind. 557, 54 N. E. 2d 944.

No. 584. CADY *v.* GEORGIA. Appeal from the Supreme Court of Georgia. November 20, 1944. *Per Curiam:* The appeal is dismissed for want of jurisdiction. § 237 (a), Judicial Code, as amended, 28 U. S. C., § 344 (a);

United States Supreme Court Rule 9; *Flournoy* v. *Wiener,* 321 U. S. 253, 259, and cases cited; *Seaboard Air Line R. Co.* v. *Watson,* 287 U. S. 86, 91. 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. Harry M. Wilson* for appellant. *Messrs. T. Grady Head,* Attorney General of Georgia, and *Victor Davidson,* Assistant Attorney General, for appellee. Reported below: 198 Ga. 99, 31 S. E. 2d 38.

No. 585. PUTZIER *v.* RICHARDSON. Appeal from the Supreme Court of Arizona. November 20, 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. Thomas A. Flynn* for appellant.

No. —. EX PARTE VERGIL D. MCMILLAN. November 20, 1944. Application denied.

No. —. EX PARTE WILLIAM H. RICCIA; and

No. —. EX PARTE JACK A. MCCOY. November 20, 1944. The motions for leave to file petitions for writs of mandamus are denied.

No. —. EX PARTE GREEN WILBURN. November 20, 1944. The motion for leave to file petition for writ of habeas corpus is denied.

No. 611. CURATORS OF THE CENTRAL COLLEGE *v.* ROSE, COLLECTOR OF REVENUE. Appeal from the Supreme Court of Missouri. December 4, 1944. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. *Chicago & Alton R. Co.* v. *Tranbarger,* 238 U. S. 67, 76; *Phelps* v. *Board of Education,* 300 U. S. 319, 322–23; *Keefe* v. *Clark,* 322 U. S. 393, 396. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case. *Mr. Elliott H. Jones* for appellant. Reported below: 182 S. W. 2d 145.

No. —. EX PARTE JAMES PRESTON BRATCHER;

No. —. EX PARTE WILLIE MAY MAXSON MCKEE;

No. —. LYNN *v.* ULIO, ADJUTANT GENERAL. December 4, 1944. The motions for leave to file petitions for writs of habeas corpus are denied.

No. —. WILSON *v.* UNITED STATES DISTRICT COURT FOR NORTHERN TEXAS. December 4, 1944. The motion for leave to file petition for writ of mandamus is denied.

No. —. LATIMER *v.* WEBB, SUPERINTENDENT. December 4, 1944. Motion for leave to file petition for writ of habeas corpus and motion for writ of certiorari denied.

No. —. EX PARTE DAISY D. WILSON. December 4, 1944. Application denied.

No. 637. CAROLINA SCENIC COACH LINES *v.* UNITED STATES ET AL. Appeal from the District Court of the United States for the Western District of North Carolina. December 11, 1944. *Per Curiam:* The motions to affirm are granted and the judgment is affirmed. (1) *North*

Coast Transportation Co. v. *United States, ante,* p. 668; (2) *Chesapeake & Ohio R. Co.* v. *United States,* 283 U. S. 35, 41–43; *United States* v. *Baltimore & Ohio R. Co.,* 293 U. S. 454, 464–5; *United States* v. *Pan American Petroleum Corp.,* 304 U. S. 156, 158; *Interstate Commerce Commission* v. *City of Jersey City,* 322 U. S. 503, 512–13; (3) *McLean Trucking Co.* v. *United States,* 321 U. S. 67, 86. *Mr. Wilmer A. Hill* for appellant. *Solicitor General Fahy* and *Mr. Daniel W. Knowlton* for the United States et al., and *Messrs. William A. Roberts* and *James E. Wilson* for the Smoky Mountain Stages, respondents. Reported below: 56 F. Supp. 801.

No. 345. NORTH SHORE CORP. *v.* BARNETT ET AL.; and

No. 346. NORTH SHORE CORP. *v.* SCOTT ET AL. Certiorari, *post,* p. 691, to the Circuit Court of Appeals for the Fifth Circuit. December 11, 1944. *Per Curiam:* The judgments of the Circuit Court of Appeals are vacated, the judgments of the District Court are modified in accordance with the stipulations signed by counsel for the parties and the cases are remanded to the District Court for the Southern District of Florida with directions to enter judgments as modified. *Mr. W. Gregory Smith* for petitioner. *Mr. Lucien H. Boggs* for respondents in No. 345. Reported below: 143 F. 2d 172, 595.

No. —. EX PARTE JOHN RUSSELL MILLER;

No. —. SAXE *v.* HEINZE ET AL.;

No. —. VERNON *v.* WYOMING ET AL.;

No. —. HENDRIN *v.* LAINSON, WARDEN; and

No. —. UNITED STATES EX REL. RUSSELL *v.* RAGEN, WARDEN, ET AL. December 11, 1944. The motions for leave to file petitions for writs of habeas corpus are denied.

No. —. Ex parte Thomas Merryl Woffard. December 11, 1944. Application denied.

No. —. Ex parte William Pabodie. December 11, 1944. The motion for leave to file petition for writ of mandamus is denied.

No. —. Noble et al. *v.* Botkin;

No. —. Kelly *v.* Dowd, Warden. December 18, 1944. The motions for leave to file petitions for writs of habeas corpus are denied.

No. —. Haines *v.* Sullivan, Director of Public Safety;

No. —. Hawkins *v.* Illinois; and

No. —. White *v.* Ragen, Warden. December 18, 1944. Applications denied.

No. —. Audett *v.* United States. December 18, 1944. The motion for a rule of law is denied.

No. —. Hughes et al. *v.* Caddo Parish School Board et al. December 18, 1944. Upon consideration of the motion for a stay and the opposition thereto, it is hereby ordered that upon the docketing of this cause in this Court, the status quo be preserved until the final disposition of the cause in this Court, by restraining and enjoining the appellees from attempting to enforce against the appellants or their children the resolution of the Caddo Parish School Board of Caddo Parish, Louisiana,

adopted September 6, 1944, under and pursuant to Act No. 342 of the Legislature of Louisiana for the year 1944, or the said Act No. 342;

It is further ordered that the stay and injunction herein ordered shall be effective and operative only on the condition that appellants shall post a bond in the penal sum of $500, to be approved by the Chief Justice, conditioned upon the payment to appellees, in the event that this appeal is dismissed or the judgment affirmed, of all damages and costs which they, or any of them, may sustain by reason of the making of this order.

See *post*, p. 685.

No. 705. MONAGHAN *v.* ARMATAGE ET AL. Appeal from the Supreme Court of Minnesota. January 2, 1945. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *City of Trenton* v. *New Jersey*, 262 U. S. 182; *Risty* v. *Chicago, R. I. & P. R. Co.*, 270 U. S. 378, 390; *Williams* v. *Mayor*, 289 U. S. 36. *Mart M. Monaghan, pro se. Messrs. Paul J. Thompson, William H. Oppenheimer,* and *Montreville J. Brown* for appellees. Reported below: 218 Minn. 108, 15 N. W. 2d 241.

No. 713. PARKE, DAVIS & Co. *v.* COOK, COMMISSIONER OF REVENUE. Appeal from the Supreme Court of Georgia. January 2, 1945. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. (1) *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113, 120–21, and cases cited; *International Harvester Co.* v. *Wisconsin Department of Taxation*, 322 U. S. 435, 441–42; (2) *Union Tank Line Co.* v. *Wright*, 249 U. S. 275, 282; *Nashville, C. & St. L. R. Co.* v. *Browning*, 310 U. S. 362, 365–66; (3) *Interna-*

tional Harvester Co. v. *Department of Treasury,* 322 U. S. 340; *Department of Treasury* v. *Wood Corporation,* 313 U. S. 62; cf. *McLeod* v. *Dilworth Co.,* 322 U. S. 327. *Messrs. B. D. Murphy* and *Edgar Watkins* for appellant. *Messrs. T. Grady Head,* Attorney General of Georgia, *Claude Shaw* and *Victor Davidson,* Assistant Attorneys General, for appellee. Reported below: 198 Ga. 457, 31 S. E. 2d 728.

No. —. Ex parte Frank Johnson;

No. —. Ex parte Mary A. Ruthven; and

No. —. Ex parte Thomas Herndon. January 2, 1945. The motions for leave to file petitions for writs of habeas corpus are denied.

No. —. Ex parte Vergil D. McMillan;

No. —. Ex parte Charles M. Keyser; and

No. —. Wilson *v.* Hopkins. January 2, 1945. Applications denied.

No. 192. Giese *v.* United States. Certiorari, *post,* p. 687, to the United States Court of Appeals for the District of Columbia. Argued December 14, 1944. Decided January 8, 1945. *Per Curiam:* The judgment is affirmed by an equally divided Court. Mr. Justice Douglas took no part in the consideration or decision of this case. *Mr. Edmund D. Campbell* for petitioner. *Mr. Paul A. Freund,* with whom *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Messrs. Robert S. Erdahl* and *Irving S. Shapiro* were on the brief, for the United States. Reported below: 143 F. 2d 633.

No. 762. Memphis Natural Gas Co. et al. *v.* State Tax Commission. Appeal from the Supreme Court of

Mississippi. January 8, 1945. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. *Underwood Typewriter Co.* v. *Chamberlain,* 254 U. S. 113, 119–21; *Memphis Natural Gas Co.* v. *Beeler,* 315 U. S. 649, 656; *International Harvester Co.* v. *Wisconsin Department of Taxation,* 322 U. S. 435, 441–42. *Messrs. Marcellus Green, E. R. Holmes,* and *Garner W. Green* for appellants. Reported below: 19 So. 2d 477.

No. —. QUINCE *v.* GENERAL ACCOUNTING OFFICE. January 8, 1945. Application denied.

No. 351. CARLOTA BENITEZ SAMPAYO *v.* UNITED STATES ET AL.;

No. 352. CARLOTA BENITEZ SAMPAYO *v.* BANK OF NOVA SCOTIA; and

No. 353. CARLOTA BENITEZ SAMPAYO *v.* BANK OF NOVA SCOTIA ET AL. January 8, 1945. The motion to strike briefs of the Bank of Nova Scotia is denied with leave to petitioner to file a consolidated reply within 20 days. The motion for other relief is denied. The CHIEF JUSTICE took no part in the consideration or decision of these applications.

No. —. KUCZYNSKI *v.* O'BRIEN, JUDGE. January 15, 1945. The motion for leave to file petition for writ of mandamus is denied.

No. —. EX PARTE WILLIAM T. REID. January 15, 1945. The petition for an injunction is denied.

No. 482. MACKEY *v.* KAISER, WARDEN. On petition for writ of certiorari to the Supreme Court of Missouri.

January 29, 1945. *Per Curiam:* The petition for writ of certiorari is granted. After the Supreme Court of Missouri denied the petition for habeas corpus in this case on the ground that it "fails to state a cause of action," this Court decided on January 8, 1945, in *Williams* v. *Kaiser,* 323 U. S. 471, and *Tomkins* v. *Missouri,* 323 U. S. 485, questions having a bearing on the issues in the present case. Accordingly we vacate the judgment and remand the case to the Supreme Court of Missouri for further consideration in the light of our decisions in those cases. *Mathews* v. *West Virginia,* 320 U. S. 707, and cases cited.

No. 732. CRICHTON ET AL., DOING BUSINESS AS SUPER SERVICE MOTOR FREIGHT CO., ET AL. *v.* UNITED STATES ET AL. Appeal from the District Court of the United States for the Southern District of New York. January 29, 1945. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. (1) *North Coast Transportation Co.* v. *United States, ante,* p. 668; *Carolina Scenic Coach Lines* v. *United States, ante,* p. 678; (2) *Alton R. Co.* v. *United States,* 315 U. S. 15, 24; and (3) *United States* v. *Pan American Petroleum Corp.,* 304 U. S. 156, 158. *Messrs. William A. Roberts, Edgar Turlington, James E. Wilson,* and *Mrs. Irene Kennedy* for appellants. *Solicitor General Fahy* and *Mr. Daniel W. Knowlton* for the United States et al., and *Mr. Mortimer Allen Sullivan* for Associated Transport, Inc. et al., appellees. Reported below: 56 F. Supp. 876.

No. 747. NEMOURS *v.* CITY OF CLAYTON; and

No. 748. NEMOURS *v.* CITY OF CLAYTON. Appeals from the Supreme Court of Missouri. January 29, 1945. *Per Curiam:* The appeals are dismissed for want of a substantial federal question. Cf. *Fischer* v. *St. Louis,* 194

U. S. 361; *Bacon* v. *Walker,* 204 U. S. 311; *Cusack Co.* v. *Chicago,* 242 U. S. 526. *Mr. J. L. London* for appellants. Reported below: 353 Mo. 61, 182 S. W. 2d 57.

No. 769. HUGHES ET AL. *v.* CADDO PARISH SCHOOL BOARD ET AL. Appeal from the District Court of the United States for the Western District of Louisiana. January 29, 1945. *Per Curiam:* The motion to amend the assignment of errors is denied. The motion to affirm is granted and the judgment is affirmed. *Waugh* v. *Mississippi University,* 237 U. S. 589. *Mr. Otis W. Bullock* for appellants. *Messrs. Edwin L. Blewer* and *W. C. Perrault* for appellees. Reported below: 57 F. Supp. 508.

No. —. PEOPLE EX REL. FORTUNE *v.* BREWSTER ET AL.;
No. —. HUTTON *v.* UNITED STATES; and
No. —. EX PARTE PERCY ARTHUR WHISTLER. January 29, 1945. The motions for leave to file petitions for writs of habeas corpus are denied.

No. —. EDWARDS *v.* DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA. January 29, 1945. The motion for leave to file petition for writ of mandamus is denied.

DECISIONS GRANTING CERTIORARI, FROM OCTOBER 2, 1944, THROUGH JANUARY 29, 1945.

No. 88. FONDREN ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Mr. E. E. Townes* for petitioners. *Solic-*

itor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., and *Messrs. Sewall Key* and *A. F. Prescott* for respondent. Reported below: 141 F. 2d 419.

No. 126. MERRILL *v.* FAHS, COLLECTOR OF INTERNAL REVENUE. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Messrs. Francis M. Holt, Sam R. Marks,* and *Harry T. Gray* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Mr. Sewall Key, Miss Helen R. Carloss,* and *Mrs. Maryhelen Wigle* for respondent. Reported below: 142 F. 2d 651.

No. 134. UNITED STATES *v.* TOWNSLEY. October 9, 1944. Petition for writ of certiorari to the Court of Claims granted. *Solicitor General Fahy* for the United States. *Messrs. Herman J. Galloway* and *Fred W. Shields* for respondent. Reported below: 101 Ct. Cls. 237.

No. 137. PRUDENCE REALIZATION CORP. *v.* FERRIS ET AL., TRUSTEES, ET AL. October 9, 1944. Petition for writ of certiorari to the Supreme Court of New York granted. *Messrs. Irving L. Schanzer* and *James F. Dealy* for petitioner. *Mr. Charles H. Kriger* and *Mrs. Henrietta Kriger* for Ferris et al., and *Messrs. John Ross Delafield* and *Robert McC. Marsh* for the City Bank Farmers Trust Co. et al., respondents. Reported below: 292 N. Y. 210, 54 N. E. 2d 367.

No. 148. WEBRE STEIB CO., LTD. *v.* COMMISSIONER OF INTERNAL REVENUE. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth

Circuit granted. *Mr. C. J. Batter* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key, Joseph M. Jones,* and *Miss Helen R. Carloss* for respondent. Reported below: 140 F. 2d 768.

No. 188. McKenzie, Trustee in Bankruptcy, *v.* Irving Trust Co. October 9, 1944. Petition for writ of certiorari to the Court of Appeals of New York granted. *Messrs. David Morgulas* and *M. Carl Levine* for petitioner. *Mr. William A. Onderdonk* for respondent. Reported below: 292 N. Y. 347, 55 N. E. 2d 192.

No. 189. Connecticut Light & Power Co. *v.* Federal Power Commission. October 9, 1944. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia granted. *Messrs. Claude R. Branch, Edward M. Day,* and *Gay H. Brown* for petitioner. *Solicitor General Fahy, Assistant Attorney General Shea,* and *Messrs. Joseph B. Goldman, Charles V. Shannon, Howard E. Wahrenbrock,* and *Howell Purdue* for respondent. Briefs were filed by *Mr. Francis A. Pallotti,* Attorney General, on behalf of the State of Connecticut, and *Mr. John E. Benton,* on behalf of the Connecticut Public Utilities Commissioners et al., as *amici curiae,* in support of the petition. Reported below: 141 F. 2d 14.

No. 192. Giese *v.* United States. October 9, 1944. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia granted. *Mr. Edmund D. Campbell* 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 633.

No. 200. Order of Railway Conductors of America et al. *v.* Pennsylvania Railroad Co. et al. October 9, 1944. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia granted. *Messrs. Rufus G. Poole, William A. Clineburg,* and *V. C. Shuttleworth* for petitioners. *Messrs. John Dickinson, John B. Prizer,* and *R. Aubrey Bogley* for the Pennsylvania Railroad Co., and *Mr. Bernard M. Savage* for the Brotherhood of Railroad Trainmen, respondents. Reported below: 141 F. 2d 366.

No. 226. Republic Aviation Corp. *v.* National Labor Relations Board. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. J. Edward Lumbard, Jr., John J. Ryan,* and *Frederick W. Davenport, Jr.* for petitioner. *Solicitor General Fahy, Messrs. Walter J. Cummings, Jr., Alvin J. Rockwell,* and *Miss Ruth Weyand* for respondent. Reported below: 142 F. 2d 193.

No. 265. Blair *v.* Baltimore & Ohio Railroad Co. October 9, 1944. Petition for writ of certiorari to the Supreme Court of Pennsylvania granted. *Mr. J. Thomas Hoffman* for petitioner. *Messrs. Charles J. Margiotti* and *Vincent M. Casey* for respondent. Reported below: 349 Pa. 436, 37 A. 2d 736.

No. 279. Canadian Aviator, Ltd. *v.* United States. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Messrs. Chauncey I. Clark* and *Eugene Underwood* for petitioner. *Solicitor General Fahy, Assistant Attorney*

General Shea, and *Messrs. Joseph B. Goldman* and *Walter J. Cummings, Jr.* for the United States. Reported below: 142 F. 2d 709.

No. 287. BARR *v.* UNITED STATES. October 9, 1944. Petition for writ of certiorari to the United States Court of Customs & Patent Appeals granted. *Mr. Albert MacC. Barnes* for petitioner. *Solicitor General Fahy, Assistant Attorney General Rao,* and *Messrs. John R. Benney* and *Walter J. Cummings, Jr.* for the United States. Reported below: 143 F. 2d 132.

No. 294. CITY BANK FARMERS TRUST CO., ADMINISTRATOR, *v.* MCGOWAN, COLLECTOR OF INTERNAL REVENUE. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. James Lloyd Derby, J. Seymour Montgomery, Jr.,* and *John K. Watson* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key, J. Louis Monarch, Carlton Fox,* and *Walter J. Cummings, Jr.* for respondent. Reported below: 142 F. 2d 599.

No. 335. TILLER, EXECUTOR, *v.* ATLANTIC COAST LINE RAILROAD CO. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. *Mr. J. Vaughan Gary* for petitioner. *Messrs. Thomas W. Davis* and *Collins Denny, Jr.* for respondent. Reported below: 142 F. 2d 718.

No. 342. YOUNG *v.* HIGBEE COMPANY ET AL. October 9, 1944. Petition for writ of certiorari to the Circuit

Court of Appeals for the Sixth Circuit granted. *Mr. James A. Butler* for petitioner. *Mr. J. Fred Potts* for respondents. *Solicitor General Fahy* and *Messrs. Roger S. Foster, Milton V. Freeman,* and *Theodore L. Thau* filed a brief on behalf of the Securities & Exchange Commission, as *amicus curiae,* in support of the petition. Reported below: 142 F. 2d 1004.

No. 118. INDUSTRIAL ADDITION ASSOCIATION *v.* COMMISSIONER OF INTERNAL REVENUE. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Mr. F. A. Berry* for petitioner. *Solictor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key, J. Louis Monarch,* and *Miss Melva M. Graney* for respondent. Reported below: 141 F. 2d 636.

No. 160. ELGIN, JOLIET & EASTERN RAILWAY CO. *v.* BURLEY ET AL. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Mr. Paul R. Conaghan* for petitioner. *Mr. John H. Gately* for respondents. Reported below: 140 F. 2d 488.

No. 181. F. W. FITCH CO. *v.* UNITED STATES. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Messrs. Arnold F. Schaetzle* and *James W. Stewart* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key* and *J. Louis Monarch* for the United States. Reported below: 141 F. 2d 380.

No. 207. ROSENMAN ET AL., EXECUTORS, *v.* UNITED STATES. October 9, 1944. Petition for writ of certiorari to the Court of Claims granted. *Mr. Charles Angulo* for petitioners. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key, Robert N. Anderson,* and *Mrs. Elizabeth B. Davis* for the United States. Reported below: 101 Ct. Cls. 437, 53 F. Supp. 722.

No. 307. CLINE, TRUSTEE IN BANKRUPTCY, *v.* KAPLAN ET AL. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Mr. Edward Rothbart* for petitioner. *Mr. Norman H. Nachman* for respondents. Reported below: 142 F. 2d 301.

No. 322. HERGET, TRUSTEE IN BANKRUPTCY, *v.* CENTRAL NATIONAL BANK & TRUST CO. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Mr. William D. Donnelly* for petitioner. *Messrs. John M. Elliott* and *Walter Bachrach* for respondent. Reported below: 141 F. 2d 150.

No. 345. NORTH SHORE CORP. *v.* BARNETT ET AL. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Mr. W. Gregory Smith* for petitioner. *Mr. Lucien H. Boggs* for respondents. Reported below: 143 F. 2d 172.

No. 346. NORTH SHORE CORP. *v.* SCOTT ET AL. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Mr. W. Gregory Smith* for petitioner. Reported below: 143 F. 2d 595.

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No. 86. REGAL KNITWEAR CO. *v.* NATIONAL LABOR RELATIONS BOARD. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted limited to the sixth question presented by the petition for the writ. *Mr. John P. Chandler* for petitioner. *Solicitor General Fahy, Messrs. Alvin J. Rockwell, Millard Cass,* and *Miss Ruth Weyand* for respondent. Reported below: 140 F. 2d 746.

No. 93. CHOATE *v.* COMMISSIONER OF INTERNAL REVENUE. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit granted limited to the second question presented by the petition for the writ. *Messrs. Charles I. Francis* and *James H. Yeatman* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key, J. Louis Monarch, Chester T. Lane,* and *Mrs. Maryhelen Wigle* for respondent. Reported below: 141 F. 2d 641.

No. 161. NATIONAL METROPOLITAN BANK *v.* UNITED STATES. October 9, 1944. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia granted. MR. JUSTICE MURPHY took no part in the consideration or decision of this application. *Mr. George C. Gertman* for petitioner. *Solicitor General Fahy, Assistant Attorney General Shea,* and *Mr. Paul A. Sweeney* for the United States. Reported below: 142 F. 2d 474.

No. 180. GEORGIA HARDWOOD LUMBER CO. *v.* COMPANIA DE NAVEGACION TRANSMAR, S. A., OWNER OF S. S. KOTOR. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted limited

to the first and second questions presented by the petition for the writ. *Mr. John Tilney Carpenter* for petitioner. *Mr. Wilbur E. Dow, Jr.* for respondent. Reported below: 141 F. 2d 652.

No. 220. SCOTTISH AMERICAN INVESTMENT CO., LTD. *v.* COMMISSIONER OF INTERNAL REVENUE;

No. 221. BRITISH ASSETS TRUST, LTD. *v.* COMMISSIONER OF INTERNAL REVENUE; and

No. 222. SECOND BRITISH ASSETS TRUST, LTD. *v.* COMMISSIONER OF INTERNAL REVENUE. October 9, 1944. Petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Mr. Marion N. Fisher* for petitioners. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key, J. Louis Monarch,* and *Miss Helen Goodner* for respondent. Reported below: 142 F. 2d 401.

No. 263. FIDELITY-PHILADELPHIA TRUST CO. ET AL., EXECUTORS, *v.* ROTHENSIES, COLLECTOR OF INTERNAL REVENUE. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted limited to the question whether the entire value of the corpus of the trust at the time of decedent's death should be included in the decedent's gross estate. *Mr. C. Russell Phillips* for petitioners. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key, Robert N. Anderson,* and *Hilbert P. Zarky* for respondent. Reported below: 142 F. 2d 838.

No. 264. GUARANTY TRUST CO. *v.* YORK. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted limited to the

first question presented by the petition for the writ. MR. JUSTICE ROBERTS and MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Messrs. John W. Davis* and *Ralph M. Carson* for petitioner. *Mr. Meyer Abrams* for respondent. Reported below: 143 F. 2d 503.

No. 312. UNITED STATES *v.* WILLOW RIVER POWER CO. October 9, 1944. Petition for writ of certiorari to the Court of Claims granted. *Solicitor General Fahy* for the United States. *Messrs. R. M. Rieser* and *John Wattawa* for respondent. Reported below: 101 Ct. Cls. 222.

No. 340. WEILER *v.* UNITED STATES. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted limited to the question presented by the petition for the writ which is stated as Question 1 in the respondent's brief. *Mr. Peter P. Zion* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Mr. William Strong* for the United States. Reported below: 143 F. 2d 204.

No. 367. MALINSKI ET AL. *v.* NEW YORK. October 9, 1944. Petition for writ of certiorari to the Court of Appeals of New York granted. *Messrs. John J. Fitzgerald, David F. Price,* and *Joseph A. Solovei* for petitioners. *Messrs. Thomas Cradock Hughes* and *Henry J. Walsh* for respondent. Reported below: 293 N. Y. 695, 56 N. E. 2d 303.

No. 354. COMMISSIONER OF INTERNAL REVENUE *v.* WHEELER ET AL., EXECUTORS, ET AL. October 16, 1944. Petition for writ of certiorari to the Circuit Court of Ap-

peals for the Ninth Circuit granted. *Solicitor General Fahy* for petitioner. *Messrs. Wm. Dwight Whitney, Roswell Magill,* and *George G. Tyler* for respondents. Reported below: 143 F. 2d 162.

No. 377. PRECISION INSTRUMENT MANUFACTURING CO. ET AL. *v.* AUTOMOTIVE MAINTENANCE MACHINERY CO. October 16, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Messrs. Will Freeman* and *Casper W. Ooms* for petitioners. *Messrs. Frank Parker Davis* and *Albert J. Smith* for respondent. Reported below: 143 F. 2d 332.

No. 337. INTERNATIONAL UNION OF MINE, MILL & SMELTER WORKERS ET AL. *v.* EAGLE-PICHER MINING & SMELTING CO. ET AL. October 16, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Mr. Louis N. Wolf* for petitioners. *Messrs. A. C. Wallace, H. W. Blair, John G. Madden, James E. Burke,* and *Ralph M. Russell* for the Eagle-Picher Mining & Smelting Co. et al., respondents. *Solicitor General Fahy, Mr. Alvin J. Rockwell,* and *Miss Ruth Weyand* filed a memorandum on behalf of the National Labor Relations Board, respondent, and *Mr. Lee Pressman* filed a brief on behalf of the Congress of Industrial Organizations, as *amicus curiae,* urging issuance of the writ. Reported below: 141 F. 2d 843.

No. 368. GEMSCO, INC. ET AL. *v.* WALLING, ADMINISTRATOR;

No. 369. MARETZO ET AL. *v.* WALLING, ADMINISTRATOR; and

No. 370. GUISEPPI ET AL. *v.* WALLING, ADMINISTRATOR. October 16, 1944. Petition for writs of certiorari to the

Circuit Court of Appeals for the Second Circuit granted limited to the first question presented by the petition for the writs. *Messrs. Milton C. Weisman, Walter Brower, Samuel J. Cohen, Samuel S. Allan, Seymour D. Altmark,* and *Coleman Gangel* for petitioners. *Solicitor General Fahy* and *Mr. Douglas B. Maggs* for respondent. Reported below: 144 F. 2d 608.

No. 371. COMMISSIONER OF INTERNAL REVENUE *v.* SMITH. October 16, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Solicitor General Fahy* for petitioner. *Messrs. Franklin T. Griffith* and *Earl S. Nelson* for respondent. Reported below: 142 F. 2d 818.

No. 391. RICE *v.* OLSON, WARDEN. October 16, 1944. Petition for writ of certiorari to the Supreme Court of Nebraska granted. Reported below: 144 Neb. 547, 14 N. W. 2d 850.

No. 410. PRICE, TRUSTEE, ET AL. *v.* GURNEY ET AL. October 23, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Messrs. Wm. W. Keifer* and *George W. Tehan* for petitioners. *Mr. Isaac E. Ferguson* for respondents. Reported below: 142 F. 2d 404.

No. 419. CATLIN ET AL., TRUSTEES, *v.* UNITED STATES. October 23, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Messrs. Thomas S. McPheeters, Henry Davis,* and *George D. Burroughs* for petitioners. *Solicitor General Fahy,*

Assistant Attorney General Littell, and *Messrs. W. Marvin Smith* and *Vernon L. Wilkinson* for the United States. Reported below: 142 F. 2d 781.

No. 92. Bates *v.* United States. See *ante,* p. 15.

No. 455. Republic of Mexico et al. *v.* Hoffman. November 6, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Morris Lavine* for petitioners. *Mr. Farnham P. Griffiths* for respondent. Reported below: 143 F. 2d 854.

No. 469. Special Equipment Co. *v.* Coe, Commissioner of Patents. November 6, 1944. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia granted. *Messrs. James Ballard Moore* and *James M. Graves* for petitioner. *Solicitor General Fahy, Assistant Attorney General Shea,* and *Messrs. Abraham J. Harris* and *Walter J. Cummings, Jr.* for respondent. Reported below: 144 F. 2d 497.

No. 486. Hoover Company *v.* Coe, Commissioner of Patents. November 6, 1944. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia granted. *Messrs. William D. Sellers, Richard R. Fitzsimmons,* and *William S. Hodges* for petitioner. *Solicitor General Fahy, Assistant Attorney General Shea,* and *Mr. Joseph B. Goldman* for respondent. *Messrs. J. Bernhard Thiess* and *Sidney Neuman* filed a brief on behalf of Paul A. Sturtevant, as *amicus curiae,* in support of the petition. Reported below: 144 F. 2d 514.

No. 495. UNITED STATES *v.* COMMODORE PARK, INC. November 6, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. *Solicitor General Fahy* for the United States. *Mr. W. R. Ashburn* for respondent. Reported below: 143 F. 2d 720.

No. 445. BROOKLYN SAVINGS BANK *v.* O'NEIL. November 6, 1944. Petition for writ of certiorari to the Court of Appeals of New York granted limited to the second question presented by the petition for the writ. *Messrs. Homer Cummings, Joseph V. Lane, Jr.,* and *Carl McFarland* for petitioner. *Messrs. Max R. Simon* and *Nathan W. Math* for respondent. Reported below: 293 N. Y. 666, 56 N. E. 2d 259.

No. 452. NATIONAL LABOR RELATIONS BOARD *v.* LE TOURNEAU COMPANY. November 6, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Solicitor General Fahy* and *Mr. Alvin J. Rockwell* for petitioner. *Messrs. Clifton W. Brannon* and *A. C. Wheeler* for respondent. Reported below: 143 F. 2d 67.

No. 421. ARSENAL BUILDING CORP. ET AL. *v.* GREENBERG. November 6, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted limited to question (h) presented by the petition for the writ. *Messrs. Robert R. Bruce* and *Kenneth C. Newman* for petitioners. *Messrs. George Trosk* and *Aaron Benenson* for respondent. Reported below: 144 F. 2d 292.

No. 462. J. F. FITZGERALD CONSTRUCTION CO. *v.* PEDERSEN. November 6, 1944. Petition for writ of certiorari

to the Supreme Court of New York granted limited to the second question presented by the petition for the writ. *Mr. Henry E. Foley* for petitioner. *Mr. William E. J. Connor* for respondent. Reported below: 288 N. Y. 687, 43 N. E. 2d 83.

No. 520. DRUMMOND *v.* UNITED STATES. November 13, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit granted. *Mr. Roy St. Lewis* for petitioner. *Solicitor General Fahy, Assistant Attorney General Littell,* and *Mr. Norman MacDonald* for the United States. Reported below: 144 F. 2d 375.

No. 523. UNITED STATES *v.* FRANKFORT DISTILLERIES, INC.;

No. 524. UNITED STATES *v.* NATIONAL DISTILLERS PRODUCTS CORP.;

No. 525. UNITED STATES *v.* BROWN FORMAN DISTILLERS CORP.;

No. 526. UNITED STATES *v.* HIRAM WALKER, INC.;

No. 527. UNITED STATES *v.* SCHENLEY DISTILLERS CORP.;

No. 528. UNITED STATES *v.* SEAGRAM-DISTILLERS CORP.;

No. 529. UNITED STATES *v.* MCKESSON & ROBBINS, INC.; and

No. 530. UNITED STATES *v.* SPEEGLE. November 13, 1944. Petition for writs of certiorari to the Circuit Court of Appeals for the Tenth Circuit granted. *Solicitor General Fahy* for the United States. *Messrs. Thomas Kiernan, Newell W. Ellison, Charles Rosenbaum,* and *C. Frank Reavis* for Frankfort Distilleries, Inc. et al., and *Messrs. George R. Beneman* and *Robert S. Marx* for Schenley Distillers Corporation, respondents. *Messrs. Gail L. Ireland,* Attorney General, and *George K. Thomas,* Assistant At-

torney General, filed a brief on behalf of the State of Colorado, as *amicus curiae,* in opposition. Reported below: 144 F. 2d 824.

No. 296. PANHANDLE EASTERN PIPE LINE CO. ET AL. *v.* FEDERAL POWER COMMISSION ET AL. November 13, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted, limited to the third question presented by the petition for the writ. *Messrs. Ira Lloyd Letts, John S. L. Yost, D. H. Culton,* and *Samuel H. Riggs* for petitioners. *Solicitor General Fahy, Assistant Attorney General Shea,* and *Messrs. Charles V. Shannon, James H. Lee, William E. Dowling, Harold Goodman, Herbert J. Rushton,* Attorney General of Michigan, and *James W. Williams,* Assistant Attorney General of Michigan, for respondents. *Mr. Spencer W. Reeder* filed a brief on behalf of the City of Cleveland, Ohio, as *amicus curiae,* suggesting that the court below was without jurisdiction over the subject matter. Reported below: 143 F. 2d 488.

No. 379. COLORADO INTERSTATE GAS CO. *v.* FEDERAL POWER COMMISSION ET AL.; and

No. 380. CANADIAN RIVER GAS CO. *v.* FEDERAL POWER COMMISSION ET AL. November 13, 1944. In No. 379 the petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit is granted limited to the fifth and sixth questions presented by the petition for the writ. In No. 380 the petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit is granted limited to the eighth question presented by the petition for the writ. *Messrs. Wm. A. Dougherty, Elmer L. Brock,* and *E. R. Campbell* for petitioner in No. 379, and *Messrs. Charles H. Keffer* and *John P. Akolt* for petitioner in No. 380. *Solicitor General Fahy, Assistant Attorney General*

Shea, and *Messrs. Paul A. Sweeney, Charles V. Shannon, Malcolm Lindsey, Thomas H. Gibson,* and *Louis J. O'Marr,* Attorney General of Wyoming, for the Federal Power Commission et al., respondents. Reported below: 142 F. 2d 943.

No. 575. COLORADO-WYOMING GAS CO. *v.* FEDERAL POWER COMMISSION ET AL. November 13, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit granted limited to the seventh question presented by the petition for the writ. *Messrs. Donald C. McCreery, Paul W. Lee, George H. Shaw,* and *Wm. A. Bryans, III,* for petitioner. *Solictor General Fahy, Assistant Attorney General Shea,* and *Messrs. Paul A. Sweeney, Charles V. Shannon,* and *Louis J. O'Marr,* Attorney General of Wyoming, for the Federal Power Commission et al., respondents. Reported below: 142 F. 2d 943.

No. 518. GARBER *v.* CREWS ET AL. November 13, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit granted limited to the first question presented by the petition for the writ. *Mr. P. C. Simons* for petitioner. *Mr. L. G. Owen* for respondents. Reported below: 144 F. 2d 665.

No. 470. AMERICAN POWER & LIGHT CO. *v.* SECURITIES & EXCHANGE COMMISSION. November 13, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Mr. A. J. G. Priest* for petitioner. *Solicitor General Fahy* and *Messrs. Roger S. Foster* and *Milton V. Freeman* for respondent. Reported below: 143 F. 2d 250.

No. 534. ESTATE OF PUTNAM ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. November 13, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. Wm. Dwight Whitney, Robert T. Swaine,* and *George G. Tyler* for petitioners. *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: 144 F. 2d 756.

No. 554. DIZE *v.* MADDRIX. November 13, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted limited to question 2 (d) presented by the petition for the writ. *Messrs. Harry Leeward Katz* and *Hyman Ginsberg* for petitioner. *Mr. Paul Berman* for respondent. Reported below: 144 F. 2d 584.

No. 431. UNITED STATES *v.* BEUTTAS ET AL., TRADING AS B–W CONSTRUCTION CO. November 20, 1944. Petition for writ of certiorari to the Court of Claims granted. *Solicitor General Fahy* for the United States. *Messrs. William F. Kelly* and *P. J. J. Nicolaides* for respondents. Reported below: 101 Ct. Cls. 748.

No. 559. FEDERAL TRADE COMMISSION *v.* A. E. STALEY MANUFACTURING CO. ET AL. November 20, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Solicitor General Fahy* for petitioner. *Messrs. Charles C. Le Forgee* and *Carl R. Miller* for respondents. Reported below: 144 F. 2d 221.

No. 581. COMMISSIONER OF INTERNAL REVENUE *v.* COURT HOLDING CO. November 20, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the

Fifth Circuit granted. *Solicitor General Fahy* for petitioner. *Mr. Maurice Kay* for respondent. Reported below: 143 F. 2d 823.

No. 588. ALABAMA STATE FEDERATION OF LABOR, LOCAL UNION No. 103, ET AL. *v.* MCADORY, SOLICITOR OF JEFFERSON COUNTY, ET AL. November 20, 1944. Petition for writ of certiorari to the Supreme Court of Alabama granted. *Messrs. Horace C. Wilkinson, Joseph A. Padway,* and *Herbert S. Thatcher* for petitioners. *Mr. William N. McQueen,* Attorney General of Alabama, for respondents. Reported below: 18 So. 2d 810.

No. 610. ANGELUS MILLING CO. *v.* COMMISSIONER OF INTERNAL REVENUE. December 4, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Prew Savoy* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key, Newton K. Fox,* and *Miss Helen R. Carloss* for respondent. Reported below: 144 F. 2d 469.

No. 613. INLAND EMPIRE DISTRICT COUNCIL, LUMBER & SAWMILL WORKERS UNION, ET AL. *v.* MILLIS, CHAIRMAN, ET AL. December 4, 1944. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia granted. *Messrs. George E. Flood, Joseph A. Padway,* and *James A. Glenn* for petitioners. *Solicitor General Fahy, Messrs. Alvin J. Rockwell, Owsley Vose,* and *Miss Ruth Weyand* for the National Labor Relations Board, respondent. Reported below: 144 F. 2d 539.

No. 629. COMMISSIONER OF INTERNAL REVENUE *v.* WEMYSS. December 4, 1944. Petition for writ of certio-

rari to the Circuit Court of Appeals for the Sixth Circuit granted. *Solicitor General Fahy* for petitioner. *Mr. Cecil Sims* for respondent. Reported below: 144 F. 2d 78.

No. 578. COMMISSIONER OF INTERNAL REVENUE *v.* ESTATE OF FIELD ET AL. December 4, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Solicitor General Fahy* for petitioner. *Messrs. Edgar J. Bernheimer* and *Harry T. Zucker* for respondents. Reported below: 144 F. 2d 62.

No. 608. A. H. PHILLIPS, INC. *v.* WALLING, ADMINISTRATOR. December 4, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Messrs. James F. Egan, Joseph B. Ely,* and *Frederick M. Kingsbury* for petitioner. *Solicitor General Fahy* and *Mr. Douglas B. Maggs* for respondent. Reported below: 144 F. 2d 102.

No. 212. WHITE *v.* RAGEN, WARDEN; and

No. 259. LUTZ *v.* RAGEN, WARDEN. December 4, 1944. Petitions for writs of certiorari to the Supreme Court of Illinois granted. *Dewey White* and *Louis Lutz, pro se. Messrs. George F. Barrett,* Attorney General of Illinois, and *William C. Wines,* Assistant Attorney General, for respondent.

No. 570. HUNT ET AL. *v.* CRUMBOCH, PRESIDENT, ET AL. December 4, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Mr. Peter P. Zion* for petitioners. *Mr. William A. Gray* for respondents. Reported below: 143 F. 2d 902.

No. 656. SINCLAIR & CARROLL CO., INC. *v.* INTERCHEMICAL CORPORATION. December 11, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. William D. Mitchell* for petitioner. *Mr. Robert W. Byerly* for respondent. Reported below: 144 F. 2d 842.

No. 205. IN RE CLYDE WILSON SUMMERS. December 11, 1944. The return to the rule to show cause is received and ordered filed. The petition for writ of certiorari to the Supreme Court of Illinois is granted and the writ is ordered to issue. *Mr. Julien Cornell* for petitioner. *Messrs. George F. Barrett,* Attorney General of Illinois, and *William C. Wines,* Assistant Attorney General, for the Chief Justice and Associate Justices of the Supreme Court of Illinois, respondents.

No. 593. RADIO STATION WOW, INC. ET AL. *v.* JOHNSON. December 11, 1944. Petition for writ of certiorari to the Supreme Court of Nebraska granted. *Messrs. Francis P. Matthews, Rainey T. Wells, Monroe Oppenheimer, Robert E. Sher, C. Petrus Peterson,* and *Paul P. Massey* for petitioners. *Mr. Don W. Stewart* for respondent. Reported below: 144 Neb. 432, 14 N. W. 2d 666.

No. 620. UNITED STATES *v.* BEACH. December 11, 1944. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia granted. *Solicitor General Fahy* for the United States. *Messrs. James R. Kirkland* and *Nathan M. Lubar* for respondent. Reported below: 144 F. 2d 533.

No. 680. Corn Products Refining Co. et al. *v.* Federal Trade Commission. December 18, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Messrs. George deForest Lord* and *Frank H. Hall* for petitioners. *Solicitor General Fahy, Assistant Attorney General Berge,* and *Messrs. Charles H. Weston* and *W. T. Kelley* for respondent. Reported below: 144 F. 2d 211.

No. 462. J. F. Fitzgerald Construction Co. *v.* Pedersen. See *post,* p. 807.

No. 688. Borden Company *v.* Borella et al. January 2, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. John A. Kelly* and *Henry Kirk Greer* for petitioner. *Messrs. A. H. Frisch* and *George W. Newgass* for respondents. Reported below: 145 F. 2d 63.

No. 666. United Brotherhood of Carpenters & Joiners *v.* United States;

No. 667. Bay Counties District Council of Carpenters et al. *v.* United States;

No. 668. Lumber Products Association, Inc. et al. *v.* United States;

No. 674. Alameda County Building & Construction Trades Council *v.* United States; and

No. 675. Boorman Lumber Co. et al. *v.* United States. January 2, 1945. Petitions for writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Messrs. Joseph O. Carson* and *Charles H. Tuttle* for petitioner in No. 666. *Messrs. Joseph O. Carson, II,* and *Harry N. Routzohn* for petitioners in No. 667. *Mr.*

Maurice E. Harrison for petitioners in No. 668. *Messrs. Guy C. Calden* and *Clarence E. Todd* for petitioner in No. 674. *Mr. Morgan J. Doyle* for petitioners in No. 675. *Solicitor General Fahy* for the United States. Reported below: 144 F. 2d 546.

No. 702. ALLEN BRADLEY CO. ET AL. *v.* LOCAL UNION No. 3, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, ET AL. January 2, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Walter Gordon Merritt* for petitioners. *Mr. Harold Stern* for respondents. Reported below: 145 F. 2d 215.

No. 721. JEWELL RIDGE COAL CORP. *v.* LOCAL No. 6167, UNITED MINE WORKERS OF AMERICA, ET AL. January 2, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. *Messrs. William A. Stuart* and *George Richardson, Jr.* for petitioner. *Messrs. Crampton Harris, Welly K. Hopkins, Frank W. Rogers,* and *Leonard Muse* for respondents. Reported below: 145 F. 2d 10.

No. 379. COLORADO INTERSTATE GAS CO. *v.* FEDERAL POWER COMMISSION ET AL.; and

No. 380. CANADIAN RIVER GAS CO. *v.* FEDERAL POWER COMMISSION ET AL. See *post*, p. 807.

No. 296. PANHANDLE EASTERN PIPE LINE CO. ET AL. *v.* FEDERAL POWER COMMISSION ET AL. See *post*, p. 808.

No. 710. COMMISSIONER OF INTERNAL REVENUE *v.* ESTATE OF BEDFORD ET AL. January 8, 1945. Petition for

writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Solicitor General Fahy* for petitioner. *Messrs. Erwin N. Griswold* and *Holt S. McKinney* for respondents. Reported below: 144 F. 2d 272.

No. 514. ROBINSON *v.* UNITED STATES. See *post*, p. 808.

No. 482. MACKEY *v.* KAISER, WARDEN. See *ante*, p. 683.

No. 788. BRIDGES *v.* WIXON, DISTRICT DIRECTOR, IMMIGRATION & NATURALIZATION SERVICE. January 29, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. The motion of the Communist Political Association for leave to intervene is denied. MR. JUSTICE JACKSON took no part in the consideration or decision of these applications. *Messrs. Lee Pressman, Richard Gladstein, Henry Cohen,* and *Mrs. Carol King* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Messrs. Chester T. Lane, Robert S. Erdahl,* and *Leon Ulman* for respondent. Reported below: 144 F. 2d 927.

DECISIONS DENYING CERTIORARI, FROM OCTOBER 2, 1944, THROUGH JANUARY 29, 1945.

No. 121. JONES *v.* CALIFORNIA. See *ante*, p. 665.

No. 378. COMMERCIAL CREDIT CO. *v.* O'BRIEN, COUNTY TREASURER, ET AL. See *ante*, p. 665.

No. 401. THORNTON *v.* MISSISSIPPI. See *ante*, p. 668.

No. 290. KENNEMER ET AL. *v.* BILLINGTON ET AL. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied for failure to comply with paragraph 2 of Rule 38 of the Rules of this Court. The brief filed in support of the petition is not "direct and concise" as required by that rule. *Mr. James S. Grisham* for petitioners. *Mr. C. G. Calhoun* for respondents. Reported below: 141 F. 2d 555.

No. —. EX PARTE CHARLES CAULO; and

No. —. EX PARTE WILLIAM M. LEE. See *ante,* p. 669.

No. 77. LOBINGIER *v.* UNITED STATES. October 9, 1944. Petition for writ of certiorari to the Court of Claims denied. *Mr. Charles S. Lobingier, pro se. Solicitor General Fahy, Assistant Attorney General Shea,* and *Mr. Joseph B. Goldman* for the United States. Reported below: 100 Ct. Cls. 448.

No. 78. AMERICAN BROACH EMPLOYEES PROTECTIVE ASSOCIATION *v.* NATIONAL LABOR RELATIONS BOARD ET AL. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. John B. Mellott* for petitioner. *Solicitor General Fahy, Mr. Alvin J. Rockwell,* and *Miss Ruth Weyand* for the National Labor Relations Board.

No. 79. GOODALL COMPANY *v.* SARTIN; and

No. 80. GOODALL COMPANY *v.* SARTIN. October 9, 1944. Petition for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Thomas G. McConnell* for petitioner. Reported below: 141 F. 2d 427.

No. 87. 46TH STREET THEATRE CORP. ET AL. *v.* CHRISTIE. October 9, 1944. Petition for writ of certiorari to the Supreme Court of New York denied. *Messrs. Milton R. Weinberger* and *William Klein* for petitioners. *Messrs. Nathaniel L. Goldstein,* Attorney General, *Orrin G. Judd,* Solicitor General, and *Wendell P. Brown,* First Assistant Attorney General, filed a brief on behalf of the State of New York, as *amicus curiae,* in opposition. Reported below: 292 N. Y. 643, 55 N. E. 2d 512.

No. 91. SITAMORE *v.* MAYO, STATE PRISON CUSTODIAN, ET AL. October 9, 1944. Petition for writ of certiorari to the Supreme Court of Florida denied. *Mr. Martin Caraballo* for petitioner. *Mr. J. Tom Watson,* Attorney General of Florida, for respondents. Reported below: 17 So. 2d 78.

No. 94. HOGAN *v.* COMMISSIONER OF INTERNAL REVENUE. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Charles I. Francis* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key, J. Louis Monarch, Chester T. Lane,* and *Mrs. Maryhelen Wigle* for respondent. Reported below: 141 F. 2d 92.

No. 95. UNION PACIFIC RAILROAD CO. *v.* THATCHER. October 9, 1944. Petition for writ of certiorari to the Supreme Court of Oregon denied. *Messrs. Roy F. Shields, Robert F. Maguire,* and *Thomas W. Bockes* for petitioner. *Mr. George M. Naus* for respondent. Reported below: 173 Ore. 572, 146 P. 2d 769.

No. 96. UNION PACIFIC RAILROAD CO. *v.* UTTERBACH ET AL. October 9, 1944. Petition for writ of certiorari to the Supreme Court of Oregon denied. *Messrs. Roy F. Shields, Robert F. Maguire,* and *Thomas W. Bockes* for petitioner. *Mr. George M. Naus* for respondents. Reported below: 173 Ore. 572, 146 P. 2d 769.

No. 97. FLETCHER TRUST CO., TRUSTEE AND TRANSFEREE, *v.* COMMISSIONER OF INTERNAL REVENUE. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Joseph J. Daniels* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key, J. Louis Monarch,* and *Harold C. Wilkenfeld* for respondent. Reported below: 141 F. 2d 36.

No. 100. ALBANO *v.* MASSACHUSETTS. October 9, 1944. Petition for writ of certiorari to the District Court of Springfield County, Massachusetts, denied. *Mr. Edward M. Dangel* for petitioner.

No. 103. NEWMAN ET AL. *v.* UNITED FRUIT CO.; and

No. 360. UNITED FRUIT CO. *v.* NEWMAN ET AL. October 9, 1944. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. William L. Standard* for Newman et al. *Mr. Chauncey I. Clark* for United Fruit Co. Reported below: 141 F. 2d 191.

No. 104. MAGRUDER *v.* MAGRUDER ET AL. October 9, 1944. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. James J. Hayden* for petitioner. *Mr. R. Sidney Johnson* for respondents. Reported below: 141 F. 2d 537.

No. 105. WALLACE *v.* UNITED STATES. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. William B. Mahony* for petitioner. *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: 142 F. 2d 240.

No. 107. SMITH, STATE AUDITOR, *v.* AMERICAN BRIDGE CO. October 9, 1944. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Messrs. Roy McKittrick,* Attorney General of Missouri, and *Tyre W. Burton* for petitioner. *Mr. Walter R. Mayne* for respondent. Reported below: 352 Mo. 616, 179 S. W. 2d 12.

No. 108. STRICKLAND ET AL. *v.* HUMBLE OIL & REFINING CO. ET AL. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Walter F. Brown* and *Oliver C. Hancock* for petitioners. *Messrs. Wm. A. Vinson, J. C. Wilhoit,* and *R. E. Seagler* for respondents. Reported below: 140 F. 2d 83.

No. 109. ZIMBERG ET AL. *v.* UNITED STATES. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Thomas H. Mahony* for petitioners. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Messrs. Robert S. Erdahl, William Strong,* and *Walter J. Cummings, Jr.* for the United States. Reported below: 142 F. 2d 132.

No. 113. ROTH ET AL. *v.* HYER ET AL. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Ap-

peals for the Fifth Circuit denied. *Mr. Lloyd B. Kanter* for petitioners. *Messrs. J. Thomas Gurney* and *Hugh Ackerman* for respondents. Reported below: 142 F. 2d 227.

No. 114. AMERICAN MUTUAL LIABILITY INSURANCE CO. *v.* ADLER. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Justin C. Despit* for petitioner. *Mr. Fred G. Benton* for respondent. Reported below: 141 F. 2d 489.

No. 116. DESPATCH SHOPS, INC. *v.* VILLAGE OF EAST ROCHESTER ET AL. October 9, 1944. Petition for writ of certiorari to the Court of Appeals of New York denied. *Mr. Daniel M. Beach* for petitioner. *Mr. Percival D. Oviatt* for respondents. Reported below: 292 N. Y. 156, 54 N. E. 2d 343.

No. 119. CASEY, TRUSTEE, *v.* JOHN HANCOCK MUTUAL LIFE INSURANCE CO. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Thomas J. Casey, pro se. Mr. G. K. Richardson* for respondent. Reported below: 141 F. 2d 104.

No. 120. UNDERWOOD ET AL. *v.* ICKES, SECRETARY OF THE INTERIOR. October 9, 1944. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. Russell Hardy* for petitioners. *Solicitor General Fahy, Assistant Attorney General Littell,* and *Messrs. Walter J. Cummings, Jr.* and *Jacob N. Wasserman* for respondent. Reported below: 141 F. 2d 546.

No. 122. MALONEY, EXECUTOR, ET AL. *v.* BOARD OF DIRECTORS OF CITY TRUSTS OF THE CITY OF PHILADELPHIA. October 9, 1944. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. Robert F. Cogswell* for petitioners. *Mr. James V. Hayes* for respondent. Reported below: 141 F. 2d 275.

No. 125. CENTURY OXFORD MANUFACTURING CORP. *v.* NATIONAL LABOR RELATIONS BOARD. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Archibald Palmer* for petitioner. *Solicitor General Fahy, Mr. Alvin J. Rockwell,* and *Miss Ruth Weyand* for respondent. Reported below: 140 F. 2d 541.

No. 127. BANKERS TRUST CO., TRUSTEE, ET AL. *v.* NEW YORK. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Jesse E. Waid* and *William St. John Tozer* for petitioners. *Messrs. Nathaniel L. Goldstein,* Attorney General of New York, *Orrin G. Judd,* Solicitor General, and *Gerald J. Carey,* Assistant Attorney General, for respondent. Reported below: 140 F. 2d 840.

No. 128. BROWN *v.* COMMISSIONER OF INTERNAL REVENUE. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. H. Lewis Brown* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key, A. F. Prescott, Newton K. Fox,* and *Walter J. Cummings, Jr.* for respondent. Reported below: 141 F. 2d 307.

No. 129. JOHNSTON *v.* COMMISSIONER OF INTERNAL REVENUE; and

No. 130. KLAGES *v.* COMMISSIONER OF INTERNAL REVENUE. October 9, 1944. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. D. A. Embury* for petitioners. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key, J. Louis Monarch,* and *Morton K. Rothschild* for respondent. Reported below: 141 F. 2d 208.

No. 131. EASTERN WINE CORP. *v.* G. H. MUMM CHAMPAGNE (SOCIETY VINICOLE DE CHAMPAGNE, SUCCESSORS) ET AL. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Samuel E. Darby, Jr.* for petitioner. *Messrs. Beekman Aitken* and *Watson Washburn* for respondents. Reported below: 142 F. 2d 499.

No. 138. GRAYBAR ELECTRIC CO., INC. *v.* NEW AMSTERDAM CASUALTY CO. October 9, 1944. Petition for writ of certiorari to the Court of Appeals of New York denied. *Mr. Dana T. Ackerly* for petitioner. *Messrs. G. Arthur Blanchet, Oscar R. Houston,* and *Arthur W. Clement* for respondent. Reported below: 292 N. Y. 643, 55 N. E. 2d 512.

No. 139. NICHOLSON *v.* UNITED STATES; and

No. 140. LOWERY *v.* UNITED STATES. October 9, 1944. Petition for writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. W. D. Bell* for petitioners. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Mr. William Strong* for the United States. Reported below: 141 F. 2d 981.

No. 141. MINUSE ET AL. *v.* UNITED STATES. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. David V. Cahill* for petitioners. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Messrs. Chester T. Lane, Roger S. Foster,* and *Theodore L. Thau* for the United States. Reported below: 142 F. 2d 388.

No. 142. CAMERON *v.* CIVIL AERONAUTICS BOARD. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Daniel D. Carmell* and *Walter F. Dodd* for petitioner. *Solicitor General Fahy, Assistant Attorney General Shea,* and *Mr. Walter J. Cummings, Jr.* for respondent. Reported below: 140 F. 2d 482.

No. 143. HANKIN *v.* UNITED STATES. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Ira Jewell Williams, Jr.* for petitioner. *Solicitor General Fahy, Assistant Attorney General Littell,* and *Messrs. Vernon L. Wilkinson, John C. Harrington,* and *Walter J. Cummings, Jr.* for the United States. Reported below: 143 F. 2d 408.

No. 146. MILLER, TRUSTEE IN BANKRUPTCY, *v.* WOOLLEY. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Earl A. Moss* for petitioner. *Messrs. Frank P. Doherty, Joseph F. Rank,* and *Ralph C. Curren* for respondent. Reported below: 141 F. 2d 837.

No. 147. SOUTHERN RAILWAY CO. *v.* JESTER, ADMINISTRATRIX. October 9, 1944. Petition for writ of certiorari to the Supreme Court of South Carolina denied. *Messrs.*

P. A. Bonham, Frank G. Tompkins, H. G. Hedrick, Sidney S. Alderman, and *S. R. Prince* for petitioner. *Messrs. James H. Price* and *James D. Poag* for respondent. Reported below: 204 S. C. 395, 29 S. E. 2d 768.

No. 157. UNITED STATES EX REL. JOHNSTON *v.* CAREY, SHERIFF. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Brien McMahon* for petitioner. Reported below: 141 F. 2d 967.

No. 162. GREENE ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Chas. I. Francis* for petitioners. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key, A. F. Prescott, Joseph M. Jones,* and *Walter J. Cummings, Jr.* for respondent. Reported below: 141 F. 2d 645.

No. 168. PENNSYLVANIA *v.* CONTE. October 9, 1944. Petition for writ of certiorari to the Superior Court of Pennsylvania denied. *Messrs. C. William Kraft, Jr.* and *William R. Toal* for petitioner. *Mr. Hayden C. Covington* for respondent. Reported below: 154 Pa. Super. 112, 35 A. 2d 742.

No. 171. TOWNSEND ET AL. *v.* NEW YORK CENTRAL RAILROAD CO. ET AL. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Leon M. Despres* for petitioners. *Messrs. J. R. Barse, M. L. Bluhm, Marvin A. Jersild, W. J. Milroy, Theodore Schmidt,* and *Milton V. Thompson* for respondents. Reported below: 141 F. 2d 483.

No. 172. PEITZMAN (NOW RILEY) ET AL., DOING BUSINESS AS U. S. ELEVATED TANK MAINTENANCE CO., *v.* CITY OF ILLMO. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Whitworth Stokes* and *Jacob M. Lashly* for petitioners. Reported below: 141 F. 2d 956.

No. 174. BASSETT *v.* BASSETT. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Samuel Platt* for petitioner. *Mr. Clyde D. Souter* for respondent. Reported below: 141 F. 2d 954.

No. 175. LINCOLN NATIONAL LIFE INSURANCE CO. *v.* CUSTER. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Walter H. Eckert* for petitioner. *Messrs. David J. Kadyk* and *Leonard F. Martin* for respondent. Reported below: 141 F. 2d 144.

No. 176. NORTH DAKOTA *v.* SZARKOWSKI. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Alvin C. Strutz,* Attorney General of North Dakota, *P. O. Sathre* and *C. E. Brace,* Assistant Attorneys General, for petitioner. *Mr. Arthur L. Knauf* for respondent. Reported below: 142 F. 2d 333.

No. 239. NORTH DAKOTA *v.* STANTON. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Alvin C. Strutz,* Attorney General of North Dakota, *P. O. Sathre*

and *C. E. Brace,* Assistant Attorneys General, for petitioner. *Mr. F. E. McCurdy* for respondent. Reported below: 142 F. 2d 860.

No. 177. LEDBETTER, ADMINISTRATOR, ET AL. *v.* FARMERS BANK & TRUST CO. ET AL. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Whiteford S. Blakeney* and *George S. Steele* for petitioners. *Messrs. M. G. Wallace* and *Robert H. Dye* for respondents. Reported below: 142 F. 2d 147.

No. 179. THOMPSON, TRUSTEE OF THE MISSOURI PACIFIC RAILROAD CO., *v.* GODSY. October 9, 1944. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Messrs. Thomas J. Cole, A. Z. Patterson,* and *DeWitt C. Chastain* for petitioner. *Mr. Emmet H. Gamble* for respondent. Reported below: 352 Mo. 681, 179 S. W. 2d 44.

No. 183. MARINO ET AL. *v.* UNITED STATES. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. J. Bertram Wegman* for petitioners. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Messrs. Robert S. Erdahl, W. Marvin Smith,* and *Leon Ulman* for the United States. Reported below: 141 F. 2d 771.

No. 186. LAND *v.* BASS ET AL. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Claude L. Gray* for petitioner. Reported below: 142 F. 2d 6.

No. 187. THE EVERGREENS *v.* COMMISSIONER OF INTERNAL REVENUE. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. John H. Jackson* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key, Robert N. Anderson* and *Joseph M. Jones* for respondent. Reported below: 141 F. 2d 927.

No. 191. BERETTA *v.* COMMISSIONER OF INTERNAL REVENUE. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *John K. Beretta, pro se. Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key, Walter J. Cummings, Jr.,* and *Misses Helen R. Carloss* and *Helen Goodner* for respondent. Reported below: 141 F. 2d 452.

No. 195. SOEDER ET AL. *v.* UNITED STATES. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. H. W. Kiser* for petitioners. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key, Robert N. Anderson,* and *Spurgeon Avakian* for the United States. Reported below: 142 F. 2d 236.

No. 202. LANDIS MACHINE CO. *v.* CHASO TOOL CO., INC. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. William A. Strauch* and *James A. Hoffman* for petitioner. *Mr. J. Harold Kilcoyne* for respondent. Reported below: 141 F. 2d 800.

No. 203. MANUFACTURERS' FINANCE CO. *v.* MARKS, TRUSTEE IN BANKRUPTCY. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Edward Rothbart* for petitioner. *Mr. Roane Waring* for respondent. Reported below: 142 F. 2d 521.

No. 206. ROGERS *v.* RAFFE, TRUSTEE IN BANKRUPTCY. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Samuel M. Chapin* for petitioner. *Mr. Hilbert I. Trachman* for respondent. Reported below: 141 F. 2d 374.

No. 208. BELKNAP *v.* MCANDREWS ET AL. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Ernest Woodward* for petitioner. Reported below: 141 F. 2d 111.

No. 209. MAGNOLIA PETROLEUM CO. *v.* UNITED STATES. October 9, 1944. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Raymond M. Myers* and *Homer R. Hendricks* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key, Robert N. Anderson, Robert L. Stern,* and *Mrs. Elizabeth B. Davis* for the United States. Reported below: 101 Ct. Cls. 1, 53 F. Supp. 231.

No. 210. KOHN *v.* NEW YORK. October 9, 1944. Petition for writ of certiorari to the Court of Appeals of New York denied. *Mr. Sydney J. Schwartz* for petitioner.

Messrs. Frank S. Hogan and *Bernard L. Alderman* for respondent. Reported below: 292 N. Y. 597, 55 N. E. 2d 370.

No. 215. LEAKE *v.* COMMISSIONER OF INTERNAL REVENUE. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Fyke Farmer* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key, Robert N. Anderson,* and *Miss Helen Goodner* for respondent. Reported below: 140 F. 2d 451.

No. 216. WALTERS *v.* WILSON. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Samuel P. Block* for petitioner. *Mr. Charles E. Beardsley* for respondent. Reported below: 142 F. 2d 59.

No. 217. KOPELOVE ET AL. *v.* SHERMAN ET AL. October 9, 1944. Petition for writ of certiorari to the Supreme Court of Tennessee denied. *Mr. Wilbur W. Piper* for petitioners. *Mr. John Jennings, Jr.* for respondents. Reported below: 180 Tenn. 541, 177 S. W. 2d 19.

No. 224. ELASTIC STOP NUT CORP. *v.* NATIONAL LABOR RELATIONS BOARD. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Henry N. Ess* and *Paul V. Barnett* for petitioner. *Solicitor General Fahy, Messrs. Alvin J. Rockwell, David Findling,* and *Miss Ruth Weyand* for respondent. Reported below: 142 F. 2d 371.

No. 225. DOMRES *v.* UNITED STATES. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Hayden C. Covington* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Messrs. Robert S. Erdahl* and *Walter J. Cummings, Jr.* for the United States. Reported below: 142 F. 2d 477.

No. 227. BALLESTER-RIPOLL *v.* COURT OF TAX APPEALS OF PUERTO RICO ET AL. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. William Cattron Rigby* and *Fred W. Llewellyn* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Mr. Sewall Key* for respondents. Reported below: 142 F. 2d 11.

No. 228. SUN LIFE ASSURANCE CO. *v.* BULL. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Silas H. Strawn* for petitioner. *Mr. Clarence W. Heyl* for respondent. Reported below: 141 F. 2d 456.

No. 229. TAYLOR *v.* UNITED STATES. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. C. M. Walter* and *John C. Stirrat* for petitioner. *Solicitor General Fahy* and *Messrs. Thomas I. Emerson* and *David London* for the United States. Reported below: 142 F. 2d 808.

No. 230. COYNE ET AL. *v.* SIMRALL CORPORATION ET AL. October 9, 1944. Petition for writ of certiorari to the

Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Jerome Weadock* for petitioners. *Mr. B. A. Wendrow* for Simrall Corporation, and *Mr. Edward W. Fehling* for Anderson et al., respondents. Reported below: 140 F. 2d 574.

No. 231. General Exporting Co. *v.* Star Transfer Line et al. October 9, 1944. Petition for writ of certiorari to the Supreme Court of Michigan denied. *Mr. Benjamin I. Salinger, Jr.* for petitioner. *Mr. Benn M. Corwin* for respondents. Reported below: 308 Mich. 86, 13 N. W. 2d 217.

No. 234. Grieder Machine Tool & Die Co. *v.* National Labor Relations Board. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Henry A. Middleton* for petitioner. *Solicitor General Fahy, Messrs. Walter J. Cummings, Jr., Alvin J. Rockwell,* and *Miss Ruth Weyand* for respondent. Reported below: 142 F. 2d 163.

No. 237. Hummel, Trustee, *v.* Hrabak. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Henry I. Quinn* for petitioner. *Mr. Philip A. Campbell* for respondent. Reported below: 143 F. 2d 594.

No. 238. Glenn, Collector of Internal Revenue, *v.* Beard. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Solicitor General Fahy* for petitioner. *Mr. Allen P. Dodd, Sr.* for respondent. Reported below: 141 F. 2d 376.

No. 241. BISHOPRIC ET AL. *v.* CITY OF JACKSON ET AL. October 9, 1944. Petition for writ of certiorari to the Supreme Court of Mississippi denied. *Messrs. Frank H. Shaffer, Jr.* and *William R. Collins* for petitioners. *Mr. W. E. Morse* for the City of Jackson, and *Messrs. Marcellus Green, Edwin R. Holmes, Jr.*, and *Garner W. Green* for Mississippi Power & Light Co., respondents. Reported below: 16 So. 2d 776.

No. 246. NEW YORK STATE GUERNSEY BREEDERS' COOPERATIVE, INC. *v.* WICKARD, SECRETARY OF AGRICULTURE. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Milo R. Kniffen* for petitioner. *Solicitor General Fahy, Assistant Attorney General Berge,* and *Messrs. Charles H. Weston, J. Stephen Doyle, Jr., W. Carroll Hunter,* and *Robert L. Stern* for respondent. Reported below: 141 F. 2d 805.

No. 247. NEW YORK HANDKERCHIEF MFG. CO. *v.* UNITED STATES. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. David Silbert* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Mr. Sewall Key,* and *Miss Melva M. Graney* for the United States. Reported below: 142 F. 2d 111.

No. 268. 18TH STREET LEADER STORES, INC. *v.* UNITED STATES. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. David J. Shorb* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark,*

Jr., and *Messrs. Sewall Key, A. F. Prescott*, and *Homer R. Miller* for the United States. Reported below: 142 F. 2d 113.

No. 251. County of Westchester et al. *v.* United States. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. William A. Davidson* and *Frank J. Claydon* for petitioners. *Solicitor General Fahy, Assistant Attorney General Littell*, and *Mr. Norman MacDonald* for the United States. Reported below: 143 F. 2d 688.

No. 254. Northwestern Mutual Fire Association et al. *v.* National Labor Relations Board. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Corwin S. Shank* and *Horatio C. Belt* for petitioners. *Solicitor General Fahy, Mr. Alvin J. Rockwell*, and *Miss Ruth Weyand* for respondent. Reported below: 142 F. 2d 866.

No. 257. Russian Greek Catholic Church of St. John the Baptist et al. *v.* McAuliffe et al. October 9, 1944. Petition for writ of certiorari to the Supreme Court of Errors of Connecticut denied. *Mr. Philip Reich* for petitioners. *Messrs. James C. Shannon, Allan E. Brosmith*, and *Thomas F. Garrahan* for respondents. Reported below: 130 Conn. 521, 36 A. 2d 53.

No. 260. Cummer-Graham Co. *v.* Straight Side Basket Corp. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit

denied. *Mr. Langdon H. Larwill* for petitioner. *Mr. Gaius G. Gannon* for respondent. Reported below: 142 F. 2d 646.

No. 267. BANKERS MORTGAGE CO. *v.* COMMISSIONER OF INTERNAL REVENUE. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Wright Matthews* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key* and *Robert N. Anderson* for respondent. Reported below: 142 F. 2d 130.

No. 272. SAULSBURY OIL CO. *v.* PHILLIPS PETROLEUM CO. ET AL.; and

No. 273. PHILLIPS PETROLEUM CO. ET AL. *v.* SAULSBURY OIL CO. October 9, 1944. Petitions for writs of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. F. H. McGregor* for petitioner in No. 272. *Messrs. H. D. Emery, Rayburn L. Foster, R. B. F. Hummer,* and *E. H. Foster* for respondents in No. 272. *Messrs. Rayburn L. Foster* and *E. H. Foster* for petitioners in No. 273. Reported below: 142 F. 2d 27.

No. 276. WEYMANN *v.* UNITED STATES. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. William A. Gray* for petitioner. *Solicitor General Fahy* and *Messrs. Thomas I. Emerson* and *David London* for the United States. Reported below: 143 F. 2d 500.

No. 277. UNITED STATES TRUST CO., EXECUTOR, *v.* COMMISSIONER OF INTERNAL REVENUE. October 9, 1944. Pe-

tition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Will R. Gregg* and *Allin H. Pierce* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Mr. Sewall Key,* and *Miss Helen R. Carloss* for respondent. Reported below: 143 F. 2d 243.

No. 278. Compania Trasatlantica (formerly Compania Trasatlantica Administrada por el Estado) *v.* The Manuel Arnus et al. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Geo. Whitefield Betts, Jr.* for petitioner. *Solicitor General Fahy, Assistant Attorney General Shea,* and *Messrs. Paul A. Sweeney* and *Walter J. Cummings, Jr.* for the United States, respondent. Reported below: 141 F. 2d 585.

No. 280. Kortz *v.* Guardian Life Insurance Co. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Max P. Zall* for petitioner. *Mr. Lowell White* for respondent. Reported below: 144 F. 2d 676.

No. 285. Layton *v.* Oregon. October 9, 1944. Petition for writ of certiorari to the Supreme Court of Oregon denied. *Richard Harry Layton, pro se. Mr. Ralph E. Moody* for respondent. Reported below: 148 P. 2d 522.

No. 286. Aluminum Company of America *v.* Commissioner of Internal Revenue. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Paul G. Rodewald* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs.*

Sewall Key, J. Louis Monarch, Bernard Chertcoff, and *Walter J. Cummings, Jr.* for respondent. Reported below: 142 F. 2d 663.

No. 289. SMITH *v.* UNITED STATES. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Charles P. Moriarity* and *Stanley J. Padden* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Mr. Leon Ulman* for the United States. Reported below: 143 F. 2d 228.

No. 292. MUTUAL FIRE INSURANCE CO. *v.* UNITED STATES. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Horace Michener Schell* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key, J. Louis Monarch, Paul R. Russell,* and *Walter J. Cummings, Jr.* for the United States. Reported below: 142 F. 2d 344.

No. 293. MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION *v.* UNITED CASUALTY CO. ET AL. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Philip E. Horan* for petitioner. *Mr. Ralph E. Tibbetts* for respondents. Reported below: 142 F. 2d 390.

No. 297. LE DUC *v.* NORMAL PARK PRESBYTERIAN CHURCH. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Clifford Littell Le Duc, pro se. Mr. Benjamin Wham* for respondent. Reported below: 142 F. 2d 105.

No. 298. PEYTON PACKING CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Eugene T. Edwards* for petitioner. *Solicitor General Fahy, Mr. Alvin J. Rockwell,* and *Miss Ruth Weyand* for respondent. Reported below: 142 F. 2d 1009.

No. 300. DVORKIN *v.* UNITED STATES. October 9, 1944. Petition for writ of certiorari to the Court of Claims denied. *Mr. Fred B. Rhodes* for petitioner. *Solicitor General Fahy, Assistant Attorney General Shea,* and *Mr. Joseph B. Goldman* for the United States. Reported below: 101 Ct. Cls. 296.

No. 301. ARNER COMPANY, INC. ET AL. *v.* UNITED STATES. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. Clinton Robb* and *Herbert S. Avery* 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: 142 F. 2d 730.

No. 304. EUGENE DIETZGEN CO. *v.* FEDERAL TRADE COMMISSION. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Arthur M. Cox* and *William E. Lamb* 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: 142 F. 2d 321.

No. 308. WAGONER *v.* UNITED STATES. October 9, 1944. Petition for writ of certiorari to the Circuit Court of

Appeals for the Seventh Circuit denied. *Mr. John D. Shoaff* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Mr. Leon Ulman* for the United States. Reported below: 143 F. 2d 1.

No. 309. TEXAS ET AL. *v.* TABASCO CONSOLIDATED INDEPENDENT SCHOOL DISTRICT. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Grover Sellers,* Attorney General of Texas, *Gaynor Kendall* and *Geo. W. Barcus,* Assistant Attorneys General, for petitioners. Reported below: 142 F. 2d 58.

No. 310. SINCLAIR REFINING CO. *v.* COE, COMMISSIONER OF PATENTS. October 9, 1944. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. W. B. Morton, Raymond F. Adams,* and *Clarence M. Fisher* for petitioner. *Solicitor General Fahy, Assistant Attorney General Shea,* and *Messrs. Paul A. Sweeney* and *W. W. Cochran* for respondent. Reported below: 142 F. 2d 569.

No. 315. LAYCOCK ET AL. *v.* HIDALGO COUNTY WATER CONTROL & IMPROVEMENT DISTRICT NO. 12 ET AL. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. W. R. Montgomery* for petitioners. *Messrs. Geo. W. Barcus,* Assistant Attorney General of Texas, *D. F. Strickland, Vernon B. Hill,* and *W. L. Matthews* for respondents. Reported below: 142 F. 2d 789.

No. 316. RALADAM COMPANY *v.* UNITED STATES. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Rockwell T. Gust* and *David A. Howell* for peti-

tioner. *Solicitor General Fahy* and *Assistant Attorney General Tom C. Clark* for the United States. Reported below: 142 F. 2d 107.

No. 317. ROCKEFELLER *v.* COMMISSIONER OF INTERNAL REVENUE. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Louis Laval Hamby* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Mr. Sewall Key,* and *Miss Helen Carloss* for respondent. Reported below: 142 F. 2d 354.

No. 318. CHICAGO & EASTERN ILLINOIS RAILROAD CO. *v.* WADDELL. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Edward W. Rawlins* for petitioner. *Mr. Royal W. Irwin* for respondent. Reported below: 142 F. 2d 309.

No. 320. TRUSTEES OF THE INTERNAL IMPROVEMENT FUND ET AL. *v.* SOUTHWEST TAMPA STORM SEWER DRAINAGE DISTRICT ET AL. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. J. Tom Watson,* Attorney General of Florida, *Woodrow M. Melvin, Lamar Warren,* and *Fred M. Burns,* Assistant Attorneys General, for petitioners. *Mr. W. F. Himes* for Southwest Tampa Storm Sewer Drainage District, and *Solicitor General Fahy* and *Messrs. John D. Goodloe, J. Bowers Campbell,* and *T. M. Shackleford, Jr.* for the Reconstruction Finance Corporation, respondents. Reported below: 142 F. 2d 637.

No. 323. FAIRCHESTER OIL CO., INC. *v.* FIRST NATIONAL BANK OF NEW ROCHELLE. October 9, 1944. Petition for

writ of certiorari to the Supreme Court of New York denied. *Mr. Wm. Dwight Whitney* for petitioner. *Mr. Warner Pyne* for respondent. Reported below: 292 N. Y. 694, 56 N. E. 2d 111.

No. 325. KIEFERDORF *v.* COMMISSIONER OF INTERNAL REVENUE. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. G. D. Schilling* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key, Walter J. Cummings, Jr., Miss Helen R. Carloss,* and *Mrs. Maryhelen Wigle* for respondent. Reported below: 142 F. 2d 723.

No. 329. BURDON, ADMINISTRATRIX, *v.* WOOD. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Charles W. LaFollette* for petitioner. *Mr. Floyd E. Thompson* for respondent. Reported below: 142 F. 2d 303.

No. 330. ILLINOIS EX REL. RECONSTRUCTION FINANCE CORPORATION ET AL. *v.* BOARD OF EDUCATION OF THE CITY OF CHICAGO ET AL. October 9, 1944. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Mr. John D. Goodloe* for Reconstruction Finance Corporation, and *Mr. Floyd E. Thompson* for Hutchinson et al., petitioners. *Messrs. Richard S. Folsom, Frank S. Righeimer,* and *Frank R. Schneberger* for respondents. Reported below: 386 Ill. 522, 54 N. E. 2d 508.

No. 331. LEWIS *v.* BOARD OF EDUCATION OF THE CITY OF CHICAGO ET AL. October 9, 1944. Petition for writ of

certiorari to the Supreme Court of Illinois denied. *Mr. Floyd E. Thompson* for petitioner. Reported below: 385 Ill. 599, 53 N. E. 2d 596.

No. 332. HUTCHINSON ET AL. *v.* BOARD OF EDUCATION OF THE CITY OF CHICAGO ET AL. October 9, 1944. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Mr. Floyd E. Thompson* for petitioners. *Messrs. Richard S. Folsom, Frank S. Righeimer,* and *Frank R. Schneberger* for respondents. Reported below: 386 Ill. 508, 54 N. E. 2d 498.

No. 336. NOVOTNY *v.* ILLINOIS EX REL. CHICAGO BAR ASSOCIATION. October 9, 1944. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Thomas V. Novotny, Sr., pro se. Mr. Charles Leviton* for respondent. Reported below: 386 Ill. 536, 54 N. E. 2d 536.

No. 343. STANT ET AL. *v.* CONTAINER PATENTS CORP. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Harold B. Hood* and *Arthur M. Hood* for petitioners. *Messrs. James C. Ledbetter* and *Ralph G. Lockwood* for respondent. Reported below: 143 F. 2d 170.

No. 344. LUDWIG ET AL. *v.* SCHEAR. October 9, 1944. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. J. Ninian Beall, Albert F. Beasley,* and *Eugene X. Murphy* for petitioners. *Mr. Thomas M. Baker* for respondent. Reported below: 143 F. 2d 20.

No. 348. ALBRIGHT *v.* PENNSYLVANIA RAILROAD CO. October 9, 1944. Petition for writ of certiorari to the Court of Appeals of Maryland denied. *Messrs. Paul Berman* and *Hamilton O'Dunne* for petitioner. *Mr. Edward E. Hargest, Jr.* for respondent. Reported below: 37 A. 2d 870.

No. 349. SPRINGFIELD SAND & TILE CO. ET AL. *v.* BAGNEL. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Thomas H. Mahony* for petitioners. *Mr. Roscoe Walsworth* for respondent. Reported below: 144 F. 2d 65.

No. 350. EMPLOYERS GROUP OF MOTOR FREIGHT CARRIERS, INC. ET AL. *v.* NATIONAL WAR LABOR BOARD ET AL. October 9, 1944. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. J. Ninian Beall* for petitioners. *Solicitor General Fahy, Assistant Attorney General Shea,* and *Mr. Joseph B. Goldman* for respondents. Reported below: 143 F. 2d 145.

No. 363. SAWYER *v.* CROWELL PUBLISHING CO. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Herbert Goldmark* for petitioner. *Mr. William I. Denning* for respondent. Reported below: 142 F. 2d 497.

No. 382. SELCHOW & RIGHTER CO. *v.* WESTERN PRINTING & LITHOGRAPHING CO. ET AL. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals

for the Seventh Circuit denied. *Mr. Ross O. Hinkle* for petitioner. *Mr. Casper W. Ooms* for respondents. Reported below: 142 F. 2d 707.

No. 383. McGrew *v.* Harbison; and

No. 384. McGrew *v.* Simmons. October 9, 1944. Petition for writs of certiorari to the Supreme Court of Pennsylvania denied. Reported below: 349 Pa. 303, 37 A. 2d 185.

No. 397. Clemens *v.* Clemens. October 9, 1944. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. Vivian O. Hill* for petitioner. *Mr. Richard L. Merrick* for respondent. Reported below: 143 F. 2d 24.

No. 398. Downey et al. *v.* Green. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Urban A. Lavery* for petitioners. *Messrs. George F. Barrett,* Attorney General of Illinois, and *William C. Wines,* Assistant Attorney General, for respondent.

No. 60. Garity *v.* New York. October 9, 1944. Petition for writ of certiorari to the Supreme Court of New York 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. Reported below: 291 N. Y. 825, 53 N. E. 2d 579.

Nos. 89 and 90. Repplier Coal Co. *v.* Commissioner of Internal Revenue. October 9, 1944. Petition for

writs of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Truman Henson* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key, J. Louis Monarch, Joseph M. Jones,* and *Walter J. Cummings, Jr.* for respondent. *Messrs. F. G. Davidson, Jr., Theodore L. Harrison, J. Donald Rawlings,* and *W. A. Sutherland,* as *amici curiae,* filed a brief in support of the petition. Reported below: 140 F. 2d 554.

No. 101. GROESBECK ET AL. *v.* GOLDSTEIN. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. MR. JUSTICE DOUGLAS and MR. JUSTICE JACKSON took no part in the consideration or decision of this application. *Messrs. John F. MacLane, Louis Connick,* and *Whitney North Seymour* for petitioners. *Mr. Nathan Witt* for respondent. *Solicitor General Fahy* and *Messrs. Chester T. Lane* and *Roger S. Foster* filed a brief on behalf of the United States and the Securities & Exchange Commission, as *amici curiae.* Reported below: 142 F. 2d 422.

No. 111. BAIRD *v.* FRANKLIN, TREASURER; and

No. 112. NEW YORK YACHT CLUB *v.* FRANKLIN, TREASURER. October 9, 1944. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of these applications. *Messrs. Granville Whittlesey, Jr., Ralstone R. Irvine,* and *Theodore S. Hope, Jr.* for petitioner in No. 111; and *Mr. William Greenough* for petitioner in No. 112. *Messrs. William Dean Embree, Lawrence Bennett,* and *Edward N. Perkins* for respondent. Reported below: 141 F. 2d 238.

No. 133. COFFEE, TRUSTEE, ET AL. *v.* SHAMROCK OIL & GAS CORP. October 9, 1944. Petition for writ of certi-

orari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Riley Strickland* and *James O. Cade* for petitioners. *Messrs. E. Byron Singleton, Cleo G. Clayton,* and *F. H. McGregor,* as *amici curiae,* filed a brief in support of the petition. Reported below: 140 F. 2d 409.

No. 135. BORAK *v.* BIDDLE, ATTORNEY GENERAL. October 9, 1944. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Stanley H. Borak, pro se. Solicitor General Fahy, Assistant Attorney General Shea,* and *Mr. Joseph B. Goldman* for respondent. Reported below: 141 F. 2d 278.

No. 144. LAWRENCE BAKING CO. *v.* MICHIGAN UNEMPLOYMENT COMPENSATION COMMISSION. October 9, 1944. Petition for writ of certiorari to the Supreme Court of Michigan denied. MR. JUSTICE MURPHY took no part in the consideration or decision of this application. *Mr. Alva M. Cummins* for petitioner. *Messrs. Herbert J. Rushton,* Attorney General of Michigan, *Edmund E. Shepherd,* Solicitor General, and *Daniel J. O'Hara,* Assistant Attorney General, for respondent. Reported below: 308 Mich. 198, 13 N. W. 2d 260.

No. 145. CITY OF WINTER HAVEN ET AL. *v.* MEREDITH ET AL. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Giles J. Patterson* and *Harry E. King* for petitioners. *Messrs. D. C. Hull, Erskine W. Landis, John L. Graham,* and *J. Compton French* for respondents. Reported below: 141 F. 2d 1019.

No. 155. DENICKE ET AL. *v.* ANGLO CALIFORNIA NATIONAL BANK ET AL.;

No. 196. DENICKE *v.* BRIGHAM ET AL.; and

No. 197. DOBLE *v.* BUCK ET AL. October 9, 1944. Petitions for writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Aaron M. Sargent* for petitioners. *Messrs. Allen L. Chickering, Walter C. Fox, Jr.,* and *Vincent I. Compagno* for Anglo California National Bank, and *Messrs. Maurice E. Harrison* and *Theo. J. Roche* for Fleishhacker et al., respondents in No. 155. *Messrs. Theo. J. Roche, Hiram W. Johnson, Theodore H. Roche,* and *James Farraher* for Fleishhacker et al., and *Mr. Robert M. Searls* for Humphrey, respondents in Nos. 196 and 197. Reported below: No. 155, 141 F. 2d 285; No. 196, 142 F. 2d 221; No. 197, 142 F. 2d 225.

No. 170. CLARK ET AL. *v.* IOWA. October 9, 1944. Petition for writ of certiorari to the Supreme Court of Iowa denied for the reason that application therefor was not made within the time provided by law. § 8 (a), Act of February 13, 1925 (43 Stat. 936, 940), 28 U. S. C., § 350. *Mr. Gordon A. Nicholson* for petitioners. Reported below: 11 N. W. 2d 722.

No. 201. UNITED GAS IMPROVEMENT CO. *v.* COMMISSIONER OF INTERNAL REVENUE. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. The CHIEF JUSTICE took no part in the consideration or decision of this application. *Messrs. John H. Minds* and *William R. Spofford* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key, J. Louis Monarch, L. W. Post,* and *Walter J. Cummings, Jr.* for respondent. Reported below: 142 F. 2d 216.

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No. 151. BAKER *v.* HUNTER, WARDEN. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied for the reason that the case is moot. *Messrs. A. G. Bush* and *James J. Laughlin* for petitioner. *Solicitor General Fahy* for respondent. Reported below: 142 F. 2d 615.

No. 240. OWENS, EXECUTRIX, *v.* UNION PACIFIC RAILROAD CO. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Frank C. Hanley* for petitioner. Reported below: 142 F. 2d 145.

No. 266. LUCKING ET AL. *v.* FIRST NATIONAL BANK-DETROIT ET AL. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. MR. JUSTICE REED took no part in the consideration or decision of this application. *Mr. William Alfred Lucking* for petitioners. *Messrs. Robert S. Marx* and *Frank E. Wood* for First National Bank-Detroit, and *Mr. John G. Garlinghouse* for National Bank of Detroit, respondents. Reported below: 142 F. 2d 528.

No. 281. SANDBERG ET AL. *v.* NEW ENGLAND NOVELTY CO., INC. October 9, 1944. Petition for writ of certiorari to the Superior Court in and for the County of Worcester, Mass., denied. MR. JUSTICE MURPHY is of opinion that certiorari should be granted. *Mr. Sidney S. Grant* for petitioners. *Mr. Samuel M. Salny* for respondent. Reported below: 315 Mass. 739, 54 N. E. 2d 915.

No. 313. UNITED STATES *v.* VAN PELT. October 9, 1944. Petition for writ of certiorari to the Circuit Court

of Appeals for the Sixth Circuit denied. *Solicitor General Fahy* for the United States. *Mr. Charles E. Marshall* for respondent. Reported below: 142 F. 2d 61.

Nos. 358 and 359. MINNESOTA *v.* TRUSTEES OF HAMLINE UNIVERSITY. October 9, 1944. Petitions for writs of certiorari to the Supreme Court of Minnesota denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of these applications. *Mr. Frank J. Williams* for petitioner in No. 358, and *Messrs. James F. Lynch* and *Andrew R. Bratter* for petitioner in No. 359. *Messrs. G. A. Youngquist, D. E. Bridgman,* and *John F. D. Meighen* for respondent. Reported below: 217 Minn. 399, 14 N. W. 2d 773.

No. 123. KUCZYNSKI *v.* COX, WARDEN, U. S. MEDICAL CENTER. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Frank Kuczynski, pro se. Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Messrs. Robert S. Erdahl* and *Leon Ulman* for respondent. Reported below: 141 F. 2d 321.

No. 124. HANDLER *v.* UNITED STATES. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Edward R. Handler, 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 351.

No. 156. DOAK *v.* FEDERAL LAND BANK OF BALTIMORE. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied.

No. 158. WEBB *v.* RAGEN, WARDEN. October 9, 1944. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 159. NEW YORK EX REL. SMITH *v.* MORHOUS, WARDEN. October 9, 1944. Petition for writ of certiorari to the Washington County Court, State of New York, denied. *John P. Smith, pro se. Messrs. Nathaniel L. Goldstein,* Attorney General of New York, *Orrin G. Judd,* Solicitor General, *Wendell P. Brown,* First Assistant Attorney General, *Patrick H. Clune,* and *Herman N. Harcourt,* Assistant Attorneys General, for respondent. Reported below: 267 App. Div. 933, 47 N. Y. S. 2d 278.

No. 163. NEW YORK EX REL. MONTAGNO *v.* MORHOUS, WARDEN. October 9, 1944. Petition for writ of certiorari to the Supreme Court of New York denied. *Michael Montagno, pro se. Messrs. Nathaniel L. Goldstein,* Attorney General of New York, *Orrin G. Judd,* Solicitor General, *Wendell P. Brown,* First Assistant Attorney General, *Patrick H. Clune,* and *Herman N. Harcourt,* Assistant Attorneys General, for respondent. Reported below: 267 App. Div. 797, 45 N. Y. S. 2d 548.

No. 164. ADAMS *v.* NIERSTHEIMER, WARDEN. October 9, 1944. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 165. WHALEY *v.* UNITED STATES. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. J. F. Kemp* for petitioner. *Solicitor General Fahy, Assistant Attorney*

General Tom C. Clark, and *Messrs. Robert S. Erdahl* and *William Strong* for the United States. Reported below: 141 F. 2d 1010.

No. 190. AUDETT *v.* JOHNSTON, WARDEN. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Theodore James Audett, pro se. Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Messrs. Robert S. Erdahl* and *Leon Ulman* for respondent. Reported below: 142 F. 2d 739.

No. 193. BOLDS *v.* RAGEN, WARDEN. October 9, 1944. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 198. GRANT *v.* ILLINOIS. October 9, 1944. Petition for writ of certiorari to the Supreme Court of Illinois denied. Reported below: 385 Ill. 61, 52 N. E. 2d 261.

No. 213. DAVIS *v.* RAGEN, WARDEN. October 9, 1944. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 214. TUTTLE *v.* RAGEN, WARDEN. October 9, 1944. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 235. YETTER *v.* ILLINOIS. October 9, 1944. Petition for writ of certiorari to the Supreme Court of Illinois denied. Reported below: 386 Ill. 594, 54 N. E. 2d 532.

No. 236. WAY *v.* NIERSTHEIMER, WARDEN. October 9, 1944. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 243. JONES *v.* STEWART, JUDGE, ET AL. October 9, 1944. Petition for writ of certiorari to the Supreme Court of Indiana denied. Reported below: 222 Ind. 353, 53 N. E. 2d 346.

No. 245. SMITH *v.* RAGEN, WARDEN. October 9, 1944. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 255. COLWELL *v.* EPSTEIN ET AL. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. Reported below: 142 F. 2d 138.

No. 256. LEIMER *v.* HULSE ET AL. October 9, 1944. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Walter A. Leimer, pro se. Messrs. Roscoe P. Conkling* and *Frank W. Hayes* for respondents. Reported below: 352 Mo. 451, 178 S. W. 2d 335.

No. 269. NESSELROTTE *v.* UNITED STATES; and

No. 270. BLACK *v.* UNITED STATES. October 9, 1944. Petitions for writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. W. D. Bell* for petitioners. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Messrs. Robert S. Erdahl* and *Leon Ulman* for the United States. Reported below: 142 F. 2d 679.

No. 282. RAVENSCROFT *v.* CASEY ET AL. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Lillian E. Ravenscroft, pro se. Messrs. William A. Davidson* and *Francis J. Morgan* for respondents. Reported below: 139 F. 2d 776.

No. 283. BRADFORD *v.* RAGEN, WARDEN. October 9, 1944. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 288. BASS *v.* KENTUCKY. October 9, 1944. Petition for writ of certiorari to the Court of Appeals of Kentucky denied. *Mr. Zeb. A. Stewart* for petitioner. *Messrs. Eldon S. Dummit,* Attorney General, *Elmer Drake* and *Guy H. Herdman,* Assistant Attorneys General, for respondent. Reported below: 296 Ky. 426, 177 S. W. 2d 386.

No. 302. WILLIAMS *v.* RAGEN, WARDEN. October 9, 1944. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 303. BRADSHAW *v.* RAGEN, WARDEN. October 9, 1944. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 305. NOWAK *v.* ILLINOIS. October 9, 1944. Petition for writ of certiorari to the Supreme Court of Illinois denied. Reported below: 387 Ill. 11, 55 N. E. 2d 63.

No. 306. MALONEY *v.* MISSOURI. October 9, 1944. Petition for writ of certiorari to the Supreme Court of Missouri denied.

No. 326. KING *v.* WEBB, SUPERINTENDENT. October 9, 1944. Petition for writ of certiorari to the Supreme Court of Washington denied.

No. 328. TRESIZE *v.* RAGEN, WARDEN. October 9, 1944. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 333. SIMPSON *v.* NIERSTHEIMER, WARDEN. October 9, 1944. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 356. MCCONNELL *v.* INDIANA. October 9, 1944. Petition for writ of certiorari to the Supreme Court of Indiana denied.

No. 357. STEFFLER *v.* UNITED STATES. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Fred Steffler, pro se. Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Miss Doris R. Williamson* for the United States. Reported below: 143 F. 2d 772.

No. 364. ROZEA *v.* NEW YORK. October 9, 1944. Petition for writ of certiorari to the Supreme Court of New York denied. Reported below: 267 App. Div. 569, 47 N. Y. S. 2d 569.

No. 389. DUNCAN *v.* RAGEN, WARDEN. October 9, 1944. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 416. PAPPAS *v.* MICHIGAN. October 9, 1944. Petition for writ of certiorari to the Supreme Court of Michigan denied.

No. 169. CASH *v.* HUFF, GENERAL SUPERINTENDENT. October 9, 1944. Motion to substitute Gill as the party respondent granted. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Albert E. Cash, pro se. Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Mr. Robert S. Erdahl* for respondent. Reported below: 142 F. 2d 60.

No. 173. MASON *v.* WEBB, SUPERINTENDENT. October 9, 1944. Petition for writ of certiorari to the Supreme Court of Washington denied for want of a final judgment.

No. 223. MASON *v.* WEBB, SUPERINTENDENT. October 9, 1944. Petition for writ of certiorari to the Supreme Court of Washington denied for want of a reviewable judgment of the highest court of the State.

No. 248. MASON *v.* WEBB, SUPERINTENDENT. October 9, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied.

No. 185. MITCHELL *v.* UNITED STATES. October 9, 1944. Petition for writ of certiorari to the Circuit Court

of Appeals for the Tenth Circuit denied for the reason that application therefor was not made within the time provided by law. Rule XI of the Criminal Appeals Rules, 292 U. S. 665–666. *H. Dulany Mitchell, pro se. Solicitor General Fahy* for the United States. Reported below: 142 F. 2d 480.

No. 199. BROWN *v.* RAGEN, WARDEN;
No. 249. BUCKHALTER *v.* RAGEN, WARDEN;
No. 250. TURNER *v.* RAGEN, WARDEN;
No. 258. WOOD *v.* RAGEN, WARDEN;
No. 327. PARKER *v.* RAGEN, WARDEN;
No. 366. FIFE *v.* RAGEN, WARDEN; and
No. 375. SCHROERS *v.* NIERSTHEIMER, WARDEN. On petitions for writs of certiorari to the Supreme Court of Illinois. October 9, 1944. The petitions for writs of certiorari are 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. 242. CAVALLUCCI *v.* PENNSYLVANIA. October 9, 1944. Petition for writ of certiorari to the Supreme Court of Pennsylvania denied. The motion for leave to file petition for writ of habeas corpus is also denied.

No. 252. FOXALL *v.* RAGEN, WARDEN. October 9, 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. The motion for leave to file petition for writ of habeas corpus is also denied.

No. 284. MINER *v.* RAGEN, WARDEN. October 9, 1944. Petition for writ of certiorari to the Supreme Court of Illinois denied. The application for other relief is also denied.

No. 365. PORTER *v.* RAGEN, WARDEN. On petition for writ of certiorari to the Supreme Court of Illinois;

No. 374. MIMEE *v.* CALIFORNIA. On petition for writ of certiorari to the Supreme Court of California; and

No. 407. MORRIS *v.* CALIFORNIA. On petition for writ of certiorari to the Supreme Court of California. October 9, 1944. The petitions for writs of certiorari are denied. The motions for leave to file petitions for writs of habeas corpus are also denied.

No. 98. ROXBOROUGH *v.* MICHIGAN; and

No. 99. WATSON *v.* MICHIGAN. October 16, 1944. Petition for writs of certiorari to the Supreme Court of Michigan denied. *Mr. Charles H. Houston* for petitioners. *Messrs. Herbert J. Rushton,* Attorney General of Michigan, *Edmund E. Shepherd,* Solicitor General, and *Daniel J. O'Hara,* Assistant Attorney General, for respondent. Reported below: 307 Mich. 575, 596, 12 N. W. 2d 466, 476.

No. 321. SHREVEPORT ENGRAVING CO., INC. *v.* UNITED STATES. October 16, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Frank J. Looney* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Mr. William Strong* for the United States. Reported below: 143 F. 2d 222.

No. 338. JOHNSTON ET AL. *v.* JOHNSTON ET AL. October 16, 1944. Petition for writ of certiorari to the Supreme Court of Appeals of Virginia denied. *Messrs. Robert A. McIntyre* and *Minitree Jones Fulton* for petitioners. *Mr. Elliott Marshall* for respondents. Reported below: 181 Va. 357, 25 S. E. 2d 274.

No. 361. CAFFEY, JUDGE, ET AL. *v.* UNITED STATES. October 16, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Chauncey I. Clark, Eugene Underwood,* and *Leonard J. Matteson* for petitioners. *Solicitor General Fahy, Assistant Attorney General Shea,* and *Mr. Joseph B. Goldman* for the United States. Reported below: 141 F. 2d 69.

No. 362. HIRSCH IMPROVEMENT CO. *v.* COMMISSIONER OF INTERNAL REVENUE. October 16, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Elliot A. Daitz* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key, Robert N. Anderson,* and *Carlton Fox* for respondent. Reported below: 143 F. 2d 912.

No. 372. NELSON *v.* UNITED STATES. October 16, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. William B. Mahoney* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Mr. William Strong* for the United States. Reported below: 143 F. 2d 584.

No. 381. SULLIVAN *v.* NEW YORK. October 16, 1944. Petition for writ of certiorari to the Court of Special Ses-

sions, County of New York, New York, denied. *Mr. Louis Halle* for petitioner. *Mr. Bernard L. Alderman* for respondent. Reported below: 267 App. Div. 979, 48 N. Y. S. 2d 692.

No. 385. J. L. BRANDEIS & SONS *v.* NATIONAL LABOR RELATIONS BOARD. October 16, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. J. A. C. Kennedy, George L. De Lacy,* and *Ralph E. Svoboda* for petitioner. *Solicitor General Fahy, Mr. Alvin J. Rockwell,* and *Miss Ruth Weyand* for respondent. Reported below: 142 F. 2d 977.

No. 386. IN THE MATTER OF HULON CAPSHAW. October 16, 1944. Petition for writ of certiorari to the Court of Appeals of New York denied. *Messrs. Thomas I. Sheridan* and *Dean Alfange* for petitioner. *Mr. Einar Chrystie* for the Association of the Bar of the City of New York, respondent. Reported below: 292 N. Y. 687, 56 N. E. 2d 107.

No. 387. UNION DIME SAVINGS BANK *v.* ADAMS ET AL. October 16, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Robert R. Bruce* for petitioner. *Mr. Lyman Stansky* for respondents. Reported below: 144 F. 2d 290.

No. 390. LOFTIN ET AL., TRUSTEES, *v.* DEAL. October 16, 1944. Petition for writ of certiorari to the Supreme Court of Florida denied. *Messrs. Robert H. Anderson, John H. Wahl, Jr.,* and *Russell L. Frink* for petitioners. *Mr. W. H. Mizell* for respondent. Reported below: 154 Fla. 489, 18 So. 2d 163.

No. 393. PAPE *v.* UNITED STATES. October 16, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Roy St. Lewis* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Messrs. Robert S. Erdahl* and *W. Marvin Smith* for the United States. Reported below: 144 F. 2d 778.

No. 395. PERSONAL FINANCE CO. *v.* HADDEN. October 16, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Jackson R. Collins* for petitioner. Reported below: 142 F. 2d 896.

No. 396. NORTHERN PACIFIC RAILWAY CO. *v.* BIMBERG, SPECIAL ADMINISTRATRIX. October 16, 1944. Petition for writ of certiorari to the Supreme Court of Minnesota denied. *Messrs. L. B. daPonte* and *Frederic D. McCarthy* for petitioner. *Mr. I. K. Lewis* for respondent. Reported below: 217 Minn. 187, 14 N. W. 2d 419.

No. 399. FAIRMONT CREAMERY CO. *v.* NATIONAL LABOR RELATIONS BOARD. October 16, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Leonard A. Flansburg* for petitioner. *Solicitor General Fahy, Mr. Alvin J. Rockwell,* and *Miss Ruth Weyand* for respondent. Reported below: 143 F. 2d 668.

No. 402. FRANK ET AL. *v.* COUNTY OF SCOTTS BLUFF. October 16, 1944. Petition for writ of certiorari to the Supreme Court of Nebraska denied. *Messrs. Thomas M. Morrow* and *Paul T. Miller* for petitioners. *Mr. Floyd E. Wright* for respondent. Reported below: 144 Neb. 512, 13 N. W. 2d 900.

No. 152. ROBERTS, ADMINISTRATRIX, ET AL. *v.* UNITED FISHERIES VESSELS CO. October 16, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. MR. JUSTICE BLACK is of opinion that certiorari should be granted. *Mr. H. S. Avery* for petitioners. *Mr. Albert T. Gould* for respondent. Reported below: 141 F. 2d 288.

No. 291. HERRON *v.* STATE BAR OF CALIFORNIA. October 16, 1944. Petition for writ of certiorari to the Supreme Court of California denied for failure to comply with the rules. Reported below: 24 Cal. 2d 53, 147 P. 2d 543.

No. 117. PARISI *v.* NEW YORK. October 16, 1944. Petition for writ of certiorari to the Court of General Sessions of New York County, New York, denied for the reason that the case is moot. Reported below: 292 N. Y. 568, 54 N. E. 2d 688.

No. 324. AVANCE *v.* THOMPSON, TRUSTEE. October 16, 1944. Petition for writ of certiorari to the Supreme Court of Illinois denied for want of a final judgment. *Mr. William H. De Parcq* for petitioner. *Messrs. Josiah Whitnel* and *T. T. Railey* for respondent. Reported below: 387 Ill. 77, 55 N. E. 2d 57.

No. 392. PARKE, AUSTIN & LIPSCOMB, INC. ET AL. *v.* FEDERAL TRADE COMMISSION. October 16, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. The CHIEF JUSTICE took no part in the consideration or decision of this application. *Mr. William A. Hines* for petitioners. *Solicitor*

General Fahy, Assistant Attorney General Berge, and *Messrs. Charles H. Weston, W. T. Kelley,* and *Jos. J. Smith, Jr.* for respondent. Reported below: 142 F. 2d 437.

No. 136. STONEBREAKER *v.* SMYTH, SUPERINTENDENT. October 16, 1944. Petition for writ of certiorari to the Supreme Court of Appeals of Virginia denied. *Mr. William Alfred Hall, Jr.* for petitioner. *Messrs. Abram P. Staples,* Attorney General of Virginia, and *M. Ray Doubles,* Assistant Attorney General, for respondent. Reported below: 182 Va. lviii.

No. 178. COUCHOIS *v.* UNITED STATES. October 16, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Osmond K. Fraenkel* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Messrs. Robert S. Erdahl* and *W. Marvin Smith* for the United States. Reported below: 142 F. 2d 1.

No. 339. WOODWARD *v.* RAGEN, WARDEN. October 16, 1944. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 341. NEELY *v.* UNITED STATES. October 16, 1944. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. Neil Burkinshaw* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Miss Beatrice Rosenberg* for the United States. Reported below: 144 F. 2d 519.

No. 447. SPRUILL *v.* TEMPLE BAPTIST CHURCH. October 16, 1944. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. Reported below: 141 F. 2d 137.

No. 458. UNITED STATES EX REL. SINGER *v.* RAGEN, WARDEN. October 16, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied.

No. 477. DOBRY *v.* OLSON, WARDEN. October 16, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. Reported below: 144 F. 2d 249.

No. 233. TAYLOR *v.* SQUIER, WARDEN. October 16, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied for the reason that the case is moot. *Adrian C. Taylor, pro se. Solicitor General Fahy* for respondent. Reported below: 142 F. 2d 737.

No. 394. NELSON *v.* KENTUCKY. On petition for writ of certiorari to the Court of Appeals of Kentucky;

No. 453. MALLECK *v.* RAGEN, WARDEN;

No. 457. UNITED STATES EX REL. PISANI *v.* RAGEN, WARDEN;

No. 476. PACKWOOD *v.* ILLINOIS; and

No. 492. JOHNSON *v.* RAGEN, WARDEN. On petitions for writs of certiorari to the Supreme Court of Illinois. October 16, 1944. Petitions for writs of certiorari 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. Reported below: 297 Ky. 189, 179 S. W. 2d 445.

No. —. Ex parte Rudolph Dreksler. See *ante*, p. 672.

No. 232. Puerto Rico Cement Corp. *v.* Royal Indemnity Co. October 23, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. L. E. Dubon* for petitioner. *Mr. Roscoe Walsworth* for respondent. *Solicitor General Fahy, Assistant Attorney General Shea,* and *Mr. Abraham J. Harris* filed a brief on behalf of the United States, as *amicus curiae,* in opposition. Reported below: 142 F. 2d 237.

No. 262. Wilson et al. *v.* Shaffer et al. October 23, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. George Bayard Jones* for petitioners. *Mr. V. C. Shuttleworth* for respondents. Reported below: 141 F. 2d 877.

No. 347. George W. Luft Co., Inc. *v.* Zande Cosmetic Co., Inc. et al. October 23, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Charles H. Tuttle* and *Gerald J. Craugh* for petitioner. *Mr. S. Mortimer Ward, Jr.* for respondents. Reported below: 142 F. 2d 536.

No. 376. Procter *v.* Commissioner of Internal Revenue. October 23, 1944. Petition for writ of cer-

tiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Frederic W. Procter, pro se. Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key, J. Louis Monarch,* and *Carlton Fox* for respondent. Reported below: 142 F. 2d 824.

No. 403. MAHER *v.* NEBRASKA. October 23, 1944. Petition for writ of certiorari to the Supreme Court of Nebraska denied. *Messrs. Eugene D. O'Sullivan* and *Grenville P. North* for petitioner. *Messrs. Walter R. Johnson,* Attorney General of Nebraska, *H. Emerson Kokjer,* Deputy Attorney General, and *Rush C. Clarke,* Assistant Attorney General, for respondent. Reported below: 13 N. W. 2d 653.

No. 404. WITTER ET AL. *v.* NIKOLAS ET AL. October 23, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Meyer Abrams* for petitioners. *Mr. Walter E. Wiles* for respondents. Reported below: 143 F. 2d 769.

Nos. 405 and 406. PEER ET AL. *v.* NIKOLAS ET AL. October 23, 1944. Petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Meyer Abrams* for petitioners. *Mr. Walter E. Wiles* for respondents. Reported below: 143 F. 2d 764.

No. 408. CLOVER SPLINT COAL CO., INC. *v.* COMMISSIONER OF INTERNAL REVENUE. October 23, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Arthur S. Dayton* and *William Wallace Booth* for petitioner. *Solicitor Gen-*

eral Fahy, Assistant Attorney General Samuel O. Clark, Jr., and *Messrs. J. Louis Monarch, A. F. Prescott,* and *Carlton Fox* for respondent. Reported below: 143 F. 2d 108.

No. 411. MASON *v.* EL DORADO IRRIGATION DISTRICT. October 23, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *J. R. Mason, pro se. Mr. Chellis M. Carpenter* for respondent. Reported below: 144 F. 2d 189.

No. 412. MASON *v.* GLENN-COLUSA IRRIGATION DISTRICT. October 23, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. W. Coburn Cook* for petitioner. *Mr. A. L. Cowell* for respondent. Reported below: 143 F. 2d 564.

No. 413. DIXIE GREYHOUND LINES, INC. ET AL. *v.* ATKINSON ET AL. October 23, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Longstreet Heiskell, William H. Watkins,* and *P. H. Eager, Jr.* for petitioners. Reported below: 143 F. 2d 477.

No. 414. CONSOLIDATED REALTY CORP. ET AL. *v.* MEREDITH ET AL., CONSTITUTING THE BONDHOLDERS' PROTECTIVE COMMITTEE, ET AL. October 23, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. James B. Alley, James F. Dealy,* and *John D. Goodloe* for petitioners. *Messrs. Lloyd B. Kanter, Percival E. Jackson,* and *Archibald Palmer* for Bondholders' Protective Committee et al., and

Messrs. Roger S. Foster, Milton V. Freeman, and *George Zolotar* for the Securities & Exchange Commission, respondents. Reported below: 144 F. 2d 473.

No. 415. WALTER WANGER PICTURES, INC. *v.* ROGAN, EXECUTRIX. October 23, 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 *Mr. J. Louis Monarch* for respondent. Reported below: 143 F. 2d 459.

No. 418. NETCHER *v.* COMMISSIONER OF INTERNAL REVENUE. October 23, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. L. A. Luce* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. J. Louis Monarch* and *L. W. Post* for respondent. Reported below: 143 F. 2d 484.

No. 423. UNITED STATES EX REL. JORDAN *v.* ICKES, SECRETARY OF THE INTERIOR. October 23, 1944. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. James E. Watson* and *Orin de Motte Walker* for petitioner. *Solicitor General Fahy, Assistant Attorney General Littell,* and *Mr. Norman MacDonald* for respondent. Reported below: 143 F. 2d 152.

No. 425. POWERS ET AL. *v.* BOWLES, PRICE ADMINISTRATOR. October 23, 1944. Petition for writ of certiorari

to the United States Emergency Court of Appeals denied. *Mr. Eliot C. Lovett* for petitioners. *Solicitor General Fahy* and *Mr. Richard H. Field* for respondent. Reported below: 144 F. 2d 491.

No. 434. Baker Oil Tools, Inc. et al. *v.* Crowell. October 23, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Alan W. Davidson* for petitioners. Reported below: 143 F. 2d 1003.

No. 435. Mutual Life Insurance Co. *v.* Hamilton. October 23, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. John G. McKay* for petitioner. *Mr. Dewey Knight* for respondent. Reported below: 143 F. 2d 726.

No. 436. Bolivian International Mining Corp. *v.* Commissioner of Internal Revenue. October 23, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. John F. Condon, Jr.* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. J. Louis Monarch* and *Walter J. Cummings, Jr.* for respondent. Reported below: 142 F. 2d 556.

No. 437. Roschek *v.* Williamson. October 23, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Eli F. Seebirt* and *Orlo R. Deahl* for petitioner. *Mr. Shepard J. Crumpacker* for respondent. Reported below: 142 F. 2d 542.

No. 314. PORTLAND GENERAL ELECTRIC CO. *v.* UNITED STATES. October 23, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied for the reason that application therefor was not made within the time provided by law. § 8 (a), Act of February 13, 1925 (43 Stat. 936, 940), 28 U. S. C., § 350. *Mr. Erskine Wood* for petitioner. *Mr. Alfred A. Hampson* for respondent. Reported below: 142 F. 2d 552.

No. 373. MACGREGOR *v.* WESTINGHOUSE ELECTRIC & MANUFACTURING CO. October 23, 1944. Petition for writ of certiorari to the Supreme Court of Pennsylvania denied for want of a final judgment. *Mr. William B. Jaspert* for petitioner. *Messrs. Jo. Baily Brown* and *William W. Booth* for respondent. Reported below: 350 Pa. 333, 38 A. 2d 244.

No. 426. BALL *v.* COOK, SUPERINTENDENT OF BANKS; and

No. 427. GEORGE AND FRANCES BALL FOUNDATION *v.* COOK, SUPERINTENDENT OF BANKS. October 23, 1944. Petitions for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. MR. JUSTICE REED took no part in the consideration or decision of these applications. *Messrs. William H. Thompson, Perry E. O'Neal,* and *John S. Miller* for petitioners. *Messrs. Thomas J. Herbert,* Attorney General of Ohio, *Hubert Hickam, Alan W. Boyd,* and *John B. Putnam* for respondent. Reported below: 144 F. 2d 423.

No. 261. LINDENFELD *v.* UNITED STATES. October 23, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *William M.*

Lindenfeld, pro se. Solicitor General Fahy, Assistant Attorney General Tom C. Clark, and *Messrs. Robert S. Erdahl* and *Leon Ulman* for the United States. Reported below: 142 F. 2d 829.

No. 432. WALTON, ADMINISTRATRIX, *v.* SOUTHERN PACKAGE CORP. October 23, 1944. Petition for writ of certiorari to the Supreme Court of Mississippi denied. *Mr. Chas. F. Engle* for petitioner. *Messrs. Wm. H. Watkins* and *P. H. Eager, Jr.* for respondent. Reported below: 18 So. 2d 458.

No. 521. SIMEON *v.* RAGEN, WARDEN;
No. 522. VAN PELT *v.* RAGEN, WARDEN;
No. 544. THOMAS *v.* RAGEN, WARDEN;
No. 545. SULLIVAN *v.* RAGEN, WARDEN;
No. 546. ROSS *v.* RAGEN, WARDEN;
No. 547. DIEKELMANN *v.* RAGEN, WARDEN;
No. 549. ROSE *v.* RAGEN, WARDEN;
No. 550. DEVERA *v.* RAGEN, WARDEN; and
No. 555. JACKSON *v.* ILLINOIS. October 23, 1944. Petitions for writs of certiorari to the Supreme Court of Illinois denied.

No. 601. DEMAUREZ *v.* SQUIER, WARDEN. October 23, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. Reported below: 144 F. 2d 564.

No. 454. GIBSON *v.* GARDNER, CIRCUIT JUDGE. October 23, 1944. Petition for writ of certiorari to the District Court of the United States for the Southern District of Iowa denied for want of jurisdiction.

No. 505. MONROE *v.* NEW YORK STATE PAROLE BOARD ET AL. On petition for writ of certiorari to the Supreme Court of New York; and

No. 517. SAIN *v.* RAGEN, WARDEN. On petition for writ of certiorari to the Supreme Court of Illinois. October 23, 1944. Petitions for writs of certiorari 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. Reported below: No. 505, 293 N. Y. 694, 56 N. E. 2d 302.

No. 409. MEZO *v.* ILLINOIS. November 6, 1944. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 420. COLACICCO *v.* UNITED STATES. November 6, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mrs. Gertrude Gottlieb* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Messrs. Robert S. Erdahl, Leon Ulman,* and *Miss Beatrice Rosenberg* for the United States. Reported below: 143 F. 2d 410.

No. 438. HOUBIGANT, INC. ET AL. *v.* FEDERAL TRADE COMMISSION. November 6, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Asher Blum* for petitioners. *Solicitor General Fahy, Assistant Attorney General Berge,* and *Messrs. Charles H. Weston, Matthias N. Orfield, Walter J. Cummings, Jr., W. T. Kelley,* and *Jos. J. Smith, Jr.* for respondent. Reported below: 139 F. 2d 1019.

No. 439. SALT RIVER VALLEY WATER USERS' ASSOCIATION *v.* REYNOLDS ET AL. November 6, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Edwin D. Green* for petitioner. *Mr. R. G. Langmade* for respondents. Reported below: 143 F. 2d 863.

No. 441. GUSS *v.* LASTRAP, ADMINISTRATRIX, ET AL. November 6, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Bernard A. Golding* for petitioner. Reported below: 142 F. 2d 872.

No. 442. ROSENSWEIG ET AL. *v.* UNITED STATES. November 6, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. John W. Preston* for petitioners. *Solicitor General Fahy* and *Mr. Thomas I. Emerson* for the United States. Reported below: 144 F. 2d 30.

No. 443. INTERCOUNTY OPERATING CORP. ET AL. *v.* COUNTY OF NASSAU. November 6, 1944. Petition for writ of certiorari to the Supreme Court of New York denied. *Messrs. Harry Mesard* and *Morris Rochman* for petitioners. *Mr. Milton Pinkus* for respondent. Reported below: 267 App. Div. 957, 47 N. Y. S. 2d 321.

No. 451. CITY NATIONAL BANK & TRUST CO., TRUSTEE, *v.* COMMISSIONER OF INTERNAL REVENUE. November 6, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Morrison Shafroth, W. W. Grant,* and *Henry W. Toll* for petitioner. *Solicitor General Fahy, Assistant Attorney Gen-*

eral Samuel O. Clark, Jr., Mr. Sewall Key, Miss Helen R. Carloss, and *Mrs. Muriel S. Paul* for respondent. Reported below: 142 F. 2d 771.

No. 459. HELTON *v.* UNITED STATES. November 6, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. R. W. Price* 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 933.

No. 460. ACME BREWING CO. *v.* ANGLIM, COLLECTOR OF INTERNAL REVENUE. November 6, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Theodore J. Roche* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key, J. Louis Monarch,* and *Miss Melva M. Graney* for respondent. Reported below: 143 F. 2d 412.

No. 463. GOLDWASSER *v.* COMMISSIONER OF INTERNAL REVENUE. November 6, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Clarence N. Goodwin* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key, J. Louis Monarch,* and *Bernard Chertcoff* for respondent. *Mr. Ewing Everett,* as *amicus curiae,* filed a brief in support of the petition. Reported below: 142 F. 2d 556.

No. 464. INTERSTATE MOTOR FREIGHT SYSTEM *v.* DUBROCK. November 6, 1944. Petition for writ of certiorari

to the Circuit Court of Appeals for the Third Circuit denied. *Mr. J. Roy Dickie* for petitioner. *Mr. J. Henry O'Neill* for respondent. Reported below: 143 F. 2d 304.

No. 465. SKINNER MANUFACTURING CO. *v.* KELLOGG SALES CO. November 6, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. William Ritchie* and *C. Earl Hovey* for petitioner. *Messrs. George L. De Lacy, Matthias Concannon,* and *Edwin L. Harding* for respondent. Reported below: 143 F. 2d 895.

No. 466. SKINNER MANUFACTURING CO. *v.* GENERAL FOOD SALES CO., INC. November 6, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. William Ritchie, C. Earl Hovey,* and *W. Ross King* for petitioner. *Mr. Lester E. Waterbury* for respondent. Reported below: 143 F. 2d 895.

No. 467. ESTATE OF GARRETT *v.* GREENBURG, TRUSTEE, ET AL. November 6, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Vincent P. McDevitt* for petitioner. *Messrs. Ernest Scott* and *Joseph S. Conwell, Sr.* for respondents.

No. 468. DEBS MEMORIAL RADIO FUND, INC. ET AL. *v.* ASSOCIATED MUSIC PUBLISHERS, INC. November 6, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. A. Walter Socolow* for petitioners. *Mr. Julius Henry Cohen* for respondent. Reported below: 141 F. 2d 852.

No. 428. HOSKYN & CO., INC. ET AL. *v.* SILVER LINE, LTD.;

No. 429. INTERNATIONAL STANDARD ELECTRIC CORP. ET AL. *v.* SILVER LINE, LTD.; and

No. 430. CHINA GENERAL EDISON CO., INC. *v.* SILVER LINE, LTD. November 6, 1944. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. D. Roger Englar* and *Henry N. Longley* for petitioners. *Mr. George de Forest Lord* for respondent. Reported below: 143 F. 2d 462.

No. 471. GOCHENOUR ET AL. *v.* CLEVELAND TERMINALS BUILDING CO. ET AL. November 6, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Meyer Abrams* for petitioners. *Mr. J. Hall Kellogg* for Cleveland Terminals Building Co., and *Mr. Frederick L. Leckie* for Leckie et al., respondents. Reported below: 142 F. 2d 991.

No. 472. GALLAND-HENNING MANUFACTURING CO. *v.* LOGEMANN BROTHERS CO. November 6, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Geo. L. Wilkinson* for petitioner. *Mr. S. L. Wheeler* for respondent. Reported below: 142 F. 2d 700.

No. 474. JONES *v.* PATTERSON, MARSHAL, ET AL. November 6, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. George B. Grigsby* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Mr. Robert S. Erdahl* for respondents. Reported below: 143 F. 2d 531.

No. 475. PENFIELD COMPANY OF CALIFORNIA *v.* SECURITIES & EXCHANGE COMMISSION. November 6, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Morris Lavine* for petitioner. *Solicitor General Fahy* and *Messrs. Roger S. Foster, Milton V. Freeman,* and *Louis Loss* for respondent. Reported below: 143 F. 2d 746.

No. 478. KAHNER *v.* MINNESOTA. November 6, 1944. Petition for writ of certiorari to the Supreme Court of Minnesota denied. *Mr. Jacob S. Guthman* for petitioner. *Mr. J. A. A. Burnquist,* Attorney General of Minnesota, and *Ralph A. Stone,* Assistant Attorney General, for respondent. Reported below: 217 Minn. 574, 15 N. W. 2d 105.

No. 480. FUSTON ET AL. *v.* UNITED STATES. November 6, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Randell S. Cobb,* Attorney General of Oklahoma, and *Fred Hansen,* First Assistant Attorney General, for petitioners. *Solicitor General Fahy, Assistant Attorney General Littell,* and *Messrs. Robt. E. Mulroney* and *Ralph S. Boyd* for the United States. Reported below: 143 F. 2d 76.

No. 481. SAFEWAY STORES, INC. ET AL. *v.* UNITED STATES. November 6, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. William H. Orrick, Henry N. Ess,* and *Louis R. Gates* for petitioners. *Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. Robert L. Stern* for the United States. Reported below: 144 F. 2d 824.

No. 487. WATERS *v.* KINGS COUNTY TRUST CO. November 6, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Sidney S. Bobbe* for petitioner. *Mr. Louis J. Castellano* for respondent. Reported below: 144 F. 2d 680.

No. 489. JAMISON COAL & COKE CO. *v.* GOLTRA ET AL., EXECUTORS, ET AL. November 6, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. James C. Jones, Jr.* and *Lon O. Hocker* for petitioner. *Mr. Frank H. Fisse* for respondents. Reported below: 143 F. 2d 889.

No. 490. ERDMAN *v.* UNITED STATES ET AL. November 6, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Warner Pyne* for petitioner. *Messrs. Vernon Sims Jones* and *Walter X. Connor* for respondents. Reported below: 143 F. 2d 198.

No. 491. EDWARD J. GAY PLANTING & MANUFACTURING CO., INC. *v.* COMMISSIONER OF INTERNAL REVENUE. November 6, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. C. J. Batter* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.*, and *Messrs. Sewall Key* and *A. F. Prescott* for respondent. Reported below: 143 F. 2d 452.

No. 493. IDAHO POTATO GROWERS, INC. ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. November 6, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Oscar W. Worthurne*

for petitioners. *Solicitor General Fahy, Messrs. Alvin J. Rockwell, Frank J. Donner,* and *Miss Ruth Weyand* for respondent. Reported below: 144 F. 2d 295.

No. 494. ADAMS *v.* TEXAS. November 6, 1944. Petition for writ of certiorari to the Court of Criminal Appeals of Texas denied. *Mr. Karl M. Gibbon* for petitioner. *Messrs. Grover Sellers,* Attorney General of Texas, *George W. Barcus,* and *Benjamin Woodall,* Assistant Attorneys General, for respondent. Reported below: 181 S. W. 2d 91.

No. 497. THORNTON *v.* CITY OF PORTLAND. November 6, 1944. Petition for writ of certiorari to the Supreme Court of Oregon denied. *Mr. Hayden C. Covington* for petitioner. *Mr. Lyman E. Latourette* for respondent. Reported below: 149 P. 2d 972.

No. 498. SONDERLICK *v.* HALLINAN. November 6, 1944. Petition for writ of certiorari to the Supreme Court of New York denied. *Mr. Jacob W. Friedman* for petitioner. *Mr. Samuel C. Duberstein* for respondent. Reported below: 267 App. Div. 880, 47 N. Y. S. 2d 319.

No. 499. SONDERLICK *v.* EMIGRANT INDUSTRIAL SAVINGS BANK. November 6, 1944. Petition for writ of certiorari to the Supreme Court of New York denied. *Mr. Jacob W. Friedman* for petitioner. *Messrs. Edwin A. Berkery* and *John E. McAniff* for respondent. Reported below: 267 App. Div. 880, 47 N. Y. S. 2d 319.

No. 440. GOLDBERG *v.* RECONSTRUCTION FINANCE CORPORATION. November 6, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. MR. JUSTICE REED took no part in the

consideration or decision of this application. *Mr. Meyer Abrams* for petitioner. *Solicitor General Fahy* and *Mr. John D. Goodloe* for respondent. Reported below: 143 F. 2d 752.

No. 488. BARNES FOUNDATION *v.* RUSSELL. November 6, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. MR. JUSTICE ROBERTS took no part in the consideration or decision of this application. *Mr. Gerald A. Gleeson* for petitioner. *Mr. Thomas Raeburn White* for respondent. Reported below: 143 F. 2d 871.

No. 319. MCNABB ET AL. *v.* UNITED STATES. November 6, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. E. B. Baker* 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: 142 F. 2d 904.

No. 563. DAVIDSON *v.* BENNETT, WARDEN;
No. 564. WHITE *v.* RAGEN, WARDEN;
No. 565. CLOSE *v.* RAGEN, WARDEN;
No. 566. GRAY *v.* RAGEN, WARDEN;
No. 571. PHILLIPS *v.* RAGEN, WARDEN;
No. 572. KING *v.* RAGEN, WARDEN;
No. 573. CONN *v.* RAGEN, WARDEN; and
No. 583. ADAMS *v.* RAGEN, WARDEN. November 6, 1944. Petitions for writs of certiorari to the Supreme Court of Illinois denied.

No. 41. MCCARTHY ET AL., TRUSTEES OF THE DENVER & RIO GRANDE WESTERN RAILROAD CO., ET AL. *v.* BRUNER. See *ante,* p. 673.

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No. 500. SEWELL HATS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. November 13, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. O. C. Hancock* for petitioner. *Solicitor General Fahy, Mr. Alvin J. Rockwell,* and *Miss Ruth Weyand* for respondent. Reported below: 143 F. 2d 450.

No. 504. MITCHELL ET AL., MEMBERS OF THE STATE TAX COMMISSION, ET AL. *v.* MISSOURI EX REL. CAIRO BRIDGE COMMISSION. November 13, 1944. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Messrs. Roy McKittrick,* Attorney General of Missouri, *Robert J. Flanagan,* Assistant Attorney General, and *Tyre W. Burton* for petitioners. *Mr. George A. McNulty* for respondent. Reported below: 352 Mo. 1136, 181 S. W. 2d 496.

No. 509. UNITED STATES *v.* BAETJER ET AL., TRUSTEES. November 13, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Solicitor General Fahy* for the United States. *Mr. Earle T. Fiddler* for respondents. Reported below: 143 F. 2d 391.

No. 513. COOPERSTOWN CORPORATION *v.* COMMISSIONER OF INTERNAL REVENUE. November 13, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Alexander B. Siegel* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key, J. Louis Monarch,* and *Warren F. Wattles* for respondent. Reported below: 144 F. 2d 693.

No. 515. ROEBLING *v.* COMMISSIONER OF INTERNAL REVENUE. November 13, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Ellsworth C. Alvord, Floyd F. Toomey,* and *Ferdinand Tannenbaum* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key* and *Hilbert P. Zarky* for respondent. Reported below: 143 F. 2d 810.

No. 519. MUNGER ET AL. *v.* CREWS ET AL.; and

No. 541. HOEHN ET AL. *v.* CREWS ET AL. November 13, 1944. Petitions for writs of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. P. C. Simons* for petitioners in No. 519. *Mr. Harry O. Glasser* for petitioners in No. 541. Reported below: 144 F. 2d 665.

No. 533. IRVING AIR CHUTE CO., INC. *v.* COMMISSIONER OF INTERNAL REVENUE. November 13, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Ralph M. Andrews* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key, J. Louis Monarch,* and *Harry Baum* for respondent. *Mr. Mitchell B. Carroll,* as *amicus curiae,* filed a brief in support of the petition. Reported below: 143 F. 2d 256.

No. 536. BENJAMIN *v.* JASPAN, TRUSTEE IN BANKRUPTCY. November 13, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Archibald Palmer* for petitioner. Reported below: 144 F. 2d 58.

No. 537. GREAT AMERICAN INDEMNITY CO. *v.* FLENIKEN ET AL. November 13, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Benj. B. Taylor* and *C. V. Porter* for petitioner. *Mr. Paul M. Peterson* for respondents. Reported below: 142 F. 2d 938.

No. 538. MONTGOMERY WARD & CO., INC. *v.* NATIONAL WAR LABOR BOARD ET AL. November 13, 1944. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. Henry F. Butler, Stuart S. Ball,* and *John A. Barr* for petitioner. *Solicitor General Fahy, Assistant Attorney General Shea,* and *Mr. Abraham J. Harris* for respondents. Reported below: 144 F. 2d 528.

No. 551. GOLDSMITH ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. November 13, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Montgomery B. Angell, Michael Halperin,* and *Marvin Lyons* for petitioners. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key, J. Louis Monarch,* and *Harry Baum* for respondent. Reported below: 143 F. 2d 466.

No. 553. M. E. BLATT CO. *v.* NATIONAL LABOR RELATIONS BOARD. November 13, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Harry Cassman* for petitioner. *Solicitor General Fahy, Messrs. Walter J. Cummings, Jr., Alvin J. Rockwell,* and *Miss Ruth Weyand* for respondent. Reported below: 143 F. 2d 268.

No. 496. TERMINAL & SHAKER HEIGHTS REALTY CO. *v.* BRADLEY ET AL. November 13, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Robert J. Bulkley* and *James A. Butler* for petitioner. *Mr. Charles K. Arter* for respondents. Reported below: 142 F. 2d 658.

No. 542. BASS *v.* BALTIMORE & OHIO TERMINAL RAILROAD CO. November 13, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied for the reason that application therefor was not made within the time provided by law. § 8 (a), Act of February 13, 1925 (43 Stat. 936, 940), 28 U. S. C., § 350. *Mr. Royal W. Irwin* for petitioner. *Mr. Edward W. Rawlins* for respondent. Reported below: 142 F. 2d 779.

No. 516. FERGUSON *v.* MASSACHUSETTS. November 13, 1944. Petition for writ of certiorari to the Supreme Judicial Court of Massachusetts denied.

No. 531. COYLE *v.* CALIFORNIA ET AL. November 13, 1944. Petition for writ of certiorari to the Supreme Court of California denied.

No. 621. CLEVELAND *v.* KAISER, WARDEN. November 13, 1944. Petition for writ of certiorari to the Supreme Court of Missouri denied.

No. 532. UNITED STATES *v.* SHEARER. See *ante*, p. 676.

No. 584. CADY *v.* GEORGIA. See *ante*, p. 676.

No. 585. PUTZIER *v.* RICHARDSON. See *ante*, p. 677.

No. 444. REDMOND ET AL. *v.* COMMERCE TRUST CO., TRUSTEE. November 20, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Fyke Farmer* and *Rudolph K. Schurr* for petitioners. Reported below: 144 F. 2d 140.

No. 503. REDMOND ET AL. *v.* UNITED FUNDS MANAGEMENT CORP. ET AL. November 20, 1944. The motion to preserve status quo is denied. The petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit is denied. *Messrs. Fyke Farmer* and *Rudolph K. Schurr* for petitioners. *Mr. John C. Grover* for Aylward, and *Mr. Paul Barnett* for Commerce Trust Co., respondents. Reported below: 144 F. 2d 155.

No. 484. JOSEPH *v.* UNITED STATES. November 20, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Strother P. Walton* and *Ralph Robinson* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Mr. William Strong,* and *Miss Beatrice Rosenberg* for the United States. Reported below: 145 F. 2d 74.

No. 501. RINTOUL *v.* SUN LIFE ASSURANCE CO. OF CANADA. November 20, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. A. A. McKinley* for petitioner. *Mr. Silas H. Strawn* for respondent. Reported below: 142 F. 2d 776.

No. 557. KROGER GROCERY & BAKING CO. ET AL. *v.* UNITED STATES. November 20, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Frank E. Wood, Robert S. Marx,* and *Thomas M. Lillard* for petitioners. *Solicitor General Fahy* and *Assistant Attorney General Berge* for the United States. Reported below: 144 F. 2d 824.

No. 576. HICKENBOTTOM ET AL. *v.* MCCAIN, COMMISSIONER, ET AL. November 20, 1944. Petition for writ of certiorari to the Supreme Court of Arkansas denied. *Mr. Charles M. Haft* for petitioners. *Mr. Guy E. Williams* for respondents. Reported below: 207 Ark. 485, 181 S. W. 2d 226.

No. 577. BOMMARITO ET AL. *v.* MICHIGAN. November 20, 1944. Petition for writ of certiorari to the Supreme Court of Michigan denied. *Messrs. Edward T. Kelley* and *P. J. M. Hally* for petitioners. *Messrs. Daniel J. O'Hara,* Assistant Attorney General of Michigan, *Edmund E. Shepherd,* Solicitor General, and *Mr. William E. Dowling* for respondent. Reported below: 309 Mich. 139, 14 N. W. 2d 812.

No. 579. PORETSKY ET AL. *v.* WOLPE ET AL. November 20, 1944. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. Louis Ottenberg* and *William C. Sullivan* for petitioners. *Mr. A. Winship Wheatley* for respondents. Reported below: 144 F. 2d 505.

No. 580. BAUER, POGUE & CO., INC. ET AL. *v.* TROUNSTINE, ANCILLARY EXECUTRIX. November 20, 1944. Peti-

tion for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Benjamin P. De Witt* for petitioners. *Messrs. Edgar J. Bernheimer* and *Harry T. Zucker* for respondent. Reported below: 144 F. 2d 379.

No. 587. McCoy et al. *v.* Holly Hill Lumber Co., Inc. November 20, 1944. Petition for writ of certiorari to the Supreme Court of South Carolina denied. *Messrs. C. T. Graydon* and *M. W. Seabrook* for petitioners. Reported below: 205 S. C. 60, 30 S. E. 2d 856.

No. 590. Elias et al., Constituting the Protective Committee, et al. *v.* Clarke, Trustee, et al.; and

No. 591. Jones et al. *v.* Clarke, Trustee, et al. November 20, 1944. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Harry O. Levin* for petitioners in No. 590, and *Messrs. Louis Boehm* and *Bernard D. Fischman* for petitioners in No. 591. *Messrs. Stanley Clarke, Samuel J. Silverman, Allen E. Throop, O. John Rogge, Jack Lewis Kraus, II, William Roberts, Charles H. Tuttle,* and *Frederick T. Kelsey* for respondents. Reported below: 143 F. 2d 640.

No. 595. George *v.* Commissioner of Internal Revenue. November 20, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Abraham Lowenhaupt, Jacob Chasnoff, Richard S. Doyle,* and *J. Gilmer Korner* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key, J. Louis Monarch,* and *L. W. Post* for respondent. Reported below: 143 F. 2d 837.

No. 609. RAYTHEON PRODUCTION CORP. *v.* COMMISSIONER OF INTERNAL REVENUE. November 20, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Edward C. Thayer* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key, J. Louis Monarch,* and *Newton K. Fox* for respondent. Reported below: 144 F. 2d 110.

No. 569. FOLKES *v.* OREGON. November 20, 1944. Petition for writ of certiorari to the Supreme Court of Oregon denied. Reported below: 150 P. 2d 17.

No. 582. STURGEON ET AL. *v.* GREAT LAKES STEEL CORP. On petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit; and

No. 598. FLORIDA EX REL. LAING *v.* SCOTT, SHERIFF. On petition for writ of certiorari to the Supreme Court of Florida. November 20, 1944. Petitions for writs of certiorari denied for the reason that applications therefor were not made within the time provided by law. § 8 (a), Act of February 13, 1925 (43 Stat. 936, 940), 28 U. S. C., § 350. *Messrs. M. C. Harrison* and *Homer Marshman* for petitioners in No. 582, and *Mr. Wm. W. Flournoy* for petitioner in No. 598. Reported below: No. 582, 143 F. 2d 819.

No. 502. ENTSMINGER *v.* YAZOO & MISSISSIPPI VALLEY RAILROAD CO. November 20, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Fred G. Benton* for petitioner. Reported below: 142 F. 2d 592.

No. 596. KENNEDY *v.* LAINSON, WARDEN. November 20, 1944. Petition for writ of certiorari to the District Court of the United States for the Southern District of Iowa denied for want of jurisdiction. 28 U. S. C. 463 (a).

No. 603. HOUGH *v.* CALIFORNIA. November 20, 1944. Petition for writ of certiorari to the Supreme Court of California denied. The motion for a stay is also denied. *Mr. Morris Lavine* for petitioner. *Messrs. Robert W. Kenny,* Attorney General of California, and *Frank W. Richards,* Deputy Attorney General, for respondent. Reported below: 24 Cal. 2d 535, 150 P. 2d 444.

Nos. 599 and 600. LIND ET AL. *v.* COE, COMMISSIONER OF PATENTS. December 4, 1944. Petition for writs of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. Nelson Littell, Robert C. Watson,* and *Francis G. Cole* for petitioners. *Solicitor General Fahy, Assistant Attorney General Shea,* and *Messrs. Joseph Y. Houghton* and *W. W. Cochran* for respondent. Reported below: 143 F. 2d 26.

No. 612. SPENCER, WHITE & PRENTIS, INC. *v.* COMMISSIONER OF INTERNAL REVENUE. December 4, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Edgar A. B. Spencer* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key, J. Louis Monarch,* and *Harry Baum* for respondent. Reported below: 144 F. 2d 45.

No. 618. ESTATE OF ROGERS ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. December 4, 1944. Petition for writ

of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. John W. Drye, Jr.* for petitioners. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key, J. Louis Monarch,* and *Morton K. Rothschild* for respondent. Reported below: 143 F. 2d 695.

No. 619. CREEK INDIANS NATIONAL COUNCIL ET AL. *v.* SINCLAIR PRAIRIE OIL CO. ET AL. December 4, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Merrill S. Bernard* for petitioners. *Messrs. Edward H. Chandler, Ralph W. Garrett, Summers Hardy, John Rogers,* and *Carter Smith* for respondents. Reported below: 142 F. 2d 842.

No. 623. DISTRICT OF COLUMBIA *v.* VIGNAU ET AL. December 4, 1944. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. Richmond B. Keech* and *Vernon E. West* for petitioner. *Mr. Joseph T. Sherier* for respondents. Reported below: 144 F. 2d 641.

No. 625. JEFFERS *v.* ISAACKS, INDEPENDENT EXECUTOR. December 4, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. J. O. Seth* and *Edwin Mechem* for petitioner. Reported below: 144 F. 2d 26.

No. 628. HOUSE *v.* UNITED STATES ET AL. December 4, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Earl Pruet* for petitioner. *Solicitor General Fahy, Assistant Attorney*

General Littell, and *Messrs. Vernon L. Wilkinson, Fred W. Smith,* and *Walter J. Cummings, Jr.,* for the United States, respondent. Reported below: 144 F. 2d 555.

No. 632. GRACE LINE, INC. *v.* CUBA DISTILLING CO., INC. ET AL. December 4, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Robert S. Erskine* for petitioner. *Messrs. D. Roger Englar* and *Leonard J. Matteson* for respondents. Reported below: 143 F. 2d 499.

Nos. 638 and 639. HUNTMAN STABILIZER CORP. *v.* GENERAL MOTORS CORP. December 4, 1944. Petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Benj. T. Rauber* and *Leonard G. Brown* for petitioner. *Messrs. Drury W. Cooper* and *Drury W. Cooper, Jr.* for respondent. Reported below: 144 F. 2d 963.

No. 606. NATIONAL SURETY CORP. *v.* UNITED STATES. December 4, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Delbert M. Tibbetts* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Messrs. Robert S. Erdahl* and *Irving S. Shapiro* for the United States. Reported below: 143 F. 2d 831.

No. 640. GREAT LAKES DREDGE & DOCK CO. *v.* UNITED STATES. December 4, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Robert S. Erskine* for petitioner. *Solicitor Gen-*

eral Fahy, Assistant Attorney General Shea, and *Mr. Abraham J. Harris* for the United States. Reported below: 144 F. 2d 451.

No. 653. AMERICAN - LAFRANCE - FOAMITE CORP. *v.* URQUHART ET AL. December 4, 1944. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. Oscar W. Jeffery, Harry G. Kimball,* and *Richard K. Stevens* for petitioner. Reported below: 144 F. 2d 542.

No. 646. REGENSBURG, EXECUTRIX, *v.* COMMISSIONER OF INTERNAL REVENUE;

No. 647. REGENSBURG *v.* COMMISSIONER OF INTERNAL REVENUE;

No. 648. REGENSBURG *v.* COMMISSIONER OF INTERNAL REVENUE;

No. 649. REGENSBURG *v.* COMMISSIONER OF INTERNAL REVENUE; and

No. 650. REGENSBURG ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. December 4, 1944. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Arthur B. Hyman* for petitioners. *Assistant Attorney General Samuel O. Clark, Jr.* and *Messrs. Sewall Key, J. Louis Monarch,* and *Harry Baum* for respondent. Reported below: 144 F. 2d 41.

No. 605. BEACON MILLING CO., INC. *v.* NEW YORK CENTRAL RAILROAD CO. December 4, 1944. Petition for writ of certiorari to the Court of Appeals of New York denied for want of a final judgment. *Mr. August G.*

Gutheim for petitioner. *Messrs. Thomas P. Healy* and *Harold H. McLean* for respondent. Reported below: 293 N. Y. 218, 56 N. E. 2d 558.

No. 626. AMERICAN SCOTTI CORP. ET AL. *v.* HENRY POLLAK, INC. December 4, 1944. Petition for writ of certiorari to the Supreme Court of New York denied. *Messrs. Frederick H. Koschwitz* and *John F. X. Finn* for petitioners. *Mr. Edwin A. Falk* for respondent. Reported below: 267 App. Div. 890, 47 N. Y. S. 2d 588.

No. 624. LORBER ET AL. *v.* VISTA IRRIGATION DISTRICT. December 4, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. MR. JUSTICE REED took no part in the consideration or decision of this application. *Mr. W. Coburn Cook* for petitioners. *Mr. Glen H. Munkelt* for respondent. Reported below: 143 F. 2d 282.

No. 645. MECCA TEMPLE OF THE ANCIENT ARABIC ORDER OF THE NOBLES OF THE MYSTIC SHRINE *v.* DARROCK. December 4, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Mr. David Haar* for petitioner. *Mr. Knowlton Durham* for respondent. Reported below: 142 F. 2d 869.

No. 543. FOWLER *v.* GRIMES, SHERIFF. December 4, 1944. Petition for writ of certiorari to the Supreme Court of Georgia denied. *Mr. Paul Washington Crutchfield* for petitioner. Reported below: 198 Ga. 84, 31 S. E. 2d 174.

No. 562. DUNCAN *v.* UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT. December 4, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. Reported below: 144 F. 2d 353.

No. 567. CRAPO *v.* JOHNSTON, WARDEN. December 4, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Alton Crapo, pro se. Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Misses Beatrice Rosenberg* and *Doris R. Williamson* for respondent. Reported below: 144 F. 2d 863.

No. 651. EGAN *v.* CALIFORNIA ET AL. December 4, 1944. Petition for writ of certiorari to the Supreme Court of California denied. Reported below: 24 Cal. 2d 323, 149 P. 2d 693.

Nos. 218 and 219. MEMPHIS NATURAL GAS CO. *v.* MCCANLESS, COMMISSIONER OF FINANCE AND TAXATION. December 11, 1944. Petitions for writs of certiorari to the Supreme Court of Tennessee denied. *Mr. J. W. Canada* for petitioner. *Messrs. Roy H. Beeler,* Attorney General of Tennessee, and *William F. Barry,* Solicitor General, for respondent. Reported below: 180 Tenn. 688, 695, 177 S. W. 2d 841, 843.

No. 539. THLOCCO ET AL. *v.* MAGNOLIA PETROLEUM CO. December 11, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Jeff Busby* for petitioners. *Messrs. Walace Hawkins* and *Chas. B. Wallace* for respondent. Reported below: 141 F. 2d 934.

Nos. 633 and 634. LAYTON *v.* THAYNE. December 11, 1944. Petitions for writs of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Elmer McClain, J. D. Skeen,* and *E. J. Skeen* for petitioner. Reported below: 144 F. 2d 94.

No. 635. DECKER ET AL. *v.* FEDERAL TRADE COMMISSION. December 11, 1944. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. Harry S. Hall, Josephus C. Trimble,* and *Paul A. Blair* for petitioners. *Solicitor General Fahy* and *Assistant Attorney General Berge* for respondent.

No. 644. PACMAN *v.* UNITED STATES. December 11, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mario Joseph Pacman, pro se. Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Messrs. Robert S. Erdahl* and *William Strong* for the United States. Reported below: 144 F. 2d 562.

No. 652. CARR, TRUSTEE IN BANKRUPTCY, *v.* BELL, SUPERINTENDENT OF BANKS. December 11, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. David Haar* for petitioner. *Mr. Edward Feldman* for respondent. Reported below: 144 F. 2d 47.

No. 681. WESTERN MESA OIL CORP. ET AL. *v.* EDLOU COMPANY ET AL. December 11, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Raphael Dechter* for petitioners. *Mr. Don G. Bowker* for respondents. Reported below: 143 F. 2d 843.

No. 658. JESKOWITZ *v.* CARTER, TRUSTEE IN BANKRUPTCY. December 11, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Archibald Palmer* for petitioner. *Messrs. Joseph Glass* and *Albert Parker* for respondent. Reported below: 144 F. 2d 39.

No. 594. BLOUNT *v.* GILL, SUCCESSOR TO HUFF, SUPERINTENDENT. December 11, 1944. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. W. Hobart Little* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Miss Beatrice Rosenberg* for respondent. Reported below: 144 F. 2d 21.

No. 602. MEYER *v.* CALIFORNIA ET AL. December 11, 1944. Petition for writ of certiorari to the Supreme Court of California and for other relief is denied.

No. 642. HAMBRICK *v.* TENNESSEE. December 11, 1944. Petition for writ of certiorari to the Supreme Court of Tennessee denied. *Mr. Whitworth Stokes* for petitioner. *Messrs. Roy H. Beeler,* Attorney General of Tennessee, and *Nat Tipton* for respondent. Reported below: 181 S. W. 2d 957.

No. —. LATIMER *v.* WEBB, SUPERINTENDENT. See *ante,* p. 678.

No. 417. JONES ET AL. *v.* WATTS, DISTRICT CLERK, ET AL. December 18, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied.

Mr. Robert L. Cole, Sr. for petitioners. *Solicitor General Fahy* and *Assistant Attorney General Shea* for respondents. Reported below: 142 F. 2d 575.

No. 679. BENNETT *v.* UNITED STATES. December 18, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. R. Palmer Ingram* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Mr. Robert S. Erdahl* for the United States. Reported below: 145 F. 2d 270.

No. 655. FOX *v.* ALCOA STEAMSHIP CO. ET AL. December 18, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Raymond H. Kierr* for petitioner. *Solicitor General Fahy, Assistant Attorney General Shea,* and *Mr. Jos. M. Rault* for respondents. Reported below: 143 F. 2d 667.

No. 422. ROBISON, ADMINISTRATRIX, *v.* NORTHERN PACIFIC RAILWAY CO. December 18, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Bernard L. Swerland* for petitioner. Reported below: 143 F. 2d 352.

No. 483. SNOW *v.* ROCHE, DISTRICT JUDGE. December 18, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Cecil Snow, pro se. Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Messrs. Robert S. Erdahl* and *W. Marvin Smith* for respondent. Reported below: 143 F. 2d 718.

No. 514. ROBINSON *v.* UNITED STATES. December 18, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Thomas Henry Robinson, Jr., pro se. Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Messrs. W. Marvin Smith, William Strong,* and *Miss Beatrice Rosenberg* for the United States. Reported below: 144 F. 2d 392.

No. 535. DAVIS *v.* JOHNSTON, WARDEN. December 18, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Paul Davis, pro se. Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Messrs. Robert S. Erdahl* and *W. Marvin Smith* for respondent. Reported below: 144 F. 2d 862.

No. 552. PETERSEN *v.* NEW YORK. December 18, 1944. Petition for writ of certiorari to the Court of Appeals of New York denied. *William Petersen, pro se. Messrs. Thomas Cradock Hughes* and *Henry J. Walsh* for respondent.

No. 607. PRICE *v.* JOHNSTON, WARDEN. December 18, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Homer C. Price, pro se. Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Miss Beatrice Rosenberg* for respondent. Reported below: 144 F. 2d 260.

No. 616. GAUSE *v.* RAGEN, WARDEN. December 18, 1944. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 622. CAMPBELL *v.* KAISER, WARDEN. December 18, 1944. Petition for writ of certiorari to the Supreme Court of Missouri denied.

No. 636. BROADNAX *v.* CALIFORNIA ET AL. December 18, 1944. Petition for writ of certiorari to the Supreme Court of California denied.

No. 627. KOTEK *v.* MICHIGAN. On petition for writ of certiorari to the Supreme Court of Michigan;

No. 643. LEWIS *v.* RAGEN, WARDEN. On petition for writ of certiorari to the Supreme Court of Illinois; and

No. 661. BANKS *v.* RAGEN, WARDEN. On petition for writ of certiorari to the Supreme Court of Illinois. December 18, 1944. The petitions for writs of certiorari are denied for the reason that applications therefor were not made within the time provided by law. § 8 (a), Act of February 13, 1925 (43 Stat. 936, 940), 28 U. S. C., § 350. Reported below: No. 627, 306 Mich. 408, 11 N. W. 2d 7.

No. 631. UNITED STATES EX REL. MCCANN *v.* THOMPSON, WARDEN, ET AL. December 18, 1944. The petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit and the application for other relief are denied. *Gene McCann, pro se. Messrs. John F. X. Finn, Hallam M. Richardson,* and *Thomas L. J. Corcoran* filed a memorandum on behalf of petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Mr. Robert S. Erdahl* for respondents. Reported below: 144 F. 2d 604.

No. —. WAGNER *v.* RAGEN, WARDEN. January 2, 1945. Petition for writ of certiorari denied.

No. 204. STANDARD OIL CO. ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. January 2, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Isador Grossman* and *James R. Tritschler* for petitioners. *Solicitor General Fahy, Messrs. Walter J. Cummings, Jr., Alvin J. Rockwell,* and *Miss Ruth Weyand* for respondent. Reported below: 142 F. 2d 676.

No. 299. RIVERA *v.* PUERTO RICO EX REL. CASTRO. January 2, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. F. Fernandez Cuyar* and *Bolivar Pagan* for petitioner. *Solicitor General Fahy, Assistant Attorney General Shea,* and *Mr. Jerome H. Simonds* for respondent. Reported below: 142 F. 2d 508.

No. 657. SEGAL LOCK & HARDWARE CO., INC. ET AL. *v.* FEDERAL TRADE COMMISSION. January 2, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Charles M. Palmer* for petitioners. *Solicitor General Fahy, Assistant Attorney General Berge,* and *Messrs. Matthias N. Orfield, W. T. Kelley,* and *W. Marvin Smith* for respondent. Reported below: 143 F. 2d 935.

No. 687. NUWAY LAUNDRY CO. *v.* BOWLES, PRICE ADMINISTRATOR. January 2, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. John B. Dudley* for petitioner. *Solicitor General Fahy* and *Messrs. Thomas I. Emerson* and *David London* for respondent. Reported below: 144 F. 2d 741.

No. 698. WARNER COAL CORP. *v.* COSTANZO TRANSPORTATION CO. ET AL. January 2, 1945. Petition for writ of cer-

tiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Robert J. Bulkley* and *James A. Butler* for petitioner. *Mr. Carl O. Schmidt* for respondents. Reported below: 144 F. 2d 589.

No. 700. HUNTER ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. January 2, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. C. J. Hoyt* for petitioners. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key, Robert N. Anderson,* and *Hilbert P. Zarky* for respondent. Reported below: 145 F. 2d 237.

No. 706. UTAH STATE TAX COMMISSION ET AL. *v.* SOUTHERN PACIFIC CO. January 2, 1945. Petition for writ of certiorari to the Supreme Court of Utah denied. *Messrs. Grover A. Giles,* Attorney General of Utah, and *J. Lambert Gibson* for petitioners. *Mr. Harry H. McElroy* for respondent. Reported below: 150 P. 2d 110.

No. 707. COMMISSIONER OF INTERNAL REVENUE *v.* ESTATE OF SHAMBERG ET AL. January 2, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Solicitor General Fahy* for petitioner. *Messrs. George Wharton Pepper, Julius Henry Cohen, Leander I. Shelley,* and *Austin J. Tobin* for respondents. Reported below: 144 F. 2d 998.

No. 708. COMMISSIONER OF INTERNAL REVENUE *v.* ESTATE OF WHITE ET AL. January 2, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Solicitor General Fahy* for petitioner. *Mr. Lewis L. Delafield, Jr.* for respondents. Reported below: 144 F. 2d 1019.

No. 722. WEIL ET AL., EXECUTORS, *v.* COMMISSIONER OF INTERNAL REVENUE. January 2, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Marion Smith* and *Bertram S. Boley* for petitioners. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.*, and *Messrs. Sewall Key* and *Bernard Chertcoff* for respondent. Reported below: 145 F. 2d 240.

No. 728. BUSCAGLIA, TREASURER OF PUERTO RICO, ET AL. *v.* DISTRICT COURT OF SAN JUAN ET AL. January 2, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Solicitor General Fahy* for petitioners. Reported below: 145 F. 2d 274.

No. 672. INTERNATIONAL CARRIER-CALL & TELEVISION CORP. *v.* RADIO CORPORATION OF AMERICA. January 2, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied for the reason that application therefor was not made within the time provided by law. § 8 (a), Act of February 13, 1925 (43 Stat. 936, 940), 28 U. S. C., § 350. *Mr. George Coffing Warner* for petitioner. *Mr. Fred J. Knauer* for respondent. Reported below: 143 F. 2d 598.

No. 586. BRADLEY *v.* BRADLEY ET AL. January 2, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Annie Mae Bradley, pro se. Solicitor General Fahy, Assistant Attorney General Shea,* and *Messrs. Wilbur C. Pickett* and *Fendall Marbury* for the United States, and *Mr. Edward M. Box* for Bradley, respondents. Reported below: 143 F. 2d 573.

No. 641. HENRY *v.* WEBB, SUPERINTENDENT. January 2, 1945. Petition for writ of certiorari to the Supreme Court of Washington denied. Reported below: 21 Wash. 2d 283, 150 P. 2d 693.

No. 660. HAINES *v.* ILLINOIS. January 2, 1945. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 685. FLANSBURG *v.* KAISER, WARDEN. January 2, 1945. Petition for writ of certiorari to the Supreme Court of Missouri denied.

No. 686. BAKER *v.* KAISER, WARDEN. January 2, 1945. Petition for writ of certiorari to the Supreme Court of Missouri denied.

No. 693. BARNARD *v.* RAGEN, WARDEN;
No. 696. SCHEIB *v.* RAGEN, WARDEN;
No. 697. DOYLE *v.* RAGEN, WARDEN; and
No. 701. O'NEILL *v.* NIERSTHEIMER, WARDEN. January 2, 1945. Petitions for writs of certiorari to the Supreme Court of Illinois denied.

No. 712. MCKENNA *v.* NEW YORK. January 2, 1945. Petition for writ of certiorari to the County Court, Kings County, New York, denied. Reported below: 266 App. Div. 976, 44 N. Y. S. 2d 949.

No. 715. RIOS *v.* RAGEN, WARDEN;
No. 716. FRITZ *v.* RAGEN, WARDEN; and

No. 724. MICHALOWSKI *v.* RAGEN, WARDEN. January 2, 1945. Petitions for writs of certiorari to the Supreme Court of Illinois denied.

No. 734. DAWSON *v.* MICHIGAN. January 2, 1945. Petition for writ of certiorari to the Supreme Court of Michigan denied.

No. 735. ADAMS *v.* RAGEN, WARDEN;
No. 736. HALL *v.* RAGEN, WARDEN;
No. 737. GLAZIER *v.* RAGEN, WARDEN;
No. 741. MALLECK *v.* RAGEN, WARDEN;
No. 742. GALL *v.* CRIMINAL COURT OF COOK COUNTY, ILLINOIS;
No. 743. LOUGHREN *v.* RAGEN, WARDEN;
No. 745. NAPLES *v.* RAGEN, WARDEN;
No. 746. MORRISON *v.* RAGEN, WARDEN; and
No. 760. BERRY *v.* RAGEN, WARDEN. January 2, 1945. Petitions for writs of certiorari to the Supreme Court of Illinois denied.

No. 659. MONTANYE *v.* NEW YORK. January 2, 1945. Petition for writ of certiorari to the Court of Claims of New York denied for want of a judgment of the highest court of the State in which a decision could be had. *Beatrice Miller Montanye, pro se.* *Messrs. Nathaniel L. Goldstein,* Attorney General of New York, *Orrin G. Judd,* Solicitor General, and *Daniel J. Loventhal,* Deputy Assistant Attorney General, for respondent.

No. 694. TRAININ *v.* CAIN, COMMANDING OFFICER. January 8, 1945. Petition for writ of certiorari to the Cir-

cuit Court of Appeals for the Second Circuit denied. *Mr. Osmond K. Fraenkel* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Mr. Robert S. Erdahl* for respondent. Reported below: 144 F. 2d 944.

No. 703. AMERICAN LIBERTY PIPE LINE CO. *v.* COMMISSIONER OF INTERNAL REVENUE. January 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Gerald C. Mann* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key* and *Robert N. Anderson* for respondent. Reported below: 143 F. 2d 873.

No. 711. AETNA CASUALTY & SURETY CO. *v.* KISHWAUKEE SPECIAL DRAINAGE DISTRICT. January 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Franz W. Castle* for petitioner. *Messrs. Floyd E. Thompson* and *Dennis J. Collins* for respondent. Reported below: 143 F. 2d 471.

No. 717. OHIO NATIONAL LIFE INSURANCE CO. ET AL. *v.* BOARD OF EDUCATION OF GRANT COMMUNITY HIGH SCHOOL DISTRICT ET AL. January 8, 1945. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Mr. Werner W. Schroeder* for petitioners. *Mr. Royal W. Irwin* for respondents. Reported below: 387 Ill. 159, 55 N. E. 2d 163.

No. 718. COMMERCIAL NATIONAL BANK *v.* PARSONS, RECEIVER, ET AL. January 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Sidney L. Herold* for petitioner.

Messrs. Pike Hall and *Monte M. Lemann* for Parsons, and *Mr. Otis W. Bullock* for the Stockholders' Committee, respondents. Reported below: 145 F. 2d 191.

No. 720. BADENHAUSEN ET AL., CONSTITUTING THE PROTECTIVE COMMITTEE, *v.* GUARANTY TRUST CO. ET AL., TRUSTEES, ET AL. January 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Abraham Mitnovetz* and *Harry O. Levin* for petitioners. *Messrs. Edwin S. S. Sunderland, Thomas O'G. FitzGibbon, Leon T. Seawell, Carlyle Barton, Irwin L. Tappen, George M. Lanning, Edward E. Watts, Jr., Bernard Meredith, Eben J. D. Cross,* and *Leonard D. Adkins* for respondents. Reported below: 145 F. 2d 40.

No. 723. COHEN ET AL. *v.* UNITED STATES. January 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Morris Lavine* for petitioners. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Mr. Irving S. Shapiro* for the United States. Reported below: 144 F. 2d 984.

No. 729. AETNA INSURANCE CO. ET AL. *v.* HENRY DU BOIS SONS CO. ET AL. January 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Ray Rood Allen* for petitioners. *Mr. Edmund F. Lamb* for respondents. Reported below: 144 F. 2d 262.

No. 731. HAYS ET AL. *v.* FARRINGTON ET AL. January 8, 1945. Petition for writ of certiorari to the Supreme Court

of Missouri denied. *Mr. Charles H. Houston* for petitioners. *Mr. Samuel H. Liberman* for respondents. Reported below: 182 S. W. 2d 186.

No. 692. SPENCER, ADMINISTRATOR, *v.* GYPSY OIL CO. ET AL. January 8, 1945. 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. *Messrs. Charles B. Rogers, Josephus C. Trimble,* and *Harry S. Hall* for petitioner. *Messrs. Richard H. Wills, Villard Martin, Harold E. Rorschach, James B. Diggs, Russell G. Lowe,* and *Jack L. Rorschach* for respondents. Reported below: 142 F. 2d 935.

No. 726. GAGLIO *v.* CITY OF NEW YORK. January 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Russell S. Coutant* for petitioner. *Mr. Ignatius M. Wilkinson* for respondent. Reported below: 143 F. 2d 904.

No. 709. ANDERSON, RECEIVER, *v.* GENERAL AMERICAN LIFE INSURANCE CO. January 15, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Frank E. Wood, Robert S. Marx,* and *Harry Kasfir* for petitioner. *Messrs. Wm. Marshall Bullitt, Leo T. Wolford,* and *Thomas W. Bullitt* for respondent. *Mr. John F. Anderson* filed a brief on behalf of the Comptroller of the Currency, as *amicus curiae,* in support of the petition. Reported below: 141 F. 2d 898.

No. 714. MACCLENNY TURPENTINE CO. ET AL. *v.* BALDWIN DRAINAGE DISTRICT ET AL. January 15, 1945. Peti-

tion for writ of certiorari to the Supreme Court of Florida denied. *Mr. Thos. B. Adams* for petitioners. *Messrs. Giles J. Patterson* and *John W. Harrell* for respondents. Reported below: 154 Fla. 525, 18 So. 2d 792.

No. 733. TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS *v.* COPELAND, ADMINISTRATRIX. January 15, 1945. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Mr. Arnot L. Sheppard* for petitioner. *Mr. Cyrus A. Geers* for respondent. Reported below: 182 S. W. 2d 600.

No. 738. MINNESOTA MINING & MANUFACTURING CO. *v.* COE, COMMISSIONER OF PATENTS. January 15, 1945. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. Harold J. Kinney* and *Charles S. Grindle* for petitioner. *Solicitor General Fahy, Assistant Attorney General Shea,* and *Mr. Joseph B. Goldman* for respondent. Reported below: 145 F. 2d 25.

No. 755. COWDRICK, GENERAL ADMINISTRATRIX, *v.* PENNSYLVANIA RAILROAD CO. January 15, 1945. Petition for writ of certiorari to the Court of Errors and Appeals of New Jersey denied. *Mr. Edward W. Haines* for petitioner. *Messrs. Frederic D. McKenney, R. Aubrey Bogley, John A. Hartpence,* and *Adelbert S. Schroeder* for respondent. Reported below: 132 N. J. L. 131, 39 A. 2d 98.

No. 669. COHEN *v.* UNITED STATES;
No. 670. RAFFE *v.* UNITED STATES;
No. 671. ROGOFF *v.* UNITED STATES;
No. 682. ROSENBERG *v.* UNITED STATES; and

No. 683. WACHTEL *v.* UNITED STATES. January 15, 1945. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of these applications. *Messrs. Walter Brower* and *Ilo Orleans* for Cohen. *Messrs. P. Wolf Winer* and *Arnold T. Koch* for Raffe. *Mr. Philip Handelman* for Rogoff. *Mr. George Wolf* for Rosenberg and Wachtel. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Mr. Robert S. Erdahl,* and *Miss Beatrice Rosenberg* for the United States. Reported below: 145 F. 2d 82.

No. 506. MOSHER *v.* HUNTER, WARDEN. January 15, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *John Mosher, pro se. Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Mr. Robert S. Erdahl* for respondent. Reported below: 143 F. 2d 745.

No. 604. WITHEY *v.* ILLINOIS;

No. 744. RUZON *v.* RAGEN, WARDEN;

No. 768. ILLINOIS EX REL. HOWLERY *v.* RAGEN, WARDEN;

No. 770. CULLOTTA *v.* RAGEN, WARDEN; and

No. 771. DIEKELMANN *v.* ILLINOIS. January 15, 1945. Petitions for writs of certiorari to the Supreme Court of Illinois denied. *Forrest Withey, pro se. Messrs. George F. Barrett,* Attorney General of Illinois, and *William C. Wines,* Assistant Attorney General, for respondent in No. 604. Reported below: No. 604, 318 Ill. 418, 56 N. E. 2d 784.

No. —. BROWN *v.* RAGEN, WARDEN. January 29, 1945. The petition for writ of certiorari is denied.

No. 750. ENGINEERING & RESEARCH CORP. *v.* NATIONAL LABOR RELATIONS BOARD. January 29, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Milton W. King* for petitioner. *Solicitor General Fahy, Mr. Alvin J. Rockwell,* and *Miss Ruth Weyand* for respondent. Reported below: 145 F. 2d 271.

No. 751. SCOTT *v.* UNITED STATES. January 29, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. H. A. Ledbetter* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Messrs. Robert S. Erdahl* and *William Strong* for the United States. Reported below: 145 F. 2d 405.

No. 754. BREITOWICH *v.* THARP ET AL. January 29, 1945. Petition for writ of certiorari to the Appellate Court, First District, of Illinois denied. *Mr. Ode L. Rankin* for petitioner. *Mr. Irving Breakstone* for respondents. Reported below: 323 Ill. App. 261, 55 N. E. 2d 392.

No. 756. MCGREW PAINT & ASPHALT CO. *v.* MURPHY, DIRECTOR OF LABOR;

No. 757. RAILWAY PAINT CO. *v.* MURPHY, DIRECTOR OF LABOR;

No. 758. DEDNOX, INC. *v.* MURPHY, DIRECTOR OF LABOR; and

No. 759. INSUL-MASTIC ROOFING & SIDING CO. *v.* MURPHY, DIRECTOR OF LABOR. January 29, 1945. Petition for writs of certiorari to the Supreme Court of Illinois denied. *Messrs. Joseph G. Slottow* and *Charles Leviton* for petitioners. *Messrs. George F. Barrett,* Attorney General of Illinois, and *William C. Wines,* Assistant Attorney General, for respondent. Reported below: 387 Ill. 241, 56 N. E. 2d 416.

No. 763. KELLING NUT CO. *v.* NATIONAL NUT CO. January 29, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Guy A. Gladson, Collins Mason,* and *Arthur D. Welton, Jr.* for petitioner. *Mr. Hugh N. Orr* for respondent. Reported below: 145 F. 2d 418.

No. 764. BUDD INTERNATIONAL CORP. *v.* COMMISSIONER OF INTERNAL REVENUE. January 29, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Henry S. Drinker, Frederick E. S. Morrison,* and *John W. Bodine* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key* and *Walter J. Cummings, Jr.* for respondent. Reported below: 143 F. 2d 784.

No. 725. NEWBURY *v.* UNITED STATES. January 29, 1945. Petition for writ of certiorari to the Court of Claims denied. *Mr. Llewellyn A. Luce* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key, Robert N. Anderson,* and *Mrs. Elizabeth B. Davis* for the United States. Reported below: 102 Ct. Cls. 192, 57 F. Supp. 168.

No. 730. THOMAS J. MOLLOY & CO., INC. *v.* BERKSHIRE, DEPUTY COMMISSIONER, ET AL. January 29, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Walter Brower* and *Coleman Gangel* for petitioner. *Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. Robert L. Wright* for respondents. Reported below: 143 F. 2d 218.

Nos. 739 and 740. INTERNATIONAL STANDARD ELECTRIC CORP. *v.* COMMISSIONER OF INTERNAL REVENUE. January 29, 1945. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Allin H. Pierce* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Mr. Sewall Key* for respondent. Reported below: 144 F. 2d 487.

No. 767. CONTINENTAL OIL CO. ET AL. *v.* MINNESOTA. January 29, 1945. Petition for writ of certiorari to the Supreme Court of Minnesota denied. *Mr. Hayner N. Larson* for petitioners. *Messrs. J. A. A. Burnquist,* Attorney General of Minnesota, *Geo. B. Sjoselius,* Deputy Attorney General, *James F. Lynch,* and *Andrew R. Bratter* for respondent. Reported below: 218 Minn. 123, 15 N. W. 2d 542.

No. 773. OILS, INC. *v.* BLANKENSHIP ET AL. January 29, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Hal S. Whitten* for petitioner. *Mr. J. B. Dudley* for Blankenship et al., and *M. E. Trapp, pro se,* respondents. Reported below: 145 F. 2d 354.

No. 780. SMITH *v.* UNITED STATES. January 29, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. W. Perry Miller* 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: 145 F. 2d 643.

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No. 786. BOARD OF COUNTY COMMISSIONERS ET AL. *v.* UNITED STATES. January 29, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Louis J. O'Marr,* Attorney General of Wyoming, *L. A. Crofts, John U. Loomis,* and *Edward T. Lazear* for petitioners. *Solicitor General Fahy* and *Messrs. Vernon L. Wilkinson, Fred W. Smith,* and *Walter J. Cummings, Jr.* for the United States. *Messrs. George M. Tunison* and *Charles J. Kappler* filed a brief on behalf of the Shoshone Tribe of Indians, as *amicus curiae,* in opposition. Reported below: 145 F. 2d 329.

No. 807. CORDELL *v.* MICHIGAN. January 29, 1945. Petition for writ of certiorari to the Supreme Court of Michigan denied. *Mr. Edward N. Barnard* for petitioner. *Messrs. John R. Dethmers,* Attorney General of Michigan, *Edmund E. Shepherd,* Solicitor General, and *Daniel J. O'Hara,* Assistant Attorney General, for respondent. Reported below: 309 Mich. 585, 16 N. W. 2d 78.

No. 790. HOBERMAN *v.* UNITED STATES. January 29, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied for the reason that application therefor was not made within the time provided by law. Rule XI of the Criminal Appeals Rules, 292 U. S. 665–66. *Mr. Martin Feldman* for petitioner. Reported below: 145 F. 2d 696.

No. 676. MACAVOY *v.* NEBRASKA. January 29, 1945. Petition for writ of certiorari to the Supreme Court of Nebraska denied. *Joseph T. MacAvoy, pro se. Messrs. Walter R. Johnson,* Attorney General of Nebraska, *H. Emerson Kokjer,* Deputy Attorney General, and *Robert A. Nelson,* Assistant Attorney General, for respondent. Reported below: 144 Neb. 827, 15 N. W. 2d 45.

No. 778. INMAN ET AL. *v.* NORTH CAROLINA. January 29, 1945. Petition for writ of certiorari to the Supreme Court of North Carolina denied. *Mr. K. R. Hoyle* for petitioners. *Messrs. Harry McMullan,* Attorney General of North Carolina, *Hughes J. Rhodes,* and *Ralph Moody,* Assistant Attorneys General, for respondent. Reported below: 224 N. C. 531, 31 S. E. 2d 641.

No. 772. BURKHART *v.* BENNETT, WARDEN;

No. 776. JOHNS *v.* RAGEN, WARDEN;

No. 777. GIBSON *v.* RAGEN, WARDEN; and

No. 796. OLSON *v.* BENNETT, WARDEN. January 29, 1945. Petitions for writs of certiorari to the Supreme Court of Illinois denied.

No. 781. WASHINGTON *v.* RAGEN, WARDEN. January 29, 1945. 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.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT, THROUGH JANUARY 29, 1945.

No. 271. UNITED STATES *v.* BARLOW ET AL. Appeal from the District Court of the United States for the District of Utah. August 25, 1944. Dismissed pursuant to Rule 35. *Solicitor General Fahy* for the United States. *Mr. O. A. Tangren* for appellees.

No. 253. DERMAN *v.* STOR-AID, INC. ET AL. On petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit. September 7, 1944. Dismissed

pursuant to Rule 35. *Mr. Roberts B. Larson* for petitioner. *Mr. David L. Samuels* for respondents. Reported below: 141 F. 2d 580.

No. 512. CURLEY *v.* FLORIDA. Appeal from the Supreme Court of Florida. September 26, 1944. Dismissed pursuant to Rule 11. *Mr. Wm. W. Flournoy* for appellant. *Messrs. J. Tom Watson,* Attorney General of Florida, and *John C. Wynn,* Assistant Attorney General, for appellee.

No. 82. SCHWARTZ *v.* COMMISSIONER OF INTERNAL REVENUE. Certiorari, 322 U. S. 724, to the Circuit Court of Appeals for the Ninth Circuit. October 2, 1944. Dismissed per stipulation of counsel.

No. 153. JOHNSON *v.* UNITED STATES; and

No. 154. SOMMERS ET AL. *v.* UNITED STATES. On petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit. December 4, 1944. Dismissed on motion of counsel for petitioners. *Mr. Homer Cummings* for petitioners. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key, J. Louis Monarch,* and *Miss Melva M. Graney* for the United States.

No. 568. SURTMAN ET AL. *v.* DIGNAN, SECRETARY OF STATE OF MICHIGAN. On petition for writ of certiorari to the Supreme Court of Michigan. December 4, 1944. Dismissed per stipulation of counsel. *Mr. Edward N. Barnard* for petitioners. *Mr. Daniel J. O'Hara* for respondent. Reported below: 309 Mich. 270, 15 N. W. 2d 471.

No. 540. FITZGERALD *v.* SANFORD, WARDEN. On petition for writ of certiorari to the Circuit Court of Appeals

for the Fifth Circuit. December 18, 1944. Dismissed on motion of petitioner. Reported below: 145 F. 2d 228.

No. 664. NEWMAN *v.* BOSTIAN, TRUSTEE. On petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit. January 29, 1945. Dismissed on motion of petitioner. *Messrs. Robert J. Ingraham* and *Hugh H. Obear* for petitioner. *Mr. Samuel W. Sawyer* for respondent.

DECISIONS GRANTING REHEARING, FROM OCTOBER 2, 1944, THROUGH JANUARY 29, 1945.

No. 462. J. F. FITZGERALD CONSTRUCTION CO. *v.* PEDERSEN. December 18, 1944. The petition for rehearing is granted and the order entered November 6, *ante*, p. 698, is vacated. The petition for writ of certiorari to the Supreme Court of New York is granted. *Mr. Henry E. Foley* for petitioner. *Mr. William E. J. Connor* for respondent. Reported below: 288 N. Y. 687, 43 N. E. 2d 83.

No. 379. COLORADO INTERSTATE GAS CO. *v.* FEDERAL POWER COMMISSION ET AL.; and

No. 380. CANADIAN RIVER GAS CO. *v.* FEDERAL POWER COMMISSION ET AL. January 2, 1945. In No. 380 the petition for rehearing is granted and the order entered November 13, *ante*, p. 700, is vacated. The petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit is granted limited to questions 1, 2, 3, and 8 presented by the petition for the writ. *Messrs. Wm. A. Dougherty, Elmer L. Brock,* and *E. R. Campbell* for petitioner in No. 379. *Messrs. Charles H. Keffer* and *John P. Akolt* for petitioner in No. 380. *Solicitor General Fahy, Assistant Attorney General Shea,* and *Messrs. Paul A. Sweeney, Charles V. Shannon, Malcolm Lindsey,*

Thomas H. Gibson, and *Louis J. O'Marr,* Attorney General of Wyoming, for the Federal Power Commission et al., respondents. Reported below: 142 F. 2d 943.

No. 296. PANHANDLE EASTERN PIPE LINE CO. ET AL. *v.* FEDERAL POWER COMMISSION ET AL. January 3, 1945. The motion for leave to file petition for rehearing is granted. The petition for rehearing is granted and the order entered November 13, *ante,* p. 700, is vacated. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted limited to questions 2 and 3 presented by the petition for the writ. *Messrs. Ira Lloyd Letts, John S. L. Yost, D. H. Culton,* and *Samuel H. Riggs* for petitioners. Reported below: 143 F. 2d 488.

No. 514. ROBINSON *v.* UNITED STATES. January 15, 1945. The petition for rehearing is granted and the order entered December 18 denying certiorari, *ante,* p. 789, is vacated. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted limited to the question presented under Point No. 1 of the petition for rehearing and under Question 5 (d) of the petition for certiorari. Reported below: 144 F. 2d 392.

DECISIONS DENYING REHEARING, FROM OCTOBER 2, 1944, THROUGH JANUARY 29, 1945.*

No. 1064, October Term, 1942. PREBYL *v.* PRUDENTIAL INSURANCE CO. ET AL. October 9, 1944. The motion for leave to file a third petition for rehearing is denied. MR. JUSTICE ROBERTS and MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. 322 U.S. 769.

*See Table of Cases Reported in this volume for earlier decisions in these cases, unless otherwise indicated.

No. —, October Term, 1943. Ex parte Allen Dixon. October 9, 1944. 322 U. S. 717.

No. —, October Term, 1943. Patterson *v.* Sanford, Warden. October 9, 1944. 322 U. S. 708.

No. 33, October Term, 1943. Northwest Airlines, Inc. *v.* Minnesota. October 9, 1944. 322 U. S. 292.

No. 217, October Term, 1943. Addison et al. *v.* Holly Hill Fruit Products, Inc. October 9, 1944. 322 U. S. 607.

No. 433, October Term, 1943. Lyons *v.* Oklahoma. October 9, 1944. 322 U. S. 596.

No. 497, October Term, 1943. Mario Mercado E Hijos *v.* Commins et al. October 9, 1944. 322 U. S. 465.

No. 716, October Term, 1943. United States *v.* Saylor et al. October 9, 1944. 322 U. S. 385.

No. 717, October Term, 1943. United States *v.* Poer et al. October 9, 1944. 322 U. S. 385.

No. 744, October Term, 1943. Nelson *v.* Webb, Superintendent. October 9, 1944. 321 U. S. 796.

No. 750, October Term, 1943. SCHITA *v.* PESCOR, WARDEN. October 9, 1944. 322 U. S. 761.

No. 828, October Term, 1943. PHILLIPS *v.* NEW YORK. October 9, 1944. 322 U. S. 748.

No. 940, October Term, 1943. YLAGAN *v.* UNITED STATES. October 9, 1944. 322 U. S. 763.

No. 948, October Term, 1943. FITZPATRICK *v.* NIERSTHEIMER, WARDEN. October 9, 1944. 322 U. S. 759.

No. 954, October Term, 1943. RONEY ET AL. *v.* FEDERAL LAND BANK OF LOUISVILLE. October 9, 1944. 322 U. S. 753.

No. 961, October Term, 1943. WHITE, ADMINISTRATOR, ET AL. *v.* SINCLAIR PRAIRIE OIL CO. ET AL. October 9, 1944. 322 U. S. 760.

No. 965, October Term, 1943. SKELLY OIL CO. *v.* AMACKER ET AL. October 9, 1944. 322 U. S. 760.

No. 971, October Term, 1943. NATIONAL BANK OF MIDDLEBORO ET AL. *v.* UNITED STATES. October 9, 1944. 322 U. S. 754.

No. 972, October Term, 1943. LOUISVILLE PROPERTY CO. ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. October 9, 1944. 322 U. S. 755.

No. 1018, October Term, 1943. PYRAMID MOVING CO. *v.* UNITED STATES ET AL. October 9, 1944. 322 U. S. 715.

No. 1060, October Term, 1943. BASS ET AL. *v.* NEW HAMPSHIRE. October 9, 1944. 322 U. S. 763.

No. 1085, October Term, 1943. KNIGHT *v.* CALIFORNIA ET AL. October 9, 1944. 322 U. S. 765.

No. 1098, October Term, 1943. EX PARTE THOMPSON, EXECUTRIX. October 9, 1944. 322 U. S. 765.

No. —, October Term, 1943. EX PARTE RAYMOND JONES. October 9, 1944. 322 U. S. 711.

No. 193, October Term, 1943. FELDMAN *v.* UNITED STATES. October 9, 1944. MR. JUSTICE MURPHY and MR. JUSTICE JACKSON took no part in the consideration or decision of this application. 322 U. S. 487.

No. 354, October Term, 1943. UNITED STATES *v.* SOUTH-EASTERN UNDERWRITERS ASSOCIATION ET AL. October 9, 1944. MR. JUSTICE ROBERTS and MR. JUSTICE REED took no part in the consideration or decision of this application. 322 U. S. 533.

No. 648, October Term, 1943. UNITED STATES *v.* HELLARD. October 9, 1944. 322 U. S. 363.

No. 724, October Term, 1943. WALKER *v.* SQUIER, WARDEN. October 9, 1944. The second petition for rehearing is denied. 322 U. S. 768.

No. 822, October Term, 1943. LONG *v.* BENSON, WARDEN. October 9, 1944. The second petition for rehearing is denied. The motion for leave to file petition for writ of habeas corpus is also denied. 322 U. S. 770.

No. 984, October Term, 1943. WATERMAN *v.* McMILLAN ET AL. October 9, 1944. The petition for removal of appeal is also denied. 322 U. S. 749.

No. 766, October Term, 1943. HUDSON & MANHATTAN RAILROAD CO. *v.* CITY OF JERSEY CITY ET AL. October 16, 1944. The motion for leave to file a second petition for rehearing is denied for want of jurisdiction. *Art Metal Construction Co.* v. *United States,* 289 U. S. 706, and cases cited. 322 U. S. 773.

No. 142. CAMERON *v.* CIVIL AERONAUTICS BOARD. October 16, 1944.

No. —. WILSON *v.* HINMAN. November 6, 1944.

No. 108. STRICKLAND ET AL. *v.* HUMBLE OIL & REFINING CO. ET AL. November 6, 1944.

No. 123. KUCZYNSKI *v.* COX, WARDEN. November 6, 1944.

No. 124. HANDLER *v.* UNITED STATES. November 6, 1944.

No. 132. HANNA FURNACE CORP. *v.* UNITED STATES ET AL. November 6, 1944.

No. 139. NICHOLSON *v.* UNITED STATES. November 6, 1944.

No. 140. LOWERY *v.* UNITED STATES. November 6, 1944.

No. 172. PEITZMAN (NOW RILEY) ET AL. *v.* CITY OF ILLMO. November 6, 1944.

No. 177. LEDBETTER, ADMINISTRATOR, ET AL. *v.* FARMERS BANK & TRUST CO. ET AL. November 6, 1944.

No. 183. MARINO ET AL. *v.* UNITED STATES. November 6, 1944.

No. 184. TAYLOR ET AL., TRUSTEES, *v.* PAYNE, ADMINISTRATRIX. November 6, 1944.

No. 194. FINLAYSON ET VIR *v.* TOWN OF MONTICELLO. November 6, 1944.

No. 229. TAYLOR *v.* UNITED STATES. November 6, 1944.

No. 244. DENNICK, ADMINISTRATOR, *v.* MIAMI SAVINGS & LOAN CO. November 6, 1944.

No. 256. LEIMER *v.* HULSE ET AL. November 6, 1944.

No. 269. NESSELROTTE *v.* UNITED STATES. November 6, 1944.

No. 270. BLACK *v.* UNITED STATES. November 6, 1944.

No. 275. NORTH COAST TRANSPORTATION CO. ET AL. *v.* UNITED STATES ET AL. November 6, 1944.

No. 282. RAVENSCROFT *v.* CASEY ET AL. November 6, 1944.

No. 305. NOWAK *v.* ILLINOIS. November 6, 1944.

No. 311. OFFHOUSE ET AL. *v.* BOARD OF EDUCATION OF THE CITY OF PATERSON. November 6, 1944.

No. 330. ILLINOIS EX REL. RECONSTRUCTION FINANCE CORPORATION ET AL. *v.* BOARD OF EDUCATION OF THE CITY OF CHICAGO ET AL. November 6, 1944.

No. 331. LEWIS *v.* BOARD OF EDUCATION OF THE CITY OF CHICAGO ET AL. November 6, 1944.

No. 332. HUTCHINSON ET AL. *v.* BOARD OF EDUCATION OF THE CITY OF CHICAGO ET AL. November 6, 1944.

No. 357. STEFFLER *v.* UNITED STATES. November 6, 1944.

No. 361. CAFFEY, JUDGE, ET AL. *v.* UNITED STATES. November 6, 1944.

No. 98. ROXBOROUGH *v.* MICHIGAN. November 13, 1944.

No. 99. WATSON *v.* MICHIGAN. November 13, 1944.

No. 248. MASON *v.* WEBB, SUPERINTENDENT. November 13, 1944.

No. 281. SANDBERG ET AL. *v.* NEW ENGLAND NOVELTY CO., INC. November 13, 1944.

No. 291. HERRON *v.* STATE BAR OF CALIFORNIA. NOVEMBER 13, 1944.

No. 321. SHREVEPORT ENGRAVING CO., INC. *v.* UNITED STATES. November 13, 1944.

No. 374. MIMEE *v.* CALIFORNIA. November 13, 1944.

No. —. EX PARTE RAYMOND MIMEE. November 13, 1944.

No. 385. J. L. BRANDEIS & SONS *v.* NATIONAL LABOR RELATIONS BOARD. November 13, 1944.

No. 407. MORRIS *v.* CALIFORNIA. November 13, 1944.

No. —. EX PARTE ALBERT MORRIS. November 13, 1944.

No. —. EX PARTE ANN H. P. KENT, FOR AND ON BEHALF OF TYLER KENT. November 13, 1944. The petition for rehearing and for other relief is denied.

No. 155. DENICKE ET AL. *v.* ANGLO CALIFORNIA NATIONAL BANK ET AL.;

No. 196. DENICKE *v.* BRIGHAM ET AL.; and

No. 197. DOBLE *v.* BUCK ET AL. November 13, 1944. The petitions for rehearing and for other relief are denied.

No. —. CURLEY *v.* FLORIDA. November 20, 1944.

No. 411. MASON *v.* EL DORADO IRRIGATION DISTRICT. November 20, 1944.

No. 451. CITY NATIONAL BANK & TRUST CO., TRUSTEE, *v.* COMMISSIONER OF INTERNAL REVENUE. November 20, 1944.

No. 386. IN THE MATTER OF HULON CAPSHAW. December 4, 1944.

No. 412. MASON *v.* GLENN-COLUSA IRRIGATION DISTRICT. December 4, 1944.

No. 440. GOLDBERG *v.* RECONSTRUCTION FINANCE CORPORATION. December 4, 1944.

No. 576. HICKENBOTTOM ET AL. *v.* McCAIN, COMMISSIONER, ET AL. December 4, 1944.

No. 603. HOUGH *v.* CALIFORNIA. December 4, 1944.

No. —. EX PARTE LOUIS MOSKOVITZ. December 11, 1944.

No. 479. PUBLIC SERVICE COMMISSION (STATE DIVISION OF THE DEPARTMENT OF PUBLIC SERVICE OF NEW YORK) ET AL. *v.* UNITED STATES ET AL. December 11, 1944.

No. 487. WATERS *v.* KINGS COUNTY TRUST CO. December 11, 1944.

No. 33. COMMISSIONER OF INTERNAL REVENUE *v.* HARMON. December 18, 1944. *Ante*, p. 44.

No. 541. HOEHN ET AL. *v.* CREWS ET AL. December 18, 1944.

No. 941, October Term, 1943. UNITED STATES EX REL. LYNN *v.* DOWNER, COMMANDING OFFICER. January 2, 1945. 322 U. S. 756.

No. —. WILSON *v.* HINMAN. January 2, 1945.

No. —. SAXE *v.* HEINZE ET AL. January 2, 1945.

No. 73. ARMOUR & CO. *v.* WANTOCK ET AL. January 2, 1945. *Ante*, p. 126.

No. 498. SONDERLICK *v.* HALLINAN; and

No. 499. SONDERLICK *v.* EMIGRANT INDUSTRIAL SAVINGS BANK. January 2, 1945.

No. 567. CRAPO *v.* JOHNSTON, WARDEN. January 2, 1945.

No. 611. CURATORS OF THE CENTRAL COLLEGE *v.* ROSE, COLLECTOR OF REVENUE. January 2, 1945.

No. 658. JESKOWITZ *v.* CARTER, TRUSTEE IN BANKRUPTCY. January 2, 1945.

No. 18. UNITED STATES *v.* CRESCENT AMUSEMENT CO. ET AL.; and

No. 19. CRESCENT AMUSEMENT CO. ET AL. *v.* UNITED STATES. January 8, 1945. MR. JUSTICE FRANKFURTER, MR. JUSTICE MURPHY, and MR. JUSTICE JACKSON took no part in the consideration or decision of this application. *Ante*, p. 173.

No. 562. DUNCAN *v.* UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT. January 8, 1945.

No. 644. PACMAN *v.* UNITED STATES. January 8, 1945.

No. 766, October Term, 1943. HUDSON & MANHATTAN RAILROAD CO. *v.* CITY OF JERSEY CITY ET AL. January 15, 1945. *Ante*, p. 812.

No. 516. FERGUSON *v.* MASSACHUSETTS. January 15, 1945.

No. 552. PETERSEN *v.* NEW YORK. January 15, 1945.

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No. 14. THOMAS *v.* COLLINS, SHERIFF. January 29, 1945.

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No. 503. REDMOND ET AL. *v.* UNITED FUNDS MANAGEMENT CORP. ET AL. January 29, 1945.

No. 535. DAVIS *v.* JOHNSTON, WARDEN. January 29, 1945.

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RULES OF CRIMINAL PROCEDURE.

ORDER.

It is ordered that Rules of Criminal Procedure for the District Courts of the United States governing proceedings in criminal cases prior to and including verdict, finding of guilty or not guilty by the court, or plea of guilty, be prescribed pursuant to the Act of June 29, 1940, c. 445, 54 Stat. 688. And the CHIEF JUSTICE is authorized and directed to transmit the Rules as prescribed to the Attorney General and to request him, as provided in that Act, to report these Rules to the Congress at the beginning of the regular session in January 1945.

MR. JUSTICE BLACK states that he does not approve of the adoption of the Rules.

MR. JUSTICE FRANKFURTER does not join in the Court's action for reasons stated in a memorandum opinion.

DECEMBER 26, 1944.

MEMORANDUM OF MR. JUSTICE FRANKFURTER.

That the federal courts have power, or may be empowered, to make rules of procedure for the conduct of litigation has been settled for a century and a quarter (*Wayman* v. *Southard,* 10 Wheat. 1). And experience proves that justice profits if the responsibility for such rule-making be vested in a small, standing rule-making body rather than be left to legislation generated by particular controversies. These views make me regret all the more not to be able to join my brethren in the adoption of the Rules of Criminal Procedure for the District Courts of the United States.

By withholding approval of the adoption of the rules I do not imply disapproval. I express no opinion on their merits. With all respect to contrary views, I believe that

this Court is not an appropriate agency for formulating the rules of criminal procedure for the district courts.

From the beginning of the nation down to the Evarts Act of 1891, though less and less after the Civil War, the members of this Court rode circuit. They thus had intimate, first-hand experience with the duties and demands of trial courts. For the last fifty years the Justices have become necessarily removed from direct, day-by-day contact with trials in the district courts. To that extent they are largely denied the first-hand opportunities for realizing vividly what rules of procedure are best calculated to promote the largest measure of justice. These considerations are especially relevant to the formulation of rules for the conduct of criminal trials. These closely concern the public security as well as the liberties of citizens.

And this leads to another strong reason for not charging this Court with the duty of approving in advance a code of criminal procedure. Such a code can hardly escape provisions in which lurk serious questions for future adjudication by this Court. Every lawyer knows the difference between passing on a question concretely raised by specific litigation and the formulation of abstract rules, however fully considered by members of the lower courts and the bar. I deem it unwise to prejudge, however unintentionally, questions that may in due course of litigation come before this Court by having this Court lay down rules in the abstract rather than deciding issues coming here with the impact of actuality and duly contested.

And there is one more important consideration. The business of this Court is increasing in volume and complexity. In the years ahead the number of cases will not decrease nor their difficulties lessen. The jurisdiction of this Court has already been cut almost to the bone. If the Court is not to be swamped, as it has been in the past, and is to do its best work, it must exercise rigorously its discretionary jurisdiction. Every additional duty, such

as responsibility for fashioning progressive codes of procedure and keeping them current, makes inroads upon the discharge of functions which no one else can exercise.

Brief as is this statement, it can leave no room for doubt that the reasons which have constrained me to withhold approval of adoption of the rules completely transcend judgment of their merits.

DECEMBER 26, 1944.

CRIMINAL APPEALS RULES.

ORDER.

It is ordered that the following rule regulating criminal appeals by the United States be prescribed, pursuant to the Act of May 9, 1942, 56 Stat. 271:

"Rules of criminal procedure after plea of guilty, or verdict or finding of guilt, promulgated from time to time pursuant to the Act of February 24, 1933, c. 119 (47 Stat. 904), as amended, shall be applicable to appeals by the United States under the Act of May 9, 1942, c. 295, sec. 1 (56 Stat. 271), 18 U. S. C. 682, except that the time for taking such appeals shall be as prescribed by the said Act of May 9, 1942."

And the CHIEF JUSTICE is authorized and directed to transmit the rule as prescribed to the Attorney General and to request him, as provided in that Act, to report the rule to the Congress at the beginning of the regular session in January next.

DECEMBER 30, 1944.

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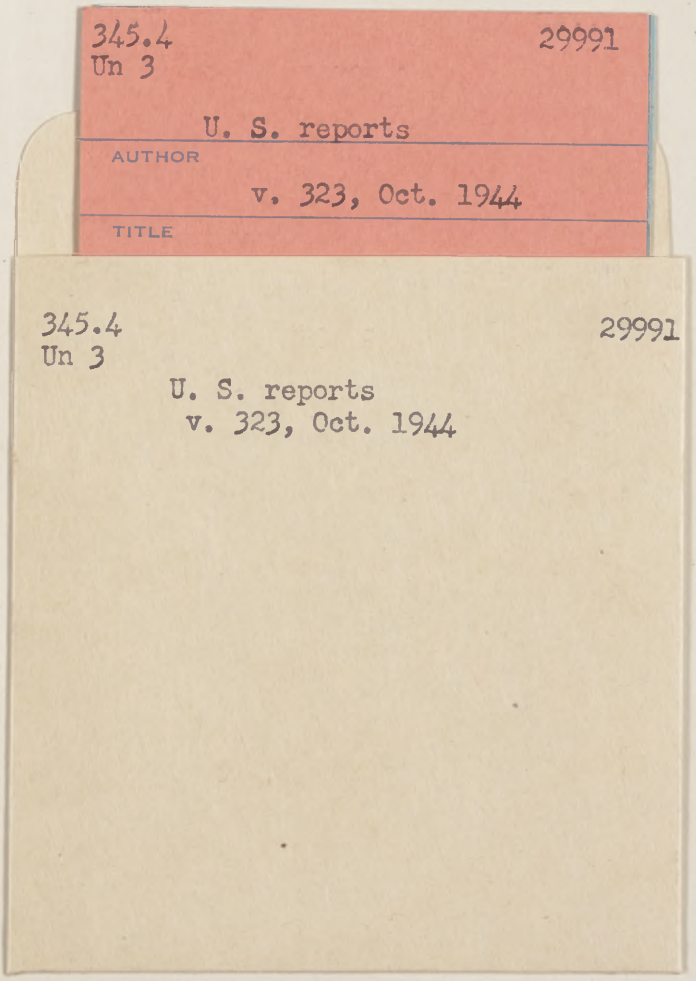
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