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UNITED STATES REPORTS

VOLUME 326

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1944

AND

OCTOBER TERM, 1945

JUNE 18, 1945 CONCLUDED (END OF 1944 TERM); AND FROM OCTOBER 1, 1945 THROUGH JANUARY 28, 1946

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ERRATA.—307 U. S. 166 – 167. In footnotes 5 and 6, "3 Daniell's . . . (2d ed.)" should be "2 Daniell's . . . (6th ed.)".

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.*

HARLAN FISKE STONE, CHIEF JUSTICE.
OWEN J. ROBERTS, ASSOCIATE JUSTICE.[1]
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.[2]
WILEY RUTLEDGE, ASSOCIATE JUSTICE.
HAROLD H. BURTON, ASSOCIATE JUSTICE.[3]

RETIRED.

CHARLES EVANS HUGHES, CHIEF JUSTICE.
JAMES CLARK McREYNOLDS, ASSOCIATE JUSTICE.

FRANCIS BIDDLE, ATTORNEY GENERAL.[4]
TOM C. CLARK, ATTORNEY GENERAL.[5]
CHARLES FAHY, SOLICITOR GENERAL.[6]
J. HOWARD McGRATH, SOLICITOR GENERAL.[7]
CHARLES ELMORE CROPLEY, CLERK.
THOMAS ENNALLS WAGGAMAN, MARSHAL.

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*Notes on p. IV.

NOTES.

[1] Mr. Justice Roberts resigned effective July 31, 1945. He had been an Associate Justice of this Court since June 2, 1930. See *post*, p. VII.

[2] Mr. Justice Jackson was absent from the bench throughout the October Term, 1945.

[3] The Honorable Harold H. Burton, United States Senator from Ohio, was nominated by President Truman on September 18, 1945, to be Associate Justice; the nomination was confirmed by the Senate September 19, 1945; he was commissioned September 22, 1945, took the oath of office and was seated October 1, 1945. See *post*, p. IX. He took no part in the consideration or decision of the judgments or orders announced on October 1 and 8, 1945.

[4] Attorney General Biddle resigned effective June 30, 1945.

[5] Assistant Attorney General Tom C. Clark was nominated by President Truman on May 24, 1945, to be Attorney General; the nomination was confirmed by the Senate on June 14, 1945; he was commissioned June 15, 1945; took the oath June 30, 1945; and entered on duty July 1, 1945.

[6] Solicitor General Fahy resigned effective September 27, 1945.

[7] The Honorable J. Howard McGrath, Governor of Rhode Island, was nominated to be Solicitor General by President Truman on September 28, 1945; the nomination was confirmed by the Senate on October 3, 1945; he was commissioned on October 5, 1945; took the oath and entered on duty October 8, 1945; and was admitted to practice before this Court on the same day.

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, HAROLD H. BURTON, 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.

October 15, 1945.

(For the next previous allotment, see 325 U. S. p. IV.)

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, STANLEY REED, Associate Justice.

For the Third Circuit, HAROLD H. BURTON, 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.

November 13, 1945.

(For the next previous allotment, see *ante*, p. v.)

RESIGNATION OF MR. JUSTICE ROBERTS.

SUPREME COURT OF THE UNITED STATES.

MONDAY, OCTOBER 1, 1945.

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

The CHIEF JUSTICE said:

With deep regret I announce the resignation of Mr. Justice Roberts as an Associate Justice of this Court. His resignation, tendered to the President last July, after the adjournment of the Court for the term, took effect on July 31 last. Appointed by President Hoover, Justice Roberts took his seat on the Bench on June 2, 1930. His term of office as a Justice of this Court thus extended over a period of fifteen years. During that period he has given to the Court and to the Nation the benefit of his great skill and wide knowledge, gained through years of assiduous study and practice of the law. He has faithfully discharged the heavy responsibility which rests on a Justice of this Court with promptness and dispatch, and with untiring energy. We who have shared with him that responsibility and in the common endeavor to make the law realize the ideal of justice among men, give to him the assurance of our continued good will and friendly regard. We wish for him in his retirement good health, abiding strength, and with them the full enjoyment of those satisfactions which will come from the continued devotion of his knowledge and skill to worthy achievement.

The text of Mr. Justice Roberts' letter of resignation to President Truman and the President's reply are published on the next page.

SUPREME COURT OF THE UNITED STATES.

JUSTICE'S CHAMBERS.

Chester Springs, Pa., June 30, 1945.

THE PRESIDENT,
The White House,

SIR,

As I have served as a member of the Supreme Court for more than fifteen years and have attained the age of seventy years, I desire to avail myself of the provisions of Section 260 of the Judicial Code, as amended, (28 U. S. Code § 375) and to resign my office as Associate Justice. Accordingly I tender you my resignation to take effect July 31, 1945.

I am, sir, with great respect,
Sincerely yours,

OWEN J. ROBERTS.

THE WHITE HOUSE.

Washington, July 5, 1945.

DEAR MR. JUSTICE:

I am indeed sorry that you have decided to retire from the Bench after your long service.

The Supreme Court, in the period during which you have served as a member, has been called upon to pass upon some of the most important economic and social problems in the history of our country.

As I told you this afternoon when I saw you and finally agreed to accept your resignation as of July 31, 1945, I do so only on your promise to continue to give your country the benefit of your sound judgment and advice as occasion arises.

I extend to you the gratitude of the nation for the service you have rendered.

Very sincerely yours,

HARRY S. TRUMAN.

MR. JUSTICE ROBERTS,
Associate Justice of the Supreme Court
of the United States, Washington, D. C.

APPOINTMENT OF MR. JUSTICE BURTON.

SUPREME COURT OF THE UNITED STATES.

MONDAY, OCTOBER 1, 1945.

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

The CHIEF JUSTICE said:

The President, with the advice and consent of the Senate, has appointed the Honorable Harold H. Burton, Senator from Ohio, an Associate Justice of this Court to succeed Justice Roberts. Justice Burton has taken the Constitutional Oath administered by the Chief Justice. He is now present in Court. The Clerk will read his commission. He will then take the Judicial Oath, to be administered by the Clerk, after which the Marshal will escort him to his seat on the Bench.

The Clerk then read the commission as follows:

HARRY S. TRUMAN

PRESIDENT OF THE UNITED STATES OF AMERICA

To All Who Shall See These Presents, Greeting:

KNOW YE: That reposing special trust and confidence in the wisdom, uprightness, and learning of Harold H. Burton, of Ohio, I have nominated, and, by and with the advice and consent of the Senate, do appoint him an Associate Justice of the Supreme Court of the United

States and do authorize and empower him to execute and fulfill the duties of that office according to the Constitution and laws of the said United States, and to have and to hold the said office, with all the powers, privileges, and emoluments to the same of right appertaining, unto him, the said Harold H. Burton, during his good behavior.

IN TESTIMONY WHEREOF, I have caused these letters to be made patent and the seal of the Department of Justice to be hereunto affixed.

Done at the city of Washington this twenty-second day of September in the year of our Lord one thousand nine hundred and forty-five, and of the Independence of the United States of America the one hundred and seventieth.

HARRY S. TRUMAN.

By the President:

TOM C. CLARK,

Attorney General.

The oath of office was then administered by the Clerk, and MR. JUSTICE BURTON was escorted by the Marshal to his seat upon the Bench.

RETIREMENT OF REPORTER AND APPOINTMENT OF SUCCESSOR.

SUPREME COURT OF THE UNITED STATES.

MONDAY, FEBRUARY 25, 1946.

Present: The CHIEF JUSTICE, MR. JUSTICE BLACK, MR. JUSTICE REED, MR. JUSTICE FRANKFURTER, MR. JUSTICE DOUGLAS, MR. JUSTICE RUTLEDGE, and MR. JUSTICE BURTON.

The CHIEF JUSTICE said:

Ernest Knaebel, who was appointed Reporter of this Court on October 10, 1916, served in that capacity until his retirement from active duty on January 31, 1944, a period of more than twenty-seven years, represented by eighty volumes of the United States Reports extending from Volume 242 to Volume 321, inclusive.

The Court records its appreciation of his diligence and valued labors as Reporter during his term of office.

We express sincere regret at the severance of a relationship which has been uniformly friendly and agreeable, and we wish for him in his retirement many years of well-earned repose.

The following is the text of Mr. Knaebel's letter regarding his retirement:

Washington, D. C., December 13, 1943.

Honorable HARLAN F. STONE,
Chief Justice of the United States.

DEAR MR. CHIEF JUSTICE:

Because of the wretched state of my health, which we have already considered, I deem it best that I retire

promptly from the office of Reporter. This I would do out of regard for the work that has been in my charge, as well as for my own security. I could wish to take the step on the 31st inst., unless you feel that, because of some matter wherein I might be of further use to the Court, postponement to a somewhat later day would be advisable.

During my long tenure—over twenty-seven years—commencing with the October Term of 1916, I served under four Chief Justices and twenty-one Associate Justices. And, earlier, when in the course of my duties as Assistant Attorney General, I was called upon to address the Court quite frequently in cases affecting interests of the United States, I happily came to know still another Chief Justice and four of his Associates, who, like him, were gone from the Bench when my career as Reporter was conceived. So, as advocate or editor, I have labored in positions of usefulness and honor, under the eyes of five of the Chief Justices and twenty-five of the Associate Justices of this unique and very potent tribunal.

And now, as I look back over the long years and pen this valedictory, I declare myself to have been most fortunate, that I enjoyed so many opportunities for worthy and congenial occupation, and so many valued contacts with so many very able and very kindly superiors. For this I give thanks to you and your Associates; to the Justices who are living in retirement; and to the memories of that larger number who, alas, have passed from sight but whose good works will live on in the pages of my Reports.

With high regard,

Very respectfully,

ERNEST KNAEBEL,
Reporter of Decisions.

To which the Justices replied:

Washington, D. C., December 21, 1943.

ERNEST KNAEBEL, Esq.,
Reporter, Supreme Court, Washington, D. C.

DEAR MR. KNAEBEL:

Since the beginning of the October Term, 1916, you have served the Court as its Reporter. Now as you inform us that, after twenty-seven years of service, you feel compelled to lay down your labors, we contemplate your retirement with regret, and with a sense of personal loss that so agreeable an association must come to an end.

In accepting your resignation we wish you to know that we hold in grateful esteem the diligent, loyal and capable performance of your duties through these many years. In that you have perpetuated a long and honorable tradition of the Court, and you will stand as an example to those who will follow you in the years to come.

We unite in expressing to you sentiments of personal regard, and the wish for you and for Mrs. Knaebel of many years enjoyment of the durable satisfactions which come from leisure well earned and well spent.

Yours sincerely,

HARLAN F. STONE.
OWEN J. ROBERTS.
HUGO L. BLACK.
STANLEY F. REED.
FELIX FRANKFURTER.
W. O. DOUGLAS.
FRANK MURPHY.
ROBERT H. JACKSON.
WILEY RUTLEDGE.

By an Order of the Court Mr. Knaebel's retirement became effective on January 31, 1944.

The decisions in Volumes 322 to 325, inclusive, and those of the October Term, 1944, published in this volume, pages 1 to 202, inclusive, were reported by Mr. Philip U. Gayaut, Assistant Reporter, assisted by Mr. Randolph S. Collins, Assistant Reporter.

On Monday, February 25, 1946, the Chief Justice also announced the following Order of the Court:

IT IS ORDERED that Mr. Walter Wyatt be, and he hereby is, appointed Reporter of this Court, effective March 1, 1946, in the place of Mr. Ernest Knaebel, resigned, and he is charged with the duty of reporting the decisions of the present term which have not been published prior to March 1, 1946.

The CHIEF JUSTICE administered the oaths of office to Mr. Wyatt in chambers on Friday, March 1, 1946.

The present Reporter is responsible for reporting all of the decisions of the October Term, 1945, since none of them had been published prior to March 1, 1946.

TABLE OF CASES REPORTED

673554°—46——2

673554°—46——3

TABLE OF CASES

Cited in Opinions

TABLE OF STATUTES

Cited in Opinions

(A) STATUTES OF THE UNITED STATES.

(B) STATUTES OF THE STATES AND TERRITORIES.

(C) TREATIES.

(D) Foreign Statutes.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1944.

ASSOCIATED PRESS ET AL. *v.* UNITED STATES.

NO. 57. APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.*

Argued December 5, 6, 1944.—Decided June 18, 1945.

By-laws of the Associated Press, a cooperative association engaged in gathering and distributing news in interstate and foreign commerce, prohibited service of AP news to non-members, prohibited members from furnishing spontaneous news to non-members, and empowered members to block membership applications of competitors. A contract between AP and a Canadian press association obligated both to furnish news exclusively to each other. Charging *inter alia* that the by-laws and the contract violated the Sherman Antitrust Act, the Government sought an injunction against AP and member publishers. Upon the Government's motion, the District Court rendered summary judgment. *Held:*

1. The by-laws and the contract, together with the admitted facts, justified summary judgment. Rule 56 of the Rules of Civil Procedure. P. 5.

2. Publishers charged with violating the Sherman Act are subject, no less than others, to the summary judgment procedure. P. 7.

3. The by-laws on their face constitute restraints of trade and violate the Sherman Act. P. 12.

(a) That AP had not achieved a complete monopoly is irrelevant. P. 12.

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*Together with No. 58, *Tribune Company et al.* v. *United States,* and No. 59, *United States* v. *Associated Press et al.,* also on appeals from the District Court of the United States for the Southern District of New York.

(b) Trade in news carried on among the States is interstate commerce. P. 14.

(c) The fact that AP's activities are cooperative does not render the Sherman Act inapplicable. P. 14.

(d) Although true in a general sense that an owner of property may dispose of it as he pleases, he can not go beyond the exercise of that right and, by contracts or combinations, express or implied, unduly hinder or obstruct the free flow of interstate commerce. P. 15.

(e) The fact that there are other news agencies which sell news, and that AP's reports are not "indispensable," can give AP's restrictive by-laws no exemption under the Sherman Act. P. 17.

(f) The result here does not involve an application of the "public utility" concept to the newspaper business. P. 19.

(g) Arrangements or combinations designed to stifle competition can not be immunized through a membership device which would accomplish that purpose. P. 19.

(h) Application of the Sherman Act to a combination of publishers to restrain trade in news does not abridge the freedom of the press guaranteed by the First Amendment. Pp. 19–20.

4. The decree of the District Court, interpreted as meaning that AP news is to be furnished to competitors of members without discrimination through by-laws controlling membership or otherwise, is not vague and indefinite and is approved. P. 21.

5. The District Court did not err in refusing to hold as a violation of the Sherman Act standing alone (1) the by-laws provision forbidding service of AP news to non-members, (2) the by-laws provision forbidding AP members from furnishing spontaneous news to non-members, or (3) the Canadian press contract; and the court was justified in enjoining their observance temporarily, pending AP's abandonment of the by-laws provision empowering members to block membership applications of competitors. P. 21.

6. The fashioning of a decree in an antitrust case, to prevent future violations and eradicate existing evils, rests largely in the discretion of the trial court. P. 22.

7. The case having been presented on the narrow issues arising out of undisputed facts, it can not be said that the District Court's decree should have been broader; and, if the decree in its present form should prove inadequate to prevent further discriminatory trade restraints against non-member newspapers, the District Court's retention of jurisdiction of the cause will enable it to take appropriate action. P. 22.

52 F. Supp. 362, affirmed.

APPEALS from a decree of a district court of three judges in a suit by the United States to enjoin alleged violations of the Sherman Act.

Mr. John T. Cahill, with whom *Messrs. Thurlow M. Gordon, Morris Hadley, Timothy N. Pfeiffer, Robert T. Neill, George Nebolsine, Jerrold G. Van Cise* and *John W. Nields* were on the brief, for the Associated Press et al., appellants in No. 57 and appellees in No. 59.

Mr. Howard Ellis, with whom *Messrs. Weymouth Kirkland, A. L. Hodson* and *Louis G. Caldwell* were on the brief, for the Tribune Company et al., appellants in No. 58.

Assistant Attorney General Berge and *Mr. Charles B. Rugg,* with whom *Solicitor General Fahy, Messrs. Charles H. Weston* and *Paul A. Freund* were on the brief, for the United States.

Briefs were filed by *Mr. Matthias Concannon* on behalf of Chicago Times, Inc., and by *Mr. Elisha Hanson* on behalf of the American Newspaper Publishers Association, as *amici curiae,* urging reversal of the decree of the District Court and dismissal of the complaint.

Messrs. Louis S. Weiss, Carl S. Stern and *Samuel J. Silverman* filed a brief on behalf of Field Enterprises, Inc., as *amicus curiae,* in support of the United States.

MR. JUSTICE BLACK delivered the opinion of the Court.*

The publishers of more than 1,200 newspapers are members of the Associated Press (AP), a cooperative

*In Number 59, all the sitting Justices concur. In Numbers 57 and 58, MR. JUSTICE REED, MR. JUSTICE DOUGLAS and MR. JUSTICE RUTLEDGE concur. MR. JUSTICE FRANKFURTER concurs in that part of the opinion which discusses the District Court's decree but concurs in the judgment of affirmance in a separate opinion.

association incorporated under the Membership Corporation Law of the State of New York. Its business is the collection, assembly and distribution of news. The news it distributes is originally obtained by direct employees of the Association, employees of the member newspapers, and the employees of foreign independent news agencies with which AP has contractual relations, such as the Canadian Press. Distribution of the news is made through interstate channels of communication to the various newspaper members of the Association, who pay for it under an assessment plan which contemplates no profit to AP.

The United States filed a bill in a Federal District Court for an injunction against AP and other defendants charging that they had violated the Sherman Anti-Trust Act, 26 Stat. 209, in that their acts and conduct constituted (1) a combination and conspiracy in restraint of trade and commerce in news among the states, and (2) an attempt to monopolize a part of that trade.

The heart of the government's charge was that appellants had by concerted action set up a system of By-Laws which prohibited all AP members from selling news to non-members, and which granted each member powers to block its non-member competitors from membership. These By-Laws, to which all AP members had assented, were, in the context of the admitted facts, charged to be in violation of the Sherman Act. A further charge related to a contract between AP and Canadian Press (a news agency of Canada, similar to AP), under which the Canadian agency and AP obligated themselves to furnish news exclusively to each other. The District Court, composed of three judges, held that the By-Laws unlawfully restricted admission to AP membership, and violated the Sherman Act insofar as the By-Laws' provisions clothed a member with powers to impose or dispense with conditions upon the admission of his business competitor.

Continued observance of these By-Laws was enjoined. The court further held that the Canadian contract was an integral part of the restrictive membership conditions, and enjoined its observance pending abandonment of the membership restrictions. The government's motion for summary judgment, under Rule 56 of the Rules of Civil Procedure,[1] was granted and its prayer for relief was granted in part and denied in part. 52 F. Supp. 362. Both sides have brought the case to us on direct appeal. 15 U. S. C., § 29; 28 U. S. C., § 345.

At this point, it seems advisable to pass upon the contention of the appellants that there were genuine disputes as to material facts and that the case therefore should have gone to trial. The only assignments of error made by the appellants in No. 57 (*Associated Press et al.* v. *United States*) relating to this question are that the court erred "In holding that there was no genuine issue between the parties as to any material fact" and "In not entering summary judgment against the plaintiff." This latter assignment is based on the premise that summary proceedings were properly utilized in the case. The appellants in No. 58 (*Tribune Company et al.* v. *United States*) have one assignment of error to the effect that "The defendants are entitled to a trial of genuine issues of fact unmentioned in the findings of the court but which if found for the defendants would render this holding unwarranted." None of the appellants has pointed to any

[1] Rule 56 provides, "A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the pleading in answer thereto has been served, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

disputed facts essential to a determination of the validity or invalidity of the By-Laws and the contract. Admitting the existence of both the By-Laws and the contract, their answers and their affidavits in the summary proceedings defended the legality of the restrictive arrangements, but did not in any instance deny that non-members of AP were denied access to news of AP and of all of its member publishers by reason of the concerted arrangements between the appellants. Nor was it denied that the By-Laws granted AP members powers to impose restrictive conditions upon admission to membership of non-member competitors. The court below in making findings and entering judgment carefully abstained from the consideration of any evidence which might possibly be in dispute. We agree that Rule 56 should be cautiously invoked to the end that parties may always be afforded a trial where there is a bona fide dispute of facts between them. *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U. S. 620. There was no injury to any of the appellants as a result of the summary proceedings since, for reasons to be indicated, the restrictive arrangements, which appellants admitted, were sufficient to justify summary action by the court at that stage of the case. In reaching our conclusion on the summary judgment question, we are not unmindful of the argument that newspaper publishers charged with combining cooperatively to violate the Sherman Act are entitled to have a different and more favorable kind of trial procedure than all other persons covered by the Act. No language in the Sherman Act or the summary judgment statute lends support to the suggestion. There is no single element in our traditional insistence upon an equally fair trial for every person from which any such discriminatory trial practice could stem. For equal—not unequal—justice under law is the goal of our society. Our legal system has not established different measures of proof for the trial of cases in which equally intelligent and respon-

sible defendants are charged with violating the same statutes. Member publishers of AP are engaged in business for profit exactly as are other business men who sell food, steel, aluminum, or anything else people need or want. See *International News Service* v. *Associated Press,* 248 U. S. 215, 229, 230. All are alike covered by the Sherman Act. The fact that the publisher handles news while others handle food does not, as we shall later point out, afford the publisher a peculiar constitutional sanctuary in which he can with impunity violate laws regulating his business practices.

Nor is a publisher who engages in business practices made unlawful by the Sherman Act entitled to a partial immunity by reason of the "clear and present danger" doctrine which courts have used to protect freedom to speak, to print, and to worship. That doctrine, as related to this case, provides protection for utterances themselves, so that the printed or spoken word may not be the subject of previous restraint or punishment, unless their expression creates a clear and present danger of bringing about a substantial evil which the government has power to prohibit. *Bridges* v. *California,* 314 U. S. 252, 261. Formulated as it was to protect liberty of thought and of expression, it would degrade the clear and present danger doctrine to fashion from it a shield for business publishers who engage in business practices condemned by the Sherman Act. Consequently, we hold that publishers, like all others charged with violating the Sherman Act, are subject to the provisions of the summary judgment statute. And that means that such judgments shall not be rendered against publishers or others where there are genuine disputes of fact on material issues. Accordingly, we treat the cause as did the court below, and will consider the validity of the By-Laws and the contract exclusively on the basis of their terms and the background of facts which the appellants admitted.

To put the issue into proper focus, it becomes necessary at this juncture to examine the By-Laws.

All members must consent to be bound by them. They impose upon members certain duties and restrictions in the conduct of their separate businesses. For a violation of the By-Laws severe disciplinary action may be taken by the Association. The Board of Directors may impose a fine of $1,000.00 or suspend a member and such "action . . . shall be final and conclusive. No member shall have any right to question the same." [2] The offending member may also be expelled by the members of the corporation for any reason "which in its absolute discretion it shall deem of such a character as to be prejudicial to the interests and welfare of the corporation and its members, or to justify such expulsion. The action of the regular members of the corporation in such regard shall be final and there shall be no right of appeal against or review of such action."

These By-Laws, for a violation of which members may be thus fined, suspended, or expelled, require that each

[2] The Directors who have this power to punish are elected by the members but each member does not have equal voting privileges in the election. The By-Laws grant one additional vote for each $25.00 of AP bonds held by a member. This means that in the election of Directors the owner of a $1,000.00 bond can cast 40 more votes than a member who owns no bonds. All members, however, do not and cannot under restrictive provisions of the By-Laws own an equal amount of bonds. In 1942, 99 out of 1,247 members owned blocks of bonds of the face value of $1,000.00 or more, totaling more than 50% of the outstanding bonds. The court below found on the undisputed evidence that the bondholder vote rather than the membership vote controls the selection of AP Directors. The Directors have power to apportion among the members the expenses of collecting and distributing news, and to levy assessments upon the members. As to this apportionment and levy the By-Laws provide that "There shall be no right to question the action of the Board of Directors in respect to such apportionment or assessments, either by appeal to a meeting of members, or otherwise, but the action of the Directors, when taken, shall be final and conclusive."

newspaper member publish the AP news regularly in whole or in part, and that each shall "promptly furnish to the corporation, through its agents or employees, all the news of such member's district, the area of which shall be determined by the Board of Directors." [3] All members are prohibited from selling or furnishing their spontaneous news to any agency or publisher except to AP. Other By-Laws require each newspaper member to conduct his or its business in such manner that the news furnished by the corporation shall not be made available to any non-member in advance of publication. The joint effect of these By-Laws is to block all newspaper non-members from any opportunity to buy news from AP or any of its publisher members. Admission to membership in AP thereby becomes a prerequisite to obtaining AP news or buying news from any one of its more than twelve hundred publishers. The erection of obstacles to the acquisition of membership consequently can make it difficult, if not impossible, for non-members to get any of the news furnished by AP or any of the individual members of this combination of American newspaper publishers.[4]

The By-Laws provide a very simple and non-burdensome road for admission of a non-competing applicant. The Board of Directors in such case can elect the applicant without payment of money or the imposition of any other onerous terms. In striking contrast are the By-Laws

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[3] Another By-Law provides that "The news which a member shall furnish as herein required shall be all such news as is spontaneous in its origin, but shall not include any news that is not spontaneous in its origin, or which has originated through deliberate and individual enterprise on the part of such member of the newspaper specified in such member's certificate of membership."

[4] The court found that out of the 1,803 daily English language newspapers published in the United States, with a total circulation of 42,080,391, 1,179 of them, with a circulation of 34,762,120, were under joint contractual obligations not to supply either AP or their own "spontaneous" news to any non-member of AP.

which govern admission of new members who do compete. Historically, as well as presently, applicants who would offer competition to old members have a hard road to travel. This appears from the following facts found by the District Court.

AP originally functioned as an Illinois corporation, and at that time an existing member of the Association had an absolute veto power over the applications of a publisher who was or would be in competition with the old member. The Supreme Court of Illinois held that AP, thus operated, was in restraint of trade. *Inter-Ocean Publishing Co.* v. *Associated Press,* 184 Ill. 438, 56 N. E. 822. As a result of this decision, the present Association was organized in New York. Under the new By-Laws, the unqualified veto power of the Illinois AP members was changed into a "right of protest" which, when exercised, prevented the AP directors from electing the applicants as in other cases. The old member's protest against his competitor's application could then be overruled only by the affirmative vote of four-fifths of all the members of AP.

In 1931, the By-Laws were amended so as to extend the right of protest to all who had been members for more than 5 years and upon whom no right of protest had been conferred by the 1900 By-Laws. In 1942, after complaints to the Department of Justice had brought about an investigation, the By-Laws were again amended. These By-Laws, presently involved, leave the Board of Directors free to elect new members unless the applicant would compete with old members, and in that event the Board cannot act at all in the absence of consent by the applicant's member competitor. Should the old member object to admission of his competitor, the application must be referred to a regular or special meeting of the Association. As a prerequisite to election, he must (a) pay to the Association 10% of the total amount of the regular assessments received by it from old members in the same

competitive field during the entire period from October 1, 1900 to the first day of the month preceding the date of the election of the applicant,[5] (b) relinquish any exclusive rights the applicant may have to any news or news picture services and, when requested to do so by his member competitor in that field, must "require the said news or news picture services, or any of them, to be furnished to such member or members, upon the same terms as they are made available to the applicant," and (c) receive a majority vote of the regular members who vote in person or by proxy. These obstacles to membership, and to the purchase of AP news, only existed where there was a competing old member in the same field.

The District Court found that the By-Laws in and of themselves were contracts in restraint of commerce[6] in that they contained provisions designed to stifle competition in the newspaper publishing field.[7] The court also

[5] Under these terms, a new applicant could not have entered the morning field in New York without paying $1,432,142.73, and in Chicago, $416,631.90. For entering the evening field in the same cities it would have cost $1,095,003.21, and $595,772.31, respectively.

[6] "The by-laws of AP are in effect agreements between the members: that one which restricts AP to the transmission of news to members, and that which restricts any member to transmitting 'spontaneous' news to the association, are both contracts in restraint of commerce. They restrict commerce because they limit the members' freedom to relay any news to others, either the news they learn themselves, or that which they learn collectively through AP as their agent." *United States* v. *Associated Press*, 52 F. Supp. 362, 368.

[7] The District Court found that, among all the news-gathering agencies in the United States, AP ranked "in the forefront in public reputation and esteem" and that it was "the chief single source of news for the American press, universally agreed to be of great consequence"; that the combination of AP owners acted together for the purpose of using the news-gathering facilities of the individual publishers and of the combination, which news was made available to members and denied to others; and that the restrictive By-Laws had been observed, carried out, and applied in practice. The court declared that the conditions which old members could impose upon

found that AP's restrictive By-Laws had hindered and impeded the growth of competing newspapers.[8] This latter finding, as to the *past* effect of the restrictions, is challenged. We are inclined to think that it is supported by undisputed evidence, but we do not stop to labor the point. For the court below found, and we think correctly, that the By-Laws on their face, and without regard to their past effect, constitute restraints of trade. Combinations are no less unlawful because they have not as yet resulted in restraint. An agreement or combination to follow a course of conduct which will necessarily restrain or monopolize a part of trade or commerce may violate the Sherman Act, whether it be "wholly nascent or abortive on the one hand, or successful on the other."[9] For

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new applicants for membership were "plainly designed in the interest of preventing competition," and that the requirement of payments from new members to competing old members "were designed to compensate competitors for the loss in value of their membership, arising out of the applicant's improved position as a competitor." The court pointed out that these restrictive provisions would "act as a deterrent," and might "prove a complete bar to the admission of any applicant."

[8] That finding is as follows: "The growth of news agencies has been fostered to some extent as a result of the restrictions of The Associated Press' services to its own members, but other restrictions imposed by The Associated Press have hampered and impeded the growth of competing news agencies and of newspapers competitive with members of The Associated Press."

The court's opinion, and its findings as a whole, show that the "other restrictions" found to have hampered competition were those relating to admissions to membership in AP and to restraints upon a member's freedom to sell his news.

[9] *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 225. See also *United States* v. *Trenton Potteries Co.*, 273 U. S. 392, 402; *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U. S. 457, 466; *United States* v. *Patten*, 226 U. S. 525, 543; *Paramount Famous Corp.* v. *United States*, 282 U. S. 30, 41; *Standard Oil Co.* v. *United States*, 221 U. S. 1, 65–66.

these reasons the argument, repeated here in various forms, that AP had not yet achieved a complete monopoly is wholly irrelevant. Undisputed evidence did show, however, that its By-Laws had tied the hands of all of its numerous publishers, to the extent that they could not and did not sell any part of their news so that it could reach any of their non-member competitors. In this respect the court did find, and that finding cannot possibly be challenged, that AP's By-Laws had hindered and restrained the sale of interstate news to non-members who competed with members.

Inability to buy news from the largest news agency, or any one of its multitude of members, can have most serious effects on the publication of competitive newspapers, both those presently published and those which, but for these restrictions, might be published in the future.[10] This is illustrated by the District Court's finding that, in 26 cities of the United States, existing newspapers already have contracts for AP news and the same newspapers have contracts with United Press and International News Service under which new newspapers would be required to pay the contract holders large sums to enter the field.[11] The net effect is seriously to limit the opportunity of any new paper to enter these cities. Trade restraints of this character, aimed at the destruction of competition, tend to block the initiative which brings newcomers into a field

[10] The District Court found as a fact that "It is practically impossible for any one newspaper alone to establish or maintain the organization requisite for collecting all of the news of the world, or any substantial part thereof; aside from the administrative and organization difficulties thereof, the financial cost is so great that no single newspaper acting alone could sustain it."

[11] INS and UP make so-called "asset value" contracts under which if another newspaper wishes to obtain their press services, the newcomer shall pay to the competitor holding the UP or INS contract the stipulated "asset value."

of business and to frustrate the free enterprise system which it was the purpose of the Sherman Act to protect.[12]

We need not again pass upon the contention that trade in news carried on among the states is not interstate commerce, *Associated Press* v. *Labor Board,* 301 U. S. 103, or that because AP's activities are cooperative, they fall outside the sphere of business, *American Medical Assn.* v. *United States,* 317 U. S. 519, 528. It is significant that when Congress has desired to permit cooperatives to interfere with the competitive system of business, it has done so expressly by legislation.[13]

Nor can we treat this case as though it merely involved a reporter's contract to deliver his news reports exclusively to a single newspaper, or an exclusive agreement as to news between two newspapers in different cities. For such trade restraints might well be "reasonable," and therefore not in violation of the Sherman Act. *Standard Oil Co.* v. *United States,* 221 U. S. 1. But however innocent such agreements might be, standing alone, they would assume quite a different aspect if utilized as essential features of a program to hamper or destroy competition. It is in this light that we must view this case.

It has been argued that the restrictive By-Laws should be treated as beyond the prohibitions of the Sherman Act, since the owner of the property can choose his associates and can, as to that which he has produced by his own enterprise and sagacity, efforts or ingenuity, decide for

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[12] *Paramount Famous Corp.* v. *United States, supra,* 42, quoted *United States* v. *Colgate & Co.,* 250 U. S. 300, 307, to the following effect: " 'The purpose of the Sherman Act is to prohibit monopolies, contracts and combinations which probably would unduly interfere with the free exercise of their rights by those engaged, or who wish to engage, in trade and commerce—in a word to preserve the right of freedom to trade.' "

[13] See e. g., 7 U. S. C. 291, 292, as to farm cooperatives; 15 U. S. C. 17, as to labor organizations. But see also as to the latter, *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, 487–498.

himself whether and to whom to sell or not to sell. While it is true in a very general sense that one can dispose of his property as he pleases, he cannot "go beyond the exercise of this right, and by contracts or combinations, express or implied, unduly hinder or obstruct the free and natural flow of commerce in the channels of interstate trade." *United States* v. *Bausch & Lomb Co.*, 321 U. S. 707, 722. The Sherman Act was specifically intended to prohibit independent businesses from becoming "associates" in a common plan which is bound to reduce their competitor's opportunity to buy or sell the things in which the groups compete. Victory of a member of such a combination over its business rivals achieved by such collective means cannot consistently with the Sherman Act or with practical, everyday knowledge be attributed to *individual* "enterprise and sagacity"; such hampering of business rivals can only be attributed to that which really makes it possible—the collective power of an unlawful combination. That the object of sale is the creation or product of a man's ingenuity does not alter this principle. *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U. S. 457.[14] It is obviously fallacious to view the By-

[14] It is argued that the decision in *Board of Trade* v. *Christie Grain & Stock Co.*, 198 U. S. 236, requires a holding that these arrangements are consistent with the Sherman Act. In that case, the Board of Trade gathered "quotations" of the prices on sales of grain for future delivery and sold the "information" under agreements forbidding the purchasers to reveal it. The Board of Trade filed suit to prevent its purchasers from breaking this agreement by transmitting the statistics to a "bucket shop or place where they are used as a basis for bets or illegal contracts," p. 246. It was said in the opinion that the statistics were in the nature of a "trade secret." The opinion stated that the Board's collection of statistical information was entitled to the protection of the laws; that it had a right to keep it to itself, and that it did not "lose its rights by communicating the result to persons, even if many, in confidential relations to itself, under a contract not to make it public, and strangers to the trust will be restrained from getting at the knowledge by inducing a breach of

Laws here in issue as instituting a program to encourage and permit full freedom of sale and disposal of property by its owners. Rather, these publishers have, by concerted arrangements, pooled their power to acquire, to purchase, and to dispose of news reports through the channels of commerce. They have also pooled their economic and news control power and, in exerting that power, have entered into agreements which the District Court found to be "plainly designed in the interest of preventing competition." [15]

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trust and using knowledge obtained by such a breach." Of course, one who has created or acquired something of value has a general right to use it according to the dictates of his own discretion, but this right of ownership is measured by the limitations of law, and the Sherman Act which obviously restricts the free and untrammeled use of property, in the public interest, is a clear and pointed instance of the non-absolute character of property rights. An argument to the contrary was expressly rejected in *Fashion Originators' Guild* v. *Federal Trade Commission, supra,* 467, 468.

Furthermore, the contracts involved in the *Christie* case were "not relied on as a cause of action." This Court found that those contracts did not show a purpose to deny sale of the statistics to non-members of the Board of Trade. Whether such a contractual restriction would have violated the Sherman Act, the Court refused to decide. In the instant case, as we have pointed out, both the individual publishers and AP have bound themselves to furnish their news to each other and to deny it to all others. Two later cases repeated the statement as to the right of one who gathered statistics to sell them on conditions. Neither of them, however, decided that such restrictive arrangements as appear in the instant case would not constitute unreasonable restraints of trade. *Moore* v. *N. Y. Cotton Exchange,* 270 U. S. 593; *Hunt* v. *N. Y. Cotton Exchange,* 205 U. S. 322.

[15] Even if additional purposes were involved, it would not justify the combination, since the Sherman Act cannot "be evaded by good motives. The law is its own measure of right and wrong, of what it permits, or forbids, and the judgment of the courts cannot be set up against it in a supposed accommodation of its policy with the good intention of parties, and it may be, of some good results." *Standard Sanitary Mfg. Co.* v. *United States,* 226 U. S. 20, 49.

It is further contended that since there are other news agencies which sell news, it is not a violation of the Act for an overwhelming majority of American publishers to combine to decline to sell their news to the minority. But the fact that an agreement to restrain trade does not inhibit competition in all of the objects of that trade cannot save it from the condemnation of the Sherman Act.[16] It is apparent that the exclusive right to publish news in a given field, furnished by AP and all of its members, gives many newspapers a competitive advantage over their rivals.[17] Conversely, a newspaper without AP service is

[16] *United States* v. *Socony-Vacuum Oil Co., supra,* 221, 224.

This Court said in *Paramount Famous Corp.* v. *United States, supra,* 44, "In order to establish violation of the Sherman Act it is not necessary to show that the challenged arrangement suppresses all competition between the parties or that the parties themselves are discontented with the arrangement. The interest of the public in the preservation of competition is the primary consideration." Again, in *Fashion Originators' Guild* v. *Federal Trade Commission, supra,* 466, we said, "Nor is it determinative in considering the policy of the Sherman Act that petitioners may not yet have achieved a complete monopoly. For 'it is sufficient if it really tends to that end and to deprive the public of the advantages which flow from free competition.' *United States* v. *E. C. Knight Co.,* 156 U. S. 1, 16; *Addyston Pipe & Steel Co.* v. *United States,* 175 U. S. 211, 237." See also *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, 485.

[17] The District Court pointed out that, "monopoly is a relative word. If one means by it the possession of something absolutely necessary to the conduct of an activity, there are few except the exclusive possession of some natural resource without which the activity is impossible. Most monopolies, like most patents, give control over only some means of production for which there is a substitute; the possessor enjoys an advantage over his competitors, but he can seldom shut them out altogether; his monopoly is measured by the handicap he can impose. . . . And yet that advantage alone may make a monopoly unlawful. It would be possible, for instance, to conduct some kind of a newspaper without any news service whatever; but nobody will maintain that, if AP were the only news service in existence, the members could keep it wholly to themselves and reduce all other papers to such news as they could gather by their own efforts." *United States* v. *Associated Press,* 52 F. Supp. 362, 371.

more than likely to be at a competitive disadvantage. The District Court stated that it was to secure this advantage over rivals that the By-Laws existed. It is true that the record shows that some competing papers have gotten along without AP news, but morning newspapers, which control 96% of the total circulation in the United States, have AP news service. And the District Court's unchallenged finding was that "AP is a vast, intricately reticulated organization, the largest of its kind, gathering news from all over the world, the chief single source of news for the American press, universally agreed to be of great consequence."

Nevertheless, we are asked to reverse these judgments on the ground that the evidence failed to show that AP reports, which might be attributable to their own "enterprise and sagacity," are clothed "in the robes of indispensability." The absence of "indispensability" is said to have been established under the following chain of reasoning: AP has made its news generally available to the people by supplying it to a limited and select group of publishers in the various cities; therefore, it is said, AP and its member publishers have not deprived the reading public of AP news; all local readers have an "adequate access" to AP news, since all they need do in any city to get it is to buy, on whatever terms they can in a protected market, the particular newspaper selected for the public by AP and its members. We reject these contentions. The proposed "indispensability" test would fly in the face of the language of the Sherman Act and all of our previous interpretations of it. Moreover, it would make that law a dead letter in all fields of business, a law which Congress has consistently maintained to be an essential safeguard to the kind of private competitive business economy this country has sought to maintain.

The restraints on trade in news here were no less than those held to fall within the ban of the Sherman Act with

reference to combinations to restrain trade outlets in the sale of tiles, *Montague & Co.* v. *Lowry,* 193 U. S. 38; or enameled ironware, *Standard Sanitary Mfg. Co.* v. *United States,* 226 U. S. 20, 48–49; or lumber, *Eastern States Lumber Dealers' Assn.* v. *United States,* 234 U. S. 600, 611; or women's clothes, *Fashion Originators' Guild* v. *Federal Trade Commission, supra;* or motion pictures, *United States* v. *Crescent Amusement Co.,* 323 U. S. 173. Here as in the *Fashion Originators' Guild* case, *supra,* 465, "the combination is in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce, and provides extra-judicial tribunals for determination and punishment of violations, and thus 'trenches upon the power of the national legislature and violates the statute.' *Addyston Pipe & Steel Co.* v. *United States,* 175 U. S. 211, 242." By the restrictive By-Laws each of the publishers in the combination has, in effect, "surrendered himself completely to the control of the association," *Anderson* v. *Shipowners Assn.,* 272 U. S. 359, 362, in respect to the disposition of news in interstate commerce. Therefore this contractual restraint of interstate trade, "designed in the interest of preventing competition," cannot be one of the "normal and usual agreements in aid of trade and commerce which may be found not to be within the [Sherman] Act . . ." *Eastern States Lumber Dealers' Assn.* v. *United States, supra,* 612, 613. It is further said that we reach our conclusion by application of the "public utility" concept to the newspaper business. This is not correct. We merely hold that arrangements or combinations designed to stifle competition cannot be immunized by adopting a membership device accomplishing that purpose.

Finally, the argument is made that to apply the Sherman Act to this association of publishers constitutes an abridgment of the freedom of the press guaranteed by the First Amendment. Perhaps it would be a sufficient answer to

this contention to refer to the decisions of this Court in *Associated Press* v. *Labor Board, supra,* and *Indiana Farmer's Guide Co.* v. *Prairie Farmer Co.,* 293 U. S. 268. It would be strange indeed, however, if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.[18] The First Amendment affords not the slightest support for the contention that a combination to restrain trade in news and views has any constitutional immunity.

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[18] It is argued that the decree interferes with freedom "to print as and how one's reason or one's interest dictates." The decree does not compel AP or its members to permit publication of anything which their "reason" tells them should not be published. It only provides that after their "reason" has permitted publication of news, they shall not, for their own financial advantage, unlawfully combine to limit its publication. The only compulsion to print which appears in the record is found in the By-Laws, previously set out, which compel members of the Association to print some AP news or subject themselves to fine or expulsion from membership in the Association.

We now turn to the decree. Having adjudged the By-Laws imposing restrictions on applications for membership to be illegal, the court enjoined the defendants from observing them, or agreeing to observe any new or amended By-Law having a like purpose or effect. It further provided that nothing in the decree should prevent the adoption by the Associated Press of new or amended By-Laws "which will restrict admission, provided that members in the same city and in the same 'field' (morning, evening or Sunday), as an applicant publishing a newspaper in the United States of America or its Territories, shall not have power to impose, or dispense with, any conditions upon his admission and that the By-Laws shall affirmatively declare that the effect of admission upon the ability of such applicant to compete with members in the same city and 'field' shall not be taken into consideration in passing upon his application." Some of appellants argue that this decree is vague and indefinite. They argue that it will be impossible for the Association to know whether or not its members took into consideration the competitive situation in passing upon applications for membership. We cannot agree that the decree is ambiguous. We assume, with the court below, that AP will faithfully carry out its purpose. Interpreting the decree to mean that AP news is to be furnished to competitors of old members without discrimination through By-Laws controlling membership, or otherwise, we approve it.

The court also held that, taken in connection with the restrictive clauses on admissions to membership, those sections of the By-Laws violated the Sherman Act which prevented service of AP news to non-members and prevented AP members from furnishing spontaneous news to anyone not a member of the Association. It held the agreement between AP and the Canadian Press, under which AP secured exclusive right to receive the news re-

ports of the Canadian Press and its members, was also, when taken in connection with the restrictive membership agreements, in violation of the Sherman Act. It declined to hold these By-Laws and the agreement with Canadian Press illegal standing by themselves. It consequently enjoined their observance temporarily, pending AP's obedience to the decree enjoining the restrictive membership agreements. The court's findings justified this phase of its injunction. *United States* v. *Bausch & Lomb Co., supra,* 724.

The government has appealed from the court's refusal to hold each of these last-mentioned items a violation of the Sherman Act standing alone. The government also asks that the decree of the District Court be broadened, so as permanently to enjoin observance of the Canadian Press contract and all the challenged By-Laws. It also suggests certain specific terms which should be added to the decree to assure the complete eradication of AP's discrimination against competitors of its members.

The fashioning of a decree in an antitrust case in such way as to prevent future violations and eradicate existing evils, is a matter which rests largely in the discretion of the court. *United States* v. *Crescent Amusement Co., supra.* A full exploration of facts is usually necessary in order properly to draw such a decree. In this case the government chose to present its case on the narrow issues which were within the realm of undisputed facts. In the situation thus narrowly presented we are unable to say that the court's decree should have gone further than it did. Furthermore, the District Court retained the cause for such further proceedings as might become necessary. If, as the government apprehends, the decree in its present form should not prove adequate to prevent further discriminatory trade restraints against non-member newspapers, the court's retention of the cause will enable it

to take the necessary measures to cause the decree to be fully and faithfully carried out.

The judgment in all three cases is

Affirmed.

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

MR. JUSTICE DOUGLAS, concurring.

I join in the opinion of the Court. But in view of the broader issues which have been injected into the discussion of the case, I add a few words to indicate what I deem to be the narrow compass of the decision.

Every exclusive arrangement in the business or commercial field may produce a restraint of trade. A manufacturer who has only one retail outlet for his product may be said to restrain trade in the sense that other retailers are prevented from dealing in the commodity. And to a degree, the same kind of restraint may be found wherever a reporter is gathering news exclusively for one newspaper. But *Standard Oil Co.* v. *United States*, 221 U. S. 1, construed the Sherman Act to include not every restraint but only those which were unreasonable. Starting from that premise, I assume that it would not be a violation of the Sherman Act if a newspaper in Seattle and one in New York made an agency agreement whereby each was to furnish exclusively to the other news reports from his locality.

But such an exclusive arrangement, though innocent standing alone, might be part of a scheme which would violate the Sherman Act in one of two respects.

(1) It might be a part of the machinery utilized to effect a restraint of trade in violation of § 1 of the Act. Cf. *United States* v. *Bausch & Lomb Co.*, 321 U. S. 707. I think the exclusive arrangement employed by the Associated Press had such a necessary effect. As developed in the opinion of the Court, the by-laws of the Associated

Press were aimed at the competitors of the Associated Press' members; their necessary effect was to hinder or impede competition with members of the combination. The District Court not only ordered the by-laws to be revised; it enjoined continuance of the exclusive arrangement until the restraint effected by the by-laws had been eliminated. That was plainly within its power. For it is well settled that a feature of an illegal restraint of trade, which is innocent by itself and which may be lawfully used if independently established, may be uprooted along with the other parts of an illegal arrangement. *Ethyl Gasoline Corp.* v. *United States,* 309 U. S. 436, 461; *United States* v. *Univis Lens Co.,* 316 U. S. 241, 254. We certainly cannot say that the District Court abused its discretion in adopting that course here as an interim measure pending a revision of the by-laws.

(2) Such an exclusive arrangement as we have here might result in the growth of a monopoly in the furnishing of news, in the access to news, or in the gathering or distribution of news. Those are business activities subject to the Sherman Act (*Indiana Farmer's Guide Co.* v. *Prairie Farmer Co.,* 293 U. S. 268) as well as other Acts of Congress regulating interstate commerce. *Associated Press* v. *Labor Board,* 301 U. S. 103. The District Court found that in its present stage of development the Associated Press had no monopoly of that character. Those findings are challenged here in the appeal taken by the United States. They are not reached in the present decision for the reason, discussed in the opinion of the Court, that they cannot be tried out on a motion for a summary judgment. The decree which we approve does not direct Associated Press to serve all applicants. It goes no further than to put a ban on Associated Press' practice of discriminating against competitors of its members in the same field or territory. That entails not only a discontinuance of the practice for the future but an undoing of the wrong which has been

done. If Associated Press, after the effects of that discrimination have been eliminated, freezes its membership at a given level, quite different problems would be presented. Whether that would result in a monopoly in violation of § 1 of the Act is distinct from the issue in this case.

Only if a monopoly were shown to exist would we be faced with the public utility theory which has been much discussed in connection with this case and adopted by MR. JUSTICE FRANKFURTER. The decrees under the Sherman Act directed at monopolies have customarily been designed to break them up or dissolve them. See *United States* v. *Crescent Amusement Co.*, 323 U. S. 173. There have been some exceptions. Thus in *United States* v. *Terminal Railroad Assn.*, 224 U. S. 383, an action was brought under the Sherman Act to dissolve a combination among certain railroads serving St. Louis. The combination had acquired control of all available facilities for connecting railroads on the east bank of the Mississippi with those on the west bank. The Court held that as an alternative to dissolution a plan should be submitted which provided for equality of treatment of all railroads. And see *United States* v. *Great Lakes Towing Co.*, 208 F. 733, 747, 217 F. 656, appeal dismissed, 245 U. S. 675. *United States* v. *New England Fish Exchange*, 258 F. 732. Whether that procedure would be appropriate in this type of case or should await further legislative action (cf. Mr. Justice Brandeis' dissenting opinion, *International News Service* v. *Associated Press*, 248 U. S. 215, 248, 262) is a considerable question, the discussion of which should not cloud the present decision. What we do today has no bearing whatsoever on it.

MR. JUSTICE FRANKFURTER, concurring.

The District Court properly applied the Sherman Law in enjoining the defendants from continuing to enforce

the existing by-laws restricting membership in the Associated Press, and further enjoining the enforcement of another restrictive by-law forbidding Associated Press members to communicate "spontaneous" news to nonmembers. I would sustain the judgment substantially for the reasons given below by Judge Learned Hand. 52 F. Supp. 362.

The Associated Press is in essence the common agent of about 1,300 newspapers in the various cities throughout the country for the interchange of news which each paper collects in its own territory, and for the gathering, editing, and distributing of news which these member papers cannot collect single-handed, and which requires their pooled resources. The historic development of this agency, its world-wide scope, the pervasive influence it exerts in obtaining and disseminating information, the country's dependence upon it for news of the world—all these are matters of common knowledge and have been abundantly spread upon the records of this Court. *International News Service* v. *Associated Press,* 248 U. S. 215; *Associated Press* v. *Labor Board,* 301 U. S. 103. See Desmond, The Press and World Affairs (1937) Chapters I, II, III.

The by-laws in controversy operate in substance as a network of agreements among the members of the Associated Press whereby they mobilize the interest of all against the danger of competition to each by a present or future rival—to the extent that inability to obtain an Associated Press "franchise" is a serious factor in the competition between papers in the same city. While a member newspaper no longer has an absolute veto power in the denial of facilities of the Associated Press service to a rival paper applying for membership, for practical purposes there remain effective barriers to admission to the Associated Press based solely on grounds of business competition. As Judge Learned Hand has pointed out, the abatement in the by-law from a former absolute veto to a

conditional veto against an applicant competing with an existing member "by no means opened membership to all those who would be entitled to it, if the public has an interest in its being free from exclusion for competitive reasons, and if that interest is paramount. Although, as we have said, only a few members will have any direct personal interest in keeping out an applicant, the rest will not feel free to judge him regardless of the effect of his admission on his competitors. Each will know that the time may come when he will himself be faced with the application of a competitor . . . A by-law which leaves it open to members to vote solely as their self-interest may dictate, disregards whatever public interest may exist." 52 F. Supp. 362, 370–371.

Indubitably, then, we have here arrangements whereby members of the Associated Press bind one another from selling local news to non-members and exercise power, which reciprocal self-interest invokes, to help one another in keeping out competitors from membership in the Associated Press, with all the advantages that it brings to a newspaper. Since the Associated Press is an enterprise engaged in interstate commerce, *Associated Press* v. *Labor Board, supra,* these plainly are agreements in restraint of that commerce. But ever since the Sherman Law was saved from stifling literalness by "the rule of reason," *Standard Oil Co.* v. *United States,* 221 U. S. 1; *United States* v. *American Tobacco Co.,* 221 U. S. 106; it is not sufficient to find a restraint. The decisive question is whether it is an unreasonable restraint. This depends, in essence, on the significance of the restraint in relation to a particular industry. Compare *Chicago Board of Trade* v. *United States,* 246 U. S. 231, 238.

To be sure, the Associated Press is a cooperative organization of members who are "engaged in a commercial business for profit." *Associated Press* v. *Labor Board, supra,* at 128. But in addition to being a commercial

enterprise, it has a relation to the public interest unlike that of any other enterprise pursued for profit. A free press is indispensable to the workings of our democratic society. The business of the press, and therefore the business of the Associated Press, is the promotion of truth regarding public matters by furnishing the basis for an understanding of them. Truth and understanding are not wares like peanuts or potatoes. And so, the incidence of restraints upon the promotion of truth through denial of access to the basis for understanding calls into play considerations very different from comparable restraints in a cooperative enterprise having merely a commercial aspect. I find myself entirely in agreement with Judge Learned Hand that "neither exclusively, nor even primarily, are the interests of the newspaper industry conclusive; for that industry serves one of the most vital of all general interests: the dissemination of news from as many different sources, and with as many different facets and colors as is possible. That interest is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment; it presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." 52 F. Supp. 362, 372.

From this point of view it is wholly irrelevant that the Associated Press itself has rival news agencies. As to ordinary commodities, agreements to curtail the supply and to fix prices are in violation of the area of free enterprise which the Sherman Law was designed to protect. The press in its commercial aspects is also subject to the regulation of the Sherman Law. *Indiana Farmer's Guide Co.* v. *Prairie Farmer Co.*, 293 U. S. 268. But the freedom of enterprise protected by the Sherman Law necessarily has different aspects in relation to the press than in the case of ordinary commercial pursuits. The interest of

the public is to have the flow of news not trammeled by the combined self-interest of those who enjoy a unique constitutional position precisely because of the public dependence on a free press. A public interest so essential to the vitality of our democratic government may be defeated by private restraints no less than by public censorship.

Equally irrelevant is the objection that it turns the Associated Press into a "public utility" to deny to a combination of newspapers the right to treat access to their pooled resources as though they were regulating membership in a social club. The relation of such restraints upon access to news and the relation of such access to the function of a free press in our democratic society must not be obscured by the specialized notions that have gathered around the legal concept of "public utility."

The short of the matter is that the by-laws which the District Court has struck down clearly restrict the commerce which is conducted by the Associated Press, and the restrictions are unreasonable because they offend the basic functions which a constitutionally guaranteed free press serves in our nation.

MR. JUSTICE ROBERTS.

I think the judgment should be reversed. In respect of most of the questions involved I might rest on the discussion by Judge Swan in his dissenting opinion in the District Court. The novelty and importance of the questions, and the summary disposition of them in the court's opinion, have, however, moved me to state my views in detail.

This case deals with "news." News is information about matters of general interest. The term has been defined as "a report of a recent event." The report may be made to one moved by curiosity or to one who wishes to make some

practical use of it. Newspapers obtain such reports and publish them as a part of a business conducted for profit. The proprietor of a newspaper, when he employs a person to inquire and report, engages personal service. I suppose no one would deny that he is entitled to the exclusive use of the report rendered as a result of the service for which he contracts and pays. I suppose that one rendering such service is free to contract with his employer that the product of his inquiries—the news he furnishes his employer—shall be used solely by the employer and not imparted to another.

As I have said, news is the result of effort in the investigation of recent events. Every newspaper is interested in procuring news of happenings in its vicinity, and maintains a staff for that purpose. Such news may have some value to newspapers published in cities outside the locality of the occurrence. I assume that if two publishers agreed that each should supply a transcript of all reports he received to the other, and conditioned their agreement that neither would abuse the privilege accorded, by giving away or selling what was furnished under the joint arrangement, there could be no objection under the Sherman Act. I had assumed, although the opinion appears to hold otherwise, that such an arrangement would not be obnoxious to the Sherman Act because many, rather than few, joined in it. I think that the situation would be no different if a machinery were created to facilitate the exchange of the news procured by each of the participants such as a partnership, an unincorporated association, or a non-profit corporation.

I assume it cannot be questioned that two or more persons desirous of obtaining news may agree to employ a single reporter, or a staff of reporters, to furnish them news, and agree amongst themselves that, as they share the expense involved, they themselves will use the fruit of

the service and will not give it away or sell it. Although the procedure has obvious advantages, and is in itself innocent, I do not know, from the opinion of the court, whether it would be held that the inevitable or necessary operation, or necessary consequence, of such an arrangement is to restrain competition in trade or commerce and that it is, consequently, illegal.[1] Many expressions in the opinion seem to recognize that all AP does is to keep for its members that which, at joint expense, its members and employees have produced,—its reports of world events. Thus it is said that nonmembers are denied access to AP news, not, be it observed, to news. Again it is said that the by-laws "block all newspaper nonmembers from any opportunity to buy news from AP or any of its publisher members"; again that "the erection of obstacles to the acquisition of membership . . . can make it difficult, if not impossible, for nonmembers to get any of the news furnished by AP . . ." If these expressions stood alone as the factual basis of decision we should know that the court is condemning a joint enterprise for the production of something—here, news copy—which those who produce it intend to use for their exclusive benefit. But it is impossible to deduce from the opinion that this is the ratio of decision.

I do not understand that the court's decision is pitched on the fact that AP is a membership corporation. The same result could be attained by resort to a multi-party contract, to a partnership, or to an unincorporated association. The choice of the form of the cooperative

[1] The argument drawn from the Congressional exemption of farmers' cooperatives from the sweep of the Sherman Act falls short, since such cooperatives often are not mere joint purchasing agencies of things needed and used by the members, but are marketing agencies which may be thought to restrain commerce and tend toward monopoly. It was to safeguard the latter sort of activity that the exemption was granted.

enterprise does not affect the nature of the problem presented.[2]

AP was created to accomplish on a mutual, nonprofit, basis the two objects mentioned. Its purpose is stated by its charter as "the collection and interchange, with greater economy and efficiency, of information and intelligence for publication in the newspapers" of its members. The organization started on a comparatively modest basis, to facilitate exchange of news reports amongst its members. It has grown into a cooperatively maintained news reporting agency having, in addition, its own reporters and agencies for the collection, arrangement, editing, and transmission to its members, of news, gathered by its employees, and those of others with whom it contracts.

The question is whether the Sherman Act precludes such a cooperative arrangement and renders those who participate liable to furnish news copy, on equal terms, to all newspapers which desire it, as the court below has held. If so, it must be because the joint arrangement constitutes a contract, combination or conspiracy in restraint of trade, or a monopolization, or an attempt or combination or conspiracy to monopolize part or all of some branch of interstate or international trade or commerce, or is a public utility subject to regulation. If AP's activities fall within the denunciation of the statute it must be because the members (1) have combined with the purpose to restrain trade by destroying competition; or (2), even though their intent was innocent, have set up a combination which either (a) tends unreasonably to restrain, or (b) has in fact resulted, in undue and unreasonable restraint of free competition in trade or commerce; or (3) intended and attempted to monopolize a part or all of a branch of trade;

[2] "A cooperative enterprise, otherwise free from objection, which carries with it no monopolistic menace, is not to be condemned as an undue restraint . . ." *Appalachian Coals* v. *United States,* 288 U. S. 344, 373–4.

or (4) have created an organization of such proportions that in fact it has such a monopoly; or (5) have created an agency which the Sherman Act renders a public utility subject to regulation notwithstanding the guarantees of the First Amendment of the Constitution.

I am unable to determine on which of such possible grounds the judgment of illegality is rested. The court's opinion blends and mingles statements of fact, inferences and conclusions, and quotations from prior opinions wrested from their setting and context, in such fashion that I find it impossible to deduce more than that orderly analysis and discussion of facts relevant to any one of the possible methods of violation of the Sherman Act is avoided, in the view that separate consideration would disclose a lack of support for any finding of specific wrongdoing. But the general principle that nothing added to nothing will not add up to something holds true in this case. It is a tedious task to separate the generalities thus mingled in the opinion, but I can only essay it by discussing one aspect of the case at a time.

In limine, it should be remembered that newspaper proprietors who are members of AP are not, as publishers, in the trade of buying or selling news. Their business is the publishing of newspapers. In this business they print *inter alia* news, editorial comment, special articles, photographs, and advertisements. It has been held that a joint effort to obtain advertising to be published in all the papers parties to the arrangement, at special rates, is not a violation of the Sherman Act.[3] It has been repeatedly held by this court that the collection of information on behalf of the membership of an unincorporated association, and the furnishing of that information for pay to such persons as the association decides shall share it, is not a violation of

[3] *Prairie Farmer Co.* v. *Indiana Farmer's Guide Co.,* 88 F. 2d 979, cert. denied 301 U. S. 696; rehearing denied 302 U. S. 773.

the Sherman Act.[4] I think this is not because the exclusive right to use information or news copy obtained differs somewhat from property rights in tiles or lumber or pipe or women's fashions or motion-picture film. I think it is because information gathered as the result of effort, or of compensation paid the gatherer, is protected as is property, until published; and that unauthorized publication by another is a wrong redressible in the same way as unauthorized interference with one's rights in tangible property. In the very case of AP, this court has so held,[5] as has the Attorney General of the United States.[6] As the Attorney General has pointed out, this proposition is subject to the qualification that there must be no purpose to destroy competition or to monopolize, but with these matters I shall deal hereafter.

First. Are the members of AP acting together with the *purpose* of destroying competition? I have not discovered any allegation in the complaint to that effect. The court below has not made any such finding. They deny any such purpose or intent and yet, as I read passages in the court's opinion, it is now found, on this summary judgment record, without a trial, that they are, and have been, actuated by such an intent. The opinion states: "An

[4] *Board of Trade* v. *Christie Grain & Stock Co.*, 198 U. S. 236, 251, 252; *Hunt* v. *New York Cotton Exchange*, 205 U. S. 322, 333; *United States* v. *New York Coffee Exchange*, 263 U. S. 611, 619; *Moore* v. *New York Cotton Exchange*, 270 U. S. 593, 604, 607.

[5] *International News Service* v. *Associated Press*, 248 U. S. 215.

[6] " . . . it is no violation of the Anti-Trust Act for a group of newspapers to form an association to collect and distribute news for their common benefit, and to that end to agree to furnish the news collected by them only to each other or to the Association; provided that no attempt is made to prevent the members from purchasing or otherwise obtaining news from rival agencies. And if that is true the corollary must be true, namely, that newspapers desiring to form and maintain such an organization may determine who shall be and who shall not be their associates." (Letter of Attorney General Gregory of March 12, 1915.)

agreement or combination to follow a course of conduct which will necessarily restrain or monopolize a part of trade or commerce may violate the Sherman Act, whether it be 'wholly nascent or abortive on the one hand, or successful on the other.' " I take this statement as suggesting the pleadings and proof disclose, without contradiction, that AP and its members agreed or combined to restrain trade. There is no such allegation in the complaint, and there is not, and cannot be, any finding on this record to support the conclusion. The cases cited in the opinion of agreements to boycott or to drive competitors out of business, or to compel merchants to deal only with members of a group, are, as will appear, inapposite to the case at bar. The defendants say that they merely keep for their own members' use that which their own members' activity and expenditure has produced. We must not confuse the intent of the members with the size of their organization. These two matters seem to be inextricably blended in the court's treatment of the case, but they differ in their nature and as a basis for decision.

But, it may be urged, intent is to be gathered from conduct, and those whose actions have in fact unduly restrained trade, will not be heard to deny the purpose to accomplish the result of their conduct. This is sound doctrine, and it leads to an inquiry as to the actual imposition of prohibited restraints.

Second. Has the plan, and have the operations of AP, the inevitable consequence of restraining competition between news agencies or newspapers, or have they, and do they now, necessarily tend to, or in fact, unreasonably restrain such competition? On this question the court below made no findings save one of dubious import.

It is worth while to quote the finding to which the opinion of this court refers:

"The growth of news agencies has been fostered to some extent as a result of the restrictions of The Associated

Press' services to its own members, but *other restrictions* imposed by The Associated Press have hampered and impeded the growth of competing news agencies and of newspapers competitive with members of The Associated Press." (Italics supplied.)

The finding is vague for it fails to specify what is meant by "other restrictions." The phrase cannot mean the membership restrictions of the by-laws for those are mentioned in the preceding clause. Nor does this court's opinion furnish any additional light.

Not only is the finding attacked, as the court's opinion admits, but, in addition, the record negatives the sweeping assumptions the court indulges respecting the effect of AP's activities.

The opinion states that the members "have, by concerted arrangements, pooled their power to acquire, to purchase, and to dispose of news reports through the channels of commerce," and, in addition, have "pooled their economic and news control power and, in exerting that power, have entered into agreements which the District Court found to be 'plainly designed in the interest of preventing competition.' " This sentence is characteristic of the opinion. In the first place, as will later appear, the record presents no question of "purchasing power." One cannot purchase the events of history; he can employ someone to report them to him. Does the sentence mean that AP has "purchased" all or most of the available reporters in the nation or the world? Secondly, the sentence seems to attribute to AP some sort of monopolization of the newspaper publishing business. And, finally, it seems to attribute to the court below a finding that AP has unduly or unreasonably restrained trade. As will appear, the court below made no such finding and, because it could not do so, sought another ground on which to base its decision. Moreover, the facts assumed are specifically denied by the answer, and contradicted by the proofs.

The uncontradicted proofs to which I shall later refer show that nonmember publishers not only have obtained, and now obtain, complete and satisfactory news coverage from other agencies, but have prospered and grown without AP news service.

It is said in the opinion that the by-laws, as obstacles to membership, tend to make it difficult to obtain news furnished by AP or its members and that it is apparent that the exclusive right which AP members have gives many newspapers a competitive advantage over their rivals. But the events of life are open to all who inquire. There is no dearth of those willing to inquire and report those events, for proper compensation. Thus the court must here be holding that if a concern gathers from the air, from the sunlight, or from the waters of the sea, by its effort and ingenuity, something that others have not garnered, it must make the results of its activity open to all, for if it sells to some and not to others the former will have a competitive advantage. The exclusive use of that which is thus obtained always, in a sense, gives a competitive advantage over those less active and enterprising. The opinion seems to mean that no contract, however narrow its effect, however innocent its purpose, which in the least degree restricts competition,[7] can survive attack under the Sherman Act; that no such concept as a reasonable restraint, a restraint limited to the legitimate protection of one's property or business, and limited in space or in time, or affecting a few only of all those engaged in a given trade, is free of illegality. Is not this to reestablish the harsh and sweeping effect attributed to the statute in *United States* v. *Trans-Missouri Freight Association,* 166 U. S. 290, and *United States* v. *Joint Traffic Association,* 171 U. S. 505, which was abandoned more than thirty years ago, for the view, ever since maintained, that the statute

[7] It was only in this limited sense that the court below found that the by-laws limited competition.

merely adopted the common law concept of undue and unreasonable restraints of trade.[8] If the court is now to revert to the harsh and mechanical application of the act that *every* agreement which in any measure restrains trade (notwithstanding the truism that "every agreement concerning trade . . . restrains" [9]) is illegal, the ruling should be made explicit and not left in the realm of speculation.

The opinion says that the District Court found that the by-laws "contained provisions designed to stifle competition in the newspaper publishing field." The District Court made no finding and reached no conclusion that AP imposed any restraint which was undue or unreasonable, and the matter quoted in footnotes 6 and 8 of the court's opinion does not support any such gloss as this court places on what the District Court said in its opinions or its formal findings and conclusions, as a mere reading will demonstrate.

If collateral restraints in agreements for the sale of a business, and others of like sort, permitted and enforced at common law, and heretofore under the Sherman Act [10] as well, are now to fall under condemnation, we should know the fact.

The opinion assumes that the competitors of AP suffer from an inability to buy news. It is replete with intima-

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[8] *Standard Oil Co.* v. *United States*, 221 U. S. 1, 59–62; *United States* v. *American Tobacco Co.*, 221 U. S. 106, 178–179; *United States* v. *Terminal R. Assn.*, 224 U. S. 383, 394–395; *Chicago Board of Trade* v. *United States*, 246 U. S. 231, 238–239; *Maple Flooring Mfrs. Assn.* v. *United States*, 268 U. S. 563, 582; *Appalachian Coals* v. *United States*, 288 U. S. 344, 359–361, 375, 376–7; *Sugar Institute* v. *United States*, 297 U. S. 553, 597–600; *Interstate Circuit* v. *United States*, 306 U. S. 208, 230–232.

[9] *Chicago Board of Trade* v. *United States, supra*, 238; *Appalachian Coals* v. *United States, supra*, 361.

[10] *Oregon Steam Navigation Co.* v. *Winsor*, 20 Wall. 64; *Cincinnati Packet Co.* v. *Bay*, 200 U. S. 179, 184, 185; *United States* v. *General Electric Co.*, 272 U. S. 476; *United States* v. *Bausch & Lomb Co.*, 321 U. S. 707.

tions that the cooperative activities of AP have, in fact, seriously impeded the founding and growth of other news-gathering agencies than AP and its member news-gathering agencies and other newspapers than AP's member newspapers. They are too many for enumeration, but may be illustrated by the court's statement that "historically, as well as presently, applicants who would offer competition to old members have a hard road to travel," and that "a newspaper without AP service is more than likely to be at a competitive disadvantage."

These conclusions are without support in the record or in the findings of the court below, and are unsupported by any finding by this court based upon the facts of record. This can be demonstrated.

The findings of the District Court, which this court has not modified, criticised, or overruled, established beyond cavil that, despite the fact that AP was early in the field and has grown to great size, many other reporting agencies have been established and grown in the United States, two of which, UP and INS, are now comparable to AP "in size, scope of coverage and efficiency." Additional agencies which furnish substantial news-reporting services in the nation total between twenty and thirty. Statistics concerning them are not included in the record, but it is evident that some, singly, furnish substantial service, and all, taken together, afford a broad coverage in competition with AP, UP and INS, widely used in the newspaper world. Their past growth, and their opportunity for expansion, contradict the assumption that AP has unreasonably, or in substantial measure, restrained free competition. Rather, its success has stimulated others to enter the field and to compete with it.

The District Court found: "AP does not prevent or hinder nonmember newspapers from obtaining access to domestic and foreign happenings and events." Newspaper publishers differ as to the comparative value of AP

and other services; many choose one in preference to the other; some have relinquished one service and acquired the other. Vast newspaper enterprises have grown up which depend on services other than those furnished by AP. These include metropolitan newspapers with circulations running from two hundred thousand to over a million. Some which have not used AP reports have outstripped competitors who were members of AP.

The uncontradicted evidence and the findings of the District Court disclose, amongst others, the following significant facts: In 1942 the total expenditures of AP and its subsidiaries were $12,986,000, those of UP and its affiliates $8,628,000, and those of INS and its affiliates $9,434,000. Thus two competitors, found by the court below to be in every way comparable with AP, together expended over $5,000,000 more in that year than AP. In the same year AP had 1,247 domestic and 5 foreign members, UP had 981 domestic and 391 foreign subscribers to its services, and INS, in 1941, 338 domestic newspaper subscribers and 3 such foreign subscribers. Here again the total subscribers of its two most substantial competitors outnumbered AP's membership in both the domestic and the foreign field. In the matter of supplying features, news pictures, and news to radio stations, UP and INS would each appear to have at least as many users as AP, although the proofs and the findings do not afford an accurate measure of comparison.

Many of the other agencies, as well as UP and INS, make contracts with their subscribers for the exclusive use of their material in the subscriber's area and field. Both UP and INS make what are known as "asset value" contracts with their subscribers, under the terms of which any newspaper in the same area and field must pay to the existing subscriber the asset value of that subscriber's contract in order to obtain the service. Thus all these agencies recognize that the exclusive right to publish the

news furnished their members or subscribers is valuable. Neither as respects AP, nor any of the other agencies, is there a finding or evidence that such provisions work any hindrance or restraint of competition as between agencies or newspapers.

As respects competition between newspapers which are members of AP and others, it is found that newspapers of large circulation in large municipalities, as well as those of medium and small circulation, have thriven and grown without AP service. The court below said: "Upon this motion we must take it as in dispute whether the general opinion in the calling is that the service of UP is better than that of AP, or vice versa." Newspapers have given up AP service for that of its competitors. Many, in varying localities and fields, not only belong to AP but patronize one or more of the other services, including UP and INS. Some of the largest and most powerful newspapers in the nation have grown to be such without AP service; not an instance is cited where a proposed newspaper was unable to start, or has been compelled to suspend, publication for lack of it. The record contradicts the assertion in the court's opinion that the proof demonstrates "the net effect is seriously to limit the opportunity of any new paper to enter these cities." No finding in these terms was made by the District Court. A great bulk of the material tendered by the defendants runs counter to the conclusion; and certainly, in a summary judgment proceeding, to draw such a conclusion from the averments pro and con of the pleadings and affidavits is to ignore what this court has said is permissible in such a proceeding.

The court below has found that, "at the present time, access to the news reports of *one or more* of AP, UP, or INS is essential to the successful conduct of any substantial newspaper serving the general reading public." (Italics supplied.) It is true also that the District Court found, referring to these three agencies, that "of the three news

agencies . . . AP ranks in the forefront in public reputation and esteem," whatever this may mean. If it means that it is thought the best of the three, this would not seem to advance the argument. If it means that AP is the largest of the three in expenditures, this also is true but irrelevant. Whatever the significance of the finding, it certainly is not a finding that AP has restricted or limited competition either between news agencies or newspapers.

In another aspect of the issue of restraint, the opinion ignores important facts. While it correctly states that, in the daily morning field, AP embraces 81% in number and 96% in circulation, it fails to state that UP serves such newspapers representing 40% in number and 64% in circulation. Again, in respect of the daily evening field, whereas AP members represent 59% in number and 77% in circulation, UP accounts for 45% in number and 65% in circulation. It will be seen that there is duplication because many newspapers take more than one of the existing services. Thus, as of 1941, of the 373 domestic morning English-language dailies,—with a total circulation of 15,849,132,—152, with a total circulation of 10,701,498, were subscribers of UP, and 55, with a total circulation of 4,149,929, were subscribers of INS; and, of the 1,480 domestic daily evening English-language newspapers,—with a total circulation of 19,616,674,—664, with a total circulation of 16,781,020, were subscribers of UP, and 206, with a total circulation of 8,608,180, were subscribers of INS.

The record indicates that, in the large, the events reported by the leading agencies are the same; the differences between the reports being in the way they are written. Inability to peruse an AP report, therefore, does not mean that the reader fails to obtain knowledge of what is happening, but of a particular reporter's account of the event.

Finally, the record contains affidavits which must, on the motion for summary judgment, be taken as true, of

twenty-three persons who are in the newspaper business. These are too lengthy to quote. In general the testimony was to this effect: Ten said the UP service was adequate and complete; thirteen said that AP service was not necessary to the success of a newspaper; one said that a newspaper was at no competitive disadvantage through lack of AP service; and five testified their papers, to which AP membership was open, elected to use competing services. As of September 1941 more than 600 domestic newspapers which were subscribers of UP were not members of AP. The fact is that AP does not attempt to restrain its members from taking services from other agencies. It is little wonder that the District Court refrained from finding that AP had unduly or unreasonably restrained competition between news agencies or newspapers.

I conclude, therefore, that there is no justification for a holding that the operations of AP must inevitably result, or that its activities have in fact resulted, in any undue and unreasonable restraint of free competition in any branch of trade or commerce.

Third. Have AP and its members intended, or attempted, to monopolize a branch of trade? As I have already pointed out, the events happening in the world are as open to all men as the air or the sunlight. The only agency required to report them is a human being who will inquire. Surely the supply of reporters is not less difficult to monopolize than the events to be reported.

The court below reached conclusions as to monopoly which were required by the record:

"AP does not monopolize or dominate the furnishing of news reports, news pictures, or features to newspapers in the United States.

"AP does not monopolize or dominate access to the original sources of news.

"AP does not monopolize or dominate transmission facilities for the gathering or distribution of news reports, news pictures, or features."

If the opinion of this court means to suggest that while the news can be gathered by anyone, because no one has, or can have, a monopoly of the events of history, AP monopolizes the services of those who report news which its energies and efforts have employed and trained (which is not shown), then, I submit, we have a new concept of monopolization, namely, that where some person, out of materials open to all, creates his own product, by hiring persons to produce it, that person may not determine to whom he will sell and from whom he will withhold the product. Such a concept can only be justified on the public utility theory upon which the court below proceeded, of which I shall say something later.

In spite of the quoted conclusions of the District Court (and no facts are cited in this court's opinion which negative their accuracy), I must take it that the court intends to hold that the pleadings and proofs disclose, without question, an intent or attempt to monopolize.

I have quoted the finding made below that AP does not prevent or hinder nonmember newspapers from obtaining access to domestic or foreign news. The facts and figures I have cited above indicate no intent or attempt to absorb the entire field of news gathering and reporting, to exclude all others from the field, or to take over the entire field, to the end that no newspaper or combination of newspapers can obtain reports of the news. Paragraph 3 of the complaint charges an attempt to monopolize a part of trade and commerce and a combination and conspiracy to monopolize the same. The answer specifically denies the allegation. The amazing growth of competing agencies, and their size, would seem to indicate that any such supposed intent or attempt had been ill served by the operations of AP. At all events, there is no room in a summary judgment proceeding, based on the facts of record, for any such finding.

Fourth. Have the defendants created an organization of such proportions as in fact to monopolize any part of trade

or commerce? In answering the inquiry I need do little more than refer to the facts already summarized. The opinion seeks support for a holding of monopolization, by referring to a finding of the District Court, in these words:

"AP is a vast, intricately reticulated organization, the largest of its kind, gathering news from all over the world, the chief single source of news for the American press, universally agreed to be of great consequence."

It may be conceded that the descriptive adjectives are not ill-chosen, but the record would support a like finding with reference to UP and INS, save for the phrases "largest of its kind" and "chief." And, upon a full trial, it may well be that evidence produced would induce significant findings with respect to size and organization of other existing news agencies. Until now it has been unquestioned that size alone does not bring a business organization within the condemnation of the Sherman Act.[11] And any consideration as to size would equally hold true whether the defendant is a single corporation dealing with many persons in trade or commerce or an instrumentality set up by a number of business enterprises to serve them all on a cooperative basis. The argument of the Government seems to assume that UP and INS, independent corporations, in spite of their size, are not monopolies or attempts to monopolize because they deal at arm's length with their patrons whereas there is something sinister about AP because it deals on the same terms with its own members. I cannot perceive how, if AP falls within the denunciation of the statute, UP and INS do not equally, and by the same test. No significant feature of the practices of the one is absent in those of the others.

Fifth. The court's opinion, under the guise of enforcing the Sherman Act, in fact renders AP a public utility sub-

[11] *United States* v. *United States Steel Corp.*, 251 U. S. 417, 451; *United States* v. *International Harvester Co.*, 274 U. S. 693, 707.

ject to the duty to serve all on equal terms. This must be so, despite the disavowal of any such ground of decision. The District Court made this public utility theory the sole basis of decision, because it was unable to find support for a conclusion that AP either intended or attempted to, or in fact did, unreasonably restrain trade or monopolize or attempt to monopolize all or any part of any branch of trade within the decisions of this court interpreting and applying the Sherman Act. Realizing the lack of support for any other, the Government urges that the District Court's ground of decision is sound and that this court should adopt it. Judge Swan, in his dissent below, has sufficiently disposed of this point,[12] and I refer to his opinion, in which I concur, without quoting or paraphrasing it.

Suffice it to say that it is a novel application of the Sherman Act to treat it as legislation converting an organization, which neither restrains trade nor monopolizes it, nor holds itself out to serve the public generally, into a public utility because it furnishes a new sort of illumination—literary as contrasted with physical—by pronouncing a fiat that the interest of consumers—the reading public—not that of competing news agencies or newspaper publishers—requires equal service to all newspapers on the part of AP and that a court of equity, in the guise of an injunction, shall write the requisite regulatory statute. This is government-by-injunction with a vengeance.

Moreover it is to make a new statute by court decision. The Sherman Act does not deal with public utilities as such. They may violate the Act, as may persons engaged in private business. But that Act never was intended and has never before been thought to require a private corporation, not holding itself out to serve the public, whose operations neither were intended to nor tended unreasonably to restrain or monopolize trade, to fulfill the duty

[12] 52 F. Supp. 375.

incident to a public calling, of serving all applicants on equal terms.

For myself, I prefer to entrust regulatory legislation of commerce to the elected representatives of the people, instead of freezing it in the decrees of courts less responsive to the public will. I still believe that "the courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it." [13]

But more, the courts are unfit instruments to make and implement such policy. A wise judge has said in a case brought by AP to redress the alleged wrong of INS in "pirating" AP's news: [14]

"Courts are ill-equipped to make the investigations which should precede a determination of the limitations which should be set upon any property right in news or of the circumstances under which news gathered by a private agency should be deemed affected with a public interest. Courts would be powerless to prescribe the detailed regulations essential to full enjoyment of the rights conferred or to introduce the machinery required for enforcement of such regulations. Considerations such as these should lead us to decline to establish a new rule of law in the effort to redress a newly-disclosed wrong, although the propriety of some remedy appears to be clear."

The considerations which led to the conclusion are persuasively stated in the preceding pages of the cited opinion.

The opinion asserts that, whatever the court below has said, this court does not adopt its reasons for the decree entered, but sustains its action upon the basis of restraint and monopoly violative of a prohibitory law. I think, however, this is too superficial a conclusion. The fact remains, as the court below concedes, that the role essayed "is ordinarily 'legislative.' " [15]

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[13] *Nebbia* v. *New York,* 291 U. S. 502, 537.

[14] *International News Service* v. *Associated Press,* 248 U. S. 215, 267.

[15] 52 F. Supp. 370.

From now on, AP is to operate under the tutelage of the court. It is ordered to submit for approval a revision of its by-laws, and, unless the court approves the changes, it is to be restrained from contracting with its members that they shall not disclose the news it furnishes, and from continuing its existing contract relations with a Canadian news agency, both of which are held, in and of themselves and apart from the alleged illegalities of the by-laws, innocent and legal. However the by-laws may be amended, and whatever judicial blessing may be given the new text, it is certain that every refusal to deal with any newspaper will evoke a fresh exercise of the judicial guardianship. Lawful practices may be threatened with injunction, as they are in the present decree, as a lever to compel obedience in some respect thought important by the court.

The decree may well result not in freer competition but in a monopoly in AP or UP, or in some resulting agency, and thus force full and complete regimentation of all news service to the people of the nation. The decree here approved may well be, and I think threatens to be, but a first step in the shackling of the press, which will subvert the constitutional freedom to print or to withhold, to print as and how one's reason or one's interest dictates. When that time comes, the state will be supreme and freedom of the state will have superseded freedom of the individual to print, being responsible before the law for abuse of the high privilege.

It is not protecting a freedom, but confining it, to prescribe where and how and under what conditions one must impart the literary product of his thought and research. This is fettering the press, not striking off its chains.

The existing situation with respect to radio points the moral of what I have said. In that field Congress has imposed regulation because, in contrast to the press, the physical channels of communication are limited, and chaos would result from unrestrained and unregulated use of

such channels. But in imposing regulation, Congress has refrained from any restraint on ownership of news or information or the right to use it. And any regulation of this major source of information, in the light of the constitutional guarantee of free speech, should be closely and jealously examined by the courts.

The court goes far afield in citing *Associated Press* v. *Labor Board,* 301 U. S. 103, and *Indiana Farmer's Guide Co.* v. *Prairie Farmer Co.,* 293 U. S. 268, as justifying the decree. Apart from the fact that the policy and the implementing regulation involved in the *Associated Press* case was that declared by Congress, not court-made, it is plain from the opinion that the freedom to publish or to refrain from publishing, the control of its news by AP and the entire conduct of its business, save only its duty to deal with employees as a class, was untouched.[16] In the *Farmer's Guide* case all that was decided was that the newspapers there in question were engaging in interstate commerce and that newspapers, like other business enterprises, can violate the Sherman Act by unreasonably restraining or monopolizing commerce in more than one state. I should be the last to deny the correctness of these propositions. But, as I have already said, when that case came to be retried, it was found that the concert of action in joint solicitation of advertising and granting a reduced rate for it if placed in all the journals in the combination violated none of the provisions of the Act.[17]

The CHIEF JUSTICE joins in this opinion.

MR. JUSTICE MURPHY, dissenting.

I

If it were made clear by the undisputed facts that, by adopting their by-laws, the members of the Associated

[16] See 301 U. S. 132–3.

[17] *Supra,* note 3.

Press were engaged in a program to hamper or destroy competition, I could accept the decision reached by the Court. But the evidence introduced, in my opinion, falls far short of proving such a program and hence the decision has grave implications relative to governmental restraints on a free press.

As I view the situation, the members of the Associated Press were entirely within their legal rights in forming a cooperative organization with facilities for the collection and exchange of news and in limiting the membership therein. Members of an incorporated society, as a general rule, may extend the privilege of membership or withhold it on such terms as they see fit. And if exclusive access to these facilities and reports gave the members of the Associated Press a competitive advantage over business rivals who were not members, that alone would not make the advantage unlawful. In restricting the admission of business rivals they were merely trying to preserve for themselves an advantage that had accrued to them from the exercise of business sagacity and foresight. Such an advantage, as I see it, is not a violation of the Sherman Act. Nor does this advantage require the Associated Press to share its products with competitors. Such a doctrine would discourage competitive enterprise and would carry the anti-trust laws to absurd lengths. In the words of the court below, "a combination may be within its rights, although it operates to the prejudice of outsiders whom it excludes." 52 F. Supp. 362, 369.

Thus for the first time the Court today uses the Sherman Act to outlaw a reasonable competitive advantage gained without the benefit of any of the evils that Congress had in mind when it enacted this statute. On the main issue before us, the record shows a complete absence of any monopoly, domination, price fixing, coercion or other predatory practices by which competition is eliminated to the injury of the public interest. *Apex Hosiery Co.* v. *Leader,*

310 U. S. 469, 491–501. And the District Court was unable to find otherwise. Nothing appears save a large, successful organization which has attempted to protect the fruits of its own enterprise from use by competitors. To conclude on such evidence that the Associated Press has violated the Sherman Act is to ignore the repeated holdings of this Court that the purpose of the statute is to maintain free competition in interstate commerce and to eliminate only those restraints that unreasonably inhibit such competition.

II

Today is also the first time that the Sherman Act has been used as a vehicle for affirmative intervention by the Government in the realm of dissemination of information. As the Government states, this is an attempt to remove "barriers erected by private combination against access to reports of world news." That newspapers and news agencies are engaged in business for profit is beyond dispute. And it is undeniable that the Associated Press and other press associations can claim no immunity from the application of the general laws or of the Sherman Act in particular. *Associated Press* v. *Labor Board,* 301 U. S. 103, 132–133. But at the same time it is clear that they are engaged in collecting and distributing news and information rather than in manufacturing automobiles, aluminum or gasoline. We cannot avoid that fact. Nor can we escape the fact that governmental action directly aimed at the methods or conditions of such collection or distribution is an interference with the press, however differing in degree it may be from governmental restraints on written or spoken utterances themselves.

The tragic history of recent years demonstrates far too well how despotic governments may interfere with the press and other means of communication in their efforts to corrupt public opinion and to destroy individual free-

dom. Experience teaches us to hesitate before creating a precedent in which might lurk even the slightest justification for such interference by the Government in these matters. Proof of the justification and need for the use of the Sherman Act to liberate and remove unreasonable impediments from the channels of news distribution should therefore be clear and unmistakable. Only then can the precedent avoid being a dangerous one authorizing the use of the Sherman Act for unjustified governmental interference with the distribution of information.

This does not mean that the Associated Press is entitled to any preferential treatment under the Sherman Act or that the Government must meet any higher degree of proof of a statutory violation when dealing with the press than when dealing with any other field of commercial endeavor. Clear and unmistakable proof of a Sherman Act violation, especially where a summary judgment procedure is followed, is necessary in any case. And failure to insist upon compliance with that standard of proof is unwise under any circumstances. But such a failure has unusually dangerous implications when it appears with reference to an alleged violation of the Act by those who collect and distribute information. We should therefore be particularly vigilant in reviewing a case of this nature, a vigilance that apparently is not shared by the Court today.

As applied to the Sherman Act, this means that an allegation by the Government that a monopoly or restraint of trade exists in the business of collecting and distributing information should be proved by clear evidence after a full canvass of all the pertinent facts. Nothing should be left to speculation, doubt or surmise. Nor can conjectures as to probabilities or inevitable consequences replace proof of the actual or potential existence of monopolies or restraints. In other words, before the Government is entitled to enjoin a combination or conspiracy alleged to be

in restraint of news dissemination it must be shown by competent evidence that such combination or conspiracy has in fact resulted in restraints or will inevitably produce actual restraints in the future. Full opportunity should be accorded the parties to cross-examine and rebut all the evidence adduced on both sides of the litigation. Such would be the requirements in any suit under the Sherman Act against those who sell food, steel or furniture, and no cogent reason is apparent for applying less stringent requirements when dealing with the business of the press. Indeed, the very nature of the newspaper business is a compelling reason for a strict adherence to these requirements. Any possible use of the Sherman Act as a ready vehicle for unjustified governmental interference in the dissemination of news is thus avoided by insistence upon these elemental standards of proof and fairness of procedure. The actual and potential dangers in any such interference greatly outweigh any public interest in destroying an abandoned, ineffective or abortive scheme that appears at first glance to restrain competition among newspapers.

Accordingly I am unable to agree that this case should be disposed of in favor of the Government on a motion for summary judgment. The issues are too grave and the possible consequences are too uncertain not to require the Government to prove its case by more probative and convincing evidence than it has submitted so far. The admitted facts are either inconclusive or definitely lean in favor of the contentions of the Associated Press. These admitted facts, in my estimation, do not constitute such clear evidence of an alleged restraint of trade as to justify the proposed interference by the Government in the Associated Press membership rules which underlie the distribution of Associated Press dispatches. They do not justify the conclusion that the Associated Press by-laws on their face, and without regard to their past effect, will "necessarily" result in unlawful restraints. It may well be that

these by-laws will restrain trade and ought to be enjoined but I am unwilling to reach that conclusion without requiring the parties and the court below to examine the facts more thoroughly, having in mind the dangerous implications inherent in this situation and the clarity of proof that the Government should present.

III

The nub of the complaint against the Associated Press is that its by-laws (1) allow discrimination in the condition of admission based upon the factor of an applicant's competition with a present member, and (2) enforce such discriminatory exclusion through a non-trading agreement among members, an agreement which the court below found to be reasonable when considered separately. In other words, these by-law provisions are said to constitute a combination for the purpose of excluding competitors from that part of the market within the scope of the agreement and hence be an unreasonable restraint of trade within the well-settled meaning of the Sherman Act.

It may be conceded that these by-law provisions on their face are restrictive in nature and that their natural effect is to exclude outside newspapers from the benefits of Associated Press membership. But that concession does not prove that these provisions are necessarily so unreasonable in nature as to be a restraint of the type clearly condemned by the Act. They may be regarded on this record as nothing more than the exercise of a trader's right arbitrarily to choose his own associates and to protect the fruits of his own enterprise from use by competitors. *United States* v. *Colgate & Co.*, 250 U. S. 300, 307; *International News Service* v. *Associated Press*, 248 U. S. 215, 235. Any frustration of competition that might result from such an exercise is a normal incident of trade in a competitive economy, a lawful objective of business enterprise. Certainly the Sherman Act was not designed to discourage men from

combining their talents and resources in order to outdo their rivals by producing better goods and services. It was meant to foster rather than to thwart or punish successful competition. Competitive practices emerge as unreasonable restraints of trade only if they are infused with an additional element of unfairness, such as monopoly, domination, coercion, price fixing or an unreasonable stifling of competition. If there is such a factor in this instance, however, it lies deep in the unfathomed sea of conflicting or unproved facts.

If it were true that the Associated Press monopolizes or dominates the newspaper field, these by-law provisions might be found to be unreasonable restraints of trade. Then the unfairness of excluding outside newspapers because of their competition would be manifest. See *United States* v. *Terminal Railroad Assn.*, 224 U. S. 383. But the Government makes no such claim. In fact, the District Court specifically found no evidence of monopoly or domination by the Associated Press in the collection or distribution of news, the means of transmitting the news, or the access to the original sources of the news. A brisk rivalry with the United Press and the International News Service is recognized in these matters. Associated Press thus has no power, through the use of its by-laws or because of its size, to exclude non-members from receiving or obtaining news reports. In this respect there is no basis for concluding that the by-laws will "necessarily" restrain trade.

A point is made of the fact, however, that the Associated Press is the largest of the news agencies, ranking "in the forefront in public reputation and esteem" and constituting "the chief single source of news for the American press, universally agreed to be of great consequence." A unique value is said to attach to Associated Press news reports, growing out of the fact that they are furnished by an agency composed of and controlled by newspapers representing nearly every shade of opinion and geographical

section of the nation. These characteristics are claimed to furnish an invaluable guaranty that the news will be presented by Associated Press with a minimum of political and sectional bias. The great size and extent of the Associated Press facilities are also said to lend a uniqueness to its reports.

But there is no evidence in the present state of the record that these factors, if they exist, make the Associated Press reports so superior to those of its rival agencies as to clothe Associated Press reports in the robes of indispensability or that competition by non-members is hindered or restrained unnecessarily. Perhaps the Government has evidence to that effect which should be introduced. In the absence of such evidence, however, neither the policy nor the language of the Sherman Act penalizes those who, by their enterprise and sagacity, have formed a news service of the first rank and of unique value in the eyes of a considerable portion of the public. A cooperative organization, untinged with any monopolistic or other objectionable hue, is free to exceed its competitors in size and excellence without losing its right to choose its members and to protect its own unique products from the use of others.

If it were shown that the Associated Press, through its by-laws, has stifled or is inevitably bound to stifle competition by non-member newspapers in an unreasonable manner, so as to injure the public interest, a violation of the Sherman Act would be beyond dispute. This appears to be the primary basis for the result reached by the Court today, for it states that inability to buy news from the Associated Press "can have" most serious effects on competing newspapers and that they are "more than likely" to be at a competitive disadvantage. But even if competitive disadvantage, under some circumstances, is sufficient to prove an unreasonable stifling of competition, the Government has as yet produced no evidence to support the existence or the likelihood of such a disadvantage.

On the contrary, the evidence submitted by the Associated Press and accepted as true by the District Court demonstrates that many newspapers have flourished without Associated Press service and have successfully competed with Associated Press members. These proofs also indicate that numerous papers actually prefer the services of other news agencies to that of Associated Press; several of them having actually dropped their Associated Press membership and become members of one of the other news associations. Moreover, there is a complete lack of any relevant proof justifying the conclusion that the Associated Press membership policy has prevented or hindered the birth of a competing newspaper, prevented or hindered the successful operation of one, or caused one to be discontinued.

Nor does it appear from the record that any appreciable segment of the public has been unduly deprived of access to world news through inability to read Associated Press dispatches in non-member newspapers. Indeed, the very presence of Associated Press newspapers in cities where there are competing non-members would seem to assure the public of Associated Press news at a small cost. The wide-spread service of the Associated Press, covering both towns with and without competing services, is to that extent a guarantee of adequate access to its dispatches.

It is conceivable, of course, that these by-laws "can have" adverse effects upon competition and upon the public. But something more than a bare possibility should be required before we are justified in sanctioning interference by the Government with the private dissemination of information. There should be clear proof here not only of a competitive advantage but also of some unfair use of any competitive advantage that the Associated Press may possess or proof that it is acting so as to stifle competition unreasonably. Evidence of this nature, moreover, unless it is undisputed, should be thoroughly tested in the cruci-

ble of cross-examination and counter-evidence. An issue of this nature deserves more than a summary disposition.

Thus if it were shown that the Associated Press was using its by-laws to fix prices for news reports or to coerce non-member newspapers in some way, a clear violation of the Sherman Act would be proved. Under certain circumstances these by-laws conceivably might be employed for the purpose of coercing the non-members to join the Associated Press, to refrain from obtaining news from other sources or to cease operations. But no attempt has been made by the Government to allege or prove such facts and their existence cannot be assumed any more than we can presuppose unfair destruction of competition in order to justify the decree of the court below.

At the same time, however, most of the cases cited in support of the result reached by the Court today are relevant only to a situation where there is some element of coercion or unfairness present. Thus the combination in *Montague & Co.* v. *Lowry,* 193 U. S. 38, was designed to force non-members to join as the price of being able "to transact their business as they had theretofore done." In *Standard Sanitary Mfg. Co.* v. *United States,* 226 U. S. 20, a combination was formed to prohibit sales to non-member jobbers, thereby tending to force them to join. In *Eastern States Lumber Dealers' Assn.* v. *United States,* 234 U. S. 600, retailers combined and refused to buy from wholesalers who sold directly to consumers, as a result of which the wholesalers were compelled to cease selling at retail. The combination in *Fashion Originators' Guild* v. *Federal Trade Commission,* 312 U. S. 457, organized a boycott against those who refused to comply with its program, thus narrowing the market and forcing them to cease pirating designs. Finally, the combination in *United States* v. *Crescent Amusement Co.,* 323 U. S. 173, used its buying power to eliminate competition with exhibitors and to acquire a monopoly in the areas in question.

There is thus no direct or authoritative precedent guiding our decision in this case. None of the foregoing cases or any other that could be cited justifies us in sanctioning the application of the Sherman Act on an unproved assumption that a particular combination will "necessarily" and illegally restrain competition in the face of overwhelming evidence to the contrary. Nor are any of these cases authority for deciding a Sherman Act case on a motion for summary judgment where serious doubts exist as to the alleged unreasonableness of the restraint of trade. No case, moreover, bids us to sanction an application of the Sherman Act to the business of gathering and distributing news with our eyes closed to the inevitable implications and hazards.

We stand at the threshold of a previously unopened door. We should pause long before opening it, lest the path be made clear for dangerous governmental interference in the future. A decree of the type present in this case is not of necessity an undue interference by the Government. If it were supported by facts, it would be a reasonable and justifiable method of liberating non-member newspapers from the alleged coercive yoke of the Associated Press and of assuring the public of full access to the news of the world. But the danger lies in approving such a decree without insisting upon more proof than yet produced by the Government. If unsupported assumptions and conjectures as to the public interest and competition among newspapers are to warrant a relatively mild decree such as this one, they will also sustain unjust and more drastic measures. The blueprint will then have been drawn for the use of the despot of tomorrow.

Since I am of the opinion that the judgment should be reversed and the cause remanded to the District Court for further consideration in light of the principles I have mentioned, I do not deem it necessary to comment in detail on the other parts of the decree discussed by the Court.

At the same time, however, it seems only fair to state that on the facts presented it is difficult to see any justification for the agreement whereby Associated Press is given the exclusive right to Canadian Press news reports in the United States. Associated Press is thereby given an outright monopoly of the only available comprehensive news coverage of a great nation, no comparable substitute being available. The only other matter remaining in doubt is the by-law restriction which prevents the Associated Press members from making their spontaneous local news available to non-members and to rival news agencies. The lower court appears to have thought this provision reasonable when considered apart from the membership restriction. On the present state of the record I am not prepared to disagree although I am inclined to believe that this provision may well be shown to be unreasonable.

INTERSTATE COMMERCE COMMISSION ET AL. *v.* PARKER, DOING BUSINESS AS PARKER MOTOR FREIGHT, ET AL.

NO. 507. APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF INDIANA.*

Argued March 28, 1945.—Decided June 18, 1945.

1. Upon an application made under §§ 206 and 207 of Part II of the Interstate Commerce Act by an applicant which was owned wholly by a railroad, the Interstate Commerce Commission granted a certificate of public convenience and necessity, authorizing operations by the applicant as a common carrier by motor vehicle over specified routes along rail lines of the railroad, upon conditions designed to restrict the applicant's operations to service auxiliary to and supplemental of rail service. The Commission found, upon adequate evidence, that the restricted operations authorized were of a character different from existing motor carrier service and not directly

*Together with No. 508, *United States* v. *Parker, doing business as Parker Motor Freight, et al.*, also on appeal from the District Court of the United States for the Southern District of Indiana.

competitive or unduly prejudicial to existing motor carriers. *Held* that issuance of the certificate was within the statutory authority and administrative discretion of the Commission. Pp. 62, 69.

2. In determining whether motor carrier service by a railroad is required by public convenience and necessity, the Commission must weigh the advantages of improved railroad service against any serious impairment of over-the-road motor carrier service. P. 68.
3. Where an existing rail service may be improved by a unified and limited rail-truck operation, which would not be unduly prejudicial to motor carrier operations, the Commission may authorize such operation by the railroad, even though existing motor carriers might have been utilized. P. 69.

   The Commission here was entitled to conclude that the public will be better served through unified operation by the railroad than by use of the available motor carrier facilities. P. 73.
4. It is the duty of the Commission, in pursuance of the national transportation policy, to guard against transportation monopolies and to preserve the inherent advantages of all modes of transportation. P. 73.
5. The Commission did not abuse its discretion in refusing to reopen the proceeding to admit evidence as to the bias of witnesses, in the absence of excuse for failure to adduce such evidence previously. P. 73.
6. In view of the conclusions here reached, refusal upon the hearing to require production of the contract between the railroad and its subsidiary was not material error. P. 74.

Reversed.

APPEALS from a decree of a district court of three judges enjoining the enforcement of an order of the Interstate Commerce Commission. See 42 M. C. C. 721.

Mr. Daniel H. Kunkel, with whom *Mr. Daniel W. Knowlton* was on the brief, for the Interstate Commerce Commission; and *Mr. John Dickinson,* with whom *Messrs. Harry E. Yockey, H. Z. Maxwell, John B. Prizer, Sterling G. McNees* and *R. Aubrey Bogley* were on the brief, for the Willett Company et al., appellants in No. 507.

Mr. Kit F. Clardy, with whom *Mr. Howell Ellis* was on the brief, for Parker et al.; *Mr. Fred I. King,* with whom

Mr. Clair McTurnan was on the brief, for the Norwalk Truck Line Co.; and *Mr. Claude H. Anderson* entered an appearance for Days Transfer, Inc. et al., appellees.

MR. JUSTICE REED delivered the opinion of the Court.

These appeals bring here for review a final judgment of the Special District Court which enjoined the enforcement of an order of the Interstate Commerce Commission. The proceedings below and the appeals here were brought under 28 U. S. C. § 41 (28), §§ 43–48 and § 345. The report of the Commission appears under the title *Willett Co. of Ind., Inc., Extension—Fort Wayne–Mackinaw City,* 42 M. C. C. 721. The district court did not file an opinion.

The applicant, the Willett Company, is a wholly owned, common carrier by motor, subsidiary of the Pennsylvania Railroad Company. Previous to this application it held motor carrier operating rights for some twenty-five routes which paralleled lines of the Pennsylvania Railroad at other points than those covered by this application. Fort Wayne was included. Willett sought to secure from the Commission in this case certificates of convenience and necessity for seven additional routes extending along the lines of the Pennsylvania Railroad between Fort Wayne, Indiana, and Mackinaw City, Michigan.

The applications were granted after findings that Willett would render service auxiliary to and supplemental of the Pennsylvania's service in the transportation of less-than-carload freight. The service is to be rendered on railroad billings and is to employ railroad fixed and clerical facilities. The Commission found that Willett's service would be coordinated with the rail service and under railroad supervision. 42 M. C. C. 725; 21 M. C. C. at 407. It also found that the present and future public convenience and necessity required those motor carrier operations.

In accordance with the policy of the Commission in granting certificates to railroad motor carrier affiliates

to improve the service of the railroad, the Commission limited the carrier to service which is auxiliary to or supplemental of the rail service of the Pennsylvania. It forbade service to "any point not a station on a rail line of the railroad," and took steps to keep the Commission informed of the contractual arrangements between Willett and the Pennsylvania.

While the routes paralleled the lines of the Pennsylvania in northern Indiana and the southern peninsula of Michigan, the authorization to Willett forbade the transportation by applicant as a common carrier of any shipments from Fort Wayne, Indiana, to Grand Rapids, Michigan, or through or to or from more than one of said points. The purpose of this limitation was to restrict Willett to transportation truly supplemental or auxiliary to the rail traffic. The two cities are break-bulk or key points. Less-than-carload freight comes to or leaves them in carload lots. When a mixed carload reaches one of these key points, the contents are distributed to the smaller, intermediate points of destination as way-freight by "peddler" cars. The Willett Company seeks to take over this "peddler" work and not to do over-the-road trucking. Such motor-rail coordination has proven successful in improving service and reducing carrier costs.

As a further assurance that Willett might not inadvertently have received privileges beyond the Commission's intention to grant, a right was reserved by the Commission to impose such further specific conditions as it might find necessary in the future to restrict Willett's operation "to service which is auxiliary to, or supplemental of, rail service."

The operation of the order of the Commission was enjoined by the district court because there was no substantial evidence to support the order of the Commission that public convenience and necessity required the issuance of a certificate to Willett. The district court said in the find-

ings of fact that there was no proof that the present highway, common motor carrier transportation service by certificated carriers was or would be inadequate to serve the public need. The appellants, of course, contest here the soundness of the district court judgment.

The Interstate Commerce Commission insists that its order authorizing the issuance to Willett of the certificates of convenience and necessity for the specified routes is valid. It bases its contention on the statutory provisions which authorize the Commission to act in regulation of motor carriers and asserts its compliance with them. Under the Interstate Commerce Act, part II, § 206 (a), 49 Stat. 551, no motor vehicle subject to the act may operate on the highways without a certificate of public convenience and necessity. Section 207 (a) provides for issuance of the certificate on application, if the proposed service "is or will be required by the present or future public convenience and necessity." No other provisions are here involved. The entire subsection appears below.[1] A finding of public convenience and necessity was made, 42 M. C. C. at 726, but that ultimate finding must have been based on the proper statutory criteria and must have had the necessary factual findings to support it.

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[1] 49 Stat. 551–52:

"Sec. 207. (a) Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however,* That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations."

Public convenience and necessity is not defined by the statute. The nouns in the phrase possess connotations which have evolved from the half-century experience of government in the regulation of transportation. When Congress in 1935 amended the Interstate Commerce Act by adding the Motor Carrier Act, it chose the same words to state the condition for new motor lines which had been employed for similar purposes for railroads in the same act since the Transportation Act of 1920, § 402 (18) and (20), 41 Stat. 477. Such use indicated a continuation of the administrative and judicial interpretation of the language. Cf. *Case* v. *Los Angeles Lumber Co.*, 308 U. S. 106, 115. The Commission had assumed, as its duty under these earlier subsections, the finding of facts and the exercise of its judgment to determine public convenience and necessity. This Court approved this construction. *Chesapeake & Ohio R. Co.* v. *United States,* 283 U. S. 35, 42. Cf. *Gray* v. *Powell,* 314 U. S. 402, 411–12. The purpose of Congress was to leave to the Commission authoritatively to decide whether additional motor service would serve public convenience and necessity. Cf. *Powell* v. *United States,* 300 U. S. 276, 287. This, of course, gives administrative discretion to the Commission, cf. *McLean Trucking Co.* v. *United States,* 321 U. S. 67, 87–88, to draw its conclusion from the infinite variety of circumstances which may occur in specific instances. The disputants, here, do not clash over the power of the Commission to determine the need for the new service or that it will serve the public convenience and necessity. The evidence is ample and uncontradicted that delivery by motor of less-than-carload freight to way stations is a more adequate, efficient and economical method for railroads than by "peddler" car. They join issue on the Commission's determination as to the carrier which will render that service. Shall it be by the railroad through the use of its trucking subsidiary or by the existing common carriers by motor?

The National Transportation Policy has recently been authoritatively summarized by Congress. That declaration requires administration so as to preserve the inherent advantages of each method of transportation and to promote "safe, adequate, economical, and efficient service." [2] Such broad generalizations, while well expressing the Congressional purpose, must frequently produce overlapping aims. In such situations, the solution lies in the balancing by the Commission of the public interests in the different types of carriers with due regard to the declared purposes of Congress. Cf. *I. C. C.* v. *Inland Waterways Corp.*, 319 U. S. 671, 691; *United States* v. *Pennsylvania R. Co.*, 323 U. S. 612, 615.

When Congress directed that the act should be administered to preserve the inherent advantages of each mode of transportation, it is abundantly clear that it was not intended to bar railroads from the operation of off-the-rail motor vehicles. In 1938 when committee hearings were being held to consider amendments to the Motor Carrier Act, 1935, Mr. Eastman explained the difference in opin-

[2] 54 Stat. 899:

"It is hereby declared to be the 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; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

ion as to whether or not railroads should acquire motor carriers.[3] Section 213 (a) of the 1935 act specifically regulated acquisition of motor carriers by railroads. Provision for such acquisitions appear now in § 5 of the Interstate Commerce Act, 54 Stat. 905. See *McLean Trucking Co.* v. *United States, supra.* Section 202 (c) (1) of the 1940 Interstate Commerce Act, part II, as amended, withdraws railroad operation of motor carriers in terminal areas from the scope of motor carrier regulation and leaves such operations under part I.[4] Railroads may, therefore,

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[3] Hearings before a subcommittee of the Committee on Interstate Commerce, United States Senate, 75th Cong., 3d Sess., on S. 3606, p. 23:

"The reason for that proviso was that at the time when this act was under consideration by your committee, there was a feeling on the part of many that railroads, for example, ought not be permitted to acquire motor carriers at all. It was pointed out, in opposition to that view, that there were many cases where railroads could use motor vehicles to great advantage in their operations, in substitution for rail service, as many of them are now doing. Many railroad men, for example, feel that the operation of way trains has become obsolete; that the motor vehicle can handle such traffic between small stations much more economically and conveniently than can be done by a way train; and the motor vehicles are being used in that way by many railroads. The same is true of many terminal operations. The motor vehicle is a much more flexible unit than a locomotive switching cars, and it can be used to great advantage and with great economy in many railroad operations.

"For that reason, something of a compromise was reached between those two opposing views, and it was provided that a railroad could acquire a motor carrier if it could make special proof that the transaction was not only consistent with the public interest but would promote the public interest and would also promote the public interest in a special way, namely, by enabling such carrier other than a motor carrier to use service by motor vehicle to public advantage in its operations. And a further finding was required, that the acquisition will not unduly restrain competition."

[4] 56 Stat. 300, § 2:

"(c) Notwithstanding any provision of this section or of section 203, the provisions of this part . . . shall not apply—

in appropriate places operate trucks. However, since the preservation of the inherent advantages of motor carriers is of equal importance with efficiency under the national transportation policy, the Commission must weigh the needs of the railroad against disadvantages to the motor carriers to find the balance of public convenience and necessity in determining whether to grant a railroad application for motor operation where these certificates are required. Cf. *Texas* v. *United States*, 292 U. S. 522, 530.

This the Commission did in its findings and conclusion. It said:

"The motor-carrier service proposed by applicant, operated in close coordination with the railroad's service, will effectuate a reduction in cost, and will result in an increase in efficiency in the transportation over the routes herein considered, which will inure to the benefit of the general public. Furthermore, it does not appear that the restricted service would be directly competitive or unduly prejudicial to the operations of any other motor carrier. . . ." 42 M. C. C. at 726.

In support of this statement the evidence showed that Willett served, similarly and satisfactorily, other localities along the Pennsylvania lines in Ohio, Indiana and Illinois. The coordination of Willett's line-haul method of operations with the rail service has been explained. The existing schedules of protestants do not fit into the needs of the projected service. Common management of railroad

"(1) to transportation by motor vehicle by a carrier by railroad subject to part I, or by a water carrier subject to part III, or by a freight forwarder subject to part IV, incidental to transportation or service subject to such parts, in the performance within terminal areas of transfer, collection, or delivery services; but such transportation shall be considered to be and shall be regulated as transportation subject to part I when performed by such carrier by railroad, as transportation subject to part III when performed by such water carrier, and as transportation or service subject to part IV when performed by such freight forwarder . . ."

See Conference Report, H. Rep. No. 2832, 76th Cong., 3d Sess., § 17 (B), p. 74.

and trucks gave promise of better cooperation than would be obtained by arm's-length contracts or agreements. While the evidence shows that there were operating truck lines in the area which individually could serve all the way-stations by securing extensions to their present routes, it also shows that no motor carrier is now in a position to render this complete service. Cf. *Kansas City Southern Transport Co., Common Carrier Application,* 10 M. C. C. 221, 232. The Commission on this evidence had a basis to conclude that a railroad subsidiary offered the most satisfactory facilities for making less-than-carload deliveries to way-stations.

The contention of appellees, protestant motor carriers, is that since no evidence was offered as to the inadequacy of the presently duly certificated motor carriers to serve the railroad's need, there was a failure of proof as to convenience of and necessity for a new motor truck operation in the territory. Public convenience and necessity should be interpreted so as to secure for the Nation the broad aims of the Interstate Commerce Act of 1940. Cf. *New England Divisions Case,* 261 U. S. 184, 189; *I. C. C.* v. *Railway Labor Assn.,* 315 U. S. 373, 376–77; *United States* v. *Lowden,* 308 U. S. 225, 230; *Texas & N. O. R. Co.* v. *Northside Belt R. Co.,* 276 U. S. 475, 479. In protestants' view a certificate of convenience and necessity should not be granted to railroads for motor truck operation when existing motor carriers are capable of rendering the same service. Appellants take the position that this precise issue need not be decided in this case. They look upon the application as asking for authority to improve "an existing service." We think that it was for a motor service to improve an existing rail service. Consequently, the issuance of the certificate is subject to all the requirements of any other application for a certificate for operation of motor lines. Since, however, on adequate evidence the Commission found that the motor service sought was of a different character from the existing motor service and not directly

competitive or unduly prejudicial to the already certificated motor carriers, 42 M. C. C. 725–26, we hold that the Commission had statutory authority and administrative discretion to order the certificate to issue. The public is entitled to the benefits of improved transportation. Where that improvement depends in the Commission's judgment upon a unified and limited rail-truck operation which is found not "unduly prejudicial" to motor carrier operations, the Commission may authorize the certificate even though the existing carriers might arrange to furnish successfully the projected service.

Certificates of the general character of the one proposed by the Commission for Willett have been granted heretofore.[5] The motor service was not the normal over-the-road type but restricted to services auxiliary or supplemental to the rail service. In order to restrict motor carriers which were operated by railroads to this coordinated service, the Commission customarily inserted a provision in the order granting the application that the motor shipments must have prior or subsequent movement by rail. E. g. *Kansas City Southern Transport Co., Common Carrier Application,* 10 M. C. C. 221, 240. The rail carriers pointed out, however, that this restriction interfered with the efficiency of their operations, since commodities might be offered them at one way-station for transportation to another way-station within ordinary motoring distance. In such a case a way-freight train would be required. It was to

[5] *Pennsylvania Truck Lines—Control—Barker,* 1 M. C. C. 101, 113; 5 M. C. C. 9. Similar finding was made in *Illinois Central R. Co., Common Carrier Application,* 12 M. C. C. 485; *Gulf, M. & N. R. Co., Common Carrier Application,* 18 M. C. C. 721; *Missouri Pacific R. Co., Extension of Operations—Illinois,* 19 M. C. C. 605; *Willett Co. of Ind., Extension—Ill., Ind. and Ky.,* 21 M. C. C. 405; *Pacific Motor Trucking Co., Common Carrier Application,* 34 M. C. C. 249, 322, par. 4.

The Commission's brief, Appendix B, lists 94 opinions dealing with truck movement of rail freight.

meet this situation that the key-point or break-bulk rule, which is employed here, was developed. *Kansas City Southern Transport Co., Common Carrier Application,* 28 M. C. C. 5, 9, 11, 22 (par. 3), 25 (App. B).

This key-point requirement is one factor of differentiation between this certificate and the normal over-the-road motor certificate of convenience and necessity. Other differentiations are found in the limitation of service to rail station points and the condition that the Commission reserved the right to impose such other requirements as might be found necessary to restrict the rail subsidiary to coordinated rail service instead of permitting general competition with motor carriers in over-the-road service.

It is, of course, obvious that opportunity exists for limited encroachment upon the over-the-road business of the existing motor carriers. A shipper from one way-station to another station on the same railroad within the permitted key-point limitation may use the railroad motor carrier instead of the motor carrier. Free pickup and delivery service may extend the competition to the limits of the territorial boundaries of the railroad terminal areas and give a further advantage to the railroad where the motor carrier does not furnish the same service.[6] If the

[6] I. C. C. Local Freight Tariff, Rules, Charges and Allowances for the Pick-Up and Delivery Service on Less Than Carload Freight, Issued January 2, 1942, effective February 6, 1942, p. 9:

"Item No. 30. Territorial Boundaries. (a) Except as otherwise specifically indicated in Section 2, Pick-up or Delivery service will be confined within the corporate limits of cities or towns; at points not having corporate limits, within a radius of one mile of carrier's freight station."

See also *Pick-up and Delivery in Official Territory,* 218 I. C. C. 441, 445; dissent, 483–84; *Pick-up of Livestock in Illinois, Iowa and Wisconsin,* 238 I. C. C. 671; 248 I. C. C. 385, 391, 397; 251 I. C. C. 549; *Morgain Forwarding Co., Pick-up and Storage,* 258 I. C. C. 547, 771; *Empire Carpet Corp.* v. *Boston & M. R. Co.,* 258 I. C. C. 697. Also see, § 202 (c) of part II, Interstate Commerce Act, 54 Stat. 920, 56 Stat. 300.

Commission later determines that the balance of public convenience and necessity shifts through competition or otherwise, so that injury to the public from impairment of the inherent advantages of motor transportation exceeds the advantage to the public of efficient rail transportation, the Commission may correct the tendency by restoration of the rail movement requirement or otherwise.

Administrative discretion rests with the Commission to further improvements in transportation. The Interstate Commerce Act contains no provision by which the Commission may compel non-rail motor carriers to coordinate their road service with rail service or may compel rail carriers to coordinate their service with motor carriers.[7] When in railroad applications for coordinated motor service the Commission finds public convenience and necessity for such motor service on evidence of transportation advantages to shippers and economy to the rail carriers, cf. *Texas* v. *United States,* 292 U. S. 522, 530, it is in a position to determine by its administrative discretion whether the

[7] 10 M. C. C. 235–36:

"We are without jurisdiction to compel coordinated service between carriers by rail and carriers by motor vehicle. It could only be accomplished through the medium of through routes and joint rates and we have no power to require their establishment. It follows that any such plan must be dependent on voluntary cooperation. While protestants say that they are willing to entertain proposals, they have not developed a plan nor do they suggest what general form it might take.

. . . . . .

"Upon the evidence, therefore, we are persuaded that coordinated service through the voluntary cooperation of all or some of the protesting motor carriers is not here practicable, and that the 'useful public purpose' which the proposed new operation will serve cannot 'be served as well by existing lines or carriers.' It remains to be determined whether, in accordance with the definition of 'public convenience and necessity' in the *Pan-American case,* [1 M. C. C. 190], 'it can be served by applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest.' "

projected service may be better rendered by the railroad or existing motor carriers. In the absence of power to compel coordination between the modes of transportation and in the presence of the probable gains in operative efficiency from unified management, we think the Commission, in view of the limitations on the railroad's motor service, is entitled to conclude that the public will be better served by the rail operation than by use of the available motor carrier facilities. The alternative to the existence of this discretion is that the language of the Interstate Commerce Act, part II, forbids the granting to railroads of a certificate of convenience and necessity for the operation of motor trucks, under specially limited certificates, when there are certificated motor carriers, independent of railroad authority or supervision, with whom arrangements for the service might be made by the rail carriers. There is no such prohibition in terms. Any such implication is negated by the discretion to grant certificates conferred on the Commission by the Act.

Protestants, the appellee motor carriers, point out that under this interpretation in every case of an application by a rail carrier or its wholly owned subsidiary, for a certificate of convenience and necessity to operate a motor line to render service at way-stations, the Commission will have power, under facts and with limitations in the certificate, previously described, to grant the certificate. This is true. It must be expected, however, that the Commission will be as alert to perform its duty in protecting the public in the maintenance of an efficient motor transportation system as it is in protecting that same public in the successful operation of its rail system. The Commission is trusted by Congress to guard against the danger of the development of a transportation monopoly. 49 U. S. C. § 5 (2) (a) and (b). It has the duty to preserve the inherent advantages of each mode of transportation.

Appellees raise here an objection to the failure of the Commission to reopen the case to hear evidence on the

bias of the railroad witnesses. No valid reason for failure to bring out the alleged bias at the trial is suggested.

We pass also without further discussion the appellees' complaint of material error in the refusal to produce the contract between the Pennsylvania and Willett at the hearing. It does not seem material in view of our conclusions. The Joint Board directed that the contract be filed as a "late exhibit."

Reversed.

MR. JUSTICE DOUGLAS, dissenting.

I

Sec. 207 (a) of the Interstate Commerce Act authorizes the issuance of a certificate to a common carrier by motor vehicle if the proposed service "is or will be required by the present or future public convenience and necessity." But the present decision allows the Commission to construe the statute as if "railroad convenience and necessity" rather than "public convenience and necessity" were the standard.

I can find in the Act no indication whatsoever that railroad applicants for a motor vehicle certificate are to be considered any more favorably than any other type of applicant. Yet it is plain that this decision permits just that. For if any applicant other than a railroad affiliate were before the Commission with an application for a certificate to serve this precise territory, it would have to show that existing transportation facilities were inadequate to serve the needs of the public efficiently.[1] No such showing has been made here. None has been attempted.

[1] *Norton, Common Carrier Application,* 1 M. C. C. 114; *C & D Oil Co., Contract Carrier Application,* 1 M. C. C. 329; *Carr, Contract Carrier Application,* 2 M. C. C. 263, 269; *Irven G. Saar, Common Carrier Application,* 2 M. C. C. 729; *Merrill & Hamel, Common Carrier Application,* 8 M. C. C. 115, 117; *Boyles & Luten, Common Carrier Application,* 8 M. C. C. 593; *White Circle Line, Common Carrier Application,* 16 M. C. C. 516.

That necessity is sought to be avoided by holding that the motor carrier service to be rendered is "auxiliary to or supplemental of rail service." If, as the Commission at first required (*Kansas City Southern Transport Co.*, 10 M. C. C. 221), this motor carrier service was restricted to goods which had a prior or subsequent rail haul, the service might properly be designated as an auxiliary or supplemental one. But the Commission changed its position and withdrew that condition. *Kansas City Southern Transport Co.*, 28 M. C. C. 5. The key-point condition was substituted. Between those points the railroad will operate like any motor carrier. The service which it seeks to render is not a combined rail-and-truck service. As the Commission states in its report in the present case, "The railroad, through its subsidiary, merely seeks the substitution of a more efficient for a less efficient means of service." This "substituted" service differs from the adequate independent motor carrier service already existing only in its being under railroad control. In that respect and in that respect alone is the service of a new and different character.

The Commission justifies that "substitution" of service on the grounds of the operating convenience of the railroad and a reduction in its costs. That is a standard of "railroad" not "public" convenience. Would it be thought for a moment that motor carriers could obtain authority to build a new competing railroad by any such standard of "motor carrier" convenience?

Whether it is wise policy for the railroads to enter and dominate this field is neither for us nor the Commission to decide. If the railroads are to be given this preferred treatment when they seek to substitute motor carrier service for rail service, the authority should come from Congress, not this Court. Meanwhile, we should be alert to see to it that administrative discretion does not become the vehicle for reshaping the laws which Congress writes.

II

If the railroad company was acquiring an existing motor carrier to render this service, the Commission could approve the acquisition only if it found, among other things, that the acquisition would "not unduly restrain competition." 49 U. S. C. § 5 (2) (b). See *McLean Trucking Co.* v. *United States,* 321 U. S. 67. This provision was inserted so as to protect the motor carrier industry from the domination of other types of carriers which "might use the control as a means to strangle, curtail, or hinder progress in highway transportation for the benefit of the other competing transportation." 79 Cong. Rec. 12206.

The same standard should be applied whether the railroads enter the motor carrier field by acquisition of existing facilities or by establishment of their own motor carrier affiliates. The potentialities for abuse may be as great in one case as in the other. Railroads, like other business enterprises, are subject to the anti-trust laws except as Congress has created exemptions for them. *Georgia* v. *Pennsylvania R. Co.,* 324 U. S. 439. And the anti-trust policy is one of the components of the public interest which the Commission is supposed to protect in the transportation field. *McLean Trucking Co.* v. *United States, supra.*

The preservation of healthy competitive conditions must therefore be an ingredient of "public convenience and necessity" which the Commission is under the duty to determine in issuing certificates under § 207 (a). Certainly the effect on competition looms large when one type of carrier seeks to enter another field of transportation. The Commission paid lip-service to that policy when it said in the present case that the restricted service to be rendered by this railroad affiliate would not appear to be "directly competitive or unduly prejudicial to the operations of any other motor carrier." But where is the evidence to support that finding? I do not find it. It is sug-

gested that there can be no competition because the railroad now has the business. But the railroad is not restricted to business which it now has. Between the key-points it is entitled to any and all business which it can get. Every future movement of freight will be the subject of competition. If, as assumed, the present railroad service is poor as compared with the proposed new motor carrier service, a new and important competitive element will certainly be introduced. The railroad wants this broad certificate so it can better compete with existing motor carriers. If the railroad really wants a purely auxiliary service, let the certificate be limited to commodities which have a prior or subsequent rail haul. But it is not so conditioned. The railroad is entering the motor carrier field and rendering a pure motor carrier service. If the policy of Congress is to be honored, there must be a finding supported by evidence that competition will not be unduly restrained. On this record no such finding has been or can be made.

MR. JUSTICE BLACK and MR. JUSTICE RUTLEDGE join in this dissent.

AMERICAN TRUCKING ASSOCIATIONS, INC. ET AL. *v.* UNITED STATES ET AL.

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

No. 558. Argued March 28, 29, 1945.—Decided June 18, 1945.

1. Under §§ 206 (a) and 207 (a) of Part II of the Interstate Commerce Act, a railroad filed several applications for certificates authorizing motor carrier operations auxiliary to and supplemental of its rail service. Some of the routes involved were wholly within a State, others crossed state lines, and many were contiguous. *Held* that, in referring each application to a joint board composed of one member from each State in which the application showed that operations were to be conducted, the Commission complied with § 205 (a). P. 81.

2. In the light of the ruling of this Court on the admissibility of certain evidence, the Commission may deem it desirable to consolidate hearings on the applications, but that is a matter for administrative discretion. P. 83.
3. In passing upon the railroad's applications for certificates authorizing auxiliary motor carrier operations, the joint boards and the Commission should have admitted evidence of the flow of traffic by truck from points covered in one application to points covered by other applications and evidence of the effect of the railroad's motor carrier operations, present and prospective, on over-the-road motor carriers. Other competent and material evidence which protestants may offer as to the economic effect on the non-rail motor carriers should also be received. The railroad should be required to furnish needed statistical evidence which is reasonably available to it, and may submit evidence on its own behalf. This specification of admissible evidence is without prejudice to the discretion of the Commission or the joint boards in receiving other evidence deemed by them or either of them material to the solution of the issues between the parties. P. 85.
4. In determining whether motor carrier service by a railroad is required by public convenience and necessity, the Commission must weigh the advantages of improved railroad service against any serious impairment of over-the-road motor carrier service. *Interstate Commerce Commission* v. *Parker, ante,* p. 60. P. 86.
5. Objections that the railroad as a motor carrier has been permitted through other proceedings to file tariffs violative of § 217 of Part II of the Interstate Commerce Act, and has been improperly exempted by the Commission from certain accounting requirements of § 220, can not sustain a protest against issuance of a certificate of public convenience and necessity under §§ 206 (a) and 207 (a). P. 86.
6. Upon the evidence, the defense of laches to the suit to set aside the Commission's orders granting the certificates in this case can not be sustained. P. 87.
7. Because of the war emergency, and the fact that some trucks are being operated under certificates issued on the applications, the mandate herein is stayed until August 1, 1945, to allow opportunity for such steps as the parties may deem advisable. P. 87.

56 F. Supp. 394, reversed.

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

Mr. J. Ninian Bell, with whom *Mr. Roland Rice* was on the brief, for appellants.

Mr. Daniel H. Kunkel, with whom *Mr. Daniel W. Knowlton* was on the brief, for the Interstate Commerce Commission; and *Mr. Charles T. Abeles,* with whom *Messrs. W. R. C. Cocke* and *Thomas L. Preston* were on the brief, for the Receivers of the Seaboard Air Line Railway Co., appellees.

MR. JUSTICE REED delivered the opinion of the Court.

This appeal involves the applicability by the Interstate Commerce Commission of the legal criteria for the issuance of certificates of convenience and necessity for motor truck operation by a railroad which were discussed in the opinion in *Interstate Commerce Commission* v. *Parker, ante,* p. 60.

In these applications Legh R. Powell and Henry W. Anderson, Receivers of the Seaboard Air Line Railway Company, sought certificates of convenience and necessity under Sections 206 (a) and 207 (a), Motor Carrier Act, 1935, 49 Stat. 551, as amended by the Transportation Act of 1940, Interstate Commerce Act, part II, 54 Stat. 923, for the operation of motor trucks as auxiliary to and supplemental of the railroad operation of Seaboard. These motor routes were sought to improve the delivery of less-than-carload freight to way stations of the railroad. Fourteen applications are involved.[1] The routes in issue paralleled the main line of the Seaboard for the greater portion of the distance between Richmond, Virginia, and Jacksonville, Florida. Other controverted routes served shorter railway lines in North Carolina, South Carolina

[1] The detailed scope of thirteen of the applications is set out in the appendices to the reports of the Commission, 17 M. C. C. at 433; 28 M. C. C. at 25, and that of Sub-No. 19—Tampa-Sebring, Florida, route, in 21 M. C. C. at 776.

and Florida. Still other similar motor routes are operated by the Seaboard under orders of the Commission which are not now in controversy. Well above a hundred way stations will be served by the proposed applications. Objections to the applications were made by existing motor carriers along the routes and by various trucking organizations.

The Commission set the applications for hearing before joint boards pursuant to its interpretation of § 205 (b), Motor Carrier Act of 1935, as amended, § 20 (c), Transportation Act of 1940. Diverse recommended reports and orders were issued by the joint boards. A number of the applications were consolidated for argument before the Commission; others were dealt with on the exceptions to the joint board reports or by individual hearing. As the Seaboard was the only applicant and the issues were similar, the applications were disposed of as a single proceeding. *Seaboard Air Line R. Co., Motor Operations—Gaston-Garnett, S. C.,* 17 M. C. C. 413; 21 M. C. C. 773; 28 M. C. C. 5; 34 M. C. C. 441.

The Commission granted the applications upon a finding that the proposed motor operations were a specialized type coordinated with rail operations. See *Thomson* v. *United States,* 321 U. S. 19. The specially constituted District Court affirmed the order of the Commission against attack because the certificates were granted without regard to their effect on existing motor carriers—a ground considered today in *Interstate Commerce Commission* v. *Parker, supra*—and over the additional objections that the joint boards were improperly constituted, that material evidence on the effect of the proposed operations on the existing or over-the-road motor truck service was excluded by the joint boards and the Commission and that the Seaboard was exempted from the tariff provisions of § 217 and the accounts and record provision of § 220 and the regulations thereunder. The appellees asserted

that laches barred the court proceedings to enjoin the order of the Commission. The same issues are here. Nothing more need be said as to the contentions which were discussed in the *Parker* case. The district court proceedings and this appeal are authorized by 28 U. S. C. § 41 (28) and §§ 43–48 and § 345.[2]

Joint Boards. From the earliest hearing, objection was made to the composition of the joint boards. Section 205 (a), so far as pertinent here, provides:

"The Commission shall, when operations of motor carriers or brokers conducted or proposed to be conducted involve not more than three States, . . . refer to a joint board for appropriate proceedings thereon, any of the following matters arising in the administration of this part with respect to such operations: Applications for certificates, permits, or licenses; . . . The joint board to which any such matter is referred shall be composed solely of one member from each State within which the motor-carrier or brokerage operations involved in such matter are or are proposed to be conducted . . ."

The applications were for short routes of varying lengths up to nearly two hundred miles. Many were contiguous. Some crossed state lines. Others were wholly within a state. The Commission referred each application to a joint board composed of one member from the state or states in which the route involved in the particular application was situated.

As the series of applications cover continuous motor routes for a large portion of the railroad, appellants contend that the Commission should have consolidated these applications, constituted a board and made its reference as though there were only a single application for motor

[2] The United States answered in the District Court and confessed error on all points. The Interstate Commerce Commission and the Seaboard supported the challenged order. The Government is represented here only by the Commission.

carrier service which was to be fully integrated with the Seaboard system in the six states which the railroad traverses, or at least Virginia, North Carolina, South Carolina and Florida, in which states are located all the routes for which applications are made. If this position is correct the joint boards should have had four or six members instead of the one or two members who actually composed them. We are of the opinion that the statute does not support appellants.

It will be noted that § 205 (a) requires that applications for certificates be referred to joint boards composed solely of members from the state within which the operations are proposed to be conducted. In these applications the proposal is to conduct operations in a single state or in some instances in two states. The only source of knowledge for the Commission as to proposed operations were the applications. It seems necessary for it, therefore, to rely on the representations in the applications in determining their scope and in designating the joint boards to hear them.

The Commission has so interpreted the act. See *Argo & Collier Truck Lines, Common Carrier Application,* 27 M. C. C. 563, 566; *Atlantic Coast Line R. Co., Extension of Operation,* 30 M. C. C. 490, 491–2. These applications did not disclose or propose any interchange or unification of the traffic among the respective routes. Any one of them, or all except one, might have been refused by the Commission. Consequently, the Commission properly referred each application to a board having a member solely from the state or states in which the application proposes to conduct operations.

But the appellant contends that the grant of appellee's applications allows a unified service in three states and that appellee may have intended this result when it filed the several applications. Assuming this to be true, it does not make the Commission's action in the designation of

separate boards unlawful. It is impossible for the Commission to predict accurately such a result or determine the existence of such an intent at the time an application is filed—at which time the Commission must designate a board for hearings. In most instances the intent or purpose of the applicant would become apparent only when hearings were held on the applications. Thus the appellant's position would require reassignment of cases to differently constituted joint boards as the scope of the application was narrowed or expanded by the testimony and arguments of the parties or conclusion of the joint boards or the Commission in the course of the hearing. See *Seaboard Air Line R. Co., Motor Operations—Gaston-Garnett, S. C.*, 17 M. C. C. 413, 416–17. It may be that in the light of our ruling on the admissibility of certain evidence the Commission may wish to consolidate hearings on the applications, but that is a matter for administrative discretion.

Excluded Evidence. Appellants throughout the proceedings have sought to introduce evidence both before the joint boards and the Commission as to the economic effect on the existing motor carriers of the proposed railway operation of motor trucks and have persisted in their objections at each stage of the proceedings. The joint boards refused to permit evidence as to conditions on any route except that covered by the application under consideration. Protestants made repeated efforts before the Commission to secure consolidation of the joint board hearings but were unsuccessful. After the grant of the certificates with the limitation of operations to a prior or subsequent movement by rail on July 11, 1939, 17 M. C. C. 413, and February 17, 1940, 21 M. C. C. 773, the proceedings were reopened to consider the modification of the rail movement requirement in prior orders.[3] Sub-

[3] Sub-No. 19 was modified in 34 M. C. C. 441.

stitution of the key-point requirement or its equivalent for rail movement was made on January 24, 1941, *Kansas City Southern Transport Co., Common Carrier Application,* 28 M. C. C. 5. On October 3, 1941, all applications were reopened solely for reexamination of Condition 3, the key-point condition, as to whether it "should be modified and, if so, the extent of such modification." This hearing was on all applications and before an examiner of the Commission alone. At that hearing the protestants pressed for the introduction and admission of further evidence as set up in their petition to which reference is about to be made. 34 M. C. C. 441, 442. This petition sought permission to introduce evidence as to the economic effect on the independent trucking industry and a direction to the Seaboard to furnish statistics as to the traffic it proposed to handle by truck.[4] The petition was denied without a statement as to the Commission's reasons for the denial. 34 M. C. C. 441, 442. This we think was erroneous.

[4] Two paragraphs of the petition read as follows:

"(b) To direct the taking of evidence for the purpose of developing and determining whether the proposed and existing operations by applicant, considered together, and in connection with its transportation policy and the transportation policy of railroads, express companies, water carriers, and railroad associations with which it is associated, will unduly restrain competition; impair sound economic conditions in the independent trucking industry; result in unfair and destructive competitive practices; discriminate against shippers; or otherwise be inconsistent with the provisions of, or the transportation policy declared in, the Interstate Commerce Act, and with the Anti-trust Laws."

"(f) To direct the Seaboard Air Line Railway to furnish such statistical information for the record as may be necessary to enable the Commission to determine the extent, quantity, kind and character of traffic which Seaboard Air Line Railway handles subject to restrictions against participation by independent motor carriers, and the quantity, kind and character of traffic which Seaboard Air Line proposes to handle by truck and upon which it relies for support of its application for a certificate of convenience and necessity."

The bill of complaint sets up in sections VIII and XI numerous types or items of evidence which it alleges were excluded by the joint boards or the Examiner. Some of these items, such as "The refusal of the railroad to enter into arrangements with the independent motor carriers" or "Use of railroad facilities and employees," hardly require proof. They are admitted by all parties. Other items have had considerable proof introduced and more may be deemed by the Commission cumulative or unnecessary. "Cost of operations" would be an example. There is considerable overlapping of some categories of proposed evidence. For instance one item is "The economic effect on existing motor carriers" and "Destructive competition flowing from subsidized truck operations." Therefore we do not determine that all the items of evidence as set out by appellants, either in their bill of complaint or the petition before the Commission, were improperly excluded.

We think that it is sufficient to say that the joint boards and the Commission should have admitted evidence of the flow of traffic by truck from points covered in one application to points covered by other applications and evidence of the effect of the motor traffic, developed or prospective on all Seaboard routes for which applications are pending or already granted, on the over-the-road motor carriers. Furthermore other competent and material evidence which the protestants may produce as to the economic effect on the non-rail motor carriers should be received. The applicant will of course be required to furnish needed statistical evidence which is reasonably available to it and will have opportunity to submit evidence upon its own part. This specification of admissible evidence shall not be deemed to restrict the discretion of the Commission or the joint boards in receiving other evidence deemed by them or either of them material to aid in the solution of the issues between the parties.

While as pointed out by the brief of the Seaboard none of this evidence goes "to the inherent nature of auxiliary motor service performed by rail carriers," it may be decisive in the Commission's determination of whether to grant the applications. We have just said in the *Parker* case that the Commission must weigh the advantages of improved rail traffic against the injury to the over-the-road motor carriers to determine where public convenience and necessity lies. It is a difficult task to appraise these conflicting interests. It is a problem which should be solved only after the receipt by the Commission, under its usual rules of admissibility, of all available material evidence as to the probable effect of the proposals on the operations both of the proponents of and the protestants against the applications. *Interstate Commerce Commission* v. *Louisville & Nashville R. Co.*, 227 U. S. 88, 91; *Chicago Junction Case,* 264 U. S. 258, 264–65. It is not enough that the railroad's motor operations are found by the Commission to be of a different character from over-the-road motor operations because they are integrated with railroad operation. The Commission must also consider the disadvantage to the public of a serious impairment of the non-rail motor carriers. Those affected are entitled to fully develop the bearing of the proposals on the transportation agencies which are involved. The discretion of the Commission should be exercised after consideration of all relevant information.

Appellants have other objections to the order of the Commission which have been considered and a few words need to be said about only two of them. It is objected that the railroad as a motor carrier has been permitted through other proceedings to file illegal tariffs, violative of § 217 of part II of the Interstate Commerce Act, and has been improperly exempted by the Commission from certain accounting requirements of § 220 of the same part

to which the other motor carriers are subject.[5] These are obviously not grounds upon which appellants can base an argument against the grant of a certificate of convenience and necessity.

Appellees on their part suggest that the Commission's grant of the requested certificates should be sustained because of laches. The final certificate was issued on November 30, 1942, and this suit was brought October 21, 1943, eleven months later. The appellees' evidence as to change of position in reliance upon the certificate is not impressive. There was no specific proof of the purchase of equipment in reliance on the certificate or of failure to purchase other equipment, such as railroad cars, in reliance on the use of trucks. There was some testimony of minor adjustments in methods of operation. A number of the routes had not been put in operation and others were abandoned. The question of laches was not passed on by the district court.

In view of this evidence, we do not feel the defense of laches should be sustained.

As some trucks are being operated under certificates which were issued on these applications, because of the present war emergency we direct that the mandate herein be stayed until August 1, 1945, to allow opportunity for such steps as the respective parties may deem advisable. See *Yonkers* v. *United States,* 320 U. S. 685, 321 U. S. 745; *Public Service Commission* v. *United States,* 323 U. S. 675.

Reversed.

MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS and MR. JUSTICE RUTLEDGE concur for the reasons stated in the dissenting opinion in *Interstate Commerce Commission* v. *Parker, ante,* p. 74.

[5] A method of objection to improper practices, such as unreasonable tariffs or irregular accounting, by motor carriers under Interstate Commerce Act, part II, is provided by § 204 (c), as amended.

RAILWAY MAIL ASSOCIATION *v.* CORSI, INDUSTRIAL COMMISSIONER OF THE STATE OF NEW YORK, ET AL.

APPEAL FROM THE SUPREME COURT OF NEW YORK.

No. 691. Argued April 3, 1945.—Decided June 18, 1945.

Section 43 of the New York Civil Rights Law forbids any "labor organization" to deny any person membership by reason of his race, color or creed, or to deny any member, by reason of race, color or creed, equal treatment in designation for employment, promotion or dismissal by any employer; other sections prescribe penalties and enforcement procedure. Appellant Railway Mail Association, an organization of regular and substitute postal clerks, limits its membership to persons of the Caucasian race and native American Indians. *Held:*

1. An appeal from a state court declaratory judgment that § 43 was applicable to the appellant and valid as so applied presents a justiciable "case or controversy" under §§ 1 and 2 of Article III of the Federal Constitution. P. 93.

2. Section 43 is not violative of the due process clause of the Fourteenth Amendment as an interference with appellant's right of selection of membership nor as an abridgment of its property rights and liberty of contract. P. 93.

3. The fact that appellant is subject to § 43 as a "labor organization," although excluded (as an organization of government employees) from the benefits of collective bargaining provisions of the state labor law, involves no denial of equal protection of the laws under the Fourteenth Amendment. P. 94.

4. As applied to appellant, § 43 is not repugnant to the provision of Art. I, § 8, cl. 7 of the Federal Constitution, conferring on Congress power over the postal service. P. 95.

5. Congress has not so clearly manifested an intent to occupy the field of regulation of organizations of federal employees as to exclude the state regulation here involved. P. 97.

293 N. Y. 315, 56 N. E. 2d 721, affirmed.

APPEAL from a judgment upholding the constitutionality of a state law as applied to the appellant association.

Mr. Daniel J. Dugan, with whom *Mr. Isadore Bookstein* was on the brief, for appellant.

Wendell P. Brown, First Assistant Attorney General of New York, with whom *Nathaniel L. Goldstein,* Attorney General, *Orrin G. Judd,* Solicitor General, and *Henry S. Manley,* Assistant Attorney General, were on the brief, for appellees.

Briefs were filed by *Messrs. William H. Hastie, Thurgood Marshall* and *Leon A. Ransom* on behalf of the National Association for the Advancement of Colored People; and by *Messrs. Arthur Garfield Hays* and *Walter Gordon Merritt* on behalf of the American Civil Liberties Union, as *amici curiae,* in support of appellees.

Mr. Justice Reed delivered the opinion of the Court.

The appellant, Railway Mail Association, questioned the validity of Section 43, and related Sections 41 and 45, of the New York Civil Rights Law which provide, under penalty against its officers and members, that no labor organization shall deny a person membership by reason of race, color or creed, or deny to any of its members, by reason of race, color or creed, equal treatment in the designation of its members for employment, promotion or dismissal by an employer.[1] Appellant contended that it was not a "labor organization" subject to these sections, and that if they were held to apply to it, they

[1] Section 43 of the New York Civil Rights Law, N. Y. Consol. Laws, ch. 6, provides:

"As used in this section, the term 'labor organization' means any organization which exists and is constituted for the purpose, in whole or in part, of collective bargaining, or of dealing with employers concerning grievances, terms or conditions of employment, or of other mutual aid or protection. No labor organization shall hereafter, directly or indirectly, by ritualistic practice, constitutional or by-law prescription, by tacit agreement among its members, or otherwise, deny a person or persons membership in its organization by reason of his race, color or creed, or by regulations, practice or otherwise, deny to any of its members, by reason of race, color or creed, equal treatment with all other members in any designation of members to

violated the due process and equal protection clauses of the Fourteenth Amendment of the federal Constitution and were in conflict with the federal power over post offices and post roads. Article I, § 8, Clause 7, of the federal Constitution. The New York Court of Appeals rejected these contentions.[2] On appeal to this Court, consideration of the question of jurisdiction was postponed to the hearing on the merits for determination of whether the case presented a "case or controversy" within the meaning of the federal Constitution. The jurisdiction of this Court rests on § 237 (a) of the Judicial Code.

The appellant, Railway Mail Association, a New Hampshire corporation, is an organization with a membership

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any employer for employment, promotion or dismissal by such employer."

Section 41 of the law, prescribing the penalties for violations of § 43, provides:

". . . any officer or member of a labor organization, as defined by section forty-three of this chapter, or any person representing any organization or acting in its behalf who shall violate any of the provisions of section forty-three of this chapter or who shall aid or incite the violation of any of the provisions of such section shall for each and every violation thereof be liable to a penalty of not less than one hundred dollars nor more than five hundred dollars, to be recovered by the person aggrieved thereby . . . and such officer or member of a labor organization or person acting in his behalf, as the case may be shall, also, for every such offense be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than one hundred dollars nor more than five hundred dollars, or shall be imprisoned not less than thirty days nor more than ninety days, or both such fine and imprisonment."

Section 45 of the same law provides:

"The industrial commissioner may enforce the provisions of sections . . . forty-three . . . of this chapter. For this purpose he may use the powers of administration, investigation, inquiry, subpoena, and hearing vested in him by the labor law; he may require submission at regular intervals or otherwise of information, records and reports pertinent to discriminatory practices in industries."

[2] *Railway Mail Association* v. *Corsi*, 293 N. Y. 315, 56 N. E. 2d 721.

of some 22,000 regular and substitute postal clerks of the United States Railway Mail Service. It has division and branch associations, thirteen of such branch associations being located in different parts of New York. Article III of appellant's constitution limits membership in the association to eligible postal clerks who are of the Caucasian race, or native American Indians.[3] Certain officers and members of one of appellant's branch associations raised the question of the validity of Article III of appellant's constitution with the appellee, the Industrial Commissioner of the State of New York, who was charged with enforcement of § 43. Faced with the threat of enforcement of the statute against it, the appellant filed suit against the Industrial Commissioner in a state court for a declaratory judgment to determine the validity of § 43, and related provisions, and for an injunction restraining its enforcement against the appellant. A state Supreme Court entered judgment for the appellant, finding that it was not a "labor organization" as defined in § 43 of the state statute.[4] On appeal to the Appellate Division, this judgment was reversed, the appellate court finding that appellant was covered by § 43 and that § 43 as applied to appellant did not violate the federal Constitution.[5]

On appeal to the New York Court of Appeals, the judgment against the appellant was affirmed. The Court of Appeals noted that appellant's constitution provided that one of the objects of the association was to enable railway

[3] Constitution, Railway Mail Association, 1941–43, Article III, provides:

"Any regular male Railway Postal Clerk or male substitute Railway Postal Clerk of the United States Railway Mail Service, who is of the Caucasian race, or a native American Indian, shall be eligible to membership in the Railway Mail Association."

[4] *Railway Mail Association* v. *Murphy,* 180 Misc. 868, 44 N. Y. S. 2d 601.

[5] *Railway Mail Association* v. *Corsi,* 267 App. Div. 470, 47 N. Y. S. 2d 404.

postal clerks "to perfect any movement that may be for their benefit as a class or for the benefit of the Railway Mail Service . . ."; [6] that the Industrial Secretary of the Association [7] was to assist in the presentation of grievances pertaining to service conditions and endeavor to secure adjustment of such through administrative action.[8] It was pointed out that appellant was affiliated with the American Federation of Labor and that the appellant was designated a "labor union" in the Bulletin of the United States Department of Labor as well as in various trade union publications and reports. Appellant's own publications claimed credit for bringing "to every railway postal clerk many material benefits" and "many additional millions of dollars brought to the pockets of railway postal clerks each year by the efforts of the Association," and pointed out that "Reforms always come as a result of demands from the worker. If better conditions are worth securing, they must come as the result of organized effort." [9] In the light of this evidence, the Court of Appeals held appellant to be a "labor organization" as defined in § 43. As heretofore stated, it rejected appellant's contentions that the statute, as applied to it, violated the federal Constitution.

[6] Constitution, Railway Mail Association, 1941–43, Article II, provides:

"The object of this Association is to conduct the business of a fraternal beneficiary association for the sole benefit of its members and beneficiaries, and not for profit; to provide closer social relations among railway postal clerks, to enable them to perfect any movement that may be for their benefit as a class or for the benefit of the Railway Mail Service and make provision for the payment of benefits to its members and their beneficiaries in case of death, temporary or permanent physical disability as a result of accidental means."

[7] The Industrial Secretary also has a duty under appellant's constitution, Article VII, § 3 (4), to represent members before the United States Employees' Compensation Commission.

[8] *Ibid.*, Article VII, § 3 (3).

[9] *Railway Mail Association* v. *Corsi*, 293 N. Y. 315, 320.

Prior to consideration of the issues, it is necessary to determine whether appeal from this state court declaratory judgment proceeding presents a justiciable "case or controversy" under §§ 1 and 2 of Article III of the federal Constitution. We are of the opinion that it does. The conflicting contentions of the parties in this case as to the validity of the state statute present a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract. Legal rights asserted by appellant are threatened with imminent invasion by appellees and will be directly affected to a specific and substantial degree by decision of the questions of law.[10] *Nashville, C. & St. L. R. Co.* v. *Wallace,* 288 U. S. 249, 261–62. See *Aetna Life Ins. Co.* v. *Haworth,* 300 U. S. 227, 242; *Currin* v. *Wallace,* 306 U. S. 1, 9; *Gibbs* v. *Buck,* 307 U. S. 66, 76–77; *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.,* 312 U. S. 270, 272–73; *Tennessee Coal Co.* v. *Muscoda Local,* 321 U. S. 590, 592. Cf. *Pierce* v. *Society of Sisters,* 268 U. S. 510.

Appellant first contends that § 43 [11] and related §§ 41 and 45 of the New York Civil Rights Law, as applied to appellant, offends the due process clause of the Fourteenth Amendment as an interference with its right of selection to membership and abridgment of its property rights and liberty of contract. We have here a prohibition of discrimination in membership or union services on account of race, creed or color. A judicial determination that such

[10] One of the appellant's branch associations attempted to admit into its membership persons not of the Caucasian race. Appellant denied such applicant's membership, whereupon state officials charged with the enforcement of § 43, on complaint by certain interested parties, asserted the applicability of that law to appellant, the invalidity of Article III of appellant's constitution and prepared to invoke substantial statutory penalties for failure to comply with § 43. Appellant asserts the invalidity of the statute and is faced with either violating its own constitution or a state statute.

[11] See note 1, *supra.*

legislation violated the Fourteenth Amendment would be a distortion of the policy manifested in that amendment, which was adopted to prevent state legislation designed to perpetuate discrimination on the basis of race or color. We see no constitutional basis for the contention that a state cannot protect workers from exclusion solely on the basis of race, color or creed by an organization, functioning under the protection of the state, which holds itself out to represent the general business needs of employees.[12]

To deny a fellow-employee membership because of race, color or creed may operate to prevent that employee from having any part in the determination of labor policies to be promoted and adopted in the industry and deprive him of all means of protection from unfair treatment arising out of the fact that the terms imposed by a dominant union apply to all employees, whether union members or not. In their very nature, racial and religious minorities are likely to be so small in number in any particular industry as to be unable to form an effective organization for securing settlement of their grievances and consideration of their group aims with respect to conditions of employment. The fact that the employer is the Government has no significance from this point of view.[13]

Appellant's second ground for attack on the validity of § 43, and related provisions, is that equal protection of the laws is denied to it by the section. Appellant rests its argument on the fact that Article 20 of the New York Labor Law,[14] conferring certain rights on employees and labor organizations with respect to organization and col-

[12] See *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192; *Tunstall* v. *Brotherhood of Locomotive Firemen*, 323 U. S. 210; *Thomas* v. *Collins*, 323 U. S. 516, 532.

[13] See 5 U. S. C. § 652, 37 Stat. 555, discussed *infra*, pp. 96–97.

[14] New York State Labor Relations Act. N. Y. Consol. Laws, ch. 31, Art. 20, §§ 700–716. This statute creates a state labor relations board and contains provisions in aid of employee's rights to organize and bargain collectively with their employers.

lective bargaining, excludes from the operations of its provisions labor organizations, such as the appellant, whose members are "employees of the state," [15] while § 43 includes the appellant in the definition of "labor organizations" subject to its provisions.[16] Appellant thus contends that the state could not classify appellant so as to be subject to § 43 and deny it the benefits of the provisions of Article 20; that the state's failure to extend Article 20 to include the appellant denies it equal protection. A state does not deny equal protection because it regulates the membership of appellant but fails to extend to organizations of government employees provisions relating to collective bargaining. Under customary practices government employees do not bargain collectively with their employer. The state may well have thought that the problems arising in connection with private employer-employee relationship made collective bargaining legislation more urgent and compelling than for government employees. Cf. *Labor Board* v. *Jones & Laughlin Corp.*, 301 U. S. 1, 46.

There remains to be considered the appellant's third contention: that § 43, and related provisions, are repugnant to Article I, § 8, Clause 7, of the federal Constitution, which confers on Congress the authority over postal matters; that § 43 constitutes an invasion of this field over which Congress has exclusive jurisdiction and constitutes an attempt to regulate a federal instrumentality. Government immunity from state tax and regulatory provisions does not extend beyond the federal government itself and its governmental functions. In the regulation of its internal affairs, the state inevitably imposes some burdens on those dealing with the national government of the same kinds as those imposed on others. *Penn Dairies* v. *Milk Control Commission,* 318 U. S. 261, 270. Section 43 does not impinge on the federal mail service or the

[15] N. Y. Consol. Laws, ch. 31, § 715.

[16] See note 1, *supra.*

power of the government to conduct it. It does not burden the government in its selection of its employees or in its relations with them. Nor does it operate to define the terms of that federal employment or relate to any aspect of it. Section 43 is confined in its application to a purely private organization deriving no financial or other statutory support or recognition from the federal government and which in no way acts as an instrumentality of the federal government in performance of its postal functions. The operation of the mails is no more affected by this statute than by a state law requiring annual meetings, or the election of officers by secret ballot, or by a state insurance regulation applicable to appellant's fraternal benefit activities. The decided cases which indicate the limits of state regulatory power in relation to the federal mail service involve situations where state regulation involved a direct, physical interference with federal activities under the postal power or some direct, immediate burden on the performance of the postal functions. *Johnson* v. *Maryland,* 254 U. S. 51, 57; *Price* v. *Pennsylvania R. Co.,* 113 U. S. 218, 222; *Martin* v. *Pittsburg & Lake Erie R. Co.,* 203 U. S. 284, 292–93. See *Ex parte Jackson,* 96 U. S. 727, 732; *In re Rapier,* 143 U. S. 110, 133. And in at least one instance this Court has sustained direct state interference with transmission of the mails where the slight public inconvenience arising therefrom was felt to be far outweighed by inconvenience to a state in the enforcement of its laws which would have resulted from a contrary holding. *United States* v. *Kirby,* 7 Wall. 482, 486.

Appellant also argues that the various federal statutes regulating the terms and conditions of employment of railway mail clerks indicate an intent on the part of Congress to completely occupy the field of regulation applicable to federal postal employees and their labor organizations.[17] Especial reliance is placed on § 652, Title 5, U. S. C., 37 Stat. 555, which provides that "Membership

[17] 39 U. S. C. §§ 601–640.

in any . . . organization of postal employees not affiliated with any outside organization imposing an obligation or duty upon them to engage in any strike, or proposing to assist them in any strike, against the United States, having for its objects, among other things, improvements in the condition of labor of its members, including hours of labor and compensation therefor and leave of absence . . . or the presenting by any such person or groups of persons of any grievance or grievances to the Congress . . . shall not constitute or be cause for reduction in rank or compensation or removal . . . from said service." The language of this provision indicates that it had the narrow purpose of prohibiting discrimination against a federal employee because of membership in an organization of employees which did not impose an obligation to strike against the government. This provision can hardly be deemed to indicate an intent on the part of Congress to enter and completely absorb the field of regulation of organizations of federal employees. Congress must clearly manifest an intention to regulate for itself activities of its employees, which are apart from their governmental duties, before the police power of the state is powerless. *Allen-Bradley Local* v. *Wisconsin Board*, 315 U. S. 740, 749, and cases cited. There is no such clear manifestation of Congressional intent to exclude in this case. Nor are we called upon to consider whether Congress, in the exercise of its power over the post offices and post roads, could regulate the appellant organization. Suffice it to say, that we do not find it to have exercised such power so far and thus regulation by the states is not precluded.

The judgment is

Affirmed.

MR. JUSTICE RUTLEDGE concurs in the result.

MR. JUSTICE FRANKFURTER, concurring.

The Railway Mail Association is a union of railway clerks. To operate as a union in New York it must obey

the New York Civil Rights Law. That law prohibits such an organization from denying membership in the union by reason of race, color or creed, with all the economic consequences that such denial entails.

Apart from other objections, which are too unsubstantial to require consideration, it is urged that the Due Process Clause of the Fourteenth Amendment precludes the State of New York from prohibiting racial and religious discrimination against those seeking employment. Elaborately to argue against this contention is to dignify a claim devoid of constitutional substance. Of course a State may leave abstention from such discriminations to the conscience of individuals. On the other hand, a State may choose to put its authority behind one of the cherished aims of American feeling by forbidding indulgence in racial or religious prejudice to another's hurt. To use the Fourteenth Amendment as a sword against such State power would stultify that Amendment. Certainly the insistence by individuals on their private prejudices as to race, color or creed, in relations like those now before us, ought not to have a higher constitutional sanction than the determination of a State to extend the area of nondiscrimination beyond that which the Constitution itself exacts.

GUARANTY TRUST CO. *v.* YORK.

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

No. 264. Argued January 3, 4, 1945.—Decided June 18, 1945.

In a suit in equity in a federal court to recover upon a State-created right, jurisdiction being based solely upon diversity of citizenship of the parties, a recovery can not be had if a state statute of limitations would have barred recovery had the suit been brought in a court of the State. *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, followed. P. 108.

143 F. 2d 503, reversed.

CERTIORARI, 323 U. S. 693, to review the reversal of a summary judgment for the defendant (petitioner here) in a suit of which the federal court had jurisdiction solely because of diversity of citizenship of the parties.

Mr. John W. Davis, with whom *Messrs. Theodore Kiendl, Ralph M. Carson* and *Francis W. Phillips* were on the brief, for petitioner.

Mr. Meyer Abrams for respondent.

Briefs were filed by *Solicitor General Fahy, Messrs. Roger S. Foster, Milton V. Freeman, David K. Kadane* and *Arnold R. Ginsburg* on behalf of the Securities and Exchange Commission, and by *Messrs. Carl J. Austrian* and *Saul J. Lance* on behalf of J. Cloyd Kent et al., Trustees, as *amici curiae,* urging affirmance.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

In *Russell* v. *Todd,* 309 U. S. 280, 294, we had "no occasion to consider the extent to which federal courts, in the exercise of the authority conferred upon them by Congress to administer equitable remedies, are bound to follow state statutes and decisions affecting those remedies." The

question thus carefully left open in *Russell* v. *Todd* is now before us. It arises under the following circumstances.

In May, 1930, Van Sweringen Corporation issued notes to the amount of $30,000,000. Under an indenture of the same date, petitioner, Guaranty Trust Co., was named trustee with power and obligations to enforce the rights of the noteholders in the assets of the Corporation and of the Van Sweringen brothers. In October, 1930, petitioner, with other banks, made large advances to companies affiliated with the Corporation and wholly controlled by the Van Sweringens. In October, 1931, when it was apparent that the Corporation could not meet its obligations, Guaranty cooperated in a plan for the purchase of the outstanding notes on the basis of cash for 50% of the face value of the notes and twenty shares of Van Sweringen Corporation's stock for each $1,000 note. This exchange offer remained open until December 15, 1931.

Respondent York received $6,000 of the notes as a gift in 1934, her donor not having accepted the offer of exchange. In April, 1940, three accepting noteholders began suit against petitioner, charging fraud and misrepresentation. Respondent's application to intervene in that suit was denied, 117 F. 2d 95, and summary judgment in favor of Guaranty was affirmed. *Hackner* v. *Morgan,* 130 F. 2d 300. After her dismissal from the *Hackner* litigation, respondent, on January 22, 1942, began the present proceedings.

The suit, instituted as a class action on behalf of non-accepting noteholders and brought in a federal court solely because of diversity of citizenship, is based on an alleged breach of trust by Guaranty in that it failed to protect the interests of the noteholders in assenting to the exchange offer and failed to disclose its self-interest when sponsoring the offer. Petitioner moved for summary judgment, which was granted, upon the authority of the *Hackner* case. On appeal, the Circuit Court of Appeals, one Judge dissenting,

found that the *Hackner* decision did not foreclose this suit, and held that in a suit brought on the equity side of a federal district court that court is not required to apply the State statute of limitations that would govern like suits in the courts of a State where the federal court is sitting even though the exclusive basis of federal jurisdiction is diversity of citizenship. 143 F. 2d 503. The importance of the question for the disposition of litigation in the federal courts led us to bring the case here. 323 U. S. 693.

In view of the basis of the decision below, it is not for us to consider whether the New York statute would actually bar this suit were it brought in a State court. Our only concern is with the holding that the federal courts in a suit like this are not bound by local law.

We put to one side the considerations relevant in disposing of questions that arise when a federal court is adjudicating a claim based on a federal law. See, for instance, *Board of Comm'rs* v. *United States,* 308 U. S. 343; *Deitrick* v. *Greaney,* 309 U. S. 190; *D'Oench, Duhme & Co.* v. *F. D. I. C.,* 315 U. S. 447; *Clearfield Trust Co.* v. *United States,* 318 U. S. 363; *O'Brien* v. *Western Union Telegraph Co.,* 113 F. 2d 539. Our problem only touches transactions for which rights and obligations are created by one of the States, and for the assertion of which, in case of diversity of the citizenship of the parties, Congress has made a federal court another available forum.

Our starting point must be the policy of federal jurisdiction which *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, embodies. In overruling *Swift* v. *Tyson,* 16 Pet. 1, *Erie R. Co.* v. *Tompkins* did not merely overrule a venerable case. It overruled a particular way of looking at law which dominated the judicial process long after its inadequacies had been laid bare. See, *e. g.,* Field, J., dissenting in *Baltimore & Ohio R. Co.* v. *Baugh,* 149 U. S. 368, 391; Holmes, J., dissenting in *Kuhn* v. *Fairmont Coal Co.,* 215 U. S. 349,

370, and in *Black & White Taxi. Co.* v. *Brown & Yellow Taxi. Co.*, 276 U. S. 518, 532; *Erie R. Co.* v. *Tompkins*, *supra* at 73, note 6. Law was conceived as a "brooding omnipresence" of Reason, of which decisions were merely evidence and not themselves the controlling formulations. Accordingly, federal courts deemed themselves free to ascertain what Reason, and therefore Law, required wholly independent of authoritatively declared State law, even in cases where a legal right as the basis for relief was created by State authority and could not be created by federal authority and the case got into a federal court merely because it was "between Citizens of different States" under Art. III, § 2 of the Constitution of the United States.

This impulse to freedom from the rules that controlled State courts regarding State-created rights was so strongly rooted in the prevailing views concerning the nature of law, that the federal courts almost imperceptibly were led to mutilating construction even of the explicit command given to them by Congress to apply State law in cases purporting to enforce the law of a State. See § 34 of the Judiciary Act of 1789, 1 Stat. 73, 92. The matter was fairly summarized by the statement that "During the period when *Swift* v. *Tyson* (1842–1938) ruled the decisions of the federal courts, its theory of their freedom in matters of general law from the authority of state courts pervaded opinions of this Court involving even state statutes or local law." *Vandenbark* v. *Owens-Illinois Co.*, 311 U. S. 538, 540.

In relation to the problem now here, the real significance of *Swift* v. *Tyson* lies in the fact that it did not enunciate novel doctrine. Nor was it restricted to its particular situation. It summed up prior attitudes and expressions in cases that had come before this Court and lower federal courts for at least thirty years, at law as well as in equity.[1]

[1] In *Russell* v. *Southard*, 12 How. 139, 147, Mr. Justice Curtis, refusing to be bound by Kentucky law barring the reception of oral

The short of it is that the doctrine was congenial to the jurisprudential climate of the time. Once established, judicial momentum kept it going. Since it was conceived that there was "a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute," 276 U. S. 518, 532, 533, State court decisions were not "the law" but merely someone's opinion—to be sure an opinion to be respected—concerning the content of this all-pervading law. Not unnaturally, the federal courts assumed power to find for themselves the content of such a body of law. The notion was stimulated by the attractive vision of a uniform body of federal law. To such sentiments for uniformity of decision and freedom from diversity in State law the federal courts gave currency, particularly in cases where equitable remedies were sought, because equitable doctrines are so often cast in terms of universal applicability when close analysis of the source of legal enforceability is not demanded.

In exercising their jurisdiction on the ground of diversity of citizenship, the federal courts, in the long course of their history, have not differentiated in their regard for State law between actions at law and suits in equity. Although § 34 of the Judiciary Act of 1789, 1 Stat. 73, 92, 28 U. S. C. § 725, directed that the "laws of the several states . . . shall be regarded as rules of decision in trials at common law . . . ," this was deemed, consistently for over a hundred years, to be merely declaratory of what would in

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evidence to show that an absolute bill of sale was in reality a mortgage, declared that "upon the principles of general equity jurisprudence, this court must be governed by its own views of those principles." To support this statement, he cited, among others, *Robinson* v. *Campbell*, 3 Wheat. 212, *Boyle* v. *Zacharie and Turner*, 6 Pet. 648, and *Swift* v. *Tyson*, *supra*. This commingling of law and equity cases indicates that the same views governed both and that *Swift* v. *Tyson* was merely another expression of the ideas put forth in the equity cases.

any event have governed the federal courts and therefore was equally applicable to equity suits.[2] See *Hawkins* v. *Barney's Lessee,* 5 Pet. 457, 464; *Mason* v. *United States,* 260 U. S. 545, 559; *Erie R. Co.* v. *Tompkins, supra* at 72. Indeed, it may fairly be said that the federal courts gave greater respect to State-created "substantive rights," *Pusey & Jones Co.* v. *Hanssen,* 261 U. S. 491, 498, in equity than they gave them on the law side, because rights at law were usually declared by State courts and as such increasingly flouted by extension of the doctrine of *Swift* v. *Tyson,* while rights in equity were frequently defined by legislative enactment and as such known and respected by the federal courts. See, *e. g., Clark* v. *Smith,* 13 Pet. 195; *Scott* v. *Neely,* 140 U. S. 106; *Louisville & Nashville R. Co.* v. *Western Union Co.,* 234 U. S. 369, 374–76; *Pusey & Jones Co.* v. *Hanssen, supra* at 498.

Partly because the States in the early days varied greatly in the manner in which equitable relief was afforded and in the extent to which it was available, see, *e. g.,* Fisher, The Administration of Equity Through Common Law Forms (1885) 1 L. Q. Rev. 455; Woodruff, Chancery in Massachusetts (1889) 5 L. Q. Rev. 370; Laussat, Essay on Equity in Pennsylvania (1826), Congress provided that "the forms and modes of proceeding in suits . . . of eq-

[2] In *Bank of Hamilton* v. *Dudley's Lessee,* 2 Pet. 492, 525, Chief Justice Marshall, in discussing the applicability of Ohio occupant law as "rules of decision" under § 34, said, "The laws of the states, and the occupant law, like others, would be so regarded, independent of that special enactment. . . ." It is interesting to note that this judicial pronouncement corresponds to the views John Marshall expressed in the Virginia Convention called to ratify the Constitution. Responding to George Mason's question as to what law would apply in the federal courts in diversity cases, Marshall declared: "By the laws of which state will it be determined? said he. By the laws of the state where the contract was made. According to those laws, and those only, can it be decided. Is this a novelty? No; it is a principle in the jurisprudence of this commonwealth." 3 Elliott's Debates, 556.

uity" would conform to the settled uses of courts of equity. § 2, 1 Stat. 275, 276, 28 U. S. C. § 723. But this enactment gave the federal courts no power that they would not have had in any event when courts were given "cognizance," by the first Judiciary Act, of suits "in equity." From the beginning there has been a good deal of talk in the cases that federal equity is a separate legal system. And so it is, properly understood. The suits in equity of which the federal courts have had "cognizance" ever since 1789 constituted the body of law which had been transplanted to this country from the English Court of Chancery. But this system of equity "derived its doctrines, as well as its powers, from its mode of giving relief." Langdell, Summary of Equity Pleading (1877) xxvii. In giving federal courts "cognizance" of equity suits in cases of diversity jurisdiction, Congress never gave, nor did the federal courts ever claim, the power to deny substantive rights created by State law or to create substantive rights denied by State law.

This does not mean that whatever equitable remedy is available in a State court must be available in a diversity suit in a federal court, or conversely, that a federal court may not afford an equitable remedy not available in a State court. Equitable relief in a federal court is of course subject to restrictions: the suit must be within the traditional scope of equity as historically evolved in the English Court of Chancery, *Payne* v. *Hook*, 7 Wall. 425, 430; *Atlas Ins. Co.* v. *Southern, Inc.*, 306 U. S. 563, 568; *Sprague* v. *Ticonic Bank*, 307 U. S. 161, 164–165; a plain, adequate and complete remedy at law must be wanting, § 16, 1 Stat. 73, 82, 28 U. S. C. § 384; explicit Congressional curtailment of equity powers must be respected, see, *e. g.*, Norris-LaGuardia Act, 47 Stat. 70, 29 U. S. C. § 101 *et seq.*; the constitutional right to trial by jury cannot be evaded, *Whitehead* v. *Shattuck*, 138 U. S. 146. That a State may authorize its courts to give equitable relief unhampered

by any or all such restrictions cannot remove these fetters from the federal courts. See *Clark* v. *Smith, supra* at 203; *Broderick's Will,* 21 Wall. 503, 519–20; *Louisville & Nashville R. Co.* v. *Western Union Co., supra* at 376; *Henrietta Mills v. Rutherford Co.,* 281 U. S. 121, 127–28; *Atlas Ins. Co.* v. *Southern, Inc., supra* at 568–70. State law cannot define the remedies which a federal court must give simply because a federal court in diversity jurisdiction is available as an alternative tribunal to the State's courts.[3] Contrariwise, a federal court may afford an equitable remedy for a substantive right recognized by a State even though a State court cannot give it. Whatever contradiction or confusion may be produced by a medley of judicial phrases severed from their environment, the body of adjudications concerning equitable relief in diversity cases leaves no doubt that the federal courts enforced State-created substantive rights if the mode of proceeding and remedy were consonant with the traditional body of equitable remedies, practice and procedure, and in so doing

[3] In *Pusey & Jones Co.* v. *Hanssen, supra,* the Court had to decide whether a Delaware statute had created a new right appropriate for enforcement in accordance with traditional equity practice or whether the statute had merely given the Delaware Chancery Court a new kind of remedy. The statute authorized the Chancellor to appoint a receiver for an insolvent corporation upon the application of an unsecured simple contract creditor. Suit was brought in a federal equity court under diversity jurisdiction. Although traditional equity notions do not give a simple contract creditor an interest in the funds of an insolvent debtor, the State may, as this Court recognized, create such an interest. When the State has done that, whatever remedies are consonant with the practice of equity courts in effectuating creditor's rights come into play. *Pusey & Jones Co.* v. *Hanssen, supra,* did not question that in the case of diversity jurisdiction the States create the obligation for which relief is sought. But the Court construed the Delaware statute merely to extend the power to an equity court to appoint a receiver on the application of an ordinary contract creditor. By conferring new discretionary authority upon its equity court, Delaware could not modify the traditional equity rule in the federal

they were enforcing rights created by the States and not arising under any inherent or statutory federal law.[4]

Inevitably, therefore, the principle of *Erie R. Co.* v. *Tompkins,* an action at law, was promptly applied to a suit in equity. *Ruhlin* v. *N. Y. Life Ins. Co.,* 304 U. S. 202.

And so this case reduces itself to the narrow question whether, when no recovery could be had in a State court because the action is barred by the statute of limitations, a federal court in equity can take cognizance of the suit because there is diversity of citizenship between the parties. Is the outlawry, according to State law, of a claim created by the States a matter of "substantive rights" to be respected by a federal court of equity when that court's jurisdiction is dependent on the fact that there is a State-

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courts that only someone with a defined interest in the estate of an insolvent person, *e. g.,* a judgment creditor, can protect that interest through receivership. But the Court recognized that if the Delaware statute had been one not regulating the powers of the Chancery Court of Delaware but creating a new interest in a contract creditor, the federal court would have had power to grant a receivership at the behest of such a simple contract creditor, as much so as in the case of a secured creditor. See *Mackenzie Oil Co.* v. *Omar Oil & Gas Co.,* 14 Del. Ch. 36, 45, 120 A. 852, for Delaware's view as to the nature of the Delaware statute.

[4] "It is true that where a state statute creates a new equitable right of a substantive character, which can be enforced by proceedings in conformity with the pleadings and practice appropriate to a court of equity, such enforcement may be had in a Federal court provided a ground exists for invoking the Federal jurisdiction. . . . But the enforcement in the Federal courts of new equitable rights created by States is subject to the qualification that such enforcement must not impair any right conferred, or conflict with any inhibition imposed, by the Constitution or laws of the United States. . . . Whatever uncertainty may have arisen because of expressions which did not fully accord with the rule as thus stated, the distinction, with respect to the effect of state legislation, has come to be clearly established between substantive and remedial rights." *Henrietta Mills* v. *Rutherford Co., supra* at 127–128.

created right, or is such statute of "a mere remedial character," *Henrietta Mills* v. *Rutherford Co., supra* at 128, which a federal court may disregard?

Matters of "substance" and matters of "procedure" are much talked about in the books as though they defined a great divide cutting across the whole domain of law. But, of course, "substance" and "procedure" are the same keywords to very different problems. Neither "substance" nor "procedure" represents the same invariants. Each implies different variables depending upon the particular problem for which it is used. See *Home Ins. Co.* v. *Dick,* 281 U. S. 397, 409. And the different problems are only distantly related at best, for the terms are in common use in connection with situations turning on such different considerations as those that are relevant to questions pertaining to *ex post facto* legislation, the impairment of the obligations of contract, the enforcement of federal rights in the State courts and the multitudinous phases of the conflict of laws. See, *e. g., American Railway Express Co.* v. *Levee,* 263 U. S. 19, 21; *Davis* v. *Wechsler,* 263 U. S. 22, 24–25; *Worthen Co.* v. *Kavanaugh,* 295 U. S. 56, 60; *Garrett* v. *Moore-McCormack Co.,* 317 U. S. 239, 248–49; and see Tunks, Categorization and Federalism: "Substance" and "Procedure" After Erie Railroad v. Tompkins (1939) 34 Ill. L. Rev. 271, 274–276; Cook, Logical and Legal Bases of Conflict of Laws (1942) 163–165.

Here we are dealing with a right to recover derived not from the United States but from one of the States. When, because the plaintiff happens to be a non-resident, such a right is enforceable in a federal as well as in a State court, the forms and mode of enforcing the right may at times, naturally enough, vary because the two judicial systems are not identic. But since a federal court adjudicating a State-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State, it cannot afford recovery

if the right to recover is made unavailable by the State nor can it substantially affect the enforcement of the right as given by the State.

And so the question is not whether a statute of limitations is deemed a matter of "procedure" in some sense. The question is whether such a statute concerns merely the manner and the means by which a right to recover, as recognized by the State, is enforced, or whether such statutory limitation is a matter of substance in the aspect that alone is relevant to our problem, namely, does it significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State court?

It is therefore immaterial whether statutes of limitation are characterized either as "substantive" or "procedural" in State court opinions in any use of those terms unrelated to the specific issue before us. *Erie R. Co.* v. *Tompkins* was not an endeavor to formulate scientific legal terminology. It expressed a policy that touches vitally the proper distribution of judicial power between State and federal courts. In essence, the intent of that decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court. The nub of the policy that underlies *Erie R. Co.* v. *Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result. And so, putting to one side abstractions regarding "substance" and "procedure," we have held that in diversity cases the federal courts must follow the law of the State as to burden of proof, *Cities Service Co.* v. *Dunlap*, 308 U. S. 208, as to conflict of laws, *Klaxon Co.* v. *Stentor Co.*,

313 U. S. 487, as to contributory negligence, *Palmer* v. *Hoffman,* 318 U. S. 109, 117. And see *Sampson* v. *Channell,* 110 F. 2d 754. *Erie R. Co.* v. *Tompkins* has been applied with an eye alert to essentials in avoiding disregard of State law in diversity cases in the federal courts. A policy so important to our federalism must be kept free from entanglements with analytical or terminological niceties.

Plainly enough, a statute that would completely bar recovery in a suit if brought in a State court bears on a State-created right vitally and not merely formally or negligibly. As to consequences that so intimately affect recovery or non-recovery a federal court in a diversity case should follow State law. See Morgan, Choice of Law Governing Proof (1944) 58 Harv. L. Rev. 153, 155–158. The fact that under New York law a statute of limitations might be lengthened or shortened, that a security may be foreclosed though the debt be barred, that a barred debt may be used as a set-off, are all matters of local law properly to be respected by federal courts sitting in New York when their incidence comes into play there.[5] Such particular rules of local law, however, do not in the slightest change the crucial consideration that if a plea of the statute of limitations would bar recovery in a State court, a federal court ought not to afford recovery.

Prior to *Erie R. Co.* v. *Tompkins* it was not necessary, as we have indicated, to make the critical analysis required by the doctrine of that case of the nature of jurisdiction of the federal courts in diversity cases. But even before *Erie R. Co.* v. *Tompkins,* federal courts relied on statutes of limitations of the States in which they sat. In suits at

[5] See, *e. g., Hulbert* v. *Clark,* 128 N. Y. 295, 28 N. E. 638; *House* v. *Carr,* 185 N. Y. 453, 78 N. E. 171; *Lightfoot* v. *Davis,* 198 N. Y. 261, 91 N. E. 582; *Davidson* v. *Witthaus,* 106 App. Div. 182, 94 N. Y. S. 428; *Matter of Ewald,* 174 Misc. 939, 22 N. Y. S. 2d 299. The statute may be waived, *Peoples Trust Co.* v. *O'Neil,* 273 N. Y. 312, 316, 237 N. Y. S. 180, and must be pleaded, *Dunkum* v. *Maceck Building Corp.,* 227 App. Div. 230, 7 N. E. 2d 244.

law State limitations statutes were held to be "rules of decision" within § 34 of the Judiciary Act of 1789 and as such applied in "trials at common law." *M'Cluny* v. *Sullivan,* 3 Pet. 270; *Bank of Alabama* v. *Dalton,* 9 How. 522; *Leffingwell* v. *Warren,* 2 Black 599; *Bauserman* v. *Blunt,* 147 U. S. 647. While there was talk of freedom of equity from such State statutes of limitations, the cases generally refused recovery where suit was barred in a like situation in the State courts, even if only by way of analogy. See, *e. g., Godden* v. *Kimmell,* 99 U. S. 201; *Alsop* v. *Riker,* 155 U. S. 448; *Benedict* v. *City of New York,* 250 U. S. 321, 327–328. However in *Kirby* v. *Lake Shore & M. S. R. Co.,* 120 U. S. 130, the Court disregarded a State statute of limitations where the Court deemed it inequitable to apply it.

To make an exception to *Erie R. Co.* v. *Tompkins* on the equity side of a federal court is to reject the considerations of policy which, after long travail, led to that decision. Judge Augustus N. Hand thus summarized below the fatal objection to such inroad upon *Erie R. Co.* v. *Tompkins:* "In my opinion it would be a mischievous practice to disregard state statutes of limitation whenever federal courts think that the result of adopting them may be inequitable. Such procedure would promote the choice of United States rather than of state courts in order to gain the advantage of different laws. The main foundation for the criticism of *Swift* v. *Tyson* was that a litigant in cases where federal jurisdiction is based only on diverse citizenship may obtain a more favorable decision by suing in the United States courts." 143 F. 2d 503, 529, 531.

Diversity jurisdiction is founded on assurance to nonresident litigants of courts free from susceptibility to potential local bias. The Framers of the Constitution, according to Marshall, entertained "apprehensions" lest distant suitors be subjected to local bias in State courts, or, at least, viewed with "indulgence the possible fears and apprehensions" of such suitors. *Bank of the United States*

v. *Deveaux*, 5 Cranch 61, 87. And so Congress afforded out-of-State litigants another tribunal, not another body of law. The operation of a double system of conflicting laws in the same State is plainly hostile to the reign of law. Certainly, the fortuitous circumstance of residence out of a State of one of the parties to a litigation ought not to give rise to a discrimination against others equally concerned but locally resident. The source of substantive rights enforced by a federal court under diversity jurisdiction, it cannot be said too often, is the law of the States. Whenever that law is authoritatively declared by a State, whether its voice be the legislature or its highest court, such law ought to govern in litigation founded on that law, whether the forum of application is a State or a federal court and whether the remedies be sought at law or may be had in equity.

Dicta may be cited characterizing equity as an independent body of law. To the extent that we have indicated, it is. But insofar as these general observations go beyond that, they merely reflect notions that have been replaced by a sharper analysis of what federal courts do when they enforce rights that have no federal origin. And so, before the true source of law that is applied by the federal courts under diversity jurisdiction was fully explored, some things were said that would not now be said. But nothing that was decided, unless it be the *Kirby* case, needs to be rejected.

The judgment is reversed and the case is remanded for proceedings not inconsistent with this opinion.

So ordered.

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

MR. JUSTICE RUTLEDGE.

I dissent. If the policy of judicial conservatism were to be followed in this case, which forbids deciding constitu-

tional and other important questions hypothetically or prematurely, I would favor remanding the cause to the Court of Appeals for determination of the narrow and comparatively minor question whether, under the applicable local law, the cause of action has been barred by lapse of time. That question has not been decided,[1] may be determined in respondent's favor, and in that event the important question affecting federal judicial power now resolved, in a manner contrary to all prior decision here, will have been determined without substantial ultimate effect upon the litigation.[2]

But the Court conceives itself confronted with the necessity for making that determination and in doing so overturns a rule of decision which has prevailed in the federal courts from almost the beginning. I am unable to assent to that decision, for reasons stated by the Court of Appeals [3] and others to be mentioned only briefly. One may give full adherence to the rule of *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, and its extension to cases in equity in so far as they affect clearly substantive rights, without conceding or assuming that the long tradition, both federal and state, which regards statutes of limitations as falling within the category of remedial rather than substantive law, necessarily must be ruled in the same way; and without conceding further that only a different jurisprudential climate or a kind of "brooding omnipresence in the sky"

[1] The Court of Appeals only assumed *arguendo* that the local statute of limitations had terminated the right to sue. 143 F. 2d 503.

[2] An inferior court, of course, is free to select one or more of several available grounds upon which to rest its decision; and generally, on review here, our function should be performed by passing upon the grounds chosen. But there are circumstances in which it is proper to vacate the judgment and remand the cause for consideration of other issues presented. Cf. e. g., the recent instance of *Herb* v. *Pitcairn,* 324 U. S. 117; 325 U. S. 77.

[3] 143 F. 2d 503. The court's opinion reviews at length the unbroken course of decision now overturned.

has dictated the hitherto unvaried policy of the federal courts in their general attitude toward the strict application of local statutes of limitations in equity causes.

If any characteristic of equity jurisprudence has descended unbrokenly from and within "the traditional scope of equity as historically evolved in the English Court of Chancery," it is that statutes of limitations, often in terms applying only to actions at law, have never been deemed to be rigidly applicable as absolute barriers to suits in equity as they are to actions at law.[4] That tradition, it would seem, should be regarded as having been incorporated in the various Acts of Congress which have conferred equity jurisdiction upon the federal courts. So incorporated, it has been reaffirmed repeatedly by the decisions of this and other courts.[5] It is now excised from those Acts. If there is to be excision, Congress, not this Court, should make it.

Moreover, the decision of today does not in so many words rule that Congress could not authorize the federal courts to administer equitable relief in accordance with the substantive rights of the parties, notwithstanding state courts had been forbidden by local statutes of limitations to do so. Nevertheless the implication to that effect seems strong, in view of the reliance upon *Erie R. Co.* v. *Tompkins*.[6] In any event, the question looms more largely in the issues than the Court's opinion appears to

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[4] *Michoud* v. *Girod*, 4 How. 503, 561; *Meader* v. *Norton*, 11 Wall. 442; *Bailey* v. *Glover*, 21 Wall. 342, 348; *Kirby* v. *Lake Shore & M. S. R. Co.*, 120 U. S. 130.

[5] See the authorities cited and discussed, 143 F. 2d 503, 522–524. See also *Committee for Holders* v. *Kent*, 143 F. 2d 684, 687; *Overfield* v. *Pennroad Corp.*, 146 F. 2d 889, 901, 921–923.

[6] In the *Erie* case the Court said: "If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. But the unconstitutionality of the course pursued has now been made clear and compels us to do so." 304 U. S. 64, 77–78.

make it. For if legislative acquiescence in long-established judicial construction can make it part of a statute, it has done so in this instance. More is at stake in the implications of the decision, if not in the words of the opinion, than simply bringing federal and local law into accord upon matters clearly and exclusively within the constitutional power of the state to determine. It is one thing to require that kind of an accord in diversity cases when the question is merely whether the federal court must follow the law of the state as to burden of proof, *Cities Service Co.* v. *Dunlap,* 308 U. S. 208; contributory negligence, *Palmer* v. *Hoffman,* 318 U. S. 109, 117; or perhaps in application of the so-called parol evidence rule. These ordinarily involve matters of substantive law, though nominated in terms of procedure. But in some instances their application may lie along the border between procedure or remedy and substance, where the one may or may not be in fact but another name for the other. It is exactly in this borderland, where procedural or remedial rights may or may not have the effect of determining the substantive ones completely, that caution is required in extending the rule of the *Erie* case by the very rule itself.

The words "substantive" and "procedural" or "remedial" are not talismanic. Merely calling a legal question by one or the other does not resolve it otherwise than as a purely authoritarian performance. But they have come to designate in a broad way large and distinctive legal domains within the greater one of the law and to mark, though often indistinctly or with overlapping limits, many divides between such regions.

One of these historically has been the divide between the substantive law and the procedural or remedial law to be applied by the federal courts in diversity cases, a division sharpened but not wiped out by *Erie R. Co.* v. *Tompkins* and subsequent decisions extending the scope

of its ruling. The large division between adjective law and substantive law still remains, to divide the power of Congress from that of the states and consequently to determine the power of the federal courts to apply federal law or state law in diversity matters.

This division, like others drawn by the broad allocation of adjective or remedial and substantive, has areas of admixture of these two aspects of the law. In these areas whether a particular situation or issue presents one aspect or the other depends upon how one looks at the matter. As form cannot always be separated from substance in a work of art, so adjective or remedial aspects cannot be parted entirely from substantive ones in these borderland regions.

Whenever this integration or admixture prevails in a substantial measure, so that a clean break cannot be made, there is danger either of nullifying the power of Congress to control not only how the federal courts may act, but what they may do by way of affording remedies, or of usurping that function, if the *Erie* doctrine is to be expanded judicially to include such situations to the utmost extent.

It may be true that if the matter were wholly fresh the barring of rights in equity by statutes of limitation would seem to partake more of the substantive than of the remedial phase of law. But the matter is not fresh and it is not without room for debate. A long tradition, in the states and here, as well as in the common law which antedated both state and federal law, has emphasized the remedial character of statutes of limitations, more especially in application to equity causes, on many kinds of issues requiring differentiation of such matters from more clearly and exclusively substantive ones. We have recently reaffirmed the distinction in relation to the power of a state to change its laws with retroactive effect, giving renewed vigor if not new life to *Campbell* v. *Holt*, 115

U. S. 620. *Chase Securities Corp.* v. *Donaldson,* 325 U. S. 304. Similar, though of course not identical, arguments were advanced in that case to bring about departure from the long-established rule, but without success. The tradition now in question is equally long and unvaried. I cannot say the tradition is clearly wrong in this case more than in that. Nor can I say, as was said in the *Erie* case, that the matter is beyond the power of Congress to control. If that be conceded, I think Congress should make the change if it is to be made. The *Erie* decision was rendered in 1938. Seven years have passed without action by Congress to extend the rule to these matters. That is long enough to justify the conclusion that Congress also regards them as not governed by *Erie* and as wishing to make no change. This should be reason enough for leaving the matter at rest until it decides to act.

Finally, this case arises from what are in fact if not in law interstate transactions.[7] It involves the rights of security holders in relation to securities which were distributed not in New York or Ohio alone but widely throughout the country. They are the kind of rights which Congress acted to safeguard when it adopted the Securities and Exchange legislation.[8] Specific provisions of that legislation are not involved in this litigation. The broad policies underlying it may be involved or affected,

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[7] Reference is made to the opinion of the Court of Appeals for a detailed statement of the nature and scope of the intricate and elaborate financial transactions, involving the distribution of $30,000,000 worth of securities, apparently in many states, including Ohio and New York, and rights growing out of the distribution. 143 F. 2d at 505 *et seq.* See also *Eastman* v. *Morgan,* 43 F. Supp. 637, aff'd *sub nom. Hackner* v. *Morgan,* 130 F. 2d 300, cert. denied, 317 U. S. 691.

[8] Cf. S. Rep. No. 714, 77th Cong., 1st Sess., Additional Report of Committee on Interstate Commerce pursuant to S. Res. 71, 74th Cong., pts. 1–4. See also Stock Exchange Practices, Hearings before Committee on Banking and Currency on S. Res. 84, 72d Cong. and S. Res. 56 and 97, 73d Cong.

namely, by the existence of adequate federal remedies, whether judicial or legislative, for the protection of security holders against the misconduct of issuers or against the breach of rights by trustees. Even though the basic rights may be controlled by state law, in such situations the question is often a difficult one whether the law of one state or another applies; and this is true not only of rights clearly substantive but also of those variously characterized as procedural or remedial and substantive which involve the application of statutes of limitations.

Applicable statutes of limitations in state tribunals are not always the ones which would apply if suit were instituted in the courts of the state which creates the substantive rights for which enforcement is sought. The state of the forum is free to apply its own period of limitations, regardless of whether the state originating the right has barred suit upon it.[9] Whether or not *the action* will be held to be barred depends therefore not upon the law of the state which creates the substantive right, but upon the law of the state where suit may be brought. This in turn will depend upon where it may be possible to secure service of process, and thus jurisdiction of the person of the defendant. It may be therefore that because of the plaintiff's inability to find the defendant in the jurisdiction which creates his substantive right, he will be foreclosed of remedy by the sheer necessity of going to the haven of refuge within which the defendant confines its "presence" for jurisdictional purposes. The law of the latter may bar the suit even though suit still would be allowed under the law of the state creating the substantive right.

It is not clear whether today's decision puts it into the power of corporate trustees, by confining their jurisdictional "presence" to states which allow their courts to give equitable remedies only within short periods of time, to

[9] 3 Beale, Conflict of Laws (1935 ed.) 1620, 1621; Goodrich, Conflict of Laws (1938 ed.) 201, 202.

defeat the purpose and intent of the law of the state creating the substantive right. If so, the "right" remains alive, with full-fledged remedy, by the law of its origin, and because enforcement must be had in another state, which affords refuge against it, the remedy and with it the right are nullified. I doubt that the Constitution of the United States requires this, or that the Judiciary Acts permit it. A good case can be made, indeed has been made, that the diversity jurisdiction was created to afford protection against exactly this sort of nullifying state legislation.[10]

In my judgment this furnishes added reason for leaving any change, if one is to be made, to the judgment of Congress. The next step may well be to say that in applying the doctrine of laches a federal court must surrender its own judgment and attempt to find out what a state court sitting a block away would do with that notoriously amorphous doctrine.

MR. JUSTICE MURPHY joins in this opinion.

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[10] Frankfurter, Distribution of Judicial Power Between United States and State Courts (1928) 13 Corn. L. Q. 499, 520. See Corwin, The Progress of Constitutional Theory (1925) 30 Am. Hist. Rev. 511, 514. See also Friendly, The Historic Basis of Diversity Jurisdiction (1928) 41 Harv. L. Rev. 483, 495–497. That the motivating desire was or may have been to protect creditors who were men of business does not make the policy less applicable when the creditor is a customer of such men.

RADIO STATION WOW, INC. ET AL. *v.* JOHNSON.

CERTIORARI TO THE SUPREME COURT OF NEBRASKA.

No. 593. Argued March 1, 1945.—Decided June 18, 1945.

1. A state court decree otherwise "final" for purposes of review by this Court is none the less so because it orders also an accounting of profits, where such accounting can not give rise to a federal question. Judicial Code, § 237. P. 127.
2. This Court will not review a state court decision resting on an adequate and independent non-federal ground, even though the state court may also have summoned to its support an erroneous view of federal law. P. 129.
3. In a decree directing a transfer of the facilities of a federally licensed radio station, the state court exceeded its power in ordering the parties "to do all things necessary" to secure a transfer of the license, since this involved restrictions upon the licensing system which Congress has established. Communications Act, § 307 (a). P. 130.
4. Although the State has not been deprived by federal legislation of the practical power to terminate a broadcasting service by a proper adjudication separating the physical property from the license, that power will be amply respected, in the instant case, if it is qualified merely to the extent of requiring the state court to withhold execution of that portion of the decree requiring retransfer of the physical properties until steps are ordered to be taken, with all deliberate speed, to enable the Communications Commission to deal with new applications in connection with the station. P. 132.
5. The question of fraud adjudicated by the state court will no longer be open insofar as it bears upon the reliability as licensee of any of the parties. P. 132.

144 Neb. 406, 14 N. W. 2d 666, remanded.

CERTIORARI, 323 U. S. 705, to review the reversal of a decree dismissing the complaint in a suit to set aside a lease and an assignment of a license of a radio station.

Mr. James Lawrence Fly, with whom *Messrs. Francis P. Matthews, Rainey T. Wells, Monroe Oppenheimer, Peter Shuebruk, Earl Cline* and *Paul P. Massey* were on the brief, for petitioners.

Mr. Don W. Stewart for respondent.

Solicitor General Fahy, Messrs. Ralph F. Fuchs, Charles R. Denny and *Harry M. Plotkin* filed a brief for the United States.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This case concerns the relation of the Federal Communications Act, 48 Stat. 1064, 47 U. S. C. § 151 *et seq.*, to the power of a State to adjudicate conflicting claims to the property used by a licensed radio station. At the outset, however, our right to review the decision below is seriously challenged.

The facts relevant to the jurisdictional problem as well as to the main issues are these, summarized as briefly as accuracy permits. Petitioner, Woodmen of the World Life Insurance Society, a fraternal benefit association of Nebraska, owns radio station WOW. The Society leased this station for fifteen years to petitioner, Radio Station WOW, Inc., a Nebraska corporation formed to operate the station as lessee. After the Society and the lessee had jointly applied to the Federal Communications Commission for consent to transfer the station license, Johnson, the respondent, a member of the Society, filed this suit to have the lease and the assignment of the license set aside for fraud. While this suit was pending, the Federal Communications Commission consented to assignment of the license, and the Society transferred both the station properties and the license to the lessee. Thereafter the Society answered that "the Federal Communications Commission . . . has and concedes that it has no jurisdiction over the subject matter of plaintiff's action, except jurisdiction to determine the transfer of the license to operate said radio station, which jurisdiction after full and complete showing and notwithstanding objections filed

thereto, was exercised in the approval of the transfer of said license to the defendant Radio Station WOW, Inc. and further order to the Society to execute and perform the provisions of said lease by virtue of which the possession of said lease property has now been delivered to the lessee, all as more particularly herein found." Respondent's reply admitted "that the Federal Communications Commission has and concedes that it has no jurisdiction over the subject matter of plaintiff's action except jurisdiction to determine the transfer of the license to operate said radio station." The trial court found no fraud and dismissed the suit.

The Supreme Court of Nebraska, three Judges dissenting, reversed and entered judgment for respondent, directing that the lease and license be set aside and that the original position of the parties be restored as nearly as possible. 144 Neb. 406, 13 N. W. 2d 556. The judgment further ordered that an accounting be had of the operation of the station by the lessee since it came into its possession and that the income less operating expenses be returned to the Society.[1] On motions for rehearing, the

[1] The judgment directed "that said judgment of the district court be, and hereby is, reversed and cause is remanded, with directions that the lease to the station, the lease to the space occupied by the station and the transfer of the license to operate the station be vacated and set aside; that the $25,000 of accounts turned over by the society to lessee be returned; that an accounting be had of the operation of the station by lessee since it took possession thereof on January 14, 1943, and that the income thereof less operating expenses be returned to the society; that the license to operate the station be returned and that lessee be directed to do all things necessary for that purpose; that generally everything be done to restore the parties to their original position prior to the entering into the lease; that all expenses had by the society in connection with the transfer of the station and license to the lessee and the expense had in connection with returning the same to the society pursuant hereto are to be paid by the lessee. It is further ordered and adjudged that all costs, both in this court and in the district court shall be paid by the defendants,

petitioners asserted that only the Federal Communications Commission and the federal courts had jurisdiction over the subject matter, not the Nebraska courts. These motions were denied in an opinion in which the Nebraska Supreme Court stated, "We conclude at the outset that the power to license a radio station, or to transfer, assign or annul such a license, is within the exclusive jurisdiction of the Federal Communications Commission. . . . The effect of our former opinion was to vacate the lease of the radio station and to order a return of the property to its former status, the question of the federal license being a question solely for the Federal Communications Commission. Our former opinion should be so construed." The claim that the Nebraska courts had no jurisdiction over the subject matter of the action was thus dealt with: "The fact that the property involved was used in a licensed business was an incident to the suit only. The answer of the defendants, heretofore quoted, squarely contradicts the position they now endeavor to assume. Their position is unsound on its merits and, in addition thereto, it was eliminated from the case by the pleadings they filed in their own behalf." 144 Neb. 432, 14 N. W. 2d 666. Because of the importance of the contention that the State court's decision had invaded the domain of the Federal Communications Commission, we granted certiorari. In the order allowing certiorari we directed attention to the questions whether the judgment is a final one and whether the federal questions raised by the petition for certiorari are properly presented by the record. 323 U. S. 705.

Since its establishment, it has been a marked characteristic of the federal judicial system not to permit an appeal until a litigation has been concluded in the court of first instance. See *Heike* v. *United States,* 217 U. S.

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except the Woodmen of the World Life Insurance Society, costs in this court being taxed at $....; for all of which execution is hereby awarded, and that a mandate issue accordingly."

423; *Cobbledick* v. *United States,* 309 U. S. 323; *Catlin* v. *United States,* 324 U. S. 229. This requirement has the support of considerations generally applicable to good judicial administration. It avoids the mischief of economic waste and of delayed justice. Only in very few situations, where intermediate rulings may carry serious public consequences, has there been a departure from this requirement of finality for federal appellate jurisdiction. This prerequisite to review derives added force when the jurisdiction of this Court is invoked to upset the decision of a State court. Here we are in the realm of potential conflict between the courts of two different governments. And so, ever since 1789, Congress has granted this Court the power to intervene in State litigation only after "the highest court of a State in which a decision in the suit could be had" has rendered a "final judgment or decree." § 237 of the Judicial Code, 28 U. S. C. § 344 (a). This requirement is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system.

But even so circumscribed a legal concept as appealable finality has a penumbral area. The problem of determining when a litigation is concluded so as to be "final" to permit review here arises in this case because, as has been indicated, the Nebraska Supreme Court not only directed a transfer of property, but also ordered an accounting of profits from such property. Considerations of English usage as well as those of judicial policy would readily justify an interpretation of "final judgment" so as to preclude reviewability here where anything further remains to be determined by a State court, no matter how dissociated from the only federal issue that has finally been adjudicated by the highest court of the State. Specifically, it might well be held that, even though definitive rulings on questions otherwise reviewable here have been made below, such rulings cannot be brought here for

review if the State court calls for the ascertainment by a master or a lower State court of an account upon which a further decree is to be entered. See *California National Bank* v. *Stateler,* 171 U. S. 447, 449; Boskey, *Finality of State Court Judgments under the Federal Judicial Code* (1943) 43 Col. L. Rev. 1002, 1009; Robertson and Kirkham, Jurisdiction of the Supreme Court (1936) p. 58.

Unfortunately, however, the course of our jurisdictional history has not run as smoothly as such a mechanical rule would make it. To enforce it now, or to pronounce it for the future, would involve disregard of at least two controlling precedents, both of them expressing the views of unanimous courts and one of which has stood on our books for nearly a hundred years in an opinion carrying the authority, especially weighty in such matters, of Chief Justice Taney. Leaving to a footnote the details of a somewhat sinuous story,[2] it suffices to say that *Forgay* v.

[2] Most of the cases cited which involve an accounting have come from federal courts. In this category are *Forgay* v. *Conrad,* 6 How. 201; *Thomson* v. *Dean,* 7 Wall. 342; *Winthrop Iron Co.* v. *Meeker,* 109 U. S. 180; *Keystone Iron Co.* v. *Martin,* 132 U. S. 91; *McGourkey* v. *Toledo & Ohio R. Co.,* 146 U. S. 536; *Gulf Refining Co.* v. *United States,* 269 U. S. 125.

In the *Forgay* case the court below set aside a conveyance of land and slaves and ordered a master to take an accounting of the rents and profits. This Court held the decree to be appealable since immediate delivery of the property was ordered although the decree was "not final, in the strict, technical sense of that term." The Court said of the lower court judgment that "the bill is retained merely for the purpose of adjusting the accounts referred to the master. In all other respects, the whole of the matters brought into controversy by the bill are finally disposed of as to all of the defendants." 6 How. 201, 204. It was suggested that if appellants had to wait, they would be subjected to irremediable injury, for execution had been awarded. Also held final was the decree in *Thomson* v. *Dean, supra,* where the court ordered immediate transfer of stock and an accounting to determine the amounts paid and to be paid and the dividends accrued. In *Gulf Refining Co.* v. *United States, supra,* a judgment was held to be final where the original decrees enjoined defendants from taking

Conrad, 6 How. 201, and *Carondelet Canal Co.* v. *Louisiana,* 233 U. S. 362, found the requirement of finality to be satisfied by judgments the characteristics of which cannot be distinguished from those presented by the Nebraska decree. In short, the rationale of those cases is that a judgment directing immediate delivery of physical property is reviewable and is to be deemed dissociated from a provision for an accounting even though that is decreed in the same order. In effect, such a controversy is a multiple litigation allowing review of the adjudication which is concluded because it is independent of, and unaffected by, another litigation with which it happens to be entangled. Compare *Clark* v. *Williard,* 292 U. S. 112, 117–119; and see Note (1934) 48 Harv. L. Rev. 302.

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oil from Government property and confirmed an accounting to January 1, 1918, although the decree appealed from ordered a further accounting for oil extracted *pendente lite.* The Court observed that the decrees were final for the purpose of the original appeals. All of these cases rely on the fact that there had been a conclusive adjudication of the rights and liabilities of the parties with immediate delivery of possession of the subject matter of the suit. This consideration was emphasized in *Grant* v. *Phoenix Ins. Co.,* 106 U. S. 429, 431–432, and in *Collins* v. *Miller,* 252 U. S. 364, 371.

Another line of cases starts with *Winthrop Iron Co.* v. *Meeker, supra,* where a decree was held final, although an accounting was ordered, because no accounting had been prayed for in the bill. This unsubstantial distinction was seized upon in *Keystone Iron Co.* v. *Martin, supra,* and in *McGourkey* v. *Toledo & Ohio R. Co., supra,* to hold not final decrees in cases where an accounting had been sought.

The cases from State courts are less numerous. *California National Bank* v. *Stateler, supra,* stated broadly that a judgment remanding for an accounting is not final. In that case, an intervening party, appointed pursuant to State law as agent for bank stockholders, secured an order directing that money be turned over to him less the holder's costs, disbursements and attorney's fees. In addition, if it should be found that the holder had received certain stock as alleged then the stock also should be turned over. But there was no immediate delivery of anything since the amount of money to be turned over re-

The presupposition in allowing such review is that the federal questions that could come here have been adjudicated by the State court, and that the accounting which remains to be taken could not remotely give rise to a federal question. Of course, where the remaining litigation may raise other federal questions that may later come here, such as is true of eminent domain cases, see *Grays Harbor Co.* v. *Coats-Fordney Co.*, 243 U. S. 251, to allow review of an intermediate adjudication would offend the decisive objection to fragmentary reviews. Since, by awarding an execution, the Nebraska Supreme Court directed immediate possession of the property to be transferred, the case comes squarely within *Forgay* v. *Conrad, supra,* and *Carondelet Canal Co.* v. *Louisiana, supra,* and the challenge to our jurisdiction cannot be sustained.

This brings us to consider what federal questions are here. The court below decreed the transfer of property used as a radio station. It conceded that it had no jurisdiction over the transfer of the license under which WOW

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mained to be ascertained as did the existence of the stock. And in *Sand Springs Home* v. *Naharkey,* 299 U. S. 588, the Court denied certiorari "for the want of a final judgment" in a case where the plaintiff's right to an undivided one-sixth interest in land was decreed plus an accounting for profits from the gas taken out of the land. In the absence of a partition, there could of course be no delivery of the property itself.

Opposed to the general observations in the *Stateler* case is the square ruling in *Carondelet Canal Co.* v. *Louisiana,* 233 U. S. 362. The State Supreme Court ordered that judgment be entered requiring delivery of a canal to Louisiana. Certain claims with respect to a small additional plot of ground were reserved and an accounting of receipts and disbursements in the management of the property was ordered. This Court denied a motion to dismiss for want of a final judgment. It noted that the decree required immediate delivery of the property to the State so that the decree possessed definiteness as to the matter decided. "In the case at bar there is distinct and explicit finality and the further proceedings are directed to apply only to the 'questions reserved.'" 233 U. S. 362, 372.

was operating. That is a matter which Congress has put in the keeping of the Federal Communications Commission. Petitioners claim that the court's decree in effect involves an exercise of the very authority which the court disavowed. This presents a federal question which was duly made below, and we must consider it.

But it is not open to us to consider independently the claim that the Federal Communications Act has withdrawn from the State court jurisdiction over the physical properties of the station and given it to the Federal Communications Commission. The Society's answer admitted that this controversy was outside the jurisdiction of the Commission except as it related to the transfer of the license, and respondent joined in this view. Only after the Nebraska Supreme Court's original opinion did petitioners, by motions to dismiss the suit and for rehearing, claim that the Nebraska courts were wholly without jurisdiction over the controversy. In its opinion on rehearing the Nebraska Supreme Court rejected this claim as "contrary to the pleadings filed" in the trial court, and also denied it on its merits. "The answer of the defendants, heretofore quoted," that court wrote, "squarely contradicts the position they now endeavor to assume. Their position is unsound on its merits and, in addition thereto, it was eliminated from the case by the pleadings they filed in their own behalf." Questions first presented to the highest State court on a petition for rehearing come too late for consideration here, unless the State court exerted its jurisdiction in such a way that the case could have been brought here had the questions been raised prior to the original disposition. *Simmerman* v. *Nebraska,* 116 U. S. 54; *Godchaux Co.* v. *Estopinal,* 251 U. S. 179; *American Surety Co.* v. *Baldwin,* 287 U. S. 156. Here the Nebraska Supreme Court held that the federal question had dropped out as a matter of pleading and also denied its merits.

This brings the situation clearly within the settled rule whereby this Court will not review a State court decision resting on an adequate and independent non-federal ground even though the State court may have also summoned to its support an erroneous view of federal law. "Where the judgment of the state court rests on two grounds, one involving a federal question and the other not . . . and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction." *Lynch* v. *New York,* 293 U. S. 52, 54–55. One of the petitioners, Radio Station WOW, Inc., seeks to avoid the force of this rule by suggesting that its answer did not make the concession as to the limited jurisdiction of the Federal Communications Commission upon which the Nebraska court relied. But it is not for us to consider the correctness of the non-federal ground unless it is an obvious subterfuge to evade consideration of a federal issue. See *Neilson* v. *Lagow,* 12 How. 98, 109–111. It may be Nebraska practice that the answer of one defendant binds the others, or that failure to raise a question in the pleadings precludes its consideration on rehearing. These are matters of State law and not our concern. Cf. *Fair Haven R. Co.* v. *New Haven,* 203 U. S. 379, 386.

The federal question that remains is whether, although the Nebraska court clearly recognized that the power to vacate a license and to authorize its transfer lies exclusively with the Federal Communications Commission, its decree in effect is inconsistent with such recognition. This is urged on two grounds. It is asserted that the Nebraska Supreme Court, by ordering the transfer of the licensed facilities from Radio Station WOW, Inc. to the Society although not having power to direct the transfer of the license, severed the licensed facilities from the license and therefore nullified the license. Secondly, it is urged that by ordering the parties "to do all things necessary" to

secure a return of the license to the defrauded Society, the State court invaded the Commission's function.

The judgment, following the original opinion, ordered that "the transfer of the license to operate the station be vacated and set aside." On rehearing, the court made it quite plain that it was within the exclusive jurisdiction of the Communications Commission to vacate radio licenses and declared that its former opinion should be so construed. While it did not formally modify its judgment, it is reasonable to assume that the view which it unambiguously rejected in its opinion it did not mean to assert through its judgment. *Hotel Employees' Local* v. *Board,* 315 U. S. 437, 440–441; *Burke* v. *Unique Printing Co.,* 63 Neb. 264, 88 N. W. 488. But in matters of potential conflict between State and federal authorities, avoidance of needless friction no less than good draftsmanship counsels explicit and not merely argumentative restriction of a State court's judgment within its powers.

In any event, we think the court went outside its bounds when it ordered the parties "to do all things necessary" to secure a return of the license. Plainly that requires the Society to ask the Commission for a retransfer of the license to it and requires WOW not to oppose such transfer. The United States, in a brief filed at our request, suggests that this provision of the decree would probably also disqualify WOW from "applying for a new license to operate a radio station in Omaha on the same frequency, should it become equipped to do so." To be sure, the Communications Commission's power of granting, revoking and transferring licenses involves proper application of those criteria that determine "public convenience, interest, or necessity." § 307 (a), 48 Stat. 1064, 1083, 47 U. S. C. § 307 (a). But insofar as the Nebraska decree orders the parties "to do all things necessary" to secure the return of the license, it hampers the freedom of the Society not to continue in broadcasting and to restrict itself, as it prop-

erly may, to its insurance business. Equally does it prevent WOW from opposing a return to the Society, or, as the United States suggests, from seeking another license of its own. These are restrictions not merely upon the private rights of parties as to whom a State court may make appropriate findings of fraud. They are restrictions upon the licensing system which Congress established. It disregards practicalities to deny that, by controlling the conduct of parties before the Communications Commission, the court below reached beyond the immediate controversy and into matters that do not belong to it.

The most troublesome question raised by this case remains. While the decree of the State court concerning the transfer of the leasehold is, in view of the pleadings, not here as an independent question, due consideration of the federal question relating to the transfer of the license makes it proper to consider the bearing of a decree ordering an immediate transfer of the leasehold upon the status of the radio license. A proper regard for the implications of the policy that permeates the Communications Act makes disposition of licensed facilities prior to action by the Communications Commission a subsidiary issue to the license question. We have no doubt of the power of the Nebraska court to adjudicate, and conclusively, the claim of fraud in the transfer of the station by the Society to WOW and upon finding fraud to direct a reconveyance of the lease to the Society. And this, even though the property consists of licensed facilities and the Society chooses not to apply for retransfer of the radio license to it, or the Commission, upon such application, refuses the retransfer. The result may well be the termination of a broadcasting station. The Communications Act does not explicitly deal with this problem, and we find nothing in its interstices that dislodges the power of the States to deal with fraud merely because licensed facilities are involved. The "public interest" with which the Commission is

charged is that involved in granting licenses. Safeguarding of that interest can hardly imply that the interest of States in enforcing their laws against fraud have been nullified insofar as licensed facilities may be the instruments of fraud.

On the other hand, if the State's power over fraud can be effectively respected while at the same time reasonable opportunity is afforded for the protection of that public interest which led to the granting of a license, the principle of fair accommodation between State and federal authority, where the powers of the two intersect, should be observed. Severance of the licensed facilities from the license so precipitously that the Federal Communications Commission is deprived of the opportunity of enabling the two to be kept together needlessly disables the Commission from protecting the public interest committed to its charge. This presents a practical and not a hypothetical situation. To carry out abruptly a State decree separating licensed facilities from the license deprives the public of those advantages of broadcasting which presumably led the Commission to grant a license. To be sure, such a license is merely a permit to serve the public and not a duty to do so. Therefore, as we have concluded, the State has not been deprived by federal legislation of the practical power to terminate the broadcasting service by a proper adjudication separating the physical property from the license. We think that State power is amply respected if it is qualified merely to the extent of requiring it to withhold execution of that portion of its decree requiring retransfer of the physical properties until steps are ordered to be taken, with all deliberate speed, to enable the Commission to deal with new applications in connection with the station. Of course, the question of fraud adjudicated by the State court will no longer be open insofar as it bears upon the reliability as licensee of any of the parties.

New situations call for new adaptation of judicial remedies. We have had occasion to limit the conceded juris-

diction of the federal courts in order to give State courts opportunity to pass authoritatively on State issues involved in federal litigation. See, *e. g., Spector Motor Co.* v. *McLaughlin,* 323 U. S. 101. It will give full play both to the powers that belong to the States and to those that are entrusted to the Federal Communications Commission, where the two are intertwined as they are here, to enforce the accommodation we have formulated.

Accordingly, the judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

MR. JUSTICE DOUGLAS concurs in the result.

MR. JUSTICE ROBERTS is of the opinion that the judgment should be affirmed.

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

MR. JUSTICE JACKSON, dissenting.

I am unable to agree with the Court's disposition of this case and will indicate briefly the reason.

Petitioner is incorporated under the laws of Nebraska and operates a radio station owned by the Woodmen of the World, an insurance society also organized under the laws of Nebraska. It is clear that the State of Nebraska has plenary power over the internal affairs of both of these corporations.

The Woodmen of the World, in addition to its insurance business, went into the radio business through radio station WOW. It became involved in controversies and eventually decided that it ought to get out of the radio operation.

From 1923 to 1928, it had carried the radio station at a loss but its net average earnings from 1936 to 1942 were $194,724.14 per year. The property and facilities of the

corporation were leased to a new corporation in 1942 for $74,000.00 per year. The new corporation consisted of organizers whom the Court found sustained such a relation to the President of the insurance company who managed the negotiations on its behalf that the transfer constituted a constructive fraud on policyholders. It ordered that the transaction be undone and complete restitution be made. I take it that this judgment was fully within the competence of the State.

Meanwhile, the transferees had obtained approval of the Federal Communications Commission of the transfer of the license to them. Because of this, it is claimed that in some way the power of the State to undo this transaction is limited. Certainly no power has been conferred on the Federal Communications Commission to hear, try or determine the case of fraud between Nebraska stockholders and the officers of Nebraska corporations. The Commission has, of course, powers to look after the public interest in the transfer of stations.

There is possibility of conflict between the judgment rendered by the state court of Nebraska and the Federal Communications Commission and this possibility of conflict leads to the decision of the Court today. That conflict can occur only if the Federal Communications Commission shall hold that the federal public interest requires this radio station to be kept in the hands of those who are adjudged to be guilty of fraud and that the public interest cannot be served by those who have been adjudged to have been victims of that fraud although they had operated the station for many years with success and without any question as to the public interest. If the Communications Commission should render such a decision by refusing to retransfer the license in accordance with the judgment we would then have a question as to the faith and credit due the state court judgment and its effects in an administrative tribunal. I would deal with that sort

of question not hypothetically, but when it arises and upon the record which is made before the Communications Commission.

But even if the Commission should decide that the federal interest requires this station to be operated by those who have obtained it by constructive fraud, I think the judgment of the state court of Nebraska would still be good. It has the power not only to compel restitution of property obtained from its corporations in violation of its laws but if by federal proceedings or otherwise the wrongdoers have put some part of the value of this station beyond their power to recapture, the State has the right to compel them to account for its value. The State, it seems to me, has the right to strip the wrongdoers of every fruit of the wrong, including the value of the federal license, even if the license itself cannot be obtained.

For these reasons, I would affirm the judgment of the Nebraska courts and leave the problem of conflict to be dealt with when and if it arises.

BRIDGES v. WIXON, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, DEPARTMENT OF JUSTICE.

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

No. 788. Argued April 2, 3, 1945.—Decided June 18, 1945.

1. The order for the deportation of the petitioner—issued under the Act of June 28, 1940, providing for the deportation of any alien who was at the time of his entry into the United States, or has been at any time thereafter, a member of or affiliated with an organization that believes in, advises, advocates or teaches the overthrow of this Government by force or violence—rests upon a misconstruction of the term "affiliation" as used in the Act, and upon an unfair hearing on the question of his membership in the Communist Party, where-

fore his detention under the warrant of deportation is unlawful. Pp. 140, 156.

2. The act or acts tending to prove "affiliation," within the meaning of the deportation statute, must be of that quality which indicates an adherence to or a furtherance of the purposes or objectives of the proscribed organization as distinguished from mere cooperation with it in lawful activities. The act or acts must evidence a working alliance to bring the program to fruition. P. 143.
3. Freedom of speech and of the press is accorded aliens residing in this country. P. 148.
4. So far as the record shows the literature published by the petitioner, the utterances made by him were entitled to the protection of the freedom of speech and of the press. They revealed a militant advocacy of the cause of trade unionism, but did not teach or advocate or advise the subversive conduct condemned by the statute. P. 148.
5. Detention under an invalid order of deportation is established where an alien is ordered deported for reasons not specified by Congress. P. 149.
6. Upon the record in this case, the finding of "affiliation" was based on too loose a meaning of that term. P. 149.
7. A person under investigation with a view to deportation is legally entitled to insist upon the observance of rules promulgated pursuant to law by the agency entrusted with the power to deport. P. 153.
8. Objection to evidence on the ground that it violates the governing regulations is timely where made before both the Board of Immigration Appeals and the Attorney General, though not at the hearing before the inspector. P. 151.
9. Since it was error to admit into evidence against the petitioner certain unsworn statements in violation of Rules 150.1 (c) and 150.6 (i) of the Regulations of the Immigration and Naturalization Service—construed as meaning (1) that an investigating officer in obtaining a "recorded statement" must obtain the statement by interrogation under oath and seek to obtain it over the signature of the maker, and (2) that only such a "recorded statement," so safeguarded, may be used as evidence when the maker of the statement gives contradictory evidence on the stand—, since the statements in question were so crucial to the findings of membership, and since that issue was so close, this Court is unable to say that the order of deportation may be sustained without them. Pp. 151, 156.
10. In habeas corpus proceedings challenging the legality of detention upon a warrant of deportation, the petitioner does not prove he had

an unfair hearing merely by proving the decision to be wrong or by showing that incompetent evidence was admitted or considered; but the case is different where evidence was improperly received and where but for that evidence it is wholly speculative whether the requisite finding would have been made. P. 156.
144 F. 2d 927, reversed.

CERTIORARI, 323 U. S. 708, to review the affirmance of a judgment denying a petition for a writ of habeas corpus.

Messrs. Lee Pressman and *Richard Gladstein,* with whom *Mrs. Carol King* and *Mr. Aubrey Grossman* were on the brief, for petitioner.

Solicitor General Fahy, with whom *Assistant Attorney General Tom C. Clark, Messrs. Robert S. Erdahl* and *Leon Ulman* were on the brief, for respondent.

Messrs. Arthur Garfield Hays, Bartley C. Crum, Isaac Pacht, A. L. Wirin and *Osmond K. Fraenkel* filed a brief on behalf of the American Civil Liberties Union, as *amicus curiae,* in support of petitioner.

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

Messrs. Ralph B. Gregg, W. Coburn Cook, Wallace L. Ware and *Seth Millington* filed a brief on behalf of the American Legion, as *amicus curiae,* urging affirmance.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Harry Bridges is an alien who entered this country from Australia in 1920. In 1938 deportation proceedings were instituted against him on the ground that he both had been and then was a member of or affiliated with the Communist Party of the United States and that that party advised and taught the overthrow by force of the govern-

ment of the United States and caused printed matter to be circulated which advocated that course. Under the statute then in force, past membership or past affiliation was insufficient for deportation, present membership or present affiliation being required. *Kessler* v. *Strecker*, 307 U. S. 22. A hearing was had. The examiner, Hon. James M. Landis, concluded that the evidence established neither that Harry Bridges "is a member of nor affiliated with" the Communist Party of the United States. The Secretary of Labor sustained the examiner and dismissed the proceedings. That was in January 1940. By the Act of June 28, 1940, Congress amended the statute so as to provide for deportation of any alien who was "at the time of entering the United States, or has been at any time thereafter" a member of or affiliated with an organization of the character attributed to the Communist Party in the first proceeding.[1] A second deportation proceeding was instituted

[1] The statute as amended (40 Stat. 1012, 41 Stat. 1008, 54 Stat. 673, 8 U. S. C. § 137) provides in part as follows:

"That any alien who, at any time, shall be or shall have been a member of any one of the following classes shall be excluded from admission into the United States:

. . . . . .

"(c) Aliens . . . who are members of or affiliated with any organization, association, society, or group, that believes in, advises, advocates, or teaches: (1) the overthrow by force or violence of the Government of the United States . . .

. . . . . .

"(e) Aliens who are members of or affiliated with any organization, association, society, or group, that writes, circulates, distributes, prints, publishes, or displays, or causes to be written, circulated, distributed, printed, published, or displayed, or that has in its possession for the purpose of circulation, distribution, publication, issue, or display, any written or printed matter of the character described in subdivision (d) [advising, advocating or teaching the overthrow by force or violence of the Government of the United States].

"For the purpose of this section: (1) the giving, loaning or promising of money or any thing of value to be used for the advising, advocacy, or teaching of any doctrine above enumerated shall con-

against Harry Bridges under the amended statute on the ground that he had been a member of or affiliated with that organization.[2] Another hearing was had. The inspector designated to conduct the hearings and make a report, Hon. Charles B. Sears, found that the Communist Party of the United States was an organization of the character described in the statute, that the Marine Workers' Industrial Union was affiliated with the Communist Party and was an organization of the same character, and that after entering this country Harry Bridges had been affiliated with both organizations and had been a member of the Communist Party. He recommended deportation. The case was heard by the Board of Immigration Appeals[3] which found that Harry Bridges had not been

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stitute the advising, advocacy, or teaching of such doctrine; and (2) the giving, loaning or promising of money or any thing of value to any organization, association, society, or group, of the character above described shall constitute affiliation therewith; but nothing in this paragraph shall be taken as an exclusive definition of advising, advocacy, teaching, or affiliation.

"Sec. 2. Any alien who was at the time of entering the United States, or has been at any time thereafter, a member of any one of the classes of aliens enumerated in section 1 of this Act, shall, upon the warrant of the Attorney General, be taken into custody and deported in the manner provided in the Immigration Act of February 5, 1917. The provisions of this section shall be applicable to the classes of aliens mentioned in this Act, irrespective of the time of their entry into the United States."

The Immigration Act of February 5, 1917 is found in 39 Stat. 874.

[2] Since June 14, 1940 the immigration laws have been administered by the Attorney General. Reorganization Plan No. V, effective June 14, 1940. 54 Stat. 230, 1238, 5 U. S. C. fol. 133t, 5 U. S. C. 133v.

[3] The Regulations of the Immigration and Naturalization Service provide that the alien shall be accorded a hearing before an immigrant inspector to determine whether he is subject to deportation on the charges stated in the warrant of arrest, at which hearing the alien is entitled to representation by counsel and to offer evidence in his behalf. As soon as practicable after the hearing has been concluded, the inspector is required to prepare a memorandum setting forth a

a member of or affiliated with either of those organizations at any time after he entered this country. The Attorney General reviewed the decision of the Board and rendered an opinion in which he made findings in accordance with those proposed by the inspector and ordered Harry Bridges to be deported. A warrant of deportation was issued. Harry Bridges surrendered himself to the custody of respondent and challenged the legality of his detention by a petition for a writ of *habeas corpus* in the District Court for the Northern District of California. That court denied the petition and remanded petitioner to the custody of respondent. 49 F. Supp. 292. The Circuit Court of Appeals affirmed by a divided vote. 144 F. 2d 927, 944. The case is here on a petition for a writ of certiorari which we granted because of the serious character of the questions which are presented.

As we have said, Harry Bridges came here from Australia in 1920. He has not returned to Australia since that time. He was a longshoreman. In 1933 he became active in trade-union work on the water front in San Francisco. The Attorney General found that he had "done much to improve the conditions that existed among the longshoremen." He reorganized and headed up the International

summary of the evidence adduced at the hearing, his proposed findings of fact and conclusions of law, and a proposed order, which are to be furnished to the alien or his counsel, who may file exception thereto and submit a brief, 8 C. F. R., 1941 Supp., 150.6, 150.7. The case is then heard by the Board of Immigration Appeals, a body authorized to perform the functions of the Attorney General in relation to deportation, but responsible solely to him. 8 C. F. R., 1940 Supp., 90.2–90.3. If exceptions have been filed, oral argument before the Board is permitted. *Ibid.*, 90.5. Where a member of the Board dissents, where the Board certifies that a question of difficulty is involved, or in any case in which the Attorney General directs, the Board must refer the case to the Attorney General for review. If the Attorney General reverses the decision of the Board, the Attorney General must state in writing his conclusions and the reasons for his decision. *Ibid.*, 90.12.

Longshoremen's Association, an American Federation of Labor union. He led the maritime workers' strike on the Pacific Coast in 1934. He was president of the local International Longshoremen's Association from 1934 to 1936 and was Pacific Coast president in 1936. In 1937 his union broke with the American Federation of Labor, changed its name to International Longshoremen and Warehousemen's Union, and became affiliated with the Committee for Industrial Organization. Bridges was elected Pacific Coast District President of that union and has held the office ever since. He also holds several important offices in the C. I. O.

The two grounds on which the deportation order rests—that Harry Bridges at one time had been both "affiliated" with the Communist party and a member of it—present different questions with which we deal separately.

Affiliation. The statute defines affiliation as follows:

"For the purpose of this section: (1) the giving, loaning or promising of money or any thing of value to be used for the advising, advocacy, or teaching of any doctrine above enumerated shall constitute the advising, advocacy, or teaching of such doctrine; and (2) the giving, loaning or promising of money or any thing of value to any organization, association, society, or group, of the character above described shall constitute affiliation therewith; but nothing in this paragraph shall be taken as an exclusive definition of advising, advocacy, teaching, or affiliation." 41 Stat. 1009, 8 U. S. C. § 137f.

The doctrine referred to is the overthrow of the government by force or violence.[4] The organizations or groups referred to are those which advise and teach that doctrine or which write, circulate, display and the like or have in their possession for such purpose any written or printed matter of that character.

[4] See note 1, *supra.*

In ruling on the question whether an alien had been "affiliated" with the Communist Party and therefore could be deported, the court in *United States* v. *Reimer*, 79 F. 2d 315, 317, said that such an affiliation was not proved "unless the alien is shown to have so conducted himself that he has brought about a status of mutual recognition that he may be relied on to co-operate with the Communist Party on a fairly permanent basis. He must be more than merely in sympathy with its aims or even willing to aid it in a casual, intermittent way. Affiliation includes an element of dependability upon which the organization can rely which, though not equivalent to membership duty, does rest upon a course of conduct that could not be abruptly ended without giving at least reasonable cause for the charge of a breach of good faith." The same idea was expressed by Dean Landis in the first Bridges' report. After stating that "affiliation" implies a "stronger bond" than "association," he went on to say: "In the corporate field its use embraces not the casual affinity of an occasional similarity of objective, but ties and connections that, though less than that complete control which parent possesses over subsidiary, are nevertheless sufficient to create a continuing relationship that embraces both units within the concept of a system. In the field of eleemosynary and political organization the same basic idea prevails." And he concluded: "Persons engaged in bitter industrial struggles tend to seek help and assistance from every available source. But the intermittent solicitation and acceptance of such help must be shown to have ripened into those bonds of mutual cooperation and alliance that entail continuing reciprocal duties and responsibilities before they can be deemed to come within the statutory requirement of affiliation. . . . To expand that statutory definition to embrace within its terms *ad hoc* cooperation on objectives whose pursuit is clearly allowable under our constitutional system, or

friendly associations that have not been shown to have resulted in the employment of illegal means, is warranted neither by reason nor by law."

The legislative history throws little light on the meaning of "affiliation" as used in the statute. It imports, however, less than membership but more than sympathy. By the terms of the statute it includes those who contribute money or anything of value to an organization which believes in, advises, advocates, or teaches the overthrow of our government by force or violence. That example throws light on the meaning of the term "affiliation." He who renders financial assistance to any organization may generally be said to approve of its objectives or aims. So Congress declared in the case of an alien who contributed to the treasury of an organization whose aim was to overthrow the government by force and violence. But he who cooperates with such an organization only in its *wholly lawful activities* cannot by that fact be said as a matter of law to be "affiliated" with it. Nor is it conclusive that the cooperation was more than intermittent and showed a rather consistent course of conduct. Common sense indicates that the term "affiliation" in this setting should be construed more narrowly. Individuals, like nations, may cooperate in a common cause over a period of months or years though their ultimate aims do not coincide. Alliances for limited objectives are well known. Certainly those who joined forces with Russia to defeat the Nazis may not be said to have made an alliance to spread the cause of Communism. An individual who makes contributions to feed hungry men does not become "affiliated" with the Communist cause because those men are Communists. A different result is not necessarily indicated if aid is given to or received from a proscribed organization in order to win a legitimate objective in a domestic controversy. Whether intermittent or repeated, the act or acts tending to prove "affiliation" must be of

that quality which indicates an adherence to or a furtherance of the purposes or objectives of the proscribed organization as distinguished from mere cooperation with it in lawful activities. The act or acts must evidence a working alliance to bring the program to fruition.

We are satisfied that the term "affiliation" was not so construed either by Judge Sears or by the Attorney General. The reports made in this case contain no precise formulation of the standard which was employed. But the way in which the term "affiliation" was used and applied convinces us that it was given a looser and more expansive meaning than the statute permits. Judge Sears in his report stated that "Affiliation is clearly a word of broader content than membership, and of narrower content than sympathy. Generally, there will be some continuity of relationship to bring the word into application." But he concluded that that was not necessarily so in view of the statutory definition. And he added: "Affiliation may doubtless be shown circumstantially. Assisting in the enterprises of an organization, securing members for it, taking part in meetings organized and directed by or on behalf of the organization, would all tend to show affiliation. The weight to be given to such evidence is, of course, determined by the trier of the fact." That view was apparently shared by the Attorney General. But the broad sweep which was given the term in its application to the facts of this case is illustrated by the following excerpt from the Attorney General's report:

"Judge Sears summarizes Bridges' attitude towards the Communist Party and its policies by saying that the 'isolated instances,' while not evidence to establish membership in or affiliation with the Communist Party, nevertheless show a sympathetic or cooperative attitude on his part to the Party, and form 'a pattern which is more consistent with the conclusion that the alien followed this course of conduct as an affiliate of the Communist Party,

rather than as a matter of chance coincidence.' This conclusion, said Judge Sears, was strengthened by his consistently favoring nondiscrimination against union men because of Communist membership; and by his excoriating 'red baiters,' as he called those who took an opposite view, which 'amounted to cooperation with the Communist Party in carrying out its program of penetration and boring from within'."

But when we turn to the facts of this case we have little more than a course of conduct which reveals cooperation with Communist groups for the attainment of wholly lawful objectives.

The associations which Harry Bridges had with various Communist groups seem to indicate no more than cooperative measures to attain objectives which were wholly legitimate. The link by which it is sought to tie him to subversive activities is an exceedingly tenuous one, if it may be said to exist at all. The Trade Union Unity League was found to be a Communist organization. It chartered the Marine Workers' Industrial Union in 1930, which continued until 1935 and was found to be a proscribed organization. That union launched the Waterfront Worker, a mimeographed sheet, in 1932. The Attorney General sustained Judge Sears' finding that Bridges sponsored it and was responsible for its publication shortly after it first appeared in 1932 and down to its abandonment in 1936. The paper acknowledged the assistance of the MWIU prior to September 15, 1933. The question when Bridges took over the paper was closely contested, the Board of Immigration Appeals finding that Bridges became connected with it about September 15, 1933, after the MWIU had abandoned it. The finding of Judge Sears, approved by the Attorney General, that the paper was an instrument of the MWIU and the Communist Party from December 1932 to its abandonment in 1936 and that it was under the domination and control

of those organizations during that period rested primarily on the following grounds: "(1) The acknowledged cooperation with the M. W. I. U., in the early issues of the paper and subsequent favorable treatment of the M. W. I. U., T. U. U. L., and other Communist-sponsored organizations during the paper's entire existence. (2) Consistent attacks upon the so-called 'reactionary' leaders of the A. F. of L. (3) Support of the Communist candidates for political office. (4) Advice to read Communist literature. (5) The use of addresses of Communists or Communist-affiliated organizations." But when the evidence underlying these findings is examined it is found to be devoid of any showing that the Waterfront Worker advocated overthrow of the government by force. It was a militant trade-union journal. It aired the grievances of the longshoreman. It discussed national affairs affecting the interests of working men. It declared against war. But we have found no evidence whatsoever which suggests that it advocated the overthrow of the government by force. Nor is there any finding that Bridges took over this project with the view of doing more than advancing the lawful cause of unionism. The advice to support for office certain candidates said to be Communists was based entirely on the platform on which they ran—cash relief; abolition of vagrancy laws; no evictions; gas, water and electricity for the unemployed; and unemployment relief. The advice to read Communist literature was not general; it was specifically addressed to the comparative merits of those publications and other papers on the truthfulness of labor news. The use of addresses of Communist organizations, especially stressed by the Attorney General, was said by Judge Sears to demonstrate "a close cooperation with the Communists and Communist Organizations." But close cooperation is not sufficient to establish an "affiliation" within the meaning of the statute. It must evidence a working alliance to bring the proscribed program to fruition.

It must be remembered that the Marine Workers' Industrial Union was not a sham or pretense. It was a genuine union. It was found to have, and we assume it did have, the illegitimate objective of overthrowing the government by force. But it also had the objective of improving the lot of its members in the normal trade union sense. One who cooperated with it in promoting its legitimate objectives certainly could not by that fact alone be said to sponsor or approve of its general or unlawful objectives. But unless he also joined in that over-all program, he would not be "affiliated" with the Communist cause in the sense in which the statute uses the term.

Whether one could be a member of that union without becoming "affiliated" with the Communist Party within the meaning of the statute, we need not decide. For Harry Bridges was never a member of it. To say that his cooperation with it made him in turn "affiliated" with the Communist Party is to impute to him belief in and adherence to its general or unlawful objectives. In that connection, it must be remembered that although deportation technically is not criminal punishment (*Johannessen* v. *United States,* 225 U. S. 227, 242; *Bugajewitz* v. *Adams,* 228 U. S. 585, 591; *Mahler* v. *Eby,* 264 U. S. 32, 39), it may nevertheless visit as great a hardship as the deprivation of the right to pursue a vocation or a calling. Cf. *Cummings* v. *Missouri,* 4 Wall. 277; *Ex parte Garland,* 4 Wall. 333. As stated by Mr. Justice Brandeis speaking for the Court in *Ng Fung Ho* v. *White,* 259 U. S. 276, 284, deportation may result in the loss "of all that makes life worth living."

We cannot assume that Congress meant to employ the term "affiliation" in a broad, fluid sense which would visit such hardship on an alien for slight or insubstantial reasons. It is clear that Congress desired to have the country rid of those aliens who embraced the political faith of force and violence. But we cannot believe that Congress intended to cast so wide a net as to reach those whose ideas

and program, though coinciding with the legitimate aims of such groups, nevertheless fell far short of overthrowing the government by force and violence. Freedom of speech and of press is accorded aliens residing in this country. *Bridges* v. *California*, 314 U. S. 252. So far as this record shows the literature published by Harry Bridges, the utterances made by him were entitled to that protection. They revealed a militant advocacy of the cause of trade-unionism. But they did not teach or advocate or advise the subversive conduct condemned by the statute.

Inference must be piled on inference to impute belief in Harry Bridges of the revolutionary aims of the groups whose aid and assistance he employed in his endeavor to improve the lot of the workingmen on the water front. That he enlisted such aid is not denied. He justified that course on the grounds of expediency—to get such help as he could to aid the cause of his union.[5] But there is evidence that he opposed the Communist tactics of fomenting strikes; that he believed in the policy of arbitration and direct negotiation to settle labor disputes, with the strike reserved only as a last resort. As Dean Landis stated in the first report:

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[5] As respects printing releases of the Communist Party in a union paper, he testified:

"As I understand, the question was my position in regard to printing official Communist releases. I still say it might depend. For example, if—there was a lot of trouble up there at that time, a lot of action and tieups. I believe that if the Communist Party happened to send in a statement saying that they would do everything they could to support the particular dispute at that time in behalf of the Union position, my position would be that I wouldn't have any great objection to seeing that carried in the Union paper."

As respects voting for a political candidate known to be a Communist, he testified:

"The question of support only goes to whether he is a unionist or not. If he is a bad unionist, we don't care what he is, we are against him; if he is a good one, we don't care what he is, we are for him. His first allegiance must be for the union."

"Bridges' own statement of his political beliefs and disbeliefs is important. It was given not only without reserve but vigorously as dogma and faiths of which the man was proud and which represented in his mind the aims of his existence. It was a fighting apologia that refused to temper itself to the winds of caution. It was an avowal of sympathy with many of the objectives that the Communist Party at times has embraced, an expression of disbelief that the methods they wished to employ were as revolutionary as they generally seem, but it was unequivocal in its distrust of tactics other than those that are generally included within the concept of democratic methods. That Bridges' aims are energetically radical may be admitted, but the proof fails to establish that the methods he seeks to employ to realize them are other than those that the framework of democratic and constitutional government permits."

That observation is equally pertinent to the record before us. We cannot construe "affiliation" as used in the statute to bring such conduct and attitudes within its reach. Whether the evidence would justify a finding of "affiliation" in the strict sense in which the statute uses the term is not for us to say. An act innocent on its face may be done with an evil purpose. But where the fate of a human being is at stake the presence of the evil purpose may not be left to conjecture. In these *habeas corpus* proceedings we do not review the evidence beyond ascertaining that there is some evidence to support the deportation order. *Vajtauer* v. *Commissioner,* 273 U. S. 103, 106. But detention under an invalid order of deportation is established where an alien is ordered deported for reasons not specified by Congress. *Mahler* v. *Eby, supra.* That is the case here. For our review of the record convinces us that the finding of "affiliation" was based on too loose a meaning of the term.

Membership. The evidence of "affiliation" was used not only to support the finding that Harry Bridges had

been "affiliated" with the Communist party but also to corroborate the finding that at one time he had been a member of that organization. We may assume that such evidence, though falling short of the requirements of "affiliation," might be admissible for the latter purpose. But the difficulty is that the finding of membership, like the finding of affiliation, has an infirmity which may be challenged in this attack on the legality of Harry Bridges' detention under the deportation order.

Rule 150.1 (c) of the Regulations of the Immigration and Naturalization Service (8 C. F. R., 1941 Supp., 150.1 (c)) provides: "All statements secured from the alien or any other person during the investigation, which are to be used as evidence, shall be taken down in writing; and the investigating officer shall ask the person interrogated to sign the statement. Whenever such a recorded statement is to be obtained from any person, the investigating officer shall identify himself to such person and the interrogation of that person shall be under oath or affirmation. Whenever a recorded statement is to be obtained from a person under investigation, he shall be warned that any statement made by him may be used as evidence in any subsequent proceeding." And Rule 150.6 (i) provides in part: "A recorded statement made by the alien (other than a General Information Form) or by any other person during an investigation may be received in evidence only if the maker of such statement is unavailable or refuses to testify at the warrant hearing or gives testimony contradicting the statements made during the investigation."

O'Neil was a government witness. He was intimate with Harry Bridges. During the course of the examination, O'Neil was asked about statements which he allegedly had made to investigating officers some months earlier. These statements were not signed by O'Neil. They were not made by interrogation under oath. And it was not

shown that O'Neil was asked to swear and sign; or that, being asked, he refused. They were read into the record and verified by the stenographer who took them down. And an officer testified that later O'Neil had repeated the statements to him and to other witnesses. These statements were that O'Neil joined the Communist Party in December, 1936; that he walked into Bridges' office one day in 1937 and saw Bridges pasting assessment stamps in a Communist Party book; and that Bridges reminded O'Neil that he had not been attending party meetings. O'Neil admitted making statements to the investigating officers but denied making those particular statements.

Judge Sears admitted the statements not for purposes of impeachment but as substantive evidence. The Board of Immigration Appeals and the Attorney General both conceded that the statements were admitted in violation of Rules 150.1 (c) and 150.6 (i).[6] The Board held that it was error to consider the statements as affirmative, probative evidence. The Attorney General ruled: "Had the

[6] We accept that construction of the Rules. For Rule 150.6 (i) when read in conjunction with Rule 150.1 (c) fairly means (1) that an investigating officer in obtaining a "recorded statement" must obtain the statement by interrogation under oath and seek to obtain it over the signature of the maker, and (2) that only such a "recorded statement," so safeguarded, may be used as evidence when the maker of the statement gives contradictory testimony on the stand. It is true that Rule 150.6 (i) also provides that "An affidavit of an inspector as to the statements made by the alien or any other person during an investigation may be received in evidence, otherwise than in support of the testimony of the inspector, only if the maker of such statement is unavailable or refuses to testify at the warrant hearing or gives testimony contradicting the statement and the inspector is unavailable to testify in person." If we assume that that provision creates an exception from the general rule in case of the inspector who is unavailable to testify in person, we can hardly infer that the exception was designed to swallow the general rule. The deep-rooted policy of the law towards hearsay evidence cautions against such a loose reading of these fundamental procedural safeguards.

alien raised the question at the time of the hearing, compliance with the Departmental Regulations would have been obligatory and a deliberate rejection of a request to exclude the testimony would have rendered appropriate the objections now raised by the Board. No objection having been raised by the alien throughout the hearing, however, he waived the right to object on the technical ground that the statement was not taken in accordance with the rules." One difficulty with that position is that Bridges did protest before Judge Sears over the use of the statement. He maintained that they were erroneously received and were without probative value though he did not rest his objection on the regulations. But there is a more fundamental difficulty. The original deciding body is not the inspector who hears the case. He merely submits a memorandum setting forth the evidence adduced at the hearing, his proposed findings of fact and conclusions of law, and a proposed order.[7] The case then is heard by the Board of Immigration Appeals, which is authorized to perform the functions of the Attorney General in relation to deportation. 8 C. F. R., 1940 Supp., §§ 90.2, 90.3. And the case may then go to the Attorney General for decision. If the objection to evidence on the ground that it violates the governing regulations is made before the agency entrusted with the duty of deciding whether a case for deportation has been established, it is made soon enough. Objection to the use of these statements as probative evidence was made before both the Board and the Attorney General. It was specifically objected that the statements did not qualify under the regulations.

The rules are designed to protect the interests of the alien and to afford him due process of law. It is the action of the deciding body, not the recommendation of the inspector, which determines whether the alien will be de-

[7] See note 3, *supra*.

ported. The rules afford protection at that crucial stage of the proceedings or not at all. The person to whom the power to deport has been entrusted is the Attorney General or such agency as he designates. 8 U. S. C. § 155. He is an original trier of fact on the whole record. It is his decision to deport an alien that Congress has made "final." 8 U. S. C. § 155. Accordingly, it is no answer to say that the rules may be disregarded because they were not called to the attention of the inspector.

It was assumed in *Bilokumsky* v. *Tod,* 263 U. S. 149, 155, that "one under investigation with a view to deportation is legally entitled to insist upon the observance of rules promulgated by the Secretary pursuant to law." We adhere to that principle. For these rules are designed as safeguards against essentially unfair procedures. The importance of this particular rule may not be gainsaid. A written statement at the earlier interviews under oath and signed by O'Neil would have afforded protection against mistakes in hearing, mistakes in memory, mistakes in transcription. Statements made under those conditions would have an important safeguard—the fear of prosecution for perjury. Moreover, if O'Neil had been asked to swear to and sign the statements and had refused to do so, the fact of his refusal would have weight in evaluating the truth of the statements.

The statements which O'Neil allegedly made were hearsay. We may assume they would be admissible for purposes of impeachment. But they certainly would not be admissible in any criminal case as substantive evidence. *Hickory* v. *United States,* 151 U. S. 303, 309, *United States* v. *Block,* 88 F. 2d 618, 620. So to hold would allow men to be convicted on unsworn testimony of witnesses [8]—a

[8] We have here quite a different case from that where a prior statement of an alien, contradictory of testimony made at the hearing, is admitted. See *Chan Wong* v. *Nagle,* 17 F. 2d 987; *Ex parte Kishimoto,* 32 F. 2d 991; 4 Wigmore, Evidence (3rd ed.) § 1048.

practice which runs counter to the notions of fairness on which our legal system is founded.[9] There has been some relaxation of the rule in alien *exclusion* cases. See *United States* v. *Corsi,* 65 F. 2d 564. But we are dealing here with deportation of aliens whose roots may have become, as they are in the present case, deeply fixed in this land. It is true that the courts have been liberal in relaxing the ordinary rules of evidence in administrative hearings. Yet as was aptly stated in *Interstate Commerce Commission* v. *Louisville & Nashville R. Co.,* 227 U. S. 88, 93, "But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended."

Here the liberty of an individual is at stake. Highly incriminating statements are used against him—statements which were unsworn and which under the governing regulations are inadmissible. We are dealing here with procedural requirements prescribed for the protection of the alien. Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness.

On the record before us it is clear that the use of O'Neil's *ex parte* statements was highly prejudicial. Those unsworn statements of O'Neil and the testimony of one Lundeberg were accepted by the Attorney General as showing

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[9] Dean Wigmore in his third edition of Evidence (1940) § 1018 (b) took the other position. But he added, "The contrary view, however, is the orthodox one. It is universally maintained by the Courts that Prior Self-Contradictions are not to be treated as having any *substantive* or *independent testimonial value.*"

that Bridges was a member of the Communist Party. There was other testimony but it was so "untrustworthy, contradictory, or unreliable" as to be rejected by the Attorney General. If the finding as to Lundeberg's testimony was treated by the Attorney General independently of his finding as to O'Neil's, we would have a different case. Then we would have to determine whether the testimony of Lundeberg alone was sufficient to sustain the order. But the Attorney General, unlike Judge Sears, did not separate the testimony of Lundeberg and that of O'Neil for the purpose of his finding as to membership. He lumped them together and found that between them their total weight was sufficient to tip the scales against Harry Bridges. He ruled that if the unsworn statements of O'Neil and the testimony of Lundeberg were believed "the doubt is decided." [10] It is thus apparent not only that the unsworn statements of O'Neil weighed heavily in the scales but also that it took those unsworn statements as well as Lundeberg's testimony to resolve the doubt on this sharply contested and close question. Whether the finding would have been made on this record

[10] The Attorney General stated, immediately prior to his analysis of the testimony of Lundeberg and O'Neil, the following: "Judge Sears examines in detail the evidence of fifteen witnesses as bearing on Bridges' membership in or affiliation with the Communist Party. Much of this evidence is rejected as being untrustworthy, contradictory, or unreliable. However, the evidence of two witnesses is accepted as showing that Bridges was a member of the party. If this evidence is believed—and Judge Sears believed it—the doubt is decided. The question is substantially one of credibility. The Review Board did not think the evidence credible. But it should be remembered that Judge Sears saw the witnesses on the stand, watched their demeanor and expression, and was in a far better position to judge their truthfulness than the Review Board, dealing with the cold print of the record.

"The two most important witnesses as to membership are Harry Lundeberg and James D. O'Neil."

from the testimony of Lundeberg alone is wholly conjectural and highly speculative. Not only was Lundeberg admittedly hostile to Bridges. Not only did the Attorney General fail to rule that on the basis of Lundeberg's testimony alone Bridges had been a member of the party. But beyond that, the Board of Immigration Appeals significantly concluded that apart from O'Neil's unsworn statements the evidence of Bridges' membership was too flimsy to support a finding. It is thus idle to consider what the Attorney General might have ruled on the basis of the other evidence before him. Cf. *United States* v. *Dunton,* 291 F. 905, 907. The issue of membership was too close and too crucial to the case to admit of mere speculation. Since it was error to admit O'Neil's unsworn statements against Bridges, since they were so crucial to the findings of membership, and since that issue was so close, we are unable to say that the order of deportation may be sustained without them.

In these *habeas corpus* proceedings the alien does not prove he had an unfair hearing merely by proving the decision to be wrong (*Tisi* v. *Tod,* 264 U. S. 131, 133) or by showing that incompetent evidence was admitted and considered. *Vajtauer* v. *Commissioner, supra,* p. 106. But the case is different where evidence was improperly received and where but for that evidence it is wholly speculative whether the requisite finding would have been made. Then there is deportation without a fair hearing, which may be corrected on *habeas corpus.* See *Vajtauer* v. *Commissioner, supra.*

Since Harry Bridges has been ordered deported on a misconstruction of the term "affiliation" as used in the statute and by reason of an unfair hearing on the question of his membership in the Communist Party, his detention under the warrant is unlawful. Accordingly, it is unnecessary for us to consider the larger constitutional questions

which have been advanced in the challenge to the legality of petitioner's detention under the deportation order.

The judgment below is

Reversed.

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

MR. JUSTICE MURPHY, concurring.

The record in this case will stand forever as a monument to man's intolerance of man. Seldom if ever in the history of this nation has there been such a concentrated and relentless crusade to deport an individual because he dared to exercise the freedom that belongs to him as a human being and that is guaranteed to him by the Constitution.

For more than a decade powerful economic and social forces have combined with public and private agencies to seek the deportation of Harry Bridges, who came to this country in 1920 from Australia. Emerging from the Pacific Coast maritime strike of 1934 as a recognized labor leader in that area, Bridges incurred the hatred and hostility of those whose interests coincided directly or indirectly with the "vicious and inhumane practices toward longshoremen," 144 F. 2d 927, 938, that Bridges was combatting. His personal viewpoint on certain matters also antagonized many people of more conservative leanings. Agitation for his deportation arose. Industrial and farming organizations, veterans' groups, city police departments and private undercover agents all joined in an unremitting effort to deport him on the ground that he was connected with organizations dedicated to the overthrow of the Government of the United States by force and violence. Wire-tapping, searches and seizures without warrants and other forms of invasion of the right of privacy have been widely employed in this deportation drive.

This opposition to Bridges' presence in the United States has been as persistent as it has been undaunted by temporary setbacks to its aims. The Immigration and Naturalization Service, after a thorough investigation of the original charges in 1934 and 1935, was unable to find even a "shred of evidence" warranting his deportation and the matter officially was dropped. But the campaign to banish him continued unabated. Eventually a warrant was issued by the Immigration and Naturalization Service in 1938 seeking his deportation. A clean bill of health was given him, however, after a full hearing before a special examiner, Dean Landis of the Harvard Law School. This only led to demands that the deportation laws be changed to make sure that Bridges was exiled. Thereupon a special bill was introduced and actually passed by the House of Representatives directing the Attorney General "notwithstanding any other provisions of law" forthwith to take into custody and deport Harry Bridges, "whose presence in this country the Congress deems hurtful." H. R. 9766, 76th Cong., 3rd Sess. Fortunately this bill died in a Senate committee after the Attorney General denounced it as inconsistent with the American practice and tradition of due process of law. S. Rep. No. 2031, 76th Cong., 3rd Sess., p. 9.

As a substitute for this direct legislative assault upon Bridges, Congress amended the deportation law by enacting § 23 of the Alien Registration Act of 1940, 54 Stat. 673. This amendment set aside this Court's decision in *Kessler* v. *Strecker,* 307 U. S. 22, by making it clear that an alien could be deported if, at the time of entering the United States or at any time thereafter, he was a member of or affiliated with an organization advocating the forceful overthrow of the Government. It thus was no longer necessary that the alien be an affiliate or member at the time of the issuance of the warrant of arrest. In the words of the author of this amendment: "It is my joy to

announce that this bill will do, in a perfectly legal and constitutional manner, what the bill specifically aimed at the deportation of Harry Bridges seeks to accomplish. This bill changes the law so that the Department of Justice should now have little trouble in deporting Harry Bridges and all others of similar ilk." 86 Cong. Rec. 9031.

This prophecy was quickly realized, to the satisfaction of the vast interests arrayed against Bridges. A warrant for his arrest and deportation under this new statutory provision was issued in 1941, followed by a hearing before another special examiner, Judge Sears. Evidence was presented by the Government on practically the same matters as in the first proceeding. This time, however, the examiner discovered sufficient grounds for recommending deportation. Although the Board of Immigration Appeals unanimously rejected this recommendation, the Attorney General, without holding a hearing or listening to argument, reversed the Board and ordered the deportation of Bridges.

It is not surprising that the background and intensity of this effort to deport one individual should result in a singular lack of due process of law. Much of the evidence presented by the Government has been described by the Attorney General as "untrustworthy, contradictory, or unreliable." The remaining Government evidence can scarcely be described in more generous terms. And the Court's opinion, in which I join, demonstrates that the proceeding had its validity further undermined by a misconception of the statutory term "affiliation" and by the improper use of hearsay statements.

But the Constitution has been more than a silent, anemic witness to this proceeding. It has not stood idly by while one of its subjects is being excommunicated from this nation without the slightest proof that his presence constitutes a clear and present danger to the public welfare. Nor has it remained aloof while this individual is

being deported, resulting in the loss "of all that makes life worth living," *Ng Fung Ho* v. *White*, 259 U. S. 276, 284, on a finding that, regardless of his personal beliefs, he was a member and an affiliate of an organization advocating the forceful overthrow of the Government. When the immutable freedoms guaranteed by the Bill of Rights have been so openly and concededly ignored, the full wrath of constitutional condemnation descends upon the action taken by the Government. And only by expressing that wrath can we give form and substance to "the great, the indispensable democratic freedoms," *Thomas* v. *Collins*, 323 U. S. 516, 530, to which this nation is dedicated.

The unconstitutionality of the statute in issue and the invalidity of the proceeding brought pursuant thereto are obvious. As construed and applied in this case, the statute calls for the deportation of Harry Bridges after a fair hearing in which "some" evidence is established that he was a member or affiliate of an organization advocating the forceful overthrow of the Government. Such a provision rests its claim to legality upon one basic assumption, an assumption that is obnoxious and intolerable when viewed in light of the supernal heritage and ideals of this nation.

This assumption underlying the statute is that the "plenary" power of Congress to deport resident aliens is unaffected by the guarantee of substantive freedoms contained in the Bill of Rights. In other words, as the Government has urged before us, the deportation power of Congress "is unaffected by considerations which in other contexts might justify the striking down of legislation as an unwarranted abridgment of constitutionally guaranteed rights of free speech and association." From this premise it follows that Congress may constitutionally deport aliens for whatever reasons it may choose, limited only by the due process requirement of a fair hearing. The color of their skin, their racial background or their religious faith may

conceivably be used as the basis for their banishment. An alien who merely writes or utters a statement critical of the Government, or who subscribes to an unpopular political or social philosophy, or who affiliates with a labor union, or who distributes religious handbills on the street corner, may be subjected to the legislative whim of deportation.

I am unable to believe that the Constitution sanctions that assumption or the consequences that logically and inevitably flow from its application. The power to exclude and deport aliens is one springing out of the inherent sovereignty of the United States. *Chinese Exclusion Case,* 130 U. S. 581. Since an alien obviously brings with him no constitutional rights, Congress may exclude him in the first instance for whatever reason it sees fit. *Turner* v. *Williams,* 194 U. S. 279. The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores. But once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders. Such rights include those protected by the First and the Fifth Amendments and by the due process clause of the Fourteenth Amendment. None of these provisions acknowledges any distinction between citizens and resident aliens. They extend their inalienable privileges to all "persons" and guard against any encroachment on those rights by federal or state authority. Indeed, this Court has previously and expressly recognized that Harry Bridges, the alien, possesses the right to free speech and free press and that the Constitution will defend him in the exercise of that right. *Bridges* v. *California,* 314 U. S. 252.

Since resident aliens have constitutional rights, it follows that Congress may not ignore them in the exercise of its "plenary" power of deportation. As this Court said in a previous exclusion case, "But this court has never held, nor

must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution." *Japanese Immigrant Case,* 189 U. S. 86, 100. No less may a statute on its face disregard the basic freedoms that the Constitution guarantees to resident aliens. The CHIEF JUSTICE, in his dissenting opinion in *Jones* v. *Opelika,* 316 U. S. 584, 609, has stated that "The First Amendment prohibits all laws abridging freedom of press and religion, not merely some laws or all except tax laws." By the same token, the First Amendment and other portions of the Bill of Rights make no exception in favor of deportation laws or laws enacted pursuant to a "plenary" power of the Government. Hence the very provisions of the Constitution negative the proposition that Congress, in the exercise of a "plenary" power, may override the rights of those who are numbered among the beneficiaries of the Bill of Rights.

Any other conclusion would make our constitutional safeguards transitory and discriminatory in nature. Thus the Government would be precluded from enjoining or imprisoning an alien for exercising his freedom of speech. But the Government at the same time would be free, from a constitutional standpoint, to deport him for exercising that very same freedom. The alien would be fully clothed with his constitutional rights when defending himself in a court of law, but he would be stripped of those rights when deportation officials encircle him. I cannot agree that the framers of the Constitution meant to make such an empty mockery of human freedom.

Since the basic assumption of the statute is false, the Bill of Rights must be brought to bear. And when that is done several constitutional infirmities are apparent in this legislation. See 52 Yale L. J. 108. As shown by the

record in this case, Harry Bridges has done no more than exercise his personal right to free speech and association. Yet upon proof of that fact, he would be subject to deportation under the statute. The invalidity of legislation of such nature is inescapable.

First. The deportation statute completely ignores the traditional American doctrine requiring personal guilt rather than guilt by association or imputation before a penalty or punishment is inflicted.

The statute does not require that an alien, to be deportable, must personally advocate or believe in the forceful overthrow of the Government. It is enough if he is a member or an affiliate of an organization which advocates such a doctrine. And in this case the Government admits that it has neither claimed nor attempted to prove that Harry Bridges personally advocated or believed in the proscribed doctrine. There is no evidence, moreover, that he understood the Communist Party to advocate violent revolution or that he ever committed or tried to commit an overt act directed to the realization of such an aim.

The doctrine of personal guilt is one of the most fundamental principles of our jurisprudence. It partakes of the very essence of the concept of freedom and due process of law. *Schneiderman* v. *United States,* 320 U. S. 118, 154. It prevents the persecution of the innocent for the beliefs and actions of others. See Chafee, Free Speech in the United States (1941), pp. 472–475.

Yet the deportation statute on its face and in its present application flatly disregards this rule. It condemns an alien to exile for beliefs and teachings to which he may not personally subscribe and of which he may not even be aware. This fact alone is enough to invalidate the legislation. Cf. *DeJonge* v. *Oregon,* 299 U. S. 353; *Herndon* v. *Lowry,* 301 U. S. 242; *Whitney* v. *California,* 274 U. S. 357.

It is no answer that a deportation proceeding is technically non-criminal in nature and that a deportable alien is

not adjudged guilty of a "crime." Those are over-subtle niceties that shed their significance when we are concerned with safeguarding the ideals of the Bill of Rights. The impact of deportation upon the life of an alien is often as great if not greater than the imposition of a criminal sentence. A deported alien may lose his family, his friends and his livelihood forever. Return to his native land may result in poverty, persecution and even death. There is thus no justifiable reason for discarding the democratic and humane tenets of our legal system and descending to the practices of despotism in dealing with deportation.

Second. The deportation statute is further invalid under the "clear and present danger" test enunciated in *Schenck* v. *United States,* 249 U. S. 47.

It is clear that if an organization advocated and was capable of causing immediate and serious violence in order to overthrow the Government and if an alien member or affiliate personally joined in such advocacy a clear and present danger to the public welfare would be demonstrated and the Government would then have the power to deport or otherwise punish the alien. But the statute in issue makes no attempt to require such proof. It is apparently satisfied if an organization at any time since the alien became a member or affiliate advocated as a theoretical doctrine the use of force under hypothetical conditions at some indefinite future time. It is immaterial whether the organization presently advocates such an abstract doctrine or whether the alien is presently a member or an affiliate or whether he presently adheres to the organization's views. It matters not that an alien member never knew or understood the organization's illegal aim or that he may have resigned in protest upon learning of it. It appears to be enough that the organization at one time advocated the unlawful doctrine and that the alien was a member or affiliate at some time in the past, even if for no longer than one minute. 86 Cong. Rec. 9032. It is not

even clear that the organization's advocacy of violent revolution and an alien's membership or affiliation must coincide in point of time. Such a statute fails to satisfy any rational or realistic test. It certainly does not pretend to require proof of a clear and present danger so as properly to negative the presumption that individual rights are supreme under the Constitution. It therefore founders in constitutional waters.

The Government frankly concedes that this case was not tried or decided below on the theory that the "clear and present danger" test had any application. Proof of Bridges' membership and affiliation with the Communist Party was shown by some of the most tenuous and unreliable evidence ever to be introduced in an administrative or legal proceeding. Proof that the Communist Party advocates the theoretical or ultimate overthrow of the Government by force was demonstrated by resort to some rather ancient party documents, certain other general Communist literature and oral corroborating testimony of Government witnesses. Not the slightest evidence was introduced to show that either Bridges or the Communist Party seriously and imminently threatens to uproot the Government by force or violence.

Deportation, with all its grave consequences, should not be sanctioned on such weak and unconvincing proof of a real and imminent threat to our national security. Congress has ample power to protect the United States from internal revolution and anarchy without abandoning the ideals of freedom and tolerance. We as a nation lose part of our greatness whenever we deport or punish those who merely exercise their freedoms in an unpopular though innocuous manner. The strength of this nation is weakened more by those who suppress the freedom of others than by those who are allowed freely to think and act as their consciences dictate.

Our concern in this case does not halt with the fate of Harry Bridges, an alien whose constitutional rights have

been grossly violated. The significance of this case is far-reaching. The liberties of the 3,500,000 other aliens in this nation are also at stake. Many of these aliens, like many of our forebears, were driven from their original homelands by bigoted authorities who denied the existence of freedom and tolerance. It would be a dismal prospect for them to discover that their freedom in the United States is dependent upon their conformity to the popular notions of the moment. But they need not make that discovery. The Bill of Rights belongs to them as well as to all citizens. It protects them as long as they reside within the boundaries of our land. It protects them in the exercise of the great individual rights necessary to a sound political and economic democracy. Neither injunction, fine, imprisonment nor deportation can be utilized to restrict or prevent the exercise of intellectual freedom. Only by zealously guarding the rights of the most humble, the most unorthodox and the most despised among us can freedom flourish and endure in our land.

MR. CHIEF JUSTICE STONE.

MR. JUSTICE ROBERTS, MR. JUSTICE FRANKFURTER and I think that the deportation order should be sustained and the judgment below affirmed.

This case presents no novel question. Under our Constitution and laws, Congress has its functions, the Attorney General his, and the courts theirs in regard to the deportation of aliens. Our function is a very limited one. In this case our decision turns on the application of the long-settled rule that in reviewing the fact findings of administrative officers or agencies, courts are without authority to set aside their findings if they are supported by evidence. This Court has not heretofore departed from that rule in reviewing deportation orders upon collateral attack by habeas corpus, *Tisi* v. *Tod*, 264 U. S. 131; *Vajtauer* v. *Commissioner of Immigration*, 273 U. S. 103, 106;

Costanzo v. *Tillinghast*, 287 U. S. 341, 343, and cases cited, and there is no occasion for its doing so now.

Congress, in the exercise of its plenary power over the deportation of aliens, has directed the deportation of any alien who, at the time of his entry into the United States or at any time thereafter, has been a member of or affiliated with "any organization, association, society, or group, that believes in, advises, advocates, or teaches . . . the overthrow by force or violence of the Government of the United States . . . [or] that writes, circulates, distributes, prints, publishes, or displays . . . any written or printed matter" advising, advocating or teaching the overthrow by force or violence of the Government of the United States. §§ 1 and 2 of the Act of October 16, 1918, c. 186, 40 Stat. 1012, as amended by the Act of June 5, 1920, c. 251, 41 Stat. 1008–1009, and the Act of June 28, 1940, c. 439, 54 Stat. 673, 8 U. S. C. § 137.

Congress has committed the conduct of deportation proceedings to an administrative officer, the Attorney General, with no provision for direct review of his action by the courts. Instead it has provided that his decision shall be "final," 8 U. S. C. § 155, as it may constitutionally do. *Zakonaite* v. *Wolf*, 226 U. S. 272, 275, and cases cited. Only in the exercise of their authority to issue writs of habeas corpus, may courts inquire whether the Attorney General has exceeded his statutory authority or acted contrary to law or the Constitution. *Bilokumsky* v. *Tod*, 263 U. S. 149, 153; *Vajtauer* v. *Commissioner of Immigration*, *supra*. And when the authority to deport the alien turns on a determination of fact by the Attorney General, the courts, as we have said, are without authority to disturb his finding if it has the support of evidence of any probative value.

In this proceeding, the Attorney General, following the prescribed procedure, issued a warrant for the arrest of petitioner, charging that after his entry into the United

States, he had been a member of and affiliated with organizations of the type referred to in the part of the deportation statute we have quoted. The Attorney General, as authorized by the applicable statutes and regulations, appointed the Honorable Charles B. Sears, an experienced judge formerly of the Court of Appeals of New York, to act as an inspector to hear evidence on the charges. The hearings before Judge Sears extended over a period of nearly three months, in the course of which evidence was offered by the Government and by petitioner, who was represented by counsel. The evidence is contained in more than seventy-five hundred typewritten pages of the record and in three hundred and fifty-nine exhibits. The record in this Court covers some seventy-eight hundred printed pages.

At the conclusion of the hearings, Judge Sears made his memorandum decision, in which he found that the Communist Party of the United States and the Marine Workers' Industrial Union were, at all relevant times, each an organization which believed in and advocated the overthrow by force and violence of the Government of the United States, and that the Communist Party also wrote, circulated, distributed, printed, published and displayed printed matter advising, advocating or teaching the overthrow by force and violence of the Government of the United States. Those findings are not challenged here. Judge Sears also found that petitioner was subject to deportation, and recommended that he be deported, on two separate and independent grounds: (a) that he was a member of the Communist Party of the United States, and (b) that he was affiliated with the Communist Party and with the Marine Workers' Industrial Union, which was a part of the Communist Party of the United States.

As we are of opinion that the finding of Bridges' membership in the Communist Party, standing alone, supports the deportation order, and that the finding is supported

by evidence, we deem it unnecessary to consider other contentions to which the Court's opinion is principally directed. The evidence of membership is of two kinds, and may be briefly summarized. It consists of background testimony of numerous witnesses, much of it uncontradicted, which Judge Sears found to be true and which showed that Bridges had long and continuously associated with Communists and Communist Party organizations, and had exhibited a sympathetic attitude toward the Communist Party and its program. More important and decisive of the issue now before us is evidence concerning Bridges' interviews with two witnesses which, if true, as to either interview, showed that Bridges, both by his words and conduct, proved his membership in the Party.

One witness, Lundeberg, a prominent labor leader, testified that he had dined at Bridges' home in 1935; that Bridges, along with a member of the Communist Party who was also present, urged the witness to join the Communist Party; and that this took place in the presence of two members of Bridges' family and his secretary. Lundeberg testified that Bridges said on that occasion:
"You don't have to be afraid because nobody has to know you are a member of the Communist Party . . . You don't have to be afraid because I am one too . . . I am a member of the Communist Party."
Bridges denied making these statements, although he admitted that the witness had dined with him at his home in 1935 when several members of his family were present. The others said to be present failed to testify and their absence from the witness stand is unexplained.

The other witness, O'Neil, who was the publicity director of the C. I. O., a member of the Communist Party, and an intimate of Bridges, and who shared offices with him after 1936, made a statement to members of the Federal Bureau of Investigation that in 1937 he saw Bridges in his office pasting assessment stamps (receipts for pay-

ment of Communist Party dues) in a Communist Party book, which the witness was certain was petitioner's membership book in the Party, and that Bridges on several occasions reminded the witness that he had not been attending Party meetings. The accuracy of the statement, as given in evidence, was verified by the stenographer who, testifying as a witness, read the statement from her stenographic notes. Major Schofield, a Special Assistant to the Attorney General, testified that O'Neil had repeated substantially the same statement to him in the presence of two witnesses. O'Neil, who had demonstrated his hostility to the Government and his unwillingness to testify, testified, when he was called as a Government witness, that he had made two statements at the times and in the manner indicated, and that they were true statements, but he denied that he had said that Bridges was a Communist or that he had seen him pasting assessment stamps in a Communist Party book.

Judge Sears, who saw and heard the witnesses, ruled that the prior statements of O'Neil were admissible. He declared in his decision that he believed and accepted as true Lundeberg's testimony and O'Neil's prior statements; that each supported his findings that Bridges was a Party member; and that each was corroborated by Bridges' associations with Communist Party members and organizations as well as by other circumstances, appearing in the testimony, and which it is unnecessary to detail. On review the Board of Immigration Appeals proposed findings, which would have rejected the findings of Judge Sears as unsupported by evidence. The Attorney General declined to follow the recommendations of the Board, but instead adopted the findings of Judge Sears. He therefore ordered petitioner's deportation.

On this record we have only a single question to decide. Was there some evidence supporting the findings of Judge Sears and the Attorney General that Bridges was a mem-

ber of the Communist Party? If there was, then, as we have said, we have no further function to perform and the judgment must be affirmed. To determine that issue we need not look beyond the testimony of Lundeberg. If his testimony is to be believed, Bridges admitted his membership in the Communist Party in circumstances which carry conviction of the truth of the fact admitted. It was for the hearing officer, Judge Sears, and the trier of fact, the Attorney General, not the courts, to say whether Lundeberg was to be believed. In deciding that issue, the administrative officials could take into account, as they did, the facts that four persons, all evidently friendly to Bridges, and who according to the testimony were present at the interview between Lundeberg and Bridges, failed to testify and that Bridges' failure to call them as witnesses stands unexplained. *Interstate Circuit* v. *United States,* 306 U. S. 208, 225–226, and cases cited.

The conclusion which the two administrative officers, charged with finding the facts, have drawn from this testimony, is not to be brushed aside by saying that the O'Neil statements are inadmissible as evidence and that the triers of fact would not or might not have accepted Lundeberg's testimony without O'Neil's. For neither Judge Sears nor the Attorney General made acceptance of the one dependent on acceptance of the other. Not a word in Judge Sears' decision or that of the Attorney General suggests that they did not regard the testimony of Lundeberg or the statements of O'Neil, each without the other, as sufficient to support their finding that Bridges was a member of the Communist Party. On the contrary, each declared that he accepted Lundeberg's testimony and O'Neil's statements, and that he believed each. It can hardly be said, without more, that they did not accept the credited evidence furnished by each witness as sufficient in itself to support their finding of Party membership.

But the record does not stop there. Both Judge Sears and the Attorney General examined the Lundeberg and

the O'Neil testimony separately and made separate findings as to the effect to be given to each. The findings of Judge Sears, adopted by the Attorney General, show affirmatively that both officials accepted the testimony of Lundeberg and the statements of O'Neil, as independently sufficient to support the finding that Bridges was a member of the Communist Party.

Lundeberg's testimony related wholly to his interview with Bridges in 1935. Of Lundeberg's testimony, Judge Sears said:

"The question for me to answer is whether the Government has established that Bridges admitted to Lundeberg at the time specified that he was a member of the Communist Party. If he did so admit, it is in my judgment conclusive evidence of the fact."

After examining Lundeberg's testimony, and considering his demeanor on the witness stand, and the strongly corroborative circumstance that others, who were in a position to deny his testimony, had failed to do so, Judge Sears said:

"I reach the conclusion, therefore, that the conversation did take place substantially as testified by Lundeberg and that Bridges did then and there admit to Lundeberg that he was a member of the Communist Party."

Thus Judge Sears clearly stated that Lundeberg's testimony alone was sufficient to sustain a finding that petitioner was a member of the Communist Party in 1935.

At the conclusion of his like examination of O'Neil's statements, which related wholly to O'Neil's interview with Bridges in 1937, Judge Sears said:

"Having thus concluded that O'Neil made the statements attributed to him by Mrs. Segerstrom [the stenographer] and Major Schofield, I am also convinced of their truth. I do not overlook O'Neil's repudiation of the statements or Bridges' denials of the facts recited therein.

"Taking into consideration all the evidence bearing on this phase of the proceeding, I conclude that it is estab-

lished that the narrations contained in O'Neil's statement to Mrs. Segerstrom and in his conversation in the presence of Major Schofield are the truth, and I find the fact that in accordance therewith that Bridges was in 1937, a member of the Communist Party."

The Attorney General, after a like separate examination of the Lundeberg and O'Neil evidence, made it perfectly clear that he accepted Judge Sears' findings as to each. He too said that the question as to each witness was a matter of his credibility, and that he believed the witness, rather than petitioner, because on this point he accepted Judge Sears' finding that they, and not Bridges, were to be believed. The conclusion is inescapable that the adminstrative officers, whose concurrent findings we are bound to accept if supported by evidence, did not make their finding, from the Lundeberg testimony, that Bridges was a Party member in 1935, dependent in any degree upon their finding, from the O'Neil evidence, that Bridges was a member of the Party in 1937, or vice versa. This is particularly the case since Lundeberg's and O'Neil's testimony was not cumulative as to membership in the Communist Party at a single time; each testified as to a different time, some two years apart.

It is true that the Attorney General, in an introductory paragraph in his decision, said: "However, the evidence of two witnesses is accepted as showing that Bridges was a member of the Party. If this evidence is believed—and Judge Sears believed it—the doubt is decided." But he went on to say that the question was one of credibility, and that Judge Sears, who saw the witnesses, was in a far better position to decide that question than the Review Board. He continued with a separate discussion of each witness and his testimony. He concluded as to each, without any reference to the other, that the witness should be believed rather than Bridges, and that Judge Sears' conclusion as to the credibility of each (which was not de-

pendent upon his like conclusion as to the other) should be sustained.

The record thus conclusively shows that both Judge Sears and the Attorney General found, on the Lundeberg testimony alone, that Bridges was a member of the Communist Party in 1935. That finding is supported by the sworn testimony of Lundeberg, which was admissible in evidence and has probative force. As it supports the concurrent findings of Judge Sears and of the Attorney General that Bridges was a Party member at that time, we cannot reject that finding.

What we have said is not to be taken as conceding that O'Neil's prior statements were improperly admitted. The Court rejects them on two grounds, that they were admitted in violation of departmental regulations, and that as hearsay they were so untrustworthy as to make them inadmissible in any event. We think neither ground tenable.

We find nothing in the rules and regulations applicable to deportation cases calling for the exclusion of the testimony concerning O'Neil's prior statements.[1] Rule 150.1 provides that statements secured during an investigation "which are to be used as evidence" shall be made under oath, and taken down in writing and signed by the person

[1] The opinion of the Court states that the Attorney General conceded that the evidence was admitted in violation of the Rules. The Department of Justice made no such concession in this Court. And we think that the Attorney General's decision, which is quoted by the Court, when fairly read, stated no more than that the objection based on the rules came too late; that had the question been raised in time, compliance with the rules would have been required (it was not stated what compliance with the rules would have entailed); that if the Inspector, after deliberation, then had rejected the objection based on the rules, it would have been "appropriate" to raise the objections before the Board of Immigration Appeals; and that the right to raise the objection had been waived. Plainly he did not state or suggest that objections to their admissibility would have been valid if timely made, and there was no occasion for him to consider that question.

interrogated. Such a statement is denominated a "recorded statement" by the rule. The purpose of securing recorded statements is obviously to preserve evidence in a readily available form, and to insure that before a warrant of arrest is issued, there is credible evidence that the person investigated is an alien and is subject to deportation. It provides neither explicitly nor by implication that statements other than recorded statements are inadmissible.

It is true that Rule 150.6 excludes "recorded" statements unless the maker of the statement is unavailable, refuses to testify or gives inconsistent testimony. These restrictions on the admissibility of ex parte recorded statements hardly can be strained into a sweeping exclusion of all unrecorded statements, otherwise admissible in the proceeding. Indeed the rule on its face quite clearly permits an inspector to testify as to statements made by persons who are unavailable, refuse to testify or give testimony contradictory to a prior statement.[2] The statements as to which the inspector may testify are not restricted by the terms of the rule to recorded statements. Hence Judge Sears' ruling that Mrs. Segerstrom and Major Schofield could testify, under oath, that O'Neil had made statements to them in contradiction with his testimony on the stand, was not in conflict with the departmental rules.

But it is said that the evidence was in any event inadmissible. That the evidence would be inadmissible in a criminal proceeding is irrelevant here, since a deportation proceeding is not a criminal proceeding. *Bugajewitz* v.

[2] Rule 150.6 (i) provides, in part: "An affidavit of an inspector as to the statements made by the alien or any other person during an investigation may be received in evidence, otherwise than in support of the testimony of the inspector, only if the maker of such statement is unavailable or refuses to testify at the warrant hearing or gives testimony contradicting the statement and the inspector is unavailable to testify in person."

Adams, 228 U. S. 585, 591 and cases cited; *Bilokumsky* v. *Tod, supra,* 154–155; *Mahler* v. *Eby,* 264 U. S. 32, 39. And no principle of law has been better settled than that the technical rules for the exclusion of evidence, applicable in trials in courts, particularly the hearsay rule, need not be followed in deportation proceedings, *Bilokumsky* v. *Tod, supra,* 157, and cases cited; *Tisi* v. *Tod, supra,* 133; *Vajtauer* v. *Commissioner of Immigration, supra,* 106, more than in other administrative proceedings. *Consolidated Edison Co.* v. *Labor Board,* 305 U. S. 197, 229–230, and cases cited; *Opp Cotton Mills* v. *Administrator,* 312 U. S. 126, 155, and cases cited. The only objections that can be taken to the evidence in such proceedings are not to its admissibility, but to its probative value. See *Consolidated Edison Co.* v. *Labor Board, supra,* 230.

Judge Sears completely and accurately ruled on the admissibility of Mrs. Segerstrom's and Major Schofield's testimony as to O'Neil's earlier statements to them. He said:

"Whatever may be the common-law rule in relation to the reception of such evidence as that of Mrs. Segerstrom and Major Schofield, in this hearing the parties are not confined to common-law proof. Hearsay is admissible but the character of such evidence is an element to be used in its evaluation. The principal reason for the exclusion of hearsay at common law is that the opportunity for cross-examination is absent. In the present case, the sanction of cross-examination was present. Although the statement given to Mrs. Segerstrom and the statement made in the presence of Major Schofield were not under oath, there is something equivalent, for O'Neil testified on the stand that he told the truth in his interview with the agents of the F. B. I. and in the interview at which Major Schofield was present. There is in my opinion, therefore, every reason why this testimony should

be heard and considered as substantive proof. It falls within the definition of substantial evidence heretofore quoted."

He appended in a footnote:

"(1) This view is fully supported by Dean Wigmore in the 3rd edition of his work (3 Wigmore, Evidence, 3rd ed., section 1018 (b)): 'It does not follow, however, that Prior Self-Contradictions, when admitted, are to be treated as having no *affirmative testimonial* value, and that any such credit is to be strictly denied them in the mind of the tribunal. The only ground for so doing would be the Hearsay rule. But the theory of the Hearsay rule is that an extrajudicial statement is rejected because it was made out of Court by an absent person not subject to cross-examination. . . . Here, however, by hypothesis the witness is present and subject to cross-examination. There is ample opportunity to test him as to the basis for his former statement. The whole purpose of the Hearsay rule has been already satisfied. Hence there is nothing to prevent the tribunal from giving such testimonial credit to the extrajudicial statement as it may seem to deserve. Psychologically of course, the one statement is as useful to consider as the other; and everyday experience outside of court-rooms is in accord.' "

See also *Opp Cotton Mills* v. *Administrator, supra,* 155, and cases cited.[3]

[3] Wigmore concedes that his views have not been accepted by the courts generally. But, as we have said, the technical rules of evidence applied by the courts are not applicable to administrative proceedings. *Consolidated Edison Co.* v. *Labor Board,* 305 U. S. 197, 229–230, and cases cited; *Opp Cotton Mills* v. *Administrator,* 312 U. S. 126, 155, and cases cited. For that reason the considerations suggested by Wigmore are controlling here and the Attorney General and Judge Sears could rightly consider O'Neil's statements as proof of the matters stated. *Bilokumsky* v. *Tod,* 263 U. S. 149, 157, and cases cited; *Tisi* v. *Tod,* 264 U. S. 131, 133; *Vajtauer* v. *Commissioner of Immigration,* 273 U. S. 103, 106.

We think that the O'Neil statements were properly admitted and that, independently of the Lundeberg testimony, they warranted the Attorney General's finding that Bridges was a Party member.

With increasing frequency this Court is called upon to apply the rule, which it has followed for many years, in deportation cases as well as in other reviews of administrative proceedings, that when there is evidence more than a scintilla, and not unbelievable on its face, it is for the administrative officer to determine its credibility and weight. *Warehouse Co.* v. *United States,* 283 U. S. 501, 508; *Trade Commission* v. *Education Society,* 302 U. S. 112, 117; *Consolidated Edison Co.* v. *Labor Board, supra,* 229; *Labor Board* v. *Nevada Copper Co.,* 316 U. S. 105; *Marshall* v. *Pletz,* 317 U. S. 383, 388; *Labor Board* v. *Southern Bell Co.,* 319 U. S. 50, 60; *Medo Corp.* v. *Labor Board,* 321 U. S. 678, 681–682. We cannot rightly reject the administrative finding here and accept, as we do almost each week, particularly in our denials of certiorari, the findings of administrative agencies which rest on the tenuous support of evidence far less persuasive than the present record presents. That is especially the case here, since the Attorney General, the district court and the court of appeals have all concurred in the conclusion that the evidence is sufficient to support the findings. *Coryell* v. *Phipps,* 317 U. S. 406, 411; *United States* v. *Johnson,* 319 U. S. 503, 518; *Mahnich* v. *Southern S. S. Co.,* 321 U. S. 96, 99, and cases cited; *Goodyear Co.* v. *Ray-O-Vac Co.,* 321 U. S. 275, 278.

Petitioner has made a number of other arguments which the Court finds it unnecessary to discuss. We think that they too are without merit. We would affirm the judgment.

Counsel for Parties.

BARRETT LINE, INC. *v.* UNITED STATES ET AL.

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

No. 630. Argued April 2, 1945.—Decided June 18, 1945.

1. An order of the Interstate Commerce Commission denying appellant's application for "grandfather" rights under § 309 (f) of Part III of the Interstate Commerce Act to engage in the business of a contract carrier by water, *held* erroneous so far as it related to appellant's chartering operations. Pp. 180, 199.

   The Commission erred in concluding that appellant was not engaged in chartering operations subject to Part III on the critical date, for failure to show "the nature of the services rendered, the commodities carried in, or the points served with such vessels." P. 196.

2. An applicant for "grandfather" rights under § 309 (f) is not required to show, so far as chartering operations are concerned, that his chartering operations during the critical period included carriage of nonexempt goods. P. 196.

3. The Commission's denial to appellant of "grandfather" rights under § 309 (f) for contract carrier operations other than chartering, and denial under § 309 (g) of a permit for a "new operation," are sustained by the findings and the evidence. Pp. 199, 200.

Affirmed in part; reversed in part.

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

Mr. Robert E. Quirk for appellant.

Mr. Walter J. Cummings, Jr., with whom *Solicitor General Fahy*, *Messrs. Daniel W. Knowlton* and *Allen Crenshaw* were on the brief, for the United States and the Interstate Commerce Commission; and *Mr. Harry C. Ames*, with whom *Messrs. Wilbur La Roe, Jr.* and *R. Granville Curry* were on the brief, for the American Barge Line Co. et al., appellees.

MR. JUSTICE RUTLEDGE delivered the opinion of the Court.

The Interstate Commerce Commission denied appellant a permit to act as a contract water carrier under the Transportation Act of 1940, 54 Stat. 898, Part III of the Interstate Commerce Act. A three-judge District Court dismissed the complaint which sought review of that order. The appeal is from this judgment.

In May, 1941, appellant applied for a permit to carry general commodities, with exceptions not now material, between points on the Mississippi River and its tributaries. The authority sought was to "continue an operation in existence January 1, 1940, and continuously thereafter," as a contract carrier of property over irregular routes, pursuant to "grandfather rights" claimed under § 309 (f) of Part III.[1] A year later, while the grandfather application was pending, appellant filed another application as a precautionary measure. This sought, in the alternative, leave to perform the same service as a new

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[1] Section 309 (f) provides in part:

"Except as otherwise provided in this section and section 311, no person shall engage in the business of a contract carrier by water unless he or it holds an effective permit, issued by the Commission authorizing such operation: Provided, That, subject to section 310, if any such carrier or a predecessor in interest was in bona fide operation as a contract carrier by water on January 1, 1940, over the route or routes or between the ports with respect to which application is made, and has so operated since that time (or, if engaged in furnishing seasonal service only, was in bona fide operation during the seasonal period, prior to or including such date, for operations of the character in question) except, in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such permit, without further proceedings, if application for such permit is made to the Commission as provided in subsection (g) . . ." 49 U. S. C. § 909 (f).

Section 310 relates to dual operation as common and contract carrier, § 311 to temporary operations.

operation "consistent with the public interest and the national transportation policy" under § 309 (g).[2]

Protests were filed by other carriers and the two applications were heard together before an examiner in September, 1942. He concluded that the showing did not warrant granting of the grandfather application, but recommended granting of the permit under § 309 (g). Division IV however denied both applications, that under § 309 (f) for failure to make the required showing of actual operations on and after the crucial date, the one under § 309 (g) on the ground that appellant had "failed to show that it is proposing any new operation, or that a new operation by it would be consistent with the public interest or the national transportation policy, or that present or future public convenience and necessity require such operation." A petition for reconsideration by the full Commission was denied and the District Court adopted its findings and conclusions in a *per curiam* opinion.

The evidence consisted of exhibits and the testimony of appellant's president, Barrett. The story is of an old-style

[2] Section 309 (g) provides:

". . . Subject to section 310, upon application the Commission shall issue such permit if it finds that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that such operation will be consistent with the public interest and the national transportation policy declared in this Act. The business of the carrier and the scope thereof shall be specified in such permit and there shall be attached thereto at time of issuance and from time to time thereafter such reasonable terms, conditions, and limitations, consistent with the character of the holder as a contract carrier by water, as are necessary to carry out the requirements of this part or those lawfully established by the Commission pursuant thereto: Provided, however, That no terms, conditions, or limitations shall restrict the right of the carrier to substitute or add contracts within the scope of the permit, or to add to his equipment, facilities, or service, within the scope of the permit, as the development of the business and the demands of the carrier's patrons shall require." 49 U. S. C. § 909 (g).

family institution which, for four generations, has had part in life on the Mississippi and its tributaries. As told by Captain Barrett, the line not only pioneered in the great development of inland water transportation of the middle nineteenth century. Its history has been constantly, during this century, one of pioneering in various fields of water transportation. And thereby, the inference seems justified, hangs the reason for its survival in an age when water transportation, like so much else of industry, has been taken over largely by corporate or governmental enterprise. Now the vicissitudes of regulation have been added to those of competition, appellant urges, to threaten its continuance.

The concern, incorporated in 1926 as successor to individual and partnership forms of operation, remains small. At the time of the hearing it owned twenty-one barges and two towboats, with two derrick boats and other equipment. Cincinnati is the port of registration; Cairo, Illinois, the situs of the fleet by reason of its accessibility to conjunctions of many rivers.

Operations historically have been highly selective and varied in character. Since 1910, at any rate, they have been limited generally to bulk materials, the greater number of which may be subjected to exposure to weather without damage, such as scrap iron, pig iron, fabricated steel, piping, bauxite ore, coal, paving brick, and stone, excluding such items as furniture. At one time or another, however, automobiles, sulphur, powder, grains, salt and petroleum products have been carried. So far as appears, the line has not held itself out in this period as a common carrier and does not now seek to become one. Its business has been strictly by special contract, negotiated with reference to the season, the course of the river required for the operation, times of loading and unloading, and other special factors. It is, in other words, an irregular operator performing what it characterizes as "special and

sporadic services under special contracts and conditions." The sporadic as well as the special character of the service becomes important, as will appear, for appellant's position on the issues.

The nature of the service and the character of the equipment are correlated. The barges are of steel construction, designed to carry dry or liquid cargo, the latter by adding piping and fittings when required. At the time of the hearing, nine had been converted in this way and were used in petroleum traffic, three by appellant and six under charter to the Standard Oil Company of Ohio. Of those remaining, six were under charter, to be converted to petroleum carriers; two were being used in carriage of coal; and four were "available for such use as we put them to." Captain Barrett testified that if the movement of petroleum products should cease the tankers readily could be reconverted for hauling dry cargo.

The service includes freighting, either with appellant's own barges and power or by towing barges owned by others. In addition appellant engages in chartering, including the leasing or chartering of equipment, at times with crew, to others. The chartering, according to Captain Barrett, involves "wide ramifications," often with difficulty in determining "just who is the operator, whether it is the shipper who is responsible, and therefore, the operator, or whether it is the carrier, who furnishes the equipment."

To establish its right to a permit, whether "grandfather" or "new operation," appellant offered evidence consisting of an exhibit listing all of its operations from January 1, 1936, to August 11, 1942, with information concerning the name of the customer, origin and destination, and nature of the cargo. No effort was made to prove specific operations in similar detail prior to the former date. But a written "Statement of the History,

Type and Scope of Operations and Services of The Barrett Line, Inc.," substantiated by the testimony of Captain Barrett, described in a general way the character and scope of such movements.

The general effect of the historical evidence was to show the varied and sporadic character of the operations from about 1910. It appeared that the company might be without contracts or business for intervals of several months at a time. Much of its activity was in the nature of "pioneering trades." In brief this consisted in demonstrating the feasibility of water transportation for particular commodities. Generally, when the demonstration had been made, the result was for the shipper or another to take over the operation and appellant then would await or seek another similar opportunity.[3]

The evidence, being general in character, was lacking to a large extent in dates concerning specific operations during the latter part of the period; so that for some ten or twelve years prior to January 1, 1936, it is difficult to gather what specific kinds of movements were being made, for whom, between what points and with reference to what materials. However, the general inference would seem justified that any suited to the equipment and the rather

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[3] Thus, according to the testimony, the line pioneered in the transportation by water of petroleum in 1912 or earlier; of steel pipes from Pittsburgh in 1920; of powder in the same year; of automobiles to points downstream from Pittsburgh and Cincinnati; of bauxite ore for the Aluminum Ore Company; of paving brick to New Orleans; of riprap stone used by the Engineer Corps for paving river banks, etc.

Frequently the demonstration resulted in appellant's supplying equipment to the shipper when the latter took over the business as, for instance, when the Standard Oil Company of Louisiana purchased boats and barges to continue the demonstrated petroleum operation with its own fleet. Other instances included sales to Atlas Cement Co. and Carnegie Steel Co.

Miscellaneous services also were rendered to other carriers, before and after 1936, including relief of grounded or disabled vessels, raising of sunken vessels, storage of barges or vessels, etc.

indefinite criteria used for negotiating contracts were taken when opportunity offered; otherwise the fleet remained idle.

On the other hand, the evidence supplied by the exhibit concerning movements between January 1, 1936, and August 11, 1942, is much more definite. In all instances where the specific character of the cargo is mentioned, except one shipment of fabricated steel and piling in 1936, either stone or petroleum products, including gasoline and furnace oil, exempt commodities, are mentioned. A very considerable number of items designate "Miscellaneous Cargo" and there were some 44 instances noted simply as "charter," without reference to character of the cargo, including 23 in which equipment was leased or chartered to shippers not carriers subject to the Act. A few items specified vessel storage, "damaged barge," steamer aground, furnishing steam and like services to other carriers. In two instances "towing" was specified for "U. S. Engineers."

The "miscellaneous cargo" items largely involved towing loaded barges of other carriers, including the American Barge Line and the Mississippi Valley Barge Line. In some instances Barrett identified the specific cargoes, as, for example, a movement of the former company's barges loaded with scrap iron, sugar and molasses and some of the latter's bearing packaged freight. In such cases, however, since only motive power was furnished, and to another carrier, appellant disclaimed relying upon the movements "to establish that he [it] is a *common* carrier of general commodities," but put them in "to show the general sweep and character of the service performed" as a contract carrier. Barrett testified that appellant did not always know what was in such barges, that the charges were on a per diem basis and it therefore made no difference to appellant what was in the barges.

The difference, if any, between this towing and chartering when labelled as such is somewhat nebulous, if indeed

it is at all material. But concerning the latter the witness gave similar testimony: that appellant's charges, whether for motive power, barges or both, were on a per diem basis, except in one instance specifying a barrel rate; and that appellant was not concerned with the character of the cargo or where the boats went, although the company's trip sheets, not presented in evidence, would show the latter.

The only evidence, apart from the exhibit, as to operations after January 1, 1940, consisted in Barrett's testimony, summarized above, relating to appellant's equipment and its use at the time of the hearing. This, as may be recalled, related exclusively to transportation of petroleum products, directly or under charter; the use of two barges for carrying coal; the availability of four others "for such use as we put them to."

It should be added that, according to the evidence, one factor inducing the concentration upon petroleum products after 1940 was the effect of the war emergency upon the carriage of these products from southwestern producing fields to central and eastern communities, together with encouragement the line received from officials of the Government to convert its barges into tankers and engage in this business. It seems obvious that, with return to normal modes of transportation as the war emergency passes, and the development of new facilities accelerated by it, the life span of this concentration is likely to repeat appellant's typical "pioneering" performance.

Appellant and the Commission are at odds upon the effects of the showing made concerning movements on and after January 1, 1936, and as to whether the Commission erroneously refused to take account of earlier ones shown by the history prior to that time. The Commission thought that it should disregard them, more particularly with reference to the "grandfather" applica-

tion, as being too remote to substantiate the claim of "bona fide operation" on the crucial date within § 309 (f);[4] and found that the movements shown after January 1, 1936, were insufficient to establish the claimed rights because all, except one, were of exempt commodities, including petroleum products which were the only ones carried after January 1, 1940, except coal, which also is exempt.

Caught between the upper and nether millstones, so to speak, of denial of "grandfather" rights and a permit for new operations,[5] appellant questions the Commission's limitation of evidence to be considered to that affecting operations after January 1, 1936; its evaluation of the evidence taken into account, particularly that relating to chartering, as showing transportation of exempt commodities only; its interpretation of the statutory provisions in their bearing upon these issues, especially as requiring a showing that chartering operations include nonexempt commodities to justify issuance of a permit; its conclusion that the showing was not sufficient to support the application for "grandfather" rights; and the further conclusions

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[4] The opinion of Division IV stated: "The term 'bona fide operations' has been interpreted to mean a holding out substantiated by actual operations consistent therewith. Actual operations in order to substantiate a claimed holding out on January 1, 1940, must have been within a reasonable length of time from that date. What constitutes a reasonable length of time may vary with the particular circumstances in each proceeding but one shipment made in 1936 and others at an indefinite period of time prior thereto are entirely too remote to establish bona fide operations on January 1, 1940, and continuously since."

[5] The grandfather rights were denied, of course, because in the Commission's view, the operations shown to sustain them were too far removed in the past. On the other hand, the permit for new operations was denied, according to its brief, because "appellant proposed no change in mode of operation but planned to continue doing business as in the past."

concerning the showing as affecting the application to perform new operations.

The short effect of appellant's position is that the Commission's action has limited it to transportation of exempt commodities only and that, if so limited, grave injury will result for its business. It maintains that, in view of its history and the facts properly interpreted, it is entitled to a permit for the transportation of commodities generally, throughout the Mississippi system, including its tributaries, and that the permit preferably should be under the grandfather clause; if not, then for a "new operation."

The controversy has become most crucial in relation to chartering. The Commission found that these activities related, in the crucial period and on the showing made, only to exempt commodities, for carriage of which authority is not required,[6] and concluded that appellant was therefore not engaged in chartering operations subject to Part III or entitled to a permit for them. The opinion stated: ". . . the only transportation which might be subject to regulation under part III was that of chartering of vessels to shippers. However, no showing is made as to the nature of the services rendered, the commodities carried in, or the points served with such vessels. On such meager showing we would not be warranted in finding that applicant, on January 1, 1940, and continuously since, was engaged in chartering operations subject to part III of the act."

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[6] Exemption is provided by § 303 for various kinds of transportation including, under limitations specified, carriage of bulk commodities when the vessel is used to transport not more than three, § 303 (b); carriage of liquid cargoes in bulk in certified tankers, § 303 (d); transportation solely within the limits of a single harbor, § 303 (g).

The Commission has uniformly denied permits or certificates where only exempt transportation is involved. Cf. *Upper Mississippi Towing Corp., Common Carrier Application,* 260 I. C. C. 292, 293; *Gallagher Bros. Sand & Gravel Corp., Contract Carrier Application,* 260 I. C. C. 224, 225.

Appellant attacks this finding and the conclusion as contrary to law. The argument is founded upon § 302 (e), which defines "contract carrier by water" and provides that the furnishing of a vessel under charter or lease to a person other than a carrier subject to the Act, for use in transporting the latter's property, shall be considered to constitute "engaging in transportation" within the meaning of the definition of "contract carrier by water." [7]

Although it is true that no permit is required if only exempt commodities are carried in chartered vessels, appellant construes § 302 (e) to entitle it to a permit if on the crucial date it was engaged in bona fide chartering operations, without regard to whether the commodities actually carried were exempt or nonexempt. In this view the Act is not concerned, so far as it relates to chartering, with the character of the commodity, but takes account only of the furnishing of the vessel; and the Commission, by requiring a showing as to the nature of the commodity, added a requirement not included or authorized by the statute.

Accordingly, since the evidence clearly disclosed numerous charter operations within the critical period, appellant draws two conclusions: (1) that it was entitled to grandfather rights for chartering, as such, and to a

[7] Section 302 (e) in pertinent part is as follows:

"The term 'contract carrier by water' means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (d) and the exception therein) by water of passengers or property in interstate or foreign commerce for compensation.

"The furnishing for compensation (under a charter, lease, or other agreement) of a vessel, to a person other than a carrier subject to this Act, to be used by the person to whom such vessel is furnished in the transportation of its own property, shall be considered to constitute, as to the vessel so furnished, engaging in transportation for compensation by the person furnishing such vessel, within the meaning of the foregoing definition of 'contract carrier by water'." 49 U. S. C. § 902 (e).

permit for such operations which would allow it to charter vessels for carriage of nonexempt as well as exempt cargo, without reference to its character in this respect; and (2), this being so, it was "engaged in transportation" of both exempt and nonexempt commodities on the critical date and therefore, under the Commission's rulings relating to such situations, was entitled to a permit authorizing not only chartering but also transportation of commodities generally.

Appellant relies especially upon the Commission's decision in *C. F. Harms Co., Contract Carrier Application,* 260 I. C. C. 171, rendered January 4, 1944, after the complaint had been filed in this cause; [8] with emphasis also upon *Russell Bros. Towing Case,* 250 I. C. C. 429, and *Moran Towing & Transportation Co. Case,* 250 I. C. C. 541; 260 I. C. C. 269.

In these cases permits were granted either to a "furnisher of vessels" or to towers without limitation as to commodities, on the basis of such a holding out, except that in the *Moran* case the tower had no official knowledge of the contents of the loaded barges. Appellant regards these decisions as inconsistent with the Commission's action in this case. The Commission distinguishes them, however, on the basis that the evidence disclosed operations affecting both exempt and nonexempt goods. The intervening protestants characterize appellant's "strategy," particularly in its reliance upon the *Russell Bros.* case, as follows: "It hopes first to have itself made subject to the act as a 'furnisher of vessels' and, having established that finger-hold, to bring to its aid the doctrine of the *Russell Bros.* case that *both* regulated and unregulated activities should be considered in determining rights."

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[8] Three decisions were rendered in the *Harms* matter. The first gave authority to furnish vessels limited to scrap iron and to specified ports, 250 I. C. C. 513; the second removed the commodity limitation, 250 I. C. C. 685; the third, by the full Commission, removed the "territorial" limitation, 260 I. C. C. 171.

If the Commission's premise were valid, that a furnisher of vessels must show, as of the critical date, that his operations included nonexempt commodities or, as its opinion stated, "the nature of the services rendered, the commodities carried in, or the points served with such vessels," we would nevertheless be in doubt concerning the validity of its ruling that no sufficient showing was made in this case.

Appellant's exhibit disclosed 43 or 44 chartering operations in the period taken by the Commission as evidential, designated simply as "charter." All but two specified Cairo, Illinois, as both origin and destination. In the brief it is suggested these were therefore exempt under § 303 (g) relating to transportation in a single harbor. The suggestion flies flatly in the face of the uncontradicted testimony given by Captain Barrett that Cairo was designated in these instances because it was the situs of the fleet, appellant was chartering or leasing the equipment on a per diem basis, was therefore not interested in the contents or character of the cargo or where the vessel went, and that these operations were not confined to the Cairo harbor but that point was designated because it was the place where the movement began and the equipment was delivered when it ended. The effect of this evidence is not nullified, as seems to be suggested in the brief, because the witness also testified that the chartered vessels were run with appellant's crews, the masters were handed manifests disclosing the cargoes carried, and the trip sheets would reveal where the vessels went. Any other than the most rigid construction would regard those facts as supporting, rather than impairing, the claim of engaging in general chartering operations without limitation to exempt commodities or particular points of loading and unloading.

Similar restrictive inferences are drawn in the brief to support "probable exemptions" in nearly all the other in-

stances of chartering, including six in 1937 as "too remote" though within the period considered. Of these, some 19 or 20, relating to chartering to other carriers subject to regulation, seem justified. But with them eliminated, 23 instances of chartering to shippers who were not carriers remain to support the claim. We are unable to accept the view that they constituted so meager a showing as to justify on this ground withholding a permit for chartering.

In the *Moran* case the Commission said:

"We think it unnecessary in this case to determine whether the services performed were or were not actually subject to the act. The nature of the cargo in the vessels towed is usually the determining factor as to whether or not the service is exempt, but applicant's towage service is performed without regard to the nature of the cargo loaded in the vessels towed by it." 260 I. C. C. 269, 272.

In the *Russell Bros.* case the Commission stated, with reference to the definition of a common carrier by water in Part III and the "grandfather" requirement of bona fide operation on the critical date:

"It will be noted that in neither instance is there any reference to whether the transportation performed by the carrier is or is not subject to regulation. In determining a carrier's status and the scope of its operations during the 'grandfather' period, its entire operation should be considered, and not merely that part which the Congress has seen fit to make subject to regulation. To find that 'grandfather' rights may be granted only to the extent that a showing is made as to the performance of regulated transportation requires the reading into the law of language which, in fact, is not there." 250 I. C. C. 429, 433-434.[9]

[9] The opinion continued: "This matter is particularly important in instances like the present where an applicant is seeking a certificate covering all commodities, or general cargo. Obviously no carrier actually transports all commodities, and therefore the bona fides of an applicant's operations depend on the representative character of

Notwithstanding the Commission's insistence that these cases are distinguishable, as resting upon different showings, it is difficult to accept that view if, as the *Moran* opinion indicates, the crucial fact to be shown is performance of service "without regard to the nature of the cargo loaded in the vessels towed by it." The conclusion is even more difficult if, as the *Russell Bros.* opinion states, "To find that 'grandfather' rights may be granted only to the extent that a showing is made as to the performance of regulated transportation requires the reading into the law of language which, in fact, is not there."

This statement applies equally to the comparable statutory provisions relating to contract carriers. Cf. *C. F. Harms Co., Contract Carrier Application,* 250 I. C. C. 685; 260 I. C. C. 171. Section 309 (f) does not in terms require that such a carrier, to be entitled to "grandfather" rights, must have been engaged in the transportation of commodities which are nonexempt. It may be conceded that such a limitation properly may be implied from the requirement of substantial parity between operations on the critical date and those for which a permit is sought, as to other forms of transportation than the furnishing of vessels as defined in § 302 (e). Cf. *Alton R. Co.* v. *United States,* 315 U. S. 15, 22; *Noble* v. *United States,* 319 U. S. 88, 92. But it does not follow that the same limitation applies to "the furnishing for compensation (under a charter, lease, or other agreement) of a vessel" under

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the transportation performed. It may well be that the carrier holds itself out to, and actually does, transport all traffic offered to it from and to all points covered by its application but that the great bulk of such transportation is exempt from regulation. It seems clear that if we shut our eyes to all of applicant's transportation except that which is subject to regulation, we get an incomplete and distorted picture of the nature and extent of its operations. To place limitations upon 'grandfather' rights predicated upon that view would be unjust and unreasonable, and is not contemplated by the law." 250 I. C. C. 429, 434.

that section. It defines the act of furnishing, to shippers other than regulated carriers, as "engaging in transportation" within the meaning of "contract carrier by water" as that term is used in the section. If the purpose was to treat this form of water operation identically with others covered by the general definition, the purpose and utility of the special provision concerning furnishing become obscure if the provision does not in fact become wholly ineffective.

The chartering or leasing of vessels and equipment is not so obviously similiar to or identical with actively "engaging in transportation" that, without specific provision for coverage, it necessarily would be included within that of the more general definitions and provisions. Quite different modes of operation, physically and in business management, as well as responsibilities, conceivably if not also generally, give the activity materially different characteristics from the carrying of goods in the more conventional sense. Congress obviously sought to bring these operations within the regulatory scheme by the special provisions.

In doing so we do not think it had in mind the purpose to draw a sharp line between furnishers of vessels carrying only exempt commodities and those carrying non-exempt ones. That is true, notwithstanding the fact that one engaging in chartering affecting only the former is no more required to secure a permit than one engaging in other forms of transporting exempt commodities.

The legislative history shows that the original counterpart of the "furnishing" provision of § 302 (e) extended to the furnishing of a vessel "to another person" rather than "to a person other than a carrier subject to this Act" as it now stands. This met with vigorous opposition, on the ground that an owner supplying equipment to another carrier would become subject to the Act, thus possibly imposing upon him responsibility for the charges of the

lessee, or other person performing the operation, for performing it and for those operations, over which of course the owner would not have control. It was feared this might destroy a large amount of chartering activity, including both intercoastal and inland waterway business, conducted then with a high degree of flexibility. Cf. 84 Cong. Rec. 9709; *id.*, 9979. Emphasis was placed in the discussion upon the freedom of railroads, acting under Part I, and of motor carriers, under Part II, to lease surplus equipment without becoming responsible as regulated carriers for its use; and upon the common practice of barge lines and other water carriers to lease equipment freely and for long or short periods of time on open markets. *Ibid.*

To meet the objections an amendment was offered in the House to make the original proposal read: ". . . a person which . . . furnishes a vessel . . . shall itself *not* be considered to be engaged. . . ." 84 Cong. Rec. 9979. Had this finally been adopted, chartering would have been wholly exempt. The final form of the bill struck out the word "not" and substituted the present provision. The Conference Report states, in addition to the purpose to limit application to cases where the vessel is furnished to a person other than a regulated carrier, the intention to clarify the language "to make sure that the person furnishing the vessel will not, *simply by reason of furnishing the vessel,* become a contract carrier subject to part III of the act *as to that part of its business not related to the furnishing and use of the vessel.*" [10] (Emphasis added.)

This seems obviously to contemplate that chartering, or the defined furnishing of equipment, is to be regarded and treated as in a separate category from other forms of engaging in regulated activity; and that the one furnish-

[10] H. R. No. 2016, 76th Cong., 3d Sess., 77.

ing the vessel by that act would become a "contract carrier subject to part III" as to that part of the business, unless the vessel were furnished to another carrier. This conclusion is further supported by the fact that § 302 (e) in terms takes account of the character of the property to be so transported in the language "to be used by the person to whom such vessel is furnished in the transportation of its own property."

This limitation takes no account of the distinction between exempt and nonexempt commodities. Had Congress intended that line to be drawn rigidly to require showing of chartering for carriage of nonexempt goods, in order to establish grandfather rights, that purpose, we think, would have been clearly expressed. Its concern in this provision was not with that line. The obvious purpose was to secure full regulation of the traffic, by application of the Act's provisions to the lessee, if he should be a regulated carrier, thus exempting the lessor in that situation; otherwise to the lessor.

In providing for the alternative incidence of coverage, Congress recognized that, in chartering, the character of the commodity, as being exempt or not exempt, was more the concern of the "lessee" than of the lessor or charterer. The latter's concern was with the furnishing of the vessel as such and with whether the "lessee" was a regulated carrier. To regard the Act as imposing the further limitation that the lessor also must have regard to the character of the cargo would cast that activity, intended to be kept flexible, as the legislative history shows, into a more rigid regulatory mold than other forms of transportation covered either by Part III or by Parts I and II.

Accordingly we think the Commission erred in concluding that appellant was not engaged in chartering operations subject to Part III on the critical date, for failure to show "the nature of the services rendered, the commodities carried in, or the points served with such vessels." This

conclusion, moreover, seems to be in accord with its own decision in the *Harms* case and in harmony with the principles followed in the *Moran Towing* case and that of *Russell Bros.*[11]

The Commission urges however that we are not concerned simply with inconsistencies in its decisions, since evidence varies with cases and to its informed judgment is confided the primary duty to make appropriate applications of the Act. We respect that judgment and that obligation. But the matter now involved goes beyond mere apparent inconsistency in the statute's application. Seemingly there has been a basic difference of opinion within the Commission itself concerning the necessity for proof showing the character of the commodity, as exempt or nonexempt, to establish grandfather rights to chartering operations and also as to the character of the proof required. This appears from the fact that two of the three Commissioners who participated in the decision by Division IV in this case dissented from the full Commission's decision in the *Harms* case and one of them in the *Moran* case.

With full respect for the dissenting judgment, we think the view eventually reached by the majority in those decisions accords with the statutory purpose and provision.[12] The dissenting Commissioners emphasize the requirement

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[11] See, however, *W–764, Upper Mississippi Towing Corp., Common Carrier Applications,* 260 I. C. C. 292.

[12] It is suggested, by the protesting intervenors, that appellant has failed to exhaust its administrative remedy by neglecting to apply a second time for reconsideration by the Commission after the final *Harms* decision, cf. note 8, although it was rendered after the complaint was filed in this case. The suggestion, if followed generally, conceivably could result in keeping applicants running back and forth between court and commission, if not interminably, then to an extent certainly not contemplated by the exhaustion doctrine. Appellant fulfilled the requirements of that doctrine by its application for reconsideration made to the entire Commission and its denial of the petition.

of § 309 (g) that a permit shall specify the business of the contract carrier and the scope thereof; and regard this as qualifying the "furnishing" provision of § 302 (e) so as to require substantially the same specific showing as to character of the commodities and territorial scope of operations in chartering as has been deemed required for other forms of transportation. Without this, they say, the substantial parity between future operations and prior bona fide operations contemplated by the grandfather provisions cannot be maintained.

The policy of maintaining that parity by adequate standards of proof is sound, although "the Act is remedial and to be construed liberally." *McDonald* v. *Thompson,* 305 U. S. 263, 266; *Crescent Express Lines* v. *United States,* 320 U. S. 401, 409. The policy, however, may be defeated by too strict an application in particular cases, more especially it would seem in relation to water carriers whose operations, in contract carriage at any rate, are more generally irregular and spasmodic than in the case of other carriers. The Court has said, even in relation to the latter: "The Commission may not atomize his prior service, product by product, so as to restrict the scope of his operations, where there is substantial evidence in addition to his holding out that he was in '*bona fide* operation' as a 'common carrier' of a large group of commodities or of a whole class or classes of property. There might be substantial evidence of such an undertaking though the evidence as to any one article was not substantial." *United States* v. *Carolina Carriers Corp.,* 315 U. S. 475, 483, 484.

This language has particularly appropriate application to the proof made in this case, at any rate in relation to the chartering operations, in so far as proof may be required for compliance with the requirements of § 309 (g). Beyond this, it bears also upon the extent to which those requirements are to be taken as qualifying § 302 (e). To

consider them as doing so in a manner to require the chartering carrier to prove specific instances of nonexempt commodity carriage would molecularize, if not atomize, the chartering business and threaten, if not accomplish, the destruction anticipated in the congressional debates. That result, or one tending strongly toward it, as would such a construction, hardly can be taken to be consistent with the declared national transportation policy "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" or the further declaration that this policy is to be applied in enforcing *all* of the Act's provisions.[13] Spasmodic operation hardly would be regarded as an inherent advantage of rail or perhaps of motor service in general. It is, or may be, the most valuable inherent advantage of a contract water carrier.

It follows that the judgment must be reversed as to the chartering phase of appellant's operations.

In view of what has been said, particularly with reference to the varied and spasmodic character of appellant's operations, and the policy of maintaining these as an inherent advantage of water transportation, our judgment might differ from the Commission's as to the sufficiency of the showing made as it related to other operations than chartering and, in view of that showing, as to the necessity or propriety of limiting the period of operations considered, in relation to the claim of grandfather rights, to that following January 1, 1936.

Nevertheless, our views in these respects are not to be substituted for the Commission's which is not only specially informed but broadly discretionary and controlling except in case of clear departure from statutory requirements. Apart from the chartering, we are unable to say

[13] Cf. Oppenheim, The National Transportation Policy and Inter-Carrier Competitive Rates (1945) 27 ff.

there was such a departure in this case. The policy of the Commission has recognized that a somewhat more liberal attitude is required in the case of water carriers than with respect to others in the length of the period to be considered as establishing the claim of bona fide operation.[14] Moreover, as has been stated, the evidence relating to the latter part of the period prior to 1936 was rather more vague than that affecting both earlier and later periods. In view of these facts we cannot say that the Commission erred in its findings or conclusion that appellant was not entitled, on the showing made, to a permit for grandfather operations other than those involving chartering.

In this phase of the case it is necessary only to add that, in view of the specific statement contained in the Conference Report quoted above,[15] appellant is not entitled to found grandfather rights to transportation other than chartering upon a showing only of chartering operations.

We think too that it would be an invasion of the province of the Commission for us to interfere with its action in finding that appellant upon the showing it made was not, at the time of the application, entitled to a permit for a new operation. It is true that its confinement, since about 1940, to operations substantially, if not exclusively, in transportation of petroleum products has been induced, according to the proof, by the war emergency, and that this business in all probability will terminate with the emergency's end. It is likewise true that appellant's equipment can be converted readily for other uses when

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[14] Compare *Moran Towing & Transp. Co., Applications,* 260 I. C. C. 269, 273; *Thames River Line, Common Carrier Application,* 250 I. C. C. 245; and other cases in the latter volume at pp. 106, 117, 179, 353, 370 and 599, with, e. g., *Jack Cole Co.* v. *United States,* 41 M. C. C. 657, 59 F. Supp. 10, affirmed per curiam, 324 U. S. 822; *Gregg Cartage Co.* v. *United States,* 316 U. S. 74.

[15] Cf. text at note 10.

that occurs and, unless authority is obtained to conduct operations upon a scale sufficient to enable appellant to employ it profitably, the business may be forced to close or required to operate uneconomically. Nevertheless, in view of the failure to make specific showing of some immediate prospect of entering upon new and nonexempt operations, and of the range and weight of the Commission's discretion in relation to such applications, we are not at liberty to interfere with its action.

The Commission has suggested, in the brief, that upon another application, accompanied by a sufficient showing of intended "new operations," the desired permit may be granted. No doubt, in such an event, the application will be considered in the light of the Act's injunction of "fair and impartial regulation . . . so administered as to recognize and preserve the inherent advantages" of the type of transportation in which the Barrett Line has been engaged through four generations of river life.

The judgment is affirmed as to operations other than chartering; as to them, it is reversed, and the cause is remanded for further proceedings in conformity with this opinion.

The CHIEF JUSTICE, MR. JUSTICE ROBERTS, MR. JUSTICE FRANKFURTER, and MR. JUSTICE JACKSON, dissenting.

The Court, in rejecting the refusal of the Interstate Commerce Commission to grant a permit as a contract carrier by water for charter purposes, is greatly influenced by an alleged conflict in the Commission's determinations. Compare *C. F. Harms Co., Contract Carrier Application,* 260 I. C. C. 171; *Russell Bros. Towing Co., Common Carrier Application,* 250 I. C. C. 429; *Moran Towing & Transportation Co., Applications,* 260 I. C. C. 269, with *Upper Mississippi Towing Corp., Common Carrier Applications,* 260 I. C. C. 292. Assuming such a conflict, it is our business to deal with the case now here and not

to be concerned with apparent inconsistencies in administrative determinations. If the Commission has kept within the bounds of the statute in this case, its order should be sustained. We think that the interpretation of § 302 (e) made by the Commission was proper. Certainly, the construction of this provision involves considerations so bound up with the technical subject matter that, even though the neutral language of the statute permits, as a matter of English, the construction which the Court now makes, the experience of the Commission should prevail. Compare *Gray* v. *Powell*, 314 U. S. 402.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1945.

BAILEY *v.* ANDERSON, STATE HIGHWAY COMMISSIONER.

APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 49. Argued October 15, 1945.—Decided November 5, 1945.

1. Section 1969j of the Virginia Code of 1942 does not deny the due process guaranteed by the Fourteenth Amendment, as applied to a landowner upon whose land the state highway commissioner entered and constructed a highway in advance of the appointment of commissioners and before they could view the land for the purpose of fixing its fair value upon condemnation, since the landowner had full opportunity for a hearing before the commissioners, and their award was subject to a judicial review upon which the award could be set aside if plainly wrong or unsupported by the evidence. P. 205.
2. The question of the constitutionality of a claimed denial to the landowner of interest on the value of the property from the time of the taking is not properly presented upon the record in this case, since it does not affirmatively appear that appellant raised that question on the record or that the state supreme court passed on it. P. 206.

Dismissed.

APPEAL from a judgment denying a petition for a writ of error to review a decree which confirmed an award of compensation in a condemnation proceeding.

Bernard B. Bailey, pro se.

Abram P. Staples, Attorney General of Virginia, for appellee.

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

Appellee, State Highway Commissioner of Virginia, brought this proceeding in conformity to §§ 1969j (1)–1969j (6) of the Virginia Code of 1942, to condemn appellant's land for use as a public highway. Acting under § 1969j (4), appellee entered on the land and constructed the highway in advance of its condemnation. In the condemnation proceeding, begun in the circuit court within sixty days after the completion of the highway, the Commissioners, appointed and acting pursuant to § 1969j (2), after viewing the land, and hearing evidence, made an award of $1,500 for the land occupied by the highway, and of $6,500 for damages "resulting to the adjacent or other property of the owner."

The Virginia Circuit Court confirmed the Commissioners' report, and by its decree directed that interest be paid on the amount of the award from the date of the decree. The Supreme Court of Appeals of Virginia, without opinion, denied appellant's petition for a writ of error. The case comes here on appeal, § 237 (a) Judicial Code, 28 U. S. C. § 344 (a), appellant assigning as error that §§ 1969j (4) and 1969j (6), as applied to appellant, deny to him the due process guaranteed by the Fourteenth Amendment. On examination of appellant's jurisdictional statement we postponed the question of our jurisdiction to the argument on the merits.

Appellant contends here, as he did in the state courts, that § 1969j (4) infringes the asserted constitutional immunity by sanctioning appellee's entry upon the land and the alteration of its physical condition, in advance of the appointment of the Commissioners and before they could

view the land for the purpose of fixing its fair value upon condemnation. But it has long been settled that due process does not require the condemnation of land to be in advance of its occupation by the condemning authority, provided only that the owner have opportunity, in the course of the condemnation proceedings, to be heard and to offer evidence as to the value of the land taken. *Bragg* v. *Weaver,* 251 U. S. 57, 62, and cases cited; *Joslin Co.* v. *Providence,* 262 U. S. 668, 677; *Georgia* v. *Chattanooga,* 264 U. S. 472, 483. Its value may be fixed by viewers without a hearing, after entry upon the land, if their award is subject to a review in which a trial upon evidence may be had. *Pearson* v. *Yewdall,* 95 U. S. 294, 296; *Backus* v. *Fort Street Union Depot Co.,* 169 U. S. 557, 569; *Bragg* v. *Weaver, supra,* 59, and cases cited; *North Laramie Land Co.* v. *Hoffman,* 268 U. S. 276, 284–285.

Here appellant was given full opportunity to be heard and to introduce evidence before the Commissioners. They could, upon the evidence submitted, take into account the alterations of the property after the taking and before the view; such was their duty under the statute. Their award is made subject to judicial review by § 1969j (2), and upon such review may be set aside if plainly wrong or without support in the evidence. *Barnes* v. *Tidewater R. Co.,* 107 Va. 263, 266–268, 58 S. E. 594; *Duncan* v. *State Highway Commission,* 142 Va. 135, 146–148, 128 S. E. 546. In this we find no denial of due process, and appellant's contention presents no substantial constitutional question, as the authorities cited show.

Appellant also insists that the state court judgment failed to include in the award interest from the date of the occupation of his land by appellee; that the award thus denied to him just compensation for the land taken, in violation of the due process clause of the Fourteenth Amendment. See *Delaware, L. & W. R. Co.* v. *Morris-*

town, 276 U. S. 182. Appellant's petition in the circuit court asked that the award include interest from the date of taking. The circuit court, without explanation, rejected his claim for interest. But throughout the proceedings in the circuit court appellant made no claim to interest on constitutional grounds, and made no attack on the constitutionality of the award or the court's decree because of the asserted denial of interest. Further, nothing appears in the record to indicate that the Commissioners' award of damages did not include the interest claimed. Appellee argues that the applicable statutes contemplate that the award shall include interest as compensation "for the damage and delay" from the time of the occupation of the premises to the date of the Commissioners' report and for such further time within which application may be made for judicial review, see *City of Richmond* v. *Goodwyn,* 132 Va. 442, 452–454, 112 S. E. 787; *Export Leaf Tobacco Co.* v. *Richmond,* 163 Va. 145, 155–156, 175 S. E. 753. Nothing appears to the contrary.

Appellant, for the first time, assailed on constitutional grounds the asserted denial of interest by his assignments of error in the state Supreme Court of Appeals. The assignments relating to interest failed to draw in question the constitutional validity of any statute as is required by § 237 (a) of the Judicial Code. The state Supreme Court by its order refusing the writ of error declared that upon consideration of the record it was of opinion that the judgment below was "plainly right."

Inspection of the record does not show that, in denying the writ of error, the state court passed upon any constitutional question not raised or passed upon in the course of the proceedings below. Such appears not to be its practice. Rule 22 of the Rules of the Supreme Court of Appeals, 181 Va. lxxv; cf. *Ward Co.* v. *Henderson-White Co.,* 107 Va. 626, 628–629, 59 S. E. 476; *Bliss* v. *Spencer,* 125 Va. 36, 50, 99 S. E. 593; *Reynolds* v. *Adams,*

125 Va. 295, 314, 99 S. E. 695. On this record we cannot say that the interest claimed was not included in the award, or, if it was not, that the Supreme Court of Appeals of Virginia, by denying writ of error, passed upon any question of the constitutionality of such denial of interest, not raised on the record or passed upon below. Unless this affirmatively appears upon the record brought here for review on appeal, this Court is without jurisdiction of the appeal. *Jacobi* v. *Alabama,* 187 U. S. 133, 135–136; *Mutual Life Ins. Co.* v. *McGrew,* 188 U. S. 291, 309; *Chicago, I. & L. R. Co.* v. *McGuire,* 196 U. S. 128, 131; see *Flournoy* v. *Wiener,* 321 U. S. 253, 262–263, and cases cited.

The appeal must be dismissed for want of any properly presented substantial federal question.

Dismissed.

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

ASBURY HOSPITAL *v.* CASS COUNTY ET AL.

APPEAL FROM THE SUPREME COURT OF NORTH DAKOTA.

No. 35. Argued October 10, 11, 1945.—Decided November 5, 1945.

A statute of North Dakota requires corporations owning farm land, except such as is reasonably necessary in the conduct of their business, to dispose of it within 10 years from the effective date of the Act. Farm land owned by any corporation in violation of the Act is subject to escheat to the county wherein such land is located, to be effected by a judicial proceeding to which the corporation must be a party. The county is required to dispose of the land at public sale within one year after escheat and to pay the proceeds to the corporation. Appellant, a foreign corporation owning farm land in North Dakota which it had acquired prior to the effective date of the Act, sought in the state courts a declaratory judgment of unconstitutionality of the Act as applied to it. *Held:*

1. A corporation is not a "citizen" within the protection of the

privileges and immunities clauses of Article IV, § 2 and the Fourteenth Amendment of the Federal Constitution. P. 210.

2. Appellant by the mere acquisition of land within the State, before the enactment of the statute, did not acquire contract rights which it could assert against the State. P. 211.

3. The statute does not violate the due process clause of the Fourteenth Amendment. P. 211.

(a) Due process does not prevent a State from excluding a foreign corporation which has theretofore lawfully entered the State and acquired immovable property there, though the corporation will thereby be compelled to sell the property. P. 211.

(b) The power of a State to exclude a foreign corporation includes the power to compel the corporation to sell its immovable property within the State, without also requiring it to end all its activities there. P. 212.

(c) A state statute, otherwise valid, requiring a foreign corporation to sell property within the State, does not deny due process notwithstanding that, due to economic conditions prevailing since enactment of the statute, the corporation will not recoup its original investment in the property. It is enough that here the corporation, in complying with the lawful command of the State to part with ownership, is afforded a fair opportunity to realize the value of the land, and that the sale, when required, is to be under conditions reasonably calculated to realize its value at the time of the sale. P. 212.

4. The statute's exemption of lands of corporations whose business is dealing in farm lands, and of lands of cooperative corporations 75% of whose members or stockholders are farmers, did not deny to appellant the equal protection of the laws. P. 214.

5. The questions of the constitutionality of the statute because of its (1) alleged failure to require an accounting of rents and profits for the period between the judgment of escheat and the sale, and (2) alleged exemption of farm lands acquired by corporations by deed or grant subsequent to the date of the statute,—involve the construction and application of provisions of the statute which have not been authoritatively construed and applied by the state courts, and therefore may not appropriately be decided by this Court. Pp. 213, 215.

73 N. D. 469, 16 N. W. 2d 523, affirmed in part.

APPEAL from the affirmance of a judgment in a declaratory judgment proceeding, wherein the constitutionality

of a state statute, as applied to the appellant, was sustained.

Mr. Herbert G. Nilles, with whom *Mr. Paul J. Thompson* was on the brief, for appellant.

Nels G. Johnson, Attorney General of North Dakota, with whom *P. O. Sathre,* Assistant Attorney General, was on the brief, for appellees.

Mr. Chief Justice Stone delivered the opinion of the Court.

Appellant, a Minnesota non-profit corporation, sought, in the state district court of North Dakota, a declaratory judgment that the so-called Initiative Measure of 1932, North Dakota Laws, 1933, pp. 494, 495, as amended by Chap. 89, Laws 1933, and Chap. 111, Laws 1935, is unconstitutional as applied to appellant's North Dakota farming lands.

The challenged statute declares, §§ 2, 3, that corporations, both domestic and foreign, which "now own or hold rural real estate, used or usable, for farming or agriculture, except such as is reasonably necessary in the conduct of their business, shall dispose of the same within ten years from the date that this Act takes effect . . .," and that "the ten year limitation provided by this Section shall be deemed a covenant, running with the title to the land against any grantee, successor of (or) assignee of such corporation, which is also a corporation." Farming land in the state owned by any corporation in violation of the statute is, by § 5, made subject to escheat to the county in which it is located, by suit instituted by the county attorney. The county is required to dispose of the land at public auction to the highest bidder within one year after escheat, and to pay the proceeds, less the expenses of sale, to the former corporate owner.

Appellant alleges in its amended complaint that prior to the enactment of the statute it had acquired a tract of

land within Cass County, North Dakota, in satisfaction of a mortgage indebtedness, and that it has since leased the property out to farmers who have used it as farm land. The amended complaint further alleges that since the enactment of the statute appellant has constantly attempted to sell this tract, and that it has been and will be unable to sell it for an amount equal to the original mortgage debt before the expiration of the statutory ten-year period; that any sale which the county, proceeding under the statute, might be able to make, would be for substantially less than the amount appellant has invested in the land and the costs of sale. The amended complaint sets up that the statute, as applied to appellant's tract, violates the privileges and immunities clauses of Article IV, § 2 and the Fourteenth Amendment of the Federal Constitution, the contract clause, Article I, § 10, and the due process and equal protection clauses of the Fourteenth Amendment, and prays for a judgment that the statute is unconstitutional and void as applied to appellant and for an injunction restraining appellee county from enforcing the statute.

The Supreme Court of North Dakota sustained an order of the trial court overruling appellees' demurrer to the amended complaint, 72 N. D. 359, 7 N. W. 2d 438. Upon remand of the case for further proceedings, the trial court found the allegations of fact set out in the amended complaint to be true, construed the statute as applicable to appellant's land, which was held not to be necessary to the conduct of appellant's business, and sustained the constitutionality of the statute in all respects. The Supreme Court of North Dakota affirmed. 73 N. D. 469, 16 N. W. 2d 523. The case comes here on appeal under § 237 (a) of the Judicial Code, 28 U. S. C. 344 (a), appellant repeating in its assignments of error the attack made on the statute by its complaint.

Appellant does not invoke the commerce clause, and is neither a citizen of a state nor of the United States

within the protection of the privileges and immunities clauses of Article IV, § 2 of the Constitution and the Fourteenth Amendment. *Paul* v. *Virginia,* 8 Wall. 168, 177; *Pembina Mining Co.* v. *Pennsylvania,* 125 U. S. 181, 187; *Selover, Bates & Co.* v. *Walsh,* 226 U. S. 112, 126. The State of North Dakota has granted no charter or certificate of incorporation to appellant, and has issued to it no permit to do business or own property within the state which could give rise to contract rights which appellant could assert against the state. None are to be implied from appellant's mere acquisition of land in the state either before or after the enactment of the statute. *Erie R. Co.* v. *Pennsylvania,* 21 Wall. 492; *Connecticut Mutual Life Ins. Co.* v. *Spratley,* 172 U. S. 602, 620–622; *Hammond Packing Co.* v. *Arkansas,* 212 U. S. 322, 344–5.

The Fourteenth Amendment does not deny to the state power to exclude a foreign corporation from doing business or acquiring or holding property within it. *Horn Silver Mining Co.* v. *New York,* 143 U. S. 305, 312–315; *Hooper* v. *California,* 155 U. S. 648, 652; *Munday* v. *Wisconsin Trust Co.,* 252 U. S. 499; *Crescent Oil Co.* v. *Mississippi,* 257 U. S. 129, 137. While recognizing the unqualified power of the state to preclude its entry into the state for these purposes, appellant points out that the state has permitted it to enter and to invest its money in obligations secured by mortgage on land within the state, in consequence of which it lawfully acquired the land free of restrictions. Appellant argues that the state may not, by later legislation, force a sale of the land thus innocently acquired, under conditions which do not allow recovery of the original investment. But a state's power to exclude a foreign corporation, or to limit the nature of the business it may conduct within the state, does not end as soon as the corporation has lawfully entered the state and there acquired immovable property. Subse-

quent legislation excluding such a corporation from continuing in the state has been sustained as an exercise of the general power to exclude foreign corporations which does not offend due process. *Hammond Packing Co.* v. *Arkansas, supra,* 342–3; see also *Baltic Mining Co.* v. *Massachusetts,* 231 U. S. 68, 83. Similarly, this Court has upheld legislation imposing burdens greater than those to which such corporations were subject at the time of their entry on the ground that the state might exclude them altogether at a later date. *Philadelphia Fire Association* v. *New York,* 119 U. S. 110; *Horn Silver Mining Co.* v. *New York, supra;* see also *Crescent Oil Co.* v. *Mississippi, supra; Lincoln National Life Ins. Co.* v. *Read,* 325 U. S. 673. Appellant, even if its activities in North Dakota are now restricted to the ownership of farm land within the state, stands in no better position to invoke the protection of the Fourteenth Amendment. The total exclusion of a corporation owning fixed property within a state requires it to sell or otherwise dispose of such property. Appellant must do no more. While appellant is not compelled by the present statute to cease all activities in North Dakota, the greater power includes the less.

Since the state may validly require appellant to sell its farm land, the contention that the statute is wanting in due process because conditions have been such since its enactment that appellant has been and will be unable to salvage an investment made more than ten years before raises no substantial constitutional question. The due process clause does not guarantee that a foreign corporation when lawfully excluded as such from ownership of land in the state shall recapture its cost. It is enough that the corporation, in complying with the lawful command of the state to part with ownership, is afforded a fair opportunity to realize the value of the land, and that the sale, when required, is to be under conditions reasonably calcu-

lated to realize its value at the time of sale. No reason is advanced for saying, and we cannot say, that the period of ten years allowed to appellant to dispose of the property, or its sale after ten years at public auction held under direction of the court and comparable generally to a mortgage foreclosure sale, fails to satisfy either of these conditions. As the North Dakota Supreme Court pointed out in its opinion, the statutory escheat of appellant's land is effected by suit to which the corporation must be a party, with full opportunity to be heard in advance. The judgment of sale in conformity to the statute is entered by the court which "has the power to protect the rights of the corporation as to the notice and conduct of the sale by appropriate provisions in its judgment."

Appellant makes the further objection that the statute denies due process because it deprives it of the possession of the property during the period from the time of escheat to the date of public sale, and makes no provision for any accounting for the rents and profits of the land during that period. The state's Attorney General argues that in the escheat proceeding the court has power to require and will require such an accounting. The record does not disclose that this objection was raised or considered by any court in the course of the present suit, or that any state court has construed the statute so as to determine whether a corporation whose land has been escheated will be deprived of the rents and profits pending the sale.

We are thus asked to pass on the constitutionality of a possible application of the state statute in advance of its application to appellant, and of its authoritative construction by the state courts. Lacking such construction, without which no constitutional question can arise, the issue is not an appropriate one for adjudication by the declaratory judgment procedure. This Court is without power to give advisory opinions. It will not decide constitutional issues which are hypothetical, or in advance

of the necessity for deciding them, or without reference to the manner in which the statute, whose constitutional validity is drawn in question, is to be applied. *Federation of Labor* v. *McAdory,* 325 U. S. 450, 459–463, and cases cited.

Only two of the equal protection contentions which appellant presses here appear to have been presented to or considered by the state courts. The North Dakota Supreme Court held that the statute's exception from its operation, of lands owned and held by corporations whose business is dealing in farm lands, (§ 2), and of the lands belonging to cooperative corporations, seventy-five per cent of whose members or stockholders are farmers residing on farms, or depending principally on farming for their livelihood, (§ 4), did not deny the equal protection claimed. We agree.

The legislature is free to make classifications in the application of a statute which are relevant to the legislative purpose. The ultimate test of validity is not whether the classes differ but whether the differences between them are pertinent to the subject with respect to which the classification is made. *Metropolitan Casualty Co.* v. *Brownell,* 294 U. S. 580, 583, and cases cited. We cannot say that there are no differences between corporations generally and those falling into the excepted classes which may appropriately receive recognition in the legislative application of a state policy against the concentration of farming lands in corporate ownership.

The North Dakota Legislature may have thought that its policy with reference to corporate-owned agricultural lands would be advanced by permitting corporations engaged in the business of dealing in farm lands to acquire and sell without restriction lands forced upon the market by the statute. It could have thought that its policy would be in part defeated by withholding authority from farm cooperatives to acquire and use farm lands for agricultural

purposes. Cf. *United States* v. *Rock Royal Co-op.*, 307 U. S. 533, 562–564. Statutory discrimination between classes which are in fact different must be presumed to be relevant to a permissible legislative purpose, and will not be deemed to be a denial of equal protection if any state of facts could be conceived which would support it. *Rast* v. *Van Deman & Lewis Co.*, 240 U. S. 342, 357; *Carmichael* v. *Southern Coal Co.*, 301 U. S. 495, 509, and cases cited.

Appellant also asserts that the statute imposes an unconstitutional discrimination because §§ 2, 3 provide that any corporation which acquired farm land in any manner prior to 1932, the effective date of the Act, or by judicial process or operation of law thereafter, is required to dispose of it within the ten-year period, while a corporation which acquired land by deed or grant after 1932 may hold it without restriction. But § 4 of Chapter 89 of the North Dakota Laws of 1933 provides: "That the title and ownership of any real estate acquired, in any manner, by any domestic or foreign corporation, since the approval and adoption of the aforesaid initiated law, is hereby declared to be legal and valid for all purposes, notwithstanding any provisions in said initiated law contained, but subject however, to all of the provisions now contained in said initiated law as hereby amended and reenacted."

This section was not construed by any state court in the present litigation and we are not advised why farming lands acquired in conformity to § 4 are not, as the section declares, made "subject . . . to all of the provisions now contained" in the Act as amended, including those relating to the escheat and sale of farming lands. Nor does it appear that any such discrimination is in fact made in the enforcement of the statute. As we have already pointed out in this opinion, a constitutional question which turns on the construction and application of a statute which has neither been authoritatively construed nor applied by the state courts may not appropriately be decided by this

Court. *Federation of Labor* v. *McAdory, supra,* and cases cited.

The North Dakota Supreme Court, in its opinion, and counsel, in brief and argument here, confined their discussion to the question whether the state's powers over a foreign corporation as such justify the compulsory disposition of its farm land within the state. We need not, for present purposes, have recourse to other possible sources of state power to control the ownership and disposition of property lying within its borders. We have considered but find it unnecessary to discuss other arguments of lesser moment.

We dismiss the appeal insofar as it draws in question the constitutionality of the act for its alleged failure to require an accounting for rents and profits of the land in the interval between the judgment of escheat and the sale of the land, and insofar as North Dakota farming lands acquired by corporations by deed or grant subsequent to 1932 are said to be exempted from the operation of the statute. In all other respects the judgment is affirmed.

So ordered.

MR. JUSTICE BLACK is of the opinion that the appeal should be dismissed for want of a substantial federal question.

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

CHICKASAW NATION *v.* UNITED STATES.

PETITION FOR CERTIORARI TO THE COURT OF CLAIMS.

No. 170. Decided November 5, 1945.

In a suit in the Court of Claims by an Indian tribe against the Government, items of the Government's gratuitous expenditures for the benefit of the Indian tribe which, pursuant to the Act of August 12, 1935, are used to offset the Government's liability, should be specifically designated in the judgment. P. 218.

103 Ct. Cls. 1, reversed.

PETITION for a writ of certiorari, herein granted, to review a judgment dismissing a suit in the Court of Claims.

Messrs. William A. Cornish and *Paul M. Niebell* for petitioner.

Acting Solicitor General Judson, Messrs. J. Edward Williams, Roger P. Marquis, John C. Harrington and *Walter J. Cummings, Jr.* for the United States.

PER CURIAM.

The Chickasaw Nation asks certiorari to review a judgment of the Court of Claims, 103 Ct. Cls. 1, dismissing its suit for moneys allegedly owing to it by the United States. Some of petitioner's claims were denied below, but others, totalling $22,858.78, were allowed. Against this amount the court below, applying § 2 of the Act of August 12, 1935, 49 Stat. 571, 596, offset a like amount which the court found to have been gratuitously expended by the United States for the benefit of the Nation. The findings listed various items of gratuity expenditures totalling $69,920.39. But the judgment did not specify which of these items were being applied as offsets to the claims allowed. Instead, all of the offset items were treated as commingled in a single gratuity fund upon which the Government might draw for the discharge of its obligations, as upon a bank account.

In *Seminole Nation* v. *United States,* 316 U. S. 286, 308, we pointed out that the gratuity items which have been used as statutory offsets to Indian claims against the Government should be specifically designated in the judgment. When that course is not followed, Indian claimants desirous of challenging the allowed offsets on appeal must be prepared to attack all the items which make up the fund, however much it may exceed their claims. Moreover, such a judgment, by leaving unidentified the particular gratuities which have been applied as offsets, necessarily adjudicates the validity for that purpose of all, since it makes all proportionately applicable as offsets. There is no reason why Indian claimants should be required in some subsequent suit to meet the defense that gratuity items whose offset was not necessary to the result in an earlier case have nevertheless been there finally adjudicated to be valid offsets, or why this Court, in reviewing the earlier judgment, should be required to pass on the validity of such items as offsets. When specified items of gratuity are allocated as offsets, other items, included in the findings but not applied as offsets, do not affect the judgment, their validity as offsets need not be reviewed on appeal, and they create no estoppel for future cases.

The gratuity items included among the findings below as available for offset are there described as "incorporated by reference" from findings in a "companion case" decided by the Court of Claims on the same day (*Chickasaw Nation* v. *United States,* 103 Ct. Cls. 45, certiorari denied, 326 U. S. 751), in which none of the gratuities found were used, nothing having been found due from the United States on the claims there advanced. The petition before us makes no objection to this procedure, and in view of the failure to apply such items as offsets in the companion case, we assume that their validity as such was open to objection in the present suit. We only conclude that the

judgment here should be in such form as not to compel unnecessary adjudication of such objections on appeal, or unnecessarily to foreclose consideration of such objections to the use of these items as offsets in some future litigation.

The petition for writ of certiorari is granted, limited to the question whether the particular gratuity items necessarily used as offsets should be designated by the judgment. The judgment is reversed and the cause remanded to the Court of Claims for further proceedings in conformity to this opinion.

So ordered.

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

LEVERS, ADMINISTRATOR, *v.* ANDERSON, DISTRICT SUPERVISOR, ALCOHOL TAX UNIT.

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

No. 51. Argued October 16, 1945.—Decided November 5, 1945.

1. An application for a rehearing before a District Supervisor of the Alcohol Tax Unit of the Bureau of Internal Revenue, who had entered orders annulling a permit to operate a wholesale liquor business and denying applications for importer's and wholesaler's permits, is not a prerequisite to the judicial review specifically provided by § 4 (h) of the Federal Alcohol Administration Act. Pp. 220, 224.

2. Hearings were held and evidence was taken before a hearing commissioner, petitioner being represented by counsel. The hearing commissioner made findings of fact which were approved by the District Supervisor without affording petitioner an opportunity to except to them. On the basis of these findings, the District Supervisor entered orders annulling an existing permit and denying applications for others, without affording petitioner an opportunity to argue orally before him. The Treasury regulations authorize, but do not require, the District Supervisor to grant a rehearing. Nor do they require him to afford petitioner an op-

portunity, on rehearing, to argue orally before him. Nor was there satisfactory proof of a publicly established practice assuring that such opportunities would be afforded. *Held* that petitioner need not apply for such an administrative rehearing before seeking the judicial review specifically provided by the statute. P. 223.
147 F. 2d 547, reversed.

CERTIORARI, 325 U. S. 844, to review a judgment dismissing an appeal from an order of the District Supervisor of the Alcohol Tax Unit of the Bureau of Internal Revenue annulling an existing permit and denying other permits under the Federal Alcohol Administration Act.

Messrs. Huston Thompson and *Hugh H. Obear* for petitioner.

Mr. Robert L. Stern, with whom *Solicitor General McGrath, Assistant Attorney General Berge* and *Mr. Matthias N. Orfield* were on the brief, for respondent.

MR. JUSTICE BLACK delivered the opinion of the Court.

The petitioner's permit to operate a wholesale liquor business under the Federal Alcohol Administration Act, 49 Stat. 977, was annulled by an order of the District Supervisor of the Alcohol Tax Unit of the Bureau of Internal Revenue of the United States. At the same time, the Supervisor denied petitioner's applications for an importer's and a new wholesaler's permit. The Supervisor was duly authorized to act in these matters.[1] Section 4 (h) of the Act authorizes an applicant or permittee to appeal to the Circuit Court of Appeals within sixty days after the entry of orders denying or annulling the permits. A petition for appeal was filed within sixty days. The Circuit Court of Appeals dismissed the appeal, 147 F. 2d 547, on the ground that petitioner had failed to exhaust his

[1] 53 Stat. 561; 54 Stat. 1231; 54 Stat. 230, 231; Treasury Order No. 30, 26 C. F. R. Cum. Supp. 171.4a, 5 Fed. Reg. 2212; Treas. Decision 4982, 26 C. F. R. Cum. Supp. 171.4c, 5 Fed. Reg. 2549.

administrative remedies, since he had not first filed a motion for reconsideration of the Supervisor's order as permitted by Treasury Regulations, 26 C. F. R. Cum. Supp. 182.255, reading in part as follows:[2]

"(a) . . . Within 20 days after an order is made by the Commissioner or district supervisor revoking a basic permit, the permittee may file an application with such Commissioner or district supervisor, for a reconsideration of such order, on one or more of the following grounds:

"(1) The order is contrary to law, or

"(2) Is not supported by the evidence, or

"(3) Because of newly discovered evidence which the permittee, with due diligence, was unable to produce at the hearing."

We thought the question involved important and granted certiorari.

Whatever might be the case in other circumstances, it is clear that where, as here, judicial review is provided in the Act itself, the petitioner's right of appeal to the courts is to be determined by looking to the statute, the valid regulations promulgated pursuant to it and proven

[2] The Circuit Court of Appeals also referred to the petitioner's failure to take an appeal to the Deputy Commissioner of Internal Revenue, as allowed by Amended Treasury Regulation 182.257. That regulation provides that: "Appeal to the Commissioner is not required. However, the Commissioner may, in his discretion, in order to insure uniformity of administrative action, entertain an appeal, after review and reconsideration as provided in § 182.255, from an order of revocation of a basic permit by a district supervisor, if filed with the Commissioner within 10 days of the date of the final order." The Government concedes that the first sentence of this regulation, "Appeal to the Commissioner is not required" was added to the regulation as it originally stood for "the deliberate object of making it unnecessary for a party to appeal to the Commissioner before going to court." Under these circumstances we do not discuss it further. Cf. *Peoria Braumeister Co.* v. *Yellowley*, 123 F. 2d 637; *Leebern* v. *United States*, 124 F. 2d 505, both decided before the first sentence was added.

administrative practice throwing light upon their meaning. In construing the Act, however, we must be mindful of the "long-settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50–51. But this rule does not automatically require that judicial review must always be denied where rehearing is authorized but not sought. This is shown by our past decisions,[3] from which we see no reason to depart. Government counsel, appearing for respondent, do not defend the dismissal of petitioner's appeal on such a sweeping assumption. On the contrary, they assert that motions for rehearing before the same tribunal that enters an order are under normal circumstances mere formalities which waste the time of litigants and tribunals, tend unnecessarily to prolong the administrative process, and delay or embarrass enforcement of orders which have all the characteristics of finality essential to appealable orders.

But Government counsel insist that the rehearing here involved is far more than a formality, and that we should therefore read the Act and regulations as if these barred judicial review prior to an application for a rehearing.[4] Of course we recognize that in a particular administrative pattern new opportunities to challenge afforded by the motion for rehearing may subject an order to such critical administrative review as to reduce it to the level of a "mere preliminary or procedural" status, thereby divesting it of those qualities of administrative finality essential

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[3] *United States* v. *Abilene & Southern R. Co.*, 265 U. S. 274, 280–282; *Prendergast* v. *New York Tel. Co.*, 262 U. S. 43, 48–49.

[4] This has been expressly done in several statutes. See for example 49 Stat. 860; 52 Stat. 831. Of course the mere fact that the regulations might bar judicial review is not conclusive, for the court will consider whether these are consistent with the legislative intent.

to invocation of judicial review. *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S. 375, 384–385. But we do not think that is the case here.

The orders here challenged were entered after a hearing and they were "of a definitive character dealing with the merits of a proceeding." *Federal Power Commission* v. *Metropolitan Edison Co., supra,* 384. The evidence was taken before, and the findings of fact were made by, a hearing commissioner before whom petitioner was represented by counsel. These findings were then approved by the district supervisor who entered the orders. True the findings were approved and the orders were made by the district supervisor without an opportunity to petitioner to except to his adverse findings of fact or to present oral argument to him. And a rehearing *if granted* would have afforded petitioner for the first time an opportunity to see and except to adverse findings of fact and *might* also have given him a chance to present oral argument to the officer who made the orders. But the regulations only provide that the Supervisor "may hear the application" for a rehearing.[5] No other language of the regulations, and no satisfactory proof of publicly established practice under them, persuades us that the "may" means must, or that the Supervisors were required to hear oral argument. Thus, despite the fact that the regulations permit a stay pending the motion, there is no assurance that a rehearing will be granted, so as to afford an opportunity to except to fact findings or argue orally before the Supervisor. Con-

[5] The only relevant provision, 26 C. F. R. Cum. Supp. 182.255, reads:

"(b) . . . The Commissioner or district supervisor, with whom such application is filed, may hear the application on a date and at a place to be fixed by him. The Commissioner or district supervisor, as the case may be, after hearing such application, may either affirm the order of revocation previously made, or may vacate and set aside such order and dismiss the proceedings or order a new hearing of the evidence before a designated hearing officer."

sequently, whatever weight such factors might be accorded in determining administrative finality of the orders is absent here.

Our conclusion is that the motion is in its effect so much like the normal, formal type of motion for rehearing that we cannot read into the Act an intention to make it a prerequisite to the judicial review specifically provided by Congress. Whether the Circuit Court of Appeals was possessed of power to exercise a discretion to stay its review until an application was made to the Supervisor to grant a rehearing is a question which was not decided and upon which we express no opinion. See *United States* v. *Abilene & Southern R. Co., supra,* 282.

Reversed.

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

IN THE MATTER OF MICHAEL.

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

No. 38. Argued October 11, 12, 1945.—Decided November 5, 1945.

1. A witness may not be punished for contempt under § 268 of the Judicial Code for perjury alone. *Clark* v. *United States,* 289 U. S. 1, distinguished. P. 228.
2. Nor may a trustee in bankruptcy be adjudged guilty of contempt under § 268 of the Judicial Code for misbehavior as an officer of the court in an official transaction, solely on the ground that he testified falsely before a Grand Jury in the course of a general investigation of frauds against the United States; since such testimony is not an "official transaction" as trustee. P. 229.

146 F. 2d 627, reversed.

CERTIORARI, 324 U. S. 837, to review the affirmance of an order upon an adjudication of contempt.

Mr. Robert T. McCracken, with whom *Messrs. Stanley F. Coar* and *D. H. Jenkins* were on the brief, for petitioner.

Mr. Robert M. Hitchcock, with whom *Acting Solicitor General Judson, 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.

A Federal District Court, after a hearing, adjudged that the petitioner was guilty of contempt on findings that he had given "false and evasive" testimony before a Grand Jury which "obstructed the said Grand Jury in its inquiry and the due administration of justice." A sentence of six months imprisonment was imposed. The Circuit Court of Appeals reviewed the evidence, found that the petitioner had not been "contumacious or obstreperous," had not refused to answer questions, and that his testimony could not "fairly be characterized as unresponsive in failing to give direct answers to the questions asked him." But it accepted the District Court's finding that the petitioner's testimony as to relevant facts was false, and concluded that it was of a type tending to block the inquiry and consequently "an obstruction of the administration of justice" within the meaning of § 268 of the Judicial Code [1] so as to subject petitioner to the District Court's power to punish for contempt. 146 F. 2d 627. We granted certiorari to review this question, in view of the close similarity of the issues here to those decided in *Ex parte Hudgings,* 249 U. S. 378, a case in which the District Court was held to have exceeded its contempt power.

A brief summary of circumstances leading to the petitioner's conviction will help to focus the issues. The Grand

[1] Section 268 provides in part that the "power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, . . . and the disobedience or resistance by any . . . witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts."

Jury undertook a general investigation of frauds against the United States which led to an inquiry concerning administration of the reorganization of the Central Forging Company under § 77 (b) of the Bankruptcy Act. The petitioner, by appointment of a district judge, had been serving as that company's trustee. While before the Grand Jury he was repeatedly interrogated concerning payments of various amounts made from the bankrupt's assets. He was asked to explain the purposes for which numerous checks had been drawn. After weeks of inquiry in which he and others were interrogated about these matters, the Court, on petition of the prosecution before the Grand Jury, issued a rule to petitioner to show cause why an order should not be made adjudging him in contempt of court for obstructing the investigation. Upon trial by the Court the transcript of petitioner's Grand Jury testimony was offered in evidence. The Court then heard other witnesses on behalf of the prosecution who testified to facts which directly conflicted with the petitioner's explanations before the Grand Jury. The District Court, disbelieving petitioner and believing the other witnesses, made its finding that petitioner's Grand Jury testimony had been false. No witness was offered to indicate that the petitioner in the Grand Jury room had been guilty of misconduct of any kind other than false swearing. And a reading of the evidence persuades us that the Circuit Court of Appeals correctly found that he had directly responded with unequivocal answers.[2] These unequivocal answers were clear enough so that if they are shown to be false petitioner would clearly be guilty of perjury. But he could have been

[2] It is true that when petitioner was first asked whether he drew certain checks on specified dates he answered that he could not be sure in view of the number of checks he drew. When the particular checks were more specifically pointed out petitioner did offer explanations, which though they might have been false, nevertheless constituted clearcut answers.

indicted for that offense, in which event a jury would have been the proper tribunal to say whether he or other witnesses told the truth. Our question is whether it was proper for the District Court to make its finding on that issue the crucial element in determining its power to try and convict petitioner for contempt.

Not very long ago we had occasion to point out that the Act of 1831, 4 Stat. 487, from which § 268 of the Judicial Code derives, represented a deliberate Congressional purpose drastically to curtail the range of conduct which courts could punish as contempt. *Nye* v. *United States,* 313 U. S. 33, 44–48.[3] True, the Act of 1831 carries upon its face the purpose to leave the courts ample power to protect the administration of justice against immediate interruption of its business. But the references to that Act's history in the *Nye* case, *supra,* reveal a Congressional intent to safeguard Constitutional procedures by limiting courts, as Congress is limited in contempt cases, to "the least possible power adequate to the end proposed." *Anderson* v. *Dunn,* 6 Wheat. 204, 231. The exercise by federal courts of any broader contempt power than this would permit too great inroads on the procedural safeguards of the Bill of Rights, since contempts are summary in their nature, and leave determination of guilt to a judge rather than a jury. It is in this Constitutional setting that we must resolve the issues here raised.

All perjured relevant testimony is at war with justice, since it may produce a judgment not resting on truth. Therefore it cannot be denied that it tends to defeat the sole ultimate objective of a trial. It need not necessarily, however, obstruct or halt the judicial process. For the function of trial is to sift the truth from a mass of contradictory evidence, and to do so the fact-finding tribunal

[3] See also as to this historical purpose, Nelles and King, Contempt by Publication in the United States, 28 Col. L. Rev. 401 *et seq.;* 525 *et seq.;* Fox, The History of Contempt of Court (1927).

must hear both truthful and false witnesses. It is in this sense, doubtless, that this Court spoke when it decided that perjury alone does not constitute an "obstruction" which justifies exertion of the contempt power and that there "must be added to the essential elements of perjury under the general law the further element of obstruction to the Court in the performance of its duty." *Ex parte Hudgings, supra,* 382, 383, 384. And the Court added, "the presence of that element [obstruction] must clearly be shown in every case where the power to punish for contempt is exerted."

Clark v. *United States,* 289 U. S. 1, is a case in which the Court found that element "clearly shown." In that case, the Court found that a prospective juror had testified falsely in order to qualify despite the fact that she was a partisan who would vote for a verdict of not guilty regardless of evidence of guilt. It is difficult to conceive of a more effective obstruction to the judicial process than a juror who has prejudged the case. For this prevents the very formation of a proper judicial tribunal. As the Court said in the *Clark* case, "The doom of mere sterility was on the trial from the beginning." p. 11. Perjury was not even the basis of the conviction. The Court's opinion makes it clear that the obstruction would have been the same had the partisan plan to thwart justice been carried out without any swearing at all. Of course the mere fact that false swearing is an incident to the obstruction charged does not immunize the culprit from contempt proceedings. Certainly that position offers no support for the present conviction.

Here there was, at best, no element except perjury "clearly shown." Nor need we consider cases like *United States* v. *Appel,* 211 F. 495, 496, pressed upon us by the government. For there the Court thought that the testimony of Appel was "on its mere face, and without inquiry collaterally, . . . not a bona fide effort to answer the ques-

tions at all." In the instant case there was collateral inquiry; the testimony of other witnesses was invoked to convince the trial judge that petitioner was a perjurer. Only after determining from their testimony that petitioner had wilfully sworn falsely, did the Court conclude that petitioner was "blocking the inquiry just as effectively by giving a false answer as refusing to give any at all." This was the equivalent of saying that for perjury alone a witness may be punished for contempt. Sec. 268 is not an attempt to grant such power.

Nor can the conviction be upheld under that part of § 268 which authorizes punishment for contempts which consist of "the misbehavior of any of the officers of said courts in their official transactions." While the petitioner was a trustee, and we may assume an officer of the Court within the statutory meaning, he was not engaged in an "official transaction" as trustee when he testified before the Grand Jury in the course of a general inquiry. Whether he could be punished for contempt for giving perjured testimony in the course of proceedings directly involving administration of the estate is another matter not now before us.

The judgments of the Circuit Court of Appeals and the District Court are

Reversed.

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

EAST NEW YORK SAVINGS BANK *v.* HAHN ET UX.

APPEAL FROM THE SUPREME COURT OF NEW YORK, COUNTY OF KINGS.

No. 62. Argued October 18, 1945.—Decided November 5, 1945.

1. Chapter 93 of the Laws of New York of 1943, which extended for a further period of one year moratory legislation first enacted in 1933, whereby as to mortgages executed prior to July 1, 1932 the right of foreclosure for default in the payment of principal was suspended, *held* not repugnant to the contract clause of the Federal Constitution. Pp. 231, 234.
2. The incidence of mortgage moratorium legislation on an isolated contract must be considered in the light of the right of the State to safeguard the interests of its people. P. 232.
3. *Home Bldg. Assn.* v. *Blaisdell,* 290 U. S. 398, and later cases, followed; *Chastleton Corp.* v. *Sinclair,* 264 U. S. 543, differentiated. Pp. 231, 235.

293 N. Y. 622, 59 N. E. 2d 625, affirmed.

APPEAL from the affirmance of a judgment (182 Misc. 863) which, in an action to foreclose a mortgage for non-payment of principal, sustained the constitutionality of a state statute suspending the right of foreclosure.

Mr. John P. McGrath for appellant.

Orrin G. Judd, Solicitor General of New York, for appellees.

Briefs were filed by *Nathaniel L. Goldstein,* Attorney General of New York, *Orrin G. Judd,* Solicitor General, and *Saul A. Shames,* Assistant Attorney General, on behalf of the State of New York, as *amicus curiae,* urging affirmance; and by *Mr. George R. Fearon* on behalf of the Savings Banks Association of the State of New York, as *amicus curiae,* urging reversal.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This was an action begun in 1944 to foreclose a mortgage on real property in the City of New York for non-

payment of principal that had become due in 1924. The trial court held that the foreclosure proceeding was barred by the applicable New York Moratorium Law. 182 Misc. 863, 51 N. Y. S. 2d 496. This Law, Chapter 93 of the Laws of New York of 1943, extended for another year legislation first enacted in 1933, whereby the right of foreclosure for default in the payment of principal was suspended for a year as to mortgages executed prior to July 1, 1932.[1] Year by year (except in 1941 when an extension for two years was made), the 1933 statute was renewed for another year. The New York Court of Appeals, one judge dissenting, affirmed the trial court's judgment. 293 N. Y. 622, 59 N. E. 2d 625. Upon claim duly made below that the Moratorium Law of 1943 was repugnant to the Contract Clause of the Constitution of the United States, Art. I, § 10, the case is here on appeal under § 237 (a) of the Judicial Code, 28 U. S. C. § 344 (a). The validity of the statute is likewise challenged under the Fourteenth Amendment but too feebly to merit consideration.

Since *Home Bldg. & L. Assn.* v. *Blaisdell,* 290 U. S. 398, there are left hardly any open spaces of controversy concerning the constitutional restrictions of the Contract Clause upon moratory legislation referable to the depression. The comprehensive opinion of Mr. Chief Justice Hughes in that case cut beneath the skin of words to the core of meaning. After a full review of the whole course of decisions expounding the Contract Clause—covering almost the life of this Court—the Chief Justice, drawing on the early insight of Mr. Justice Johnson [2] in *Ogden* v.

[1] The 1943 Moratorium Law made the payment of interest, taxes, insurance, and amortization charges a prerequisite to suspension of foreclosure. These conditions concededly were met and the only default here was in unpaid principal.

[2] For Mr. Justice Johnson's constitutional views regarding the scope and limits of the Contract Clause, see Morgan, *Mr. Justice William*

Saunders, 12 Wheat. 213, 286, as reinforced by later decisions cast in more modern terms, *e. g., Manigault* v. *Springs,* 199 U. S. 473, 480; *Marcus Brown Co.* v. *Feldman,* 256 U. S. 170, 198, put the Clause in its proper perspective in our constitutional framework. The *Blaisdell* case and decisions rendered since (*e. g., Honeyman* v. *Jacobs,* 306 U. S. 539; *Veix* v. *Sixth Ward Assn.,* 310 U. S. 32; *Gelfert* v. *National City Bank,* 313 U. S. 221; *Faitoute Co.* v. *Asbury Park,* 316 U. S. 502), yield this governing constitutional principle: when a widely diffused public interest has become enmeshed in a network of multitudinous private arrangements, the authority of the State "to safeguard the vital interests of its people," 290 U. S. at 434, is not to be gainsaid by abstracting one such arrangement from its public context and treating it as though it were an isolated private contract constitutionally immune from impairment.

The formal mode of reasoning by means of which this "protective power of the State," 290 U. S. at 440, is acknowledged is of little moment. It may be treated as an implied condition of every contract and, as such, as much part of the contract as though it were written into it, whereby the State's exercise of its power enforces, and does not impair, a contract. A more candid statement is to recognize, as was said in *Manigault* v. *Springs, supra,* that the power "which in its various ramifications is known as the police power, is an exercise of the sovereign right of the Government to protect the . . . general welfare of the people, and is paramount to any rights under contracts

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Johnson and the Constitution (1944) 57 Harv. L. Rev. 328, 352 *et seq.,* and Hale, *The Supreme Court and the Contract Clause: III* (1944) 57 Harv. L. Rev. 852, 872 *et seq.* See also Levin, *Mr. Justice William Johnson and the Unenviable Dilemma* (1944) 42 Mich. L. Rev. 803; *Mr. Justice William Johnson, Creative Dissenter* (1944) 43 Mich. L. Rev. 497; *Mr. Justice William Johnson and the Common Incidents of Life* (1945) 44 Mich. L. Rev. 59.

between individuals." 199 U. S. at 480. Once we are in this domain of the reserve power of a State we must respect the "wide discretion on the part of the legislature in determining what is and what is not necessary." *Ibid.* So far as the constitutional issue is concerned, "the power of the State when otherwise justified," *Marcus Brown Co.* v. *Feldman,* 256 U. S. 170, 198, is not diminished because a private contract may be affected.

Applying these considerations to the immediate situation brings us to a quick conclusion. In 1933, New York began a series of moratory enactments to counteract the virulent effects of the depression upon New York realty which have been spread too often upon the records of this Court to require even a summary. Chapter 793 of the Laws of 1933 gave a year's grace against foreclosures of mortgages, but it obligated the mortgagor to pay taxes, insurance, and interest. The validity of the statute was sustained in *Klinke* v. *Samuels,* 264 N. Y. 144, 190 N. E. 324. The moratorium has been extended from year to year. When the 1937 reenactment was questioned, the New York Court of Appeals again upheld the legislation. *Maguire & Co.* v. *Lent & Lent, Inc.,* 277 N. Y. 694, 14 N. E. 2d 629. This decision was rendered after a joint legislative committee had made a thorough study and recommended continuance of the moratorium. New York Legislative Document (1938) No. 58. In 1941, the Legislature reflected some changes in economic conditions by requiring amortization of the principal at the rate of 1% per annum, beginning with July 1, 1942. The same legislature established another joint legislative committee to review once more the New York mortgage situation. "After a most exhaustive study of the moratorium," a report was submitted recommending its extension for another year. New York Legislative Document (1942) No. 45. The Governor of New York urged such legislation (New York Legislative Document (1943) No. 1,

p. 9) and the Law now under attack was enacted. It is relevant to note that the New York Legislature in subsequent extensions of the moratorium again took note of changed economic conditions by increasing the amortization rate to 2% in 1944 (L. 1944, c. 562) and to 3% in 1945 (L. 1945, c. 378).

Appellant asks us to reject the judgment of the joint legislative committee, of the Governor, and of the Legislature, that the public welfare, in the circumstances of New York conditions, requires the suspension of mortgage foreclosures for another year. On the basis of expert opinion, documentary evidence, and economic arguments of which we are to take judicial notice, it urges such a change in economic and financial affairs in New York as to deprive of all justification the determination of New York's Legislature of what New York's welfare requires. We are invited to assess not only the range and incidence of what are claimed to be determining economic conditions insofar as they affect the mortgage market—bank deposits and war savings bonds; increased payrolls and store sales; available mortgage money and rise in real estate values—but also to resolve controversy as to the causes and continuity of such improvements, namely the effect of the war and of its termination, and similar matters. Merely to enumerate the elements that have to be considered shows that the place for determining their weight and their significance is the legislature not the judiciary. Unlike *Worthen Co.* v. *Kavanaugh,* 295 U. S. 56, 60, here there was no "studied indifference to the interests of the mortgagee or to his appropriate protection." Here the Legislature was not even acting merely upon the pooled general knowledge of its members. The whole course of the New York moratorium legislation shows the empiric process of legislation at its fairest: frequent reconsideration, intensive study of the consequences of what has been done, readjustment to changing conditions, and safeguarding the

future on the basis of responsible forecasts. The New York Legislature was advised by those having special responsibility to inform it that "the sudden termination of the legislation which has dammed up normal liquidation of these mortgages for more than eight years might well result in an emergency more acute than that which the original legislation was intended to alleviate." New York Legislative Document (1942) No. 45, p. 25. It would indeed be strange if there were anything in the Constitution of the United States which denied the State the power to safeguard its people against such dangers. There is nothing. Justification for the 1943 enactment is not negatived because the factors that induced and constitutionally supported its enactment were different from those which induced and supported the moratorium statute of 1933.

It only remains to say that in *Chastleton Corp.* v. *Sinclair,* 264 U. S. 543, which was strongly pressed on us, the Court dealt with quite a different situation. The differentiating factors are too glaring to require exposition.

Judgment affirmed.

MR. JUSTICE RUTLEDGE concurs in the result.

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

UNITED STATES ET AL. *v.* DETROIT & CLEVELAND NAVIGATION CO. ET AL.

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

No. 22. Argued October 9, 10, 1945.—Decided November 5, 1945.

Application was made to the Interstate Commerce Commission under § 309 (c) of Part III of the Interstate Commerce Act for a certificate of convenience and necessity to operate as common carriers of motor vehicles by water on the Great Lakes. It was opposed by appellees, who had been engaged in such service before the war. The Government had requisitioned many vessels of the appellees, leaving two of them with no automobile carriers and the third with only nine vessels, five of which were owned by and operated for the Government. Applicants owned free of encumbrance three vessels which had been used extensively before the war as automobile carriers, mostly under charter to one of the appellees. They had been converted for carrying bulk traffic but could readily be reconverted to handle automobile traffic. The Commission found that before the war there were insufficient facilities for this purpose during peak periods, that there had been a definite need for the carrying capacity of applicants' vessels, that there was a reasonable certainty that a like need would arise when production of automobiles for civilians was resumed, that there was considerable uncertainty as to the time it would take for appellees to procure additional vessels and place them in operation, and that the public interest would be adversely affected if appellees were delayed in acquiring the additional facilities needed. It held that the proposed service would be required by future public convenience and necessity and granted the certificate. Its action was challenged by appellees. *Held:*

1. The Commission acted within its statutory authority and administrative discretion in granting the certificate. P. 241.

2. A positive finding by the Commission of an actual inability of existing carriers to acquire the necessary facilities to meet future transportation needs is not a prerequisite to the granting of such a certificate. P. 240.

3. The Commission has been entrusted with a wide range of discretionary authority in determining whether to grant such certificates. P. 241.

4. Its function is not only to appraise the facts and draw inferences from them but also to exercise an expert judgment and to determine from its analysis of the total situation on which side of the controversy the public interest lies. P. 241.

5. It is entitled to consider the margin of safety which the public interest requires for the resumption of an interrupted service; and it has discretion to conclude that future shipping needs should be assured rather than left uncertain. Pp. 240, 241.

57 F. Supp. 81, reversed.

APPEAL from a decree of a district court of three judges setting aside an order of the Interstate Commerce Commission granting a certificate of convenience and necessity to operate as common carriers of motor vehicles by water on the Great Lakes.

Mr. Charles H. Weston, with whom *Acting Solicitor General Judson, Assistant Attorney General Berge, Messrs. Walter J. Cummings, Jr., Daniel W. Knowlton* and *Daniel H. Kunkel* were on the brief, for the United States and the Interstate Commerce Commission; and *Mr. Sparkman D. Foster* for the T. J. McCarthy Steamship Co. et al., appellants.

Messrs. S. S. Eisen and *Ernest S. Ballard,* with whom *Messrs. James Turner, Willis C. Bullard, Isaac H. Mayer* and *Carl Meyer* were on the brief, for appellees.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The Interstate Commerce Commission pursuant to § 309 (c) of Part III of the Interstate Commerce Act (54 Stat. 941, 49 U. S. C. § 909 (c)) granted to T. J. McCarthy Steamship Co. and Automotive Trades Steamship Co. (whom we will call the applicants) a certificate of convenience and necessity to operate as common carriers in the transportation by water of motor vehicles from Detroit, Michigan to ports on Lake Erie and Lake

Superior.[1] 260 I. C. C. 175. The appellees, who were protestants in the proceeding before the Commission and who are common carriers of motor vehicles by vessels on the Great Lakes, challenged that order before a district court of three judges. That court set aside the Commission's order. 57 F. Supp. 81. The case is here on appeal.[2]

World War II caused the cessation of the production of motor vehicles for civilian use. Prior to that time appellees as common carriers had transported motor vehicles by vessels from Detroit to various ports on the Great Lakes. The applicants owned three vessels equipped as automobile carriers. These vessels were used extensively prior to the war in transporting automobiles from Detroit to Lake Erie ports. They were for the most part under charter to one of the appellees from 1936 through 1941. With the advent of the war the United States requisitioned many of the vessels of the appellees, using some of them for carrying bulk commodities on the Great Lakes and removing others to the salt water. As a result, two of the appellees at the time of the hearing[3] in June, 1943, had no automobile carriers and were not operating; the third was operating nine vessels, of which five were owned by and operated for the United States. In contrast, the applicants owned their three vessels free and clear of any incumbrance; and while those vessels had been converted for carrying bulk traffic, all of the equipment necessary for reconversion into automobile carriers had been preserved. The Commission found that prior to the war there were insufficient facilities for the movement of automobiles on

[1] The companies are both controlled by T. J. McCarthy. The certificate runs to T. J. McCarthy Steamship Co., for itself and as managing agent of Automotive Trades Steamship Co.

[2] Sec. 210 (28 U. S. C. § 47a) and § 238 of the Judicial Code as amended, 28 U. S. C. § 345.

[3] The Commission rendered its decision on March 7, 1944.

the Great Lakes during certain peak periods even with the carrying capacity of applicants' vessels included. There was testimony of automobile manufacturers and of motor common carriers that the carrying capacity of applicants' vessels would be needed when the manufacture of automobiles was resumed. The Commission found that prior to the war there was a definite need for the carrying capacity of applicants' vessels in this transportation and that there was a reasonable certainty that a like need for that capacity would arise when the production of automobiles for civilian use was resumed. It found that while the applicants could readily reconvert their vessels to handle automobile traffic, there was considerable uncertainty as to the length of time it would take the appellees to procure and place in operation the additional vessels which would be needed when production of automobiles for civilian use was resumed. It concluded that the public interest would be adversely affected if, after production was resumed, appellees were delayed in acquiring the additional facilities needed to meet the transportation demands. On that basis it held that the proposed service would be required by future public convenience and necessity.

The District Court held that the Commission's order could not be sustained in absence of evidence that applicants' vessels were the only vessels available to appellees to meet the prospective transportation demands beyond that furnished by their own vessels. It concluded that not only was there no finding that if applicants' vessels were not chartered there was no other carrying capacity which could have been acquired but that the record established the contrary.

The case, however, is not one where there is a service presently being rendered and a newcomer seeks entry into the field. Whether in that event the ruling of the District Court would be correct is a question we do not reach.

While the authority of appellees to serve as carriers has not been terminated, the service formerly rendered by them has been interrupted by the war. The applications concern a proposed additional service to be rendered in the future. Sec. 309 (c) authorizes the Commission to permit the proposed service to be rendered if it "is or will be required by the present or future public convenience and necessity." That entails a prophecy so far as future requirements are concerned. The Commission made that prophecy on the basis of (1) the earlier service which had been discontinued during the war, (2) the likely requirements for the future, and (3) the ability of the existing carriers to effect an expeditious resumption of service at the war's end. The ability of the applicants promptly to render the service at that time is adequately established. Whether the appellees could or would move with like dispatch is less certain. Many of the vessels which they previously owned had been taken by the United States. And the Commission had doubt as to whether they would or could obtain the necessary additional transportation facilities in time to meet the foreseeable future demands which would arise when automobile manufacture was resumed. We do not have here a case where there was a surplus of facilities in the prior service which the war interrupted. The Commission indeed found that the prior service had not been adequate, a finding which we think is supported by evidence. It took that fact into consideration in determining the margin of safety which the public interest required for the resumption of the interrupted service. We think the inadequacy of the prior service was relevant to that determination. It not only bore upon the future shipping needs which were likely but also underscored the danger of delays in resuming the service if the field were left exclusively to existing carriers.

If the Commission were required to deny these applications unless it found an actual inability on the part of

existing carriers to acquire the facilities necessary for future transportation needs, a limitation would be imposed on the power of the Commission which is not found in the Act. The Commission is the guardian of the public interest in determining whether certificates of convenience and necessity shall be granted. For the performance of that function the Commission has been entrusted with a wide range of discretionary authority. *Interstate Commerce Commission* v. *Parker,* 326 U. S. 60. Its function is not only to appraise the facts and to draw inferences from them but also to bring to bear upon the problem an expert judgment and to determine from its analysis of the total situation on which side of the controversy the public interest lies. Its doubt that the public interest will be adequately served if resumption of service is left to existing carriers is entitled to the same respect as its expert judgment on other complicated transportation problems. See *Chesapeake & Ohio R. Co.* v. *United States,* 283 U. S. 35, 42; *Alton R. Co.* v. *United States,* 315 U. S. 15, 23. Forecasts as to the future are necessary to the decision. But neither uncertainties as to the future nor the inability or failure of existing carriers to show the sufficiency of their plans to meet future traffic demands need paralyze the Commission into inaction. It may be that the public interest requires that future shipping needs be assured rather than left uncertain. The Commission has the discretion so to decide. It went no further here.

Reversed.

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

GENERAL ELECTRIC CO. *v.* JEWEL INCANDESCENT LAMP CO. ET AL.

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

No. 46. Argued October 18, 19, 1945.—Decided November 5, 1945.

1. Pipkin Patent No. 1,687,510 for a frosted glass electric lamp bulb, characterized by the presence on the interior of rounded instead of sharp, angular crevices so as to strengthen resistance against breakage by impact, *held* invalid for want of invention. Pp. 243, 248.
2. It did not appear that, prior to the patent in question, electric bulbs had been frosted on the interior with rounded rather than sharp, angular crevices. But an earlier patent, as well as the art which preceded it, showed how to produce such a surface on the exterior of electric bulbs; and another earlier patent showed how to frost the inside of an electric bulb. *Held* that, in view of these disclosures, there could be no invention in frosting either the outside or inside of an electric bulb so as to produce rounded rather than sharp, angular crevices. Principle of *Ansonia Brass & Copper Co.* v. *Electric Supply Co.*, 144 U. S. 11, applied. Pp. 247–249.
3. Where the method of the manufacture of an article is known, more than a new advantage of the product must be discovered in order to claim invention. P. 249.

146 F. 2d 414, affirmed.

CERTIORARI, 324 U. S. 838, to review affirmance of an order, 47 F. Supp. 818, dismissing a suit for infringement of a patent.

Mr. Alexander C. Neave, with whom *Mr. John H. Anderson* was on the brief, for petitioner.

Mr. Samuel E. Darby, Jr., with whom *Mr. Paul Kolisch* was on the brief, for respondents.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This is a suit for infringement of Pipkin Patent No. 1,687,510 issued to petitioner, assignee of Marvin Pipkin,

on October 16, 1928. The District Court found the patent to be invalid and also that the accused structure did not infringe. It accordingly dismissed the bill. 47 F. Supp. 818. The Circuit Court of Appeals affirmed, holding the patent invalid. 146 F. 2d 414. The case is here on a petition for writ of certiorari which we granted because of a conflict of decision among the Circuit Courts of Appeals.[1]

The patent relates to a frosted glass bulb for electric lamps. It is defended here as a product not a process patent. The product is described in the first claim as follows:

"A glass electric lamp bulb having its interior surface frosted by etching so that the maximum brightness of an ordinary incandescent lamp comprising such a bulb will be less than twenty-five per cent of that of said lamp with a clear bulb, said interior bulb surface being characterized by the presence of rounded as distinguished from sharp angular crevices to such an extent that the strength to resist breakage by impact is greater than twenty per cent of that of the clear bulb."

Many years prior to the Pipkin patent, efforts had been made to reduce the glare produced by the brilliant filament of an incandescent lamp having a clear bulb. The most common method of reducing the glare was to frost the outside surface with an acid frosting solution. While bulbs so treated reduced the glare, the rough outside surface

[1] The Circuit Court of Appeals for the Sixth Circuit in *General Electric Co.* v. *Save Sales Co.*, 82 F. 2d 100, and the Circuit Court of Appeals for the Second Circuit in *General Electric Co.* v. *Wabash Appliance Corp.*, 93 F. 2d 671, held the patent valid. The corresponding Canadian Pipkin Patent No. 289,379 was held invalid by the Supreme Court of Canada. *Fuso Electric Works* v. *Canadian General Electric Co.*, 1940 Can. L. Rep. 371. The British Pipkin patent, No. 228,907, was held invalid by the High Court of Justice. *British Thomson-Houston Co., Ltd.* v. *Tungstalite, Ltd.*, 57 Pat. Journ. 271 (1940).

collected dirt and was difficult to clean, with the result that the light output was further reduced. Twenty-five years before Pipkin, Kennedy (patent No. 733,972 issued July 21, 1903) had showed an inside frosted bulb. But a difficulty appeared. When the outside surface of a bulb was frosted the strength of the bulb was not materially affected. When the inside surface, however, was frosted, the strength of the bulb was substantially reduced, making it unfit for practical use. Pipkin recited these facts in his specifications and stated, "The object of my invention is to produce an inside frosted glass bulb which will be much stronger than those heretofore produced." He went on to state that the preferred method of frosting was by use of a chemical medium which, when applied so as to produce the proper light diffusion, made the bulb extremely fragile. And he added: "I have found, however, that if the bulb is given a further treatment, which I term a strengthening treatment, in which it is subjected to an etching or frosting treatment of lower degree than that to which it was first subjected, it becomes quite strong. Indeed, it may be made practically as strong as the original clear glass bulb." He gave as the probable explanation the fact that the first treatment produced sharp, angular crevices or pits in the glass, while the second or strengthening treatment ate away additional glass and rounded out the angular crevices into saucer-shaped pits.[2] The fact that the bulb was strengthened when additional glass was dissolved was

[2] One of the experts, when asked for the explanation of this phenomenon, testified: "Because in the instance where we have sharp angular crevices on the inside surface and the bulb is subjected to impact on its outer surface, the inner surface tends to be extended and therefore it is put into tension and the sharp angular crevices are the starting point for cracks, whereas in the case . . . where the crevice has been rounded out the impact against a bulb having on its inner surface this type of frosting, is such that the testing effort is spread over a very much larger area and the bulb is almost as strong as it was before frosting."

referred to by the court below as "Pipkin's paradox." The patent contains charts showing the relative extent to which the strength of the bulb is weakened by the first frosting treatment and its strength restored by the second treatment. The patent also shows that while the bulb of the patent materially reduced the glare obtained in a clear bulb, the lighting efficiency of the two is substantially the same for any given wattage.

As the first claim of the patent indicates, the characteristic feature of the patented bulb is the fact that the interior surface is "characterized by the presence of rounded as distinguished from sharp angular crevices." It is that feature which is responsible for the bulb's strength. Now, an electric bulb frosted on the inside was old in the art. Kennedy had disclosed such a product twenty-five years earlier. Moreover, it had long been known in the art that successive acid treatments of glass rounded out the sharp angular crevices produced by the first etching. That was shown in particularity by Reinitzer [3] in 1887 and by Tillotson [4] in 1917. And it was shown in Sprechsaal of 1907 (a German trade paper) that if hollow glass was subjected to a second etching, the surface would have a silk-like appearance, the finish being called satin etching or silk mat.[5] It is true that these prior publications were concerned with frosting for the purpose of obtaining a decorative finish in glass ware or desired optical effects in focusing screens for cameras and the like. But Sprechsaal in 1912 specifically described the application of successive etchings to electric bulbs. And that publication recommended, as Pipkin did years later, that a weaker or diluted

[3] Die Glashutte of 1887, Contributions to the Knowledge of Glass Etching.

[4] Journal of Industrial and Engineering Chemistry, October 1917.

[5] It was largely on the basis of this prior disclosure that the British patent was held invalid. See *British Thomson-Houston Co., Ltd.* v. *Tungstalite, Ltd., supra* note 1, pp. 288–289.

etching solution be used for the second etching. Moreover, Wood (patent No. 1,240,398 issued September 18, 1917) observed that successive acid treatments of glass rounded out the sharp angular crevices produced by the first etching, and he applied that idea to electric bulbs as well as to other glass articles. His patent covered the making of light-diffusing screens. He noted that if glass was etched once, the surface was cut into irregular crevices, pits and grooves, with the result that only a portion of the light was transmitted. But if after the first etching (which he accomplished by a blast of air charged with a fine dust of flour emery or carborundum) the surface was flowed with acid, the crevices and pits were enlarged and smoothed out into minute concave lenses. These microscopical lenses diffused the light perfectly and transmitted practically all of it. He noted that his process was especially valuable in the case of certain types of cameras. But he added, "Such a screen is also useful for rendering the bulbs of incandescent lamps diffusing without at the same time causing the very marked loss in the efficiency of the lamp, which results from frosting the bulbs in the usual manner." Wood, to be sure, did not describe frosting the inside of the bulb. Kennedy, however, had shown that. Moreover, prior to Wood it was well known in the art, as we have noted, that successive acid treatments of glass produced a surface characterized by the presence of rounded as distinguished from sharp angular crevices or pits. If there was novelty in applying that process to electric bulbs, Wood achieved it. At least since Kennedy, it was known that inside-frosted electric bulbs were preferable to outside-frosted bulbs.

Wood, of course, was concerned only with light diffusion and transmission primarily of screens, secondarily of electric bulbs. Neither he nor any other before Pipkin appears to have given any indication that the second treatment resulted in any strengthening of the glass. But

strengthening was inherent in the method he proposed. And it appears that an electric bulb, which had been frosted inside pursuant to his method, would have inevitably obtained the rounded pits and hence the attendant strength characteristic of the Pipkin bulb.

If A without mentioning the element of strength patented a bulb which was extra strong, B could not obtain a patent on the bulb because of its strength, though he was the first to recognize that feature of it. That is the import of *Ansonia Brass & Copper Co.* v. *Electrical Supply Co.*, 144 U. S. 11. That case involved the question of the validity of a patent for an insulated electric conductor. The prior art disclosed a similar method of insulation which was used in connection with the wiring of burglar alarms. Such use involved no problem of combustibility of the insulating material which emerged on the introduction of electric lighting. The insulator disclosed by the prior art was not intended to be, and perhaps was not known to be incombustible. But in fact the earlier insulator had approximately the same degree of incombustibility as that described in the patent. The Court ruled that "the application of an old process to a new and analogous purpose does not involve invention, even if the new result had not before been contemplated." 144 U. S. p. 18. Since the two insulators were practically the same in their method of construction, the patentee was not allowed to claim the feature of incombustibility as his invention. The benefits of the "potencies and values more important than the uses that were immediately apparent" belong to him who establishes priority of discovery. *Radio Corporation of America* v. *Radio Engineering Laboratories*, 293 U. S. 1, 14.

Petitioner, however, insists that this is not a case where the patentee merely observed the advantageous properties of an old article of manufacture. It says that Pipkin created a new article of manufacture, an inside-frosted bulb having an etched inner surface characterized by

rounded rather than sharp angular crevices—an article that never existed before. It points out that prior to Pipkin no one knew why inside frosted bulbs were weak nor knew how to remedy the weakness. Pipkin indeed seems to be the first to have recognized that the form of the pitting had an effect on the strength of the glass. The prior art appears to have made no such disclosure. And it is true that the Pipkin bulb met with commercial success. The question remains, however, whether the Pipkin patent was invalid because of anticipation.

It is true that there is a difference between the *Ansonia* case and the present one. There a prior product had been created having qualities which were unrecognized at the time and which later were sought to be patented. On the other hand, it does not appear in the present case that prior to Pipkin electric bulbs had been frosted on the interior with rounded rather than sharp angular crevices or pits. But Wood, as well as the art which preceded him, showed how to produce such a surface on electric bulbs as well as on other articles of glass. Kennedy showed how to frost the inside of an electric bulb. In view of these disclosures it is difficult to see how there could be invention in frosting either the outside or inside of an electric bulb so as to produce saucer-shaped rather than sharp, angular crevices or pits. A product claim describes an article, new and useful. The principle of the *Ansonia* case plainly would deny validity to the Pipkin patent if the prior art disclosed an electric bulb so frosted on the inside as to round out the angular crevices produced by the first etching, whether the full utility of the bulb had been previously recognized or not. The same result is indicated where, as in the present case, the prior art discloses the method of making an article having the characteristics of the patented product, though all the advantageous properties of the product had not been fully appreciated. *Lovell Mfg. Co.* v. *Cary,* 147 U. S. 623. Pipkin found

latent qualities in an old discovery and adapted it to a useful end. But that did not advance the frontiers of science in this narrow field so as to satisfy the exacting standards of our patent system. Where there has been use of an article or where the method of its manufacture is known, more than a new advantage of the product must be discovered in order to claim invention. See *DeForest Radio Co.* v. *General Electric Co.*, 283 U. S. 664, 682. It is not invention to perceive that the product which others had discovered had qualities they failed to detect. See *Corona Cord Tire Co.* v. *Dovan Chemical Corp.*, 276 U. S. 358, 369.

Affirmed.

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

SCOTT PAPER CO. *v.* MARCALUS MANUFACTURING CO., INC. ET AL.

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

No. 54. Argued October 17, 1945.—Decided November 13, 1945.

1. The nature and extent of the legal consequences of the expiration of a patent are federal questions, the answers to which are to be derived from the patent laws and the policies which they adopt. P. 255.
2. An assignor of a patent is not estopped by virtue of his assignment to defend a suit for infringement of the assigned patent on the ground that the alleged infringing device is that of a prior-art expired patent. *Westinghouse Co.* v. *Formica Co.*, 266 U. S. 342, distinguished. Pp. 250, 257.
3. The application of the doctrine of estoppel so as to foreclose the assignor of a patent from asserting the right to make use of the prior-art invention of an expired patent, which anticipates that of the assigned patent, is inconsistent with the patent laws which dedicate to public use the invention of an expired patent. P. 257.

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4. The patent laws do not contemplate that anyone by contract or any form of private arrangement may withhold from the public the use of the invention of an expired patent, the public right to the enjoyment of which has been secured by the grant of a monopoly in the patented invention for a limited time. P. 256.

147 F. 2d 608, affirmed.

CERTIORARI, 325 U. S. 843, to review a judgment which reversed a judgment for the plaintiff, 54 F. Supp. 105, in a suit for infringement of a patent.

Mr. George E. Middleton for petitioner.

Mr. Samuel E. Darby, Jr., with whom *Mr. Donald J. Overocker* was on the brief, for respondents.

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

In this patent infringement suit the question is whether the assignor of a patent is estopped by virtue of his assignment to defend a suit for infringement of the assigned patent on the ground that the alleged infringing device is that of a prior art, expired patent.

Automatic Paper Machinery Company, Inc., petitioner's assignor, acquired by assignment, from respondent Marcalus, Patent No. 1,843,429 of February 2, 1932, issued on the application of Marcalus for "a method and machine for mounting a cutting strip of a hard non-metallic substance on an edge of a box blank." The patent describes and claims a method, and a machine for employing it, whereby, in substantially one operation, indurated paper is drawn from a roll and brought into overlapping relationship with the edge of a box blank, when a strip of the paper is automatically cut off and glued to the box blank in such position that its longitudinal edge projects beyond the edge of the box blank. The box thus equipped with the cutting edge of the strip is useful as a dispensing container for rolled wax paper which, as drawn from the roll, may be cut in any desired lengths by drawing it across the

cutting edge at an angle with the plane of the cutter. Marcalus, while an officer and employee of petitioner, made the patented invention and assigned his patent application to petitioner for a valuable consideration. The patent issued on the application as filed, without amendment, after which Marcalus severed his connection with petitioner and organized respondent company, which he controls, and which, like petitioner, is engaged in producing and selling box blanks having a cutting edge.

In the present suit, brought by petitioner for infringement of the assigned patent, respondents defended on the ground that their accused machine is a copy of that of the expired, prior art patent issued to Inman in 1912. The District Court gave judgment for petitioner, 54 F. Supp. 105, holding that inasmuch as respondents were estopped by Marcalus' assignment of the patent to show its invalidity, they could not, by recourse to the prior art to show noninfringement, accomplish the same result by indirection. The Court of Appeals reversed, 147 F. 2d 608, holding that the prior art may be resorted to by the assignor to measure the extent of anticipation for the purpose of limiting the claims of the assigned patent, and thus avoid infringement. Because of the identity patentwise of the Inman patent with the assigned patent and with the accused device, the court held that the claims of the assigned patent were limited to naught, and hence that there could be no infringement.

To sustain its right to enjoin infringement by the assignor of a patented invention anticipated by a prior art patent, petitioner relies on the doctrine of estoppel as applied to the assignor of a patent for value. Its basic principle is said to be one of good faith, that one who has sold his invention may not, to the detriment of the purchaser, deny the existence of that which he has sold. See *Westinghouse Co.* v. *Formica Co.*, 288 F. 330, 333. The rule, as stated by this Court in *Westinghouse Co.* v. *For-*

mica Co., 266 U. S. 342, 349, is "that an assignor of a patent right is estopped to attack the utility, novelty or validity of a patented invention which he has assigned or granted as against any one claiming the right under his assignment or grant. As to the rest of the world, the patent may have no efficacy and create no right of monopoly; but the assignor can not be heard to question the right of his assignee to exclude him from its use. *Curran* v. *Burdsall*, 20 Fed. 835; *Ball & Socket Fastener Co.* v. *Ball Glove Fastening Co.*, 58 Fed. 818; *Woodward* v. *Boston Lasting Machine Co.*, 60 Fed. 283, 284; *Babcock* v. *Clarkson*, 63 Fed. 607; *Noonan* v. *Chester Park Athletic Co.*, 99 Fed. 90, 91."

Respondents, denying that the doctrine of estoppel can rightly be applied to patent assignments, also insist that the present case is not within the scope of the doctrine. Compare *Buckingham Products Co.* v. *McAleer Mfg. Co.*, 108 F. 2d 192 with *Casco Products Corp.* v. *Sinko Tool & Mfg. Co.*, 116 F. 2d 119. Both parties rely on the decision of this Court in the *Formica* case, *supra*, which, although stating that the assignor cannot deny the novelty and validity of the assigned patented invention, nevertheless held that the claims of a patent may be narrowed by reference to the prior art so as to restrict them to so much of the invention described by the specifications as is not exhibited by the prior art. *Klein* v. *Russell*, 19 Wall. 433, 466, 467; *Garneau* v. *Dozier*, 102 U. S. 230; *Wollensak* v. *Reiher*, 115 U. S. 87; *Beidler* v. *United States*, 253 U. S. 447; *Mackay Co.* v. *Radio Corp.*, 306 U. S. 86, 94. Cf. *Hocking & Co.* v. *Hocking*, 4 R. P. C. 255, 434, 6 R. P. C. 69; *Clark* v. *Adie*, 2 App. Cas. 423; *Crosthwaite* v. *Steel*, 6 R. P. C. 190.

This Court in the *Formica* case, passing the question, not present here, whether the estoppel of the assignor extends to claims added by the assignee to the application in the Patent Office, held that the estoppel did not, in any

event, preclude the assignor charged as an infringer from narrowing or qualifying their construction by reference to the prior art, saying, 266 U. S. at 351: "The distinction may be a nice one but seems to be workable." It accordingly, by reference to the prior art, interpreted the claims, by narrowing them to a two-step process, shown by the specifications, which the court found to be the assignor's advance over the prior art, but which was not in terms embodied in the claims. The Court thus sustained the defense of noninfringement by restricting the claims by reference to the prior art, and by holding in effect that the invention assigned was not as broad in scope as the claims would otherwise on their face define it to be.

Petitioner, pointing to the logical embarrassment in applying a doctrine which forbids the assignor to deny validity of the patented invention for want of novelty, but nevertheless allows him to narrow its scope by reference to the prior art in order to save his accused device from infringement, insists that the court below has resorted to the prior art, not for the purpose of narrowing the claims and distinguishing from the prior art something which the assignor invented, but for the purpose of destroying the claims because anticipated. This is said to be precisely the same in purpose and effect as to deny invention for want of novelty. It is urged that the permission thus given to respondent assignor to show want of novelty which he is estopped to deny, is to disregard the estoppel by which, by hypothesis, he is bound.

Respondents, on the other hand, insist that a literal application of the rule of the *Formica* case limits the claims of the assigned patent to a structure having certain minor mechanical additions made by Marcalus to the machine of the Inman patent which respondents copied by their accused device. These additions, it is conceded, may not involve invention, but if so, it is said, respondents are estopped to assert it. And applying the rule of the

Formica case they urge that the claims of the patent may nevertheless be narrowed to a machine embodying the additional, minor features not found in the Inman machine, and infringement may thus be avoided.

But in the circumstances of this case we find it unnecessary to pursue these logical refinements, or to determine whether, as respondent asks, the doctrine of estoppel by patent assignment as stated by the *Formica* case should be rejected. To whatever extent that doctrine may be deemed to have survived the *Formica* decision or to be restricted by it, we think that case is not controlling here. For other considerations are dispositive of this case, in which, unlike *Formica,* the accused machine is precisely that of an expired patent. Neither in that case nor in any other, so far as we are advised, was the doctrine of estoppel applied so as to penalize the use of the invention of an expired patent. That we think is foreclosed by the patent laws themselves.

Revised Statutes, §§ 4886, 4884 as amended, 35 U. S. C. §§ 31, 40, provide for the grant of a patent for a term of seventeen years to any person who has invented a "new and useful art, machine, manufacture, or composition of matter." The grant is conditioned upon the filing of an application in the Patent Office describing the invention and the manner of making and using it. R. S. § 4888 as amended, 35 U. S. C. § 33. Revised Statutes, §§ 4895, 4898, 35 U. S. C. §§ 44, 47, authorize the assignment of an invention while the application for a patent is pending and of the patent rights to the invention after the patent has issued. Section 24 (7) of the Judicial Code, 28 U. S. C. § 41 (7), confers on district courts of the United States jurisdiction of cases arising under the patent laws, and R. S. § 4921 as amended, 35 U. S. C. § 70, gives the district courts authority to entertain suits to restrain infringement and for recovery of any resulting damage from the infringement of any right secured by the patent grant.

The enactment of these provisions is the mode by which Congress has chosen to carry into effect the policy sanctioned by the Constitution, Article I, § 8, Cl. 8 "To promote the Progress of Science and useful Arts, by securing for limited Times to . . . Inventors the exclusive Right to their . . . Discoveries." The nature and extent of the legal consequences of the expiration of a patent are federal questions, the answers to which are to be derived from the patent laws and the policies which they adopt. Cf. *Sola Electric Co.* v. *Jefferson Co.*, 317 U. S. 173, 176; *Steele* v. *L. & N. R. Co.*, 323 U. S. 192, 204, and cases cited. By the patent laws Congress has given to the inventor opportunity to secure the material rewards for his invention for a limited time, on condition that he make full disclosure for the benefit of the public of the manner of making and using the invention, and that upon the expiration of the patent the public be left free to use the invention. See *Special Equipment Co.* v. *Coe*, 324 U. S. 370, 378. As has been many times pointed out, the means adopted by Congress of promoting the progress of science and the arts is the limited grant of the patent monopoly in return for the full disclosure of the patented invention and its dedication to the public on the expiration of the patent. *Grant* v. *Raymond*, 6 Pet. 218, 241–242; *Gill* v. *Wells*, 22 Wall. 1; *Bauer* v. *O'Donnell*, 229 U. S. 1; *Motion Picture Co.* v. *Universal Film Co.*, 243 U. S. 502, 510–511, and cases cited.

The aim of the patent laws is not only that members of the public shall be free to manufacture the product or employ the process disclosed by the expired patent, but also that the consuming public at large shall receive the benefits of the unrestricted exploitation, by others, of its disclosures. *Kellogg Co.* v. *National Biscuit Co.*, 305 U. S. 111, 117–120. If a manufacturer or user could restrict himself, by express contract, or by any action which would give rise to an "estoppel," from using the invention of an

expired patent, he would deprive himself and the consuming public of the advantage to be derived from his free use of the disclosures. The public has invested in such free use by the grant of a monopoly to the patentee for a limited time. Hence any attempted reservation or continuation in the patentee or those claiming under him of the patent monopoly, after the patent expires, whatever the legal device employed, runs counter to the policy and purpose of the patent laws. And for the same reason a stranger, such as respondent Marcalus, cannot, by securing and assigning a patent on the invention of the expired Inman patent, confer on petitioner any right to deprive the public of the benefits of the free use of the invention for which the public has paid by the grant of a limited monopoly.

By the force of the patent laws not only is the invention of a patent dedicated to the public upon its expiration, but the public thereby becomes entitled to share in the good will which the patentee has built up in the patented article or product through the enjoyment of his patent monopoly. Hence we have held that the patentee may not exclude the public from participating in that good will or secure, to any extent, a continuation of his monopoly by resorting to the trademark law and registering as a trademark any particular descriptive matter appearing in the specifications, drawings or claims of the expired patent, whether or not such matter describes essential elements of the invention or claims. *Kellogg Co.* v. *National Biscuit Co., supra,* 117–120; *Singer Manufacturing Co.* v. *June Manufacturing Co.,* 163 U. S. 169, 185.

It is thus apparent that the patent laws preclude the patentee of an expired patent and all others including petitioner from recapturing any part of the former patent monopoly; for those laws dedicate to all the public the ideas and inventions embodied in an expired patent. They do not contemplate that anyone by contract or any

form of private arrangement may withhold from the public the use of an invention for which the public has paid by its grant of a monopoly and which has been appropriated to the use of all. The rights in the invention are then no longer subject to private barter, sale, or waiver. Cf. *Phillips Co.* v. *Grand Trunk R. Co.,* 236 U. S. 662; *Midstate Horticultural Co.* v. *Pennsylvania R. Co.,* 320 U. S. 356, 361; *Brooklyn Bank* v. *O'Neil,* 324 U. S. 697, 704. It follows that the patent laws preclude the petitioner assignee from invoking the doctrine of estoppel, as a means of continuing as against respondent, his assignor, the benefit of an expired monopoly, and they preclude the assignor from estopping himself from enjoying rights which it is the policy of the patent laws to free from all restrictions. For no more than private contract can estoppel be the means of successfully avoiding the requirements of legislation enacted for the protection of a public interest. Compare *Pittsburgh, C., C. & St. L. R. Co.* v. *Fink,* 250 U. S. 577, 583 with *Louisville & Nashville R. Co.* v. *Mottley,* 219 U. S. 467, 476–477; *New York Central & H. R. R. Co.* v. *Gray,* 239 U. S. 583, 586–587; *Norman* v. *B. & O. R. Co.,* 294 U. S. 240, 304–305, 309–310, and cases cited. The interest in private good faith is not a universal touchstone which can be made the means of sacrificing a public interest secured by an appropriate exercise of the legislative power. The patent laws preclude us from saying that the patent assignment, which they authorize, operates to estop the assignor from asserting that which the patent laws prescribe, namely, that the invention of an expired patent is dedicated to the public, of which the assignor is a member.

The judgment is affirmed for the reason that we find that the application of the doctrine of estoppel so as to foreclose the assignor of a patent from asserting the right to make use of the prior art invention of an expired patent, which anticipates that of the assigned patent, is incon-

sistent with the patent laws which dedicate to public use the invention of an expired patent. The assignor has a complete defense to an action for infringement where the alleged infringing device is that of an expired patent.

We have no occasion to consider the question discussed in briefs and arguments of counsel, whether the estoppel by patent assignment violates either the terms or policy of the laws against restraints of trade and competition.*

Affirmed.

MR. JUSTICE REED considers that the dominant rule of *Westinghouse Co.* v. *Formica Co.*, 266 U. S. 342, 349, is "that an assignor of a patent right is estopped to attack the utility, novelty or validity of a patented invention which he has assigned or granted as against any one claiming the right under his assignment or grant." The fact that the prior art is evidenced by an expired patent does not seem significant to him. Consequently he would reverse.

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

MR. JUSTICE FRANKFURTER, dissenting.

When by a fair and free bargain a man sells something to another, it hardly lies in his mouth to say, "I have sold you nothing." It certainly offends the rudimentary sense of justice for courts to support one who purports to sell

*This question was not raised or argued in *Westinghouse Co.* v. *Formica Co., supra,* nor, so far as appears, in any of the cases cited in that opinion or the English cases which preceded it.

By § 515 of the Restatement of Contracts, a restraint of trade is unreasonable and hence unlawful if it "is based on a promise to refrain from competition and is not ancillary either to a contract for the transfer of good will or other subject of property . . ." See generally as to the validity of contracts not to compete 76 Pa. L. Rev. 244, 257 ff.; Handler, Cases and Materials on Trade Regulation, 102–150.

something to another in saying "What I have sold you is worthless," even though he did not expressly promise that what he sold had worth. The obvious implications of fair dealing in commercial transactions have been part of our law for at least a hundred years. And it would be surprising indeed if the law made a difference whether what was purported to be sold was a diamond, or a secret process for manufacturing a commodity, or a patented machine.

It has never been questioned that courts will not make themselves instruments of unfair dealing when what is sold is a patent. In technical language, the sale of a patent means its assignment. Congress might have confined the right to exploit a patent solely to the patentee. Congress has acted on the contrary policy. Ever since the Act of February 21, 1793, 1 Stat. 318, Congress has sanctioned the right to assign patents, requiring only fulfillment of certain formalities. To be sure, Congress has not said in so many words that the seller of a patent—an assignor—is subject like other sellers to the obligations of fair dealing. It has not said that he cannot turn around on the morrow and render futile that which he has sold by claiming that what he purported to sell as a patent was in truth not a patent, and, since it was not a patent, he, the seller, could not be charged with impairing the worth of the patent by practising it himself. Until this day such a sophistical argument to accomplish overreaching in a business transaction has uniformly been rejected by the courts, and it has been rejected by this Court on basic considerations of "fair dealing." *Westinghouse Co.* v. *Formica Co.*, 266 U. S. 342, 350. It is relevant to recall that insistence on this doctrine was unanimously made in the *Formica* case by a Court which included Mr. Justice Brandeis, than whom no one was more zealously alert against the slightest inroads upon the public interest through undue extension of patent rights. It is important to emphasize that the principle of good faith which the

conscience of equity has thus enforced binds only an assignor who seeks to use the courts to defeat that which he purported to sell. It merely restricts one person, the assignor, from denying that he sold a patent when he purported to sell it, leaving the whole rest of the world free to assail the validity or novelty of the patent.

To be sure, the patent legislation does not in so many words formulate this doctrine of fair dealing between assignor and assignee. But patent legislation, like other legislation and indeed like all compositions, impliedly contains presuppositions which need not be spelled out precisely because they are taken for granted. The fair intendment of a patent assignment authorized by Congress is as much to be respected as the same meaning explicitly stated. Patent legislation is part of the great body of law. Familiar equitable doctrines, applicable to the whole domain of law and unquestioned as part of the judicial process, are infused into specific enactments dealing only with the specific problems that call for specific formulation. If warrant in the language of Congress had to be found for all adjudications made by this Court in litigation involving patents, no inconsiderable volume of decisions drawn from general equitable principles ought never to have been made and should be undone.

The principle of fair dealing as between assignor and assignee of a patent whereby the assignor will not be allowed to say that what he sold as a patent was not a patent has been part of the fabric of our law throughout the life of this nation. It has been undeviatingly enforced by English-speaking courts in this country, in England, in Canada, and Australia. See, *e. g., Oldham* v. *Langmead,* cited in *Hayne* v. *Maltby,* 3 T. R. 438, 439, 441 (1789); *Indiana Mfg. Co.* v. *Smith,* 10 Can. Exch. 17 (1905); *Shepherd* v. *Patent Composition Pavement Co.,* 5 Aust. Jur. 27 (1874). If there are reasons of public policy against the continued application of this equitable doc-

trine in the case of a patent, Congress has ready means of undoing that which has always been part of the patent law, as is true of other provisions which in its wisdom may call for change. This doctrine, voluminously applied in the Law Reports, has never been questioned by Congress in the successive enactments amending the patent law. Only very recently bills dealing with this subject have been introduced but have not yet been acted upon. See, *e. g.*, H. R. 97 and H. R. 3462, 79th Cong., 1st Sess. (1945); H. R. 3874, 78th Cong., 1st Sess. (1943). The place for reconsidering the policy which this Court more than twenty years ago characterized as "a rule well settled by forty-five years of judicial consideration," *Westinghouse Co.* v. *Formica Co., supra,* at 349, is the Congress. That forum is not confronted with the stark alternatives of either adhering to the rule or wiping it out, but has the wide range of legislative discretion in considering what is good and what is bad in the rule and fashioning legislation appropriate to the diversified aspects of the problem.

The Court professes neither to reject, nor to adhere to, the equitable principle of fair dealing reaffirmed by the *Formica* case. It finds ground for avoiding what seem to me to be inescapable alternatives by the claim that the assignor here purported to assign a patent which turns out to be invalid because it now appears that it was based on an earlier expired patent. Since an expired patent makes it part of the public domain, the assignor, although he had sold what need not have been bought, could enter the domain like the rest of the public. So goes the argument. But this, I submit with all respect, is to throw out the baby with the bath. For it amounts to saying that the assignor in raising invalidity in a suit for infringement is just a part of the general public and can ask the Court to enforce every defense open to the rest of the public. The essence of the principle of fair dealing which binds the assignor of a patent in a suit by the assignee, even

though it turns out that the patent is invalid or lacks novelty, is that in this relation the assignor is not part of the general public but is apart from the general public. The isolated, individual relation between assignor and assignee, due to the sale by the assignor of something which he afterwards should not be allowed to say was nothing, is the basis of the doctrine of fair dealing which operates against him and against nobody else. That doctrine is wholly consistent with the right of the general public to the free and unfettered use of a patent after its time has expired. It is suggested, also, that the public is harmed by removing the assignor from the ranks of actual or potential manufacturers of what is covered by the patent. But that is true of every case in which the assignor is barred from questioning the validity of his assignment. As against the loss to the public of one possible manufacturer is put the public policy of fair dealing between man and man. That is the meaning of the *Formica* doctrine.[1]

[1] The complicated facts in the *Formica* case have somewhat obscured the true scope and meaning of that decision. What was decided is perhaps best disclosed in the lower court's opinion which was here affirmed. That opinion was by Judge Denison who spoke with special authority on patent law: "It may be granted that these two claims [in controversy] were properly readable upon the specification and drawings of the application signed by O'Connor [the assignor]—that is to say, in the language of the Patent Office, that he had the right to make these claims. Nevertheless they expressed a conception of the invention, which rested solely on the 'nonplaniform' shape of the article and was in this respect broader than any claim which O'Connor had drafted, and if the prior Baekeland patent had been known to O'Connor, as it became known to his assignees when it later compelled them to abandon the original broad claims, he probably never would have claimed as his the invention thus formulated. The record does not support the inference that O'Connor either expressly or impliedly represented to the Westinghouse Company [the assignee] that he was the inventor of the process defined in these two claims, and hence the claim of estoppel must fail." 288 F. 330, 334.

A machine that is not patentable because it is not novel is just as much part of the public domain as a machine on which the patent has expired. If public policy does not preclude an individual from being held to a fair bargain with another when he purported to sell as a patent what in fact was never patentable, what is there in reason—for there is nothing in what Congress has said—that should preclude enforcement of a fair bargain whereby an individual agreed, in effect, not to compete with another regarding a machine which turns out not to have been patentable because it represented an expired patent open to all the rest of the world? Of course, parties cannot by agreement defeat an explicit provision or purpose of legislation. One shipper cannot, for instance, secure the private advantage of a lower rate when the Interstate Commerce Act provides for equality of rates among shippers, *Pittsburgh, C., C. & St. L. R. Co.* v. *Fink,* 250 U. S. 577; nor can an employer defeat the protective purpose of the Fair Labor Standards Act setting minimum wage limits, by an agreement based on the inequality of bargaining power between employers and individual employees, *Brooklyn Savings Bank* v. *O'Neil,* 324 U. S. 697, 706. There is nothing comparable to such situations in the language or purpose of the patent laws regarding assignment of patents. On the contrary, as we have seen, the principle whereby an assignor is held to his bargain with the assignee has been part of the texture of our patent law throughout its history. Congress in its successive enactments modifying the patent law has respected this principle and left it untouched.[2]

[2] Nor can the assignor of an expired patent, when the assignee seeks to hold him to his bargain, invoke the law condemning contracts in restraint of trade. So far as the hitherto recognized principle of fair dealing between an assignor and his assignee unduly restrains the freedom of action of the assignor, it merely restrains in the manner that every contract is a restraint of trade. See *Chicago Board of*

Happily law is not so divorced from ethical standards that a hitherto unquestioned principle of fair dealing should be deemed hostile to any branch of the law. But if the principle of fair dealing as between the assignor and the assignee of a patent that has for so long been part of the patent law is to be repudiated judicially, it is better to do so explicitly, not by circumlocution.

Trade v. *United States*, 246 U. S. 231, 238. And it restrains equally whether what is assigned is an expired patent or something that never was a patent. In fact, however, the doctrine of such fair dealing does not run counter to the considerations by which the law outlaws restraints which persons may impose on themselves by contract. For such an implied restraint as is found in the assignment of a patent, purportedly valid but in fact invalid, like all reasonable restraints, does not offend the objections to unreasonable restraints. The underlying rationale of the law against unreasonable restraints is twofold. The first of these reasons is that the law will not lend its aid in the enforcement of a contract by means of which a man may deprive himself of the possibility of earning a livelihood and deprive the public of the "benefit of his labor." The second, "that such restraints tended to give . . . the beneficiary of such restraints, a monopoly of the trade, from which he had thus excluded one competitor, and by the same means might exclude others." Taft, J., in *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271, 279, *modified*, 175 U. S. 211. Neither consideration is pertinent here.

GLASS CITY BANK *v.* UNITED STATES.

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

No. 50. Argued October 15, 16, 1945.—Decided November 13, 1945.

1. Section 3670 of the Internal Revenue Code, which provides that the amount of taxes owed the United States government by a taxpayer "shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person," and § 3671 create a continuing tax lien covering all property or rights to property owned by a tax delinquent at any time during the life of the lien, including property acquired after the lien arose. P. 267.
2. Section 3678 shows a plain intent to subject to the tax lien "property owned by the delinquent" when suit to enforce the lien is filed, rather than only that owned when the lien arose. P. 267.

146 F. 2d 831, affirmed.

CERTIORARI, 325 U. S. 844, to review affirmance of an order granting priority to the United States over a judgment creditor whose judgment was obtained after the tax lien arose but before the property in question was acquired.

Mr. Fred B. Trescher for petitioner.

Mr. Ralph F. Fuchs, with whom *Solicitor General McGrath, Assistant Attorney General Clark, Messrs. Sewall Key, J. Louis Monarch* and *Miss Helen Goodner* were on the brief, for the United States.

MR. JUSTICE BLACK delivered the opinion of the Court.

In 1941 the petitioner bank obtained a judgment in a Pennsylvania State Court against one Frank A. Maddas, for about $19,000.00. The United States had unpaid, judicially established, income tax claims against Maddas for the years 1920, 1921, and 1922,[1] which exceed

[1] There is also a claim for 1936 taxes which raises different questions that need not be considered here.

$1,000,000.00. 40 B. T. A. 572; 114 F. 2d 548. Because of Maddas' past services as a State court receiver of a brewing company, the trustee of that company, now in bankruptcy, owes Maddas $3,228.53. The issue here is whether the bank or the government may recover on the debt owed to Maddas. The bank claims under a lien alleged to have been created by an attachment-execution issued on its State court judgment and served on the trustee in bankruptcy February 21, 1941. The United States claimed priority, by virtue of a tax lien under 26 U. S. C., §§ 3670, 3671,[2] which both parties admit arose in 1935, five years prior to the taxpayer's services as receiver. The contention of the bank in the District Court[3] was that the statutory tax lien, which became effective in 1935, did not cover Maddas' claim since it did not exist when the lien arose but only thereafter, and that the government, therefore, could reach the debt only by garnishment or distraint as provided by other sections of the Internal

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[2] "Sec. 3670. Property Subject to Lien.

"If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

"Sec. 3671. Period of Lien.

"Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time."

Section 3672 provides that the lien shall not be valid against any mortgagee, pledgee, purchaser, or judgment creditor until notice is filed in an office designated by State law or in the office of the clerk of the United States District Court. Here such notice was duly filed.

[3] The District Court acquired jurisdiction because the indebtedness to Maddas was due from the trustee. The procedure by which that jurisdiction was acquired is sufficiently set forth in the opinions below and need not be repeated here. 54 F. Supp. 11; 146 F. 2d 831.

Revenue Code. The Circuit Court of Appeals concluded that the statutory tax lien did cover after-acquired property and accordingly affirmed the District Court's judgment for the United States. 146 F. 2d 831. We granted certiorari because of statements made in the opinions of other courts which seemed to conflict with the conclusion below. *United States* v. *Long Island Drug Co.*, 115 F. 2d 983; *United States* v. *Pacific Railroad*, 1 F. 97.

By § 3670, 26 U. S. C., Congress impressed a lien upon "all property and rights to property, whether real or personal, belonging" to a tax delinquent. Stronger language could hardly have been selected to reveal a purpose to assure the collection of taxes. Not content with this language, however, Congress also provided that the lien should "continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time." 26 U. S. C., § 3671. These two sections read together indicate that a continuing lien covers property or rights to property in the delinquent's hands at any time prior to expiration. This is confirmed by § 3678, which provides that "whether distraint proceedings have been commenced or not," action to enforce the lien may be instituted against "any property and rights to property, whether real or personal, or to subject any such property and rights to property *owned by the delinquent,* or in which he *has* any right, title, or interest, to the payment of such tax." (Italics supplied.) For here is a plain intent to subject to the lien "property owned by the delinquent" when suit is filed, rather than only that owned when the lien arose. Indeed, the meaning of these sections is so plain as to render superfluous a detailed discussion of the legislative history which is consistent with our interpretation.[4]

Furthermore the agencies administering the statute have construed it in the same way. Thus, in 1928 Gen-

[4] 14 Stat. 98, 107; 15 Stat. 125, 167; 37 Stat. 1016; 45 Stat. 791, 875.

eral Counsel Memorandum No. 4715, VII–2 Cum. Bul. 94, declared that "a delinquent taxpayer may at any time prior to the expiration of the statutory period of limitation become possessed of property against which the lien may attach, thus making the tax liability enforceable through the lien." Again in Treasury Decision 4275, VIII–2 Cum. Bul. 167, Collectors were admonished to keep on the alert where notice of liens had been filed, so as to extend the period of their effectiveness "whenever it is reasonably possible that the taxpayer may, in the future, acquire property or property rights from which the tax liability may be satisfied." And in *Graves* v. *Commissioner,* 12 B. T. A. 124, 133, the Tax Board said that the lien applied, "of course, to all the property that the tax debtor subsequently acquires."

The bank's arguments on behalf of a statutory construction supporting its claims are without merit. We are told that to increase unduly the scope of the government's lien is unwise. But most of the objections raised would apply not merely to liens that cover after-acquired property, but also with equal force to most other types of liens. At any rate the wisdom of legislation is a question for Congress. We are further told that the tax lien cannot attach to Maddas' claim because the law of Pennsylvania, where this obligation arose, does not treat "future earning capacity" as "property or rights to property." But the question of whether the tax lien covers future earning capacity is not before us. For the government here seeks to reach an already existing obligation for services rendered, which clearly falls within the statutory language. Cf. *Matter of Rosenberg,* 269 N. Y. 247, 199 N. E. 206. Moreover, the Congressional meaning is not to be determined by resorting to the local law of Pennsylvania. *United States* v. *Snyder,* 149 U. S. 210; *Helvering* v. *Stuart,* 317 U. S. 154, 161–162.

Our conclusion is that the lien applies to property owned by the delinquent at any time during the life of the lien.

This is in accord with all the cases that have directly passed upon this question.[5] As previously noted, there are two cases which contain language which might lead to another conclusion. But nothing there said offers any persuasive reason for restricting the scope of the lien.

Affirmed.

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

MR. JUSTICE RUTLEDGE, dissenting.

I am unable to find in the applicable statutes the clear expression of Congressional intent which I think is required to extend the tax lien to after-acquired property. Under § 3670 the lien is imposed as to taxpayers delinquent after demand "upon all property and rights to property, whether real or personal, belonging to such person." By § 3671 the lien arises, unless another date is specifically fixed by law, "at the time the assessment list was received by the collector" and continues "until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time." Nothing in these sections gives any indication that Congress intended the lien to reach after-acquired property. The language used, whether in § 3670 or in § 3671, is fully satisfied if the lien is held to attach to property belonging to the taxpayer as of the time the lien arises.[1] Had Congress intended to reach not only

[5] *Citizens National Bank* v. *United States,* 135 F. 2d 527 (C. C. A. 9); *Nelson* v. *United States,* 139 F. 2d 162 (C. C. A. 9); *Investment & Securities Co.* v. *United States,* 140 F. 2d 894 (C. C. A. 9); *United States* v. *Worley,* 64 F. Supp. 271 (S. D. Ind.); *Minnesota Mutual Life Ins. Co.* v. *United States,* 47 F. 2d 942, 944 (N. D. Tex.). See also *United States* v. *Warren R. Co.,* 127 F. 2d 134; *Matter of Rosenberg, supra.*

[1] Although by § 3671 the lien "arises" as of the time the assessment list is received by the collector, it relates back to the time of notice and demand, § 3670, as against the taxpayer, though by virtue

every description of property then owned by the taxpayer, but also every species which might later come into his hands, clearer words than "all property" and "belonging to" were readily available to express this purpose. The harshness of the consequences, not only for the taxpayer but for others dealing with him, which this case dramatically exemplifies, gives reason beyond the ambiguity of the language used for thinking there was no such intent.

Nor is such an intent supplied by use of the present tense of the verb "has" in the final clause of § 3678 (a).[2] That section merely provides for the manner in which the lien defined by §§ 3670 and 3671 shall be enforced. Section 3678 (a), in my opinion, was not intended to add to the scope of the lien or extend its definition beyond the limits defined by those sections. If the lien was designed to reach after-acquired property, the alternative method specified in § 3678 (a) for reaching the property then owned by the debtor would seem to be redundant.

I find nothing in the legislative history which discloses any intention, more clearly than the words of the statute themselves, to include after-acquired property within the coverage of the lien. In the absence of clearer statutory foundation, the comparatively recent administrative con-

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of § 3672 (a) it is not valid as against any mortgagee, pledgee, purchaser, or judgment creditor "until notice thereof has been filed by the collector" as provided.

[2] "Sec. 3678. Civil Action to Enforce Lien on Property.

"(a) Filing.—In any case where there has been a refusal or neglect to pay any tax, and it has become necessary to seize and sell property and rights to property, whether real or personal, to satisfy the same, whether distraint proceedings have been commenced or not, the Attorney General at the request of the Commissioner may direct a civil action to be filed, in a district court of the United States, to enforce the lien of the United States for tax upon any property and rights to property, whether real or personal, or to subject any such property and rights to property owned by the delinquent, or in which he *has* any right, title, or interest, to the payment of such tax." (Emphasis added.)

struction cannot supply the required Congressional intent; and the scanty evidence of established and accepted practice is neither so wholly consistent nor so convincing as to furnish this necessary element.

Accordingly I would reverse the judgment and remand the cause to the Circuit Court of Appeals for the consideration and disposition of the issues presented to but not determined by it in view of its disposition upon the matters now determined here.

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

HAWK *v.* OLSON, WARDEN.

CERTIORARI TO THE SUPREME COURT OF NEBRASKA.

No. 17. Argued October 8, 1945.—Decided November 13, 1945.

1. Upon review of a state court judgment dismissing a petition for habeas corpus for failure to state a cause of action, this Court determines for itself whether the allegations of the petition entitle the petitioner to a hearing on his claim that in his conviction of murder he was denied due process in violation of the Fourteenth Amendment. P. 273.
2. The petition to a state court of Nebraska for habeas corpus, by one under sentence of a court of that State upon a conviction of murder in the first degree, sufficiently alleged that at his trial the petitioner was denied opportunity to consult with counsel in the critical period between his arraignment and the impaneling of the jury—a denial of due process in violation of the Fourteenth Amendment—and he was entitled to a hearing upon the petition. Pp. 276–278.

   Denial of opportunity to consult with counsel on any material step after indictment or similar charge and arraignment violates the Fourteenth Amendment. P. 278.
3. Petitioner will have an opportunity on the new hearing to furnish such further specification as the state practice may require in support of his claim that his conviction was procured by the use of testimony known by the prosecutor and the trial court to have been perjured. P. 273.

4. On the issues of the sufficiency of the evidence and the interference with the right of appeal, this Court accepts the decision of the state court that the first can not be raised by habeas corpus and that the second is not supported by the facts stated by the petitioner. P. 273.

145 Neb. 306, 16 N. W. 2d 181, reversed.

CERTIORARI, 324 U. S. 839, to review the affirmance of a judgment which dismissed a petition for habeas corpus.

Mr. Joseph A. Fanelli, with whom *Mr. Milton Kramer* was on the brief, for petitioner.

Mr. Robert A. Nelson argued the cause, and *Walter R. Johnson,* Attorney General of Nebraska, and *H. Emerson Kokjer,* Deputy Attorney General, were on the brief, for respondent.

MR. JUSTICE REED delivered the opinion of the Court.

This writ of certiorari brings before us the judgment of the Supreme Court of Nebraska which affirmed a judgment of a district court dismissing a petition for habeas corpus to inquire into petitioner's detention for want of merit and failure to state a cause of action. *Hawk* v. *Olson,* 145 Neb. 306, 16 N. W. 2d 181.[1] Petitioner was in the penitentiary after conviction for murder. The writ was granted because a substantial federal question as to restraint without due process of law under the Fourteenth

[1] The opinion of the Supreme Court of Nebraska does not deal with an alternate ground of the district court judgment. This was that previous petitions for habeas corpus had "fully and finally adjudicated" the present issues. Compare *Salinger* v. *Loisel,* 265 U. S. 224, 230; *Ex parte Hawk,* 321 U. S. 114, 118. We do not consider this issue.

The following reported cases show the efforts of petitioner to secure release. There are other proceedings not reported. *Hawk* v. *O'Grady,* 137 Neb. 639, 290 N. W. 911 (appeal from denial of writ in state district court), cert. den. 311 U. S. 645; *Hawk* v. *Olson,* 130 F. 2d 910 (appeal from denial of writ in district court), cert. den. 317 U. S. 697; 318 U. S. 746 (original); 321 U. S. 114 (original).

Amendment seemed to be presented by the petition for certiorari and the response. 324 U. S. 839.

As no response was filed or evidence received in the district court, we accept as true all well-pleaded allegations of the petition and, in the exercise of the duty which lies on us as well as the Nebraska courts to safeguard the federal constitutional rights of petitioner, examine for ourselves whether under the facts stated the petitioner is now entitled to a hearing on the claimed violations of the due process clause in his conviction for murder in the first degree. *Lisenba* v. *California,* 314 U. S. 219, 237; *White* v. *Ragen,* 324 U. S. 760.

In its opinion the Supreme Court of Nebraska carefully considers a number of claims of denial of due process. It is said that some of the grounds for release are pleaded in the form of conclusions and that Nebraska procedure requires in habeas corpus proceedings that the applicant must set forth the facts from which it must appear that he will be entitled to discharge. *Hawk* v. *Olson,* 16 N. W. 2d 181, 183, l. c. We assume, since such grounds appear in the petition, that one of these pretermitted grounds is that "Conviction was obtained by the use of perjured testimony knowingly used by the Prosecuting Officials and the Trial Court." See *Ex parte Hawk,* 321 U. S. 114, 116. Whatever Nebraska may require in the way of further specification may be furnished, if available, and permissible under the law of Nebraska (see *Hawk* v. *Olson, supra,* 183, r. c.), by petitioner on a new hearing. Cf. *Tomkins* v. *Missouri,* 323 U. S. 485, 487. On the issues of the sufficiency of the evidence and the interference with the right of appeal, we accept the decision of Nebraska that the first cannot be raised by habeas corpus (*Hawk* v. *Olson,* 16 N. W. 2d 181, 183) and that the second is not supported by the facts stated by petitioner.[2] Other ob-

[2] Lack of counsel and wrongful withholding by judicial officers of the necessary record form the substance of this claim. The opinion

jections to the judgment have been made which are not discussed herein but which we have looked into and which we do not consider merit further attention.

Petitioner contends that his conviction violates the Fourteenth Amendment because of denial at his trial of an opportunity to examine the charge, subpoena witnesses, consult counsel and prepare a defense. Denial of effective assistance of counsel does violate due process. *Powell* v. *Alabama,* 287 U. S. 45, 58; *House* v. *Mayo,* 324 U. S. 42, 46; compare *White* v. *Ragen,* 324 U. S. 760, 764.

Since *Frank* v. *Mangum,* 237 U. S. 309, 331, this Court has recognized that habeas corpus in the federal courts by one convicted of a criminal offense is a proper procedure "to safeguard the liberty of all persons within the jurisdiction of the United States against infringement through any violation of the Constitution," even though the events which were alleged to infringe did not appear upon the face of the record of his conviction. This opportunity for an examination into the "very truth and substance of the causes of his detention" was said in the *Frank* case to have come from the adoption in 1867 of a statute which empowered federal courts to examine into restraints of liberty in violation of the Constitution of the United States. 14 Stat. 385, c. 28.[3] The legislation en-

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of the Supreme Court of Nebraska disposes of this by pointing out that petitioner never alleged a request to the Public Defender for assistance on appeal and that a mandamus (for the record) was denied. We assume the denial was proper as petitioner makes no complaint as to it. On the present record the failure to seek review from the conviction was without excuse. 16 N. W. 2d 181, 184.

[3] This statute was reenacted as R. S. §§ 752–761. The provision now appears in 28 U. S. C. § 453:

"The writ of habeas corpus shall in no case extend to a prisoner in jail unless where he is . . . in custody in violation of the Constitution or of a law or treaty of the United States . . ."

The section had its origin in a bill (No. 605) reported by the Judiciary Committee of the House in response to a resolution directing

larged for the federal courts the "bare legal review" of the authority under which a petitioner was held which had been previously afforded by habeas corpus.[4] *Johnson* v. *Zerbst,* 304 U. S. 458, 465–67. See also *In re Neagle,* 135 U. S. 1, 69–76; *McNally* v. *Hill,* 293 U. S. 131.

This liberalization of habeas corpus required federal courts, when the issue was presented, to examine whether a conviction occurred under such influence by mob spirit as to deny due process. *Frank* v. *Mangum, supra,* 331, 335, dissent 347. The power was called into play a few years later to examine a state conviction under alleged community coercion; and this Court said that, if the facts set out were true, the trial would not support a conviction. *Moore* v. *Dempsey,* 261 U. S. 86. In *Mooney* v. *Holohan,* 294 U. S. 103, 112, it was declared that the knowing use of material perjured testimony by a state prosecutor would make a trial unfair within the meaning of the Fourteenth Amendment.

When the absence of counsel at a trial was urged as a ground for a federal writ of habeas corpus, we held that in federal courts a felony conviction without benefit of counsel is subject to collateral attack because a violation of the accused's constitutional right to the services of an attorney unless he has intelligently waived that privilege.

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that committee to inquire and report to the House by bill or otherwise "what legislation is necessary to enable the courts of the United States . . . to enforce the liberty of all persons under the operation of the constitutional amendment abolishing slavery." See Cong. Globe, 39th Cong., 1st Sess., 87, 4151. The debates on the bill in the House and Senate, while mostly concerned with incidental matters, indicated that jurisdiction to issue the writ of habeas corpus was not intended to be limited merely to violations of the Thirteenth Amendment. See Cong. Globe, 39th Cong., 1st Sess., 4150, 4151, 4229; Cong. Globe, 39th Cong., 2d Sess., 730, 790.

[4] See *Ex parte Watkins,* 3 Pet. 193, 202, cited in the *Frank* case, and 4 Bacon's Abridgement 563, *et seq.,* Johnson Edition 1856; XIV Viner's Abridgment, (2d Ed.), 212 (D) and 217 (F) (2).

Johnson v. *Zerbst, supra,* 467–68; *Walker* v. *Johnston,* 312 U. S. 275, 286. The same is true in instances of coercion. *Waley* v. *Johnston,* 316 U. S. 101, 104.

In state prosecutions a conviction on a plea of guilty, obtained by a trick, *Smith* v. *O'Grady,* 312 U. S. 329, 334, or, after refusal of a proper request for counsel, because of the accused's incapacity adequately to defend himself, *Williams* v. *Kaiser,* 323 U. S. 471, will not support imprisonment. Such procedure violates the Fourteenth Amendment to the Constitution. See *Tomkins* v. *Missouri,* 323 U. S. 485; *Cochran* v. *Kansas,* 316 U. S. 255. That Amendment is violated also when a defendant is forced by a state to trial in such a way as to deprive him of the effective assistance of counsel. *Powell* v. *Alabama, supra,* 52, 58; *House* v. *Mayo,* 324 U. S. 42. Compare *Ex parte Hawk,* 321 U. S. 114; *Glasser* v. *United States,* 315 U. S. 60, 69–70. When the state does not provide corrective judicial process, the federal courts will entertain habeas corpus to redress the violation of the federal constitutional right. *White* v. *Ragen,* 324 U. S. 760. When the corrective process is provided by the state but error, in relation to the federal question of constitutional violation, creeps into the record, we have the responsibility to review the state proceedings. *Williams* v. *Kaiser,* 323 U. S. 471; *Tomkins* v. *Missouri, supra.*

Petitioner, a layman, set out the following allegations in his petition. On March 16, 1936, at 4:15 p. m., the petitioner, who had previously had a preliminary hearing, was brought to Omaha from the federal penitentiary at Leavenworth, Kansas. He was held incommunicado in the Omaha jail except for a visit of fifteen minutes that evening, 11 to 11:15 p. m., by the Public Defender and his assistant. These officials tried to intimidate the petitioner to plead guilty. This petitioner refused to do, ". . . at which time the two Public Officials left your Petitioner and at the time said they would have nothing

to do with Petitioner's trial scheduled for trial the following morning." The next day petitioner was arraigned and was read an information charging the murder to which he pleaded "not guilty," [5] and "forthwith moved the Trial Court orally for a continuance of twenty-four (24) hours for the purpose of consulting counsel, examine the charge, subpoena witnesses and prepare a defense, and forthwith the Trial Court overruled the motion for a continuance and ordered the trial to proceed at which time the Clerk of the Court began to impanel the trial jury and had called two or three jurymen, when Joseph M. Lovely, a Public Official (Public Defender) and John N. Baldwin, his assistant stepped forward and entered the case, without ever having consulted your Petitioner, and without ever having been assigned by the Trial Court to represent your Petitioner.

"Your Petitioner had no consultation whatsoever with either of the aforesaid Public Officials regarding his defense, they picked the jury and testimony was adduced and a continuance or recess taken until the following morning March 18 (Wednesday), 1936." Petitioner claimed the protection of the Fourteenth Amendment. The record is either silent on or not inconsistent with anything material in these allegations. Cf. *Tomkins* v. *Missouri,* 323 U. S. 485, 487. There is no allegation or sug-

[5] Petitioner does not allege whether or not he had previously received a copy of the charge in conformity with the requirement of Revised Statutes of Nebraska § 29–1802 which provides that, "Within twenty-four hours after the filing of an indictment for felony, and in every other case on request, the clerk shall make and deliver to the sheriff, the defendant or his counsel a copy of the indictment, and the sheriff on receiving such copy shall serve the same upon the defendant. No one shall be, without his assent, arraigned or called on to answer to any indictment until one day shall have elapsed, after receiving in person or by counsel, or having an opportunity to receive a copy of such indictment as aforesaid." Section 29–1604 makes this section applicable to an information.

gestion of ignorance of or unfamiliarity with procedural or substantive law or sub-normal mentality.

These facts, if true, we think, set out a violation of the Fourteenth Amendment. They are not conclusions of law. They are not too vague. The charge upon which petitioner was convicted was murder in the first degree. He had no advice of counsel prior to the calling of the jury. His motion for continuance to examine the charge and consult counsel was made without assistance. Homicide has degrees in Nebraska. Comp. Stat. Neb. 1929, § 28–401 to § 28–403. There are difficulties in the application of the rules. *In re Application of Cole,* 103 Neb. 802, 805, 174 N. W. 509; *Bourne* v. *State,* 116 Neb. 141, 216 N. W. 173. The defendant needs counsel and counsel needs time. Cf. *Tomkins* v. *Missouri,* 323 U. S. 485, 488.

As the Supreme Court of Nebraska considered the motion for continuance on the merits,[6] no question of state procedure for the reexamination of criminal convictions arises. As to the issue on the motion for continuance, our duty requires us to determine only whether or not the denial under the facts alleged violates due process. We think there was an allegation that no effective assistance of counsel was furnished in the critical time between the plea of not guilty and the calling of the jury. Continuance may or may not have been useful to the accused, but the importance of the assistance of counsel in a serious criminal charge after arraignment is too large to permit speculation on its effect. We hold that denial of opportunity to consult with counsel on any material step after indictment or similar charge and arraignment violates the Fourteenth Amendment.

Petitioner states a good cause of action when he alleges facts which support his contention that through denial of asserted constitutional rights he has not had the kind of

[6] *Hawk* v. *Olson,* 16 N. W. 2d 181, 184.

trial in a state court which the due process clause of the Fourteenth Amendment requires. This, of course, does not mean that uncontradicted evidence of a witness must be accepted as true on the hearing. Credibility is for the trier of facts. The evidence may show that the charge was served upon petitioner well in advance of the trial (see note 5, *supra*) and that he had ample opportunity to consult with counsel and secure any needed witnesses. He may have intelligently waived his constitutional rights. *Adams* v. *U. S. ex rel. McCann,* 317 U. S. 269, 275.

Petitioner carries the burden in a collateral attack on a judgment.[7] He must prove his allegations but he is entitled to an opportunity.

Reversed and remanded.

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

BETTER BUSINESS BUREAU OF WASHINGTON, D. C., INC. *v.* UNITED STATES.

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

No. 52. Argued October 19, 1945.—Decided November 13, 1945.

1. A Better Business Bureau, an important if not the primary object of which is to promote not only an ethical but also a profitable business community, *held* not exempt from social security taxes as a corporation "organized and operated exclusively for scientific or educational purposes," within the meaning of § 811 (b) (8) of the Social Security Act. P. 282.

   This conclusion is supported by the legislative history of § 811 (b) (8) of the Social Security Act and by applicable administrative regulations.

2. Liberal construction of a statute does not mean that words and phrases may be given unusual or tortured meanings unjustified by

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[7] *Johnson* v. *Zerbst,* 304 U. S. 458, 468; *Walker* v. *Johnston,* 312 U. S. 275, 286; *Williams* v. *Kaiser,* 323 U. S. 471, 474.

legislative intent, or that express limitations on exemptions may be ignored. P. 283.

79 U. S. App. D. C. 380, 148 F. 2d 14, affirmed.

CERTIORARI, 325 U. S. 844, to review a judgment which affirmed a summary judgment for the United States in a suit for a refund of social security taxes.

Mr. R. B. H. Lyon, with whom *Mr. Simon Lyon* was on the brief, for petitioner.

Mr. Joseph S. Platt, with whom *Solicitor General McGrath, Assistant Attorney General Clark, Messrs. Sewall Key, J. Louis Monarch, Ralph F. Fuchs* and *John Costelloe* were on the brief, for the United States.

MR. JUSTICE MURPHY delivered the opinion of the Court.

Here our consideration is directed to the question of whether the petitioner, the Better Business Bureau of Washington, D. C., Inc., is exempt from social security taxes as a corporation organized and operated exclusively for scientific or educational purposes within the meaning of Section 811 (b) (8) of the Social Security Act.[1]

From the stipulated statement of facts it appears that petitioner was organized in 1920 as a non-profit corpora-

[1] 49 Stat. 620, 639, 42 U. S. C. § 1011 (b): "The term 'employment' means any service, of whatever nature, performed within the United States by an employee for his employer, except—

. . . . . .

"(8) Service performed in the employ of a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual."

An amendment to this definition, not here relevant, was added in 1939. The entire definition has been incorporated into § 1426 (b) (8) of the Internal Revenue Code.

tion under the laws of the District of Columbia. It has no shares of stock and no part of its earnings inures to the benefit of any private shareholder or individual. Its officers are elected annually from its membership; they have merely nominal duties and are paid no salary. Only the managing director and a small number of employees are paid. Membership is open to "any person, firm, corporation or association interested in better business ethics" as may be elected by the board of trustees and pay "voluntary subscriptions" or dues.

The charter of petitioner states that "the object for which it is formed is for the mutual welfare, protection and improvement of business methods among merchants and other persons engaged in any and all business or professions and occupations of every description whatsoever that deal directly or indirectly with the public at large, and for the educational and scientific advancements of business methods among persons, corporations or associations engaged in business in the District of Columbia so that the public can obtain a proper, clean, honest and fair treatment in its dealings or transactions with such merchants, tradesmen, corporations, associations or persons following a profession and at the same time protecting the interest of the latter classes of businesses to enable such as are engaged in the same to successfully and profitably conduct their business and for the further purposes of endeavoring to obtain the proper, just, fair and effective enforcement of the Act of Congress approved May 29th, 1916, otherwise known as 'An Act to prevent fraudulent advertising in the District of Columbia.' "

In carrying out its charter provisions, petitioner divides its work roughly into five subdivisions:

(1) Prevention of fraud by informing and warning members and the general public of the plans and schemes of various types of swindlers.

(2) Fighting fraud by bringing general and abstract fraudulent practices to the attention of the public.

(3) Elevation of business standards by showing and convincing merchants that the application of "the doctrine of caveat emptor is not good business" and by showing and convincing them that misleading advertising, extravagant claims and price comparisons are not good business.

(4) Education of consumers to be intelligent buyers.

(5) Cooperation with various governmental agencies interested in law enforcement.

Information which the petitioner compiles is available to anyone without charge and is communicated to the members and the public by means of the radio, newspapers, bulletins, meetings and interviews. This information is also exchanged with the approximately eighty-five other Better Business Bureaus in the United States.

After paying the social security taxes for the calendar years 1937 to 1941, inclusive, petitioner filed claims for refunds, which were disallowed. This suit to recover the taxes paid was then filed by petitioner in the District Court, which granted a motion for summary judgment for the United States. The court below affirmed the judgment, 79 U. S. App. D. C. 380, 148 F. 2d 14, and we granted certiorari, the Tenth Circuit Court of Appeals having reached a contrary result in *Jones* v. *Better Business Bureau of Oklahoma City,* 123 F. 2d 767.

Petitioner claims that it qualifies as a corporation "organized and operated exclusively for . . . scientific . . . or educational purposes . . . no part of the net earnings of which inures to the benefit of any private shareholder or individual" within the meaning of § 811 (b) (8) of the Social Security Act and hence is exempt from payment of social security taxes. No serious assertion is made, however, that petitioner is devoted exclusively to scientific purposes. The basic contention is that all of its purposes and activities are directed toward the education of business men and the general public. Merchants are taught to conduct their businesses honestly,

while consumers are taught to avoid being victimized and to purchase goods intelligently. We join with the courts below in rejecting this contention.

It has been urged that a liberal construction should be applied to this exemption from taxation under the Social Security Act in favor of religious, charitable and educational institutions. Cf. *Trinidad* v. *Sagrada Orden,* 263 U. S. 578; *Helvering* v. *Bliss,* 293 U. S. 144. But it is unnecessary to decide that issue here. Cf. *Hassett* v. *Associated Hospital Service Corp.,* 125 F. 2d 611 (C. C. A. 1). Even the most liberal of constructions does not mean that statutory words and phrases are to be given unusual or tortured meanings unjustified by legislative intent or that express limitations on such an exemption are to be ignored. Petitioner's contention, however, demands precisely that type of statutory treatment. Hence it cannot prevail.

In this instance, in order to fall within the claimed exemption, an organization must be devoted to educational purposes exclusively. This plainly means that the presence of a single noneducational purpose, if substantial in nature, will destroy the exemption regardless of the number or importance of truly educational purposes. It thus becomes unnecessary to determine the correctness of the educational characterization of petitioner's operations, it being apparent beyond dispute that an important, if not the primary, pursuit of petitioner's organization is to promote not only an ethical but also a profitable business community. The exemption is therefore unavailable to petitioner.

The commercial hue permeating petitioner's organization is reflected in its corporate title and in the charter provisions dedicating petitioner to the promotion of the "mutual welfare, protection and improvement of business methods among merchants" and others and to the securing

of the "educational and scientific advancements of business methods" so that merchants might "successfully and profitably conduct their business." Petitioner's activities are largely animated by this commercial purpose. Unethical business practices and fraudulent merchandising schemes are investigated, exposed and destroyed. Such efforts to cleanse the business system of dishonest practices are highly commendable and may even serve incidentally to educate certain persons. But they are directed fundamentally to ends other than that of education. Any claim that education is the sole aim of petitioner's organization is thereby destroyed. See *Better Business Bureau* v. *District Unemployment Compensation Board*, 34 A. 2d 614 (D. C. Mun. App.).

The legislative history of § 811 (b) (8) of the Social Security Act confirms the conclusion that petitioner is not exempt under that section. This provision was drawn almost verbatim from § 101 (6) of the Internal Revenue Code, dealing with exemptions from income taxation. And Congress has made it clear, from its committee reports, that it meant to include within § 811 (b) (8) only those organizations exempt from the income tax under § 101 (6).[2] Significantly, however, Congress did not write into the Social Security Act certain other exemptions embodied in the income tax provisions, especially the exemption in § 101 (7) of "business leagues, chambers of commerce, real-estate boards, or boards of trade." Petitioner closely resembles such organizations and has, indeed, secured an exemption from the income tax under § 101 (7)

[2] "The organizations which will be exempt from such [social security] taxes are churches, schools, colleges, and other educational institutions not operated for private profit, the Y. M. C. A., the Y. W. C. A., the Y. M. H. A., the Salvation Army, and other organizations which are exempt from income tax under section 101 (6) of the Revenue Act of 1932." H. Rep. No. 615 (74th Cong., 1st Sess.) p. 33; S. Rep. No. 628 (74th Cong., 1st Sess.) p. 45.

as a "business league." [3] Thus Congress has made, for income tax exemption purposes, an unmistakable demarcation between corporations organized and operated exclusively for educational purposes and those organizations in the nature of business leagues and the like. Its manifest desire to include only the former within the meaning of § 811 (b) (8) of the Social Security Act prevents us from construing the language of that section to include an organization like petitioner.

Moreover, in amending the Social Security Act in 1939, Congress created certain new exemptions by providing, *inter alia,* that an organization exempt from income taxes under any of the subdivisions of § 101 of the Internal Revenue Code was also exempt from social security taxes as to those employees receiving no more than $45 in a calendar quarter.[4] The Congressional committee reports referred specifically to "business leagues, chambers of commerce, real estate boards, [and] boards of trade" as being included among those organizations exempt from income taxes and affected by this new partial exemption from social security taxes.[5] The inescapable inference from this is that such organizations, of which petitioner is

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[3] Petitioner states that it was incorporated under the provision of the District of Columbia Code relating to educational and scientific institutions and it asserts that if it were another type of institution it would have been required to incorporate under some other Code provision. But petitioner's classification for incorporation purposes has no more relevance for purposes of exemption from social security taxes than it has for purposes of income tax exemption, as to which petitioner has been classified as a business league rather than as an educational or scientific institution.

[4] 53 Stat. 1360, 1374, 1384; 42 U. S. C. § 409 (b) (10), 26 U. S. C. § 1426 (b) (10).

[5] H. Rep. No. 728 (76th Cong., 1st Sess.) pp. 47–48; S. Rep. No. 734 (76th Cong., 1st Sess.) p. 57. Educational institutions of the type already exempt under § 811 (b) (8) were not mentioned in this respect.

an example, remain subject to social security taxes as to higher paid employees. No contention has been made that any of petitioner's employees are within the low-paid category.

Finally, a Treasury regulation [6] defining an educational organization as "one designed primarily for the improvement or development of the capabilities of the individual" for purposes of § 101 (6) of the Internal Revenue Code was in effect at the time when Congress used that section in framing § 811 (b) (8) of the Social Security Act. An identical definition has been promulgated under § 811 (b) (8) and petitioner admittedly does not meet its terms.[7] Under the circumstances the administrative definition is "highly relevant and material evidence of the probable general understanding of the times and of the opinions of men who probably were active in the drafting of the statute." *White* v. *Winchester Club*, 315 U. S. 32, 41. It lends persuasive weight to the conclusion we have reached.

For the foregoing reasons the judgment of the court below is

Affirmed.

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

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[6] Article 101 (6)–1 of Treasury Regulations 86.

[7] Article 12 of Treasury Regulations 91; § 402.215 of Treasury Regulations 106. The definition further states that "under exceptional circumstances" an educational organization "may include an association whose sole purpose is the instruction of the public, or an association whose primary purpose is to give lectures on subjects useful to the individual and beneficial to the community, even though an association of either class has incidental amusement features." No "exceptional circumstances" are apparent in petitioner's case and, moreover, neither exceptional category fits the petitioner.

BOEHM *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 69. Argued October 19, 1945.—Decided November 13, 1945.

1. Treasury Regulations long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law. P. 291.
2. To be deductible in computing income tax under § 23 (e) of the Revenue Act of 1936, a loss must have been sustained *in fact* during the taxable year. P. 292.
3. The determination of whether under § 23 (e) a loss was sustained in a particular tax year requires consideration of all pertinent facts and circumstances, regardless of their objective or subjective nature. P. 292.

   The taxpayer's attitude and conduct, though not to be ignored, are not decisive. P. 293.
4. Whether, within the meaning of § 23 (e), particular corporate stock became worthless during a given taxable year is purely a question of fact to be determined in the first instance by the Tax Court; and the circumstance that the facts may be stipulated or undisputed does not make this issue any the less factual in nature. P. 293.
5. A decision of the Tax Court which is "in accordance with law" may not be set aside on review, even though different inferences and conclusions might fairly have been drawn from the undisputed facts. P. 293.
6. The taxpayer has the burden of establishing that a claimed deductible loss was sustained in the taxable year. P. 294.
7. Upon the stipulated facts of this case, the Tax Court's conclusion that the corporate stock in question did not become worthless in 1937, and that the taxpayer therefore sustained no deductible loss in that year, is sustained. P. 294.
8. Remedying harshness in the operation of a Revenue Act is for Congress, not the courts. P. 295.

146 F. 2d 553, affirmed.

CERTIORARI, 325 U. S. 847, to review a judgment affirming in part a decision of the Tax Court which sustained

the Commissioner's determination of a deficiency in income tax.

Mr. Louis Boehm, with whom *Mr. B. D. Fischman* was on the brief, for petitioner.

Mr. Walter J. Cummings, Jr., with whom *Acting Solicitor General Judson, Assistant Attorney General Clark, Messrs. Sewall Key, I. Henry Kutz* and *Miss Helen R. Carloss* were on the brief, for respondent.

MR. JUSTICE MURPHY delivered the opinion of the Court.

We are met here with the problem of whether the Tax Court properly found that certain corporate stock did not become worthless in 1937, thereby precluding the petitioning taxpayer from claiming a deductible loss in that year under § 23 (e) of the Revenue Act of 1936.[1]

The facts, which are stipulated, show that the taxpayer in 1929 bought 1,100 shares of Class A stock of the Hartman Corporation for $32,440. This corporation had been formed to acquire the capital stock of an Illinois corporation, and its affiliates, engaged in the business of selling furniture, carpets and household goods.

In April, 1932, the Hartman Corporation sent its stockholders a letter reporting that the current business depression had caused shrinkage of sales, decline in worth of assets[2] and unprecedented credit and corporate losses. Another letter sent the following month informed them that business had not shown any improvement although counteracting measures were being taken. Then on June 16, 1932, a federal court in Illinois appointed equity receivers upon the allegations of a creditor, which were ad-

[1] 49 Stat. 1648, 1659; 26 U. S. C. § 23 (e).

[2] The balance sheet as of December 31, 1931, which accompanied this letter, showed assets and liabilities of $15,401,097.97 and a total net worth of $9,410,659.50.

mitted to be true by the Hartman Corporation, that the company had sustained large liquidating and operating losses from 1930 to 1932.[3]

Subsequently, on December 16, 1932, a stockholders' derivative action, the so-called Graham suit, was instituted in a New York court against the Hartman Corporation and nine members of its board of directors, some of whom were also officers. This suit was brought by the taxpayer and eight others on behalf of themselves as stockholders[4] and on behalf of the corporation and all other stockholders who might join with them in the suit. The defendants were charged with waste, extravagance, mismanagement, neglect and fraudulent violation of their duties as officers and directors, "to the great damage, loss and prejudice of the Corporation and its stockholders." The plaintiffs sought (1) to compel the defendants to account to the corporation for their official conduct, (2) to compel the defendants to pay to the corporation's treasury the amount of loss resulting from their alleged wrongful acts, (3) to secure from the corporation suitable allowance for counsel fees and other costs incurred in the suit and (4) to secure such other relief as might be just, equitable and proper.

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[3] The creditor's bill of complaint stated that Hartman Corporation and its subsidiaries in 1931 sustained losses of $761,648 from closing stores and losses of $1,150,000 from necessary liquidation. It was further alleged that the corporation sustained operating losses in 1930 in the amount of $1,830,000; in 1931, $2,076,266; from January, 1932, to June 16, 1932, $400,000. After stating that the company was being operated at a great financial loss and that it was unable to meet and pay its obligations, the bill concluded by alleging that the assets and properties were of great value and that if they were administered through a receivership they would be sufficient to pay all of the corporation's liabilities, leaving a surplus for the stockholders.

[4] These nine plaintiffs represented 4,407 of the approximately 60,000 Class A shares outstanding and 115½ of the more than 335,000 Class B shares outstanding.

The Hartman Corporation ceased operations under the receivers on May 26, 1933, when a new company, Hartman's Inc., bought at a bankruptcy sale all of the assets of Hartman Corporation's subsidiary company for $501,000. The stock of the new company was issued to the subsidiary's creditors. Stockholders of Hartman Corporation were also given the right to subscribe to the stock and debentures of the new company, but the taxpayer did not exercise that right.

The receivers filed their first report in the federal court on August 10, 1934, in which it appeared that Hartman Corporation had outstanding claims of $707,430.67 and assets of only $39,593.13 in cash and the pending Graham suit. It does not appear whether the suit was listed as having any value. The identical situation was apparent in the second report, filed on July 11, 1935, except that the cash assets had fallen to $27,192.51. A 4% dividend to creditors was also approved at that time. On September 30, 1937, the final report was made. Outstanding claims of $630,574.57 were then reported; the sole asset was cash in the amount of $1,909.94, which was then distributed to creditors after deduction of receivership costs.

In the meantime the Graham suit was slowly progressing. From 1933 to 1936, inclusive, extensive examinations were made of certain defendants, the plaintiffs expending some $2,800 in connection therewith exclusive of counsel fees. But the case never reached trial. On February 27, 1937, a settlement was consummated whereby the defendants paid the taxpayer and her eight co-plaintiffs the sum of $50,000 in full settlement and discharge of their claims and the cause of action. The taxpayer's share of the settlement, after payment of expenses, amounted to $12,500.

The taxpayer had tried unsuccessfully in her 1934 income tax return to claim a deduction from gross income in the amount of $32,302 as a loss due to the worthlessness

of her 1,100 shares of stock. The Commissioner denied the deduction on the ground that the stock had not become worthless during 1934; apparently no appeal was taken from this determination. Then in 1937 the taxpayer claimed a deduction from gross income in the amount of $19,940, being the difference between the $32,440 purchase price of the stock and the $12,500 received pursuant to the settlement. The Commissioner again denied the deduction, this time on the ground that the stock had not become worthless during 1937. The Tax Court sustained his action and the court below affirmed as to this point.[5] 146 F. 2d 553. We granted certiorari because of an alleged inconsistency with *Smith* v. *Helvering,* 78 U. S. App. D. C. 342, 141 F. 2d 529, as to the proper test to be used in determining the year in which a deductible loss is sustained.

Section 23 (e) of the Revenue Act of 1936, like its identical counterparts in many preceding Revenue Acts, provides that in computing net income for income tax purposes there shall be allowed as deductions "losses sustained during the taxable year and not compensated for by insurance or otherwise." Treasury regulations, in effect prior to and at the time of the adoption of the 1936 Act and repeated thereafter, have consistently interpreted § 23 (e) to mean that deductible losses "must be evidenced by closed and completed transactions, fixed by identifiable events, bona fide and actually sustained during the taxable period for which allowed." [6] Such regulations, being

[5] The Commissioner also included in the taxpayer's 1937 gross income the $12,500 received in the settlement and the Tax Court sustained his action. But the court below reversed, holding that the $12,500 must be regarded as a capital item in reduction of loss rather than as income. This point is not now before us.

[6] Treasury Regulations 94, Art. 23 (e)–1, under the Revenue Act of 1936. Identical language is contained in Regulations 86, Art. 23 (e)–1, under the Revenue Act of 1934; Regulations 101, Art. 23 (e)–1, under the Revenue Act of 1938; Regulations 103, § 19.23 (e)–1, under

"long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law." *Helvering* v. *Winmill,* 305 U. S. 79, 83.

First. The taxpayer claims that a subjective rather than an objective test is to be employed in determining whether corporate stock became worthless during a particular year within the meaning of § 23 (e). This subjective test is said to depend upon the taxpayer's reasonable and honest belief as to worthlessness, supported by the taxpayer's overt acts and conduct in connection therewith.

But the plain language of the statute and of the Treasury interpretations having the force of law repels the use of such a subjective factor as the controlling or sole criterion. Section 23 (e) itself speaks of losses "sustained during the taxable year." The regulations in turn refer to losses "actually sustained during the taxable period," as fixed by "identifiable events." [7] Such unmistakable phraseology compels the conclusion that a loss, to be deductible under § 23 (e), must have been sustained *in fact* during the taxable year. And a determination of whether a loss was in fact sustained in a particular year cannot fairly be made by confining the trier of facts to an examination of the taxpayer's beliefs and actions. Such an issue of necessity requires a practical approach, all pertinent facts and circumstances being open to inspection and consideration regardless of their objective or subjective nature. As this Court said in *Lucas* v. *American*

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the Internal Revenue Code; and Regulations 111, § 29.23 (e)–1, under the Internal Revenue Code.

[7] Treasury Regulations 94, Art. 23 (e)–4, further makes clear that only losses in fact are deductible. Losses on stock due to shrinkage of value are allowable only to the extent "actually suffered when the stock is disposed of." And if, before being disposed of, the stock becomes worthless, its cost or other basis "is deductible by the owner for the taxable year in which the stock became worthless, provided a satisfactory showing is made of its worthlessness."

Code Co., 280 U. S. 445, 449, "no definite legal test is provided by the statute for the determination of the year in which the loss is to be deducted. The general requirement that losses be deducted in the year in which they are sustained calls for a practical, not a legal test."

The standard for determining the year for deduction of a loss is thus a flexible, practical one, varying according to the circumstances of each case. The taxpayer's attitude and conduct are not to be ignored, but to codify them as the decisive factor in every case is to surround the clear language of § 23 (e) and the Treasury interpretations with an atmosphere of unreality and to impose grave obstacles to efficient tax administration.

Second. The taxpayer contends that even under the practical, realistic test the stipulated facts demonstrate as a matter of law that the stock of the Hartman Corporation did not become worthless until 1937, when the stockholders' suit was settled. Hence it is claimed that the Tax Court erred in concluding that there was not a deductible loss in 1937 within the meaning of § 23 (e).

But the question of whether particular corporate stock did or did not become worthless during a given taxable year is purely a question of fact to be determined in the first instance by the Tax Court, the basic fact-finding and inference-making body. The circumstance that the facts in a particular case may be stipulated or undisputed does not make this issue any less factual in nature. The Tax Court is entitled to draw whatever inferences and conclusions it deems reasonable from such facts. And an appellate court is limited, under familiar doctrines, to a consideration of whether the decision of the Tax Court is "in accordance with law." 26 U. S. C. § 1141 (c) (1). If it is in accordance, it is immaterial that different inferences and conclusions might fairly be drawn from the undisputed facts. *Commissioner* v. *Scottish American Co.*, 323 U. S. 119.

Here it was the burden of the taxpayer to establish the fact that there was a deductible loss in 1937. *Burnet* v. *Houston,* 283 U. S. 223, 227. This burden was sought to be carried by means of the stipulation of facts. But the Tax Court, using the practical test previously discussed, found the stipulated facts "insufficient to establish that the stock had any value at the beginning of 1937 and became worthless during that year." It felt that such evidence "clearly shows that the stock was worthless prior to that year."

We are unable to say that the Tax Court's inferences and conclusions on this factual matter are so unreasonable from an evidentiary standpoint as to require a reversal of its judgment. The stipulation shows a succession of "identifiable events," occurring long before 1937, to justify the conclusion that the stock was worthless prior to the taxable year. The serious losses over a period of years, the receivership, the receivers' reports, the excess of liabilities over assets, the termination of operations and the bankruptcy sale of the assets of the principal subsidiary all lend credence to the Tax Court's judgment.[8] While the stockholders' suit was prosecuted against defendants of admitted "financial responsibility" and constituted an asset of the corporation until settled in 1937, the Tax Court felt that no substantial value to the suit had been shown. There was no evidence in the stipulation of the merits of the suit, the probability of recovery or any assurance of collection of an amount sufficient to pay the creditors' claims of more than $630,000 and to provide a sufficient surplus for stockholders so as to give any real value to their stock. The mere fact that the defendants were financially responsible does not necessarily inject any

[8] See, in general, 5 Mertens, Law of Federal Income Taxation, §§ 28.65 to 28.69; Lynch, "Losses Resulting From Stock Becoming Worthless—Deductibility Under Federal Income Tax Laws," 8 Fordham L. Rev. 199.

recognizable value into the suit from the stockholders' viewpoint. Hence it was reasonable to conclude that all value had departed from the stock prior to 1937 and that there was nothing left except a claim for damages against third parties for destruction of that value.

The taxpayer points to the consequences of error and other difficulties confronting one who in good faith tries to choose the proper year in which to claim a deduction. But these difficulties are inherent under the statute as now framed. Any desired remedy for such a situation, of course, lies with Congress rather than with the courts. It is beyond the judicial power to distort facts or to disregard legislative intent in order to provide equitable relief in a particular situation.

Affirmed.

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

GANGE LUMBER CO. *v.* ROWLEY AND DEPARTMENT OF LABOR & INDUSTRIES OF THE STATE OF WASHINGTON.

APPEAL FROM THE SUPREME COURT OF WASHINGTON.

No. 53. Argued October 16, 17, 1945.—Decided November 13, 1945.

Prior to the 1941 amendment of the Washington Industrial Insurance Act, there was a 3-year limitation on the filing by a workman of a claim for readjustment of compensation on account of aggravation of injury. The 1941 amendment authorized the filing of such a claim within five years from its effective date. There was no limitation, however, before or after the amendment, on the reopening of a claim and the awarding of additional compensation by the Department on its own motion. A workman, against whom the 3-year limitation of the preexisting law had run, filed pursuant to the 1941 amendment a claim for readjustment and was awarded additional compensation.

Held that, upon the record in this case, the appellant employer—having shown neither a probability that its future premium rate

would be increased by allowance of the additional award nor that under the preexisting law the liability for an additional award had been extinguished—failed to make a showing of such substantial injury, actual or impending, to any legally protected interest as would entitle it to question the validity of the statute under the due process clause of the Fourteenth Amendment. Pp. 297, 307.

22 Wash. 2d 250, 155 P. 2d 802, appeal dismissed.

APPEAL from a judgment which sustained the constitutionality of a state statute as applied to the appellant.

Mr. T. J. Hanify, with whom *Messrs. John Ambler* and *L. B. Donley* were on the brief, for appellant.

Mr. Harry Ellsworth Foster, with whom *Smith Troy,* Attorney General of the State of Washington, was on the brief, for the Department of Labor & Industries; and *Mr. Charles R. Carey* for Rowley, appellees.

MR. JUSTICE RUTLEDGE delivered the opinion of the Court.

This appeal is from a judgment of the Supreme Court of Washington rendered after the case journeyed twice through the state's appropriate administrative and judicial tribunals. 21 Wash. 2d 420, 22 Wash. 2d 250.[1] The judgment sustained an award made by the appellee, Department of Labor and Industries, in favor of Rowley, the individual appellee. The award was for compensation on account of the aggravation, by 1943, of injuries originally

[1] The procedure for making claims before the Department of Labor and Industries and for obtaining judicial review is sketched below in note 10. On the first journey of the cause to the Supreme Court, the Department and the Superior Court held that the claim was out of time and that it should be dismissed. After reversal of these rulings, the case was returned to the Department for the making of an award, and its order accomplishing this was affirmed by the Superior and Supreme Courts, as against appellant's constitutional objections urged here and others.

sustained by Rowley in 1937 in the course of his employment by appellant. A prior award for the original injury, made in 1938, became "final" [2] without appeal and is only indirectly in issue. Both awards were made pursuant to the state's statutory provisions for industrial insurance and were payable from a publicly administered fund maintained, as the statute required, by "premiums" or contributions of employers.[3] Appellant claims that the statute has been applied, in respect to its liability for the payment of premiums, in a manner to deprive it of property without due process of law, contrary to the prohibition of the Fourteenth Amendment.

The controversy results from a 1941 amendment of the Washington Industrial Insurance Act,[4] by which the time allowed for the beneficiary of an award to apply for additional compensation on account of aggravation of his injury was extended from three to five years after the establishment (or termination) of compensation or, by virtue of a proviso, to five years from the amendment's

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[2] The award became final, for purposes of review, in so far as the amount of compensation allowable for the original injury as proved in that proceeding was concerned. But it was at all times subject to being reopened for the allowance of additional compensation on account of aggravation of the original injury taking place after the original award. See note 5; also notes 14, 15 and text.

[3] Washington's original Workmen's Compensation (or more properly Industrial Insurance) Act was adopted in 1911, Laws of Wash., 1911, c. 74 (Remington's Revised Statutes of Washington, §§ 7673 *et seq.*). For purposes material to the disposition of this cause, the Act was amended in 1927, by placing a limit of three years from specified dates upon the filing of claims by injured workmen for aggravation of injuries (Laws of Wash., 1927, c. 310, p. 844; Rem. Rev. Stat. Wash., 1932, § 7679 (h), amending Laws of 1911, c. 74, § 5 (h)) and in 1941 (effective December 3, 1942) by extending the three-year period to five years. Laws of Wash., 1941, c. 209, § 1; Rem. Rev. Stat. Wash., 1941 Supp., § 7679, amending subsection (h) of the 1927 amendment.

[4] See note 3.

effective date.[5] Since Rowley's application presently involved was made in time only by virtue of the proviso,[6] appellant asserts that the amendment has been applied retroactively to revive a claim barred by the preexisting law, to its substantial detriment; and thereby, under this Court's decision in *Danzer & Co.* v. *Gulf & Ship Island R. Co.*, 268 U. S. 633, the claimed unconstitutional consequences have been created.

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[5] The provision, as amended in 1941, was as follows: "If aggravation, diminution, or termination of disability takes place or be discovered after the rate of compensation shall have been established or compensation terminated, in any case the director of labor and industries, through and by means of the division of industrial insurance, may, upon the application of the beneficiary, *made within five years after the establishment or termination of such compensation, or upon his own motion,* readjust for further application the rate of compensation in accordance with the rules in this section provided for the same, or in a proper case terminate the payment: *Provided, Any such applicant whose compensation has heretofore been established or terminated shall have five years from the taking effect of this act within which to apply for such readjustment.*" Laws of Wash., 1941, c. 209, § 1; Rem. Rev. Stat. Wash., 1941 Supp., § 7679 (h). (Emphasis added.)

The 1927 amendment, see note 3, was identical except for use of the word "three" where "five" is employed. The original provision, in force from 1911 to 1927, was as follows: "If *aggravation, diminution, or termination* of disability takes place or be discovered after the rate of compensation shall have been established or compensation terminated in any case *the department may, upon the application of the beneficiary or upon its own motion, readjust* for future application *the rate* of compensation in accordance with the rules in this section provided for the same, or in a proper case terminate the payments." Laws of Wash., 1911, c. 74, § 5 (h). (Emphasis added.)

[6] The original injury was incurred July 13, 1937. The original award, of $307.50, for permanent partial disability of the right hand, became "final," cf. note 2, March 9, 1938. The 1927 amendment, see notes 3 and 5, was in force at that time and until December 3, 1942, when the 1941 amendment became effective. Rowley's claim for aggravation was not filed until March 19, 1943, more than five years from the time the original award was "closed," but less than five years from the date the 1941 amendment, with the proviso, became effective.

Appellees have responded by relying upon *Campbell* v. *Holt,* 115 U. S. 620, and *Chase Securities Corp.* v. *Donaldson,* 325 U. S. 304. They have urged that as applied the statute has produced no unconstitutional injury or detriment to any substantive interest of appellant; and that the only effect has been to modify its procedural rights, in particular by supplying judicial review of awards for aggravation where previously only an administrative remedy was available to the employee.[7] As all of these contentions are somewhat interrelated, precise consideration requires more explicit statement of the statutory scheme in its application to the facts.

Washington's plan of industrial insurance is much like that of Ohio, briefly described in *Copperweld Steel Co.* v. *Industrial Commission,* 324 U. S. 780; cf. *Mattson* v. *Department of Labor,* 293 U. S. 151. The state Supreme Court has characterized the system as neither an employers' liability act nor an ordinary workmen's compensation act, but rather as an industrial insurance statute having all the features of an insurance act. *Stertz* v. *Industrial Insurance Commission,* 91 Wash. 588, 594–595, 158 P. 256. Salient characteristics, for present purposes, include the maintenance and administration by the state of an accident fund, which is paid into the state treasury by employers pursuant to annual assessments made by the Director of Labor and Industries, through the Supervisor of Industrial Insurance. Except in situations not presently material,[8] injured employees are deprived of common-law causes of action against their employers and are restricted to recovery from this fund as reparation for injuries sustained at work.

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[7] Cf. note 18.

[8] E. g., the Act provides that an employer, defaulting in his payment of premiums, shall be liable to suit by the injured workman, as prior to 1911, but without specified defenses then available. Rem. Rev. Stat. Wash., § 7676.

The Director is empowered to promulgate, change and revise rates to be paid by employer contributors. The scheme for determining the rates is somewhat complicated, requiring classification of contributors and their work according to its hazard; and adjustment of premiums to take account of the cost experience not only of each class but also of each employer, as well as the condition of the fund. Rem. Rev. Stat. Wash., § 7676. A basic premium rate, to apply for the ensuing calendar year, is fixed annually for each class, which takes account of its cost experience over a two-year period and of the condition of the class fund. At the same time a premium rate of each employer is fixed with relation to each class, also to apply for the ensuing year, which takes into consideration the employer's average cost experience "for each workman hour reported by him during each fiscal year . . . over the five year period" immediately preceding the determination. The actual premium rate the employer is required to pay consists of 40 per cent of the basic rate plus 60 per cent of his cost rate as thus determined; but in no event is the total rate to exceed 160 per cent of the basic rate.

Premiums when paid are placed to the credit of the employer in the appropriate fund, but become the exclusive property of the state, earmarked and appropriated for the specific uses provided by the statute. Rem. Rev. Stat. Wash., § 7676. See *State ex rel. Trenholm* v. *Yelle,* 174 Wash. 547, 550. No provision is made for repayment or recovery of any employer's contribution once it is paid in, regardless of whether the full amount is required to compensate his or others' employees for injuries sustained; and no such repayments are contemplated. Awards are payable solely from the appropriate fund thus accumulated and payment is in no wise dependent upon the employer's continued existence, operation or contribution to the fund. Nor, under the plan, can payment affect the rate of premium for the year in which the award is allowed.

In view of these provisions and effects, the state Supreme Court has declared that neither the employer nor the employee has a vested right or interest in the fund; the moneys when collected are public moneys, held and administered by the state, albeit pursuant to the statutory purpose they constitute a "trust fund" for the benefit of injured workmen and their dependents.[9] The fund is therefore in no sense the private property of the employer. Consequently the payment of awards out of the fund in itself could not amount to a deprivation of the employer's property. Indeed, appellant does not urge that the application of moneys previously paid in to the payment of an award of itself works the claimed unconstitutional result. Rather this is said to arise from the effect the award and its payment may have, by virtue of the statute's provisions relating to cost experience in the fixing of rates, upon appellant's liability for the payment of premiums in the future. It is anticipated, not presently realized or immediate, financial injury of which complaint is made.

As has been noted, in computing the rate of premium the Director is required to take into account not only the cost experience of each class over a previous two-year period, but also the average cost experience of each employer over the immediately preceding five-year period, in addition to "the then condition of each class and/or sub-class account." The quoted reference relates to the requirements for the keeping of class accounts, in the administration of the fund, for crediting of the payments

[9] See the opinion of the court upon the first appeal in this cause, 21 Wash. 2d 420, 427–429; *Mattson* v. *Department of Labor,* 176 Wash. 345, 347–348, 29 P. 2d 675, affirmed, 293 U. S. 151, holding that the 1927 amendment putting a limit of three years to the employee's right to claim compensation as of right impaired no vested right of the employee, whether of property or equal protection under the Fourteenth Amendment, or of contract under Article I, § 10, of the Federal Constitution, and authorities cited.

made by each employer to the appropriate accounts, and for the charging of awards made to or on account of injuries to his employees against his experience. Rem. Rev. Stat. Wash., § 7676. It is this charge of which appellant complains, in the view apparently that it necessarily will entail the payment of a higher premium in years following the one in which the award is made, when the rate computed as the statute requires will reflect inclusion of the award in its cost experience. Accordingly, since it determines that the charge will be made, the allowance of an award is said to be a matter vitally affecting the employer's substantive liability and constitutes a final adjudication of that liability to the extent that the charge may affect the future rate.

Moreover, the statute provides in its procedural phases for the employer to have notice and the right to participate fully in the determination.[10] It must be taken that this right is conferred for the employer's protection in the fixing of rates as they may be affected by the allowance of awards through the inclusion of his cost experience as a factor in rate computation. Especially in view of these

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[10] Report of accident and claim for compensation must be filed with the appellee Department of Labor and Industries. If either the claimant or the employer is aggrieved by any order, decision or award, he may petition for rehearing before the Joint Board of the Department. If rehearing is granted, the board may receive testimony. Appeal lies from the board's order to the Superior Court, where the matter is triable *de novo,* but upon the record made before the board, and from the Superior Court's judgment to the Supreme Court. Rem. Rev. Stat. Wash., § 7686; (1943 Supp.) § 7697.

No complaint is made that appellant did not have full benefit of the Act's procedural protections.

Although the Act does not provide specifically for the employer to contest the validity of an award at the time the Department is fixing the rate for the ensuing year or when he is called upon to pay that premium, it does not appear affirmatively that he may not have remedy then under the general law of the state. Cf. *Copperweld Steel Co.* v. *Industrial Commission,* 324 U. S. 780.

procedural protections, appellant urges that its substantive liability, once it is terminated through barring of a claimant's right to proceed by lapse of time, becomes an adjudicated matter, substantive, not merely procedural or remedial in character; and cannot therefore be revived consistently with the decision in the *Danzer* case.

Were this all, and were the state of the record plain that the allowance of the award necessarily would result in a later increase of the premium, we would be confronted with the necessity of determining whether such an increase would constitute the kind of injury or detriment forbidden by the due process clause. A mere increase in premium, under a compulsory and publicly administered accident insurance plan, designed to operate at cost based upon general and individual experience rather than at an arbitrary figure,[11] and surrounded with adequate procedural safeguards against arbitrary action, would not seem to be so obviously harsh or arbitrary in its effect upon employers generally that it could be said without question to be beyond the scope of the state's regulatory power or in violation of the due process prohibition of the federal Constitution.

But we are not faced with the necessity for deciding that question. Although appellant's brief states that "the award will be paid in large measure" by itself, it is not

[11] The original act, as adopted in 1911, provided for a uniform rate of premium to be collected from all employers. Laws of Wash., 1911, c. 74, § 4. The cost feature based upon experience was introduced in 1931. Laws of Wash., 1931, c. 104, § 1.

The original act with its feature of "uniform payment" was held constitutional by this Court in *Mountain Timber Co.* v. *Washington*, 243 U. S. 219, affirming *State* v. *Mountain Timber Co.*, 75 Wash. 581, 135 P. 645. See also *State ex rel. Davis-Smith Co.* v. *Clausen*, 65 Wash. 156, 117 P. 1101. The "cost experience" amendment was said to be valid in *State ex rel. Crabb* v. *Olinger*, 196 Wash. 308, 82 P. 2d 865, overruled on another point in *St. Paul & Tacoma Lumber Co.* v. *Department of Labor*, 19 Wash. 2d 639, 649, 144 P. 2d 250.

asserted that this burden will result from any increase in appellant's rate or in fact that any increase necessarily will follow from allowance and payment of the award. On the contrary, the statement seems obviously irrelevant, or erroneous in so far as it may be taken to imply that either of these consequences will follow, since in no event can the award be paid out of the funds collected from an increase produced wholly or in part by its allowance. It is not until after the award has been allowed that it can be charged to the employer's experience or affect his rate of contribution.

Moreover, if appellant is taken to argue that an increase will result for the year or years following the award's allowance, the record neither demonstrates this nor furnishes support for an inference that such a result necessarily or even probably will follow. As the Department points out, the payment when made may be one factor in determining appellant's future rate. But the record does not disclose what rate appellant has been paying. For all that appears, this may be the maximum permitted by the statute, in which event no injury, present or future, could result from allowance and payment of the award.[12] Moreover, if it were assumed that the rate was less than the maximum, whether or not an increase would result or, if so, whether it would be substantial, are questions wholly speculative.

A variety of considerations makes them so. Appellant's experience is but one factor in the computation. It affects only 60 per cent of the actual rate. A single award is reflected in this fraction only as it affects the five-year individual average. When so reflected the amount of resulting increase in that average and in the fraction may be infinitesimal or insubstantial. The ultimate effect upon

[12] Except possibly upon the contingency, equally speculative upon the record, that the maximum rate might be reduced in case the charge resulting from the award were not made.

the actual rate will be watered down nearly by half through inclusion of the 40 per cent factor for class experience. Since the condition of the fund also must be considered, this too may minimize further the effect or, so far as appears, make an increase entirely unnecessary. The record furnishes no evidence concerning the condition of the fund, the class experience over the required period or the appellant's individual experience over the specified five years. The amount of the award is small, $460.50.

In sum, all that the record discloses is that this amount will be charged against the appellant's experience and taken into account with other factors, as the statute requires, in the computation for some future period, with possibly some increase resulting in the rate. But, in the absence of all evidence showing the facts concerning the other factors, it is entirely problematical whether an increase will follow or, if so, whether it will be wholly mathematical and infinitesimal or substantial in its ultimate effect upon appellant. This being so, appellant's complaint comes down, on the record, to nothing more than the bare possibility of some injury in the future.

The Fourteenth Amendment, through the due process clause, does not assure protection from the states' regulatory powers against injuries so remote, contingent and speculative.[13] Some substantial and more immediate harm must be shown to present a justiciable question concerning the state's power. The injury, as it appears from this record, is neither so certain nor so substantial as to justify a finding, upon that showing, that appellant's substantial rights have been or will be invaded by allowance and payment of the award.

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[13] Cf. *Mallinckrodt Chemical Works* v. *Missouri ex rel. Jones,* 238 U. S. 41, 54; *Plymouth Coal Co.* v. *Pennsylvania,* 232 U. S. 531, 544–545, and authorities cited. Cf. also *Castillo* v. *McConnico,* 168 U. S. 674, 680; *Tyler* v. *Judges of the Court of Registration,* 179 U. S. 405; *Frothingham* v. *Mellon,* 262 U. S. 447, 488.

Moreover, under the Act's procedural provisions, appellant has at no time been free from this contingent liability, whether before or after the 1941 amendment. For, although the 1927 amendment precluded the employee from filing claim as of right after the three-year period, it followed the original act in placing no limit upon the time within which the Department, of its own motion, might reopen the claim and increase, reduce or terminate the compensation.[14] Appellant therefore was at all times substantively liable to have its premium rate increased by the allowance of an award for aggravation; and the initial award, in consequence, was in no sense *res judicata* against later imposition of this liability.[15] Appellant's contrary argument erroneously correlates its own liability to pay

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[14] See the terms of subsection (h) in its original and amended forms as set forth in note 5; *Smith* v. *Department of Labor*, 8 Wash. 2d 587, 113 P. 2d 57; cf. note 15.

[15] It was exactly to prevent such rigid finality that the statute preserved both the Department's unlimited power to reopen the case and the employee's power to have it reopened as a matter of right during the limited period. From the beginning the Act seems to have been drawn to avoid the crystallizing effects of the doctrine of *res judicata* in relation to awards, whether as against the employer or the employee. The idea apparently was that the initial award for an injury would afford compensation for harms then apparent and proved. But it was recognized, on the one hand, that all harmful consequences might not have become apparent at that time and, on the other, that harms then shown to exist might later be terminated or minimized. Cf. *Choctaw Portland Cement Co.* v. *Lamb*, 79 Okla. 109, 110, 189 P. 750. The purpose of the provisions for reopening, whether at the instance of the employer, the employee, or the Department, cf. notes 5 and 14, obviously was to prevent the initial award from finally cutting off power to take account of these later frequent developments. It was to maintain a mobile system, capable of adapting the amount of compensation from time to time in accordance with the facts relating to the injurious consequences for disability as they actually develop, not to cut off rigidly the power either to increase or to decrease the compensation once an award had become "final" for purposes of appeal.

premiums, for purposes of applying the statute's bar, with the employee's right formally to institute the proceedings (and to have judicial review) for securing an award, and assumes that this liability was terminated.[16]

It is true that the restoration, by the 1941 amendment, of the employee's right of taking the initiative may have had practical effects toward increasing the rates of premium, although none are shown by this record with any certainty. But appellant is seeking to have a state statute voided on the ground that it works a substantial injury to its substantive rights by creating or recreating a liability which had been extinguished by previously applicable law. It thereby has undertaken to demonstrate not only the injury and its substantial character, but as part of that burden the extinction of the preexisting substantive liability. This it has not done and could not do, in view of the Department's power to reopen the claim. It has succeeded only in showing that one mode provided by the preexisting law for bringing the liability into play had been terminated. It was this and only this which the 1941 amendment revived. At the most, therefore, appellant's injury, if it were otherwise more substantial, would consist in the restoration of an alternative, if also possibly a more effective, method for putting in motion the machinery provided for making an award.

In our view appellant has not made the showing of substantial harm, actual or impending, to any legally protected interest which is necessary to call in question the

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[16] Obviously the liability and the right were not coextensive in duration, since the one continued after the other had been cut off. They were lacking also in correlation of obligation, since the employer was bound to pay the fund, not the employee; and the latter recovered from the fund, not the employer. Right and liability are usually correlative in a legal relation. But in this instance the correlation, as appellant poses it, is lacking; for two legal relations are involved, from each of which it seeks to extract a correlative.

statute's validity.[17] Accordingly, the appeal must be and hereby is

Dismissed.[18]

MR. JUSTICE BLACK is of the opinion that the only practical effect of the challenged state statute was to give to an injured employee a right to judicial review of an administrative action; that a contention that such a statute violates the Federal Constitution is frivolous; and that the appeal should be dismissed for that reason.

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

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BURTON concurs.

We cannot agree that the injury to appellant is so remote and speculative as to preclude it from attacking on constitutional grounds the award in question. The award, whether small or great, enters into the employer's cost experience; and the future premium payable by the employer reflects in part any increase or decrease in his cost experience. If the employer is not paying the maximum rate, an increase in his cost experience will inevitably make

[17] Cf. *Mattson* v. *Department of Labor*, 293 U. S. 151.

[18] Appellees have urged that the 1941 amendment did no more than restore the right of judicial review, as to claims filed after the three-year period, which prior to 1927 had existed with reference to all claims for aggravation without limitation as to time; and therefore the amendment could be taken in no way to violate any provision of the Constitution. It is true that the 1941 amendment restored the employee's right of judicial review where previously none had existed. But it accomplished more. It invested the employee with the right to require the Department itself to proceed, where previously no such right existed. Whether or not this would give cause for complaint, if the right were coupled with a more substantial and less contingent injury than is shown to exist in this case and with a previous total extinction of the employer's liability, need not be determined.

him pay a rate which would be lower but for the increase in his cost experience. And if, perchance, he is already paying the maximum rate, an increase in his cost experience will inevitably hold him there longer or lessen any reduction to which he otherwise would be entitled. The precise effect on future rates cannot, of course, be presently ascertained. Nor could it be shown in any case, whether the award was $460 or $46,000. For the rates are fixed annually and at the time of any one award all of the elements entering into the future computation will not be known. So if this employer is barred here because he can show no injury, he and all other employers will be barred in every case.[1] Yet we know from the operation of the system that the cost experience of each employer determines 60 per cent of his future rate. Their respective costs also affect to a lesser degree the basic premium rate applicable to each employer's class, and 40 per cent of that basic rate is reflected in the actual premium rate paid by each employer in that class. We might as well say that no employer could ever challenge the constitutionality of an award under this system because bankruptcy, fire or some cataclysm might put him out of business before a new rate is fixed.

On the merits we think *Campbell* v. *Holt,* 115 U. S. 620, and *Chase Securities Corp.* v. *Donaldson,* 325 U. S. 304, govern this case. At no time was the employee's claim for aggravation extinguished. At all times the Department could have reopened the claim and made an additional award. We therefore do not reach the question of

[1] We are not advised that the employer can contest the validity of a prior award at the time the Department of Labor and Industries is fixing the premium rate to be paid into the fund for the ensuing year. The pertinent statute (Rem. Rev. Stat. § 7676) does not prescribe such a remedy and the decision of the Washington Supreme Court in *Mud Bay Logging Co.* v. *Department of Labor,* 189 Wash. 285, 286, 64 P. 2d 1054, would seem to indicate that it is not contemplated.

the constitutionality of an act which makes it possible to enlarge an award where previously there had been a final adjudication of the claim. Cf. *Danzer & Co.* v. *Gulf & Ship Island R. Co.*, 268 U. S. 633.

We would affirm the judgment.

INTERNATIONAL SHOE CO. *v.* STATE OF WASHINGTON ET AL.

APPEAL FROM THE SUPREME COURT OF WASHINGTON.

No. 107. Argued November 14, 1945.—Decided December 3, 1945.

Activities within a State of salesmen in the employ of a foreign corporation, exhibiting samples of merchandise and soliciting orders from prospective buyers to be accepted or rejected by the corporation at a point outside the State, were systematic and continuous, and resulted in a large volume of interstate business. A statute of the State requires employers to pay into the state unemployment compensation fund a specified percentage of the wages paid for the services of employees within the State. *Held:*

1. In view of 26 U. S. C. § 1606 (a), providing that no person shall be relieved from compliance with a state law requiring payments to an unemployment fund on the ground that he is engaged in interstate commerce, the fact that the corporation is engaged in interstate commerce does not relieve it from liability for payments to the state unemployment compensation fund. P. 315.

2. The activities in behalf of the corporation render it amenable to suit in courts of the State to recover payments due to the state unemployment compensation fund. P. 320.

(a) The activities in question established between the State and the corporation sufficient contacts or ties to make it reasonable and just, and in conformity to the due process requirements of the Fourteenth Amendment, for the State to enforce against the corporation an obligation arising out of such activities. P. 320.

(b) In such a suit to recover payments due to the unemployment compensation fund, service of process upon one of the corporation's salesmen within the State, and notice sent by registered mail to the corporation at its home office, satisfies the requirements of due process. P. 320.

3. The tax imposed by the state unemployment compensation statute—construed by the state court, in its application to the corporation, as a tax on the privilege of employing salesmen within the State—does not violate the due process clause of the Fourteenth Amendment. P. 321.

22 Wash. 2d 146, 154 P. 2d 801, affirmed.

APPEAL from a judgment upholding the constitutionality of a state unemployment compensation statute as applied to the appellant corporation.

Mr. Henry C. Lowenhaupt, with whom *Messrs. Lawrence J. Bernard, Jacob Chasnoff* and *Abraham Lowenhaupt* were on the brief, for appellant.

George W. Wilkins, Assistant Attorney General of the State of Washington, with whom *Smith Troy,* Attorney General, and *Edwin C. Ewing,* Assistant Attorney General, were on the brief, for appellees.

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

The questions for decision are (1) whether, within the limitations of the due process clause of the Fourteenth Amendment, appellant, a Delaware corporation, has by its activities in the State of Washington rendered itself amenable to proceedings in the courts of that state to recover unpaid contributions to the state unemployment compensation fund exacted by state statutes, Washington Unemployment Compensation Act, Washington Revised Statutes, § 9998–103a through § 9998–123a, 1941 Supp., and (2) whether the state can exact those contributions consistently with the due process clause of the Fourteenth Amendment.

The statutes in question set up a comprehensive scheme of unemployment compensation, the costs of which are defrayed by contributions required to be made by employers to a state unemployment compensation fund.

The contributions are a specified percentage of the wages payable annually by each employer for his employees' services in the state. The assessment and collection of the contributions and the fund are administered by appellees. Section 14 (c) of the Act (Wash. Rev. Stat., 1941 Supp., § 9998–114c) authorizes appellee Commissioner to issue an order and notice of assessment of delinquent contributions upon prescribed personal service of the notice upon the employer if found within the state, or, if not so found, by mailing the notice to the employer by registered mail at his last known address. That section also authorizes the Commissioner to collect the assessment by distraint if it is not paid within ten days after service of the notice. By §§ 14e and 6b the order of assessment may be administratively reviewed by an appeal tribunal within the office of unemployment upon petition of the employer, and this determination is by § 6i made subject to judicial review on questions of law by the state Superior Court, with further right of appeal in the state Supreme Court as in other civil cases.

In this case notice of assessment for the years in question was personally served upon a sales solicitor employed by appellant in the State of Washington, and a copy of the notice was mailed by registered mail to appellant at its address in St. Louis, Missouri. Appellant appeared specially before the office of unemployment and moved to set aside the order and notice of assessment on the ground that the service upon appellant's salesman was not proper service upon appellant; that appellant was not a corporation of the State of Washington and was not doing business within the state; that it had no agent within the state upon whom service could be made; and that appellant is not an employer and does not furnish employment within the meaning of the statute.

The motion was heard on evidence and a stipulation of facts by the appeal tribunal which denied the motion

and ruled that appellee Commissioner was entitled to recover the unpaid contributions. That action was affirmed by the Commissioner; both the Superior Court and the Supreme Court affirmed. 22 Wash. 2d 146, 154 P. 2d 801. Appellant in each of these courts assailed the statute as applied, as a violation of the due process clause of the Fourteenth Amendment, and as imposing a constitutionally prohibited burden on interstate commerce. The cause comes here on appeal under § 237 (a) of the Judicial Code, 28 U. S. C. § 344 (a), appellant assigning as error that the challenged statutes as applied infringe the due process clause of the Fourteenth Amendment and the commerce clause.

The facts as found by the appeal tribunal and accepted by the state Superior Court and Supreme Court, are not in dispute. Appellant is a Delaware corporation, having its principal place of business in St. Louis, Missouri, and is engaged in the manufacture and sale of shoes and other footwear. It maintains places of business in several states, other than Washington, at which its manufacturing is carried on and from which its merchandise is distributed interstate through several sales units or branches located outside the State of Washington.

Appellant has no office in Washington and makes no contracts either for sale or purchase of merchandise there. It maintains no stock of merchandise in that state and makes there no deliveries of goods in intrastate commerce. During the years from 1937 to 1940, now in question, appellant employed eleven to thirteen salesmen under direct supervision and control of sales managers located in St. Louis. These salesmen resided in Washington; their principal activities were confined to that state; and they were compensated by commissions based upon the amount of their sales. The commissions for each year totaled more than $31,000. Appellant supplies its salesmen with a line of samples, each consisting of one shoe of a pair, which

they display to prospective purchasers. On occasion they rent permanent sample rooms, for exhibiting samples, in business buildings, or rent rooms in hotels or business buildings temporarily for that purpose. The cost of such rentals is reimbursed by appellant.

The authority of the salesmen is limited to exhibiting their samples and soliciting orders from prospective buyers, at prices and on terms fixed by appellant. The salesmen transmit the orders to appellant's office in St. Louis for acceptance or rejection, and when accepted the merchandise for filling the orders is shipped f. o. b. from points outside Washington to the purchasers within the state. All the merchandise shipped into Washington is invoiced at the place of shipment from which collections are made. No salesman has authority to enter into contracts or to make collections.

The Supreme Court of Washington was of opinion that the regular and systematic solicitation of orders in the state by appellant's salesmen, resulting in a continuous flow of appellant's product into the state, was sufficient to constitute doing business in the state so as to make appellant amenable to suit in its courts. But it was also of opinion that there were sufficient additional activities shown to bring the case within the rule frequently stated, that solicitation within a state by the agents of a foreign corporation plus some additional activities there are sufficient to render the corporation amenable to suit brought in the courts of the state to enforce an obligation arising out of its activities there. *International Harvester Co.* v. *Kentucky,* 234 U. S. 579, 587; *People's Tobacco Co.* v. *American Tobacco Co.,* 246 U. S. 79, 87; *Frene* v. *Louisville Cement Co.,* 77 U. S. App. D. C. 129, 134 F. 2d 511, 516. The court found such additional activities in the salesmen's display of samples sometimes in permanent display rooms, and the salesmen's residence within the state, continued over a period of years, all resulting in a

substantial volume of merchandise regularly shipped by appellant to purchasers within the state. The court also held that the statute as applied did not invade the constitutional power of Congress to regulate interstate commerce and did not impose a prohibited burden on such commerce.

Appellant's argument, renewed here, that the statute imposes an unconstitutional burden on interstate commerce need not detain us. For 53 Stat. 1391, 26 U. S. C. § 1606 (a) provides that "No person required under a State law to make payments to an unemployment fund shall be relieved from compliance therewith on the ground that he is engaged in interstate or foreign commerce, or that the State law does not distinguish between employees engaged in interstate or foreign commerce and those engaged in intrastate commerce." It is no longer debatable that Congress, in the exercise of the commerce power, may authorize the states, in specified ways, to regulate interstate commerce or impose burdens upon it. *Kentucky Whip & Collar Co.* v. *Illinois Central R. Co.*, 299 U. S. 334; *Perkins* v. *Pennsylvania*, 314 U. S. 586; *Standard Dredging Corp.* v. *Murphy*, 319 U. S. 306, 308; *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, 679; *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, 769.

Appellant also insists that its activities within the state were not sufficient to manifest its "presence" there and that in its absence the state courts were without jurisdiction, that consequently it was a denial of due process for the state to subject appellant to suit. It refers to those cases in which it was said that the mere solicitation of orders for the purchase of goods within a state, to be accepted without the state and filled by shipment of the purchased goods interstate, does not render the corporation seller amenable to suit within the state. See *Green* v. *Chicago, B. & Q. R. Co.*, 205 U. S. 530, 533; *International Harvester Co.* v. *Kentucky, supra*, 586–587; *Philadelphia*

& Reading R. Co. v. *McKibbin,* 243 U. S. 264, 268; *People's Tobacco Co.* v. *American Tobacco Co., supra,* 87. And appellant further argues that since it was not present within the state, it is a denial of due process to subject it to taxation or other money exaction. It thus denies the power of the state to lay the tax or to subject appellant to a suit for its collection.

Historically the jurisdiction of courts to render judgment *in personam* is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him. *Pennoyer* v. *Neff,* 95 U. S. 714, 733. But now that the *capias ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment *in personam,* if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." *Milliken* v. *Meyer,* 311 U. S. 457, 463. See Holmes, J., in *McDonald* v. *Mabee,* 243 U. S. 90, 91. Compare *Hoopeston Canning Co.* v. *Cullen,* 318 U. S. 313, 316, 319. See *Blackmer* v. *United States,* 284 U. S. 421; *Hess* v. *Pawloski,* 274 U. S. 352; *Young* v. *Masci,* 289 U. S. 253.

Since the corporate personality is a fiction, although a fiction intended to be acted upon as though it were a fact, *Klein* v. *Board of Supervisors,* 282 U. S. 19, 24, it is clear that unlike an individual its "presence" without, as well as within, the state of its origin can be manifested only by activities carried on in its behalf by those who are authorized to act for it. To say that the corporation is so far "present" there as to satisfy due process requirements, for purposes of taxation or the maintenance of suits against it in the courts of the state, is to beg the question to be decided. For the terms "present" or "presence" are

used merely to symbolize those activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process. L. Hand, J., in *Hutchinson* v. *Chase & Gilbert,* 45 F. 2d 139, 141. Those demands may be met by such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there. An "estimate of the inconveniences" which would result to the corporation from a trial away from its "home" or principal place of business is relevant in this connection. *Hutchinson* v. *Chase & Gilbert, supra,* 141.

"Presence" in the state in this sense has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on, even though no consent to be sued or authorization to an agent to accept service of process has been given. *St. Clair* v. *Cox,* 106 U. S. 350, 355; *Connecticut Mutual Co.* v. *Spratley,* 172 U. S. 602, 610–611; *Pennsylvania Lumbermen's Ins. Co.* v. *Meyer,* 197 U. S. 407, 414–415; *Commercial Mutual Co.* v. *Davis,* 213 U. S. 245, 255–256; *International Harvester Co.* v. *Kentucky, supra;* cf. *St. Louis S. W. R. Co.* v. *Alexander,* 227 U. S. 218. Conversely it has been generally recognized that the casual presence of the corporate agent or even his conduct of single or isolated items of activities in a state in the corporation's behalf are not enough to subject it to suit on causes of action unconnected with the activities there. *St. Clair* v. *Cox, supra,* 359, 360; *Old Wayne Life Assn.* v. *McDonough,* 204 U. S. 8, 21; *Frene* v. *Louisville Cement Co., supra,* 515, and cases cited. To require the corporation in such circumstances to defend the suit away from its home or other jurisdiction where it carries on more substantial activities has been thought to lay too great and unreasonable a burden on the corporation to comport with due process.

While it has been held, in cases on which appellant relies, that continuous activity of some sorts within a state is not enough to support the demand that the corporation be amenable to suits unrelated to that activity, *Old Wayne Life Assn.* v. *McDonough, supra; Green* v. *Chicago, B. & Q. R. Co., supra; Simon* v. *Southern R. Co.*, 236 U. S. 115; *People's Tobacco Co.* v. *American Tobacco Co., supra;* cf. *Davis* v. *Farmers Co-operative Co.*, 262 U. S. 312, 317, there have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities. See *Missouri, K. & T. R. Co.* v. *Reynolds*, 255 U. S. 565; *Tauza* v. *Susquehanna Coal Co.*, 220 N. Y. 259, 115 N. E. 915; cf. *St. Louis S. W. R. Co.* v. *Alexander, supra.*

Finally, although the commission of some single or occasional acts of the corporate agent in a state sufficient to impose an obligation or liability on the corporation has not been thought to confer upon the state authority to enforce it, *Rosenberg Bros. & Co.* v. *Curtis Brown Co.*, 260 U. S. 516, other such acts, because of their nature and quality and the circumstances of their commission, may be deemed sufficient to render the corporation liable to suit. Cf. *Kane* v. *New Jersey*, 242 U. S. 160; *Hess* v. *Pawloski, supra; Young* v. *Masci, supra.* True, some of the decisions holding the corporation amenable to suit have been supported by resort to the legal fiction that it has given its consent to service and suit, consent being implied from its presence in the state through the acts of its authorized agents. *Lafayette Insurance Co.* v. *French*, 18 How. 404, 407; *St. Clair* v. *Cox, supra*, 356; *Commercial Mutual Co.* v. *Davis, supra*, 254; *Washington* v. *Superior Court*, 289 U. S. 361, 364–365. But more realistically it may be said that those authorized acts were of such a nature as to justify the fiction. *Smolik* v. *Philadelphia &*

Reading Co., 222 F. 148, 151. Henderson, The Position of Foreign Corporations in American Constitutional Law, 94–95.

It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative. The test is not merely, as has sometimes been suggested, whether the activity, which the corporation has seen fit to procure through its agents in another state, is a little more or a little less. *St. Louis S. W. R. Co.* v. *Alexander, supra,* 228; *International Harvester Co.* v. *Kentucky, supra,* 587. Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations. Cf. *Pennoyer* v. *Neff, supra; Minnesota Commercial Assn.* v. *Benn,* 261 U. S. 140.

But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue. Compare *International Harvester Co.* v. *Kentucky, supra,* with *Green* v. *Chicago, B. & Q. R. Co., supra,* and *People's Tobacco Co.* v. *American Tobacco Co., supra.* Compare *Connecticut Mutual Co.* v. *Spratley, supra,* 619, 620 and *Commercial Mutual Co.* v. *Davis, supra,* with *Old Wayne Life Assn.* v. *McDonough, supra.* See 29 Columbia Law Review, 187–195.

Applying these standards, the activities carried on in behalf of appellant in the State of Washington were neither irregular nor casual. They were systematic and continuous throughout the years in question. They resulted in a large volume of interstate business, in the course of which appellant received the benefits and protection of the laws of the state, including the right to resort to the courts for the enforcement of its rights. The obligation which is here sued upon arose out of those very activities. It is evident that these operations establish sufficient contacts or ties with the state of the forum to make it reasonable and just, according to our traditional conception of fair play and substantial justice, to permit the state to enforce the obligations which appellant has incurred there. Hence we cannot say that the maintenance of the present suit in the State of Washington involves an unreasonable or undue procedure.

We are likewise unable to conclude that the service of the process within the state upon an agent whose activities establish appellant's "presence" there was not sufficient notice of the suit, or that the suit was so unrelated to those activities as to make the agent an inappropriate vehicle for communicating the notice. It is enough that appellant has established such contacts with the state that the particular form of substituted service adopted there gives reasonable assurance that the notice will be actual. *Connecticut Mutual Co.* v. *Spratley, supra,* 618, 619; *Board of Trade* v. *Hammond Elevator Co.,* 198 U. S. 424, 437–438; *Commercial Mutual Co.* v. *Davis, supra,* 254–255. Cf. *Riverside Mills* v. *Menefee,* 237 U. S. 189, 194, 195; see *Knowles* v. *Gaslight & Coke Co.,* 19 Wall. 58, 61; *McDonald* v. *Mabee, supra; Milliken* v. *Meyer, supra.* Nor can we say that the mailing of the notice of suit to appellant by registered mail at its home office was not reasonably calculated to apprise appellant of the suit. Compare *Hess* v. *Pawloski, supra,* with *McDonald* v. *Mabee, supra,*

92, and *Wuchter* v. *Pizzutti*, 276 U. S. 13, 19, 24; cf. *Becquet* v. *MacCarthy*, 2 B. & Ad. 951; *Maubourquet* v. *Wyse*, 1 Ir. Rep. C. L. 471. See *Washington* v. *Superior Court*, *supra*, 365.

Only a word need be said of appellant's liability for the demanded contributions to the state unemployment fund. The Supreme Court of Washington, construing and applying the statute, has held that it imposes a tax on the privilege of employing appellant's salesmen within the state measured by a percentage of the wages, here the commissions payable to the salesmen. This construction we accept for purposes of determining the constitutional validity of the statute. The right to employ labor has been deemed an appropriate subject of taxation in this country and England, both before and since the adoption of the Constitution. *Steward Machine Co.* v. *Davis*, 301 U. S. 548, 579, *et seq.* And such a tax imposed upon the employer for unemployment benefits is within the constitutional power of the states. *Carmichael* v. *Southern Coal Co.*, 301 U. S. 495, 508, *et seq.*

Appellant having rendered itself amenable to suit upon obligations arising out of the activities of its salesmen in Washington, the state may maintain the present suit *in personam* to collect the tax laid upon the exercise of the privilege of employing appellant's salesmen within the state. For Washington has made one of those activities, which taken together establish appellant's "presence" there for purposes of suit, the taxable event by which the state brings appellant within the reach of its taxing power. The state thus has constitutional power to lay the tax and to subject appellant to a suit to recover it. The activities which establish its "presence" subject it alike to taxation by the state and to suit to recover the tax. *Equitable Life Society* v. *Pennsylvania*, 238 U. S. 143, 146; cf. *International Harvester Co.* v. *Department of Taxation*, 322 U. S. 435, 442, *et seq.*; *Hoopeston Canning Co.* v. *Cullen*,

supra, 316–319; see *General Trading Co.* v. *Tax Comm'n,* 322 U. S. 335.

Affirmed.

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

MR. JUSTICE BLACK delivered the following opinion.

Congress, pursuant to its constitutional power to regulate commerce, has expressly provided that a State shall not be prohibited from levying the kind of unemployment compensation tax here challenged. 26 U. S. C. 1600. We have twice decided that this Congressional consent is an adequate answer to a claim that imposition of the tax violates the Commerce Clause. *Perkins* v. *Pennsylvania,* 314 U. S. 586, affirming 342 Pa. 529; *Standard Dredging Corp.* v. *Murphy,* 319 U. S. 306, 308. Two determinations by this Court of an issue so palpably without merit are sufficient. Consequently that part of this appeal which again seeks to raise the question seems so patently frivolous as to make the case a fit candidate for dismissal. *Fay* v. *Crozer,* 217 U. S. 455. Nor is the further ground advanced on this appeal, that the State of Washington has denied appellant due process of law, any less devoid of substance. It is my view, therefore, that we should dismiss the appeal as unsubstantial,[1] *Seaboard Air Line R. Co.* v. *Watson,* 287 U. S. 86, 90, 92, and decline the invitation to formulate broad rules as to the meaning of due process, which here would amount to deciding a constitutional question "in advance of the necessity for its decision." *Federation of Labor* v. *McAdory,* 325 U. S. 450, 461.

[1] This Court has on several occasions pointed out the undesirable consequences of a failure to dismiss frivolous appeals. *Salinger* v. *United States,* 272 U. S. 542, 544; *United Surety Co.* v. *American Fruit Product Co.,* 238 U. S. 140; *De Bearn* v. *Safe Deposit & Trust Co.,* 233 U. S. 24, 33–34.

Certainly appellant cannot in the light of our past decisions meritoriously claim that notice by registered mail and by personal service on its sales solicitors in Washington did not meet the requirements of procedural due process. And the due process clause is not brought in issue any more by appellant's further conceptualistic contention that Washington could not levy a tax or bring suit against the corporation because it did not honor that State with its mystical "presence." For it is unthinkable that the vague due process clause was ever intended to prohibit a State from regulating or taxing a business carried on within its boundaries simply because this is done by agents of a corporation organized and having its headquarters elsewhere. To read this into the due process clause would in fact result in depriving a State's citizens of due process by taking from the State the power to protect them in their business dealings within its boundaries with representatives of a foreign corporation. Nothing could be more irrational or more designed to defeat the function of our federative system of government. Certainly a State, at the very least, has power to tax and sue those dealing with its citizens within its boundaries, as we have held before. *Hoopeston Canning Co.* v. *Cullen,* 318 U. S. 313. Were the Court to follow this principle, it would provide a workable standard for cases where, as here, no other questions are involved. The Court has not chosen to do so, but instead has engaged in an unnecessary discussion in the course of which it has announced vague Constitutional criteria applied for the first time to the issue before us. It has thus introduced uncertain elements confusing the simple pattern and tending to curtail the exercise of State powers to an extent not justified by the Constitution.

The criteria adopted insofar as they can be identified read as follows: Due Process does permit State courts to "enforce the obligations which appellant has incurred" if

it be found "reasonable and just according to our traditional conception of fair play and substantial justice." And this in turn means that we will "permit" the State to act if upon "an 'estimate of the inconveniences' which would result to the corporation from a trial away from its 'home' or principal place of business," we conclude that it is "reasonable" to subject it to suit in a State where it is doing business.

It is true that this Court did use the terms "fair play" and "substantial justice" in explaining the philosophy underlying the holding that it could not be "due process of law" to render a personal judgment against a defendant without notice and an opportunity to be heard. *Milliken* v. *Meyer*, 311 U. S. 457. In *McDonald* v. *Mabee*, 243 U. S. 90, 91, cited in the *Milliken* case, Mr. Justice Holmes, speaking for the Court, warned against judicial curtailment of this opportunity to be heard and referred to such a curtailment as a denial of "fair play," which even the common law would have deemed "contrary to natural justice." And previous cases had indicated that the ancient rule against judgments without notice had stemmed from "natural justice" concepts. These cases, while giving additional reasons why notice under particular circumstances is inadequate, did not mean thereby that all legislative enactments which this Court might deem to be contrary to natural justice ought to be held invalid under the due process clause. None of the cases purport to support or could support a holding that a State can tax and sue corporations only if its action comports with this Court's notions of "natural justice." I should have thought the Tenth Amendment settled that.

I believe that the Federal Constitution leaves to each State, without any "ifs" or "buts," a power to tax and to open the doors of its courts for its citizens to sue corporations whose agents do business in those States. Believing that the Constitution gave the States that power, I think it a judicial deprivation to condition its exercise upon this

Court's notion of "fair play," however appealing that term may be. Nor can I stretch the meaning of due process so far as to authorize this Court to deprive a State of the right to afford judicial protection to its citizens on the ground that it would be more "convenient" for the corporation to be sued somewhere else.

There is a strong emotional appeal in the words "fair play," "justice," and "reasonableness." But they were not chosen by those who wrote the original Constitution or the Fourteenth Amendment as a measuring rod for this Court to use in invalidating State or Federal laws passed by elected legislative representatives. No one, not even those who most feared a democratic government, ever formally proposed that courts should be given power to invalidate legislation under any such elastic standards. Express prohibitions against certain types of legislation are found in the Constitution, and under the long-settled practice, courts invalidate laws found to conflict with them. This requires interpretation, and interpretation, it is true, may result in extension of the Constitution's purpose. But that is no reason for reading the due process clause so as to restrict a State's power to tax and sue those whose activities affect persons and businesses within the State, provided proper service can be had. Superimposing the natural justice concept on the Constitution's specific prohibitions could operate as a drastic abridgment of democratic safeguards they embody, such as freedom of speech, press and religion,[2] and the right to counsel. This

[2] These First Amendment liberties—freedom of speech, press and religion—provide a graphic illustration of the potential restrictive capacity of a rule under which they are protected at a particular time only because the Court, as then constituted, believes them to be a requirement of fundamental justice. Consequently, under the same rule, another Court, with a different belief as to fundamental justice, could, at least as against State action, completely or partially withdraw Constitutional protection from these basic freedoms, just as though the First Amendment had never been written.

has already happened. *Betts* v. *Brady,* 316 U. S. 455. Compare *Feldman* v. *United States,* 322 U. S. 487, 494–503. For application of this natural law concept, whether under the terms "reasonableness," "justice," or "fair play," makes judges the supreme arbiters of the country's laws and practices. *Polk Co.* v. *Glover,* 305 U. S. 5, 17–18; *Federal Power Commission* v. *Natural Gas Pipeline Co.,* 315 U. S. 575, 600, n. 4. This result, I believe, alters the form of government our Constitution provides. I cannot agree.

True, the State's power is here upheld. But the rule announced means that tomorrow's judgment may strike down a State or Federal enactment on the ground that it does not conform to this Court's idea of natural justice. I therefore find myself moved by the same fears that caused Mr. Justice Holmes to say in 1930:

"I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the Fourteenth Amendment in cutting down what I believe to be the constitutional rights of the States. As the decisions now stand, I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable." *Baldwin* v. *Missouri,* 281 U. S. 586, 595.

ASHBACKER RADIO CORP. *v.* FEDERAL COMMUNICATIONS COMMISSION.

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

No. 65. Argued November 13, 1945.—Decided December 3, 1945.

1. Where two applications pertaining to broadcasting station licenses under the Federal Communications Act are mutually exclusive, the grant of one without hearings on both deprives the loser of the opportunity for a hearing to which he is entitled under § 309 (a) of the Act, even though his application is set for a hearing at a later date. Pp. 327, 329, 333.
2. In such a case, the applicant whose application was not acted upon is placed in the same position as a newcomer who seeks to displace an established broadcaster and thus is placed under a greater burden than if a hearing on his application had preceded the grant of the other application. P. 332.
3. While his statutory right to a hearing has been preserved in form, it has been substantially nullified as a practical matter by the grant of the other application. P. 334.

Reversed.

CERTIORARI, 325 U. S. 846, to review dismissal of an appeal from an order of the Federal Communications Commission dismissing a petition for a hearing, rehearing and other relief.

Mr. Paul M. Segal, with whom *Messrs. Philip J. Hennessey, Jr.* and *Harold G. Cowgill* were on the brief, for petitioner.

Mr. Ralph F. Fuchs, with whom *Solicitor General McGrath, Messrs. Rosel H. Hyde, Harry M. Plotkin, Max Goldman* and *Joseph M. Kittner* were on the brief, for respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The primary question in this case is whether an applicant for a construction permit under the Federal Com-

munications Act (48 Stat. 1064, 47 U. S. C. § 151) is granted the hearing to which he is entitled by § 309 (a) of the Act,[1] where the Commission, having before it two applications which are mutually exclusive, grants one without a hearing and sets the other for hearing.

In March 1944 the Fetzer Broadcasting Company filed with the Commission an application for authority to construct a new broadcasting station at Grand Rapids, Michigan, to operate on 1230 kc with 250 watts power, unlimited time. In May 1944, before the Fetzer application had been acted upon, petitioner filed an application for authority to change the operating frequency of its station WKBZ of Muskegon, Michigan, from 1490 kc with 250 watts power, unlimited time, to 1230 kc. The Commission, after stating that the simultaneous operation on 1230 kc at Grand Rapids and Muskegon "would result in intolerable interference to both applicants," declared that the two applications were "actually exclusive." The Commission, upon an examination of the Fetzer application and supporting data, granted it in June 1944 without a hearing. On the same day the Commission designated petitioner's application for hearing. Petitioner thereupon filed a petition for hearing, rehearing and other relief directed against the grant of the Fetzer application. The Commission denied this petition, stating,

"The Commission has not denied petitioner's application. It has designated the application for hearing as required by Section 309 (a) of the Act. At this hearing, petitioner will have ample opportunity to show that its operation as proposed will better serve the public interest than will the grant of the Fetzer application as authorized June 27, 1944. Such grant does not preclude the Commis-

[1] Sec. 319 relates to applications for construction permits. But since such applications are in substance applications for station licenses (*Goss* v. *Federal Radio Commission*, 62 App. D. C. 301, 67 F. 2d 507, 508) the Commission in such cases uniformly follows the procedure prescribed in § 309 (a) for station licenses.

sion, at a later date from taking any action which it may find will serve the public interest. In re: *Berks Broadcasting Company* (WEEU), Reading, Pennsylvania, 8 FCC 427 (1941); In re: *The Evening News Association* (WWJ), Detroit, Michigan, 8 FCC 552 (1941); In re: *Merced Broadcasting Company* (KYOS), Merced, California, 9 FCC 118, 120 (1942)."

Petitioner filed a notice of appeal from the grant of the Fetzer construction permit in the Court of Appeals for the District of Columbia, asserting that it was a "person aggrieved or whose interests are adversely affected" by the action of the Commission within the meaning of § 402 (b) (2) of the Act.[2] The Commission filed a motion to dismiss the appeal for want of jurisdiction on the part of the court to entertain it. This motion was granted without opinion. The case is here on a petition for a writ of certiorari which we granted because of the importance of the question presented.

Our chief problem is to reconcile two provisions of § 309 (a) where the Commission has before it mutually exclusive applications. The first authorizes the Commission "upon examination" of an application for a station license to grant it if the Commission determines that "public interest, convenience, or necessity would be served" by the grant.[3] The second provision of § 309 (a) says that if, upon examination of such an application, the

[2] The relevant provisions of § 402 (b) read as follows:

"An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

. . . . . .

"(2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application."

[3] Sec. 307 (a) provides: "The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefor a station license provided for by this chapter."

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Commission does not reach such a decision, "it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe."[4] It is thus plain that § 309 (a) not only gives the Commission authority to grant licenses without a hearing, but also gives applicants a right to a hearing before their applications are denied. We do not think it is enough to say that the power of the Commission to issue a license on a finding of public interest, convenience or necessity supports its grant of one of two mutually exclusive applications without a hearing of the other. For if the grant of one effectively precludes the other, the statutory right to a hearing which Congress has accorded applicants before denial of their applications becomes an empty thing. We think that is the case here.

The Commission in its notice of hearing on petitioner's application stated that the application "will not be granted by the Commission unless the issues listed above are determined in favor of the applicant on the basis of a record duly and properly made by means of a formal hearing." One of the issues listed was the determination of "the extent of any interference which would result from the simultaneous operation" of petitioner's proposed station and Fetzer's station. Since the Commission itself stated

[4] Sec. 309 (a) reads as follows:

"If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe."

that simultaneous operation of the two stations would result in "intolerable interference" to both, it is apparent that petitioner carries a burden which cannot be met. To place that burden on it is in effect to make its hearing a rehearing on the grant of the competitor's license rather than a hearing on the merits of its own application. That may satisfy the strict letter of the law but certainly not its spirit or intent.[5]

The Fetzer application was not conditionally granted pending consideration of petitioner's application. Indeed a stay of it pending the outcome of this litigation was denied. Of course the Fetzer license, like any other license granted by the Commission, was subject to certain conditions which the Act imposes as a matter of law. We fully recognize that the Commission, as it said, is not precluded "at a later date from taking any action which it may find will serve the public interest." No licensee obtains any vested interest in any frequency.[6] The Commission for

[5] The Commission recognizes in its regulations the desirability of hearing such related matters at the same time or in consolidated cases. By § 1.193, 47 Code Fed. Reg. Cum. Supp. it is provided:

"In fixing dates for hearings the Commission will, so far as practicable, endeavor to fix the same date for separate hearings (a) on all related matters which involve the same applicant, or arise out of the same complaint or cause; and (b) for separate hearings on all applications which by reason of the privileges, terms, or conditions requested present conflicting claims of the same nature."

And by § 1.194, 47 Code Fed. Reg. Cum. Supp. it is provided:

"The Commission, upon motion, or upon its own motion, will, where such action will best conduce to the proper dispatch of business and to the ends of justice, consolidate for hearing (a) any cases which involve the same applicant or arise from the same complaint or cause, or (b) any applications which by reason of the privileges, terms, or conditions requested present conflicting claims of the same nature."

[6] See §§ 301, 304, 307 (d), 309 (b) (1) of the Act. "The policy of the Act is clear that no person is to have anything in the nature of a property right as a result of the granting of a license." *Federal Communications Commission* v. *Sanders Radio Station,* 309 U. S. 470, 475.

specified reasons may revoke any station license pursuant to the procedure prescribed by § 312 (a) and may suspend the license of any operator on the grounds and in the manner specified by § 303 (m). It may also modify a station license if in its judgment "such action will promote the public interest, convenience, and necessity, or the provisions of this chapter . . . will be more fully complied with." § 312 (b). And licenses for broadcasting stations are limited to three years, the renewals being subject to the same considerations and practice which affect the granting of original applications. § 307 (d). But in all those instances the licensee is given an opportunity to be heard before final action can be taken.[7] What the Commission can do to Fetzer it can do to any licensee. As the Fetzer application has been granted, petitioner, therefore, is presently in the same position as a newcomer who seeks to displace an established broadcaster. By the grant of the Fetzer application petitioner has been placed under a greater burden than if its hearing had been earlier. Legal theory is one thing. But the practicalities are different. For we are told how difficult it is for a newcomer to make the comparative showing necessary to displace an established licensee. *Peoria Broadcasting Co. and Illinois Broadcasting Co.*, 1 F. C. C. 167. No suggestion is made here as in *Matheson Radio Co.*, 8 F. C. C. 427 or *The Evening News Association*, 8 F. C. C. 552, that it may be possible to make workable adjustments so that both applications can be granted. The Commission concedes that "these applications are actually exclusive." The applications are for a facility which can be granted to only one. Since the facility has been granted to Fetzer, the hearing accorded petitioner concerns a license facility

[7] For the regulations of the Commission governing these procedures see 47 Code Fed. Reg. Cum. Supp. § 1.401 (revocation), § 1.359 and § 1.402 (modification), § 1.411 and § 1.412 (suspension), § 1.360 (renewal).

no longer available for a grant unless the earlier grant is recalled. A hearing designed as one for an available frequency becomes by the Commission's action in substance one for the revocation or modification of an outstanding license. So it would seem that petitioner would carry as a matter of law the same burden regardless of the precise provisions of the notice of hearing.

It is suggested that the Commission, by granting the Fetzer application first, concluded that the public interest would be furthered by making Fetzer's service available at the earliest possible date. If so, that conclusion is only an inference from what the Commission did. There is no suggestion, let alone a finding, by the Commission that the demands of the public interest were so urgent as to preclude the delay which would be occasioned by a hearing.

The public, not some private, interest, convenience, or necessity governs the issuance of licenses under the Act. But we are not concerned here with the merits.[8] This involves only a matter of procedure. Congress has granted applicants a right to a hearing on their applications for station licenses.[9] Whether that is wise policy or whether the procedure adopted by the Commission in this case is preferable is not for us to decide. We only hold that where two *bona fide* applications are mutually exclusive the grant of one without a hearing to both deprives the loser of the opportunity which Congress chose to give him.

In *Federal Communications Commission* v. *Sanders Radio Station,* 309 U. S. 470, 476–477, we held that a rival station which would suffer economic injury by the grant

[8] See *Federal Communications Commission* v. *Pottsville Broadcasting Co.,* 309 U. S. 134, 145–146.

[9] Apparently no regulation exists which, for orderly administration, requires an application for a frequency, previously applied for, to be filed within a certain date. Nor is there any suggestion that petitioner's application, which was filed shortly after Fetzer's, was not filed in good faith.

of a license to another station had standing to appeal under § 402 (b) (2) of the Act. In *Federal Communications Commission* v. *National Broadcasting Co.*, 319 U. S. 239, we reached the same conclusion where an application had been granted which would create such interference on the channel given an existing licensee as in effect to modify the earlier license. Petitioner is at least as adversely affected by the action of the Commission in this case as were the protestants in those cases. While the statutory right of petitioner to a hearing on its application has in form been preserved, it has as a practical matter been substantially nullified by the grant of the Fetzer application.[10]

Reversed.

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

MR. JUSTICE FRANKFURTER, dissenting.

The extent to which administrative agencies are to be entrusted with the enforcement of federal legislation is

[10] A license to operate a station is required in addition to a permit to construct one. As respects an operating license, § 319 (b) provides: "Upon the completion of any station for the construction or continued construction of which a permit has been granted, and upon it being made to appear to the Commission that all the terms, conditions, and obligations set forth in the application and permit have been fully met, and that no cause or circumstance arising or first coming to the knowledge of the Commission since the granting of the permit would, in the judgment of the Commission, make the operation of such station against the public interest, the Commission shall issue a license to the lawful holder of said permit for the operation of said station. Said license shall conform generally to the terms of said permit."
For the regulations of the Commission governing such applications see 47 Code Fed. Reg. Cum. Supp. § 1.357. It was conceded on oral argument that in that proceeding petitioner would not be entitled to intervene to challenge the propriety of the grant of the construction permit to Fetzer without a hearing on petitioner's application.

for Congress to determine. Insofar as the actions of these agencies come under the scrutiny of judicial review, it is the business of the courts to respect the distribution of authority that Congress makes as between administrative and judicial tribunals. Of course courts must hold the administrative agencies within the confines of their Congressional authority. But in doing so they should not even unwittingly assume that the familiar is the necessary and demand of the administrative process observance of conventional judicial procedures when Congress has made no such exaction. Since these agencies deal largely with the vindication of public interest and not the enforcement of private rights, this Court ought not to imply hampering restrictions, not imposed by Congress, upon the effectiveness of the administrative process. One reason for the expansion of administrative agencies has been the recognition that procedures appropriate for the adjudication of private rights in the courts may be inappropriate for the kind of determinations which administrative agencies are called upon to make.

The disposition of the present case seems to me to disregard these controlling considerations, if the Court now holds, as I understand it so to do, that whenever conflicting applications are made for a radio license the Communications Commission must hear all the applications together.

In the regulation of broadcasting, Congress moved outside the framework of protected property rights. See *Commission* v. *Sanders Radio Station,* 309 U. S. 470. Congress could have retained for itself the granting or denial of the use of the air for broadcasting purposes, and it could have granted individual licenses by individual enactments as in the past it gave river and harbor rights to individuals. Instead of making such a crude use of its Constitutional powers, Congress, by the Communications Act of 1934, 48 Stat. 1064, 47 U. S. C. § 151, for-

mulated an elaborate licensing scheme and established the Federal Communications Commission as its agency for enforcement. Our task is to give effect to this legislation and to the authority which Congress has seen fit to repose in the Communications Commission.

To come to the immediate issue, what has the Commission done that is here challenged and what authority from Congress does it avouch for what it has done?

The Commission had before it at least two applications for the use of the same radio wave length in the Western Michigan area (Muskegon-Grand Rapids)—that of the petitioner and Fetzer's. The problem before the Commission was the procedure appropriate in acting upon these two applications. Congress has authorized the Commission to grant an application without resort to a public hearing, 47 U. S. C. §§ 309 (a), 319 (a), but a public hearing may be demanded when the Commission denies an application, 47 U. S. C. § 309 (a). The Court in effect rules that in the case of multiple applications the Commission can decide only after a public hearing on all of them. This requirement is apparently derived from the assumption that in this case the Commission, having received two conflicting applications, shut off, out of hand and quite arbitrarily, petitioner's right to have its application considered, as of course the Commission is in duty bound to consider it, by granting Fetzer's. But that is not what happened. The Commission is charged with the ascertainment of the public interest. We must assume that an agency which Congress has trusted discharges its trust. On the record before us it must be accepted that the Commission, before having taken action, carefully tested, according to its established practice, the claims both of Fetzer and of petitioner by the touchstone of public interest. See Attorney General's Committee on Administrative Procedure, Monograph No. 3, The Federal Communications Commission (1940) 8 *et seq.* On

the basis of such inquiry, it found that the Fetzer application was clearly in the public interest; it found that the Ashbacker application did not make a sufficient showing even to stay the Commission's hand in withholding the Fetzer grant long enough to enable Ashbacker to support its application more persuasively. On the contrary, it thought the public interest would be furthered by making Fetzer's service available at the earliest possible date. There is nothing in the Communications Act that restricts the Commission in translating its duty to further the public interest as it did in the particular situation before it. In granting Fetzer's application and setting the denial of the petitioner's down for a hearing after fully canvassing the situation, the Commission brought itself within the explicit provisions of the Communications Act and applied them with that flexibility of procedure which Congress has put into the Commission's own keeping. *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 138.

But it is suggested that the right to a hearing upon denial of an application is not satisfied by a hearing bound to be barren. In order to appreciate the function of a hearing under the statute in a situation like that before us, however, it is vital to remember that the two applications of petitioner's and Fetzer's are very different from an ordinary litigation between Fetzer and petitioner in a court of law. Each of them was before the Commission as the representative of the public interest, the ascertainment of which is the expert function of the Communications Commission. It bears repeating that the application of both presumably received careful scrutiny by the Commission before action was taken. Administrative practice indicates that where there are conflicting applications, the Commission has granted some without hearing where it thought the public interest best served by that procedure, while setting others for hearing where the pub-

lic interest so demanded.[1] Fetzer made a clear showing to the agency designated for the purpose by Congress that the public interest would be served by the grant of its application. The same agency found no basis in public interest for Ashbacker's application. Certainly it is wholly consonant with the scheme of the legislation and the powers given to the Commission that, upon denial of the Ashbacker application after a finding that it would not and Fetzer would serve the public interest, the burden be cast on Ashbacker to show that it would serve the public interest better than would Fetzer. The Commission is authorized by statute to modify a construction permit or any license granted by it.[2] This gives considerable scope for adjusting the prior grant to Fetzer so as to give to the public the benefits of reconciling both the Fetzer and the Ashbacker applications, if the hearing should develop considerations not disclosed by the prior scrutiny of the Commission. Not only that, but the Commission, in its opinion on hearing the Ashbacker complaint, construed its own action in granting the Fetzer application to be conditional, so as to have room for any action which it may find will serve the public interest after the hearing on the Ash-

[1]

Fiscal Year	*Total No. of Applications Considered*	*Conflicting Applications*		
		Number	*No. Granted Without Hearing*	*No. Granted After Hearing*
1941	159	49	14	2
1942	142	52	1	2
1943	23	5	0	1
1944	39	14	2	1
1945	114	69	5	8

[2] Sec. 312 (b): "Any station license hereafter granted under the provisions of this Act or the construction permit required hereby and hereafter issued, may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this Act or of any treaty ratified by the United States will be more fully complied with . . ." *Cf.* 47 Code Fed. Reg. § 1.402.

backer application. Such a practice of conditional grant by the Commission ought not to be deemed outside the range of the procedural discretion allowed to it by Congress.[3]

In this case, however, the restrictions of the hearing granted to Ashbacker do make of it a mere formality, for the Commission put upon Ashbacker the burden of establishing that the grant of a license to it would not interfere with the simultaneous operations of the proposed Fetzer station. But since the Commission had apparently already concluded that the simultaneous operation of the two stations would result in "intolerable interference," its order for a hearing seems to foreclose the opportunity that should still be open to Ashbacker. It is entitled to show the superiority of its claim over that of Fetzer, even though the Commission, on the basis of its administrative inquiry, was entitled to grant Fetzer the license in the qualified way in which the statute authorized, and the Commission made, the grant. In my view, therefore, the proper disposition of the case is to return it to the Commission with direction that it modify its order so as to assure an appropriate hearing of the Ashbacker application. It may be wise policy to require that the Communications Commission should give a public hearing for all multiple applications before granting any. But to my reading of the Communications Act, Congress has not expressed this policy.

MR. JUSTICE RUTLEDGE joins in this opinion.

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[3] Cf. *Berks Broadcasting Co.* (WEEU), Reading, Pennsylvania, 8 F. C. C. 427; *The Evening News Association* (WWJ), Detroit, Michigan, 8 F. C. C. 552; *Merced Broadcasting Co.* (KYOS), Merced, California, 9 F. C. C. 118, 120.

FERNANDEZ, COLLECTOR OF INTERNAL REVENUE, *v.* WIENER ET AL.

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

No. 58. Argued November 5, 1945.—Decided December 10, 1945.

1. Upon the termination of a Louisiana marital community by the death of the husband, a federal estate tax, measured by the value of the entire community property, was levied pursuant to § 811 (e) (2) of the Internal Revenue Code as amended by § 402 of the Revenue Act of 1942. *Held* that the tax does not infringe any provision of the Federal Constitution. Pp. 342, 362.

(1) The statute is a revenue measure enacted by Congress in the exercise of the federal power to lay and collect an excise. P. 351.

(2) The tax does not violate the due process clause of the Fifth Amendment. Pp. 346, 357.

(a) The power of Congress to impose death taxes is not limited to the taxation of transfers at death, but extends to the creation, exercise, acquisition, or relinquishment of any power or legal privilege which is incident to the ownership of property, when any of these is occasioned by death. P. 352.

(b) Upon the termination of a Louisiana marital community by the death of either the husband or wife, there occurs, by virtue of state law, a redistribution of powers and restrictions upon power with respect to the entire community property which affords an appropriate occasion for the levy of an excise tax measured by the value of the entire community property, although from the moment the community was established the respective rights of the spouses in the community were in every sense "vested," and it was certain that the changes in legal and economic relationships to property which occasion the tax would occur. P. 355.

(c) The statute is not invalid as arbitrary and capricious although it taxes transfers at death and also the shifting at death of particular incidents of property. P. 358.

(d) The statute is an excise tax upon the shifting at death of the incidents of property, regardless of their origin, and does not depend for its operation upon any presumption that the entire community property is owned or economically attributable to the spouse first to die. P. 358.

(3) The statute does not contravene the requirement of Article I, § 8 of the Constitution that "excises shall be uniform throughout the United States." P. 359.

(a) The uniformity commanded by the Constitution is geographical uniformity, not uniformity of intrinsic equality and operation. P. 359.

(b) The tax on community property interests is not lacking in geographical uniformity by reason of the fact that in some States such interests are not found. A taxing statute does not fall short of the prescribed uniformity because its operation and incidence may be affected by differences in state laws. P. 359.

(c) The statute is not lacking in uniformity, even though it applies to community property interests and not to interests in tenancies in common and limited partnerships. P. 360.

(4) The tax imposed by the statute, laid upon the shifting at death of some of the incidents of property, is not a direct tax which the Constitution requires to be apportioned. P. 361.

(5) The tax does not invade the powers reserved to the States by the Tenth Amendment. P. 362.

(a) The Tenth Amendment does not restrict the power delegated to the national government to lay an excise tax *qua* tax. P. 362.

(b) The incidental regulatory effect of the tax is embraced within the power to lay it. P. 362.

(c) It is not within the province of the courts to inquire into the unexpressed purposes or motives which may have moved Congress to exercise a power constitutionally conferred upon it. P. 362.

2. Also included in the decedent's gross estate, pursuant to § 811 (g) (4) of the Code as amended by § 404 of the Act, were the entire proceeds of insurance policies on the life of the decedent, on all of which policies the wife was named beneficiary, the right to change the name of the beneficiary was reserved to the insured, and premiums were paid from community funds. *Held* that the tax as so applied is constitutional. Pp. 362–363.

The death of the insured, since it ended his control over the disposition of the proceeds and gave his wife the present enjoyment of them, may constitutionally be made the occasion for the imposition of an indirect tax measured by the proceeds themselves. P. 363.

60 F. Supp. 169, reversed.

APPEAL under § 2 of the Act of August 24, 1937, from a judgment for the plaintiffs in a suit against the Collector

of Internal Revenue to recover an alleged overpayment of federal estate tax, the decision being against the constitutionality of the federal estate tax statute as applied.

Assistant Attorney General Clark, with whom *Acting Solicitor General Judson, Messrs. Sewall Key, Arnold Raum, Bernard Chertcoff* and *Miss Helen R. Carloss* were on the brief, for appellant.

Messrs. Sidney L. Herold and *Charles E. Dunbar, Jr.,* with whom *Mr. Esmond Phelps* was on the brief, for appellees.

The Attorneys General of the States of Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington filed a brief (*Messrs. Max Radin* and *Joseph D. Brady* of counsel), and by special leave of Court *Mr. Radin* argued the cause, on behalf of those States, as *amici curiae,* urging affirmance.

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

In this case the Commissioner of Internal Revenue, proceeding under § 811 (e) (2) of the Internal Revenue Code, 26 U. S. C. § 811 (e) (2), as amended by § 402 of the Revenue Act of 1942, 56 Stat. 798, has levied an estate tax on the termination of the marital community by the death of the husband, a domiciled resident of Louisiana, the tax being measured by the value of the entire community property. And, on the authority of § 811 (g) (4) of the Code, 26 U. S. C. § 811 (g) (4), as amended by § 404 of the same statute, he also included in decedent's gross estate the entire proceeds of insurance policies on the decedent's life.

The principal questions for decision are (1) whether the power asserted by the statute, to tax the entire community interest, is within the taxing power of the United States;

(2) whether the tax infringes the due process clause of the Fifth Amendment; (3) whether the taxing statute contravenes the command of Article I, § 8 of the Constitution that "excises shall be uniform throughout the United States"; (4) whether the tax so far as it is measured by the surviving wife's share of the community property, is a direct tax, invalid because not apportioned as required by Article I, § 8 of the Constitution; and (5) whether the tax invades the powers reserved to the states by the Tenth Amendment.

Appellees, the children and sole heirs of decedent, brought this suit in the District Court for Eastern Louisiana, to recover from appellant, the collector, as an alleged overpayment, so much of the estate tax paid as is attributable to the inclusion in decedent's gross estate of his wife's share of the community property, and of all, rather than half, of the insurance money. The district court gave judgment for appellees, 60 F. Supp. 169, holding that the statute as applied violated the due process clause of the Fifth Amendment. The case comes here on direct appeal from the judgment of the district court under § 2 of the Act of August 24, 1937, 50 Stat. 751, 28 U. S. C. § 349a, appellant assigning as error the lower court's ruling that the statute denied due process, and the court's failure to sustain the levy as a constitutional exercise of the federal taxing power.

The facts as found by the district court are not in dispute. In 1907, decedent, a resident of Louisiana, married a Louisiana resident with whom he lived in that state until his death, his wife surviving. During the marriage he carried on in Louisiana various kinds of business. With the exception of certain real estate located in Mississippi, all the property of decedent at the time of his death was held in ownership by the marital community which existed between him and his wife. At no time during the existence of the community was the wife gainfully em-

ployed outside the household, nor did she receive from any one any salary or other compensation for personal services, nor was any part of the community property derived originally from any separate property of her own. Decedent, having by his will constituted appellees his sole heirs, and having no debts of consequence, no administration was had on his estate, and appellees were by judgment of the probate court placed in possession of all decedent's property.

Appellees filed the federal estate tax return, in which they reported only one-half of the net value of the community property as subject to the tax. Included in the community property, and also reported to the extent of only one-half, were the proceeds of fifteen policies of insurance on the life of decedent, all of which were (a) effected by decedent during the marriage, (b) named the wife as beneficiary, and (c) reserved the right to the insured of changing the beneficiary. All of the premiums on these policies had been paid from community funds. The Commissioner assessed a deficiency in estate tax based upon appellees' failure to include in the gross estate, subject to tax, the entire value of all the community property, and the proceeds of the fifteen insurance policies. Appellees paid the deficiency and, following rejection of their claim for refund, brought the present suit to recover the amount of the deficiency payment which has resulted in the judgment in their favor.

Section 402 of the Revenue Act of 1942 amended § 811 (e) of the Internal Revenue Code, 26 U. S. C. § 811 (e), so as to include in the gross estate of decedent, subject to the estate tax:

"(2) Community Interests.—To the extent of the interest therein held as community property by the decedent and surviving spouse under the law of any State . . . of the United States, . . . except such part thereof as may be shown to have been received as compensation

for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse. In no case shall such interest included in the gross estate of the decedent be less than the value of such part of the community property as was subject to the decedent's power of testamentary disposition." [1]

The revenue laws make no provision for the distribution of the burden of the tax beyond providing that the tax shall be a lien on all of the property included in the decedent's gross estate. § 827 (a) I. R. C., 26 U. S. C. § 827 (a). See *Detroit Bank* v. *United States,* 317 U. S. 329, 331–333. Section 826 (b) of the I. R. C. contemplates that the tax "be paid out of the [taxable] estate before its distribution," unless otherwise directed by decedent's will. Although the share of the surviving spouse is subject to the lien and the tax must be paid out of the estate

[1] Section 811 of the Internal Revenue Code (26 U. S. C. § 811) as amended by § 404 of the Act of 1942, provides that the taxable value of the gross estate of the decedent shall be determined by including the value at the time of his death of

"(g) Proceeds of life insurance

"(1) . . . To the extent of the amount receivable by the executor . . .

"(2) . . . To the extent of the amount receivable by all other beneficiaries as insurance under policies upon the life of the decedent (A) purchased with premiums, or other consideration, paid . . . by the decedent, . . . or (B) with respect to which the decedent possessed at his death any of the incidents of ownership . . .

"(4) . . . For the purposes of this subsection, premiums . . . paid with property held as community property by the insured and surviving spouse under the law of any State, . . . shall be considered to have been paid by the insured, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse; and the term 'incidents of ownership' includes incidents of ownership possessed by the decedent at his death as manager of the community."

as a whole, the federal statute leaves it to the states to determine how the tax burden shall be distributed among those who share in the taxed estate. See *Riggs* v. *Del Drago,* 317 U. S. 95.

Appellees' argument is in substance that the nature of community property is such that husband and wife each has, by virtue of the establishment of their marital community, and from its beginning, a present half interest in such property; that the death of either effects no transfer or relinquishment of any interest in the property other than that of the half share which the decedent had before his death; and that the survivor in consequence of the death of the other spouse acquires no new or different interest in the property, but only retains the half share he or she had prior to the death of the other spouse. From this appellees conclude that the death of either spouse is not an event which in any case can bring more than one-half of the community property within the reach of the power to "lay and collect . . . imposts and excises" conferred on Congress by Article I, § 8 of the Constitution, and that the present amendment taxing the entire value of the community property on the death of either spouse is a denial of due process because the death of neither operates to transfer, relinquish or enlarge any legal or economic interest in the property of the other spouse. Hence it is said that the statute infringes due process by adding to the concededly valid tax on the decedent's half share a further tax measured by the one-half interest of the surviving spouse. Further, it is urged in support of the due process contention, that the statute arbitrarily and capriciously invents different rules of taxation whose alternative application is governed by a single consideration, namely, which will yield the greater tax; and that the statute creates a presumption contrary to state law, and having no rational basis in fact, that the entire com-

munity is owned or economically attributable to the spouse first to die. It is also argued that even if Congress could validly impose the tax where, as here, the husband is first to die, there is no basis for the tax where the wife dies first, and that since the statute purports to apply in either case, and is not separable, it cannot be validly applied in this.

It is also contended that the tax is not uniform as required by Article I, § 8, Clause 1 of the Constitution, because the joint interests of husband and wife in community property states are taxed according to a different and more onerous standard than is applied to comparable joint interests, and specifically to tenancies in common and limited partnerships, created under the laws of other states in which the presumption is not applied; and because the statute disregards for purposes of taxation the property laws of the community property states, while recognizing the property laws of other states for those purposes.

It is said too that the levy is a direct tax, invalid because not apportioned (Article I, § 9, Clause 4 of the Constitution), insofar as it contemplates collection of part of the tax out of the wife's half of the community property, since, it is said, there is no excisable event touching her property on her husband's death and the tax collected out of her property is in effect a direct tax upon it. And finally the tax is said to invade the powers reserved to the states by the Tenth Amendment, to determine property relationships within their borders.

The merits of these contentions cannot be accurately appraised without some inquiry as to the nature of respective spouses' community property interests as defined by Louisiana law. We have had occasion in several earlier cases to make some examination of the laws governing the interests of the spouses in community property states.

See e. g., *Moffitt* v. *Kelly*, 218 U. S. 400; *Poe* v. *Seaborn*, 282 U.S. 101; *Bender* v. *Pfaff*, 282 U.S. 127; *Commissioner* v. *Harmon*, 323 U. S. 44. Counsel for appellees concede that the opinion in *Bender* v. *Pfaff*, *supra*, so far as it goes, correctly defines the several interests of the spouses in Louisiana community property. To that we now add a more detailed statement so far as it may be relevant to the decision of the present case.

By the law of Louisiana, every marital status subject to the laws of the state superinduces a partnership or community of the spouses with respect to property in the state acquired during the life of the community, unless there be at the time of the marriage a stipulation to the contrary.[2] All earnings and all property acquired by the husband or wife during the life of the community become community property, with certain limited exceptions not here involved, and which need not be detailed further than to say that the spouses can acquire some separate property during marriage.[3] It is said that all property acquired by the spouses during the marriage which falls into the community is "due to the joint or common efforts, labor, industry, economy, and sacrifices of the husband and wife," and that for this reason the husband and wife each has at all times an equal present interest in an undivided half of the whole community.[4] The management of the community is entrusted to the exclusive control of the husband,[5] and he may deal with and dispose of community property with no liability to account to the wife so long

[2] Dart's Louisiana Civil Code (1945) Article 2399.

[3] *Id.*, Article 2402; see *Troxler* v. *Colley*, 33 La. Ann. 425. The income from the separate property of the husband, and of such of the wife's separate property as is given over to the husband's management also falls into the community by Article 2402, *supra;* see also *Hellberg* v. *Hyland*, 168 La. 493, 122 So. 593.

[4] *Succession of Wiener*, 203 La. 649, 14 So. 2d 475; see also *Phillips* v. *Phillips*, 160 La. 813, 825 *et seq.*, 107 So. 584.

[5] Dart's Louisiana Civil Code (1945) Article 2404.

as the community continues.[6] The rule is, however, that the husband may not give away any of the immovables, nor a quota of the movables, nor may he fraudulently make any alienation of property "to injure his wife."[7]

So long as the community continues, the wife has no control over community property. She may not give it away, nor sell it, and in general, may not bind it for the payment of her debts.[8] But upon the termination of the community,[9] she, her heirs, or other designees receive in full possession and enjoyment one-half in value of the

[6] *McCaffrey* v. *Benson,* 40 La. Ann. 10, 3 So. 393; *Frierson* v. *Frierson,* 164 La. 687, 114 So. 594.

[7] Dart's Louisiana Civil Code (1945) Art. 2404. The rights secured to the wife by this inhibition on gifts apparently may not be enforced against the husband or those taking under him either during the life of the community or after its termination. The sole remedy is a suit against the donee to recover the property in his hands, *Bister* v. *Menge,* 21 La. Ann. 216; *Frierson* v. *Frierson, supra,* and even such a suit apparently may not be maintained until after the termination of the community. Daggett, The Community Property System of Louisiana (1931) 24. Where the husband has aliened some part of the community in fraud of his wife's rights, she or those representing her have an action for reimbursement against the husband or his representatives upon the termination of the community, but not before. *Guice* v. *Lawrence,* 2 La. Ann. 226, 228. The fraud required for an action of this kind seemingly must be intentional and the motive for the transfer. See Art. 2404, *supra; Succession of Packwood,* 12 Rob. (La.) 334, 364–5; *Exposito* v. *Lapeyrouse,* 195 So. 814 (La. App.).

[8] *Bywater* v. *Enderle,* 175 La. 1098, 145 So. 118; *D. H. Holmes Co.* v. *Morris,* 188 La. 431, 177 So. 417.

[9] Dart's Louisiana Civil Code (1945) Articles 2406, 2425. At the dissolution of the community, the share of each spouse in the partnership's assets is credited with one-half of the amount by which the other spouse's separate property has been enhanced in value by the application thereto of community funds or of common labor, *id.,* Article 2408; *Dillon* v. *Dillon,* 35 La. Ann. 92. The wife's share must also be credited with one-half of the amount of community funds expended to pay the husband's separate debts, *Glenn* v. *Elam,* 3 La.

total community assets subject to the payment of community debts.[10] This right so to receive one-half is indefeasible, and if she die first, her heirs or legatees take her half-share to the exclusion of the husband; if the husband die first, his half passes to his heirs or as he has directed, and the other half is the wife's.[11]

Examination of the legislative history of the challenged statute, as disclosed by the Committee Hearings and Reports and the Congressional debates, can leave no doubt that the purpose of Congress in enacting it was the elimination of what was believed to be an unequal distribution of the tax burdens of estate taxes which led Congress to apply to community property the principles of death taxes which it had already applied to other forms of joint ownership, on the death of either of the joint owners. The Report of the House Committee recommending the adoption of the amendment to § 811 of the Internal Revenue Code pointed out the preferential treatment accorded by

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Ann. 611, although those debts may be satisfied during the community by levy upon community property. *Davis* v. *Compton,* 13 La. Ann. 396.

The community relationship ends upon the death of one spouse, divorce, separation from bed and board, or, in the absence of these, upon a judgment of judicial separation of property. See Dart's Louisiana Civil Code (1945), Articles 2425, 2427, 2430. Only the wife may request such a separation, and the separation is not a mere matter of consent between the spouses. *Driscoll* v. *Pierce,* 115 La. 156, 38 So. 949. She must show that her dowry rights or other separate property entrusted to the husband are in danger owing to her husband's mismanagement or financial embarrassment, or that like conditions render it doubtful that she or the children of the marriage will have the benefit of her own earnings, or of her future acquisitions of separate property. *Davock* v. *Darcy,* 6 Rob. (La.) 342; *Webb* v. *Bell,* 24 La. Ann. 75; *Meyer* v. *Smith & Co.,* 24 La. Ann. 153; *Jones* v. *Jones,* 119 La. 677, 44 So. 429.

[10] Dart's Louisiana Civil Code (1945) Articles 2406, 2409, 2430.

[11] See *Succession of Wiener, supra.*

the federal estate tax laws to community property. H. Rep. No. 2333, 77th Cong., 2d Sess., pp. 35 to 37, 160.[12]

There is no dispute as to the construction or operation of the provisions of the statute. Appellees do not deny that the Commissioner correctly applied the statute and correctly computed the tax if the statute is valid. Here, as will presently appear, there is no basis for saying that the statute, either in its purpose or in its practical effect, operates to regulate matters whose regulation the Constitution reserved to the states. It is a revenue measure

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[12] The report stated:

"For the purpose of Federal estate taxation, husband and wife living in community-property States enjoy a preferential treatment over those living in non-community-property States. This is due to the fact that all of the property acquired by the husband after marriage, through his own efforts, in a community-property State is treated as if one-half belonged to the wife. In non-community-property States, all such property is regarded as belonging entirely to the husband. The difference in the amount of the Federal estate tax is enormous as shown by the following tables: . . ."

The tables show the great disparity between the estate tax levied on community property upon the death of the husband who had accumulated it and the death of the husband in like circumstances in non-community states. The tax upon an estate of $100,000 being $500 in a community property state and $9,500 in non-community property states. In the case of a $5,000,000 estate the tax saving in a community property state would amount to as much as $485,800, the saving on a $10,000,000 estate in a community property state amounting to as much as $1,171,800.

The proposed amendment, it was said, "eliminates special estate tax privileges enjoyed by decedents of community property estates." To the same effect is S. Rep. No. 1631, 77th Cong., 2d Sess., p. 231. The inequity inherent in allowing spouses in community property states to bear a lighter tax burden than their counterparts in other states had been brought to Congressional attention on other occasions. See e. g., President Roosevelt's message to Congress June 1, 1937, H. Doc. No. 260, 75th Cong., 1st Sess., p. 5; also Reports to the Joint Committee on Internal Revenue Taxation, Vol. 2, Part II (1933), pp. 15, 118–121, 139–140.

enacted in the exercise of the federal power to lay and collect an excise. Congress has a wide latitude in the selection of objects of taxation, *Brushaber* v. *Union Pacific R. Co.*, 240 U. S. 1, 12; *Steward Machine Co.* v. *Davis*, 301 U. S. 548, 581, and even under the equal protection clause of the Fourteenth Amendment, which was not included in the Fifth, the states may distinguish, for purposes of transfer taxes, between property which has borne its fair share of the tax burdens and similar or like property passing to the same class of beneficiaries which has not. *Watson* v. *State Comptroller*, 254 U. S. 122. Hence we are concerned only with the power of Congress to enact the tax.

It is true that the estate tax as originally devised and constitutionally supported was a tax upon transfers. *Knowlton* v. *Moore*, 178 U. S. 41; *Y. M. C. A.* v. *Davis*, 264 U. S. 47, 50. But the power of Congress to impose death taxes is not limited to the taxation of transfers at death. It extends to the creation, exercise, acquisition, or relinquishment of any power or legal privilege which is incident to the ownership of property, and when any of these is occasioned by death, it may as readily be the subject of the federal tax as the transfer of the property at death. See *Bromley* v. *McCaughn*, 280 U. S. 124, 135, *et seq.*

Congress may tax real estate or chattels if the tax is apportioned, and without apportionment it may lay an excise upon a particular use or enjoyment of property or the shifting from one to another of any power or privilege incidental to the ownership or enjoyment of property. *Bromley* v. *McCaughn, supra; Burnet* v. *Wells*, 289 U. S. 670, 678; cf. *Nashville, C. & St. L. R. Co.* v. *Wallace*, 288 U. S. 249, 267–8; *Henneford* v. *Silas Mason Co.*, 300 U. S. 577, 582. The power to tax the whole necessarily embraces the power to tax any of its incidents or the use or enjoyment of them. If the property itself may con-

stitutionally be taxed, obviously it is competent to tax the use of it, *Hylton* v. *United States,* 3 Dall. 171; *Billings* v. *United States,* 232 U. S. 261, or the sale of it, *Nicol* v. *Ames,* 173 U. S. 509; *Thomas* v. *United States,* 192 U. S. 363, 370, or the gift of it, *Bromley* v. *McCaughn, supra.* It may tax the exercise, non-exercise, or relinquishment of a power of disposition of property, where other important indicia of ownership are lacking. *Saltonstall* v. *Saltonstall,* 276 U. S. 260; *Chase National Bank* v. *United States,* 278 U. S. 327; *Estate of Rogers* v. *Commissioner,* 320 U. S. 410; cf. *Graves* v. *Schmidlapp,* 315 U. S. 657 with § 811 (d) (f) of the Internal Revenue Code, 26 U.S.C. § 811 (d) (f).

If the gift of property may be taxed, we cannot say that there is any want of constitutional power to tax the receipt of it, whether as the result of inheritance, *Stebbins* v. *Riley,* 268 U. S. 137, or otherwise, whatever name may be given to the tax, and even though the right to receive it, as distinguished from its actual receipt and possession at a future date, antedated the statute. Receipt in possession and enjoyment is as much a taxable occasion within the reach of the federal taxing power as the enjoyment of any other incident of property. The taking of possession of inherited property is one of the most ancient subjects of taxation known to the law. Such taxes existed on the European Continent and in England prior to the adoption of our Constitution.[13]

It is upon these principles that this Court has consistently sustained the application of estate taxes upon the death of one of the joint owners to property held in joint ownership, measured by the full value of the property so

[13] *Nielsen* v. *Johnson,* 279 U. S. 47, 54, *et seq.;* Gleason & Otis, "Inheritance Taxation" (4th ed.), p. 243 *et seq.* Feudal "relief" was a payment exacted of the heir for the privilege of admission to possession of the land of his ancestor. Digby, "History of the Law of Real Property" (5th ed.), p. 40.

held. We upheld a like tax when applied to tenancies by the entirety in *Tyler* v. *United States,* 281 U. S. 497; *Third National Bank & Trust Co.* v. *White,* 287 U. S. 577, and to property held in joint tenancy in *United States* v. *Jacobs* and *Dimock* v. *Corwin* (companion cases), 306 U. S. 363.

Decision in these cases was not rested, as appellees argue, on the ground that the tax was imposed on a gift made by the husband, who had created the tenancy, viewed as a substitute for a testamentary transfer, or on any event which antedated the death of one of the joint owners. Instead, as we said in *Whitney* v. *Tax Commission,* 309 U. S. 530, 539, "the emphasis in these cases [was] on the practical effect of death in bringing about a shift in economic interest, and the power of the legislature to fasten on that shift as the occasion for a tax." We pointed out in *Tyler* v. *United States, supra,* 503, 504, that the use, possession and enjoyment of the joint property which was joint before the death was thereby made exclusive in the survivor, and thus constituted a "definite accession to the property rights" of the survivor. These circumstances were thought sufficient to make valid the inclusion of the property in the gross estate which forms the primary basis for the measurement of the tax. And in *United States* v. *Jacobs, supra,* this Court sustained the tax, assailed on due process grounds, when applied to a joint tenancy created before the enactment of the taxing statute. We said, 306 U. S. at 371, that the subject of the tax was not the gift to the wife made by the husband's creation of the joint tenancy for himself and wife, but the change in possession and enjoyment of the entire property, occasioned by the death of one of the joint tenants, and that the tax was appropriately measured by the value of the entire property. "Under the statute the death of decedent is the event in respect of which the tax is laid. It is the existence of the joint tenancy at that time, and not its creation

at the earlier date, which furnishes the basis for the tax." *Griswold* v. *Helvering,* 290 U. S. 56, 58. Compare *Saltonstall* v. *Saltonstall, supra,* 271.

Similarly, a tax upon the termination by death of a power to dispose of property, created before the enactment of the tax statute, does not offend due process, *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339, nor does a tax upon the receipt of income which was earned and due before the enactment of the taxing statute. *Brushaber* v. *Union Pacific R. Co., supra,* 20; *Lynch* v. *Hornby,* 247 U. S. 339, 343; *Taft* v. *Bowers,* 278 U. S. 470, 483, 484; *Cooper* v. *United States,* 280 U. S. 409, 411. It is the receipt in possession or enjoyment of the proceeds of a right previously acquired and vested upon which the tax is laid. Such was deemed to be the taxable event under our earlier death taxes. *Clapp* v. *Mason,* 94 U. S. 589; *Vanderbilt* v. *Eidman,* 196 U. S. 480. And see *Moffitt* v. *Kelly, supra.*

With these general principles in mind, we turn to their application to federal death taxes laid with respect to the interests in community property. As we have seen, the death of the husband of the Louisiana marital community not only operates to transfer his rights in his share of the community to his heirs or those taking under his will. It terminates his expansive and sometimes profitable control over the wife's share, and for the first time brings her half of the property into her full and exclusive possession, control and enjoyment. The cessation of these extensive powers of the husband, even though they were powers over property which he never "owned," and the establishment in the wife of new powers of control over her share, though it was always hers, furnish appropriate occasions for the imposition of an excise tax.

Similarly, with the death of the wife, her title or ownership in her share of the community property ends, and passes to her heirs or other appointees. More than this,

her death, by ending the marital community, liberates her husband's share from the restrictions which the existence of the community had placed upon his control of it. He acquires by her death, the right to have his share of the community separated from hers by partition and to hold it free of all controls. He obtains, for the first time, the right to give away his immovables, and the right to give away his movables as a whole or by a fraction of the whole. Here too, the wife's death brings into being a new set of relationships with respect to his share of the community as well as hers, among which are new powers of control and disposition which are proper subjects of an excise tax measured by the value of his share. And while we do not rest decision on the point, it is of some significance that this shift of legal relationships effects a shift in point of economic substance. The precept that the wife is equal co-owner with her husband of community property undoubtedly calls into play within the marital relationship personal and psychological forces which have great importance in the practical determination of how community property shall be managed by the husband. Though it may be impossible fully to translate these imponderables into legal rules, the death of the wife undoubtedly brings, in every practical aspect, greater freedom to the husband in his disposition of that share of community property which is technically his, than is to be gathered solely from a reading of statutes and case law.

This redistribution of powers and restrictions upon power is brought about by death notwithstanding that the rights in the property subject to these powers and restrictions were in every sense "vested" from the moment the community began. It is enough that death brings about changes in the legal and economic relationships to the property taxed, and the earlier certainty that those changes would occur does not impair the legislative power

to recognize them, and to levy a tax on the happening of the event which was their generating source.

The principles which sustain the present tax against due process objections are precisely those which sustained the California tax, measured by the entire value of community property in *Moffitt* v. *Kelly, supra.* There the Court recognized that the surviving wife took her share of the property on her husband's death, not as an heir, but as an owner of an interest, the right to which she acquired before the death and before the enactment of the taxing act. But the levy upon the entire value of the community was sustained, not as a tax upon property or the transfer of it, but as a tax upon the "vesting of the wife's right of possession and enjoyment arising upon the death of her husband," which the Court deemed an appropriate subject of taxation, notwithstanding the contract, equal protection and due process clauses of the Constitution.[14] So far as *Coolidge* v. *Long,* 282 U. S. 582, is inconsistent with *Moffitt* v. *Kelly, supra,* and the contentions now urged by the Government, the application of the reasoning of the *Coolidge* case to the taxation of joint or community interests must be taken to have been limited by our decisions in *Tyler* v. *United States, supra,* and *United States* v. *Jacobs, supra,* and the cases following them.

What we have said of the nature and incidence of the tax on community property in large measure disposes of the various other contentions of appellees. Since the levy is an excise and not a property tax, the case is not one of

[14] The force of *Moffitt* v. *Kelly, supra,* as an authority controlling the taxation of community property in Louisiana, where the wife's interest is vested before the death of the husband, is not impaired by the fact that the California courts later held that the wife's interest in community property in that state is not so vested. Cf. *United States* v. *Robbins,* 269 U. S. 315 with *United States* v. *Malcolm,* 282 U. S. 792. The Moffitt case was decided upon the assumption that the wife's interest was "vested."

taking the survivor's property to pay the tax on decedent's estate. As the tax is upon the surrender of old incidents of property by the decedent and the acquisition of new by the survivor, it is appropriately measured by the value of the property to which these incidents attach. The tax burden thus laid is not so unrelated to the privileges enjoyed by the taxpayers who are owners of the property affected that it can be said to be an arbitrary exercise of the taxing power. *Milliken* v. *United States,* 283 U. S. 15; *Burnet* v. *Wells, supra,* 678–9. Compare *Saltonstall* v. *Saltonstall, supra.* While it may generally be true, as appellees argue, that neither the husband nor wife gains any over-all financial advantage when the other dies, it suffices that the decedent loses and the survivor acquires, with respect to the property taxed, substantial rights of enjoyment and control which may be of value. Liability to the tax, in order to avoid constitutional objection, does not have to rest upon the enjoyment by the taxpayer of all the privileges and benefits of the most favored owner at a given time and place. *Corliss* v. *Bowers,* 281 U. S. 376; *Reinecke* v. *Smith,* 289 U. S. 172; cf. *Burnet* v. *Guggenheim,* 288 U. S. 280.

We find no basis for the contention that the tax is arbitrary and capricious because it taxes transfers at death and also the shifting at death of particular incidents of property. Congress is free to tax either or both, and here it has taxed both, as it may constitutionally do, in order to accomplish "the purposes and policy of taxation" to protect the revenue and avoid an unequal distribution of the tax burden. *Watson* v. *State Comptroller, supra.*

Even if it could be thought to affect the constitutionality of the taxing statute, it is plain that the statute does not depend for its operation upon any presumption that the entire community property is owned or economically attributable to the spouse first to die. Save as the statute itself grants an exemption by such attribution, so

far as the community property "may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse," the tax is laid without regard to the economic source of the community property. Apart from the exemption, it is, as we have seen, the shifting at death of the incidents of the property, regardless of origin, which is the subject of the tax.

The present statute, which was enacted in order to secure a more equitable distribution of the burden of federal death taxes,[15] is assailed because the tax is lacking in uniformity. But the uniformity in excise taxes exacted by the Constitution is geographical uniformity, not uniformity of intrinsic equality and operation. *Knowlton* v. *Moore, supra,* 83–109. The Constitution does not command that a tax "have an equal effect in each State," *id.* p. 104. It has long been settled that within the meaning of the uniformity requirement a "tax is uniform when it operates with the same force and effect in every place where the subject of it is found." *Head Money Cases,* 112 U. S. 580, 594. See also *LaBelle Iron Works* v. *United States,* 256 U. S. 377, 392–3; *Bromley* v. *McCaughn, supra,* 138; *Steward Machine Co.* v. *Davis, supra,* 583.

The amendment taxing community property interests is applicable throughout the territory of the United States wherever such interests may be found. There is no lack of geographical uniformity because in some states they are not found. For a taxing statute does not fall short of the prescribed uniformity because its operation and incidence may be affected by differences in state laws. *Phillips* v. *Commissioner,* 283 U. S. 589, 602; *Riggs* v. *Del Drago, supra,* 102. "Differences of state law, which may bring a person within or without the category designated by

[15] See footnote 12, *ante.*

Congress as taxable, may not be read into the Revenue Act to spell out a lack of uniformity" in the constitutional sense. *Poe* v. *Seaborn, supra,* 117–8.

Appellees suggest that interests in tenancies in common and limited partnerships are very like interests in community property, and that if the tax is to be uniform, the one cannot be taxed unless the others are also. But even if it be as appellees argue, that common law family partnership or other arrangements with different names can be so devised that the marital relationship is attended by the same powers and restrictions as those derived from the laws of the community property states, and that they are differently or more lightly taxed than community property interests, we find no lack of uniformity in the constitutional sense. The present amendment is geographically uniform in its application to the only subject of which it treats, community property interests, and it levies in every state an identical tax upon the subject matter included within its terms—defined property interests created by state law, having a common historical origin, a common name, and constituting a universally recognized distinct class of property interests.

There can be no doubt that the selection of such a class for taxation would not offend against the Fifth Amendment, or even the Fourteenth, merely because it did not attempt to reach casual arrangements resulting from individual agreements. Taxes must be laid by general rules. See *State Railroad Tax Cases,* 92 U. S. 575, 612; *Head Money Cases, supra,* 595; *LaBelle Iron Works* v. *United States, supra,* 392; *Great Atlantic & Pacific Tea Co.* v. *Grosjean,* 301 U. S. 412, 424. Considerations of practical administrative convenience and cost in the administration of tax laws afford adequate grounds for imposing a tax on a well recognized and defined class, without attempting to extend it so as to embrace a penumbra of special and more or less casual interests which in each case may or

may not resemble the taxed class. *Burnet* v. *Wells, supra,* 678; *Carmichael* v. *Southern Coal & Coke Co.,* 301 U. S. 495, 511; *Rapid Transit Corp.* v. *New York,* 303 U. S. 573, 582–3; *Madison Avenue Offices* v. *Browne,* appeal dismissed, 326 U. S. 682. Such interests would be but isolated specimens of the attorney's art, and likely to resist efforts to identify them with the taxable subject.

Appellees' contention that the uniformity clause precludes such classification would in effect add to the constitutional restraints upon Congress an equal protection clause more restrictive than that of the Fourteenth Amendment, and is without judicial or historical support. This Court in *LaBelle Iron Works* v. *United States, supra,* 392, *et seq.* recognized that the uniformity clause, beyond requiring geographical uniformity in the application of the particular tax laid by the taxing act, could not be taken to impose greater restrictions on Congress' power to tax than those which the equal protection clause places upon the states. We reaffirm what this Court has many times held, that the constitutional command that "Excises shall be uniform throughout the United States" refers to geographical uniformity in the application of the particular excise which Congress has prescribed. We conclude that it adds nothing to restrictions which other clauses of the Constitution may impose upon the power of Congress to select and classify the subjects of taxation. It requires only that what Congress has properly selected for taxation must be identically taxed in every state where it is found.

An excise tax, which the Constitution requires to be uniform, laid upon the shifting at death of some of the incidents of property, could hardly be thought to be a direct tax which must be apportioned. See *Bromley* v. *McCaughn, supra,* 138. The contention that such a tax is direct because measured by the property whose incidents are shifted at death, was rejected in *Bromley* v.

McCaughn, supra, and in *Tyler* v. *United States, supra,* 501–4, and *Phillips* v. *Dime Trust Co.,* 284 U. S. 160, 165. A tax imposed upon the exercise of some of the numerous rights of property is clearly distinguishable from a direct tax, which falls upon the owner merely because he is owner, regardless of his use or disposition of the property. "The persistence of this distinction and the justification for it rest upon the historic fact that [excise] taxes of this type were not understood to be direct taxes when the Constitution was adopted and, as well, upon the reluctance of this Court to enlarge, by construction, limitations upon the sovereign power of taxation by Article I, § 8, so vital to the maintenance of the national government." *Bromley* v. *McCaughn, supra,* 137.

The Tenth Amendment does not operate as a limitation upon the powers, express or implied, delegated to the national government. *United States* v. *Darby,* 312 U. S. 100, 123–4. The amendment has clearly placed no restriction upon the power delegated to the national government to lay an excise tax *qua* tax. Undoubtedly every tax which lays its burden on some and not others may have an incidental regulatory effect. But since that is an inseparable concomitant of the power to tax, the incidental regulatory effect of the tax is embraced within the power to lay it. It has long been settled that an Act of Congress which on its face purports to be an exercise of the taxing power, is not any the less so because the tax is burdensome or tends to restrict or suppress the thing taxed. In such a case it is not within the province of courts to inquire into the unexpressed purposes or motives which may have moved Congress to exercise a power constitutionally conferred upon it. *Sonzinsky* v. *United States,* 300 U. S. 506, 513–514, and cases cited.

We conclude that the tax here laid with respect to the community property infringes no constitutional provision.

The inclusion of all the proceeds of decedent's life in-

surance policies within his gross estate for purposes of estate taxation requires no extended discussion. There is no contention that the proceeds of the policies are not made taxable by the terms of § 811 (g) of the Internal Revenue Code as amended by § 404 of the Revenue Act of 1942.[16] The amendment indicates on its face the purpose to bring the provisions for the taxation of the proceeds of insurance policies payable at death into harmony with the amendment taxing community interests, and the court below seems to have regarded, as do the parties here, the disposition of the questions affecting the tax on community interests as determinative of the validity of the tax on the proceeds of the policies. But it is sufficient for present purposes that the tax is laid upon the amount receivable by the wife as a beneficiary of the policies on the death of her husband, and that the husband possessed at his death an incident of ownership, the power to change the beneficiaries.

For reasons which we have already fully developed in this opinion, the death of the insured, since it ended his control over the disposition of the proceeds and gave his wife the present enjoyment of them, may be constitutionally made the occasion for the imposition of an indirect tax measured by the proceeds themselves. *Stebbins* v. *Riley, supra,* 141; *Chase National Bank* v. *United States, supra.*

Reversed.

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

MR. JUSTICE DOUGLAS, concurring.

Prior to the Revenue Act of 1942 there was a great lack of uniformity among the States in the incidence of the federal estate tax. In most of the States the accumulations

[16] Footnote 1, *ante.*

of the husband (who typically is the bread-winner) were taxed in their entirety on his death. In the community property states the tax generally reached only half of the accumulations because of the theory that they were the product of the wife's as well as of the husband's activities. It was this disparity which Congress sought to eliminate. As stated in the House Report (H. Rep. No. 2333, 77th Cong., 2d Sess., pp. 35–37),

"For the purpose of Federal estate taxation, husband and wife living in community-property States enjoy a preferential treatment over those living in non-community-property States. This is due to the fact that all of the property acquired by the husband after marriage, through his own efforts, in a community-property State is treated as if one-half belonged to the wife. In non-community-property States, all such property is regarded as belonging entirely to the husband."

There are contained in the Report tables showing the difference in the amount of the federal estate tax in the community property States and in the other States, after which the Committee makes the following comment,

". . . in some instances there is an entire exemption from the Federal estate tax for the reason that the omission of one-half of the community property reduces the husband's net estate below the minimum exemption of $40,000. Moreover, this halving of community property greatly reduces the estate tax because of the progressive rates. For example, under the present law, a net estate of $50,000 will pay an estate tax of $500 in a non-community-property State and no tax in a community-property State. An estate of $100,000 will pay a tax of $9,500 on the death of the husband in a non-community-property State and a tax of $500 on the death of the husband in a community-property State.

"If the wife dies within 5 years of her husband, the remaining $50,000 upon which the husband paid no estate

tax will be subject to an estate tax of $500. Thus, the total tax paid on this $100,000 estate in the community-property State will be $1,000 as compared with $9,500 in the non-community-property State or a tax saving of $8,500. In the case of a $5,000,000 estate, the tax saving in a community-property State will amount to as much as $485,800 and in the case of a $10,000,000 estate, the tax saving in a community-property State will amount to as much as $1,171,800."

And see S. Rep. No. 1631, 77th Cong., 2d Sess., p. 231.

Much may be said for the community property theory that the accumulations of property during marriage are as much the product of the activities of the wife as those of the titular bread-winner. But I can see no constitutional reason why Congress may not credit them all to the husband for estate tax purposes. The character and extent of property interests under local law often determine the reach of federal tax statutes. *Helvering* v. *Stuart,* 317 U. S. 154, 161–162, and cases cited. And see Cahn, Local Law in Federal Taxation, 52 Yale L. Journ. 799. Yet that is not always so. *United States* v. *Pelzer,* 312 U. S. 399. Taxation is eminently a practical matter. Congress need not be circumscribed by whatever lines are drawn by local law. It may rely, as *Tyler* v. *United States,* 281 U. S. 497, 502–503, held, on more realistic considerations and base classifications for estate tax purposes on economic actualities. It was held, to be sure, in *Hoeper* v. *Tax Commission,* 284 U. S. 206, that a State could not assess against the husband an income tax computed on the combined total of his and his wife's income. But I can see no reason why that which is in fact an economic unit may not be treated as one in law. For as Mr. Justice Holmes pointed out in his dissent, there is a community of interest "when two spouses live together and when usually each would get the benefit of the income of each without inquiry into the source." And he went on to say

"Taxation may consider not only command over, but actual enjoyment of, the property taxed." 284 U. S. pp. 219–220. Cf. *Helvering* v. *Clifford,* 309 U. S. 331, 335–337.

The Congress has not gone the full distance here. It has not included in one estate all the property owned by husband and wife. So far as this case is concerned, it has only included in the estate of the husband the accumulations which under the community property system are deemed to have been produced by the joint efforts of him and his wife. I can see no obstacle to that course unless it be the uniformity clause of the Constitution. Art. I, § 8, Cl. 1. But there can be no objection on that score. On the facts of this case the law goes no further than to eliminate the estate tax advantage which a married rancher, business man, etc., in Louisiana has over those similarly situated in the common law States. Congress, to be sure, has disregarded the manner in which Louisiana divided "ownership" of property between husband and wife. But as between husband and wife, notions of "vested interests," "ownership," and the like, established by local law, are no sure guide to what "belongs" to one or the other in any practical sense. We would be blind to the usual implications of the intimate relationship of marriage if we forced Congress to treat such divisions of "ownership" the same way it does divisions of "ownership" among strangers. I find no such compulsion in the Constitution.

MR. JUSTICE BLACK joins in this opinion.

Counsel for Parties.

UNITED STATES *v.* ROMPEL, ADMINISTRATOR.

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

No. 59. Argued November 5, 6, 1945.—Decided December 10, 1945.

A federal estate tax, pursuant to § 811 (e) (2) of the Internal Revenue Code as amended by § 402 of the Revenue Act of 1942, on the termination of a Texas marital community by the death of the husband, the tax being measured by the value of the entire community property, *held* valid under the Federal Constitution. *Fernandez* v. *Wiener, ante,* p. 340. P. 370.

59 F. Supp. 483, reversed.

APPEAL under § 2 of the Act of August 24, 1937, from a judgment for the plaintiff in a suit against the United States to recover an alleged overpayment of federal estate tax, the decision being against the constitutionality of the federal estate tax statute as applied.

Assistant Attorney General Clark, with whom *Acting Solicitor General Judson, Messrs. Sewall Key, Arnold Raum, Bernard Chertcoff* and *Miss Helen R. Carloss* were on the brief, for the United States.

Messrs. J. Paul Jackson and *Harry C. Weeks,* with whom *Messrs. Rupert N. Gresham* and *Palmer Hutcheson* were on the brief, for appellee.

The Attorneys General of the States of Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington filed a brief (*Messrs. Max Radin* and *Joseph D. Brady* of counsel) on behalf of those States as *amici curiae,* urging affirmance. By special leave of Court, *Mr. Palmer Hutcheson* argued the cause for the State of Texas as *amicus curiae.*

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

This is a companion case to *Fernandez* v. *Wiener, ante,* p. 340. The Commissioner of Internal Revenue, proceeding under § 811 (e) (2) of the Internal Revenue Code, 26 U. S. C. § 811 (e) (2), as amended by § 402 of the Revenue Act of 1942, 56 Stat. 798, has levied, and appellee has paid, an estate tax on the termination of a Texas marital community by the death of the husband, a domiciled resident of Texas, the tax being measured by the value of the entire community property. All of the constitutional questions raised here were presented and decided in *Fernandez* v. *Wiener.*

Appellee, decedent's Administrator, brought this suit under the Tucker Act, 28 U. S. C. §§ 761–765, to recover as an alleged overpayment so much of the estate tax paid as is attributable to the inclusion in decedent's gross estate of the value of the wife's share of the community property.

The facts found by the district court were stipulated and are not in dispute. Decedent, a resident of Texas, was married February 12, 1901, and died on November 17, 1943, leaving him surviving his wife, their child, and grandchildren. From the date of the marriage until 1934 decedent's principal activity was that of raising livestock on a ranch in Texas, acquired largely on credit, and paid for out of savings from the ranching business. Other savings from the business were invested from time to time. After 1934 he received rent from the ranch property and income from loans and investments accumulated out of savings. During the marriage neither decedent nor his wife was ever employed by any one at a wage or salary, and neither received any commissions, fees or similar compensation for personal services rendered. At the time of decedent's death the community property consisted of the original ranch property, investments acquired from

savings from the ranch business, rentals and other income from investments.

In the estate tax return for decedent's estate only one-half of the value of the community property was reported. The Commissioner included the full value of the community property in the decedent's gross estate, and assessed a deficiency accordingly, which appellee paid. In this suit which followed, the district court gave judgment for appellee, 59 F. Supp. 483, holding that the tax violated the due process clause of the Fifth Amendment and the command of Article I, § 8 that "all Duties, Imposts and Excises shall be uniform throughout the United States." The Court found it unnecessary to pass on other constitutional contentions presented.

The case comes here on direct appeal under § 2 of the Act of August 24, 1937, 50 Stat. 751, 28 U. S. C. § 349a, appellant assigning as error the district court's ruling that the tax violates the due process clause of the Fifth Amendment and the uniformity clause of Article I, § 8 of the Constitution, and the district court's failure to hold that the tax is constitutional.

Community property has been recognized and defined by the laws of Texas throughout its history.* Its laws governing community property interests are similar in most respects to those of Louisiana described in our opinion in the *Wiener* case, *supra*. On the death of the husband, in Texas, as in Louisiana, the wife's share of the community is freed from the restrictions of his exclusive management and control, and the wife acquires exclusive possession and enjoyment of the property constituting her share, as well as important new powers of control and disposition over it. On the death of the wife, her share passes to her heirs, and his share is freed from the limitations which the existence of the community places on his

*Speer, Law of Marital Rights in Texas (1929) p. 409 *et seq.*

control of community property. While Texas does not have the statutory restrictions on gifts which are to be found in the Louisiana Civil Code, Texas does place some limitations on the husband's power to make gifts of community property. As we said of Texas community property in *Hopkins* v. *Bacon,* 282 U. S. 122, 126, the authorities hold "that if the husband, as agent of the community, acts in fraud of the wife's rights, she is not without remedy in the courts. (*Stramler* v. *Coe,* 15 Tex. 211; *Martin* v. *Moran,* 32 S. W. 904; *Watson* v. *Harris,* 130 S. W. 237; *Davis* v. *Davis,* 186 S. W. 775.)" Appellee also concedes that "excessive and capricious donations are void," and that malicious or fraudulent intent need not be established in order that the wife shall have the remedies referred to. Appellee does not question that these are the rules generally applicable to community property in Texas.

The death of either the husband or the wife of the Texas community thus effects sufficient alteration in the spouses' possession and enjoyment and reciprocal powers of control and disposition of the community property as to warrant the imposition of an excise tax measured by the value of the entire community.

For the reasons fully stated in our opinion in the *Wiener* case, we conclude that the tax amendment of § 811 of the Internal Revenue Code authorizing the tax as applied in this case is not open to any of the constitutional objections which have been raised against it either here or below. The judgment is accordingly

Reversed.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS concur in the result for the reasons stated in the concurring opinion of MR. JUSTICE DOUGLAS in *Fernandez* v. *Wiener, ante,* p. 363.

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

MINE SAFETY APPLIANCES CO. *v.* FORRESTAL.

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

No. 71. Argued November 9, 13, 1945.—Decided December 10, 1945.

1. In a suit brought by a government contractor in the form of a suit against the Under Secretary of the Navy as an individual and not as an officer of the Government, but the sole purpose of which is to prevent him from taking action under the Renegotiation Act to stop payment of money by the Government to satisfy the Government's and not the Under Secretary's debt, the United States is an indispensable party. P. 373.
2. Such a suit was properly dismissed, even though it challenged the constitutionality of the Renegotiation Act; because it was a suit against the United States to which the sovereign had not consented. Section 403 (e) of the Renegotiation Act applied. P. 374.

59 F. Supp. 733, affirmed.

APPEAL from an order of a three-judge district court dismissing, as a suit against the United States to which the sovereign had not consented, a complaint against the Under Secretary of the Navy seeking an injunction and a declaratory judgment holding the Renegotiation Act unconstitutional.

Mr. W. Denning Stewart, with whom *Messrs. Mahlon E. Lewis* and *Charles Effinger Smoot* were on the brief, for appellant.

Mr. David L. Kreeger, pro hac vice, with whom *Solicitor General McGrath, Messrs. A. Morris Kobrick* and *Jerome H. Simonds* were on the brief, for appellee.

MR. JUSTICE BLACK delivered the opinion of the Court.

After an investigation in which appellant appeared, appellee James V. Forrestal, while Under Secretary of the Navy, determined that the appellant had received a large

amount of excessive profits on government war contracts within the meaning of the Renegotiation Act.[1] Pursuant to the powers given him by that Act the appellee notified appellant that unless appellant took action to eliminate these profits the Under Secretary would direct government disbursing officers to withhold payments due appellant on other contracts, sufficient in amount to offset the government's loss due to the excessive profits.[2] Section 403 (e) of the Renegotiation Act provides that any contractor aggrieved by the Secretary's determination may within ninety days apply to the Tax Court for a de novo trial and adjudication of the issue. The section provides that the Tax Court "shall have exclusive jurisdiction . . . to finally determine the amount . . . and such determination shall not be reviewed or redetermined by any court or agency." 58 Stat. 86. The appellant, without following the procedure provided for in § 403 (e), filed this complaint in the District Court. The complaint seeks an injunction and declaratory judgment. It alleges, among other things, that the Act is unconstitutional on many grounds; that withholding payment of the sums found to represent excessive profits would seriously interfere with appellant's operations and with production of critical materials for the government; that, due to statutes and executive orders which make many of the appellant's contracts confidential and secret, it will be impossible for it to carry on proceedings to enforce its contract rights until these restrictions are lifted; and that it is without

[1] 56 Stat. 226, 245; 56 Stat. 798, 982; 57 Stat. 347; 57 Stat. 564; 58 Stat. 21, 78.

[2] Section 403 (c) (2) of the Renegotiation Act authorizes and directs the Secretary to eliminate excessive profits by, among other things, "withholding from amounts otherwise due to the contractor any amount of such excessive profits."

a plain, adequate and complete remedy at law.[3] The District Court composed of three judges dismissed the complaint as a suit against the United States to which the sovereign had not consented, 59 F. Supp. 733, and the case comes before us on direct appeal. 28 U. S. C. § 380a. Here government counsel, appearing for the Secretary, advance the District Court's grounds and contend further that the judgment below be affirmed because appellant failed to exhaust its administrative remedy and to follow the statutory procedure in not first going before the Tax Court to which Congress has granted "exclusive" jurisdiction, and because it does not appear that appellant is without an adequate legal remedy.

We think the government is an indispensable party in this case, and since it has not consented to be sued in the District Court in this type of proceeding, the complaint was properly dismissed against the government officer. *Minnesota* v. *United States,* 305 U. S. 382; *Stanley* v. *Schwalby,* 162 U. S. 255. Appellant contends that the action seeks to prevent a tort by the Secretary, acting as an individual and not as an officer of the government, consisting of a trespass against appellant's property, and that equitable relief is necessary because appellant has no adequate remedy at law and since it would otherwise suffer irreparable loss. Under our former decisions, had the factual allegations supported these contentions, the com-

[3] Appellant also alleged below that the Secretary had threatened to instruct other contractors to withhold any moneys due to appellant. A stipulation and affidavit by the parties reveal, however, that this action will in fact not be taken. Any controversy that might have been before the court by virtue of this allegation has, thus, become moot. It can therefore not serve as the basis for the court's consideration of the constitutional and other questions here in issue. *United States* v. *Alaska Steamship Co.,* 253 U. S. 113; *Commercial Cable Co.* v. *Burleson,* 250 U. S. 360; *Montgomery Ward & Co.* v. *United States,* 326 U. S. 690. Cf. *Coffman* v. *Breeze Corporations,* 323 U. S. 316.

plaint as filed would, in the absence of any further proceedings, have provided a basis for the equitable relief sought. See e. g., *Philadelphia Company* v. *Stimson,* 223 U. S. 605, 619–620. For according to these cases, if we assume, as we must for the purpose of disposing of the jurisdictional issue, that appellant's allegations including the one that the Renegotiation Act is unconstitutional are true, the fact that the Secretary had acted pursuant to the command of that statute would have made no difference. These cases hold that a public officer can not justify a trespass against a person's property by invoking the command of an unconstitutional statute. Under such circumstances, the tort becomes the officer's individual responsibility, and the government is not held to have sufficient interest in the controversy to be considered an indispensable party. But the government does not lack such interest in all cases where the suit is nominally against the officer as an individual. The government's interest must be determined in each case "by the essential nature and effect of the proceeding, as it appears from the entire record." *Ex parte New York,* 256 U. S. 490, 500.

Here, the essential allegations and the relief sought do not make out a threatened trespass against any property in the possession of or belonging to the appellant. Nor does the record present any other circumstances that would make the Secretary suable as an individual in this proceeding. Certainly the action which the Secretary proposed to take is not a violation of any express command of Congress. Cf. *Rolston* v. *Missouri Fund Comm'rs,* 120 U. S. 390, 411; *Houston* v. *Ormes,* 252 U. S. 469; *Smith* v. *Jackson,* 246 U. S. 388. The sole purpose of this proceeding is to prevent the Secretary from taking certain action which would stop payment by the government of money lawfully in the United States Treasury to satisfy the government's and not the Secretary's debt to the appellant. The assumption underlying this action

is that if the relief prayed for is granted, the government will pay and thus relinquish ownership and possession of the money. In effect, therefore, this is an indirect effort to collect a debt allegedly owed by the government in a proceeding to which the government has not consented. The underlying basis for the relief asked is the alleged unconstitutionality of the Renegotiation Act [4] and the sole purpose of the proceeding is to fix the government's and not the Secretary's liability. Thus, though appellant denies it, the conclusion is inescapable that the suit is essentially one designed to reach money which the government owns. Under these circumstances the government is an indispensable party, *Minnesota* v. *United States,* 305 U. S. 382, 388, even though the Renegotiation Act under which the Secretary proposed to act might be held unconstitutional. *Louisiana* v. *Jumel,* 107 U. S. 711; *Cunningham* v. *Macon & Brunswick R. Co.,* 109 U. S. 446; *Hagood* v. *Southern,* 117 U. S. 52, 67, 68; *In re Ayers,* 123 U. S. 443, 496, 497, 505–507; *Pennoyer* v. *McConnaughy,* 140 U. S. 1, 9; *Wells* v. *Roper,* 246 U. S. 335, 337; see also *N. Y. Guaranty & Indemnity Co.* v. *Steel,* 134 U. S. 230. In short the government's liability can not be tried "behind its back." *Louisiana* v. *Garfield,* 211 U. S. 70, 78.

Affirmed.

MR. JUSTICE REED concurs in the result for the reason that he thinks no adequate ground is alleged for an injunction. In his view a legal remedy exists in the Court of Claims since objection to the amount of excess profits is waived and the stipulation, referred to in the opinion, removes multiplicity of actions for relief as a possible ground.

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

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[4] This is seen from the prayer for a declaratory judgment, which asks only that the Renegotiation Act be held unconstitutional.

MAY DEPARTMENT STORES CO., DOING BUSINESS AS FAMOUS-BARR CO., *v.* NATIONAL LABOR RELATIONS BOARD.

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

No. 39. Argued October 12, 1945.—Decided December 10, 1945.

1. The conclusion of the National Labor Relations Board that all non-supervisory employees in the men's busheling rooms of a department store, though numbering only 30 to 40 of the store's 5,000 employees, constituted an appropriate unit for collective bargaining under § 9 (b) of the Act, since these employees had a degree of self-organization and a special trade which sufficiently differentiated them from other employees, was amply supported by the evidence. P. 380.
2. In the circumstances of the election of a Joint Council as bargaining representative in this case—the Board having directed the placing of the name of the Joint Council on the ballot, although the employees in the unit were members of a local union which the Joint Council represented—there is no basis for the employer's objection to the certification on the ground of possible confusion of the employees. P. 381.
3. Under the National Labor Relations Act, it is the duty of the employer to bargain collectively only with the duly recognized or accredited representative of the employees; and disregard of this duty is a violation of § 8 (1) of the Act. P. 383.
4. The National Labor Relations Board was justified in finding that the employer, in seeking the War Labor Board's approval of wage increases for its employees, including employees in the unit here involved, without bargaining collectively with the certified representative in respect of the wages, was guilty of an unfair labor practice in violation of § 8 (1) of the Act. P. 384.
5. The admission in evidence and consideration by the Board of announcements made over the store's public address system and in the house organ, concerning the application for War Labor Board approval of wage increases for its employees, did not deny the employer's freedom of speech under the First Amendment of the Federal Constitution. P. 386.
6. In the circumstances of this case, the injunction against the em-

ployer will be modified so as not to apply generally to all violations of the rights of the employees in the bargaining unit here involved, but only to other interferences, in violation of § 8 (1) or otherwise, with the certified agent's representation of these employees. P. 392. 146 F. 2d 66, modified and affirmed.

CERTIORARI, 324 U. S. 838, to review a decree ordering enforcement of an order of the National Labor Relations Board, 53 N. L. R. B. 1366.

Messrs. Milton H. Tucker and *Robert T. Burch,* with whom *Messrs. Lyle M. Allen* and *R. Walston Chubb* were on the brief, for petitioner.

Miss Ruth Weyand, with whom *Acting Solicitor General Judson, Messrs. Mozart G. Ratner* and *Millard Cass* were on the brief, for respondent.

MR. JUSTICE REED delivered the opinion of the Court.

This writ of certiorari brings here for review the decree of the Circuit Court of Appeals enforcing an order of the National Labor Relations Board which was entered after the Board found upon hearings that petitioner had violated Sections 8 (1) and 8 (5) of the National Labor Relations Act.[1] The petition for the writ presented issues

[1] 49 Stat. 452–53. "Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

"Sec. 8. It shall be an unfair labor practice for an employer—

"(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

. . . . . .

"(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a)."

Opinion of the C. C. A., *Labor Board* v. *May Department Stores Co.,* 146 F. 2d 66; determination of National Labor Relations Board, 53 N. L. R. B. 1366.

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(1) as to whether two small related departments with thirty to forty employees may be an appropriate bargaining unit when the department store of which they are a part has around three hundred and fifty departments and approximately five thousand employees; (2) as to whether the Board could properly place the name of a Joint Labor Council on the ballot for the employees' bargaining representative when none of the employees were members of the Council but only of a local union which was associated with others in the Council; (3) as to whether seeking authority by the employer from the National War Labor Board to increase wages without taking up the increase with a certified bargaining agent may be an unfair labor practice under § 8 (1) of the Labor Act; and (4) as to the propriety of a Board order to cease and desist generally from unfair labor practices instead of an order to cease and desist only from the type or types of unfair practices which the Board found the employer committed. As these issues presented important problems in the administration of the National Labor Relations Act, certiorari was granted. 324 U. S. 838.

Appropriate Unit. After a hearing in which the employer, the petitioner here, the May Department Stores Company, doing business as Famous-Barr Company, a St. Louis department store, took part, the Labor Relations Board, on June 16, 1943, found that all non-supervisory employees of the Company, then 28 in number, working in the main and basement men's busheling rooms, constituted an appropriate unit for collective bargaining within the meaning of § 9 (b) [2] of the Labor Relations Act.

[2] 49 Stat. 453, § 9. "(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof."

An election was ordered. It resulted in the choice and designation of the St. Louis Joint Council, United Retail, Wholesale & Department Store Employees of America, C. I. O., as the representative for collective bargaining of the employees of the unit.

The Company contended that a store-wide unit of its five thousand employees was the most appropriate and at any rate that employees in the women's alteration and the fur alteration departments should be added to the employees in the men's busheling rooms to form the unit. As there is no provision for direct review of the determination and certification of the bargaining representative, the Company, in order to secure judicial review of the finding as to the unit, awaited this proceeding which sought a decree directing it to bargain collectively with the representative. See *Inland Empire Council* v. *Millis,* 325 U. S. 697.

A few months before this proceeding a determination that all employees of the Company subject to stated exceptions were the appropriate unit for collective bargaining had been sought by the C. I. O. The Company objected because no sufficient showing of representation was made and because it took exception to the exclusion of certain employees from the proposed unit. This petition was dismissed for failure of the C. I. O. to make a substantial showing of membership in the suggested store-wide unit. 46 N. L. R. B. 305. That prior application is not a bar to this. The Board was careful to note in this proceeding that a larger unit might be fixed as appropriate if self-organization developed. Other departments of the store had members of this and other unions as employees. This presence of union members throughout the enterprise was a matter of consideration in deciding upon the appropriate unit but was not decisive. Compare *Pittsburgh Plate Glass Co.* v. *Labor Board,* 313 U. S. 146, 156. No labor organization claimed to represent the entire body

of employees. Therefore the Board determined to approve this unit as appropriate so that collective bargaining might start for these employees without waiting until more employees might be organized into a larger unit. Compare *Labor Board* v. *Hearst Publications*, 322 U. S. 111, 134.

Under § 9 (b) the Board is delegated the authority to determine the unit. The judicial review afforded is not for the purpose of weighing the evidence upon which the Board acted and perhaps to overrule the exercise of its discretion but to "guarantee against arbitrary action by the Board." [3] The Board had before it the business of the Company, the numbers of employees, the treatment of all employees as a unit by management with reference to sick leave, hospitalization, employee privileges, vacations, et cetera. Evidence was presented that a large proportion of employees in the proposed unit were members of the same union. It had testimony as to similarity and dissimilarity in tailoring and altering between the men's and women's alteration rooms. There was evidence that those who work on men's clothing, speaking generally, belong to a different union organization than those who work on women's clothes. The Board considered the interchange of workers between the two groups. We think that there was ample testimony to support the Board's conclusion that the employees of the two busheling rooms were an appropriate unit, since these employees had a degree of self-organization and a special trade which sufficiently differentiated them from other employees.

Form of Ballot. Petitioner objects to the certification because the ballot contained the name of the St. Louis Joint Council, United Retail, Wholesale & Department Store Employees, as a candidate for bargaining representative from the unit. This was the organization which was

[3] S. Rep. No. 573, 74th Cong., 1st Sess., p. 14.

certified. It had filed the petition for determination of the representative. The Council claimed that more than 51% of the employees in the suggested unit had designated it as their collective bargaining representative. The Board directs what names go on the ballot. Unless there is a showing of a substantial number of employees in the proposed unit who have become members of and selected the petitioner as their bargaining representative, the Board does not ordinarily order an election.[4] This is an administrative policy of the Board. In this case, on the Joint Council's petition for certification, the Board found that the Council had a majority of the employees. As a matter of fact it was a local union which the employees had selected and joined. The Board pointed out in its finding of facts on the petition for an election that the Joint Council represented this local and similar locals in other stores.

The Company says that some employees may have been misled by the ballot into thinking that the Joint Council had a substantial number of the unit's employees as members, because elections are not ordinarily called unless that situation exists. The local was represented by the Joint Council. Cf. *Labor Board* v. *Franks Bros. Co.*, 137 F. 2d 989, 992, affirmed on other grounds, *Franks Bros. Co.* v. *Labor Board*, 321 U. S. 702. The Joint Council was chosen by a majority of the employees of the unit and certified. In the circumstances of this election, we see no basis for the Company's objection to the certified representative on the ground of possible confusion of the employees.

Action on Wages. The Board found that the Company interfered with, restrained and coerced its employees in the exercise of the rights guaranteed by § 7 of the Act,

[4] *In re Houston Shipbuilding Corp.*, 41 N. L. R. B. 638; *In re American Manufacturing Co.*, 41 N. L. R. B. 995.

under the circumstances herein detailed, in seeking the necessary approval (56 Stat. 765; Executive Order 9250, 7 Fed. Reg. 7871) on August 30, 1943, of the National War Labor Board for an upward wage adjustment for a large proportion of its employees, including the employees of the unit here involved, without bargaining collectively on the subject of the wages with the certified union. A letter accompanied the request to the War Labor Board which explained that certain craft employees, not here involved, were excluded from the application for authority to increase wages because they were covered by collective bargaining agreements. The letter went on to say:

"The St. Louis Joint Council, United Retail, Wholesale and Department Store Employees of America, C. I. O., . . . has been certified by the National Labor Relations Board, but we do not regard this as an appropriate unit and have consistently taken that position and have so notified all parties concerned. It is our intention to submit that question to the Courts, if and when the occasion arises. We have not recognized this Union and have not bargained with it for the employees in Departments 280 or 281 and no negotiations with that Union are pending. It is intended, however, that the employees in Departments 280 and 281 shall be included in this application.

"We do not believe that any of the organizations named in the application, nor the organization named above, have any interest whatever in the enclosed application. However, if the organization named above should object to the inclusion of the employees of Departments 280 and 281 in the application, you are advised that said application may be considered as having been amended so as to exclude those employees from the application."

The next morning the employees were told over the store address system of the application for a wage increase for all employees, except higher paid executives and those employees "whose salaries have been fixed by closed shop

agreements." A short time later another reference to the application was made over the address system. A similar announcement appeared in the September 3 issue of the store paper. The conditional offer to exclude the employees of the unit was not referred to in the announcements. Upon these facts the Board found a violation of § 8 (1).

The Company urges that its request for authority, without negotiation with the certified union as to the application to the War Labor Board, was not an unfair practice under § 8 (1) but only a necessary result of its position on non-recognition of the certified representative because the Company did not agree with the Board's determination of the appropriate unit for the selection of representatives. The Company says it could not give recognition to the certified agent and maintain this position.

We have in a preceding division of this opinion stated our conclusion that the Joint Council was a properly certified bargaining representative. Therefore at the time of the request to the War Labor Board for authority to increase wages, the Joint Council must be considered as a properly certified bargaining agent. Company action in regard to it must be judged in that light even though its attitude toward the certification made its choice difficult.

The Joint Council was certified on July 12, 1943. After the election, the Council had requested a conference with the Company for negotiating a contract to cover wages, hours and working conditions. This request was declined on July 19th with the statement that the Company did not agree with the decision of the Board and desired to preserve its full rights to question the result as it "may see fit." The application to the War Labor Board followed on August 30th.

It is settled law that the Labor Relations Act makes it an employer's duty to bargain collectively only with the

duly recognized or accredited representative of the employees. Disregard of this duty violates § 8 (1) of the Act. § 9 (a). *Medo Corp.* v. *Labor Board*, 321 U. S. 678, 683–84. Any other conclusion would infringe an essential principle of collective bargaining. See *J. I. Case Co.* v. *Labor Board*, 321 U. S. 332, 338. Employer action to bring about changes in wage scales without consultation and negotiation with the certified representative of its employees cannot, we think, logically or realistically, be distinguished from bargaining with individuals or minorities. The fact that the application to the War Labor Board was not the actual increase of wages but a necessary preliminary does not make unilateral action, accompanied by publication of the step taken to the employees, any the less objectionable. The application to the War Labor Board marked a unilateral determination by the Company that the employees of this unit should have the specific increase deemed due them by the Company or none at all, if the bargaining agent should object in accordance with the letter quoted above. The employer was not getting into position to negotiate with the agent. He declared the contrary and proposed that he, as employer, would make the increase if permission were granted.

Two national labor groups had each separately sought for months to organize the Company. One effort to secure the designation of a unit had failed. The present designation was made over the protests of the Company. It had urged in its motion for reconsideration of the order of election:

"There are two competing labor organizations seeking to organize the employees in this store. By this decision one of them is granted an election in the unit composed of two departments. There are some 350 departments in this store and if this Employer is to be confronted with elections and separate bargaining for each one or two de-

partments it will be an endless and intolerable interference with store operations, which should not be permitted." By going ahead with wage adjustments without negotiation with the bargaining agent, it took a step which justified the conclusion of the Board as to the violation of § 8 (1). Such unilateral action minimizes the influence of organized bargaining. It interferes with the right of self-organization by emphasizing to the employees that there is no necessity for a collective bargaining agent. If successful in securing approval for the proposed increase of wages, it might well, as the Board points out, block the bargaining representative in securing further wage adjustments.

It may be that the Company sought only to preserve its opportunity to contest the certification of the unit. It is pointed out that the increases for which approval was sought covered several thousand employees and that it is hardly conceivable that a general increase for so many would be sought to injure so few. But the Board's contention is not that the application, as a whole, was for the purpose of undermining the Council. Its conclusion was that the manner of presenting and publicizing the application had the effect of coercing the employees. Instead of taking up the increase of this unit's wages with the Council, filing a joint application, with reservation of the Company's legal right to challenge the certification of the bargaining agent when any complaint might be filed for refusal to bargain collectively, or, omitting the employees of the questioned unit, if the Council would not join in such an application, the Company chose to ignore the properly certified agent. Nor can we agree that if, under the procedure suggested, the employees in this unit had been omitted from the employees who received increases, there would have been danger that the National Labor Relations Board would have considered such omission an

unfair labor practice. Whatever weight an omission might have under other circumstances, under these it would have followed an effort to avoid injury to the employees and could not properly be held an interference with their rights.

We find no basis for eliminating the announcements or the publication from consideration on the ground that they were an exercise of the right of free expression, secured by the First Amendment. They are a part of the totality of Company activities and were properly received by the Board as evidence of the unilateral action of the employer. *Labor Board* v. *Virginia Power Co.*, 314 U. S. 469, 477.

Breadth of Order. Petitioner complains here of the refusal of the Court to modify paragraph 1 (b) of the Board's order to the extent which petitioner explicitly asked for below in its petition for rehearing.[5] That paragraph, together with another which enjoins refusal to bargain, is

[5] Section 10 (e) of the National Labor Relations Act, 49 Stat. 454, precludes the consideration by the Circuit Court of any objection not raised before the Board, unless such failure is excusable because of "extraordinary circumstances." This Court therefore is authorized, *sua sponte*, to appraise the record to determine the power of the Circuit Court to review paragraph 1 (b) of the Board's order. *Labor Board* v. *Bradford Dyeing Assn.*, 310 U. S. 318, 341.

In this proceeding the paragraph first appeared in the intermediate report of the Board's examiner. The petitioner excepted specifically to paragraph 1 (b) of the proposed order as "not supported or justified by the record." This was the only objection made to the paragraph in question in the record of the proceedings before the Board. The examiner's recommendation was adopted by the Board in its order. Unless this objection was sufficiently specific to apprise the Board of the question now presented, the Circuit Court had no power to consider it. *Marshall Field & Co.* v. *Labor Board*, 318 U. S. 253. In the *Marshall Field* case we declined to consider an issue as to the power of the Board to grant a back pay order which was construed as barring the deduction of unemployment compensation from the award, although the question was raised by answer and decided by

set out below.[6] Petitioner argues that the broad, blanket provisions of 1 (b) are invalid, even though, of course, restricted to the few employees in the affected unit. The language of the prohibition covers interferences with all the rights of these employees which are secured by § 7 of the Labor Act, while at the most, petitioner urges, the

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the Circuit Court of Appeals, *Labor Board* v. *Marshall Field & Co.*, 129 F. 2d 169. Our reason for refusing review was that the only objection to the Board's power was error by the examiner "in making each and every recommendation." The remedy recommended by the examiner was the usual back pay less earnings without any word in the report as to the unemployment compensation. This was too general to apprise the Board of an intention to bring up the question of the deductibility of the compensation and of the necessity for findings.

Although it falls short of desirable specificity, we think the objection was sufficient in the present case. No further findings are needed. The paragraph in issue is a standard form of order frequently used by the Board; the same question with respect to an almost identical order was considered by this Court in *Labor Board* v. *Express Pub. Co.*, 312 U. S. 426, and has been a frequent subject of dispute in the Circuit Courts (see n. 10 *infra*). These circumstances coupled with an objection that the order was "not supported or justified by the record" put the Board on notice of the issue now presented.

[6] Decreed that May Department Stores Company, etc., shall: "1. Cease and desist from: (a) Refusing to bargain collectively with St. Louis Joint Council, United Retail & Department Store Employees of America, affiliated with the Congress of Industrial Organizations, as the exclusive representative of all its employees at its St. Louis store engaged in the busheling room, second floor, department 280, and in the busheling room, basement, department 281, including regular extra employees in these departments, but excluding the two foremen and all other employees of the respondent;

"(b) In any other manner interfering with, restraining, or coercing its employees who are referred to in paragraph 1 (a) in the exercise of their right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the National Labor Relations Act."

Board has found and the Circuit Court sustained only two unfair labor practices by petitioner, "(1) refusal to bargain and (2) the storewide salary increase." Both of these, it is asserted, are but incidents in petitioner's effort to obtain judicial review of the Board's certification. As the Board's selection of an appropriate unit to choose the employees' bargaining representative and the Board's subsequent certification of the representative chosen, § 9, are not judicially reviewable directly, petitioner takes the position that it committed the unfair labor practice of refusing to bargain with an accredited union merely to open the way for judicial review of the certification.[7] Consequently petitioner urges the cease and desist order should be no broader than the refusal to bargain which is covered by paragraph 1 (a), note 6 *supra,* with the addition of "or from any other acts in any manner interfering with the representative's efforts to negotiate." The suggested addition is taken from the *Express Publishing Company* case, 312 U. S. at 438. Thus the breadth of paragraph 1 (b) of the Board's order is sharply challenged as being beyond the power of the Board in view of the evidence and findings in this case.

The scope of injunctions which follow National Labor Relations Board determinations is important to employer and employee. While contempt proceedings can be instituted only by the Board and in the public interest,[8] the possibility of contempt penalties by the court for future Labor Act violations adds sufficient additional sanctions to make material the difference between enjoined and non-enjoined employer activities.[9] The deci-

[7] See *American Federation of Labor* v. *Labor Board,* 308 U. S. 401; *Pittsburgh Plate Glass Co.* v. *Labor Board,* 313 U. S. 146; *Inland Empire Council* v. *Millis,* 325 U. S. 697.

[8] *Amalgamated Workers* v. *Edison Co.,* 309 U. S. 261, 269.

[9] See for business operations under contempt orders 41 Columbia L. Rev. at 913.

sion in the *Express Publishing Company* case emphasized this issue.[10] The paragraph under attack in that case was substantially like the paragraph here attacked.

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[10] The problem of the scope of injunction dealt with in *Labor Board* v. *Express Publishing Co.*, 312 U. S. 426, has recently received careful consideration by judges and writers. 41 Columbia L. Rev. 911; 29 Georgetown L. J. 1026; 53 Harvard L. Rev. 472; 23 Boston University L. Rev. 447; 54 Yale L. J. 141.

Illustrative of the decisions in the Circuit Courts are the following cases:

1. National Labor Relations Board

(*a*) *Upholding a general § 8 (1) order on the basis of a single unfair labor practice (the nature of the unfair practices is given in brackets).*—*Labor Board* v. *Highland Park Mfg. Co.*, 110 F. 2d 632 (C. C. A. 4) [§ 8 (5)]; *Art Metals Const. Co.* v. *Board*, 110 F. 2d 148 (C. C. A. 2) [§ 8 (5)]; *Wilson & Co.* v. *Board*, 124 F. 2d 845 (C. C. A. 7) [§ 8 (3)]; *Labor Board* v. *Sunbeam Electric Mfg. Co.*, 133 F. 2d 856 (C. C. A. 7) [§ 8 (1)]; *Labor Board* v. *Standard Oil Co.*, 138 F. 2d 885 (C. C. A. 2) [§ 8 (2)].

(*b*) *Upholding a general § 8 (1) order where there was more than one unfair labor practice.*—*Labor Board* v. *Boss Mfg. Co.*, 107 F. 2d 574 (C. C. A. 7) [§§ 8 (1), 8 (3), 8 (5)]; *Labor Board* v. *Reed & Prince Mfg. Co.*, 118 F. 2d 874 (C. C. A. 1) [§§ 8 (1), 8 (3), 8 (5)]; *F. W. Woolworth Co.* v. *Board*, 121 F. 2d 658 (C. C. A. 2) [§§ 8 (1), 8 (3)]; *Board* v. *Algoma Net Co.*, 124 F. 2d 730 (C. C. A. 7) [§§ 8 (1), 8 (3)]; *Labor Board* v. *Baldwin Locomotive Works*, 128 F. 2d 39 (C. C. A. 3) [§§ 8 (1), 8 (2), 8 (3), 8 (4)]; *Labor Board* v. *Brezner Tanning Co.*, 141 F. 2d 62 (C. C. A. 1) [§§ 8 (1), 8 (3)]; *Idaho Potato Growers* v. *Board*, 144 F. 2d 295 (C. C. A. 9) [§§ 8 (3), 8 (5)].

(*c*) *Limiting a § 8 (1) order based on a single unfair labor practice to acts specifically condemned.*—*Globe Cotton Mills* v. *Board*, 103 F. 2d 91 (C. C. A. 5) [§ 8 (5)]; *Labor Board* v. *Swift & Co.*, 108 F. 2d 988 (C. C. A. 7) [§ 8 (2)]; *McQuay-Norris Mfg. Co.* v. *Board*, 119 F. 2d 1009 (C. C. A. 7) [§ 8 (5)]; *Labor Board* v. *Newark Morning Ledger Co.*, 120 F. 2d 262 (C. C. A. 3) [§ 8 (3)]; *Labor Board* v. *Burry Biscuit Corp.*, 123 F. 2d 540 (C. C. A. 7) [§ 8 (2)]; *Labor Board* v. *Stone*, 125 F. 2d 752 (C. C. A. 7) [§ 8 (1)]; *Commonwealth Edison Co.* v. *Board*, 135 F. 2d 891 (C. C. A. 7) [§ 8 (2)]; *Consolidated Aircraft Corp.* v. *Board*, 141 F. 2d 785 (C. C. A. 9) [§ 8 (1)]; *Labor Board* v. *Walt Disney Productions*, 146 F. 2d 44

The test of the proper scope of a cease and desist order is whether the Board might have reasonably concluded from the evidence that such an order was necessary to prevent the employer before it "from engaging in any unfair labor practice affecting commerce." § 10 (a).[11] Equity has long been accustomed in other fields to reach conclusions as to the scope of orders which are necessary

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(C. C. A. 9) [§ 8 (3)]; *Labor Board* v. *Lipshutz,* 149 F. 2d 141 (C. C. A. 5) [§ 8 (1)].

(*d*) *Limiting a § 8 (1) order where there was more than one unfair labor practice.—Press Co.* v. *Board,* 73 App. D. C. 103, 118 F. 2d 937 [§§ 8 (1), 8 (3)]; *Labor Board* v. *Grower-Shipper Vegetable Assn.,* 122 F. 2d 368 (C. C. A. 9) [§§ 8 (1), 8 (3)]; *Wilson & Co.* v. *Board,* 123 F. 2d 411 (C. C. A. 8) [§§ 8 (1), 8 (2), 8 (3)]; *Labor Board* v. *Servel, Inc.,* 149 F. 2d 542 (C. C. A. 7) [§§ 8 (1), 8 (3)].

2. Office of Price Administration

A similar situation prevails with respect to the use of injunctions to restrain violations of regulations issued under the Emergency Price Control Act, 56 Stat. 23.

(*a*) *Sustaining general injunctions on the basis of particular violations of a regulation.—Bowles* v. *Montgomery Ward & Co.,* 143 F. 2d 38 (C. C. A. 7) [preliminary injunction against violation of any price regulation for violation of several provisions of one regulation sustained].

(*b*) *Sustaining limited injunctions.—Bowles* v. *Town Hall Grill,* 145 F. 2d 680 (C. C. A. 1) [violation of restaurant ceiling prices on poultry, lobster, gin items; injunction limited to such items sustained]; *Bowles* v. *Sacher,* 146 F. 2d 186 (C. C. A. 2) [sustaining preliminary injunction limited to particular type of violation proved].

3. Federal Trade Commission

(*a*) *Enforcing or affirming order broader than specific acts complained of.—Ostler Candy Co.* v. *F. T. C.,* 106 F. 2d 962 (C. C. A. 10); *Hershey Chocolate Corp.* v. *F. T. C.,* 121 F. 2d 968 (C. C. A. 3); *Eugene Dietzgen Co.* v. *F. T. C.,* 142 F. 2d 321 (C. C. A. 7).

(*b*) *Limiting orders to specific acts.—F. T. C.* v. *Beechnut Packing Co.,* 257 U. S. 441; *F. T. C.* v. *A. McLean & Son,* 84 F. 2d 910 (C. C. A. 7); *Helen Ardelle, Inc.* v. *F. T. C.,* 101 F. 2d 718 (C. C. A. 9).

[11] *Ethyl Gasoline Corp.* v. *United States,* 309 U. S. 436, 461; *Union Pacific R. Co.* v. *United States,* 313 U. S. 450, 470; *United States* v. *Bausch & Lomb Co.,* 321 U. S. 707, 724.

to prevent interferences with the rights of those who seek the courts' protection.[12] Injunctions in broad terms are granted even in acts of the widest content, when the court deems them essential to accomplish the purposes of the act.[13] We think that the Board has the same power to

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[12] *Hecht Co.* v. *Bowles,* 321 U. S. 321, 328; *Wyoming* v. *Colorado,* 286 U. S. 494, 508.

[13] Sherman Act—*Standard Oil Co.* v. *United States,* 221 U. S. 1, 77:

"It may be conceded that ordinarily where it was found that acts had been done in violation of the statute, adequate measure of relief would result from restraining the doing of such acts in the future. *Swift* v. *United States,* 196 U. S. 375. But in a case like this, where the condition which has been brought about in violation of the statute, in and of itself, is not only a continued attempt to monopolize, but also a monopolization, the duty to enforce the statute requires the application of broader and more controlling remedies."

"So far as the owners of the stock of the subsidiary corporations and the corporations themselves were concerned after the stock had been transferred, § 6 of the decree enjoined them from in any way conspiring or combining to violate the act or to monopolize or attempt to monopolize in virtue of their ownership of the stock transferred to them, and prohibited all agreements between the subsidiary corporations or other stockholders in the future, tending to produce or bring about further violations of the act." P. 79.

"We so think, since we construe the sixth paragraph of the decree, not as depriving the stockholders or the corporations, after the dissolution of the combination, of the power to make normal and lawful contracts or agreements, but as restraining them from, by any device whatever, recreating directly or indirectly the illegal combination which the decree dissolved." P. 81.

Local 167 v. *United States,* 291 U. S. 293, 299:

"Appellants seek elimination of the provision of the decree that enjoins them from using any of the offices or positions in Local 167 or the shochtim union 'for the purpose of coercing marketmen to buy poultry, poultry feed, or other commodities necessary to the poultry business from particular sellers thereof.' The United States is entitled to effective relief. To that end the decree should enjoin acts of the sort that are shown by the evidence to have been done or threatened in furtherance of the conspiracy. It should be broad enough to prevent evasion. In framing its provisions doubts should

determine the needed scope of cease and desist orders under the National Labor Relations Act that courts have, when authorized to issue injunctions, in other litigation.

That power of the Board is subject to review under § 10. While the Board has been delegated initially the exclusive authority to prevent unfair labor practices,[14] courts, which are called upon to enforce such orders by their own decrees, may examine its scope to see whether, on the evidence, they go so beyond the authority of the Board as to require modification as a matter of law before enforcement. § 10 (a) and (e). The *Express Publishing Company* case declared:

"To justify an order restraining other violations it must appear that they bear some resemblance to that which the employer has committed or that danger of their commission in the future is to be anticipated from the course of his conduct in the past." P. 437.

We think that, in the circumstances of this proceeding, although there is a violation of § 8 (1) as well as 8 (5), the violation of 8 (1) is so intertwined with the refusal to bargain with a unit asserted to be certified improperly that, without a clear determination by the Board of an attitude of opposition to the purposes of the Act to protect the rights of employees generally, the decree need not enjoin Company actions which are not determined by the Board to be so motivated.

This conclusion requires a modification of the decree so that the injunction will not apply generally to all viola-

be resolved in favor of the Government and against the conspirators. *Warner & Co.* v. *Lilly & Co.*, 265 U. S. 526, 532. . . . When regard is had to the evidence disclosing the numerous purposes of the conspiracy and the acts of coercion customarily employed by defendants, it is plain that the clause referred to cannot be condemned as unnecessary or without warrant."

See *American Foundries* v. *Tri-City Council*, 257 U. S. 184, 194.

[14] S. Rep. No. 573, 74th Cong., 1st Sess., p. 15; H. Rep. No. 1147, 74th Cong., 1st Sess., p. 23.

tions under the Act of the rights of the employees in Departments 280 and 281, but will apply to other interferences, in violation of § 8 (1) or otherwise, with the Council's representation of these employees. There should be added to paragraph 1 (a) of the decree, note 6 *supra,* the following clause, "or from any other acts in any manner interfering with the representative's efforts to negotiate for or represent the above named employees as bargaining agent." Paragraph 1 (b) should be stricken. Textual corrections should be made to conform to these changes. As thus modified, the decree is

Affirmed.

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

MR. JUSTICE RUTLEDGE, concurring in part.

I cannot agree, as the Court seems to say and the Labor Board found,[1] that there were two unfair practices in this case, (1) refusal to bargain, contrary to § 8 (5); and (2) interference, restraint and coercion of employees in violation of § 8 (1). I think only one unfair labor practice was shown, namely, refusal to bargain; and for that reason I think the Board's order must be modified to eliminate the restraints based on its finding of violation

[1] The Board adopted the trial examiner's intermediate report without change, the employer not having applied for oral argument. 53 N. L. R. B. 1366. After reviewing the evidence under the separate headings of "A. The refusal to bargain" and "B. Interference, restraint and coercion," the report found as to the former that "on July 19, 1943, and at all times thereafter" the company had refused to bargain collectively with the union; as to the latter "that, by its unilateral action in seeking approval of its proposed wage adjustments," and by later publicizing this action, it had "interfered with, restrained, and coerced its employees" in the exercise of the rights guaranteed in § 7. There were separate and independent conclusions of law based on these findings, to which the separate provisions of the order related.

of § 8 (1), as the *Express Publishing Company* case, 312 U. S. 426, requires in such a situation.

I am unable to understand the majority's application of that case to a situation in which the Board has found there were two different and substantial violations of the Act. The Court does not hold to the contrary or rule that either finding was unsupported by the evidence. Rather it seems to approve and sustain both. Yet it modifies, as I think ambiguously,[2] the relief which the Board found appropriate to prevent a repetition of the interference, coercion and restraint it determined had been inflicted upon the employees, in addition to the refusal to bargain. The *Express Publishing* case covers no such situation. It was limited to one where the Board had imposed both types of restraint upon a finding only of refusal to bargain.[3]

It is apposite to inquire, therefore, whether that case has now been expanded to forbid the Board to impose

[2] The modification directed by the Court, if it is more than a change in the form of words used in Paragraph 1 (b) of the Board's order, necessarily cuts down the substance of the order. But since the injunction will apply "to other interferences, in violation of § 8 (1) or otherwise, with the Council's representation" of employees in Departments 280 and 281, and since violation of § 8 (1) includes interference, restraint or coercion of employees' rights as guaranteed by § 7, it is difficult to understand in just what particulars the order has been modified. In the absence of more definite specification we must accept the Court's modification as meaning that some substantial change from the order's terms is intended.

[3] Under the ruling the Board is not free to utilize § 8 (1) as a device for multiplying an unfair practice under § 8 (5), so that the single act of refusing to bargain may be made to justify an order forbidding not only that conduct but also the numerous types of unfair practice prohibited by the broad language of § 8 (1). The gist of the decision was that the Board cannot thus pile unfair practice on unfair practice, like presumption on presumption, for purposes of enforceable relief, notwithstanding the act of merely refusing to bargain may be held technically to violate both sections in view of the language of § 7. *Labor Board* v. *Express Publishing Co.*, 312 U. S. 426, 433.

both types of restraint where it has found both kinds of violation and neither finding is overturned. If so, I think the result squarely conflicts with repeated decisions, reflected in the language of the opinion in the *Express Publishing* case itself, that "having found the acts which constitute the unfair labor practice the Board is free to restrain the practice and other like or related unlawful acts." 312 U. S. 426, 436.[4]

It is important for the administration of the Act to know whether the Board is to be free to adapt the remedy to fit the evil it has found to exist, as the statute commands, § 10 (c); or, on the contrary, its remedy thus adapted may be stricken down or modified although the finding which justifies it is approved. That, in my judgment, goes beyond correction of abuse of the Board's discretion and substitutes the Court's judgment for the Board's in devising the appropriate remedy.

For this reason it becomes important to state the different reasons why I think the order should be modified to eliminate any restraint based upon the finding of violation of § 8 (1). It is not because this Court has power or discretion, when there are two substantial and different unfair practices, to modify the Board's order by restricting the relief to what is appropriate to prevent

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[4] This Court has, in various contexts, declared that the particular means by which the effects of unfair labor practices are to be expunged is for the Board and not for the courts to determine. *Virginia Electric & Power Co.* v. *Labor Board,* 319 U. S. 533, 539; *Labor Board* v. *Link-Belt Co.,* 311 U. S. 584, 600; *International Association of Machinists* v. *Labor Board,* 311 U. S. 72, 82. See *Labor Board* v. *Bradford Dyeing Association,* 310 U. S. 318, 342–343. And the Court has said that "the relation of remedy to policy is peculiarly a matter for administrative competence" and that "courts must not enter the allowable area of the Board's discretion. . . ." *Phelps Dodge Corp.* v. *Labor Board,* 313 U. S. 177, 194. See also *Regal Knitwear Co.* v. *Labor Board,* 324 U. S. 9, 13.

repeating only one or by other modification to eliminate relief appropriately designed by the Board to prevent repetition of unfair practices it has found to exist. It is because, in my opinion, there was only one unfair practice and that was the refusal to bargain. Hence I think the *Express Publishing* case exactly applies, and does so without necessity for extending the scope of its ruling as the Court's application appears to do.

In my judgment, an employer does not commit an unfair labor practice when he does no more than exercise rights secured by the Federal Constitution and laws, including the Wagner Act.[5] That Act does not put him to the choice of giving up his rights or exercising them on pain of being found guilty of unfair practice. Apart from the evidence relating to refusal to bargain under § 8 (5), there was nothing, in my opinion, which went beyond what was necessary to exercise or preserve the employer's rights secured by law. The application to the War Labor Board for approval of the proposed weekly increase of $2.00 for all the St. Louis employees, except those represented by recognized unions, was made August 31, 1943, shortly after the company had declined to bargain with the union in order to preserve its right to contest appropriateness of the unit. Announcements of this action over the public address system followed on September 1 and 11, with one also in "Store Chat" on September 3.

In the background of the facts, I do not think these acts amounted to more than the exercise of legal rights secured to the employer by the Wagner Act, the Stabilization Act and the First Amendment. They constituted neither a wage increase nor an offer of one. There was no more than taking steps to secure official approval, required in advance by the Stabilization Act, to make an increase, or

[5] The Wagner Act, designed to promote the public interest by securing employees' rights, does so by appropriate remedies which also afford protections for the employer. See text at note 13.

tender one, at some uncertain future date, possibly never to arrive. The application was merely a necessary preliminary step to later action, which might or might not materialize, in the nature of dealing with employees or offering to do so, whether directly or through their bargaining representatives.

The case therefore is not *Medo*,[6] in spite of the Board's repeated and insistent argument to the contrary. There the employer actually dealt with the employees, not only negotiating but contracting with them. So in *J. I. Case Co.* v. *Labor Board*, 321 U. S. 332. Here there was neither negotiation nor contracting. There was nothing the employer could offer at that time or the employees then could accept. There was only preparatory action looking to the possibility of later negotiations, and announcement of this action to the employees.

If the employer had the right to put itself legally in position to negotiate, either with the employees or with the union, it also had the right to state what it had done. The effect of the Board's decision, and now apparently of the Court's, is to rule that the Wagner Act so circumscribes an employer that he cannot take the necessary preliminary steps, in this case required by law, to place himself in position to undertake bargaining with his employees, whether directly or through their selected representatives. It is further to hold that if he takes such steps, without having first secured the union's permission, he must keep the fact to himself and dare not disclose to his employees what is to all others a matter of public record. This goes beyond protecting the rights of employees. It gives to the union a veto on management, not only as respects negotiations for terms of employment but for putting the employer in position to negotiate. No case here has gone so far and, in my judgment, the Wagner Act does not contemplate that any should do so.

[6] *Medo Photo Supply Corp.* v. *Labor Board*, 321 U. S. 678.

Other facts bear out this conclusion. One is that the Board made no finding that the employer's action was taken with intent to interfere with, restrain or coerce the employees in respect to their rights. Naturally enough there was no such finding. The application affected some 4,500 employees. The unit involved only about 30. It is hardly conceivable that the employer would have taken this step in relation to so many for the purpose of coercing, interfering with or restraining 30. There is lacking, therefore, any showing or finding of intent, a factor the courts have considered important in concluding from otherwise innocent or equivocal facts that unfair practice may exist; [7] and one which in this case the Court apparently makes crucial to determine whether relief relevant to a finding of unfair practice may be sustained. The Board found only that the employer's "unilateral action," in making the application to the War Labor Board and in announcing this fact, "*had the effect* of depriving the Union of credit which normally would accrue to it, and of nullifying its efficacy as a bargaining agent." (Emphasis added.)

Even were this true, it has not heretofore been held that the Wagner Act forbids an employer to take any preliminary step whatever looking toward dealing with his employees in the future which, though not intended to discredit the union, may have the effect to prevent it from obtaining some credit for proposing possible future action which in fact the employer has proposed. Nothing in the Act requires an employer to maintain a union's prestige or to give it credit for originating all proposals

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[7] See *Montgomery Ward & Co.* v. *Labor Board,* 107 F. 2d 555, 559; *Labor Board* v. *Whittier Mills Co.,* 111 F. 2d 474, 478–479; *Labor Board* v. *Elkland Leather Co.,* 114 F. 2d 221, 224; *Labor Board* v. *Chicago Apparatus Co.,* 116 F. 2d 753, 756–757; *Peter J. Schweitzer, Inc.* v. *Labor Board,* 79 U. S. App. D. C. 178, 144 F. 2d 520, 522.

which may have some future effect upon his relations with his employees. Section 8 (1) forbids interference, coercion and restraint upon employees in the exercise of their rights, not the mere failure of the employer to magnify the union's influence.

Moreover the Board made no finding, presumably because there is no evidence to sustain one, of particular and concrete facts showing that the employer's so-called "unilateral action" adversely affected the union's status among its members or other employees.[8] It only concluded that the action "reasonably [may] be said to have undermined the Union . . . and to have discouraged employees generally in their union affiliation." Presumably, since no such effects were proved or found specifically, the basis for this conclusion was the Board's "experience," though this was not referred to in the order or the report on which it was founded. That foundation was not sufficient, in my judgment, in the absence of proof of more unequivocal acts of unfair practice, of any finding of intent to interfere, restrain or coerce, and of any showing whatever of specific discouraging or undermining effects. Something more than supposition should underlie a conclusion which supports a finding of unfair practice.

Nor did the employer ignore the union's possibly legitimate status or its right to have a voice in the matter of the increase, if approval by the War Labor Board should materialize. The application set forth the essential facts with reference to the existing dispute concerning appropriateness of the unit, the employer's intention to litigate the question whenever it might, its nonrecognition of the

[8] The general "finding" that the company's action in making the application and publicizing it "interfered with, restrained, and coerced its employees," 53 N. L. R. B. at 1371, rested on no more than the Board's assertion that "it logically follows" that these acts "had the effect" of depriving the union of credit and "may . . . be said to have undermined" it.

union pending the obtaining of a decision, and its purpose for these reasons to include the affected employees in the application. But the application went on to say that if the union should object to the increase, for Departments 280 and 281, the Board should consider it as amended to exclude those employees.[9]

This hardly furnishes ground for concluding that the employer was attempting to "short-circuit" the union, undermine it, or discredit it with the employees. It explicitly recognized that the union, if rightly designated and certified, was entitled to say whether or not the proposed change in pay should become effective. Actually, that right was conceded, regardless of the ultimate outcome of the issue on validity of the certification.[10] Clearly, in view of this concession, there was no effort either to contract with the employees directly or to deal with them, over the union's head, about the increase. Whether or not it should become effective as to them was left, not to the employees themselves, but to the sole and exclusive judgment of the union. There was therefore no semblance of the short-circuiting or direct dealing with employees which was present in both the *Medo* and the *J. I. Case* decisions.

Possibly for this reason the Board is driven back to its "undermining" contention. The company, it says, by including these employees, "put the union on the spot," so that it had no real choice. The argument shows concern for the union's "spot," but gives no recognition to the employer's. The Board does not urge that the company should have excluded these employees from the general application, with good reason. Had this been done,

[9] The Board's brief states that the union objected and the War Labor Board accordingly eliminated the bushelmen from the application, citing *In re May Dept. Stores Co.*, N. W. L. B. Case No. 7–6585 (unreported).

[10] See note 11.

obviously the company would have laid itself open to a charge and a finding of unfair practice under § 8 (1). The Board is unwilling, apparently, to put the employer in that dilemma. Cf. *Medo Photo Supply Corp.* v. *Labor Board,* 321 U. S. 678, 699. It does not say, though the Court does by way of dictum, that excluding these employees from the application would not have been an unfair practice. The Board says the employer's only way out was to consult the union before making the application.

This can only mean that the employer was compelled to ask the union's permission to include these employees; in short, that the union had the right under the Wagner Act to veto any action taken by the employer to obtain the necessary legal authority to propose any increase for them, whether directly or through the union. I do not think the Wagner Act confers such a power on the union. Nor did the Stabilization Act or the regulations in effect pursuant to its provisions do so.[11] Moreover, the employer asserts that it could not refer the matter to the union without surrendering the very rights it was seeking to preserve. This, it says, would have amounted to recog-

[11] The regulations required that the application be signed "either (a) jointly by the employer and a duly recognized collective bargaining agency . . ., or (b) by the employer alone." 4 War Labor Rep. XXXI, XXXIII–XXXIV, § III, 3. It was further required, in either case, that the application state whether or not there was "a duly recognized collective bargaining agency . . . which has not joined with the employer in the application." If so, provision was made for the Wage and Hour Division to notify the organization and request it to inform the office of objections, if any, to action on the application. Cf. note 9. If none were made, the application would be acted on. If made, the matter was to be treated as a dispute and referred to the Conciliation Service of the Department of Labor.

It was apparently in compliance with this regulation that the application in this case set forth the representations concerning the nonrecognition of the union, the dispute, etc. The regulations were amended later to include either a recognized or a certified union. 9 War Labor Rep. XXXIII; 8 Fed. Reg. 16678.

nition and would have foreclosed it later from securing review under the terms of § 10 upon the question whether the unit was appropriate.

Whether or not that is true, there was certainly good reason to believe it so. The right to review is given in terms only as an incident of an unfair practice proceeding. § 10; cf. *American Federation of Labor* v. *Labor Board,* 308 U. S. 401; *Inland Empire Council* v. *Millis,* 325 U. S. 697. In this state of the law, the company's only certain remedy was to withhold recognition until the matter could be determined. Had it recognized the union, by seeking its permission to include the affected employees, there would have been no factual or legal basis for the only proceedings by which review was assured; and, in order to secure it, the company then would have been forced to commit some other act of unfair practice or to take its chance upon some other doubtful remedy. In either event, it would have been confronted with its prior action of dealing with the union and the possibilities this would present either for applying the broad doctrine of estoppel or for occupying the inconsistent, not to say indefensible, position of having recognized the union and then having deliberately repudiated the recognition.

I do not think the Wagner Act was intended to put the employer in such a dilemma. It has been settled that he takes the risk of his error when he mistakenly judges that the unit is not appropriate or for other reason that the duly selected or certified union is not entitled to recognition.[12] As to that, the employer's choice was hard, made so by the very state of the law. Had the law been that

[12] See, e. g., *Labor Board* v. *Hearst Publications,* 322 U. S. 111; *Franks Bros. Co.* v. *Labor Board,* 321 U. S. 702; *Medo Photo Supply Corp.* v. *Labor Board,* 321 U. S. 678; *J. I. Case Co.* v. *Labor Board,* 321 U. S. 332; *Pittsburgh Plate Glass Co.* v. *Labor Board,* 313 U. S. 146; *Labor Board* v. *Bradford Dyeing Assn.,* 310 U. S. 318; *National Licorice Co.* v. *Labor Board,* 309 U. S. 350; cf. *H. J. Heinz Co.* v. *Labor Board,* 311 U. S. 514, 523 (employer bargained but refused to sign written contract).

certification was none of the company's business and that the company had *no* right of review, it would have known its rights and its liabilities. That was not and is not the law. The company was told expressly that it had a right of review, but only in an unfair practice proceeding.[13] It was therefore put to the choice, by the statute's terms, of foregoing review or having it by an act of unfair practice. Hence the finding of unfair practice by refusal to bargain must be sustained. But, in taking this risk, the employer did no more than it was compelled by law to do to save its rights under the Wagner Act and to avoid being found guilty, by virtue of some alternative course of conduct relating to the application, of further unfair practices.

I do not agree, therefore, that this necessitous action amounted to an additional unfair practice, in the nature of interference, coercion or restraint of employees' rights, whether or not the finding that it was is sufficient to sustain an independent provision for relief.

A word remains to be said concerning the announcements. As has been stated, if the company had the right to make the application as it did, it also had the right to announce that fact to the public and to the employees, so long as in doing this it did not do so with intent or in a manner to violate the Act. I find nothing in the announcements to justify a finding they were made with this purpose or effect, and there is no finding to the contrary.[14] They were, in my judgment, no more than an

[13] The attenuated character of the right makes all the more essential that it not be whittled away or nullified by rulings which make its exercise more precarious than it is by the very conditions of its existence.

[14] The mere fact that the announcements omitted specific reference to Departments 280 and 281 does not supply this element. Such a reference, if made, might have been construed, by its singling out of this unit for special treatment and thereby for invidious implication, as furnishing the very evidence of wrongful specific intent and effect which the Board has failed to find.

exercise of the employer's rights of free speech and a free press, secured by the First Amendment. Cf. *Labor Board* v. *Virginia Electric & Power Co.*, 314 U. S. 469; *Labor Board* v. *Ford Motor Co.*, 114 F. 2d 905; *Labor Board* v. *American Tube Bending Co.*, 134 F. 2d 993; compare *Texas & N. O. R. Co.* v. *Brotherhood*, 281 U. S. 548, 568.

It follows from my view of the case that the Board's order should be modified by striking from it Paragraph 1 (b) together with the words "and (b)" from Paragraph 2 (b), and as so modified enforced. Accordingly, I think the judgment of the Court of Appeals, enforcing the Board's order, should be modified in these respects and, as thus modified, affirmed.

The CHIEF JUSTICE and MR. JUSTICE FRANKFURTER join in this opinion.

MARKHAM, ALIEN PROPERTY CUSTODIAN, ET AL. *v.* CABELL.

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

No. 76. Argued October 19, 1945.—Decided December 10, 1945.

1. Section 9 (a) of the Trading with the Enemy Act allows "Any person not an enemy or ally of enemy . . . to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian" to sue the Custodian or the Treasurer of the United States in the federal courts. Section 9 (e) provides that no debt shall be allowed under § 9 "unless it was owing to and owned by the claimant prior to October 6, 1917" nor "unless notice of the claim has been filed, or application therefor has been made, prior to the date of the enactment of the Settlement of War Claims Act of 1928." *Held:*

(a) The Trading with the Enemy Act became effective again automatically at the outbreak of World War II. P. 407.

The Act was designed to operate not only in World War I but also, unless repealed or superseded, in any future war. P. 409.

(b) The right to sue on a debt, granted by § 9 (a), has not been wholly withdrawn. P. 412.

(c) The time limitations in § 9 (e) relate to claims against property seized during World War I. P. 412.

(d) Allowance of suit on a debt as prescribed by § 9 (a) is not inconsistent with the power granted the Executive by the 1941 amendment of § 5 (b) to vest the property of any foreign country or national thereof and to make of seized property any use which the national interest in wartime might require. P. 412.

2. Resort to the policy of a law may be had to ameliorate its seeming harshness or to qualify its apparent absolutes. *Holy Trinity Church v. United States*, 143 U. S. 457. P. 409.
3. A less literal reading which effectuates a statute is preferred to a strict reading which would render it ineffectual. P. 409.
4. Where Congress amends only one section of a law, leaving another untouched, the normal assumption is that the two were designed to function as an integrated whole. P. 411.

148 F. 2d 737, affirmed.

CERTIORARI, 325 U. S. 847, to review the reversal of a judgment dismissing the complaint in a suit under the Trading with the Enemy Act.

Mr. Paul A. Freund argued the cause, and *Acting Solicitor General Judson, Assistant Attorney General Wechsler, Messrs. M. S. Isenbergh* and *Raoul Berger* were on the brief, for petitioner.

Mr. Hartwell Cabell, with whom *Mr. Charlton Ogburn* was on the brief, for respondent.

Messrs. George Whitefield Betts, Jr. and *George Yamaoka* filed a brief as *amici curiae*, urging affirmance.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Respondent, an American citizen, brought this suit against the Alien Property Custodian and the Treasurer of the United States to recover from the assets of the Assicurazioni Generali di Trieste e Venezia, an Italian

insurance company, the unpaid portion of a claim for legal services rendered that company. The assets of the company had vested in the Alien Property Custodian in 1942[1] and the vested assets had been delivered to him. The suit was sought to be maintained under § 9 (a) of the Trading with the Enemy Act (40 Stat. 411, as amended 41 Stat. 977, 50 U. S. C. App. § 9 (a)) which allows "Any person not an enemy or ally of enemy . . . to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian" to sue the Custodian or the Treasurer of the United States in the federal courts. Petitioners moved to dismiss on the ground that the claim did not qualify under § 9 (e) of the Act. Sec. 9 (e), which was added to the Act in 1920 (41 Stat. 980) and amended in 1928 (45 Stat. 271), provides that no debt shall be allowed under § 9 "unless it was owing to and owned by the claimant prior to October 6, 1917" nor "unless notice of the claim has been filed, or application therefor has been made, prior to the date of the enactment of the Settlement of War Claims Act of 1928." In view of those provisions of § 9 (e) the District Court dismissed the complaint. The Circuit Court of Appeals reversed. 148 F. 2d 737. The case is here on a petition for a writ of certiorari which we granted because of the public importance of the question presented.

If § 9 (e) is applicable here, the suit may not be maintained since the debt was not in existence on October 6,

[1] See Vesting Order 218, dated October 7, 1942, 7 Fed. Reg. 9466; Vesting Order 468, dated December 9, 1942, 8 Fed. Reg. 1038. For the establishment of the office of Alien Property Custodian and the definition of his functions as respects the vesting of alien property, see Executive Order 9193, dated July 6, 1942, 7 Fed. Reg. 5205, amending Executive Order 9095, dated March 11, 1942, 7 Fed. Reg. 1971.

1917, nor had notice of the claim been filed or application therefor been made prior to the date of the enactment of the Settlement of War Claims Act of 1928. We would have quite a different case if § 9 (a) and (e) had been enacted after the outbreak of the recent war. For we may assume that Congress could set up such barriers as it chose to the enforcement of the claims of an alien's creditors against the seized property. But the doubt as to the applicability of § 9 (e) to the present situation arises because that provision was part of the legislation enacted after the outbreak of World War I to deal with the claims against property seized during that period. That legislation was not reenacted when the recent war broke out. It automatically went into effect again at that time.[2] Hence the argument that these provisions of § 9 (e) are limited to claims against property seized during World War I. Our conclusion is that they are so limited.

In the first place, § 9 (e) disallows recovery "to any person who is a citizen or subject of any nation which was associated with the United States in the prosecution of the war, unless such nation in like case extends reciprocal rights to citizens of the United States." When it is recalled that § 9 (e) was first added to the Act in 1920, it seems tolerably clear that the words "was associated with the United States in the prosecution of the war" refer to World War I. The use not only of the past tense but

[2] As the Circuit Court of Appeals pointed out, that followed from several circumstances: (a) § 2 (c) defined "the beginning of the war" to mean "midnight ending the day on which Congress has declared or shall declare war or the existence of a state of war"; (b) § 302 of the First War Powers Act, approved December 18, 1941 (55 Stat. 838, 840) assumed that the Trading with the Enemy Act had not been in force before December 8, 1941, and that it went into effect again at that time; and (c) § 5 (b) of the Trading with the Enemy Act was amended December 18, 1941, by the First War Powers Act without any mention of the other parts of the earlier Act. 55 Stat. 839.

also of the concept of "associate" is significant. As Judge Learned Hand speaking for the Court below said, the word "associate" was used during World War I "in sedulous avoidance of any implication" that we had "allies." In the second place, the time limitations contained in § 9 (e) point the same way. As the United States says, some sections of the Act were explicitly restricted to situations growing out of World War I, as, for example, § 3 (d). But it seems to us that the provisions of § 9 (e) with which we are now concerned carry almost as plain a hallmark. For the restriction of suits to debts which were owing to and owned by the claimant prior to October 6, 1917 and as respects which a notice of claim had been filed prior to the date of the enactment of the Settlement of War Claims Act of 1928 strongly suggests that Congress was dealing exclusively with World War I claims, not with claims which might arise in some future war. As of 1920 and 1928 the time limitations written into § 9 (e) had no other relevancy. The Committee Reports,[3] accompanying the legislation by which § 9 (e) was added to the law, while not explicit on the precise point, show that Congress was concerned solely with the handling of claims which then existed. There is not the slightest suggestion that Congress was drafting a statute of limitations likewise applicable to claims which might be asserted in case the United States at some future time again went to war. These considerations indicate to us that it would be a

[3] See H. Rep. No. 1089, 66th Cong., 2d Sess.; S. Rep. No. 273, 70th Cong., 1st Sess., p. 29; H. Rep. No. 17, 70th Cong., 1st Sess., p. 20. In S. Rep. No. 273, *supra*, it was stated: "Under the existing law a creditor of a person whose property was seized by the Alien Property Custodian may file a claim and institute proceedings for the payment of the debt, under certain conditions. Inasmuch as these claimants have had more than 10 years in which to file their claims, this provision is amended by subsection (b) of section 12 of the proposed bill so as to permit payment only where the claim was filed prior to the date of the enactment of the bill."

distortion to read § 9 (e) as if Congress in December 1941 decided that the statute of limitations applicable to World War I claims should likewise be applicable to World War II claims. If we gave § 9 (e) that broad interpretation, we would, in the third place, deprive § 9 (a) of all meaning so far as World War II claims were concerned. That we hesitate to do, for the Act was not only designed to operate in the first World War; it was also to become effective at the time of any future war unless repealed or superseded. Yet the remedy afforded by § 9 (a) would be quite illusory and ineffective so far as it applies to World War II claims if § 9 (e) were read literally without regard to its history. It was for this reason particularly that the court below refused "to make a fortress out of the dictionary" and to read § 9 (e) strictly and literally. The policy as well as the letter of the law is a guide to decision. Resort to the policy of a law may be had to ameliorate its seeming harshness or to qualify its apparent absolutes as *Holy Trinity Church* v. *United States*, 143 U. S. 457 illustrates. The process of interpretation also misses its high function if a strict reading of a law results in the emasculation or deletion of a provision which a less literal reading would preserve.

The United States, however, contends that such a construction of § 9 (e) would gravely interfere with the efficient administration of alien property controls in accordance with policies adopted by Congress in relation to World War II. It points out that by virtue of amendments to § 5 (b) of the Trading with the Enemy Act which were made on December 18, 1941 by the First War Powers Act (55 Stat. 839, 50 U. S. C. App., Supp. IV, § 616), the Executive is now armed with far more comprehensive power over alien property and the property of other foreign interests than in World War I. Now there is the "freezing" or "blocking" of foreign funds aimed at the immobilization of foreign assets in the United States by prohibiting,

without a license, any transactions involving them—a program initiated after the invasion by Germany of Denmark and Norway and administered by the Treasury.[4] If the Treasury refuses a license permitting payment of creditors out of blocked funds, neither the creditor nor the owner has any remedy as a matter of right under the Act. It is said that to allow creditors of certain aliens whose property has been vested in the Alien Property Custodian to maintain suits but to disallow suits by creditors of aliens whose funds are merely frozen is to destroy consistency in the position of creditors under the Trading with the Enemy Act. Moreover, § 9 (a) permits suits on debt claims only if the debt is one "owing from an enemy or ally of enemy" whose property has been taken. By the 1941 amendment to § 5 (b) the vesting power has not been so limited but extends to "any property or interest of any foreign country or national." The argument is that to construe § 9 (e) so as to permit creditors of an enemy to sue is to discriminate without warrant against creditors of non-enemy foreign nationals who are given no such remedy. Moreover, it is said that if § 9 (e) is not a barrier to suits, a race of diligence would be started with no guarantee of any equitably ordered priority in the payment of the claims out of the seized property. It is also argued that if these suits are allowed the operations of the Custodian would be burdened with litigation.

We have concluded that however meritorious these considerations are, they raise questions of policy for Congress. We are concerned only with the right to sue on a debt under § 9. Congress granted that right to some claimants and withheld it from others. Whether its choice was wise or not is not for us to say. The right to sue, explicitly granted by § 9 (a), should not be read out of the law

[4] This program, initiated by Executive Order 8389, dated April 10, 1940, 5 Fed. Reg. 1400, was ratified by Congress on May 7, 1940, by Joint Resolution. 54 Stat. 179.

unless it is clear that Congress by what it later did withdrew its earlier permission. We can find no indication in the 1941 legislation that Congress by amending § 5 (b) desired to delete or wholly nullify § 9 (a). On the contrary, the normal assumption is that where Congress amends only one section of a law, leaving another untouched, the two were designed to function as parts of an integrated whole. We should give each as full a play as possible. Moreover, we are able to find in the amendment to § 5 (b) no suggestion or indication that Congress was writing a different statute of limitations than was then contained in § 9 (e). The 1941 amendment is as silent on that score as it is on the right to sue afforded by § 9 (a).

It is true that § 5 (b) gave a broader grant of authority to the Executive than had existed under the original Act.[5] As respects the seizure of property it provides:

[5] As stated in H. Rep. No. 1507, 77th Cong., 1st Sess., pp. 2–3:

"Section 5 (b) of the Trading With the Enemy Act has been continued down to the present time. The existing system of foreign property control (commonly known as freezing control) is based on that subdivision as last amended on May 7, 1940. That subdivision of section 5 as it is now in effect, however, does not give the broad powers to take, administer, control, use, liquidate, etc., such foreign-owned property that would be given by section 301 of the bill.

"At present the Government exercises supervision over transactions in foreign property, either by prohibiting such transactions or by permitting them on condition and under license. It is, therefore, a system which can prevent transactions in foreign property prejudicial to the best interests of the United States, but it is not a system which can affirmatively compel the use and application of foreign property in those interests.

"Section 301 remedies that situation by adding to the existing freezing control, in substance, the powers contained in the Trading With the Enemy Act with respect to alien property, extending those powers, and adding a flexibility of control which experience under the original act and the recent experience under freezing control have demonstrated to be advisable. The provisions of section 301

"any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe *such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States,* and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes." (Italics added.)

It is said that the survival of the privilege of satisfying debt claims as a matter of right out of vested property is inconsistent with the new power granted the Executive by § 5 (b) to make any affirmative use of the property that the national interest in time of war might require. But we are here concerned solely with the right to sue on a debt, not with the right to sue to reclaim property nor with any question concerning the satisfaction of any judgment which may be obtained. We only hold that the right to sue on a debt granted by § 9 (a) has not been wholly withdrawn and that § 9 (e) is not applicable to this class of claims. We cannot see that the allowance of

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would permit the establishment of a complete system of alien property treatment. It vests flexible powers in the President, operating through such agency or agencies as he might choose, to deal with the problems that surround alien property or its ownership or control in the manner deemed most effective in each particular case. In this respect the bill avoids the rigidity and inflexibility which characterized the alien property custodian law enacted during the last war. The necessity for flexibility in legislation on this subject is accentuated by the vastness of the alien property problem confronting the Government today. At the peak of his activity, the Alien Property Custodian of the last war administered property valued at something over $500,000,000. Today there is over $7,000,000,000 worth of property already subject to the existing control."

And see S. Rep. No. 911, 77th Cong., 1st Sess., p. 2.

a suit on a debt as prescribed by § 9 (a) collides with the policy of § 5 (b). That does not in any way cause interference with the administration of the vested property pursuant to § 5 (b). Sec. 9 (a), to be sure, contains a provision which prescribes how any judgment obtained in the suit against the Custodian or Treasurer shall be satisfied;[6] and also allows suits to reclaim property.[7] Whether those provisions have been superseded by § 5 (b) or whether § 5 (b) contains a grant of authority which may be so exercised as to prevent the reclamation of property or the payment of the judgment or to alter the procedure for reclamation or payment as prescribed in § 9 (a) are distinct questions. Here we are dealing solely with the right to maintain a suit on a debt, a right which is not shown to collide with § 5 (b). We reserve decision on the other questions.

Affirmed.

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

MR. JUSTICE BURTON, concurring.

A review of the development of the Trading with the Enemy Act from its inception in 1917, early in World War

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[6] "If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated."

[7] Sec. 9 (a) allows suits by "Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States," as well as suits by any such person to whom a debt may be owing from any enemy or ally of enemy whose property has been seized.

I, further discloses its dual purposes in a way that throws needed light upon its meaning at the time of this proceeding in 1944, late in World War II.

It originated as H. R. 4960, June 11, 1917, drafted in the form of permanent legislation. Its purposes were explained by House and Senate Committees in terms suited to permanent legislation.[1] Before its passage, several amendments were inserted which limited specific sections of the Act to "the present war," [2] but none of these so limited § 9 or the Act as a whole. Other sections were limited by references made to specific nations and still others by references to specific dates. Later amendments added other provisions confined to World War I. However, no general limitation ever has confined the Act as a whole or its main structural provisions to a specific war, specific nations or specific dates. In this way the Act has met the immediate needs of its time and also has stood ready to meet additional wars and additional enemies. The beginning of World War II in 1941 accordingly found

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[1] "The chief objects of this bill are (1) to recognize and apply concretely, subject to definite modifications, the principle and practice of international law interdicting trade in time of war, and (2) to conserve and utilize upon a basis of practical justice enemy property found within the jurisdiction of the United States. . . . According to American law one of the immediate consequences of war is to put an end to all commercial relations between citizens or subjects of belligerent nations." H. R. Rep. No. 85, 65th Cong., 1st Sess., 1, June 21, 1917. "To summarize the purpose of the bill is not to create new international rules or practices, but to define and mitigate them." H. R. Rep. No. 85, *supra*, p. 2. "The purpose of this bill is to mitigate the rules of law which prohibit all intercourse between the citizens of warring nations, and to permit, under careful safeguards and restrictions, certain kinds of business to be carried on. It also provides for the care and administration of the property and property rights of enemies and their allies in this country pending the war." Sen. Rep. No. 113, 65th Cong., 1st Sess., 1, Aug. 31, 1917.

[2] The conference report inserted five such references. H. R. Rep. No. 155, 65th Cong., 1st Sess., 3, 6, September 21, 1917.

many provisions of the Act, such as § 9 (e), limited by references to World War I, and others, such as § 9 (a), not so limited.

By its terms, its nature and its history, § 9 (e) [3] from its inception has related solely to World War I. Its relation to World War I is apparent on its face. Its first clause refers to a restriction on the allowance of a debt "to any person who is a citizen or a subject of any nation *which was associated with the United States in the prosecution of the war.*" These words, enacted in 1920 (41 Stat. 977, 980) and reenacted in 1923 (42 Stat. 1511, 1514), refer to any nation "associated" with us in World War I. "Associated" was then a word of art. Its second clause reads, "*nor in any event shall a debt be allowed under this section unless it was owing to and owned by the claimant prior to October 6, 1917.*" This refers to the effective date of the original Trading with the Enemy Act. This date provides a reasonable test for debts to be al-

[3] Section 9 (e) of the Trading with the Enemy Act, as last amended, August 24, 1937 (50 U. S. C. App., § 9 (e)), is as follows:

"No money or other property shall be returned nor any debt allowed under this section to any person who is a citizen or subject of any nation which *was associated* with the United States in the prosecution of the war, unless such nation in like case extends reciprocal rights to citizens of the United States: *Provided,* That any arrangement made by a foreign nation for the release of money and other property of American citizens and certified by the Secretary of State to the Attorney General as fair and the most advantageous arrangement obtainable shall be regarded as meeting this requirement; *nor in any event shall a debt be allowed under this section unless it was owing to and owned by the claimant prior to October 6, 1917,* and as to claimants other than citizens of the United States unless it arose with reference to the money or other property held by the Alien Property Custodian or Treasurer of the United States hereunder; *nor shall a debt be allowed under this section unless notice of the claim has been filed, or application therefor has been made, prior to the date of the enactment of the Settlement of War Claims Act of 1928* (Act March 10, 1928, ch. 167)." (Italics supplied.)

lowed against property seized by the Alien Property Custodian in connection with World War I. It has no reasonable relation to a war beginning in 1941. To require claims to be more than 24 years old in order to be acceptable is beyond reason. The last clause reads, "*nor shall a debt be allowed under this section unless notice of the claim has been filed, or application therefor has been made, prior to the date of the enactment of the Settlement of War Claims Act of 1928.*" This clause means nothing when applied to a claim like the present one which was not earned until 1935.

Section 9 (e) as thus earmarked prescribes a natural limitation upon claims to be allowed against enemy property seized in World War I. As such it is reasonable. It is not possible, however, that Congress intentionally chose this indirect way of saying that American creditors may assert just claims against assets of debtors whose properties were seized in World War I, but not against assets of debtors whose properties might be held in custody by the Alien Property Custodian as a result of future wars.

The legislative history emphasizes this. The original Trading with the Enemy Act, when enacted, October 6, 1917 (40 Stat. 411), contained two kinds of provisions. The general structure of the Act was in terms of permanent legislation. Section 2 in defining terms refrained from reference to the war then in progress or to specific nations or fixed dates. For example, it provided that:

"The words 'the beginning of the war,' as used herein, shall be deemed to mean midnight ending the day on which Congress has declared or shall declare war or the existence of a state of war.

"The words 'end of the war,' as used herein, shall be deemed to mean the date of proclamation of exchange of ratifications of the treaty of peace, unless the President shall, by proclamation, declare a prior date, in which case the date so proclaimed shall be deemed to be the 'end of

the war' within the meaning of this Act." (50 U. S. C. App., § 2 (c).)

Sections 3 (a), (b) and (c) dealt in like terms with general procedure for trading under Presidential license in time of war. Section 5 (b) dealt with the regulation of foreign exchange, coin export, transfers of credit, etc. Section 6 authorized the President to appoint an official to be known as the Alien Property Custodian. Section 9 provided for the assertion of property claims and debt claims on behalf of any person not an enemy or ally of enemy against certain assets in the possession of the Custodian.

On the other hand, certain other provisions were, from the beginning, earmarked as temporary provisions. For example, § 3 (d) referred to certain censorship to be established "during the present war." Section 4 (a) referred to certain German insurance companies. Section 4 (b) referred to "the present war." Similar references to "the present war" occurred in §§ 11, 13 and 14.

Section 9 is typical. Originally it was all of a general and permanent nature. It has been amended nine times. Its first paragraph has been preserved, with slight changes, as § 9 (a) in the form of permanent legislation. On the other hand, many new subsections of § 9, including § 9 (e), contain provisions suited only to transactions growing out of World War I. The first amendment to § 9 was that of July 11, 1919 (41 Stat. 35). This threatened to confuse the situation. It inserted in the first paragraph a proviso referring to (41 Stat. 36) "all property *heretofore* determined by the President to have been held . . . for the benefit of a person who was an enemy or ally of enemy" and to "territory of any nation associated with the United States in the prosecution of the war which *was* occupied by the military or naval forces of *Germany or Austria-Hungary, or their allies.*" (Italics supplied.) On June 5, 1920, however, the second amendment (41 Stat. 977)

corrected this and set the pattern which has since been followed. It reenacted the whole of § 9 and, in doing so, removed from its first paragraph the 1919 proviso. It restored that paragraph to general terms and gave it the designation of § 9 (a) which it has retained. Congress, at the same time, added several subsections most of which contained express references to Germany and Austria-Hungary. Section 9 (e) first appeared at that time. From the beginning, § 9 (e) contained its present references to "any nation which *was associated* with the United States in the prosecution of the war" and to the requirement that a debt in order to be allowed under the section must have been *"owing to and owned by the claimant prior to October 6, 1917."* Later amendments emphasized this restriction of § 9 (e) to World War I, while preserving the general and permanent character of § 9 (a).[4] Distor-

[4] The later amendments were those of February 27, 1921 (41 Stat. 1147), applying §§ 9 (b) (2) and (3) to situations where a woman "prior to April 6, 1917, intermarried with a subject or citizen of Germany or Austria-Hungary";

December 21, 1921 (42 Stat. 351), amending § 9 (a) to permit suits to be brought eighteen months instead of six months after the "end of the war." The amendment did not insert any calendar date relating to World War I although peace had been declared July 2, 1921. The words "end of the war" must, therefore, be given their general meaning applicable to all wars as provided in the definitions in § 2, *supra;*

December 27, 1922 (42 Stat. 1065), amending § 9 (a) to permit suits to be brought 30 months instead of 18 months after the "end of the war";

March 4, 1923 (42 Stat. 1511), reenacting the whole § 9. In § 9 (a) it omitted all limitation on the time within which suits might be brought. It added new subsections especially adapted to World War I claims such as a restriction against claims on behalf of citizens of the United States naturalized since November 11, 1918;

May 7, 1926 (44 Stat. 406), adding §§ 9 (b) (3A) and (3B) as to citizens of Germany, Austria, Hungary or Austria-Hungary;

March 10, 1928 (45 Stat. 254–279). This was the "Settlement of War Claims Act of 1928." It dealt expressly with World War I. It

tion of the meaning of statutory language would result not from limiting § 9 (e) to World War I but from applying it to World War II.

It is argued that to exclude the defense which is claimed to be supplied by § 9 (e) against debts payable out of property vested in the Custodian during World War II, under § 5 (b), as amended by the First War Powers Act, December 18, 1941 (55 Stat. 839), will result in inequities. For example, it is urged that § 5 (b) was amended in 1941 to permit vesting in the Custodian of property of "any foreign country or national thereof." However, § 9 (a) has not been amended correspondingly to permit the assertion of claims to the payment of debts out of the property of a foreign national as distinguished from that of an "enemy or ally of enemy." From this it is argued that Congress should not be regarded as having intended to create such inequities, if there be such, between creditors of "enemies" and those of other "foreign nationals," through the passage of the First War Powers Act; and that, therefore, Congress must be regarded as having intended that § 9 (e) eliminate all creditors' claims under § 9 (a) against property of enemies and of allies of enemies, unless filed or claimed before March 10, 1928.

This amounts to an argument that because subsequent legislation has produced inequitable results, therefore pre-existing legislation should be reinterpreted so as to

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was concerned with such subjects as the "Mixed Claims Commission" and "The Tripartite Claims Commission." It amended the Trading with the Enemy Act in many details as to World War I claims and added many new provisions as to those claims. It added subsections to § 9. In § 9 (e) it inserted the clause which required that notices of claims must have been filed or applications for claims must have been made before the enactment of the Settlement of War Claims Act of 1928;

August 24, 1937 (50 Stat. 748), amending § 9 (e) by inserting the proviso as to arrangements which will be regarded as meeting the requirements of reciprocal rights.

eliminate these subsequently created inequities. If the meaning of § 9 (e) was restricted to World War I prior to the enactment of the First War Powers Act, the First War Powers Act cannot change the meaning of § 9 (e) without amending it, and it does not amend it. A suggestion that amendatory legislation might now be helpful is found in bills recently introduced in Congress with the support of the Alien Property Custodian. The hearings emphasize that need.[5]

Furthermore, the interpretation now urged to offset inequities would create other inequities. For example, the proposed interpretation would result in an inequity to the respondent in the present case. He is an American citizen with an admittedly good claim for about $7,000 earned in 1935, against an enemy corporation, assets of which in the hands of the Alien Property Custodian are ample to pay the claim. The claimant filed his claim within the one year prescribed in the order vesting the assets of the enemy company in the Custodian.[6] The claimant is now met with a defense that he cannot recover because he failed to file his claim before March 10, 1928, which was seven years before it was earned and fourteen years before the assets had been vested in the Custodian with whom he is asked to file his notice. The decision as to the existence of inequities under the 1941 amendment and as to the best way to deal with them lay with Congress in 1941 and still lies there.

The Act never has had a termination clause and was expressly excluded from the Joint Resolution of March 3, 1921 (41 Stat. 1359), which declared that certain acts of

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[5] S. 1940, H. R. 4840 and H. R. 5031 were introduced in the 78th Congress. H. R. 1530 was introduced in the 79th Congress, January 16, 1945. See Hearings on H. R. 4840 before Subcommittee No. 1 of the Committee on the Judiciary of the House of Representatives, 78th Cong., 2d Sess., Serial No. 18, June 9–15, 1944.

[6] See note 10 *infra*.

Congress should be construed as if the war had ended and the present or then existing emergency had expired. The Settlement of War Claims Act of 1928 [7] was engrafted upon the Trading with the Enemy Act without affecting its general structure or its life. In the natural course of events World War I claims ultimately would have been disposed of and yet the main structure of the Act would have remained on the books ready for later use. That this was contemplated is evidenced by Executive Order 6694, May 1, 1934.[8] This was issued under authority of the Reorganization Act of March 3, 1933 (47 Stat. 1489, 1517). Section 1 expressly abolished the Office of the Alien Property Custodian and transferred the "authority, rights, privileges, powers, and duties conferred and imposed on the Alien Property Custodian by law and/or Executive Order . . . to the Department of Justice, to be administered under the supervision of the Attorney General." This incorporated the office of the Alien Property Custodian into the permanent structure of the Government. Within the Department of Justice the rights, privileges, powers and duties conferred upon the Alien Property Custodian were placed under the Attorney General and were later exercised largely through him or the Assistant Attorney General in charge of the Claims Division in the Department of Justice. On May 15, 1939, by Executive Order 8136, 4 Fed. Reg. 2044, all power and authority conferred upon the President by §§ 9, 12, 20 and 21 of the Trading with the Enemy Act and all power and authority which the President under that Act had theretofore ordered to be exercised through the Alien Property Custodian were vested in and required to be exercised through the Attorney General or the Assistant Attorney General in charge of the Claims Division in the Department of Justice.

In this status § 9 (a) and other permanent portions of

[7] See note 4 *supra.*

[8] 28 C. F. R. § 4.1.

the Trading with the Enemy Act awaited the next war. If left in that form there would have been no inequities other than those which had existed in World War I. The Act would have been administered much as it was in World War I except that it would have been administered through the Attorney General and the Department of Justice instead of through an independent agency. In 1940, at the approach of World War II, the Act had much the same structure in §§ 9 (a), 9 (e) and 5 (b) as it had in 1928. The inequities discussed in this proceeding arose later from the substantial expansion of § 5 (b).[9]

[9] The development of the law especially affecting § 5 (b) which took place during the national emergency prior to World War II, did not change the situation although it did emphasize the connection of the Trading with the Enemy Act with the permanent structure of the Federal Government.

For example, on March 9, 1933 (48 Stat. 1), § 5 (b), relating to foreign exchange, export or hoarding of coin, etc., was amended as a part of the legislative program to meet the national emergency in banking. The amendment thus applied the power of the President under this Act to the internal conditions of the country rather than to its international relations. This was supplemented by Executive Order 6560, January 15, 1934, 31 C. F. R. § 127.0.

Following the transfer of the office of the Alien Property Custodian to the Department of Justice, § 9 (e) received a slight amendment on August 24, 1937. (50 Stat. 748.) See note 4 *supra*. Additional responsibility under the Act was placed upon the Attorney General or the Assistant Attorney General in charge of Claims on May 15, 1939. Executive Order 8136, 4 Fed. Reg. 2044. On April 10, 1940, the President issued Executive Order 8389, 5 Fed. Reg. 1400, which, under authority of § 5 (b), extended control over property in which Norway or Denmark or any national thereof had an interest. This action was confirmed and further supplemented by the Act of May 7, 1940 (54 Stat. 179). This was substantially extended to many other nations by Executive Order 8785, June 14, 1941, 6 Fed. Reg. 2897; Proclamation No. 2497, July 17, 1941, 6 Fed. Reg. 3555; Executive Order 8832, July 26, 1941, 6 Fed. Reg. 3715; Executive Order 8839, July 30, 1941, 6 Fed. Reg. 3823; Executive Order 8900, September 15, 1941, 6 Fed. Reg. 4795; Executive Order 8963, December 9, 1941, 6 Fed. Reg. 6348.

On December 18, 1941 came the First War Powers Act. 55 Stat. 839. No statutory or executive action was needed to make the machinery of the Trading with the Enemy Act available. It was already in effect with the full statutory powers of the Alien Property Custodian vested in the Attorney General. Title III of the First War Powers Act expressly recognized the Trading with the Enemy Act by amending only § 5 (b) of it. Congress also confirmed all actions already taken "under the Trading with the Enemy Act" which would have been authorized "if the provisions of this Act [First War Powers Act] and the amendments made by it had been in effect."

On March 11, 1942, the President issued Executive Order 9095, 7 Fed. Reg. 1971, establishing in the Office for Emergency Management of the Executive Office of the President, the Office of Alien Property Custodian, at the head of which there again would be an Alien Property Custodian appointed by the President. By Executive Order 9142, April 21, 1942, 7 Fed. Reg. 2985, expressly acting under the Constitution and laws of the United States, and in particular under Title I of the First War Powers Act, the President transferred "for the continuance of the present war and for six months after the termination thereof" to "the Alien Property Custodian provided for by Executive Order No. 9095," everything that had been transferred to the Attorney General by Executive Order 6694 of May 1, 1934, or to the Assistant Attorney General in charge of the Claims Division of the Department of Justice under Executive Order 8136, May 15, 1939, 4 Fed. Reg. 2044.

On July 6, 1942, Executive Order 9095 was amended by Executive Order 9193, 7 Fed. Reg. 5205. The Alien Property Custodian "provided for by Executive Order No. 9095," as amended by Executive Order 9193, was thus given the powers of the Trading with the Enemy Act as fully as in World War I and also additional powers pro-

vided through amendments including the expansion of powers under § 5 (b). These authorizations carried power to issue regulations particularly in connection with the vesting of property as was done by the vesting orders in this case.[10] The Alien Property Custodian, in taking over the administration of the Trading with the Enemy Act, is entitled to the full scope of its permanent provisions whether found in § 5 (b) or § 9 (a) or elsewhere.

For these reasons, § 9 (e) does not present a ground for dismissal of the complaint which depends upon § 9 (a) and the decision of the Circuit Court of Appeals should be affirmed.

MR. JUSTICE FRANKFURTER, having concurred in the Court's opinion, also joins in these views.

[10] "Without limitation as to any other powers or authority of the Secretary of the Treasury or the Alien Property Custodian under any other provision of this Executive Order, the Secretary of the Treasury and the Alien Property Custodian are authorized and empowered, either jointly or severally, to prescribe from time to time, regulations, rulings, and instructions to carry out the purposes of this Executive Order." Sec. 4, Executive Order 9193, July 6, 1942, 7 Fed. Reg. 5205. See also, provisions of the Vesting Orders as to notice of claims against the property involved in this proceeding.

Each of the Vesting Orders cited in the Court's opinion provides: "Any person, except a national of a designated enemy country, asserting any claim arising as a result of this order may file with the Alien Property Custodian a notice of his claim, together with a request for a hearing thereon, on Form APC–1, within one year from the date hereof, or within such further time as may be allowed by the Alien Property Custodian. Nothing herein contained shall be deemed to constitute an admission of the existence, validity or right to allowance of any such claim." The amended complaint in this case alleges, "A notice of this claim dated and verified January 19th, 1943, was filed with the Alien Property Custodian on or about that date and by him assigned the number F–38–98–1. An amended and supplemental notice of the claim dated and verified May 1st, 1944, has, at the suggestion of the Alien Property Custodian, been executed and filed and a new number, to wit, 280 has been assigned thereto."

Counsel for Parties.

HERCULES GASOLINE CO., INC. *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 93. Argued December 6, 1945.—Decided December 17, 1945.

1. The Revenue Act of 1936 imposed a tax on undistributed profits, but § 26 (c) (1) allowed credit, in the computation of the tax, for such undistributed earnings as the corporation could not distribute "without violating a provision of a written contract executed by the corporation . . . which provision expressly deals with the payment of dividends." *Held* that the credit was not allowable where restrictions on the payment of dividends were contained in provisions of preferred stock certificates incorporating by reference terms of the corporation's charter. P. 428.
2. Section 26 (c) (1) of the Revenue Act of 1936 is limited to contracts involving ordinary obligations to creditors (*Helvering* v. *Northwest Steel Mills,* 311 U. S. 46), and does not apply to obligations to preferred stockholders, since they are not creditors. P. 428.

147 F. 2d 972, affirmed.

CERTIORARI, *post,* p. 701, to review the affirmance of a judgment of the Tax Court sustaining the Commissioner's action in rejecting claims for certain credits under § 26 (c) (1) of the Revenue Act of 1936 against the tax on undistributed profits imposed by that Act.

Mr. Melvin F. Johnson, with whom *Mr. Joseph H. Jackson* was on the brief, for petitioner.

Mr. Joseph S. Platt, with whom *Solicitor General McGrath, Assistant Attorney General Clark, Messrs. Sewall Key, J. Louis Monarch, Walter J. Cummings, Jr.* and *Mrs. Maryhelen Wigle* were on the brief, for respondent.

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MR. JUSTICE BLACK delivered the opinion of the Court.

This case requires us to construe § 26 (c)[1] of the undistributed profits tax law, 49 Stat. 1648, enacted by Congress in 1936. The undistributed profits tax, which was not continued by Congress after 1938, was a surtax at graduated rates upon corporate profits not distributed during the tax year by way of dividends. Section 26 (c)

[1] "Sec. 26. Credits of Corporations.

In the case of a corporation the following credits shall be allowed to the extent provided in the various sections imposing tax—

. . . . . .

(c) Contracts Restricting Payment of Dividends.—

(1) Prohibition on payment of dividends.—An amount equal to the excess of the adjusted net income over the aggregate of the amounts which can be distributed within the taxable year as dividends without violating a provision of a written contract executed by the corporation prior to May 1, 1936, which provision expressly deals with the payment of dividends. If a corporation would be entitled to a credit under this paragraph because of a contract provision and also to one or more credits because of other contract provisions, only the largest of such credits shall be allowed, and for such purpose if two or more credits are equal in amount only one shall be taken into account.

(2) Disposition of profits of taxable year.—An amount equal to the portion of the earnings and profits of the taxable year which is required (by a provision of a written contract executed by the corporation prior to May 1, 1936, which provision expressly deals with the disposition of earnings and profits of the taxable year) to be paid within the taxable year in discharge of a debt, or to be irrevocably set aside within the taxable year for the discharge of a debt; to the extent that such amount has been so paid or set aside. For the purposes of this paragraph, a requirement to pay or set aside an amount equal to a percentage of earnings and profits shall be considered a requirement to pay or set aside such percentage of earnings and profits. As used in this paragraph, the word 'debt' does not include a debt incurred after April 30, 1936.

(3) Double credit not allowed.—If both paragraph (1) and paragraph (2) apply, the one of such paragraphs which allows the greater credit shall be applied; and, if the credit allowable under each paragraph is the same, only one of such paragraphs shall be applied."

allowed credits designed to afford relief where the payment of dividends is prevented by certain contract provisions. Subdivision (c) (1) of the section allowed such a credit where a distribution of earnings would violate a "*provision of a written contract executed by the corporation . . . which provision expressly deals with the payment of dividends.*" (Italics supplied.) Subdivision (c) (2) allowed a credit where "earnings and profits of the taxable year . . . [are] required (*by a provision of a written contract executed by the corporation . . ., which provision expressly deals* with the disposition of earnings and profits of the taxable year) to be paid within the taxable year in discharge *of a debt,* or to be irrevocably set aside within the taxable year for the discharge *of a debt.*" (Italics supplied.) Petitioner claimed a credit under § 26 (c) (1), but in assessing the deficiency for 1937 the Commissioner rejected this claim. The Tax Court sustained the Commissioner and its judgment was affirmed by the Circuit Court of Appeals. 147 F. 2d 972. We granted certiorari because of conflicting determinations by the Circuit Courts as to the scope of these credit provisions.[2]

Petitioner, a Delaware corporation, admits liability as transferee of the assets of the Hercules Gasoline Company, Inc., a Louisiana corporation, which was dissolved in 1939. Article V of the original charter of the transferor authorized the issuance of non-par common stock and of preferred stock at $50 par value. The preferred stock was entitled "to cumulative dividends at the rate of 8% per annum . . . in preference and priority to any payment of any dividend on the common stock for such year." The charter further provided that "there shall be no dividend on the common stock until all of the preferred stock

[2] *Lehigh Structural Steel Co.* v. *Commissioner,* 127 F. 2d 67; *Philadelphia Record Co.* v. *Commissioner,* 145 F. 2d 613.

has been retired, redeemed and discharged." All certificates of preferred stock contained the following provision: "For Rights and Voting Powers of Preferred Stock See Article V of Charter." The petitioner contends that these preferred stock certificates constituted contracts executed by the corporation which expressly prohibited the payment of dividends while these shares were outstanding and that petitioner is therefore entitled to the credit allowed under Subdivision (c) (1).

We think that the preferred stock certificates are not the kind of contracts which entitle a corporation to allowance of credit under subdivision (c) (1). In our view, that subdivision must be read in the light of § 26 (c) and the Act as a whole and, when thus read, is confined to contracts made with creditors and does not extend to restrictions imposed within the body corporate. In *Helvering* v. *Northwest Steel Mills,* 311 U. S. 46, the question before us was whether § 26 (c) (1) allows a credit where the payment of dividends is prohibited by statute. In construing § 26 (c), we stated:

"That the language used in § 26 (c) (1) does not authorize a credit for statutorily prohibited dividends is further supported by a consideration of § 26 (c) (2). By this section, a credit is allowed to corporations contractually obligated to set earnings aside for the payment of debts. That this section referred *to routine contracts dealing with ordinary debts and not to statutory obligations is obvious*—yet the words used to indicate that the section had reference only to a 'written contract executed by the corporation' are identical with those used in § 26 (c) (1). *There is no reason to believe that Congress intended that a broader meaning be attached to these words as used in § 26 (c) (1) than attached to them under the necessary limitations of 26 (c) (2).*" 311 U. S. 46, at 49–50. (Italics supplied.)

We thus held that § 26 (c) (1) is limited to contracts involving ordinary obligations to creditors and since preferred stockholders are not creditors, *Warren* v. *King,* 108 U. S. 389, 399, § 26 (c) (1) does not apply here.

Petitioner contends, however, that our construction of § 26 (c) (1) was erroneous but for reasons given in the *Northwest Steel* case we think it was correct and adhere to it. Our construction finds further support in § 26 (c) (3) which, in order to prevent "Double credit," provides that in the event both subdivisions (c) (1) and (c) (2) apply, "the one of such paragraphs which allows the greater credit shall be applied; and, if the credit allowable under each paragraph is the same, only one of such paragraphs shall be applied." Congress having thus made the relief obtainable under (c) (1) and (c) (2) mutually exclusive has indicated that it considered the two subdivisions as interdependent. Congress therefore intended to cover the same type of contract, namely a contract with creditors, in both subsections and not to extend subdivision (c) (1) to intra-corporate contracts while subdivision (c) (2) was to cover contracts with creditors only. Moreover, statements made in the course of the Congressional debate [3] refer to § 26 (c) as a whole, as providing for the relief of corporations prevented from paying dividends by contracts involving the payment of debts. No other view of the Section would be in keeping with the policy behind the undistributed profits tax. That tax was designed to reach profits held by the corporation which as a consequence could not be taxed as dividends in the hands of stockholders. An intra-corporate agreement is simply one way of keeping profits in the corporation's treasury so that the tax collector cannot reach

[3] See for illustration the statement by the Hon. Samuel B. Hill, 80 Cong. Rec. 6004.

them.[4] To hold that such an agreement entitled the corporation to tax credit would defeat the very purpose of the undistributed profits tax.[5] The rejection of petitioner's claim for tax credit was proper.

Affirmed.

MR. JUSTICE BURTON dissents.

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

MR. JUSTICE REED, dissenting.

Accepting *Helvering* v. *Northwest Steel Mills,* 311 U. S. 46, completely, I am unable to agree that this contract with preferred stockholders was other than a "routine contract dealing with ordinary debts." Certainly this is not an instance of a "statutory obligation," which are the words used in the *Northwest* case to describe the antithesis of the contract covered. "Routine" and "ordinary," as

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[4] See *Warren Telephone Co.* v. *Commissioner,* 128 F. 2d 503, 506. Here there was nothing in the agreement that absolutely prohibited the payment of dividends. During 1937 and 1938 transferor had outstanding 1,294 shares of preferred stock of a total par value of $64,700. These shares were all retired in 1939. Had they been redeemed in 1937 there would have been nothing in the agreement preventing the distribution of earnings. Consequently it does not clearly appear that there was any provision in the agreements absolutely prohibiting the payment of dividends. Cf. *Dr. Pepper Bottling Co.* v. *Commissioner,* 45 B. T. A. 540; *Staley Manufacturing Co.* v. *Commissioner,* 46 B. T. A. 199, 205.

[5] The Board of Tax Appeals and later the Tax Court have consistently held that § 26 (c) (1) does not cover the type of agreement here involved. *Thibaut & Walker Co.* v. *Commissioner,* 42 B. T. A. 29; *Eljer Co.* v. *Commissioner,* decided Dec. 4, 1941, 1941 P-H B. T. A. Memorandum Decisions, Par. 41,533; *Budd International Corp.* v. *Commissioner,* 45 B. T. A. 737; *Bishop & Babcock Manufacturing Co.* v. *Commissioner,* 45 B. T. A. 776; *Philadelphia Record Co.* v. *Commissioner,* decided January 23, 1943, 1943 P-H T. C. Memorandum Decisions, Par. 43,038.

used in *Northwest,* do not imply to me anything more than an express contract, executed in accordance with § 26 (c) (1).

The exemption provisions of § 26 (c) make no exceptions because the debt of the corporation is owned by a stockholder. If such an exception is to be deduced from the purpose behind the words of the section, it should not be applied to such preferred stockholders as these because their interest is like that of a creditor. As I believe the statutory requirements are met, I should reverse.[1]

The CHIEF JUSTICE joins in this dissent.

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[1] See in accord, *Lehigh Structural Steel Co.* v. *Commissioner,* 127 F. 2d 67; *Budd International Corp.* v. *Commissioner,* 143 F. 2d 784; *Philadelphia Record Co.* v. *Commissioner,* 145 F. 2d 613; *Rex-Hanover Mills Co.* v. *United States,* 53 F. Supp. 235. See *Eljer Co.* v. *Commissioner,* 134 F. 2d 251, 255.

SCHENLEY DISTILLERS CORP. ET AL. *v.* UNITED STATES ET AL.

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

No. 560. Decided January 2, 1946.

In order to obtain a determination as to whether it was a "contract carrier by motor vehicle" as defined by § 203 (a) (15) of Part II of the Interstate Commerce Act or a "private carrier of property by motor vehicle" as defined by § 203 (a) (17), one of the appellants applied to the Interstate Commerce Commission for a permit under § 209 (b) to operate as a "contract carrier." In the proceedings before the Commission, it moved to dismiss its own application on the ground that the proposed operations were not such as to make it a "contract carrier," introduced no evidence to prove compliance with § 209 (b), and sought a ruling by the Commission that it could carry on its operations as a "private carrier" without obtaining a permit. It contended that it was a "private carrier" because its operations were to be performed for its parent corporation (which owned all of applicant's stock) and for other corporations owned or controlled by the parent. The Commission ruled in its report that applicant was a "contract carrier" and not a "private carrier" and made this report a part of an order denying the application because of failure to show compliance with § 209 (b). Applicant and its parent corporation sued to set aside the Commission's order. *Held:*

1. The parent corporation had no standing to sue, since it did not apply for a permit and its sole interest in the permit sought by the applicant was that of a stockholder. P. 435.

2. The parent corporation is adequately represented for the purposes of such a suit by the subsidiary, whose conduct of the litigation it controls. P. 435.

3. It was appropriate for the Commission to treat the filing of an application under § 209 (b), with a request that it be dismissed on the ground that it is not required, as a proper method of raising the issue whether the applicant is subject to the Act. *Cornell Steamboat Co.* v. *United States,* 321 U. S. 634, 635, reaffirmed. P. 436.

4. The Commission's order determining that applicant is subject to the Act is a reviewable order. P. 436.

5. Applicant's proposed operations would clearly constitute it a "contract" rather than a "private" carrier. P. 436.

6. While corporate entities may be disregarded when they are used to avoid a clear legislative purpose, they will not be disregarded where those in control have deliberately adopted the corporate form in order to secure its advantages and where no violence to the legislative purpose is done by treating the corporation as a separate legal person. P. 437.

7. The fact that several corporations are used in carrying on one business does not relieve them of their several statutory obligations. P. 437.

61 F. Supp. 981, affirmed.

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

Mr. Charles E. Cotterill for appellants.

Solicitor General McGrath and *Mr. J. Stanley Payne* for the United States and the Interstate Commerce Commission, appellees.

PER CURIAM.

This is an appeal from a judgment of a district court, three judges sitting, constituted under the Urgent Deficiencies Act, 38 Stat. 220, 28 U. S. C. § 47, dismissing appellants' petition to set aside an order of the Interstate Commerce Commission. Appellant Schenley Distilleries Motor Division, Inc., applied to the commission for a permit, under § 209 (b) of Part II of the Interstate Commerce Act, 49 U. S. C. § 309 (b), authorizing operation as a "contract carrier by motor vehicle" of specified commodities in interstate commerce between specified points. At the outset of the proceedings before the commission, the appellant moved for dismissal of the application on the ground that the proposed operations were not such as to constitute applicant a "contract carrier by motor vehicle," defined by § 203 (a) (15) of the Act, 49 U. S. C.

§ 303 (a) (15), as "any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (14) and the exception therein) by motor vehicle of passengers or property in interstate or foreign commerce for compensation."

Applicant contended at the hearing that it was a "private carrier of property by motor vehicle," which is defined by § 203 (a) (17) as "any person not included in the terms 'common carrier by motor vehicle' or 'contract carrier by motor vehicle', who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise."

Applicant introduced no evidence to prove compliance with the requirements set forth by § 209 (b) for granting a permit as a "contract carrier" but sought a ruling by the commission that it could carry on its operations as a "private carrier" without obtaining a permit. Stating that "the primary reason for filing this application was to secure a determination as to whether the involved operations were those of a contract carrier of property by motor vehicle or of a private carrier," Division 5 of the commission in its report ruled that the applicant was a "contract carrier" and not a "private carrier." As no evidence had been introduced to show that the proposed operations would comply with § 209 (b), Division 5 made its order denying the application, and made the report a part of the order. Reconsideration by the full commission was denied.

This suit to set aside the commission's order was brought by the applicant, Schenley Distilleries Motor Division, and by Schenley Distillers Corporation, owner of all the

stock of the former. The district court held that it had jurisdiction to review the order. It dismissed the suit as to the parent corporation on the ground that it had no legal interest sufficient to entitle it to maintain suit. The court held that the commission properly ruled that the applicant was a "contract carrier," and accordingly dismissed the complaint.

The district court rightly held that the parent corporation had no standing to sue. It did not ask that a permit be issued to it, and its sole interest in the permit sought for its co-appellant was that of a stockholder. We have held that a minority stockholder of a carrier corporation cannot bring suit to set aside a commission order against the corporation. *Pittsburgh & W. Va. R. Co.* v. *United States,* 281 U. S. 479, 486–488. A parent corporation which by its stock ownership controls its subsidiary, and which as a party litigant asserts only its stockholder's derivative rights to have its subsidiary secure the permit, cf. *American Power Co.* v. *S. E. C.,* 325 U. S. 385, 389, is even less aggrieved by the commission's order denying the permit than would be a minority stockholder. For the parent is adequately represented for purposes of suit by the subsidiary whose conduct of the litigation it controls. We conclude that the character of a stockholder's interest in this regard is not so altered by the mere facts that it owns all the stock of the corporation against which the commission's order is entered and that the parent manages and controls its subsidiary, as to give the stockholder standing to sue to set aside the commission's order.

As to appellant Schenley Distilleries Motor Division, Inc., the appellee urges that the judgment should be affirmed on the ground that the appellant made no showing sufficient to require the issuance of the permit sought by the application and that thus the commission's order rests on a controlling ground, i. e., lack of evidence. But there

remains the question whether the commission's determination that appellant will be a "contract carrier" is reviewable in the present suit. The commission made its report a part of its order, and the report denied the relief which appellant sought, namely, a determination that it was a "private carrier" entitled to carry on its operations without a permit and without subjecting itself to criminal proceedings. The commission has treated the filing of an application under § 209 (b) with a request that the application be dismissed on the ground that it is not required, as a proper method of raising the issue whether the applicant is subject to the Act. Any other construction of that section would make it necessary for a carrier to take the risk of operating illegally and incurring criminal and other penalties in order to secure a determination whether it is within the permit requirement. We have already decided that the course followed here was "appropriate," and that an order determining that the appellant is within the permit requirement is a reviewable order. *Cornell Steamboat Co.* v. *United States,* 321 U. S. 634, 635. We reaffirm that holding.

We think the district court was plainly right in upholding the commission's decision that appellant's proposed operations would constitute it a "contract" rather than a "private" carrier. Appellant's contention to the contrary is based on the fact that its operations were to be performed for its parent and for other corporations owned or controlled by the parent. Appellant says that the transportation will be in furtherance of one "commercial enterprise" within the meaning of § 203 (a) (17). But that section applies only to the extent to which § 203 (a) (15) does not, and the evidence supports the commission's finding that the transportation was to be "for compensation" from appellant's parent and the other corporations controlled by the parent. Appellant urges that we dis-

regard the separate corporate entities which are to pay compensation to appellant for the transportation and treat the corporations controlled by appellant's parent as one single commercial enterprise. While corporate entities may be disregarded where they are made the implement for avoiding a clear legislative purpose, they will not be disregarded where those in control have deliberately adopted the corporate form in order to secure its advantages and where no violence to the legislative purpose is done by treating the corporate entity as a separate legal person. One who has created a corporate arrangement, chosen as a means of carrying out his business purposes, does not have the choice of disregarding the corporate entity in order to avoid the obligations which the statute lays upon it for the protection of the public.

The fact that several corporations are used in carrying on one business does not relieve them of their several statutory obligations more than it relieves them of the taxes severally laid upon them. "If the one business could not be carried on without two corporations taking part in it, each must pay, by the plain words of the Act." *Edwards* v. *Chile Copper Co.*, 270 U. S. 452, 456. Cf. *Gray* v. *Powell*, 314 U. S. 402, 414; *Moline Properties* v. *Commissioner*, 319 U. S. 436.

Affirmed.

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

MISSISSIPPI PUBLISHING CORP. *v.* MURPHREE.

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

No. 234. Argued December 12, 1945.—Decided January 2, 1946.

Respondent, a resident of the northern district of Mississippi, brought suit in the federal district court for that district against petitioner, a Delaware corporation having an office and place of business in the southern district of Mississippi, to recover damages in an amount exceeding $3,000 for libel published in the southern district. The suit was begun by service of summons in the southern district by the United States marshal upon the agent designated by petitioner to receive service of process within the State. *Held:*

1. The case being of a civil nature, the amount in controversy exceeding $3,000, and the parties being of diverse citizenship, the district court had jurisdiction of the subject matter. P. 440.

2. Since the sole ground of federal jurisdiction was diversity of citizenship and suit was brought in the district of the plaintiff's residence, there was no want of venue under § 51 of the Judicial Code. P. 441.

3. Petitioner was properly brought before the district court for the northern district and subjected to its judgment in the suit by service of summons on petitioner's agent in the southern district, since this was authorized by Rules 4 (d) (3) and 4 (f) of the Rules of Civil Procedure. P. 443.

4. As thus applied, Rule 4 (f) of the Rules of Civil Procedure is in harmony with the Enabling Act under which it was promulgated and with the statutes fixing venue and the jurisdiction of the district courts. P. 445.

5. By consenting to service of process upon its agent residing in the southern district, petitioner rendered itself "present" there for purposes of service. P. 442.

6. By appointing an agent to receive service, petitioner consented to suits within the State in courts which apply the law of the State, whether they be state or federal courts. P. 443.

7. The fact that this Court promulgated the Rules of Civil Procedure as formulated and recommended by the Advisory Committee does not foreclose consideration of their validity, meaning or construction; but in ascertaining their meaning the construction given to them by the Committee is of weight. P. 444.

8. Rule 4 (f) was devised to permit service of process anywhere within a State in which the district court issuing the process is held and where the State embraces two or more districts. P. 444.

9. It was adopted with particular reference to suits against a foreign corporation having an agent to receive service of process resident in a district within the State other than that in which the suit is brought. P. 444.

10. Rule 4 (f) does not conflict with Rule 82 or the statutes fixing venue and jurisdiction of the district courts, since it does not enlarge or diminish the venue or jurisdiction of the district courts but serves only to implement the jurisdiction over the subject matter which Congress has conferred, by providing a procedure by which the defendant may be brought into court at the place where Congress has declared that suit may be maintained. P. 444.

11. Rule 4 (f) does not "abridge, enlarge, nor modify the substantive rights of any litigant," since it is a rule of procedure and not of substantive right. P. 445.

12. The prohibition in the Enabling Act of any alteration of substantive rights of litigants obviously was not addressed to such incidental effects as necessarily attend the adoption of new rules of procedure upon the rights of litigants who, agreeably to rules of practice and procedure, have been brought before a court authorized to determine their rights. P. 445.

149 F. 2d 138, affirmed.

CERTIORARI, *post*, p. 702, to review reversal of a judgment dismissing a suit on the ground that the venue was not properly laid.

Mr. William H. Watkins, with whom *Messrs. P. H. Eager, Jr., E. C. Brewer* and *Mrs. Elizabeth Hulen* were on the brief, for petitioner.

Mr. Rufus Creekmore, with whom *Messrs. W. E. Gore* and *H. H. Creekmore* were on the brief, for respondent.

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

Respondent, a resident of the northern district of Mississippi, brought this suit in the district court for that district against petitioner, a Delaware corporation having

an office and place of business in the southern district of Mississippi, to recover damages for libel published in the southern district. The suit was begun by service of summons in the southern district by the United States marshal upon the agent designated by petitioner to receive service of process within the state. The questions for our decision are whether the venue was properly laid in the northern district, and whether petitioner could be brought before the court and subjected to its judgment in the suit by service of summons on petitioner's agent in the southern district.

The district court granted petitioner's motion to dismiss the suit on the ground that the venue was not properly laid in the northern district. The Circuit Court of Appeals for the Fifth Circuit reversed, 149 F. 2d 138, holding that as there was diversity of citizenship and as the amount in controversy exceeded $3,000, the district court for the northern district had jurisdiction, that the venue was properly laid there under the provisions of § 51 of the Judicial Code, 28 U. S. C. § 112, and that service of summons in the southern district was authorized by Rule 4 (f) of the Federal Rules of Civil Procedure. We granted certiorari, 326 U. S. 702.[1]

The present case being of a civil nature, the amount in controversy exceeding $3,000, and the parties being of diverse citizenship, the district court had jurisdiction of

[1] The lower courts have not been consistent in the application of Rule 4 (f). Compare *Contracting Division, A. C. Horn Corp.* v. *New York Life Ins. Co.*, 113 F. 2d 864; *Gibbs* v. *Emerson Electric Mfg. Co.*, 29 F. Supp. 810; *Melekov* v. *Collins*, 30 F. Supp. 159; *Carby* v. *Greco*, 31 F. Supp. 251; *Richard* v. *Franklin County Distilling Co.*, 38 F. Supp. 513, with the opinion of the Court of Appeals in the present case, 149 F. 2d 138; *Devier* v. *George Cole Motor Co.*, 27 F. Supp. 978; *Zwerling* v. *New York & Cuba Mail S. S. Co.*, 33 F. Supp. 721; *Williams* v. *James*, 34 F. Supp. 61; *Salvatori* v. *Miller Music, Inc.*, 35 F. Supp. 845; *Andrus* v. *Younger Bros.*, 49 F. Supp. 499, and *O'Leary* v. *Loftin*, 3 F. R. D. 36.

the subject matter of the suit, that is, of the class of cases of which the present is one. 28 U. S. C. § 41 (1). The court had jurisdiction over the parties if the petitioner was properly brought before the court by the service of process within the southern district. And it could rightly exercise its jurisdiction, notwithstanding petitioner's motion, unless there was want of venue. Venue in the present case is controlled by § 51 of the Judicial Code, 28 U. S. C. 112, which provides, with exceptions not now material, that "where the jurisdiction is founded only on the fact that the action is between citizens of different States, suits shall be brought only in the district of the residence of either the plaintiff or the defendant . . ."

Since there was jurisdiction of the present suit on the sole ground of diversity of citizenship and since the suit was brought in the district of the plaintiff's residence, as found by both courts below, there was, by § 51 of the Judicial Code, no want of venue and the court was not warranted in dismissing the suit if the service of summons was effective to make the defendant a party. *Neirbo Co.* v. *Bethlehem Corp.*, 308 U. S. 165, on which petitioner relies, supports no different conclusion. There the sole ground of jurisdiction was diversity of citizenship of the parties. The foreign corporation was sued in the district court for southern New York, in which neither the plaintiff nor the defendant was a citizen or resident,[2] but where the defendant was doing business, maintained an office, and had consented to be sued by appointing a resident agent to receive service of process. Recognizing that § 51 of the Judicial Code, in cases where the jurisdiction is founded on diversity of citizenship, establishes venue as

[2] For purposes of jurisdiction a corporation is a citizen or resident only of the state of its organization. *Shaw* v. *Quincy Mining Co.*, 145 U. S. 444, 451; *In re Keasbey & Mattison Co.*, 160 U. S. 221, 229; *Macon Grocery Co.* v. *Atlantic Coast Line*, 215 U. S. 501, 509; *Seaboard Rice Co.* v. *Chicago, R. I. & P. R. Co.*, 270 U. S. 363, 366.

the place where the suit may be maintained for the convenience of the parties, and that the statutory venue for a suit of which the court has jurisdiction may be waived, we held that the corporation had waived objections to venue by its consent to the suit. By designating an agent to receive service of process and consenting to be sued in the courts of the state, the corporation had consented to suit in the district court, being a court sitting for a district within the state and applying there the laws of the state, and it had thus waived the venue provisions of § 51 of the Judicial Code. 308 U. S. at 175. Cf. *Railroad Co.* v. *Harris,* 12 Wall. 65; *Lafayette Ins. Co.* v. *French,* 18 How. 404; *Ex parte Schollenberger,* 96 U. S. 369. In the present suit there was no occasion to establish waiver of objections to venue in the northern district of Mississippi, since the statute had provided in advance that there should be venue in the district court for the northern district, where respondent resided.

Unlike the consent to service in the *Neirbo* case the consent to service of process on petitioner's agent throughout the state was not significant as a waiver of venue, but it was an essential step in the procedure by which petitioner was brought before the court and rendered amenable to its judgment in the northern district. By consenting to service of process upon its agent residing in the southern district, petitioner rendered itself "present" there for purposes of service. See *Ex parte Schollenberger, supra,* 377; cf. *International Shoe Co.* v. *Washington,* 326 U. S. 310. Had Congress specifically authorized service there for purposes of suit in the northern district, petitioner would have been properly brought before the district court for the purposes of the present suit, since Congress could provide for service of process anywhere in the United States. *Toland* v. *Sprague,* 12 Pet. 300, 328; *United States* v. *Union Pacific R. Co.,* 98 U. S. 569, 604; *Robertson* v. *Railroad Labor Board,* 268 U. S. 619, 622.

Congress, having omitted so to direct, the omission was supplied by Rule 4 (f) of the Rules of Civil Procedure, which provides that "All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held." In the present case the service was made pursuant to Rule 4 (d) (3) by the United States Marshal, who delivered the summons to the agent of petitioner designated to receive the service. If the service of the summons was valid petitioner was properly brought before the court in the northern district, which had venue and jurisdiction of the subject matter of the suit.

It is said that petitioner, by appointing an agent to receive service, has only consented to service of process in suits brought in the state courts and in conformity to state statutes regulating the venue, and that in any case Rule 4 (f) was adopted without authority since the Act of June 19, 1934, 48 Stat. 1064, 28 U. S. C. § 723b, which authorized the promulgation of rules of practice for the district courts, directed that they "shall neither abridge, enlarge, nor modify the substantive rights of any litigant," and because the construction given to Rule 4 (f) by the court below is inconsistent with Rule 82 which provides that the rules "shall not be construed to extend or limit the jurisdiction of the district courts of the United States or the venue of actions therein."

The answer to the suggestion that the consent to suit in the state is a consent to suit only in the state courts and subject to state statutes regulating venue in those courts is plain. Such consent has been uniformly construed to mean suits within the state which apply the law of the state, whether they be state or federal courts. See *Neirbo Co.* v. *Bethlehem Corp., supra,* 171; cf. *Ex parte Schollenberger, supra,* 377; *Madisonville Traction Co.* v. *Mining Co.,* 196 U. S. 239, 255–256; *Louisville & Nashville R. Co.* v. *Chatters,* 279 U. S. 320, 329. And since

the consent is to suits in the federal courts, it is a consent to suits brought in conformity to the federal regulations governing the jurisdiction, venue and procedure of those courts. *Ex parte Schollenberger, supra,* 377; *Neirbo Co.* v. *Bethlehem Corp., supra,* 175.

The question remains whether Rule 4 (f) is an effective means of bringing the petitioner before the district court in the northern district where the suit was properly brought in conformity to § 51 of the Judicial Code. The fact that this Court promulgated the rules as formulated and recommended by the Advisory Committee does not foreclose consideration of their validity, meaning or consistency. But in ascertaining their meaning the construction given to them by the Committee is of weight. Rule 4 (f), as explained by the authorized spokesmen for the Advisory Committee, see Proceedings of Washington and New York Institute on Federal Rules, 291, 292; Proceedings of The Cleveland Institute on the Federal Rules, 205, 206, was devised so as to permit service of process anywhere within a state in which the district court issuing the process is held and where the state embraces two or more districts. It was adopted with particular reference to suits against a foreign corporation having an agent to receive service of process resident in a district within the state other than that in which the suit is brought. It was pointed out that the rule did not affect the jurisdiction or venue of the district court as fixed by the statute, but was intended among other things to provide a procedural means of bringing the corporation defendant before the court in conformity to its consent, by serving the agent wherever he might be found within the state. See also Hughes, Federal Practice, Vol. 17, § 18993; Moore, Federal Practice, Vol. 1, p. 360–361.

It is true that the service of summons is the procedure by which a court having venue and jurisdiction of the subject matter of the suit asserts jurisdiction over the

person of the party served. But it is evident that Rule 4 (f) and Rule 82 must be construed together, and that the Advisory Committee, in doing so, has treated Rule 82 as referring to venue and jurisdiction of the subject matter of the district courts as defined by the statutes, §§ 51 and 52 of the Judicial Code in particular, rather than the means of bringing the defendant before the court already having venue and jurisdiction of the subject matter. Rule 4 (f) does not enlarge or diminish the venue of the district court, or its power to decide the issues in the suit, which is jurisdiction of the subject matter, *Industrial Assn.* v. *Commissioner,* 323 U. S. 310, 313, to which Rule 82 must be taken to refer. Rule 4 (f) serves only to implement the jurisdiction over the subject matter which Congress has conferred, by providing a procedure by which the defendant may be brought into court at the place where Congress has declared that the suit may be maintained. Thus construed, the rules are consistent with each other and do not conflict with the statute fixing venue and jurisdiction of the district courts.

We think that Rule 4 (f) is in harmony with the Enabling Act which, in authorizing this Court to prescribe general rules for the district courts governing practice and procedure in civil suits in law and equity, directed that the rules "shall neither abridge, enlarge, nor modify the substantive rights of any litigant." Undoubtedly most alterations of the rules of practice and procedure may and often do affect the rights of litigants. Congress' prohibition of any alteration of substantive rights of litigants was obviously not addressed to such incidental effects as necessarily attend the adoption of the prescribed new rules of procedure upon the rights of litigants who, agreeably to rules of practice and procedure, have been brought before a court authorized to determine their rights. *Sibbach* v. *Wilson & Co.,* 312 U. S. 1, 11–14. The fact that the application of Rule 4 (f) will operate to subject

petitioner's rights to adjudication by the district court for northern Mississippi will undoubtedly affect those rights. But it does not operate to abridge, enlarge or modify the rules of decision by which that court will adjudicate its rights. It relates merely to "the manner and the means by which a right to recover . . . is enforced." *Guaranty Trust Co.* v. *York,* 326 U. S. 99, 109. In this sense the rule is a rule of procedure and not of substantive right, and is not subject to the prohibition of the Enabling Act.

The judgment is

Affirmed.

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

RAILROAD RETIREMENT BOARD ET AL. *v.* DUQUESNE WAREHOUSE CO.

NO. 95. CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.*

Argued November 14, 1945.—Decided January 2, 1946.

Where a warehouse company wholly owned by a railroad company loads and unloads goods shipped on the railroad, it performs services "in connection with the transportation of . . . property by railroad"; it is an "employer" within the meaning of § 1 (a) of the Railroad Retirement Act of 1937 and § 1 (a) of the Railroad Unemployment Insurance Act of 1938; and its employees are entitled to the benefits of those Acts, even though the services are rendered to, and paid for by, the shippers. P. 453.

148 F. 2d 473, reversed; 149 F. 2d 507, affirmed.

No. 95. CERTIORARI, 325 U. S. 848, to review affirmance of a judgment, 56 F. Supp. 87, setting aside a decision of

*Together with No. 103, *Duquesne Warehouse Co.* v. *Railroad Retirement Board et al.,* on certiorari to the United States Court of Appeals for the District of Columbia.

the Railroad Retirement Board holding that respondent is an "employer" within the meaning of § 1 (a) of the Railroad Retirement Act.

No. 103. CERTIORARI, 325 U. S. 848, to review reversal of a judgment setting aside a decision of the Railroad Retirement Board holding that petitioner is an "employer" within the meaning of § 1 (a) of the Railroad Unemployment Insurance Act.

Mr. Robert L. Stern, with whom *Solicitor General McGrath, Messrs. David L. Kreeger, Myles F. Gibbons* and *David B. Schreiber* were on the brief, for the Railroad Retirement Board. *Mr. Willard H. McEwen,* with whom *Messrs. Frank L. Mulholland* and *Clarence M. Mulholland* were on the brief, for the Brotherhood of Railway & Steamship Clerks, etc. et al., petitioners in No. 95 and respondents in No. 103.

Mr. John Dickinson, with whom *Messrs. George R. Allen, John Spalding Flannery* and *R. Aubrey Bogley* were on the brief, for the Duquesne Warehouse Company.

Messrs. John J. Hickey and *Walter W. Ahrens* filed a brief on behalf of the American Warehousemen's Association, as *amicus curiae,* urging affirmance in No. 95 and reversal in No. 103.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The Railroad Retirement Act of 1937, 50 Stat. 307, 45 U. S. C. § 228a, established a system of annuity, pension, and death benefits for employees of designated classes of employers. The Railroad Retirement Board adjudicates claims of eligible employees for the various types of benefits created by the Act. § 10 (b). The eligibility of an employee for such benefits is based on service to those included in the Act's definition of "employer." § 1 (a).

The question arose whether the Duquesne Warehouse Co. was such an "employer." The Board after a hearing found in No. 95 that it was. Duquesne, pursuant to the provisions of § 11 of the Act, brought suit in a district court to compel the Board to set aside its order.[1] That court rendered judgment for Duquesne. 56 F. Supp. 87. The Circuit Court of Appeals affirmed, by a divided vote. 148 F. 2d 473.

The Railroad Unemployment Insurance Act of 1938, 52 Stat. 1094, 45 U. S. C. § 351, established a system of unemployment insurance for employees of designated classes of employers. The Railroad Retirement Board adjudicates claims of eligible employees for unemployment insurance payments. § 5 (b). The eligibility of an employee for such payments is based on service to those included in the Act's definition of "employer." § 1 (a). The question arose whether Duquesne was such an "employer." The Board after a hearing found in No. 103 that it was. The findings were identical to those which the Board made in No. 95 and were based on the same record. Duquesne, pursuant to § 5 (f), brought suit in the district court for the District of Columbia to set aside that order. That court gave judgment for Duquesne. The Court of Appeals for the District of Columbia reversed. 149 F. 2d 507. Since the definition of "employer" under both Acts was the same, there was presented a conflict in decisions which led us to grant the petitions for writs of certiorari.

The material part of the definition of "employer" contained in each Act is as follows:

"The term 'employer' means any carrier . . . and any company which is directly or indirectly owned or controlled by one or more such carriers or under common con-

[1] The Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees and its president, G. M. Harrison, were allowed to intervene as defendants in No. 95. The Brotherhood intervened in No. 103.

trol therewith, and which operates any equipment or facility or performs any service . . . in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad . . ."

Duquesne meets the requirements of the first part of the definition. For it is a corporation, all of whose stock is owned by the Pennsylvania Railroad Company, a carrier by railroad. The question is whether Duquesne "performs any service" (1) "in connection with the transportation of . . . property by railroad" or (2) "in connection with . . . the receipt, delivery . . . storage, or handling of property transported by railroad."

Duquesne operates two warehouses owned and leased to it by the Pennsylvania, one in Pittsburgh and the other in East Liberty, within the Pittsburgh city limits. Each warehouse is on a rail siding of the Pennsylvania. At East Liberty, Duquesne handles and stores carload sugar, all of which comes in and goes out over the Pennsylvania. The sugar is handled by Duquesne under so-called storage-in-transit privileges covered by tariffs filed by the Pennsylvania with the Interstate Commerce Commission.[2] Duquesne unloads the sugar from the Pennsylvania's cars on arrival and reloads the sugar into Pennsylvania's cars on their departure. By the tariff the owners are required to do the loading and unloading. The work of unloading and loading is performed for the owner by Duquesne, who

[2] Incoming shipments are consigned to the owner care of Duquesne, the route being designated "Penn R R — For Stge in Transit." Outgoing shipments are consigned to the owner; they have a transit record number and are marked "accorded transit privilege at East Liberty, Pa." That is, sugar in carload lots transported by the Pennsylvania to consignees at East Liberty may be delivered there to the consignees at the local rates. When it is subsequently shipped out via the same road it is entitled to be charged the through rate from the first point of shipment to the ultimate destination.

bills the owner for that service as well as for storage and other services rendered. At its Pittsburgh warehouse Duquesne handles freight which has come in, or is destined to movement, over the Pennsylvania, or which has both come in and is going out over the Pennsylvania. The commodities handled at that place are hauled in both carload and less-than-carload lots. Duquesne loads and unloads the carload shipments as they arrive at and depart from its platform, stores the goods, and performs other handling services in connection with their receipt and delivery. Duquesne charges the owner for these services. In the case of incoming less-than-carload shipments the freight is unloaded by the Pennsylvania from the cars to its platform and is delivered to and received by Duquesne there. In the case of outgoing less-than-carload shipments, Duquesne delivers the freight on the Pennsylvania's platform. Pennsylvania then issues its bill of lading, loads the freight into cars, and moves them out. During a part of the period relevant here,[3] Duquesne also performed unloading, storing and reloading services and certain other transit services at Erie, Pennsylvania, in connection with carload shipments of newsprint paper which were entitled to storage-in-transit privileges under the tariffs. These services were similar to those performed by Duquesne at East Liberty.[4]

Of the total space used by Duquesne at its warehouses at East Liberty and Pittsburgh, about 30 per cent was devoted to the handling of freight accorded storage-in-

[3] Between August 1937 and May 1938. The Board found that Duquesne is now and has been at least since August 28, 1935, an employer within the meaning of the Acts.

[4] Duquesne also has "salvage freight" agreements with the Pennsylvania under which the Pennsylvania turns over to it, for sale or other disposition, "over" and damaged freight which has been refused or unclaimed by the owner. For this service Duquesne retains 10 per cent of the gross plus certain costs and remits the balance to the Pennsylvania.

transit privileges in 1936; about 12.5 per cent in 1937; about 12.5 per cent in 1938. During the period of operation at Erie, all the space at that point was used for such freight.

It appears that the definition of "employer" in the present Acts derives without substantial change from the Railway Labor Act, 48 Stat. 1185, 45 U. S. C. § 151, First.[5] We are referred to the legislative history of the Railway Labor Act which was sponsored by Mr. Eastman, Federal Co-ordinator of Transportation. Reliance is made on his testimony at the hearings[6] as indicating that the words in the carrier definition in the Railway Labor Act descriptive of transportation service were taken from the Interstate Commerce Act,[7] 41 Stat. 474, 54 Stat. 899, 49 U. S. C. § 1. The Railroad Retirement Act of 1937 was sponsored by both labor and management, whose views were presented at the hearings by George M. Harrison.[8] References are made to his testimony that the carrier affiliates embraced within the definition of "employer" are

[5] The corresponding part of the definition of "carrier" contained in § 1 First of the Railway Labor Act reads as follows: "any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad . . ."

[6] Hearings, S. Committee on Interstate Commerce on S. 3266, 73d Cong., 2d Sess., pp. 10–11, 145. At the latter point he testified, "I am inclined to believe that for the present it would be well not to go beyond carriers and their subsidiaries engaged in transportation." And see Hearings, H. Committee on Interstate and Foreign Commerce on H. R. 7650, 73d Cong., 2d Sess., pp. 17, 18.

[7] Sec. 1 (3) (a) of the Interstate Commerce Act includes in the definition of transportation "all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported."

[8] See Hearings, H. Committee on Interstate and Foreign Commerce, on H. R. 6956, 75th Cong., 1st Sess., pp. 10–11, 82.

those who are engaged in service that is part of railway transportation.[9] Duquesne argues on the basis of that legislative history that any service "in connection with the transportation" of property or any service "in connection with" the receipt, etc., of "property transported by railroad," as used in the present Acts, means that kind of activity which is defined by the Interstate Commerce Act as forming a part of transportation service. On the other hand, the Board argues that the statutory definition of "employer" is not so restricted. It stresses the broad sweep of the statutory language and the purpose to bring under the Act affiliates which carry out portions of the railroad's business.[10]

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[9] See Hearings, *supra*, note 8, pp. 16, 17. He testified at the latter point that carrier affiliates were included "when those companies are engaged in the business of transporting passengers or property for the railroad, or other service that is a part of railway transportation." And see Hearings, S. Committee on Interstate Commerce on S. 2395, 75th Cong., 1st Sess., p. 11.

[10] Senator Wagner, who was in charge of the Retirement Bill in the Senate, stated: "the coverage is extended expressly to railroad labor organizations, railroad associations, traffic associations, and is made more clearly applicable to subsidiaries of railroad companies such as refrigerator storage and other facilities. In other words, it covers a greater number of employees, not only those directly in the railroad business but those associated with it, and in that regard it is more liberal than the present act." 81 Cong. Rec. 6223.

In S. Rep. No. 697, 75th Cong., 1st Sess., p. 7, it is stated, after noting that casual service and operation is excluded, "In addition to trucking service, it is intended to exclude employees of a contractor who may, for example, be occasionally employed by a 'carrier' to repair a depot or build a bridge. Contractors, other than those which perform casual service, would not be excluded, irrespective of whether control be legal or de facto. De-facto control may be exercised not only by direct ownership of stock, but by means of agreements, licenses, and other devices which insure that the operation of the company is conducted in the interests of the carrier.

"By these changes there are brought within the scope of the act substantially all those organizations which are intimately related to

We do not find it necessary to resolve that controversy. At the very least the phrases in question embrace activities which form a part of transportation service within the meaning of the Interstate Commerce Act. Duquesne regularly performs service of that character. It is, therefore, an "employer" within the meaning of the present Acts.

We have noted the loading and unloading services rendered by Duquesne. The duty of unloading carload freight ordinarily rests with the shipper or consignee. *Pennsylvania R. Co.* v. *Kittanning Co.*, 253 U. S. 319, 323. But it is a transportation service within the meaning of the Interstate Commerce Act. *Atchison, T. & S. F. R. Co.* v. *United States*, 295 U. S. 193, 200; *Barringer & Co.* v. *United States*, 319 U. S. 1, 6. Its cost may be included in the line-haul tariffs or separately fixed or allowed as an additional charge. *Adams* v. *Mills*, 286 U. S. 397, 410–415; *Loading and Unloading Carload Freight*, 101 I. C. C. 394; *Berg Industrial Alcohol Co.* v. *Reading Co.*, 142 I. C. C. 161, 163–164; *Livestock Loaded and Unloaded at Chicago*, 213 I. C. C. 330, 336–337. See *Haberman* v. *Pennsylvania R. Co.*, 234 I. C. C. 167, dealing with less-than-carload lots.

Duquesne's answer is that the service of loading and unloading is done by it for its customers, that these services are rendered before railroad transportation has begun

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the transportation of passengers or property by railroad in the United States."

It is also pointed out that various railroad associations are included in the Acts and that their express inclusion was to make clear what had been previously implied. *Id.*, pp. 6–7. It is therefore argued that since some of those associations are not engaged in railroad transportation, Congress did not intend the coverage of the Acts to be restricted to organizations engaged in transportation either in the ordinary sense or in the sense in which the Interstate Commerce Act uses the term.

or after it has ended, that they are not and cannot be a part of railroad transportation since the tariff of the Pennsylvania forbids it from performing the services. Duquesne's conclusion is that under such circumstances loading and unloading are not and cannot be a part of railroad transportation. The question, however, is not whether in these cases the service of loading and unloading is being rendered by the Pennsylvania and is, therefore, in fact a part of its transportation service. It is not whether the affiliate would itself be subject to the Interstate Commerce Act. It is whether a carrier's affiliate is performing a service that could be performed by the carrier and charged for under the line-haul tariffs. If it is such a service, it is a transportation service within the meaning of the present Acts. Senator Wagner, who was in charge of the Retirement Bill in the Senate, stated that its coverage included "not only those directly in the railroad business but those associated with it." [11] And George M. Harrison, on whose testimony Duquesne heavily relies, stated that affiliates of carriers were included "when those companies are engaged in the business of transporting passengers or property for the railroad, or other service that is a part of railway transportation." [12] In other words if a service is involved which the railroad could perform as a part of its transportation service, it is within the present Acts. It then makes no difference that it is performed by a carrier affiliate rather than by the carrier itself. We think it plain that the definitions in question include at the very least those activities which would be transportation services when performed by a railroad but which it chooses to have performed by its affiliate.

We do not decide whether services other than loading and unloading which are performed by Duquesne are in the same category nor whether the "employer" definitions

[11] See note 10, *supra.*

[12] See note 9, *supra.*

may be given a broader scope. It is sufficient for the disposition of these cases that the loading and unloading services performed by Duquesne are services performed "in connection with the transportation of . . . property by railroad."

The judgment in No. 95 is reversed. The judgment in No. 103 is affirmed.

It is so ordered.

MR. JUSTICE JACKSON took no part in the consideration or decision of these cases.

CHATWIN *v.* UNITED STATES.

NO. 31. CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.*

Argued October 10, 1945.—Decided January 2, 1946.

1. In a prosecution for violation of the Federal Kidnaping Act, the stipulated facts as to the circumstances in which a 15-year-old girl undertook and continued a "celestial" marriage relationship with a cultist, failed to establish that she had been "held" within the meaning of the words "held for ransom or reward or otherwise" as used in the Act, and therefore convictions of the petitioners under the Act can not be sustained. P. 459.

(a) For aught that appears from the stipulated facts, the alleged victim was free to leave the petitioners when and if she desired; therefore there was no proof of unlawful restraint. P. 460.

(b) There was no proof that any of the petitioners willfully intended, by force, fear, or deception, to hold the alleged victim against her will. Petitioners' beliefs are not shown to involve unlawful restraint of celestial wives. P. 460.

(c) There was no competent or substantial proof that the girl was of such an age or mentality as necessarily precluded her from understanding the doctrine of celestial marriage and from exercising her own free will; therefore the consent of the parents or guardian is not a factor in the case. P. 461.

*Together with No. 32, *Zitting* v. *United States*, and No. 33, *Christensen* v. *United States*, also on certiorari to the Circuit Court of Appeals for the Tenth Circuit.

(d) In the absence of evidence of the method of testing the girl's mental age, and of proof as to the weight and significance to be attached to the particular mental age, the stipulated fact that, a year before the alleged inveiglement and detention, the girl was of the mental age of 7 can not be said necessarily to have precluded her from judging the principles of celestial marriage and from acting in accordance with her beliefs in the matter. There must be competent proof beyond a reasonable doubt of a victim's mental incapacity in relation to the very acts in question before the consent of the victim's parents or guardian can become a factor. P. 462.

2. Involuntariness of the victim's seizure and detention is of the essence of the crime of kidnaping; and, if that essential element is absent, the act of participating in illicit relations or contributing to the delinquency of a minor or entering into a celestial marriage, followed by interstate transportation, does not violate the Federal Kidnaping Act. P. 464.

3. The purpose of the Federal Kidnaping Act was to outlaw interstate kidnapings rather than general transgressions of morality involving the crossing of state lines; and the broad language of the Act must be interpreted and applied in the light of that purpose. P. 464.

146 F. 2d 730, reversed.

CERTIORARI, 324 U. S. 835, to review the affirmance of convictions, 56 F. Supp. 890, of violations of the Federal Kidnaping Act.

Mr. Claude T. Barnes, with whom *Messrs. Ed. D. Hatch* and *O. A. Tangren* were on the brief, for petitioners.

Assistant Solicitor General Judson, with whom *Messrs. W. Marvin Smith, Robert S. Erdahl* and *Miss Beatrice Rosenberg* were on the brief, for the United States.

MR. JUSTICE MURPHY delivered the opinion of the Court.

The Federal Kidnaping Act[1] punishes any one who knowingly transports or aids in transporting in interstate or foreign commerce "any person who shall have been un-

[1] 47 Stat. 326; 48 Stat. 781; 18 U. S. C. § 408a.

lawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away by any means whatsoever and held for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof." The sole issue confronting us in these cases is whether the stipulated facts support the convictions of the three petitioners under this Act, the indictment having charged that they unlawfully inveigled, decoyed and carried away a minor child of the age of 15, held her for a stated period, and transported her from Utah to Arizona with knowledge that she had been so inveigled and held. We are not called upon to determine or characterize the morality of their actions. Nor are we concerned here with their liability under any other statute, federal or state.

Petitioners are members of the Fundamentalist cult of the Mormon faith, a cult that sanctions plural or "celestial" marriages. In August, 1940, petitioner Chatwin, who was then a 68-year old widower, employed one Dorothy Wyler as a housekeeper in his home in Santaquin, Utah. This girl was nearly 15 years old at this time although the stipulation indicates that she had only a mental age of 7.[2] Her employment by Chatwin was approved by her parents. While residing at Chatwin's home, the girl was continually taught by Chatwin and one Lulu Cook, who also resided there, that plural marriage was essential to her salvation. Chatwin also told her that it was her grandmother's desire that he should take her in celestial marriage and that such a marriage was in conformity with the true principles of the original Mormon Church. As a result of these teachings, the girl was converted to the principle of celestial marriage and entered into a cult marriage with Chatwin

[2] At the time of her employment by Chatwin, the girl's physical age was 14 years and 8 months; her mental age was 7 years and 2 months; her intelligence quotient was 67. At the time of the stipulation in March, 1944, she was a "high grade moron" with a mental age of 9 years and 8 months and an intelligence quotient of 64.

on December 19, 1940. Thereafter she became pregnant, which fact was discovered by her parents on July 24, 1941. The parents then informed the juvenile authorities of the State of Utah of the situation and they took the girl into custody as a delinquent on August 4, 1941, making her a ward of the juvenile court.

On August 10, 1941, the girl accompanied a juvenile probation officer to a motion picture show at Provo, Utah. The officer left the girl at the show and returned later to call for her. The girl asked to be allowed to stay on for a short time and the officer consented. Thereafter, and prior to the second return of the officer, the girl "left the picture show and went out onto the street in Provo." There she met two married daughters of Chatwin who gave her sufficient money to go from Provo to Salt Lake City. Shortly after arriving there she was taken to the home of petitioners Zitting and Christensen. They, together with Chatwin, convinced her that she should abide, as they put it, "by the law of God rather than the law of man" and that she was perfectly justified in running away from the juvenile court in order to live with Chatwin. They further convinced her that she should go with them to Mexico to be married legally to Chatwin and then remain in hiding until she had reached her majority under Utah law. Thereafter, on October 6, 1941, the three petitioners transported the girl in Zitting's automobile from Salt Lake City to Juarez, Mexico, where she went through a civil marriage ceremony with Chatwin on October 14. She was then brought back to Utah and thence to Short Creek, Arizona. There she lived in hiding with Chatwin under assumed names until discovered by federal authorities over two years later, December 9, 1943. While in Short Creek she gave birth to two children by Chatwin. The transportation of the girl from Provo to Salt Lake City, thence to Juarez, Mexico, and finally to Short Creek was without the consent and against the wishes of her

parents and without authority from the juvenile court officials.[3]

Having waived jury trials, the three petitioners were found guilty as charged and were given jail sentences. 56 F. Supp. 890. The court below affirmed the convictions. 146 F. 2d 730. We granted certiorari, 324 U. S. 835, because of our doubts as to the correctness of the judgment that the petitioners were guilty under the Federal Kidnaping Act on the basis of the foregoing facts.

The Act by its own terms contemplates that the kidnaped victim shall have been (1) "unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away by any means whatsoever" and (2) "held for ransom or reward or otherwise." The Government contends that both elements appear from the stipulated facts in this case. The petitioners, it is argued, unlawfully "inveigled" or "decoyed" the girl away from the custody of her parents and the juvenile court authorities, the girl being "incapable of understanding the full significance of petitioners' importunities" because of her tender years and extremely low mentality. It is claimed, moreover, that the girl was "held" during the two-month period from August 10 to October 6, 1941, prior to the legal marriage, for the purpose of enabling Chatwin to cohabit with her and that this purpose, being of "benefit to the transgressor," is within the statutory term "or otherwise" as defined in *Gooch* v. *United States*, 297 U. S. 124, 128.

We are unable to approve the Government's contention. The agreed statement that the girl "left the picture show and went out onto the street in Provo" without any apparent motivating actions by the petitioners casts serious doubts on the claim that they "inveigled" or "decoyed" her

[3] In *Chatwin* v. *Terry*, 107 Utah 340, 153 P. 2d 941 (1944), the Utah Supreme Court held that the juvenile court had authority to hold the girl in custody until she reached the age of 21, despite her legal marriage to Chatwin.

away from the custody of the juvenile court authorities. But we do not pause to pursue this matter for it is obvious that there has been a complete lack of competent proof that the girl was "held for ransom or reward or otherwise" as that term is used in the Federal Kidnaping Act.

The act of holding a kidnaped person for a proscribed purpose necessarily implies an unlawful physical or mental restraint for an appreciable period against the person's will and with a willful intent so to confine the victim. If the victim is of such an age or mental state as to be incapable of having a recognizable will, the confinement then must be against the will of the parents or legal guardian of the victim. In this instance, however, the stipulated facts fail to reveal the presence of any of these essential elements.

(1) There is no proof that Chatwin or any of the other petitioners imposed at any time an unlawful physical or mental restraint upon the movements of the girl. Nothing indicates that she was deprived of her liberty, compelled to remain where she did not wish to remain, or compelled to go where she did not wish to go. For aught that appears from the stipulation, she was perfectly free to leave the petitioners when and if she so desired. In other words, the Government has failed to prove an act of unlawful restraint.

(2) There is no proof that Chatwin or any of the other petitioners willfully intended through force, fear or deception to confine the girl against her desires. While bona fide religious beliefs cannot absolve one from liability under the Federal Kidnaping Act, petitioners' beliefs are not shown to necessitate unlawful restraints of celestial wives against their wills. Nor does the fact that Chatwin intended to cohabit with the girl and to live with her as husband and wife serve as a substitute for an intent to restrain her movements contrary to her wishes, as required by the Act.

(3) Finally, there is no competent or substantial proof that the girl was of such an age or mentality as necessarily to preclude her from understanding the doctrine of celestial marriage and from exercising her own free will, thereby making the will of her parents or the juvenile court authorities the important factor. At the time of the alleged inveiglement in August, 1941, she was 15 years and 8 months of age and the alleged holding occurred thereafter. There is no legal warrant for concluding that such an age is ipso facto proof of mental incapacity in view of the general rule that incapacity is to be presumed only where a child is under the age of 14. 9 Wigmore on Evidence (3rd ed.) § 2514.[4] Nor is there any statutory warrant in this instance for holding that the consent of a child of this age is immaterial. Cf. *In re Morrissey,* 137 U. S. 157; *United States* v. *Williams,* 302 U. S. 46; *State* v. *Rhoades,* 29 Wash. 61, 69 P. 389. In Utah, parenthetically, any alleged victim over the age of 12 is considered sufficiently competent so that his consent may be used by an alleged kidnaper in defense to a charge under the state kidnaping statute. Utah Code Ann. (1943) § 103–33–2. And a person over the age of 14 in Utah is stated to be capable of committing a crime, the presumption of incapacity applying only to those younger. § 103–1–40. *Sadleir* v. *Young,* 97 Utah 291, 85 P. 2d 810; *State* v. *Terrell,* 55 Utah 314, 186 P. 108.

Great stress is placed by the Government, however, upon the admitted fact that the girl possessed a mental

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[4] See *Commonwealth* v. *Nickerson,* 87 Mass. 518 (child of 9 held incompetent to assent to forcible transfer of custody); *State* v. *Farrar,* 41 N. H. 53 (child of 4 held incapable of consenting to forcible seizure and abduction); *Herring* v. *Boyle,* 1 C. M. & R. 377 (child of 10 could not recover for false imprisonment without proof that he knew of alleged restraint upon him); *In re Lloyd,* 3 Man. & Gr. 547 (child between 11 and 12 held competent to decide whether to live with father or mother).

age of 7 in 1940, one year before the alleged inveiglement and holding. It is unnecessary here to determine the validity, the reliability or the proper use of mental tests, particularly in relation to criminal trials. It suffices to note that the method of testing the girl's mental age is not revealed and that there is a complete absence of proof in the record as to the proper weight and significance to be attached to this particular mental age. Nothing appears save a bare mathematical approximation unrestricted in terms to the narrow legal issue in this case. Under such circumstances a stipulated mental age of 7 cannot be said necessarily to preclude one from understanding and judging the principles of celestial marriage and from acting in accordance with one's beliefs in the matter. The serious crime of kidnaping should turn on something more substantial than such an unexplained mathematical approximation of the victim's mental age. There must be competent proof beyond a reasonable doubt of a victim's mental incapacity in relation to the very acts in question before criminal liability can be sanctioned in a case of this nature.[5]

The stipulated facts of this case reveal a situation quite different from the general problem to which the framers of the Federal Kidnaping Act addressed themselves. This statute was drawn in 1932 against a background of organized violence. 75 Cong. Rec. 13282–13304. Kidnaping by that time had become an epidemic in the United States. Ruthless criminal bands utilized every known legal and scientific means to achieve their aims and to protect them-

[5] See *State* v. *Kelsie*, 93 Vt. 450, 108 A. 391; *State* v. *Schilling*, 95 N. J. L. 145, 112 A. 400; *People* v. *Oxnam*, 170 Cal. 211, 149 P. 165; *State* v. *Schafer*, 156 Wash. 240, 286 P. 833; *Commonwealth* v. *Stewart*, 255 Mass. 9, 151 N. E. 74; *Commonwealth* v. *Trippi*, 268 Mass. 227, 167 N. E. 354; Woodbridge, "Physical and Mental Infancy in the Criminal Law," 87 U. of Pa. L. Rev. 426.

selves. Victims were selected from among the wealthy with great care and study. Details of the seizures and detentions were fully and meticulously worked out in advance. Ransom was the usual motive. "Law enforcement authorities, lacking coordination, with no uniform system of intercommunication and restricted in authority to activities in their own jurisdiction, found themselves laughed at by criminals bound by no such inhibitions or restrictions . . . The procedure was simple—a man would be kidnapped in one State and whisked into another, and still another, his captors knowing full well that the police in the jurisdiction where the crime was committed had no authority as far as the State of confinement and concealment was concerned." Fisher and McGuire, "Kidnapping and the So-called Lindbergh Law," 12 New York U. L. Q. Rev. 646, 653. See also Hearing before the House Committee on the Judiciary (72d Cong., 1st Sess.) on H. R. 5657, Serial 4; Finley, "The Lindbergh Law," 28 Georgetown L. J. 908.

It was to assist the states in stamping out this growing and sinister menace of kidnaping that the Federal Kidnaping Act was designed. Its proponents recognized that where victims were transported across state lines only the federal government had the power to disregard such barriers in pursuing the captors. H. Rep. No. 1493 (72d Cong., 1st Sess.); S. Rep. No. 765 (72d Cong., 1st Sess.). Given added impetus by the emotion which gripped the nation due to the famous Lindbergh kidnaping case, the federal statute was speedily adopted. See 75 Cong. Rec. 5075–5076, 13282–13304. Comprehensive language was used to cover every possible variety of kidnaping followed by interstate transportation. Armed with this legislative mandate, federal officials have achieved a high and effective control of this type of crime.

But the broadness of the statutory language does not permit us to tear the words out of their context, using the magic of lexigraphy to apply them to unattractive or immoral situations lacking the involuntariness of seizure and detention which is the very essence of the crime of kidnaping. Thus, if this essential element is missing, the act of participating in illicit relations or contributing to the delinquency of a minor or entering into a celestial marriage, followed by interstate transportation, does not constitute a crime under the Federal Kidnaping Act. No unusual or notorious situation relating to the inability of state authorities to capture and punish participants in such activities evidenced itself at the time this Act was created; no authoritative spokesman indicated that the Act was to be used to assist the states in these matters, however unlawful and obnoxious the character of these activities might otherwise be. Nor is there any indication that Congress desired or contemplated that the punishment of death or long imprisonment, as authorized by the Act, might be applied to those guilty of immoralities lacking the characteristics of true kidnapings. In short, the purpose of the Act was to outlaw interstate kidnapings rather than general transgressions of morality involving the crossing of state lines. And the broad language of the statute must be interpreted and applied with that plain fact in mind. See *United States* v. *American Trucking Associations,* 310 U. S. 534, 543–544.

Were we to sanction a careless concept of the crime of kidnaping or were we to disregard the background and setting of the Act the boundaries of potential liability would be lost in infinity. A loose construction of the statutory language conceivably could lead to the punishment of anyone who induced another to leave his surroundings and do some innocent or illegal act of benefit to the former, state lines subsequently being traversed. The absurdity of such a result, with its attendant likelihood of unfair

punishment and blackmail, is sufficient by itself to foreclose that construction.

The judgment of the court below affirming the convictions of the petitioners must therefore be

Reversed.

MR. JUSTICE BURTON concurs in the result.

MR. JUSTICE JACKSON took no part in the consideration or decision of these cases.

COMMISSIONER OF INTERNAL REVENUE *v.* FLOWERS.

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

No. 145. Argued December 11, 12, 1945.—Decided January 2, 1946.

1. Under § 23 (a) (1) (A) of the Internal Revenue Code, authorizing in computing income tax the deduction of traveling expenses incurred in the pursuit of a trade or business, as interpreted by § 19.23 (a)–2 of Treasury Regulations 103, traveling expenses of an employee resulting from the fact that he chooses for reasons of personal convenience to maintain a residence in a city other than that in which his post of duty is located are not deductible as travel expenses in pursuit of business. P. 473.
2. Traveling expenses in pursuit of business, within the meaning of § 23 (a) (1) (A) of the Internal Revenue Code, can arise only when the employer's business forces the taxpayer to travel and live temporarily at some place other than where his business headquarters are located, thereby advancing the interests of the employer. The exigencies of business rather than the personal conveniences and necessities of the traveler must be the motivating factor. P. 474.
3. The interpretation given by § 19.23 (a)–2 of Treasury Regulations 103 to the provision of § 23 (a) (1) (A) of the Internal Revenue Code, which is precisely the same as that given to identical provisions of prior and subsequent Revenue Acts, must be deemed to have legislative approval and to have the force of law. P. 469.

4. Whether particular expenses are deductible as traveling expenses under § 23 (a) (1) (A) of the Internal Revenue Code, as interpreted by § 19.23 (a)–2 of Treasury Regulations 103, is in most instances purely a question of fact, upon which the Tax Court's inferences and conclusions should not be disturbed by an appellate court. P. 470.

148 F. 2d 163, reversed.

CERTIORARI, *post*, p. 701, to review the reversal of a decision of the Tax Court which sustained the Commissioner's disallowance of certain deductions in computing the taxpayer's income tax.

Mr. J. Louis Monarch, with whom *Solicitor General McGrath*, *Assistant Attorney General Samuel O. Clark, Jr.*, *Messrs. Sewall Key* and *Harry Baum* were on the brief, for petitioner.

Mr. James N. Ogden for respondent.

MR. JUSTICE MURPHY delivered the opinion of the Court.

This case presents a problem as to the meaning and application of the provision of § 23 (a) (1) (A) of the Internal Revenue Code [1] allowing a deduction for income

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[1] 26 U. S. C. § 23 (a) (1) (A), as amended, 56 Stat. 819.

"§ 23. DEDUCTIONS FROM GROSS INCOME.

"In computing net income there shall be allowed as deductions:

"(a) *Expenses.*—

"(1) *Trade or Business Expenses.*—

"(A) *In General.*—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity."

tax purposes of "traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business."

The taxpayer, a lawyer, has resided with his family in Jackson, Mississippi, since 1903. There he has paid taxes, voted, schooled his children and established social and religious connections. He built a house in Jackson nearly thirty years ago and at all times has maintained it for himself and his family. He has been connected with several law firms in Jackson, one of which he formed and which has borne his name since 1922.

In 1906 the taxpayer began to represent the predecessor of the Gulf, Mobile & Ohio Railroad, his present employer. He acted as trial counsel for the railroad throughout Mississippi. From 1918 until 1927 he acted as special counsel for the railroad in Mississippi. He was elected general solicitor in 1927 and continued to be elected to that position each year until 1930, when he was elected general counsel. Thereafter he was annually elected general counsel until September, 1940, when the properties of the predecessor company and another railroad were merged and he was elected vice president and general counsel of the newly formed Gulf, Mobile & Ohio Railroad.

The main office of the Gulf, Mobile & Ohio Railroad is in Mobile, Alabama, as was also the main office of its predecessor. When offered the position of general solicitor in 1927, the taxpayer was unwilling to accept it if it required him to move from Jackson to Mobile. He had established himself in Jackson both professionally and personally and was not desirous of moving away. As a result, an arrangement was made between him and the railroad whereby he could accept the position and continue to reside in Jackson on condition that he pay his traveling expenses between Mobile and Jackson and pay his living expenses in both places. This arrangement permitted the taxpayer to determine for himself the amount

of time he would spend in each of the two cities and was in effect during 1939 and 1940, the taxable years in question.

The railroad company provided an office for the taxpayer in Mobile but not in Jackson. When he worked in Jackson his law firm provided him with office space, although he no longer participated in the firm's business or shared in its profits. He used his own office furniture and fixtures at this office. The railroad, however, furnished telephone service and a typewriter and desk for his secretary. It also paid the secretary's expenses while in Jackson. Most of the legal business of the railroad was centered in or conducted from Jackson, but this business was handled by local counsel for the railroad. The taxpayer's participation was advisory only and was no different from his participation in the railroad's legal business in other areas.

The taxpayer's principal post of business was at the main office in Mobile. However, during the taxable years of 1939 and 1940, he devoted nearly all of his time to matters relating to the merger of the railroads. Since it was left to him where he would do his work, he spent most of his time in Jackson during this period. In connection with the merger, one of the companies was involved in certain litigation in the federal court in Jackson and the taxpayer participated in that litigation.

During 1939 he spent 203 days in Jackson and 66 in Mobile, making 33 trips between the two cities. During 1940 he spent 168 days in Jackson and 102 in Mobile, making 40 trips between the two cities. The railroad paid all of his traveling expenses when he went on business trips to points other than Jackson or Mobile. But it paid none of his expenses in traveling between these two points or while he was at either of them.

The taxpayer deducted $900 in his 1939 income tax return and $1,620 in his 1940 return as traveling expenses

incurred in making trips from Jackson to Mobile and as expenditures for meals and hotel accommodations while in Mobile.[2] The Commissioner disallowed the deductions, which action was sustained by the Tax Court. But the Fifth Circuit Court of Appeals reversed the Tax Court's judgment, 148 F. 2d 163, and we granted certiorari because of a conflict between the decision below and that reached by the Fourth Circuit Court of Appeals in *Barnhill* v. *Commissioner,* 148 F. 2d 913.

The portion of § 23 (a) (1) (A) authorizing the deduction of "traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business" is one of the specific examples given by Congress in that section of "ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business." It is to be contrasted with the provision of § 24 (a) (1) of the Internal Revenue Code disallowing any deductions for "personal, living, or family expenses." And it is to be read in light of the interpretation given it by § 19.23 (a)–2 of Treasury Regulations 103, promulgated under the Internal Revenue Code. This interpretation, which is precisely the same as that given to identical traveling expense deductions authorized by prior and successive Revenue Acts,[3] is deemed to possess implied legislative approval and to have the effect of law. *Helvering* v. *Winmill,* 305 U. S. 79; *Boehm* v. *Commissioner,* 326 U. S. 287. In pertinent part, this interpretation states that "Traveling expenses, as ordi-

[2] No claim for deduction was made by the taxpayer for the amounts spent in traveling from Mobile to Jackson. He also took trips during the taxable years to Washington, New York, New Orleans, Baton Rouge, Memphis and Jackson (Tenn.), which were apparently in the nature of business trips for which the taxpayer presumably was reimbursed by the railroad. No claim was made in regard to them.

[3] Article 23 (a)–2 of Regulations 101, 94, 86; Article 122 of Regulations 77 and 74; Article 102 of Regulations 69 and 65; Article 101 (a) of Regulations 62.

narily understood, include railroad fares and meals and lodging. If the trip is undertaken for other than business purposes, the railroad fares are personal expenses and the meals and lodging are living expenses. If the trip is solely on business, the reasonable and necessary traveling expenses, including railroad fares, meals, and lodging, are business expenses. . . . Only such expenses as are reasonable and necessary in the conduct of the business and directly attributable to it may be deducted. . . . Commuters' fares are not considered as business expenses and are not deductible."

Three conditions must thus be satisfied before a traveling expense deduction may be made under § 23 (a) (1) (A):

(1) The expense must be a reasonable and necessary traveling expense, as that term is generally understood. This includes such items as transportation fares and food and lodging expenses incurred while traveling.

(2) The expense must be incurred "while away from home."

(3) The expense must be incurred in pursuit of business. This means that there must be a direct connection between the expenditure and the carrying on of the trade or business of the taxpayer or of his employer. Moreover, such an expenditure must be necessary or appropriate to the development and pursuit of the business or trade.

Whether particular expenditures fulfill these three conditions so as to entitle a taxpayer to a deduction is purely a question of fact in most instances. See *Commissioner* v. *Heininger,* 320 U. S. 467, 475. And the Tax Court's inferences and conclusions on such a factual matter, under established principles, should not be disturbed by an appellate court. *Commissioner* v. *Scottish American Co.,* 323 U. S. 119; *Dobson* v. *Commissioner,* 320 U. S. 489.

In this instance, the Tax Court without detailed elaboration concluded that "The situation presented in this

proceeding is, in principle, no different from that in which a taxpayer's place of employment is in one city and for reasons satisfactory to himself he resides in another." It accordingly disallowed the deductions on the ground that they represent living and personal expenses rather than traveling expenses incurred while away from home in the pursuit of business. The court below accepted the Tax Court's findings of fact but reversed its judgment on the basis that it had improperly construed the word "home" as used in the second condition precedent to a traveling expense deduction under § 23 (a) (1) (A). The Tax Court, it was said, erroneously construed the word to mean the post, station or place of business where the taxpayer was employed—in this instance, Mobile—and thus erred in concluding that the expenditures in issue were not incurred "while away from home." The court below felt that the word was to be given no such "unusual" or "extraordinary" meaning in this statute, that it simply meant "that place where one in fact resides" or "the principal place of abode of one who has the intention to live there permanently." 148 F. 2d at 164. Since the taxpayer here admittedly had his home, as thus defined, in Jackson and since the expenses were incurred while he was away from Jackson, the court below held that the deduction was permissible.

The meaning of the word "home" in § 23 (a) (1) (A) with reference to a taxpayer residing in one city and working in another has engendered much difficulty and litigation. 4 Mertens, Law of Federal Income Taxation (1942) § 25.82. The Tax Court [4] and the administrative

[4] *Bixler* v. *Commissioner,* 5 B. T. A. 1181; *Griesemer* v. *Commissioner,* 10 B. T. A. 386; *Brown* v. *Commissioner,* 13 B. T. A. 832; *Duncan* v. *Commissioner,* 17 B. T. A. 1088; *Peters* v. *Commissioner,* 19 B. T. A. 901; *Lindsay* v. *Commissioner,* 34 B. T. A. 840; *Powell* v. *Commissioner,* 34 B. T. A. 655; *Tracy* v. *Commissioner,* 39 B. T. A.

rulings [5] have consistently defined it as the equivalent of the taxpayer's place of business. See *Barnhill* v. *Commissioner, supra* (C. C. A. 4). On the other hand, the decision below and *Wallace* v. *Commissioner,* 144 F. 2d 407 (C. C. A. 9), have flatly rejected that view and have confined the term to the taxpayer's actual residence. See also *Coburn* v. *Commissioner,* 138 F. 2d 763 (C. C. A. 2).

We deem it unnecessary here to enter into or to decide this conflict. The Tax Court's opinion, as we read it, was grounded neither solely nor primarily upon that agency's conception of the word "home." Its discussion was directed mainly toward the relation of the expenditures to the railroad's business, a relationship required by the third condition of the deduction. Thus even if the Tax Court's definition of the word "home" was implicit in its decision and even if that definition was erroneous, its judgment must be sustained here if it properly concluded that the necessary relationship between the expenditures and the railroad's business was lacking. Failure to satisfy any one of the three conditions destroys the traveling expense deduction.

Turning our attention to the third condition, this case is disposed of quickly. There is no claim that the Tax Court misconstrued this condition or used improper standards in applying it. And it is readily apparent from the

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578; *Priddy* v. *Commissioner,* 43 B. T. A. 18; *Schurer* v. *Commissioner,* 3 T. C. 544; *Gustafson* v. *Commissioner,* 3 T. C. 998.

[5] Section 19.23 (a)–2 of Treasury Regulations 103 does not attempt to define the word "home" although the Commissioner argues that the statement therein contained to the effect that commuters' fares are not business expenses and are not deductible "necessarily rests on the premise that 'home' for tax purposes is at the locality of the taxpayer's business headquarters." Other administrative rulings have been more explicit in treating the statutory home as the abode at the taxpayer's regular post of duty. See, e. g., O. D. 1021, 5 Cum. Bull. 174 (1921); I. T. 1264, I–1 Cum. Bull. 122 (1922); I. T. 3314, 1939–2 Cum. Bull. 152; G. C. M. 23672, 1943 Cum. Bull. 66.

facts that its inferences were supported by evidence and that its conclusion that the expenditures in issue were non-deductible living and personal expenses was fully justified.

The facts demonstrate clearly that the expenses were not incurred in the pursuit of the business of the taxpayer's employer, the railroad. Jackson was his regular home. Had his post of duty been in that city the cost of maintaining his home there and of commuting or driving to work concededly would be non-deductible living and personal expenses lacking the necessary direct relation to the prosecution of the business. The character of such expenses is unaltered by the circumstance that the taxpayer's post of duty was in Mobile, thereby increasing the costs of transportation, food and lodging. Whether he maintained one abode or two, whether he traveled three blocks or three hundred miles to work, the nature of these expenditures remained the same.

The added costs in issue, moreover, were as unnecessary and inappropriate to the development of the railroad's business as were his personal and living costs in Jackson. They were incurred solely as the result of the taxpayer's desire to maintain a home in Jackson while working in Mobile, a factor irrelevant to the maintenance and prosecution of the railroad's legal business. The railroad did not require him to travel on business from Jackson to Mobile or to maintain living quarters in both cities. Nor did it compel him, save in one instance, to perform tasks for it in Jackson. It simply asked him to be at his principal post in Mobile as business demanded and as his personal convenience was served, allowing him to divide his business time between Mobile and Jackson as he saw fit. Except for the federal court litigation, all of the taxpayer's work in Jackson would normally have been performed in the headquarters at Mobile. The fact that he traveled frequently between the two cities and incurred

extra living expenses in Mobile, while doing much of his work in Jackson, was occasioned solely by his personal propensities. The railroad gained nothing from this arrangement except the personal satisfaction of the taxpayer.

Travel expenses in pursuit of business within the meaning of § 23 (a) (1) (A) could arise only when the railroad's business forced the taxpayer to travel and to live temporarily at some place other than Mobile, thereby advancing the interests of the railroad. Business trips are to be identified in relation to business demands and the traveler's business headquarters. The exigencies of business rather than the personal conveniences and necessities of the traveler must be the motivating factors. Such was not the case here.

It follows that the court below erred in reversing the judgment of the Tax Court.

Reversed.

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

MR. JUSTICE RUTLEDGE, dissenting.

I think the judgment of the Court of Appeals should be affirmed. When Congress used the word "home" in § 23 of the Code, I do not believe it meant "business headquarters." And in my opinion this case presents no other question.

Congress allowed the deduction for "traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business." Treasury Regulations 103, § 19.23 (a)–1, are to the same effect, with the word "solely" added after "home." Section 19.23 (a)–2 also provides: "Commuters' fares are not considered as business expenses and are not deductible." By this decision, the latter regulation is

allowed, in effect, to swallow up the deduction for many situations where the regulation has no fit application.

Respondent's home was in Jackson, Mississippi, in every sense, unless for applying § 23. There he maintained his family, with his personal, political and religious connections; schooled his children; paid taxes, voted, and resided over many years. There too he kept hold upon his place as a lawyer, though not substantially active in practice otherwise than to perform his work as general counsel for the railroad. This required his presence in Mobile, Alabama, for roughly a third of his time. The remainder he spent in Jackson at the same work, except for the time he was required to travel to points other than Mobile.

The company's principal offices were there, including one set aside for respondent's use. But the bulk of its trackage was in Mississippi and much of its legal work, with which he was concerned, was done there. His choice to keep his home in Jackson must have been affected by this fact, although it was motivated chiefly by more purely personal considerations. It is doubtful indeed, though perhaps not material, whether by not moving to Mobile he did not save the Government from larger deductions on account of traveling expense than those he claimed.

There is no question therefore but that respondent's home was in Jackson for every purpose, unless for the single one of applying § 23. Nor is it in doubt that he traveled from Jackson to Mobile and return, as he claimed, or that he spent the sums deducted for that purpose, including meals and lodging. Neither is it denied, as matter of fact, that his sole reason for going to Mobile was to perform his work as it required his presence or that he returned to his home in Jackson periodically when his duties no longer required him to be in Mobile.

I think this makes a case squarely within the statute and the regulations. But the Tax Court ruled that the claimed deductions were "personal, living, or family ex-

penses." Because the taxpayer elected to keep his home in Jackson, rather than move to Mobile, and because his employer did not undertake to pay these expenses, it viewed the case as being the same as if he had moved to Mobile. In that event, it said, he would have been required to bear the expenses of his own meals and lodging. This is obvious, even though the "as if" conclusion does not follow. The court went on, however, to give the further reason for it: "The situation . . . is, in principle, no different from that in which a taxpayer's place of employment is in one city and for reasons satisfactory to himself he resides in another." It seems questionable whether, in so ruling, the Tax Court has not confused the taxpayer's principal place of employment with his employer's. For on the facts Jackson rather than Mobile would seem more appropriately to be found *his* business headquarters. But, regardless of that, the authorities cited [1] and the Government's supporting argument show that the case was regarded as in essence the commuter's, excepted by the regulations.

Apart from this ruling, the Tax Court made no finding, of fact or law, that respondent was not engaged "in the pursuit of a trade or business"; that he was not "away

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[1] *Frank H. Sullivan*, 1 B. T. A. 93; *Mort L. Bixler*, 5 B. T. A. 1181; *Jennie A. Peters*, 19 B. T. A. 901; *Walter M. Priddy*, 43 B. T. A. 18.

The *Sullivan* case illustrates the typical commuter situation. The *Peters* case illustrates the extension of that ruling to greater distances and irregular travel.

Recent decisions, however, where the traveling distance is great, appear to go on the theory, presented in the instant case, that the word "home" within the meaning of § 23 (a) (1) means "principal place of business." See Tax Court Memorandum Opinion, Dec. 13,853 (M), 1 C. C. H. Tax Serv. 1945, p. 1268. Thus, Mertens says that the disallowance of traveling expenses to one's place of business "is based primarily on the requirement that the traveling expenses include only amounts expended 'while away from home.'" 4 Mertens, Law of Federal Income Taxation, 478.

from home"; that the expenses were not "business expenses" or "business traveling expenses"; or that they were not "ordinary and necessary." Yet by a merry-go-round argument,[2] which always comes back to rest on the idea that "home" means "business headquarters," the Government seeks to inject such issues and findings, including a *Dobson* (320 U. S. 489) contention, into the Tax Court's determination. I think there was only one issue, a question of law requiring construction of the statute as to the meaning of the word "home" and, if that is resolved against the Government, the Tax Court's judgment has no other foundation on which to stand. Every other contention falls when this one does. All stand if it is valid.

I agree with the Court of Appeals that if Congress had meant "business headquarters," and not "home," it would have said "business headquarters." When it used "home" instead, I think it meant home in everyday parlance, not in some twisted special meaning of "tax home" or "tax headquarters."[3] I find no purpose stated or implied in the Act, the regulations or the legislative history to support such a distortion or to use § 23 as a lever to force people to move their homes to the locality where their

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[2] Thus, the assertion that the deductions were "not even 'business' expenses" is brought back to the meaning of "home" by the given reason that "the maintenance of more than one dwelling place manifestly is not essential to the prosecution of a business." And this, in turn, completes the circle by resting on the conclusion that the taxpayer had two dwelling places, one in Mobile (presumably the hotel or hotels where he stopped) "where he resided during the periods the living expenses in question were incurred," the other in Jackson "where he resided during other periods." Likewise, the conclusion that the deductions were not "ordinary and necessary expenses," see note 8, depends on the view that Jackson was not "home" but Mobile was. So with the assertion that the "Mobile living expenses" were not "business traveling expenses."

[3] Cf. *Cox* v. *Collector,* 12 Wall. 204; *Addison* v. *Holly Hill Co.,* 322 U. S. 607, 617–618.

employer's chief business headquarters may be, although their own work may be done as well in major part at home. The only stated purpose, and it is clearly stated, not in words of art, is to relieve the tax burden when one is away from home on business.

The Government relies on administrative construction, by the Commissioner and the Tax Court, and says that unless this is accepted the Act creates tax inequality. If so, it is inequality created by Congress, and it is not for the Commissioner or the Tax Court, by administrative reconstruction, to rewrite what Congress has written or to correct its views of equality. Moreover, in my opinion, the inequity, if any, comes not from the statute or the regulation but from the construction which identifies petitioner with a commuter.

That word too has limitations unless it also is made a tool for rewriting the Act. The ordinary, usual connotation, cf. 21 I. C. C. 428; *Pennsylvania R. Co.* v. *Towers*, 245 U. S. 6, 12, does not include irregular, although frequent journeys of 350 miles, requiring Pullman accommodations and some twelve to fifteen hours, one way.

Congress gave the deduction for traveling away from home on business. The commuter's case, rightly confined, does not fall in this class. One who lives in an adjacent suburb or city and by usual modes of commutation can work within a distance permitting the daily journey and return, with time for the day's work and a period at home, clearly can be excluded from the deduction on the basis of the section's terms equally with its obvious purpose. But that is not true if "commuter" is to swallow up the deduction by the same sort of construction which makes "home" mean "business headquarters" of one's employer. If the line may be extended somewhat to cover doubtful cases, it need not be lengthened to infinity or to cover cases as far removed from the prevailing connotation of

commuter as this one. Including it pushes "commuting" too far, even for these times of rapid transit.[4]

Administrative construction should have some bounds. It exceeds what are legitimate when it reconstructs the statute to nullify or contradict the plain meaning of non-technical terms not artfully employed. Moreover, in this case the matter has been held in suspension by litigation with varying results[5] and apparent qualification by the Tax Court consequent upon some of the decisions.[6]

By construing "home" as "business headquarters"; by reading "temporarily" as "very temporarily" into § 23; by bringing down "ordinary and necessary" from its first sentence into its second;[7] by finding "inequity" where Congress has said none exists; by construing "commuter" to cover long-distance, irregular travel; and by conjuring

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[4] Conceivably men soon may live in Florida or California and fly daily to work in New York and back. Possibly they will be regarded as commuters when that day comes. But, if so, that is not this case and, in any event, neither situation was comprehended by Congress when § 23 was enacted.

[5] See *Wallace* v. *Commissioner,* 144 F. 2d 407 (C. C. A. 9); *Coburn* v. *Commissioner,* 138 F. 2d 763 (C. C. A. 2); and the decision now in review, 148 F. 2d 163 (C. C. A. 5), with which compare *Barnhill* v. *Commissioner* and *Winborne* v. *Commissioner,* 148 F. 2d 913 (C. C. A. 4).

[6] See *Harry F. Schurer,* 3 T. C. 544; *Charles G. Gustafson,* 3 T. C. 998; *Mortimer M. Mahony,* C. C. H. Tax Ct. Serv., Dec. 14,508 (M), April 10, 1945; *Charles J. McLennan,* C. C. H. Tax Ct. Serv., Dec. 14,644 (M), June 25, 1945; *Robert S. Shelley,* C. C. H. Tax Ct. Serv., Dec. 14,642 (M), June 25, 1945.

[7] The language is: "All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; . . ." § 23 (a) (1) (A), Internal Revenue Code.

from the "statutory setting" a meaning at odds with the plain wording of the clause, the Government makes over understandable ordinary English into highly technical tax jargon. There is enough of this in the tax laws inescapably, without adding more in the absence of either compulsion or authority. The arm of the tax-gatherer reaches far. In my judgment it should not go the length of this case. Congress has revised § 23 once to overcome niggardly construction.[8] It should not have to do so again.

COMMISSIONER OF INTERNAL REVENUE *v.* ESTATE OF HOLMES.

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

No. 203. Argued December 12, 1945.—Decided January 2, 1946.

1. Decedent in 1935 transferred property upon trusts for the benefit of three sons, retaining no power to revest in himself or in his estate any part of the income or corpus. Decedent was named trustee and acted as such until his death. Each trust was to continue for 15 years, or on certain conditions longer; and various provisions were made for disposition over upon the death of any beneficiary. The trustee was authorized in his discretion either to distribute or to accumulate the income, and to apply each beneficiary's share of the corpus to the welfare and happiness of such beneficiary. Decedent reserved to himself the power to terminate any or all of the trusts, and to distribute the principal and accumulated income to the beneficiaries then entitled to receive it. *Held* that, under § 811 (d) (2) of the Internal Revenue Code, for the purpose of the federal estate tax, the value of the property so transferred by the decedent was includible in his gross estate, as an interest whereof the "enjoyment" was subject, at the date of his death, to change through exercise of a power to "alter, amend, or revoke." P. 483.

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[8] The Treasury Regulations in force in 1920 allowed deduction of only the excess of the cost of meals and lodging away from home over the cost at home; and under earlier regulations none of this expense was allowed. Congress inserted the words "all" and "entire" in the 1921 Act to overcome this ruling.

(a) One who has the power to terminate contingencies upon which the right of enjoyment is staked, so as to make certain that a beneficiary will have it who may never come into it if the power is not exercised, has not divested himself of control to the extent which § 811 (d) (2) requires in order to avoid the tax. P. 487.

(b) Decedent's failure to reserve for himself any beneficial interest or power to recapture one is not controlling. P. 489.

(c) Nor is it controlling that the decedent was without power to designate beneficiaries other than those specified in the indenture, and was therefore limited to changing enjoyment among only that group. P. 489.

(d) Upon the language of the trusts, it can not be said that the decedent reserved the power of termination to himself merely as trustee rather than as donor; and it is therefore unnecessary to determine the effect of the variation between §§ 811 (d) (1) and (2) in this respect. P. 489.

2. The words "enjoyment" and "enjoy," as used in § 811 of the Internal Revenue Code and similar statutes, are not terms of art, but connote substantial present economic benefit rather than technical vesting of title or estates. P. 486.

3. The 1936 amendment of § 302 (d) of the Revenue Act of 1926, whereby as to transfers subsequent to June 22, 1936, the words "or terminate" were added to "alter, amend, or revoke," was declaratory of the existing law. P. 488.

148 F. 2d 740, reversed.

CERTIORARI, *post*, p. 702, to review the affirmance of a decision of the Tax Court, 3 T. C. 571, which set aside the Commissioner's determination of a deficiency in estate tax.

Miss Helen R. Carloss, with whom *Solicitor General McGrath*, *Assistant Attorney General Samuel O. Clark, Jr.*, *Messrs. Sewall Key* and *Hilbert P. Zarky* were on the brief, for petitioner.

Mr. J. V. Wheat, with whom *Messrs. W. J. Howard* and *J. E. Price* were on the brief, for respondent.

MR. JUSTICE RUTLEDGE delivered the opinion of the Court.

In *White* v. *Poor*, 296 U. S. 98, the question arose whether the power "to alter, amend, or revoke" included

the power of a decedent to terminate a trust so as to bring the trust estate within his gross estate for purposes of the transfer tax imposed by § 302 (d) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 71. The Court, finding it unnecessary to determine that question, disposed of the case upon another ground. The question is here again, this time inescapably, but with a further legislative history and a somewhat different setting of fact.

In 1936, immediately following the *White* decision, Congress revised § 302 (d) by rewriting it into two separate paragraphs relating to "revocable transfers," one applying to transfers after June 22, 1936, the other to transfers on or prior to that date. These are now §§ 811 (d) (1) and (2) of the Internal Revenue Code, which are set forth in the margin.[1] For present purposes the difference claimed to be important consisted in changing the phrase

[1] "Sec. 811. Gross Estate. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

"(d) Revocable transfers.—(1) Transfers after June 22, 1936.—To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona-fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power (in whatever capacity exercisable) by the decedent alone or by the decedent in conjunction with any other person (without regard to when or from what source the decedent acquired such power), to alter, amend, revoke, or terminate, or where any such power is relinquished in contemplation of decedent's death;

"(2) Transfers on or prior to June 22, 1936.—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale

"to alter, amend, or revoke" applying to transfers on or prior to June 22, 1936, so that in § 811 (d) (1) it reads "to alter, amend, revoke, or terminate," as to transfers after that date.

However § 811 (d) (2) governs the transfer in this case, since it was made in January, 1935, prior to the dividing date. And the question most mooted has been whether the change was one of substance or was only a clarifying amendment. Put differently, the principal issue is whether power to "alter, amend, or revoke" included power merely to terminate the interests created by the trust or required some further change.

The Tax Court and the Circuit Court of Appeals for the Fifth Circuit, one judge dissenting, have ruled that the change was substantial, not merely declaratory. 3 T. C. 571; 148 F. 2d 740. Accordingly they have held that no deficiency resulted from the taxpayer's failure to include the value of the trust estate created by the decedent Holmes in his gross estate for estate tax purposes. The Commissioner maintains the contrary view. Because of alleged conflict with decisions from other circuits,[2] certiorari was granted. 326 U. S. 702.

We think the Tax Court and the Court of Appeals were in error in their view of the statute's effect.

The facts were stipulated. In so far as necessary to state, they are as follows. On January 20, 1935, by a single trust indenture Holmes created three several irrevocable trusts, one for each of three sons then aged 22, 19 and 14

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for an adequate and full consideration in money or money's worth. Except in the case of transfers made after June 22, 1936, no interest of the decedent of which he has made a transfer shall be included in the gross estate under paragraph (1) unless it is includible under this paragraph." 26 U. S. C. § 811.

[2] *Mellon* v. *Driscoll*, 117 F. 2d 477 (C. C. A. 3); *Commissioner* v. *Hofheimer's Estate*, 149 F. 2d 733 (C. C. A. 2). See also the authorities cited in note 11 *infra*.

years respectively. Each was given the beneficial interest in one-third of a common fund consisting of corporate stock later converted into other assets.[3] The three trusts were identical in terms. Holmes was named and acted as trustee until his death October 5, 1940.

Each trust was to continue for a period of fifteen years, unless earlier terminated under power reserved to the grantor, or for a longer term on specified conditions summarized below. But the grantor reserved to himself during his lifetime the power to terminate any or all of the trusts and distribute the principal, with accumulated income, to the beneficiaries then entitled to receive it.[4] He retained no power to revest in himself or his estate any portion of the corpus or income.

Various provisions for disposition over were made to cover contingencies created by the death of beneficiaries during continuance of the trust. Generally stated, the scheme was that the surviving issue of each son should take his share of the corpus, receiving it share and share alike, unconditionally if over 21; as beneficiaries until at-

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[3] The corporation which had issued the stock was liquidated and the corporate assets were transferred to the trust to replace the stock.

[4] The power of termination was reserved by paragraph eleven of the indenture, as follows:

"Grantor, during his lifetime, and my son or sons herein named, while acting as Trustee hereunder, may, if deemed advisable by them as Trustee, distribute to either of Grantor's children, the whole or any part of the principal of their respective trusts, and their interests thereunder. And Grantor may, during his lifetime, if deemed advisable by him, and my son or sons herein named, while acting as Trustee hereunder, may, if deemed advisable by them as Trustee, terminate either or all of said trusts herein created for the respective benefit of my said sons, and distribute the principal of the trust to the persons entitled to receive the same under the terms hereof on the date of such termination."

It seems questionable on the wording that the grantor's power of termination, like that of his sons, was limited by the clause "while acting as Trustee hereunder." See note 13 and text.

taining that age, if under it. If a son should die without issue, his "share or trust" was to go "pro rata" to the other two sons, or their surviving issue *per stirpes;* if either other son should be dead without issue, the survivor or his issue was to take the whole; and if all the sons should be deceased without issue, whatever might remain in the trust estate was given to the grantor's wife, if living; if not, to her heirs at law. The trust was to terminate in any event upon the death of the last survivor of the three sons and the expiration of twenty-one years thereafter.

The trustee was given broad discretionary power to apply each beneficiary's share of the corpus for his maintenance, welfare, comfort or happiness, with a precatory suggestion of liberality.

The income was subject to spendthrift provisions and discretionary power of accumulation. If not accumulated, it was to be distributed to the beneficiary, preferably in monthly instalments.

The principal contention is that the sum of the various provisions was to create or reserve to the decedent only a power to accelerate in time the enjoyment of the beneficial interests brought into being by the trusts; that these were vested interests; that no power was reserved to revest them or any of them in the donor or his estate or to change or alter them, or the terms of the gifts, in any manner other than by mere acceleration of enjoyment; and that the powers thus reserved are not sufficient to bring the trust estate, or any part of it, within the coverage of § 811 (d) (2).[5]

[5] The taxpayer asserts that each son acquired, on execution of the indenture, "a fee simple title to one-third of the trust corpus and income," subject only to the trustee's power of management for 15 years at the most and to the son's living until this power should end. The reserved power of termination, it is said, applies only to the several contingencies which might affect the time of enjoyment, but not enjoyment itself.

This view presupposes two things. One is that termination of contingencies upon which enjoyment is dependent does not "change, alter, or revoke" enjoyment; the other, that the power "to alter, amend, or revoke" specified in § 811 (d) (2) does not include a power to terminate contingencies which accelerate enjoyment, with the effect of making certain that the beneficiary taking will have it rather than others to whom it would or might inure if termination were longer deferred.

One difficulty with respondent's position is in its conception of "enjoyment." More than once recently we have emphasized that "enjoyment" and "enjoy," as used in these and similar statutes, are not terms of art, but connote substantial present economic benefit rather than technical vesting of title or estates. Cf. *United States* v. *Pelzer,* 312 U. S. 399, 403; *Fondren* v. *Commissioner,* 324 U. S. 18, 20; *Commissioner* v. *Disston,* 325 U. S. 442.[6] In this sense it is clear that none of the sons here had a present right to immediate enjoyment of either income or principal, see *Commissioner* v. *Disston, supra,* although each may have been invested with what respondent regards as a "fee simple" in an equitable interest, subject to divestment by the contingency of the beneficiary's death during continuance of the trust. So long as it continued—and it might continue for the life of the survivor of the three sons and 21 years—it could not be said with assurance that any of the sons, or his issue, would come into present enjoyment of his share, or any part of it; for in connection with the possible occurrence of many contingencies, in-

[6] It is true that this case is not one involving the taxability of gifts of "future interests in property" as was true of the cases cited. It is likewise true that the laws relating to estate taxes and those relating to gift taxes are not completely reciprocal. *Estate of Sanford* v. *Commissioner,* 308 U. S. 39; *Smith* v. *Shaughnessy,* 318 U. S. 176. But there can be no difference in the meaning of the words "enjoyment" and "enjoy" as they are used in the pertinent statutory provisions respectively.

cluding the grantor's death and his earlier exercise of the power of termination, it is to be recalled that the grantor reserved to himself, while acting as trustee, the power to accumulate the income.

It seems obvious that one who has the power to terminate contingencies upon which the right of enjoyment is staked, so as to make certain that a beneficiary will have it who may never come into it if the power is not exercised, has power which affects not only the time of enjoyment but also the person or persons who may enjoy the donation. More therefore is involved than mere acceleration of the time of enjoyment. The very right of enjoyment is affected, the difference dependent upon the grantor's power being between present substantial benefit and the mere prospect or possibility, even the probability, that one may have it at some uncertain future time or perhaps not at all. A donor who keeps so strong a hold over the actual and immediate enjoyment of what he puts beyond his own power to retake has not divested himself of that degree of control which § 811 (d) (2) requires in order to avoid the tax.

But the respondent relies heavily upon the legislative history and the continued use of "alter, amend, or revoke" in the 1936 revision, which at the same time introduced "or terminate" to govern future transactions, as expressive of intention to differentiate the two classes of transfers. This view puts emphasis on the meaning of "revoke" rather than of "enjoyment," and excludes from that term's scope a power not amounting to more than one of termination.

We think the history gives the opposite story. The 1936 revision resulted from the *White* decision, which raised doubt whether Congress had included the power to terminate in the words "alter, amend, or revoke." To clarify the matter Congress removed all doubt for the future by enacting § 811 (d) (1). At the same time it adopted § 811 (d) (2), which retained the earlier phrasing.

This was from concern that retroactive application of § 811 (d) (1) should not impose taxes on prior transfers not comprehended by the prior law, as the concluding sentence of § 811 (d) (2) shows.[7] Notwithstanding this and the doubt created by *White* v. *Poor, supra,* the report of the Committee on Ways and Means of the House of Representatives expressly states that the addition of "or terminate" in § 811 (d) (1) was "declaratory of existing law." [8] Administrative interpretation, including Treasury Regulations, support this view,[9] which also is either followed or indicated in decisions of the Circuit Courts of Appeals, except the one now in review.[10] As we have pointed out, that view is more consonant with the structure and interpretation given concomitant taxing act provisions. For all these reasons, we think it must prevail.

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[7] See note 1.

[8] The report stated: "Another change made in subsection (a) of section 206 has been to expressly include a power to terminate along with the powers to alter, amend, or revoke. In the case of *White* v. *Poor, supra,* the Supreme Court did not pass on the question of whether the power to terminate was included in the language relating to a power 'to alter, amend or revoke.' Since in substance a power to terminate is the equivalent of a power to revoke, this question should be set at rest. Express provision to that effect has been made and it is believed that it is declaratory of existing law." H. Rep. No. 2818, 74th Cong., 2d Sess., 10. The report was issued in connection with H. R. 12,793, of the same session, of which § 206 contained the changes later enacted, without presently material difference, as § 805 of the Revenue Act of 1936, now § 811 (d) of the Code.

[9] See Treasury Regulations 105, § 81.20, stating: "Such addition is considered but declaratory of the meaning of the subdivision prior to the amendment. A power to terminate capable of being so exercised as to revest in the decedent the ownership of the transferred property or an interest therein, or as otherwise to inure to his benefit or the benefit of his estate, is, to that extent, the equivalent of a power to 'revoke,' *and when otherwise so exercisable as to effect a change in the enjoyment,* is the equivalent of a power to 'alter.'" (Emphasis added.)

[10] Cf. the authorities cited in note 11.

Respondent's other contentions require only brief notice. The contingencies here were too numerous and too important in their effects not only upon the time but also upon the right of immediate enjoyment for them to be regarded as trivial or inconsequential, as respondent urges. Decedent's failure to reserve for himself any beneficial interest or power to recapture one is not controlling. *Porter* v. *Commissioner*, 288 U. S. 436. Nor is the fact that he could not select new beneficiaries outside those comprehended by the indenture, and was therefore limited to changing enjoyment among that group.[11]

It seems suggested that the power of termination was reserved to the grantor, not in the capacity of donor, but only in that of trustee, from which the conclusion appears to be drawn that no power of termination was reserved within the meaning of § 811 (d) (2). As we have noted,[12] the eleventh paragraph of the indenture is not wholly clear concerning the premise. But in terms the reservation is to the "Grantor, during his lifetime" and grammatical construction of the second sentence seems to indicate the qualifying clause "while acting as Trustee hereunder" was intended to apply only to the decedent's son or sons acting in that capacity.[13] If the question has been

[11] *Chickering* v. *Commissioner*, 118 F. 2d 254; *Commissioner* v. *Hofheimer's Estate*, 149 F. 2d 733; *Commissioner* v. *Bridgeport City Trust Co.*, 124 F. 2d 48; *Guggenheim* v. *Helvering*, 117 F. 2d 469; *Commissioner* v. *Chase National Bank*, 82 F. 2d 157; *Union Trust Co.* v. *Driscoll*, 138 F. 2d 152; *Millard* v. *Maloney*, 121 F. 2d 257; *Mellon* v. *Driscoll*, 117 F. 2d 477; *Holderness* v. *Commissioner*, 86 F. 2d 137.

[12] Note 4.

[13] *Ibid.* The parenthetical phase "(in whatever capacity exercisable)" was added to § 811 (d) (1) at the same time as "or terminate," and possibly also as a consequence of the decision in *White* v. *Poor*. Although the legislative reports are not clear, see H. Rep. No. 2818, 74th Cong., 2d Sess., 9, this change also has been held to have been declaratory of existing law. *Welch* v. *Terhune*, 126 F. 2d 695; *Union Trust Co.* v. *Driscoll*, 138 F. 2d 152; see also Treas. Reg. 105, § 81.20; *Estate of Nettleton* v. *Commissioner*, 4 T. C. 987.

saved, we cannot say upon this language that the grantor did not reserve the power of termination to himself as donor rather than merely as trustee. It is unnecessary therefore to determine whether, if the reservation were different, the variation in wording between §§ 811 (d) (1) and (2) in this respect would be material.[14] We have considered respondent's remaining contentions and find them without merit.

The judgment of the Court of Appeals is reversed and the cause is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

MR. JUSTICE DOUGLAS dissents.

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

MARKHAM, ALIEN PROPERTY CUSTODIAN, *v.* ALLEN ET AL.

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

No. 60. Argued December 5, 1945.—Decided January 7, 1946.

1. A federal district court has jurisdiction of a suit by the Alien Property Custodian against an executor and resident heirs to determine the Custodian's asserted right to share in the decedent's estate which is in course of probate administration in a state court. Pp. 491, 496.
2. While a federal court has no jurisdiction to probate a will or administer an estate, it does have jurisdiction to entertain suits to establish claims against a decedent's estate, so long as it does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court. P. 494.

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[14] See the preceding note.

3. While a federal court may not disturb or affect the possession of property in the custody of a state court, it may adjudicate rights in such property when the final judgment does not interfere with the state court's possession save to the extent that the state court is bound by the judgment to recognize the right adjudicated by the federal court. P. 494.
4. Where the effect of a judgment of a federal court is to leave undisturbed the orderly administration of a decedent's estate in a state probate court but to decree a right in property to be distributed after administration, this is not an exercise of probate jurisdiction or an interference with property in the possession or custody of a state court. P. 495.
5. A federal district court properly exercised its discretion in entertaining a suit by the Alien Property Custodian to determine his right to share in a decedent's estate in course of probate administration in a state court, even though the suit involved issues of state law; because § 17 of the Trading with the Enemy Act specially confers on the federal courts jurisdiction to enter all such orders and decrees as may be necessary and proper to enforce the provisions of the Act and this indicates that Congress has adopted the policy of permitting the Custodian to proceed in the federal courts to enforce his rights, whether they depend on state or federal law. P. 495.

147 F. 2d 136, reversed.

CERTIORARI, 325 U. S. 846, to review reversal of a judgment of a district court (52 F. Supp. 850) allowing a claim of the Alien Property Custodian against a decedent's estate.

Mr. M. S. Isenbergh, with whom *Solicitor General McGrath, Messrs. Harry LeRoy Jones* and *Raoul Berger* were on the brief, for petitioner.

Mr. Joseph Wahrhaftig submitted for respondents.

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

The question is whether a district court of the United States has jurisdiction of a suit brought by the Alien Property Custodian against an executor and resident heirs

to determine the Custodian's asserted right to share in decedent's estate which is in course of probate administration in a state court.

On January 23, 1943, petitioner, the Alien Property Custodian, acting under § 5 (b) (1) (B) of the Trading with the Enemy Act, 55 Stat. 839, 50 U. S. C. App., Supp. IV, § 616, and Executive Order No. 9095, as amended by Executive Order 9193, 3 Code Fed. Reg. (Cum. Supp.) 1174, issued vesting order No. 762, by which he purported to vest in himself as Custodian all right, title and interest of German legatees in the estate of Alvina Wagner, who died testate, a resident of California, whose will was admitted to probate and whose estate is being administered in the Superior Court of California. Previously, on December 30, 1942, six of the other heirs-at-law of decedent, residing in the United States, filed a petition in the Superior Court of California for determination of heirship, asserting that under the provisions of California Statutes, 1941, chap. 895, § 1,* the German legatees were ineligible as beneficiaries, and that the American heirs were therefore entitled to inherit decedent's estate. This proceeding is still pending.

On April 6, 1943, the Custodian brought the present suit in the district court for the northern district of California against the executor and the six California claimants, seeking a judgment determining that the resident claimants have no interest in the estate, and that the Custodian, by virtue of his vesting order, is entitled to the entire net estate of the decedent after payment of expenses of administration, debts, and taxes, and is the owner of specified real estate of decedent passing under the will. The complaint prayed that the executor be ordered to pay the entire net estate to the Custodian upon the allowance by

*This statute purports to limit inheritance by non-resident aliens to nationals of countries which grant reciprocal rights of inheritance to American citizens.

the state court of the executor's final account. On motion of respondents to strike the complaint, and on petitioner's motion for judgment on the pleadings, the district court gave judgment for petitioner, 52 F. Supp. 850. The court held that it had jurisdiction to enforce the vesting order of petitioner; that its jurisdiction is derived from the Constitution and laws of the United States and is not subject to restriction or ouster by state legislation; and that California Statutes, 1941, chap. 895, § 1, is invalid. The judgment declared that petitioner had acquired the interests of the German nationals in the estate of decedent; that none of respondents have any right, title or interest in the estate; and that petitioner is entitled to receive the net estate in distribution after payment of expenses of administration, debts and taxes.

Without passing upon the merits, the Court of Appeals for the Ninth Circuit reversed and ordered the cause dismissed, upon the ground that the district court was without jurisdiction of the subject matter of the action. 147 F. 2d 136. The court thought that since "the matter is within probate jurisdiction and that court is in possession of the property, its right to proceed to determine heirship cannot be interfered with by the federal court."

It is not denied that the present suit is a suit "of a civil nature . . . in equity," brought by an officer of the United States, authorized to sue, of which district courts are given jurisdiction by § 24 (1), 28 U. S. C. § 41 (1), of the Judicial Code. But respondents argue, as the Circuit Court of Appeals held, that as the district courts of the United States are without jurisdiction over probate matters, see *Broderick's Will,* 21 Wall. 503, 517; *Byers* v. *McAuley,* 149 U. S. 608, 615, which the Court of Appeals thought are not "cases or controversies within the meaning of Art. III of the Constitution," and since the present suit to determine heirship of property being administered in a state probate court is an exercise of probate jurisdiction, the district court is without jurisdiction.

It is true that a federal court has no jurisdiction to probate a will or administer an estate, the reason being that the equity jurisdiction conferred by the Judiciary Act of 1789 and § 24 (1) of the Judicial Code, which is that of the English Court of Chancery in 1789, did not extend to probate matters. *Kerrich* v. *Bransby,* 7 Brown P. C. 437; *Barnesley* v. *Powel,* 1 Ves. Sen. 284; *Allen* v. *Macpherson,* 1 Phillips 133, 1 House of Lords Cases 191; *Broderick's Will, supra; Farrell* v. *O'Brien,* 199 U. S. 89; *Sutton* v. *English,* 246 U. S. 199, 205. But it has been established by a long series of decisions of this Court that federal courts of equity have jurisdiction to entertain suits "in favor of creditors, legatees and heirs" and other claimants against a decedent's estate "to establish their claims" so long as the federal court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court. *Waterman* v. *Canal-Louisiana Bank Co.,* 215 U. S. 33, 43, and cases cited. See *Sutton* v. *English, supra,* 205; *United States* v. *Bank of New York Co.,* 296 U. S. 463, 477; *Commonwealth Trust Co.* v. *Bradford,* 297 U. S. 613, 619; *United States* v. *Klein,* 303 U. S. 276; *Princess Lida* v. *Thompson,* 305 U. S. 456, 466.

Similarly while a federal court may not exercise its jurisdiction to disturb or affect the possession of property in the custody of a state court, *Penn Co.* v. *Pennsylvania,* 294 U. S. 189, 195–196 and cases cited; *United States* v. *Bank of New York Co., supra,* 477–478 and cases cited, it may exercise its jurisdiction to adjudicate rights in such property where the final judgment does not undertake to interfere with the state court's possession save to the extent that the state court is bound by the judgment to recognize the right adjudicated by the federal court. *Commonwealth Trust Co.* v. *Bradford, supra,* 619; *United States* v. *Klein, supra,* 281 and cases cited.

Although in this case petitioner sought a judgment in the district court ordering defendant executor to pay over the entire net estate to the petitioner upon an allowance of the executor's final account, the judgment declared only that petitioner "is entitled to receive the net estate of the late Alvina Wagner in distribution, after the payment of expenses of administration, debts, and taxes." The effect of the judgment was to leave undisturbed the orderly administration of decedent's estate in the state probate court and to decree petitioner's right in the property to be distributed after its administration. This, as our authorities demonstrate, is not an exercise of probate jurisdiction or an interference with property in the possession or custody of a state court.

There remains the question whether the district court having jurisdiction should, in the exercise of its discretion, have declined to entertain the suit which involves issues of state law and have remitted the petitioner to his remedy in the state probate proceeding. See *Thompson* v. *Magnolia Co.*, 309 U. S. 478, 483; *Railroad Commission* v. *Pullman Co.*, 312 U. S. 496; *Chicago* v. *Fieldcrest Dairies*, 316 U. S. 168; compare *Pennsylvania* v. *Williams*, 294 U. S. 176, 182–186; *Gordon* v. *Ominsky*, 294 U. S. 186; *Gordon* v. *Washington*, 295 U. S. 30, 39; *United States* v. *Bank of New York Co., supra*, 480. The mere fact that the district court, in the exercise of the jurisdiction which Congress has conferred upon it, is required to interpret state law is not in itself a sufficient reason for withholding relief to petitioner. *Meredith* v. *Winter Haven*, 320 U. S. 228. This is the more so in this case because § 17 of the Trading with the Enemy Act, 50 U. S. C. App. § 17, specially confers on the district court, independently of the statutes governing generally jurisdiction of federal courts, jurisdiction to enter "all such orders and decrees . . . as may be necessary and proper in the premises to enforce the

provisions" of the Act. Although the district court has jurisdiction of the present case under § 24 (1) of the Judicial Code, irrespective of § 17, the latter section plainly indicates that Congress has adopted the policy of permitting the Custodian to proceed in the district courts to enforce his rights under the Act, whether they depend on state or federal law. The cause was therefore within the jurisdiction of the district court, which could appropriately proceed with the case, and the Court of Appeals erroneously ordered its dismissal.

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

Reversed.

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

MR. JUSTICE RUTLEDGE is of the opinion that the cause should be remanded to the district court and jurisdiction should be retained by it pending the state court's decision as to the persons entitled to receive the net estate.

NEW YORK EX REL. RAY *v.* MARTIN, WARDEN.

CERTIORARI TO THE COUNTY COURT OF WYOMING COUNTY, NEW YORK.

No. 158. Argued December 13, 1945.—Decided January 7, 1946.

1. A state court of New York has jurisdiction to try a non-Indian for the murder of another non-Indian committed on the Allegany Reservation of the Seneca Indians within that State. *United States* v. *McBratney*, 104 U. S. 621, followed. P. 498.
2. Section 2145 of the Revised Statutes does not operate to deprive States of jurisdiction of crimes committed on Indian reservations by one non-Indian against another. P. 499.
3. Exercise of jurisdiction by a state court of New York over crimes

involving only non-Indians and committed on the Allegany Reservation of the Seneca Indians within that State does not violate the Treaty of 1794. P. 500.

294 N. Y. 61, 60 N. E. 2d 541, affirmed.

CERTIORARI, *post,* p. 685, to review the affirmance of a judgment dismissing a writ of habeas corpus. See 268 App. Div. 218, 52 N. Y. S. 2d 496; 181 Misc. 925, 47 N. Y. S. 2d 883.

Mr. Thomas J. McKenna for petitioner.

Henry S. Manley, Assistant Attorney General of New York, with whom *Nathaniel L. Goldstein,* Attorney General, and *Orrin G. Judd,* Solicitor General, were on the brief, for the Warden and the State of New York. *Mr. Charles E. Congdon* for Cattaraugus County.

Mr. Roger P. Marquis, with whom *Solicitor General McGrath, Messrs. J. Edward Williams, John C. Harrington* and *Walter J. Cummings, Jr.* were on the brief, for the United States, as *amicus curiae,* urging affirmance.

MR. JUSTICE BLACK delivered the opinion of the Court.

In *United States* v. *McBratney,* 104 U. S. 621, this Court held that the State courts of Colorado, not the Federal courts, had jurisdiction to prosecute a murder of one non-Indian by another committed on an Indian reservation located within that State. The holding in that case was that the Act of Congress admitting Colorado into the Union overruled all prior inconsistent statutes and treaties and placed it "upon an equal footing with the original States . . ."; that this meant that Colorado had "criminal jurisdiction over its own citizens and other white persons throughout the whole of the territory within its limits, including the Ute Reservation"; and that consequently,

the United States no longer had "sole and exclusive jurisdiction" over the Reservation, except to the extent necessary to carry out such treaty provisions which remained in force. That case has since been followed by this Court [1] and its holding has not been modified by any act of Congress. The question this case presents is whether New York, which is one of the original States, has jurisdiction to punish a murder of one non-Indian committed by another non-Indian upon the Allegany Reservation of the Seneca Indians located within the State of New York.

In 1939, the petitioner was sentenced to life imprisonment in a New York State court for the murder of a man in the City of Salamanca, which is within the Allegany Reservation but has only 8 Indian families living among its 9,000 inhabitants. He later brought this habeas corpus proceeding in a county court of the State.[2] He alleged that since the Indian reservation was under the exclusive jurisdiction of the United States, the State courts lacked jurisdiction to try and convict him. The County Court of Wyoming County heard the case and ordered the writ dismissed. 181 Misc. 925, 47 N. Y. S. 2d 883. Both the Appellate Division of the Supreme Court, 268 App. Div. 218, 52 N. Y. S. 2d 496, and the Court of Appeals, 294 N. Y. 61, 60 N. E. 2d 541, affirmed the dismissal.[3] We granted certiorari because of the federal questions raised.

[1] *Draper* v. *United States,* 164 U. S. 240. See also *United States* v. *Ramsey,* 271 U. S. 467, 469; *Donnelly* v. *United States,* 228 U. S. 243, 271; *United States* v. *Kagama,* 118 U. S. 375, 383.

[2] A previous petition in the Federal courts had been denied because relief had not first been sought in the New York State courts. 54 F. Supp. 218; 141 F. 2d 300.

[3] The New York Court of Appeals held, and the State urges here, that the State court had jurisdiction by virtue of § 7 of the Act of Congress passed in 1875, 18 Stat. 330, authorizing certain parts of the Allegany Reservation to be surveyed for establishment of a number of villages including Salamanca. Section 8 provided among other things that "all the municipal laws and regulations of said State [New York] may extend over and be enforced within said villages." Act-

We think the rule announced in the *McBratney* case controlling and that the New York Court therefore properly exercised its jurisdiction. For that case and others which followed it all held that in the absence of a limiting treaty obligation or Congressional enactment each state had a right to exercise jurisdiction over Indian reservations within its boundaries.[4] Petitioner claims that the *McBratney* case differs from this proceeding in several respects. First, he contends that Colorado could exercise greater powers over its Indian reservations than New York can by virtue of the enabling act which admitted Colorado into the Union, a similar enactment being lacking here since New York is one of the original states. As we have seen, the Colorado enabling act was held in the *McBratney* case to put Colorado "upon an equal footing with the original States," and to repeal earlier legislation and treaties inconsistent with the enabling act. The fact that Colorado was put on an equal footing with the original states obviously did not give it any greater power than New York. And no greater power can be inferred from the repealing function of the enabling act, since, as we shall point out, the statutes and treaties which petitioner claims deprive New York of jurisdiction do not in fact do so.

This brings us to petitioner's further contention that certain Federal statutes specifically grant the United States exclusive jurisdiction over the Seneca Reservation. He points out that the laws of the United States make murder a crime "if committed in *any place* within the sole and

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ing under what it conceived to be the authority granted by this Section, New York passed a law, Chap. 188 of New York Laws of 1881, extending its "general law" so as to apply to Salamanca. Since we think the rule in the *McBratney* case controlling, we find it unnecessary in this case to pass on the scope and validity of this Act.

[4] This holding was in harmony with general principles governing this subject. *Surplus Trading Co.* v. *Cook,* 281 U. S. 647, 651; *Hallowell* v. *United States,* 221 U. S. 317, 320; *United States* v. *McGowan,* 302 U. S. 535, 539.

exclusive jurisdiction of the United States . . ."; 18 U. S. C. 452; that § 2145 of the Revised Statutes, 25 U. S. C. 217, makes this murder statute applicable to "Indian country"; and contends that the Seneca Reservation is Indian country, and that consequently New York has no jurisdiction to punish a murder committed on that Reservation. The cases following the *McBratney* case adequately answer petitioner's contentions concerning § 2145, even if we assume, what we need not decide, that the Seneca Reservation is Indian country within the meaning of the statute. While § 2145 of the Revised Statutes has been held applicable in territories to crimes between whites and whites which do not affect Indians,[5] the *McBratney* line of decisions stands for the proposition that States, by virtue of their statehood, have jurisdiction over such crimes notwithstanding § 2145.[6] See also *New York* v. *Dibble,* 21 How. 366.

Petitioner further contends that the *McBratney* rule is not applicable here because exercise of state jurisdiction over non-Indians at Salamanca would violate the Treaty of 1794, 7 Stat. 44. We can find no language in that Treaty that lends itself to such interpretation. The Treaty was one of peace and friendship between the United States and the Indians. It provided against private revenge or retaliation on account of injuries done by individuals on either side. Such injuries were to be reported by each nation to the other with a view of having the nation to which the individual offender belonged take "such prudent measures

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[5] *In re Wilson,* 140 U. S. 575; *Pickett* v. *United States,* 216 U. S. 456, 458.

[6] In *Donnelly* v. *United States, supra,* 228 U. S. at p. 270, this Court pointed out that the provisions contained in § 2145 of the Revised Statutes were first enacted as § 25 of the Indian Intercourse Act of June 30, 1834, 4 Stat. 729, 733. This means that the statute was in effect at the time of the *McBratney* decision. Yet, significantly, the Court did not even find it necessary to mention it.

. . . as shall be necessary to preserve . . . peace and friendship unbroken." This procedure was to be followed until Congress made "other equitable provision for the purpose." This latter language, upon which the petitioner most strongly relies as imposing a duty upon the United States to exercise jurisdiction over the whole Reservation to the exclusion of the State, even as to offenses committed by whites against whites, cannot properly be interpreted as the petitioner asks. The entire emphasis in treaties and Congressional enactments dealing with Indian affairs has always been focused upon the treatment of the Indians themselves and their property. Generally no emphasis has been placed on whether state or United States courts should try white offenders for conduct which happened to take place upon an Indian reservation, but which did not directly affect the Indians. Neither the 1794 Treaty nor any other requires a holding that offenses by non-Indians against non-Indians disturbing the peace and order of Salamanca are beyond New York's power to punish.

Affirmed.

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

MARSH *v.* ALABAMA.

APPEAL FROM THE COURT OF APPEALS OF ALABAMA.

No. 114. Argued December 6, 1945.—Decided January 7, 1946.

1. A state can not, consistently with the freedom of religion and the press guaranteed by the First and Fourteenth Amendments, impose criminal punishment on a person for distributing religious literature on the sidewalk of a company-owned town contrary to regulations of the town's management, where the town and its shopping district are freely accessible to and freely used by the public in general, even though the punishment is attempted under a state statute making it a crime for anyone to enter or remain on the premises of another after having been warned not to do so. Pp. 502, 505.

2. Whether a corporation or a municipality owns or possesses a town, the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free. P. 507.
3. People living in company-owned towns are free citizens of their State and country, just as residents of municipalities; and there is no more reason for depriving them of the liberties guaranteed by the First and Fourteenth Amendments than there is for curtailing these freedoms with respect to any other citizen. P. 508.

21 So. 2d 558, reversed.

APPEAL from the affirmance of a conviction for violation of a state statute challenged as invalid under the Federal Constitution. The State Supreme Court denied certiorari, 246 Ala. 539, 21 So. 2d 564.

Mr. Hayden C. Covington, with whom *Mr. Grover C. Powell* was on the brief, for appellant.

William M. McQueen, Attorney General of Alabama, and *John O. Harris,* Assistant Attorney General, submitted for appellee.

MR. JUSTICE BLACK delivered the opinion of the Court.

In this case we are asked to decide whether a State, consistently with the First and Fourteenth Amendments, can impose criminal punishment on a person who undertakes to distribute religious literature on the premises of a company-owned town contrary to the wishes of the town's management. The town, a suburb of Mobile, Alabama, known as Chickasaw, is owned by the Gulf Shipbuilding Corporation. Except for that it has all the characteristics of any other American town. The property consists of residential buildings, streets, a system of sewers, a sewage disposal plant and a "business block" on which business places are situated. A deputy of the Mobile County Sheriff, paid by the company, serves as the town's policeman. Merchants and service establishments have rented the stores and business places on the business block and

the United States uses one of the places as a post office from which six carriers deliver mail to the people of Chickasaw and the adjacent area. The town and the surrounding neighborhood, which can not be distinguished from the Gulf property by anyone not familiar with the property lines, are thickly settled, and according to all indications the residents use the business block as their regular shopping center. To do so, they now, as they have for many years, make use of a company-owned paved street and sidewalk located alongside the store fronts in order to enter and leave the stores and the post office. Intersecting company-owned roads at each end of the business block lead into a four-lane public highway which runs parallel to the business block at a distance of thirty feet. There is nothing to stop highway traffic from coming onto the business block and upon arrival a traveler may make free use of the facilities available there. In short the town and its shopping district are accessible to and freely used by the public in general and there is nothing to distinguish them from any other town and shopping center except the fact that the title to the property belongs to a private corporation.

Appellant, a Jehovah's Witness, came onto the sidewalk we have just described, stood near the post office and undertook to distribute religious literature. In the stores the corporation had posted a notice which read as follows: "This Is Private Property, and Without Written Permission, No Street, or House Vendor, Agent or Solicitation of Any Kind Will Be Permitted." Appellant was warned that she could not distribute the literature without a permit and told that no permit would be issued to her. She protested that the company rule could not be constitutionally applied so as to prohibit her from distributing religious writings. When she was asked to leave the sidewalk and Chickasaw she declined. The deputy sheriff arrested her and she was charged in the state court with violating Title

14, § 426 of the 1940 Alabama Code which makes it a crime to enter or remain on the premises of another after having been warned not to do so. Appellant contended that to construe the state statute as applicable to her activities would abridge her right to freedom of press and religion contrary to the First and Fourteenth Amendments to the Constitution. This contention was rejected and she was convicted. The Alabama Court of Appeals affirmed the conviction, holding that the statute as applied was constitutional because the title to the sidewalk was in the corporation and because the public use of the sidewalk had not been such as to give rise to a presumption under Alabama law of its irrevocable dedication to the public. 21 So. 2d 558. The State Supreme Court denied certiorari, 246 Ala. 539, 21 So. 2d 564, and the case is here on appeal under § 237 (a) of the Judicial Code, 28 U. S. C. § 344 (a).

Had the title to Chickasaw belonged not to a private but to a municipal corporation and had appellant been arrested for violating a municipal ordinance rather than a ruling by those appointed by the corporation to manage a company town it would have been clear that appellant's conviction must be reversed. Under our decision in *Lovell* v. *Griffin,* 303 U. S. 444 and others which have followed that case,[1] neither a State nor a municipality can completely bar the distribution of literature containing religious or political ideas on its streets, sidewalks and public places or make the right to distribute dependent on a flat license tax or permit to be issued by an official who could deny it at will. We have also held that an ordinance completely prohibiting the dissemination of ideas on the city streets cannot be justified on the ground that the

[1] *Hague* v. *C. I. O.,* 307 U. S. 496; *Schneider* v. *State,* 308 U. S. 147; *Thornhill* v. *Alabama,* 310 U. S. 88; *Cantwell* v. *Connecticut,* 310 U. S. 296; dissent of Chief Justice Stone in *Jones* v. *Opelika,* 316 U. S. 584, 600, adopted as the opinion of the Court, 319 U. S. 103; *Largent* v. *Texas,* 318 U. S. 418; *Murdock* v. *Pennsylvania,* 319 U. S. 105; *Follett* v. *McCormick,* 321 U. S. 573.

municipality holds legal title to them. *Jamison* v. *Texas,* 318 U. S. 413. And we have recognized that the preservation of a free society is so far dependent upon the right of each individual citizen to receive such literature as he himself might desire that a municipality could not, without jeopardizing that vital individual freedom, prohibit door to door distribution of literature. *Martin* v. *Struthers,* 319 U. S. 141, 146, 147. From these decisions it is clear that had the people of Chickasaw owned all the homes, and all the stores, and all the streets, and all the sidewalks, all those owners together could not have set up a municipal government with sufficient power to pass an ordinance completely barring the distribution of religious literature. Our question then narrows down to this: Can those people who live in or come to Chickasaw be denied freedom of press and religion simply because a single company has legal title to all the town? For it is the State's contention that the mere fact that all the property interests in the town are held by a single company is enough to give that company power, enforceable by a state statute, to abridge these freedoms.

We do not agree that the corporation's property interests settle the question.[2] The State urges in effect that

[2] We do not question the state court's determination of the issue of "dedication." That determination means that the corporation could, if it so desired, entirely close the sidewalk and the town to the public and is decisive of all questions of state law which depend on the owner's being estopped to reclaim possession of, and the public's holding the title to, or having received an irrevocable easement in, the premises. *Demopolis* v. *Webb,* 87 Ala. 659, 6 So. 408; *Hamilton* v. *Town of Warrior,* 215 Ala. 670, 112 So. 136; *Town of Leeds* v. *Sharp,* 218 Ala. 403, 405, 118 So. 572; *Forney* v. *Calhoun County,* 84 Ala. 215, 4 So. 153; *Cloverdale Homes* v. *Cloverdale,* 182 Ala. 419, 62 So. 712. The "dedication" of a road to the public may also be decisive of whether, under Alabama law, obstructing the road constitutes a crime, *Beverly* v. *State,* 28 Ala. App. 451, 185 So. 768, and whether certain action on or near the road amounts to a tort. *Thrasher* v. *Burr,* 202 Ala. 307, 80 So. 372. But determination of the issue of "dedication" does not decide the question under the Federal Constitution here involved.

the corporation's right to control the inhabitants of Chickasaw is coextensive with the right of a homeowner to regulate the conduct of his guests. We cannot accept that contention. Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. Cf. *Republic Aviation Corp.* v. *Labor Board,* 324 U. S. 793, 798, 802, n. 8. Thus, the owners of privately held bridges, ferries, turnpikes and railroads may not operate them as freely as a farmer does his farm. Since these facilities are built and operated primarily to benefit the public and since their operation is essentially a public function, it is subject to state regulation.[3] And, though the issue is not directly analogous to the one before us, we do want to point out by way of illustration that such regulation may not result in an operation of these facilities, even by privately owned companies, which unconstitutionally interferes with and discriminates against interstate commerce. *Port Richmond Ferry* v. *Hudson County, supra,* 234 U. S. at 326 and cases cited, pp. 328–329; cf. *South Carolina Highway Dept.* v. *Barnwell Bros.,* 303 U. S. 177. Had the corporation here owned the segment of the four-lane highway which runs parallel to the "business block" and operated the same under a state franchise, doubtless no one would have seriously contended that the corporation's property interest in the highway gave it power to obstruct through traffic or to discriminate against interstate commerce. See

[3] *Clark's Ferry Bridge Co.* v. *Public Service Commission,* 291 U. S. 227; *American Toll Bridge Co.* v. *Railroad Commission,* 307 U. S. 486; *Mills* v. *St. Clair County,* 8 How. 569, 581; *Port Richmond Ferry* v. *Hudson County,* 234 U. S. 317, 327, 331–332; *Covington & L. Turnpike Road Co.* v. *Sandford,* 164 U. S. 578; *Norfolk & S. Turnpike Co.* v. *Virginia,* 225 U. S. 264; *Donovan* v. *Pennsylvania Co.,* 199 U. S. 279, and cases cited on pp. 293–295.

County Commissioners v. *Chandler,* 96 U. S. 205, 208; *Donovan* v. *Pennsylvania Co., supra,* 199 U. S. at 294; *Covington Drawbridge Co.* v. *Shepherd,* 21 How. 112, 125. And even had there been no express franchise but mere acquiescence by the State in the corporation's use of its property as a segment of the four-lane highway, operation of all the highway, including the segment owned by the corporation, would still have been performance of a public function and discrimination would certainly have been illegal.[4]

We do not think it makes any significant constitutional difference as to the relationship between the rights of the owner and those of the public that here the State, instead of permitting the corporation to operate a highway, permitted it to use its property as a town, operate a "business block" in the town and a street and sidewalk on that business block. Cf. *Barney* v. *Keokuk,* 94 U. S. 324, 340. Whether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free. As we

[4] And certainly the corporation can no more deprive people of freedom of press and religion than it can discriminate against commerce. In his dissenting opinion in *Jones* v. *Opelika,* 316 U. S. 584, 600, which later was adopted as the opinion of the Court, 319 U. S. 103, 104, Mr. Chief Justice Stone made the following pertinent statement: "Freedom of press and religion, explicitly guaranteed by the Constitution, must at least be entitled to the same freedom from burdensome taxation which it has been thought that the more general phraseology of the commerce clause has extended to interstate commerce. Whatever doubts may be entertained as to this Court's function to relieve, unaided by Congressional legislation, from burdensome taxation under the commerce clause, see *Gwin, White & Prince* v. *Henneford,* 305 U. S. 434, 441, 446–55; *McCarroll* v. *Dixie Lines,* 309 U. S. 176, 184–85, it cannot be thought that that function is wanting under the explicit guaranties of freedom of speech, press and religion." 316 U. S. at 610–11.

have heretofore stated, the town of Chickasaw does not function differently from any other town. The "business block" serves as the community shopping center and is freely accessible and open to the people in the area and those passing through. The managers appointed by the corporation cannot curtail the liberty of press and religion of these people consistently with the purposes of the Constitutional guarantees, and a state statute, as the one here involved, which enforces such action by criminally punishing those who attempt to distribute religious literature clearly violates the First and Fourteenth Amendments to the Constitution.

Many people in the United States live in company-owned towns.[5] These people, just as residents of municipalities, are free citizens of their State and country. Just as all other citizens they must make decisions which affect the welfare of community and nation. To act as good citizens they must be informed. In order to enable them to be properly informed their information must be uncensored. There is no more reason for depriving these people of the liberties guaranteed by the First and Four-

[5] In the bituminous coal industry alone, approximately one-half of the miners in the United States lived in company-owned houses in the period from 1922–23. The percentage varied from 9 per cent in Illinois and Indiana and 64 per cent in Kentucky, to almost 80 per cent in West Virginia. U. S. Coal Commission, Report, 1925, Part III, pp. 1467, 1469 summarized in Morris, The Plight of the Coal Miner, Philadelphia 1934, Ch. VI, p. 86. The most recent statistics we found available are in Magnusson, Housing by Employers in the United States, Bureau of Labor Statistics Bulletin No. 263 (Misc. Ser.) p. 11. See also United States Department of Labor, Wage and Hour Division, Data on Pay Roll Deductions, Union Manufacturing Company, Union Point, Georgia, June 1941; Rhyne, Some Southern Cotton Mill Workers and Their Villages, Chapel Hill, 1930 (Study completed under the direction of the Institute for Research in Social Science at the University of North Carolina); Comment, *Urban Redevelopment,* 54 Yale L. J. 116.

teenth Amendments than there is for curtailing these freedoms with respect to any other citizen.[6]

When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position.[7] As we have stated before, the right to exercise the liberties safeguarded by the First Amendment "lies at the foundation of free government by free men" and we must in all cases "weigh the circumstances and . . . appraise the . . . reasons . . . in support of the regulation . . . of the rights." *Schneider* v. *State*, 308 U. S. 147, 161. In our view the circumstance that the property rights to the premises where the deprivation of liberty, here involved, took place, were held by others than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties and the enforcement of such restraint by the application of a state statute. Insofar as the State has attempted to impose criminal punishment on appellant for undertaking to distribute religious literature in a company town, its action cannot stand. The case is re-

[6] As to the suppression of civil liberties in company towns and the need of those who live there for Constitutional protection, see the summary of facts aired before the Senate Committee on Education and Labor, *Violations of Free Speech and Rights of Labor*, Hearings pursuant to S. Res. 266, 74th Cong., 2d Sess., 1937, summarized in Bowden, *Freedom for Wage Earners*, Annals of The American Academy of Political and Social Science, Nov. 1938, p. 185; Z. Chafee, *The Inquiring Mind* (New York, 1928), pp. 173–74; Pamphlet published in 1923 by the Bituminous Operators' Special Committee under the title *The Company Town;* U. S. Coal Commission, Report, *supra*, Part III, p. 1331.

[7] *Jones* v. *Opelika, supra*, 316 U. S. at 608; *Murdock* v. *Pennsylvania, supra*, 319 U. S. at 115; *Follett* v. *McCormick, supra*, 321 U. S. at 577.

versed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

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

MR. JUSTICE FRANKFURTER, concurring.

So long as the views which prevailed in *Jones* v. *Opelika,* 319 U. S. 103, in connection with 316 U. S. 584, 600; *Murdock* v. *Pennsylvania,* 319 U. S. 105; *Martin* v. *Struthers,* 319 U. S. 141, express the law of the Constitution, I am unable to find legal significance in the fact that a town in which the Constitutional freedoms of religion and speech are invoked happens to be company-owned. These decisions accorded the purveyors of ideas, religious or otherwise, "a preferred position," *Murdock* v. *Pennsylvania, supra* at 115, even to the extent of relieving them from an unhampering and non-discriminatory duty of bearing their share of the cost of maintaining the peace and the other amenities of a civilized society. Constitutional privileges having such a reach ought not to depend upon a State court's notion of the extent of "dedication" of private property to public purposes. Local determinations of such technical matters govern controversies affecting property. But when decisions by State courts involving local matters are so interwoven with the decision of the question of Constitutional rights that one necessarily involves the other, State determination of local questions cannot control the Federal Constitutional right.

A company-owned town gives rise to a net-work of property relations. As to these, the judicial organ of a State has the final say. But a company-owned town is a town. In its community aspects it does not differ from other towns. These community aspects are decisive in

adjusting the relations now before us, and more particularly in adjudicating the clash of freedoms which the Bill of Rights was designed to resolve—the freedom of the community to regulate its life and the freedom of the individual to exercise his religion and to disseminate his ideas. Title to property as defined by State law controls property relations; it cannot control issues of civil liberties which arise precisely because a company town is a town as well as a congeries of property relations. And similarly the technical distinctions on which a finding of "trespass" so often depends are too tenuous to control decision regarding the scope of the vital liberties guaranteed by the Constitution.

Accordingly, as I have already indicated, so long as the scope of the guarantees of the Due Process Clause of the Fourteenth Amendment by absorption of the First remains that which the Court gave to it in the series of cases in the October Term, 1942, the circumstances of the present case seem to me clearly to fall within it. And so I agree with the opinion of the Court, except that portion of it which relies on arguments drawn from the restrictions which the Commerce Clause imposes on State regulation of commerce. It does not seem to me to further Constitutional analysis to seek help for the solution of the delicate problems arising under the First Amendment from the very different order of problems which the Commerce Clause presents. The latter involves an accommodation between National and State powers operating in the same field. Where the First Amendment applies, it is a denial of all governmental power in our Federal system.

MR. JUSTICE REED, dissenting.

Former decisions of this Court have interpreted generously the Constitutional rights of people in this Land to

exercise freedom of religion, of speech and of the press.[1] It has never been held and is not now by this opinion of the Court that these rights are absolute and unlimited either in respect to the manner or the place of their exercise.[2] What the present decision establishes as a principle is that one may remain on private property against the will of the owner and contrary to the law of the state so long as the only objection to his presence is that he is exercising an asserted right to spread there his religious views. See *Marrone* v. *Washington Jockey Club,* 227 U. S. 633. This is the first case to extend by law the privilege of religious exercises beyond public places or to private places without the assent of the owner. Compare *Martin* v. *Struthers,* 319 U. S. 141.

As the rule now announced permits this intrusion, without possibility of protection of the property by law, and apparently is equally applicable to the freedom of speech and the press, it seems appropriate to express a dissent to this, to us, novel Constitutional doctrine. Of course, such principle may subsequently be restricted by this Court to the precise facts of this case—that is to private property in a company town where the owner for his own advantage has permitted a restricted public use by his licensees and invitees. Such distinctions are of degree and require new arbitrary lines, judicially drawn, instead of those hitherto established by legislation and precedent. While the power

[1] *Lovell* v. *Griffin,* 303 U. S. 444; *Hague* v. *C. I. O.,* 307 U. S. 496; *Schneider* v. *State,* 308 U. S. 147; *Thornhill* v. *Alabama,* 310 U. S. 88; *Cantwell* v. *Connecticut,* 310 U. S. 296; dissent of Chief Justice Stone in *Jones* v. *Opelika,* 316 U. S. 584, 600, adopted as the opinion of the Court, 319 U. S. 103; *Jamison* v. *Texas,* 318 U. S. 413; *Largent* v. *Texas,* 318 U. S. 418; *Murdock* v. *Pennsylvania,* 319 U. S. 105; *Martin* v. *Struthers,* 319 U. S. 141; *Follett* v. *McCormick,* 321 U. S. 573.

[2] *Schenck* v. *United States,* 249 U. S. 47; *Gitlow* v. *New York,* 268 U. S. 652; *Near* v. *Minnesota,* 283 U. S. 697; *Cantwell* v. *Connecticut,* 310 U. S. 296; *Chaplinsky* v. *New Hampshire,* 315 U. S. 568; *Prince* v. *Massachusetts,* 321 U. S. 158.

of this Court, as the interpreter of the Constitution to determine what use of real property by the owner makes that property subject, at will, to the reasonable practice of religious exercises by strangers, cannot be doubted, we find nothing in the principles of the First Amendment, adopted now into the Fourteenth, which justifies their application to the facts of this case.[3]

Both Federal and Alabama law permit, so far as we are aware, company towns. By that we mean an area occupied by numerous houses, connected by passways, fenced or not, as the owners may choose. These communities may be essential to furnish proper and convenient living conditions for employees on isolated operations in lumbering, mining, production of high explosives and large-scale farming. The restrictions imposed by the owners upon the occupants are sometimes galling to the employees and may appear unreasonable to outsiders. Unless they fall under the prohibition of some legal rule, however, they are a matter for adjustment between owner and licensee, or by appropriate legislation. Compare *Western Turf Assn.* v. *Greenberg,* 204 U. S. 359.

Alabama has a statute generally applicable to all privately owned premises. It is Title 14, § 426, Alabama Code 1940 which so far as pertinent reads as follows:

"Trespass after warning.—Any person who, without legal cause or good excuse, enters into the dwelling house or on the premises of another, after having been warned, within six months preceding, not to do so; or any person, who, having entered into the dwelling house or on the premises of another without having been warned within six months not to do so, and fails or refuses, without legal

[3] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." First Amendment to the Constitution.

cause or good excuse, to leave immediately on being ordered or requested to do so by the person in possession, his agent or representative, shall, on conviction, be fined not more than one hundred dollars, and may also be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than three months."

Appellant was distributing religious pamphlets on a privately owned passway or sidewalk thirty feet removed from a public highway of the State of Alabama and remained on these private premises after an authorized order to get off. We do not understand from the record that there was objection to appellant's use of the nearby public highway and under our decisions she could rightfully have continued her activities a few feet from the spot she insisted upon using. An owner of property may very well have been willing for the public to use the private passway for business purposes and yet have been unwilling to furnish space for street trades or a location for the practice of religious exhortations by itinerants. The passway here in question was not put to any different use than other private passways that lead to privately owned areas, amusement places, resort hotels or other businesses. There had been no dedication of the sidewalk to the public use, express or implied. Alabama so decided and we understand that this Court accepts that conclusion. Alabama, also, decided that appellant violated by her activities the above-quoted state statute.

The Court calls attention to the fact that the owners of public utilities, bridges, ferries, turnpikes and railroads are subject to state regulation of rates and are forbidden to discriminate against interstate commerce. This is quite true but we doubt if the Court means to imply that the property of these utilities may be utilized, against the companies' wishes, for religious exercises of the kind in question.

A state does have the moral duty of furnishing the opportunity for information, education and religious enlightenment to its inhabitants, including those who live in company towns, but it has not heretofore been adjudged that it must commandeer, without compensation, the private property of other citizens to carry out that obligation. Heretofore this Court has sustained the right of employees, under an appropriate statute, protecting full freedom of employee organization, to solicit union membership in nonworking time on the property of an employer and against his express prohibition. This is because the prohibition is an impediment to the right of organization which is protected by a statute which governs a relation between employers and employees if and when the latter are admitted to the employers' premises as licensees. It was recognized in the opinion that the freedom of solicitation was the result of a regulatory statute and was not a Constitutional right. *Republic Aviation Corp.* v. *Labor Board,* 324 U. S. 793, 803. In the area which is covered by the guarantees of the First Amendment, this Court has been careful to point out that the owner of property may protect himself against the intrusion of strangers. Although in *Martin* v. *Struthers,* 319 U. S. 141, an ordinance forbidding the summonsing of the occupants of a dwelling to receive handbills was held invalid because in conflict with the freedom of speech and press, this Court pointed out at page 147 that, after warning, the property owner would be protected from annoyance.[4]

[4] "The dangers of distribution can so easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors, that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas.

"Traditionally the American law punishes persons who enter onto the property of another after having been warned by the owner to keep off. General trespass after warning statutes exist in at least

The very Alabama statute which is now held powerless to protect the property of the Gulf Shipbuilding Corporation, after notice, from this trespass was there cited, note 10, to show that it would protect the householder, after notice. The right to communicate ideas was expressed by us in *Jamison* v. *Texas,* 318 U. S. 413, 416, as follows: "But one who is rightfully on a street which the state has left open to the public carries with him there as elsewhere the Constitutional right to express his views in an orderly fashion."

Our Constitution guarantees to every man the right to express his views in an orderly fashion. An essential element of "orderly" is that the man shall also have a right to use the place he chooses for his exposition. The rights of the owner, which the Constitution protects as well as the right of free speech, are not outweighed by the interests of the trespasser, even though he trespasses in behalf of religion or free speech. We cannot say that Jehovah's Witnesses can claim the privilege of a license, which has never been granted, to hold their meetings in other private places, merely because the owner has admitted the public to them for other limited purposes. Even though we have reached the point where this Court is required to force private owners to open their property for the practice there of religious activities or propaganda dis-

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twenty states, while similar statutes of narrower scope are on the books of at least twelve states more. We know of no state which, as does the Struthers ordinance in effect, makes a person a criminal trespasser if he enters the property of another for an innocent purpose without an explicit command from the owners to stay away. The National Institute of Municipal Law Officers has proposed a form of regulation to its member cities which would make it an offense for any person to ring the bell of a householder who has appropriately indicated that he is unwilling to be disturbed. This or any similar regulation leaves the decision as to whether distributers of literature may lawfully call at a home where it belongs—with the homeowner himself." *Martin* v. *Struthers,* 319 U. S. 141, 147–48.

tasteful to the owner, because of the public interest in freedom of speech and religion, there is no need for the application of such a doctrine here. Appellant, as we have said, was free to engage in such practices on the public highways, without becoming a trespasser on the company's property.

The CHIEF JUSTICE and MR. JUSTICE BURTON join in this dissent.

TUCKER *v.* TEXAS.

APPEAL FROM THE COUNTY COURT OF MEDINA COUNTY, TEXAS.

No. 87. Argued December 6, 1945.—Decided January 7, 1946.

1. A State can not, consistently with the freedom of religion and the press guaranteed by the First and Fourteenth Amendments, impose criminal punishment upon a person engaged in religious activities and distributing religious literature in a village owned by the United States under a Congressional program designed to provide housing for workers engaged in national defense activities, where the village is freely accessible and open to the public and has all the characteristics of a typical American town, even though the punishment is attempted under a state statute making it unlawful for any "peddler or hawker of goods or merchandise" willfully to refuse to leave the premises after having been notified to do so by the owner or possessor thereof. P. 519.
2. Neither the Federal Housing Act nor the Housing Authority Regulations indicate a purpose to restrict freedom of religion and of the press within villages such as the one here involved. P. 520.
3. A judgment of an intermediate state court sustaining a state statute challenged as repugnant to the Federal Constitution is reviewable here under § 237 (a) of the Judicial Code, where such intermediate court is the highest court of the State in which a decision in the case could be had. P. 518.

Reversed.

APPEAL from a judgment sustaining a conviction for violation of a state statute challenged as invalid under the Federal Constitution.

Mr. Hayden C. Covington, with whom *Mr. Grover C. Powell* was on the brief, for appellant.

No appearance for appellee.

MR. JUSTICE BLACK delivered the opinion of the Court.

The appellant was charged in the Justice Court of Medina County, Texas, with violating Article 479, Chap. 3 of the Texas Penal Code which makes it an offense for any "peddler or hawker of goods or merchandise" wilfully to refuse to leave premises after having been notified to do so by the owner or possessor thereof. The appellant urged in his defense that he was not a peddler or hawker of merchandise, but a minister of the gospel engaged in the distribution of religious literature to willing recipients. He contended that to construe the Texas statute as applicable to his activities would, to that extent, bring it into conflict with the Constitutional guarantees of freedom of press and religion. His contention was rejected and he was convicted. On appeal to the Medina County Court, his Constitutional contention was again overruled. Since he could not appeal to a higher state court this appeal under § 237 (a) of the Judicial Code, 28 U. S. C. 344 (a) is properly before us. *Largent* v. *Texas,* 318 U. S. 418.

The facts shown by the record need be but briefly stated. Appellant is an ordained minister of the group known as Jehovah's Witnesses. In accordance with the practices of this group he calls on people from door to door, presents his religious views to those willing to listen, and distributes religious literature to those willing to receive it. In the course of his work, he went to the Hondo Navigation Village located in Medina County, Texas. The village is owned by the United States under a Congressional program which was designed to provide housing for persons engaged in National Defense activities. 42 U. S. C., §§ 1521–1553. According to all indications the

village was freely accessible and open to the public and had the characteristics of a typical American town. The Federal Public Housing Authority had placed the buildings in charge of a manager whose duty it was to rent the houses, collect the rents, and generally to supervise operations, subject to over-all control by the Authority. He ordered appellant to discontinue all religious activities in the village. Appellant refused. Later the manager ordered appellant to leave the village. Insisting that the manager had no right to suppress religious activities, appellant declined to leave, and his arrest followed. At the trial the manager testified that the controlling Federal agency had given him full authority to regulate the conduct of those living in the village, and that he did not allow preaching by ministers of any denomination without a permit issued by him in his discretion. He thought this broad authority was entrusted to him, at least in part, by a regulation, which the Authority's Washington office had allegedly promulgated. He testified that this regulation provided that no peddlers or hawkers could come into or remain in the village without getting permission from the manager.[1] Since the Texas Court has deemed this evidence of authority of the manager to suppress appellant's activities sufficient to support a conviction under the State statute, we accept their holding in this respect for the purposes of this appeal.

The foregoing statement of facts shows their close similarity to the facts which led us this day to decide in *Marsh* v. *Alabama, ante,* p. 501, that managers of a company-owned town could not bar all distribution of religious literature within the town, or condition distribution upon a permit issued at the discretion of its man-

[1] The available Regulations of the Authority, of which we can take judicial notice, *Bowles* v. *United States,* 319 U. S. 33, 35, do not show a regulation of this kind.

agement. The only difference between this case and *Marsh* v. *Alabama* is that here instead of a private corporation, the Federal Government owns and operates the village. This difference does not affect the result. Certainly neither Congress nor Federal agencies acting pursuant to Congressional authorization may abridge the freedom of press and religion safeguarded by the First Amendment. True, under certain circumstances it might be proper for security reasons to isolate the inhabitants of a settlement, such as Hondo Village, which houses workers engaged in producing war materials. But no such necessity and no such intention on the part of Congress or the Public Housing Authority are shown here.

It follows from what we have said that to the extent that the Texas statute was held to authorize appellant's punishment for refusing to refrain from religious activities in Hondo Village it is an invalid abridgement of the freedom of press and religion.

We think it only proper to add that neither the Housing Act passed by Congress nor the Housing Authority Regulations contain language indicating a purpose to bar freedom of press and religion within villages such as the one here involved. The case is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

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

MR. JUSTICE FRANKFURTER, concurring.

It will be time enough to consider the constitutionality of an Act of Congress that is claimed to be in defiance of the First Amendment when such legislation by Congress confronts us with the problem. The present case does not present such a situation. Subject to this reservation, I

agree with the opinion of the Court for the reasons briefly stated in *Marsh* v. *Alabama, ante,* p. 510. In the case of communities established under the sponsorship of the United States by virtue of its spending power, it would, I should think, be even less desirable than in the case of company towns to make the constitutional freedoms of religion and speech turn on gossamer distinctions about the extent to which land has been "dedicated" to public uses.

The CHIEF JUSTICE, MR. JUSTICE REED and MR. JUSTICE BURTON, dissenting.

The CHIEF JUSTICE, MR. JUSTICE REED and MR. JUSTICE BURTON construe the record in this case as showing a conviction for refusing, at the request of its authorized agent, to leave premises which are owned by the United States and which have not been shown to be dedicated to general use by the public. We, therefore, would affirm the conviction for the reasons given in the dissent in *Marsh* v. *Alabama, ante,* p. 511.

JOHN KELLEY CO. *v.* COMMISSIONER OF INTERNAL REVENUE.

NO. 36. CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.*

Argued October 11, 1945.—Decided January 7, 1946.

1. Two tax cases turned upon the question whether payments made under certain corporate obligations were interest or dividends. Although the facts were quite similar, the characteristics of the obligations in question and the surrounding circumstances were of such a nature that it was reasonably possible to reach the conclu-

*Together with No. 47, *Talbot Mills* v. *Commissioner of Internal Revenue,* on certiorari to the Circuit Court of Appeals for the First Circuit.

sion that the payments were interest to creditors in one case and dividends to stockholders in the other case; and the Tax Court so decided. *Held* the conclusions of the Tax Court in such cases should be accepted. Pp. 526–529.

2. Section 1141 (c) (1) of the Internal Revenue Code, which authorizes the circuit court of appeals, upon reviewing a decision of the Tax Court, to affirm it or, if the decision of the Tax Court "is not in accordance with law," to modify or reverse it, leaves to the final determination of the Tax Court all issues which are not clear-cut questions of law. *Dobson* v. *Commissioner*, 320 U. S. 489, followed. P. 526.

3. The words "interest" and "dividends," as used in the tax statutes, are well understood and need no further definition. P. 530.

146 F. 2d 466, reversed; 146 F. 2d 809, affirmed.

No. 36. CERTIORARI, 325 U. S. 843, to review reversal of a decision of the Tax Court, 1 T. C. 457, holding certain payments by the petitioner to be interest on indebtedness and deductible under § 23 (b) of the Internal Revenue Code.

No. 47. CERTIORARI, 325 U. S. 844, to review affirmance of a decision of the Tax Court, 3 T. C. 95, holding certain payments by the petitioner to be dividends on stock and not deductible as interest under § 23 (b) of the Internal Revenue Code.

Mr. Frank J. Albus for petitioner in No. 36. *Mr. Melville F. Weston* for petitioner in No. 47.

Mr. J. Louis Monarch, with whom *Acting Solicitor General Judson, Assistant Attorney General Samuel O. Clark, Jr., Mrs. Maryhelen Wigle* and *Mr. I. Henry Kutz* were on the brief, for respondent.

Messrs. Joseph S. Clark and *Marion N. Fisher* filed a brief in No. 36, as *amici curiae*, urging reversal.

Opinion of the Court by MR. JUSTICE REED, announced by MR. JUSTICE FRANKFURTER.

These writs of certiorari were granted to examine the deductibility as interest of certain payments which the

taxpayer corporations made to holders of their corporate obligations. Although the obligations of the two taxpayers had only one striking difference, the noncumulative in one and the cumulative quality in the other of the payments reserved under the characterization of interest, the Tax Court (formerly the Board of Tax Appeals, 56 Stat. 957; only its present name will be used herein) held that the payments under the former, the *Kelley Company* case, were interest and under the *Talbot Mills* were dividends. The Circuit Court of Appeals reversed the Tax Court in the *Kelley* case and another circuit affirmed the *Talbot Mills* decision.[1] On account of the diversity of approach in the Tax Court and the reviewing courts, we granted certiorari.

In the *Kelley* case, a corporation, all of whose common and preferred stock was owned directly or as trustee by members of a family group, was reorganized by authorizing the issue of $250,000 income debenture bearer bonds, issued under a trust indenture, calling for 8% interest, noncumulative. They were offered only to shareholders of the taxpayer but were assignable. The debentures were payable in twenty years, December 31, 1956, with payment of general interest conditioned upon the sufficiency of the net income to meet the obligation. The debenture holders had priority of payment over stockholders but were subordinated to all other creditors. The debentures were redeemable at the taxpayer's option and carried the usual acceleration provisions for specific defaults. The debenture holders had no right to participate in management. Other changes not material here were made in the corporate structure. Debentures were issued to the amount of $150,000 face value. The greater part, $114,648, was issued in exchange for the original preferred, with six per

[1] 1 T. C. 457; 146 F. 2d 466; cert. granted, 325 U. S. 843; Judicial Code § 240 (a). 3 T. C. 95; 146 F. 2d 809; cert. granted, 325 U. S. 844; Judicial Code § 240 (a).

cent cumulative guaranteed dividends, at its retirement price and the balance sold to stockholders at par, which was eventually paid with sums obtained by the purchasers from common stock dividends. Common stock was owned in the same proportions by the same stockholders before and after the reorganization.

In the *Talbot Mills* case the taxpayer was a corporation which, prior to its recapitalization, had a capital stock of five thousand shares of the par value of $100 or $500,000. All of the stock with the exception of some qualifying shares was held by members, through blood or marriage, of the Talbot family. In an effort to adjust the capital structure to the advantage of the taxpayer, the company was recapitalized just prior to the beginning of the fiscal year in question, by each stockholder surrendering four-fifths of his stock and taking in lieu thereof registered notes in aggregate face value equal to the aggregate par value of the stock retired. This amounted to an issue of $400,000 in notes to the then stockholders. These notes were dated October 2, 1939, and were payable to a specific payee or his assignees on December 1, 1964. They bore annual interest at a rate not to exceed 10% nor less than 2%, subject to a computation that took into consideration the net earnings of the corporation for the fiscal year ended last previous to the annual interest paying date. There was, therefore, a minimum amount of 2% and a maximum of 10% due annually and between these limits the interest payable varied in accordance with company earnings. The notes were transferable only by the owner's endorsement and the notation of the transfer by the company. The interest was cumulative and payment might be deferred until the note's maturity when "necessary by reason of the condition of the corporation." Dividends could not be paid until all then due interest on the notes was satisfied. The notes limited the corporation's right to mortgage its real assets. The notes could be subordi-

nated by action of the Board of Directors to any obligation maturing not later than the maturity of the notes. For the fiscal year in question the maximum payment of 10% was made on the notes.

The payments in question on corporate obligations were for the years in the *Kelley* case, 1937, 1938 and 1939; in the *Talbot Mills* case for the year 1940. Both corporations deducted the payments as interest from their reports of gross income under statutory sections and regulations set out in the footnote.[2] The applicable statutes and regulations were identical for all periods. The Commissioner asserted deficiencies because the payments were considered dividends and not interest.

There is not present in either situation the wholly useless temporary compliance with statutory literalness which this Court condemned as futile, as a matter of law, in *Gregory* v. *Helvering,* 293 U. S. 465. The demonstrated

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[2] Internal Revenue Code:

"SEC. 23. Deductions from Gross Income. In computing net income there shall be allowed as deductions:

. . . . . .

"(b) Interest.—All interest paid or accrued within the taxable year on indebtedness . . ."

"SEC. 115. Distributions by Corporations. (a) Definition of Dividend.—The term 'dividend' when used in this chapter (except in section 203 (a) (3) and section 207 (c) (1), relating to insurance companies) means any distribution made by a corporation to its shareholders, whether in money or in other property, (1) out of its earnings or profits accumulated after February 28, 1913, or (2) out of the earnings or profits of the taxable year . . ."

Treasury Regulations 103:

"SEC. 19.23 (b)–1. Interest.—Interest paid or accrued within the year on indebtedness may be deducted from gross income . . .

. . . . . .

"So-called interest on preferred stock, which is in reality a dividend thereon, cannot be deducted in computing net income. . . ."

See Revenue Acts of 1936 and 1938, 49 Stat. 1648, 1659, 52 Stat. 447, 460, and Treasury Regulations 94, Art. 23 (b)–1, and 101, Art. 23 (b)–1.

possibility of sales by the holders of the obligations to persons other than stockholders alone proves the differentiation. As material amounts of capital were invested in stock, we need not consider the effect of extreme situations such as nominal stock investments and an obviously excessive debt structure.

From the foregoing statements of facts, it appears that the characteristics of all the obligations in question and the surrounding circumstances were of such a nature that it is reasonably possible for determiners to reach the conclusion that the secured annual payments were interest to creditors in one case and dividends to stockholders in the other case. In the *Kelley* case there were sales of the debentures as well as exchanges of preferred stock for debentures, a promise to pay a certain annual amount, if earned, a priority for the debentures over common stock, the debentures were assignable without regard to any transfer of stock, and a definite maturity date in the reasonable future. These indicia of indebtedness support the Tax Court conclusion that the annual payments were interest on indebtedness. On the other hand, in the *Talbot Mills* case, the Tax Court found the factors there present of fluctuating annual payments with a two per cent minimum, the limitation of the issue of notes to stockholders in exchange only for stock, to be characteristics which distinguish the Talbot Mills notes from the Kelley Company debentures. Upon an appraisal of all the facts, the Tax Court reached the conclusion that the annual payments by Talbot Mills were in reality dividends and not interest.

We think these conclusions should be accepted by the Circuit Courts of Appeals and by ourselves. Judicial review of Tax Court decisions depends upon the Internal Revenue Code, § 1141 (c) Powers (1). It reads:

"To affirm, modify, or reverse.—Upon such review, such courts shall have power to affirm or, if the decision of the

Board is not in accordance with law, to modify or to reverse the decision of the Board, with or without remanding the case for a rehearing, as justice may require."

It is only recently that we gave careful consideration to the problems of review of Tax Court decisions. *Dobson v. Commissioner,* 320 U. S. 489. That opinion emphasized that our interpretation of Congressional purpose, in enacting the statute, just quoted, for judicial review of Tax Court decisions, was that Congress intended to leave to the final determination of the Tax Court all issues which were not clear-cut questions of law.

The provisions for review are the same now as they were when enacted in 1926. Congress, and all others interested, were then well aware of the difficulties in drawing a line between questions of fact and questions of law.[3] The legislation was upon a subject, the collection of the revenue, in which federal administrative finality had been given wide scope.[4] The Tax Court was originally established to "secure an impartial and disinterested determination of the issues involved," [5] so that the taxpayer and the Government would have an independent review of the position of either on tax demands before payment of

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[3] Compare Thayer, A Preliminary Treatise on Evidence at the Common Law, Ch. V, with Holmes, The Common Law, pp. 123–129. 1 Holdsworth, History of English Law, 298, 312; Dickinson, Administrative Justice, c. III, p. 55:

"In truth, the distinction between 'questions of law' and 'questions of fact' really gives little help in determining how far the courts will review; and for the good reason that there is no fixed distinction. They are not two mutually exclusive *kinds* of questions, based upon a difference of subject-matter. Matters of law grow downward into roots of fact, and matters of fact reach upward, without a break, into matters of law. The knife of policy alone effects an artificial cleavage at the point where the court chooses to draw the line between public interest and private right."

[4] R. S. § 3224; 26 U. S. C. § 3653; *Heiner* v. *Diamond Alkali Co.,* 288 U. S. 502; *Cary* v. *Curtis,* 3 How. 236.

[5] S. Rep. No. 398, 68th Cong., 1st Sess., p. 9.

the tax or foreclosure of an asserted deficiency. Two years later its success was recognized by committee commendation and the enlargement of the finality of its decisions from "prima facie evidence of the facts contained therein" to reviewability only "if the decision of the Board is not in accordance with law." [6] As to the mischief which the limitation of the scope of judicial review was to cure, we find only the words of the committee reports.[7] Without

[6] H. Rep. No. 179, 68th Cong., 1st Sess., p. 8; 44 Stat. 110, § 1003 (b); H. Rep. No. 1, 69th Cong., 1st Sess., p. 17; S. Rep. No. 52, 69th Cong., 1st Sess., p. 34.

While establishing a complete system of review, it has all along been recognized that the taxpayer could secure a jury trial of fact issues, if he chose to pay and sue for recovery. S. Rep. No. 52, 69th Cong., 1st Sess., p. 37. *Dobson* v. *Commissioner*, 320 U. S. 489, 495.

[7] H. Rep. No. 1, 69th Cong., 1st Sess., p. 19–20:

"*Court review—Questions of fact and law.*—The procedure is made to conform as nearly as may be to the procedure in the case of an original action in a Federal district court. Inasmuch as the complicated and technical facts governing tax liability require a determination by a body of experts, the review is taken directly to an appellate court, just as, for instance, in the case of orders of the Federal Trade Commission, and orders of the Secretary of Agriculture under the packers and stockyards act. In view of the grant of exclusive power to the board finally to determine the facts upon which tax liability is based, subdivision (b) of section 914 limits the review on appeal to what are commonly known as questions of law. The court upon review may consider, for example, questions as to the constitutionality of the substantive law applied, the constitutionality of the procedure used, failure to observe the procedure required by law, the proper interpretation and application of the statute or any regulation having the force of law, the existence of at least some evidence to support the findings of fact, and the validity of any ruling upon the admissibility of evidence (see subdivision (a) of section 907 and subdivision (b) of section 914). [§ 1003 (b) of the Act as passed.] The court, therefore, may adequately control the action of the administrative officer or agency, but will not be burdened with the duty of substituting its opinion for that of the board upon the evidence."

The reference to the Federal Trade Commission and to the Packers and Stockyards Act was to show the choice of a circuit court of appeals for judicial review and was not intended to suggest the adoption for the Tax Court review of any standard of scope of review.

a clearer description by Congress of the intended line to separate reviewability of the Tax Court decisions from non-reviewability, courts must interpret the review statute, as best they can, to accomplish the declared Congressional purpose of adequate control of administrative action without substituting judicial opinion for that of the Tax Court upon the evidence. Note 7, *supra.*

The illustrations in the report, note 7, *supra,* are legal questions without doubt, except the possibility that the words "application of the statute or any regulation having the force of law" may be thought to give a reviewing court power to pass upon the Tax Court's conclusion from the primary or evidential facts. So that, in the present cases, it might be said to be a question of law as to whether the primary facts adduced made the payments under consideration dividends or interest. But we think such conclusion gives inadequate weight to the purpose of the Tax Court. The finality of the Tax Court's rulings was being enlarged by the 1926 Act. The then Board was spoken of as an impartial and independent tribunal of experts "for the determination of tax liabilities as between the Government and the taxpayer." H. Rep. No. 1, 69th Cong., 1st Sess., p. 17. There would hardly need to be experts in tax affairs to decide questions of dates or amounts or values or to calculate rates. Their usefulness lies primarily in their ability to examine relevant facts of business to determine whether or not they come under statutory language. Adequate reason for the use of the word "application" of course exists in situations where true legal questions arise, as in whether an act applies to transfers antecedent to its enactment or to income or estate taxes from trusts or to situations which involve conflicts of law. There is nothing in the context in which the word "application" is used which suggests to us that it should be given its widest connotation.

These cases now under consideration deal with well understood words as used in the tax statutes—"interest" and "dividends." They need no further definition. *Equitable Life Assurance Society* v. *Commissioner,* 321 U. S. 560; *Deputy* v. *DuPont,* 308 U. S. 488, 498. The Tax Court is fitted to decide whether the annual payments under these corporate obligations are to be classified as interest or dividends. The Tax Court decisions merely declare that the undisputed facts do or do not bring the payments under the definition of interest or dividends.[8] The documents under consideration embody elements of obligations and elements of stock. There is no one characteristic, not even exclusion from management, which can be said to be decisive in the determination of whether the obligations are risk investments in the corporations or debts. So-called stock certificates may be authorized by corporations which are really debts, and promises to pay may be executed which have incidents of stock. Such situations seem to us to fall within the *Dobson* rule.[9]

This leads us to affirm the *Talbot Mills* decree and to reverse the *Kelley* judgment.

It is so ordered.

MR. JUSTICE BLACK concurs in the result in No. 47. He is of the opinion that No. 36 should be affirmed for the reasons given by the Circuit Court of Appeals, 146 F. 2d 466.

MR. JUSTICE BURTON concurs in the result in the *Kelley* case but dissents from the result in the *Talbot Mills* case

[8] Dickinson, Administrative Justice, 312; Paul, Dobson *v.* Commissioner: The Strange Ways of Law and Fact, 57 Harv. L. R. 753, 826, 832, 840; Brown, Fact and Law in Judicial Review, 56 Harv. L. R. 899, 904.

[9] Compare *Helvering* v. *F. & R. Lazarus Co.,* 308 U. S. 252, 255; *Wilmington Trust Co.* v. *Helvering,* 316 U. S. 164, 167; *Helvering* v. *Stock Yards Co.,* 318 U. S. 693, 700, 702; *Equitable Society* v. *Commissioner,* 321 U. S. 560, 563; *Commissioner* v. *Scottish American Co.,* 323 U. S. 119.

on the grounds stated in the dissenting opinion of Magruder, J., in the Circuit Court of Appeals.

MR. JUSTICE JACKSON took no part in the consideration or decision of these cases.

MR. JUSTICE RUTLEDGE.

I think the judgments in both cases should be affirmed. On the records presented, I can see no satisfactory basis for deciding one case one way and the other differently. And I agree with the Courts of Appeals that, on the substantially identical facts, the payments were dividends and not interest.

In the first place, I do not believe that Congress has authorized the Tax Court to make or the reviewing courts to sustain directly conflicting determinations of tax liability in identical fact situations. Nor, in my opinion, was this the purpose or effect of the *Dobson* decisions, 320 U. S. 489. So to regard them or the statute nullifies the right to review expressly given by Congress. Moreover that view destroys the very uniformity which *Dobson* sought, transferring the conflict of decision from the Courts of Appeals back to the Tax Court, by making the conflicting decisions of its sixteen divisions final.[1] This affords relief to the taxpayer from judicial review and to the courts from judicially reviewing. But it defies Congress' mandate for review and, what is more, perpetuates chaos in the law.

[1] The Internal Revenue Code provides that the chairman (now presiding judge of the Tax Court, § 1100) may "from time to time divide the Board into divisions of one or more members" and "a majority of the members of the Board or of any division thereof shall constitute a quorum for the transaction of the business of the Board or of the division, respectively." §§ 1103 (c), (d). By § 1118 (b) the report of a division becomes the report of the Board within 30 days unless the chairman directs that it be reviewed by the Board.

Each of the two cases before us was decided by only one Tax Court judge, a different judge in each case. See Griswold, The Need for a Court of Tax Appeals (1944) 57 Harv. L. Rev. 1153, 1170–1172.

All this presupposes, of course, that the records now here present fact situations identical in all material respects. That is true in my judgment. It is hardly necessary to attempt demonstration. But, besides referring to the opinions of the Courts of Appeals for the small details of the facts and their minute differences,[2] it may be noted that there was no question of credibility. Substantially all of the evidentiary facts were stipulated in both cases. Nor is there any finding in either case that the arrangements were a sham. Cf. *Gregory* v. *Helvering*, 293 U. S. 465. Apart from such considerations, the material facts in my opinion were not substantially different in any respect sufficient to support one ultimate conclusion, whether labelled of "law," of "fact," or "mixed," for one case and the opposite conclusion for the other.

That is true whether the final conclusion of "interest" or "dividend" is to be drawn from a minute comparison of, and effort to differentiate, the multitudinous microscopic details by which in both cases it was sought to convert stock into "debentures" or "registered notes," without losing any of the stock's substantial advantages; or, on the other hand, the final plunge of judgment is to be made from wholesale weighing of the evidentiary facts. Neither approach discloses factors of substantial difference in what was done sufficient to sustain contrary judgments.

There were some highly technical differences in the two types of "security" which were devised to replace the preexisting preferred stock issues. But in both instances the original stock and the replacing security were closely held. There was no substantial change in the distribution after the "reorganization." The difference between the stock and the substituted security was so small, in its effect upon the holders' substantial rights, that for all practical purposes it was negligible. For example, a remote right to sue to enforce the obligation, deferred in one case for 25

[2] 146 F. 2d 466; 146 F. 2d 809.

years, took the place of the holder's right to share in the corporation's assets on dissolution or winding up. Meanwhile "interest" was hooked in large part to net annual earnings and was made entirely subject to the directors' power to suspend payment until the ultimate maturity date. The shortened story is that the preferred shareholders who went into the wash came out substantially, for all purposes material to any tax determination and it may be for practically all others, just about what they were when they went in.

The Court indeed does not attempt to find a substantial differentiating factor other than in the Tax Court's "appraisal of all the facts," in other words its ultimate conclusion. That is true as between the two cases and also as affects the positions of the respective shareholders before and after the wash. Rather the opinion concedes that in each case the circumstances were such that determiners reasonably could conclude that the so-called annual payments were either interest or dividends. Hence, it seems to follow, the conclusion may be drawn in squarely conflicting ways, if the Tax Court sees fit so to draw it; and it is immaterial that no factor of substantial difference is or can be pointed out.

One might entertain the view that in a close situation the Tax Court's judgment should be accepted whatever way the die were cast, although reviewing courts might differ on the direction. But it would not follow, and in my judgment should not, that they are powerless when the throw is in opposite directions at the same time. When this occurs, in my opinion a "clear-cut" question of law is presented, rising above the rubric of "expert administrative determination." The more apt characterization would be "expert administrative fog."

I think the Courts of Appeals and we are bound to review such cases; they by plain mandate of § 1141 (c) (1) of the Code, we by that section (see *Bingham's Trust* v.

Commissioner, 325 U. S. 365) and the provision of our rules making conflict between circuits "special and important reason" for granting certiorari. Rule 38–5 (b). Conflict is not removed simply because judgments of the Courts of Appeals judicially formalize the contrary ultimate, but nevertheless administrative, conclusions of the Tax Court. When no facts can be pointed to which are sufficient to distinguish Tax Court decisions in legal effect, except that the Tax Court has decided differently in two cases, the Courts of Appeals and we are bound by law and by our duty to exercise a sound discretion in review to resolve the conflict.

Another reason convinces me that both judgments should be affirmed. What has been said applies to conflicting determinations of the Tax Court, whatever the particular line which is to be drawn and regardless of its general location. But in these cases I think that as a matter of law the line should not be located where the Tax Court has placed it.

Tax liability should depend upon the subtle refinements of corporate finance no more than it does upon the niceties of conveyancing.[3] Sheer technicalities should have no more weight to control federal tax consequences in one instance than in the other. The taxing statute draws the line broadly between "interest" and "dividend." This requires one who would claim the interest deduction to bring himself clearly within the class for which it was intended.[4] That is not done when the usual signposts between bonds and stock are so obliterated that they become invisible or point equally in both directions at the same time.

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[3] *Helvering* v. *Hallock,* 309 U. S. 106, 117–118; *Smith* v. *Shaughnessy,* 318 U. S. 176, 180.

[4] *Interstate Transit Lines* v. *Commissioner,* 319 U. S. 590, 593; see also *New Colonial Co.* v. *Helvering,* 292 U. S. 435, 440; *Deputy* v. *du Pont,* 308 U. S. 488, 493; *McDonald* v. *Commissioner,* 323 U. S. 57, 60.

"Dividend" and "interest," "stock" and "bond," "debenture" or "note," are correlative and clearly identifiable conceptions in their simpler and more traditional exemplifications. But their distinguishing features vanish when astute manipulation of the broad permissions of modern incorporation acts results in a "security device" which is in truth neither stock nor bond, but the half-breed offspring of both. At times only the label enables one to ascertain what the manipulator intended to bring forth. But intention clarified by label alone is not always legally effective for the purpose in mind.[5] And there is scarcely any limit to the extent or variety to which this kind of intermingling of the traditional features of stock and bonds or other forms of debt may go, as the books abundantly testify.[6] The taxpayer should show more than a label or a hybrid security to escape his liability. He should show at the least a substantial preponderance of facts pointing to "interest" rather than "dividends."

Something more is at stake in these cases than nice distinctions between "stock" and "bonds," on the one hand, or between ultimate conclusions of "fact" and "law" or "mixed fact and law," on the other, just as was true in the conveyancing cases. The border cutting across one set of normally opposing conceptions may be deliberately obscured and made into a no man's land as readily as that involved in the other. When this happens, the final link

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[5] *In re Fechheimer Fishel Co.*, 212 F. 357, 360; *Matter of Collier*, 112 Misc. 70, 182 N. Y. S. 555; *Cass* v. *Realty Securities Co.*, 148 App. Div. 96, 100, 132 N. Y. S. 1074, affirmed, 206 N. Y. 649, 99 N. E. 1105; see *Commissioner* v. *Schmoll Fils Associated, Inc.*, 110 F. 2d 611.

[6] See Hansen, Hybrid Securities: A Study of Securities Which Combine Characteristics of Both Stocks and Bonds (1936) 13 N. Y. U. L. Q. 407; Uhlman, The Law of Hybrid Securities (1938) 23 Wash. U. L. Q. 182; *Jewel Tea Co.* v. *United States*, 90 F. 2d 451, 452–453.

in the chain of judgment is decisive, whatever its label.[7] If the ultimate conclusion of the Tax Court or its divisions can be made in exactly opposing ways, and must be left undisturbed, without substantial differentiating facts, or when hybrid arrangements bear tax indicia equally with marks of non-taxability, not only is the statutory review nullified. The right of taxpayers to be treated with equal justice before the law is denied.

MASON *v.* PARADISE IRRIGATION DISTRICT.

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

No. 306. Submitted December 4, 1945.—Decided January 7, 1946.

1. A plan for composition of debts of an irrigation district under Chapter IX of the Bankruptcy Act provided that the holders of outstanding bonds were to be paid in cash 52.521 cents on each dollar of principal, exclusive of interest, the cash to be supplied through a loan from the Reconstruction Finance Corporation, which was to receive new or refunding 4 per cent bonds in the principal amount of its loan. Creditors owning not less than 92 per cent in amount of the bonds accepted the plan, consented to the filing of the petition, and deposited their bonds under the plan. The R. F. C. did not advance the funds to the irrigation district but purchased the bonds at the composition figure and registered them in its name. The old bonds so acquired remained obligations of the irrigation district, were held by the R. F. C. as security for its advances, and were to be exchanged under the plan for 4 per cent refunding bonds in the full amount of its cash advances. The R. F. C., as holder of about 92 per cent of the bonds, approved the plan prior to the filing of the petition. There was full disclosure to the security holders and to the court. The bankruptcy court, finding that all of the outstanding bonds were of one class, that the requisite per-

[7] The legal element is not eliminated merely because it appears in "a molecular combination of fact and law which defies separation." *Berry* v. *Irving Place Corp.*, 52 F. Supp. 875, 881. It may be the dominant element in the combination. When it is, minutiae of factual difference should not govern result or sustain conflicting outcomes.

centage of bondholders had approved the plan, that the irrigation district was unable to meet its debts as they matured, that the plan was fair, equitable and for the best interests of creditors, and that it did not discriminate unfairly in favor of any creditor, approved the plan. Mason, who owned some of the old bonds and had opposed the plan, appealed, contending that, since he and the R. F. C. were put in the same class, they should be treated alike and he should receive 4 per cent refunding bonds, instead of 52.521 cents in cash on each dollar of principal. There was no showing that the full value of his claim was more than 52.521 cents on the dollar. *Held* that this Court is unable to say that the bankruptcy court was not warranted in finding that the cash offer was fair and equitable. P. 546.

2. The mere fact that the R. F. C. holds the vast majority of all the bonds and is in a dominant position in the reorganization does not mean that it is entitled to preferred treatment. P. 541.
3. However, those who put new money into a distressed enterprise may be given preferred treatment. Pp. 541, 543.
4. Congress intended the R. F. C. to be treated in such situations as a creditor. P. 542.
5. The securities acquired by the R. F. C. pursuant to the plan of composition are not extinguished and may be computed in determining the percentage of consenting creditors necessary for the filing of a petition under Chapter IX. P. 542.
6. Since there was no showing that 52.521 cents in cash was not as advantageous as 52.521 cents in refunding bonds, it is impossible for this Court to say that, although a difference in treatment was warranted, any discrimination in favor of the R. F. C. was so great as to be unfair. P. 543.
7. While the provision of 11 U. S. C. § 403 (b) to the effect that holders of all claims payable without preference from the same source shall be put in one class states the general rule, the bankruptcy court has the power to make a different classification where inequitable results would otherwise obtain. P. 544.
8. Under § 403 (j) the securities acquired by the R. F. C. may be included in the percentage of consenting securities necessary for the filing of a petition under Chapter IX. P. 544.
9. Section 403 (d), requiring approval by creditors "holding at least two-thirds of the aggregate amount of claims of all classes," is construed to mean two-thirds of the total amount of all claims in all classes and not two-thirds of each class. P. 544.
10. The purpose of this legislation to give taxing agencies a workable and practical method of obtaining relief from oppressive debt bur-

dens would be thwarted or impeded if Chapter IX were given a construction which placed the fate of composition plans in the hands of minority, non-consenting bondholders. P. 545.

11. Provision "for the protection" of the claims of non-assenting creditors, as provided in § 403 (d), could be made by leaving them undisturbed; but, if the non-assenting creditors had the option to come in under the plan or to retain their old securities, the debtor would be unable to get the relief which Chapter IX affords or could do so only on such terms as a minority dictated. P. 545.

12. Assuming that provision "for the protection" of the claims of non-assenting creditors could be made under § 403 (d) in ways other than by leaving the claims undisturbed, there would seem to be no reason why payment in cash of the full value of their claims would not be adequate. P. 546.

149 F. 2d 334, affirmed.

CERTIORARI, *post*, p. 704, to review affirmance of a decree approving a plan of composition of the debts of an irrigation district under Chapter IX of the Bankruptcy Act—limited to the question whether it was proper to approve a plan which treated petitioner differently from the Reconstruction Finance Corporation.

Petitioner submitted *pro se*.

Mr. P. M. Barceloux submitted for respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Respondent is organized under the laws of the State of California and located in the County of Butte of that State. It experienced financial difficulties in the 1930's. It had outstanding $476,000 principal amount of bonds bearing interest at the rate of 6 per cent. Being unable to collect taxes sufficient to service the bonds, it tried to work out a debt readjustment program. It applied for a loan from the Reconstruction Finance Corporation. A loan of $252,500 was arranged, provided all the holders of the outstanding bonds agreed to the refinancing pro-

gram. The offer to the bondholders was that they surrender their bonds for 52.521 cents on each dollar of principal, exclusive of interest—an amount which respondent deemed fair to the bondholders and to the owners of the land in the district. The holders of about 92 per cent of the principal amount of the outstanding bonds agreed. Respondent, being unable to obtain the assent of the holders of the remaining bonds, filed its petition under Ch. IX of the Bankruptcy Act late in 1937. 50 Stat. 653, 52 Stat. 939, 54 Stat. 667, 11 U. S. C. § 401. It submitted with its petition its plan of composition or debt readjustment and prayed, *inter alia,* that the plan be approved. The plan provided that the holders of the outstanding bonds be paid in cash 52.521 cents on each dollar of principal, exclusive of interest; that the cash was to be supplied from the proceeds of a loan of $252,500 from the Reconstruction Finance Corporation; that the Reconstruction Finance Corporation was to receive new or refunding 4 per cent bonds in the principal amount of its loan, and 4 per cent on all disbursements from the date thereof until the new or refunding bonds were issued to it. The petition recited that the creditors owning not less than 92 per cent in amount of the bonds had accepted the plan and consented to the filing of the petition.[1] It appears that the consenting bondholders had deposited their bonds under the plan; that the Reconstruction Finance Corporation did not advance the funds to respondent but, acting through a bank, purchased the bonds at the composition figure and registered the bonds in its name; that in accordance with the terms of the contract between respondent and the Reconstruction Finance Corporation,

[1] Sec. 403 (a) requires the petition to state, *inter alia,* that "creditors of the petitioner owning not less than 51 per centum in amount of the securities affected by the plan (excluding, however, any such securities owned, held, or controlled by the petitioner), have accepted it in writing."

the old bonds so acquired remained obligations of respondent, were held by the Reconstruction Finance Corporation as security for its advances and are to be exchanged under the plan for 4 per cent refunding bonds. The Reconstruction Finance Corporation, as holder of about 92 per cent of the bonds, approved the plan prior to the filing of the petition under Ch. IX.

The District Court found that all of the outstanding bonds were of one and the same class,[2] that the requisite percentage of bondholders had approved the plan,[3] that respondent was unable to meets its debts as they matured,[4] and held that the plan was fair, equitable and for the best interests of its creditors and did not unfairly discriminate in favor of any creditor.[5] It accordingly approved the plan.[6]

Petitioner is the owner of $29,000 principal amount of the old bonds who opposed the plan of composition. His objections were not sustained in the District Court. The Circuit Court of Appeals likewise overruled them. 149 F. 2d 334. The case is here on a petition for a writ of certiorari which we granted because of a conflict among

[2] Sec. 403 (b) provides that "the holders of all claims, regardless of the manner in which they are evidenced, which are payable without preference out of funds derived from the same source or sources shall be of one class. The holders of claims for the payment of which specific property or revenues are pledged, or which are otherwise given preference as provided by law, shall accordingly constitute a separate class or classes of creditors."

[3] Sec. 403 (d) provides that a plan of composition shall not be confirmed, with exceptions not material here, "until it has been accepted in writing, by or on behalf of creditors holding at least two-thirds of the aggregate amount of claims of all classes affected" by the plan, excluding "claims owned, held, or controlled by the petitioner."

[4] Sec. 403 (a) requires the petition to state that the petitioner is "insolvent or unable to meet its debts as they mature." Among the findings required by § 403 (e) for confirmation of a plan is that it "complies with the provisions of this chapter."

[5] That finding is required by § 403 (e).

[6] November, 1943.

the Circuit Courts of Appeals,[7] limited to the question whether it was proper to approve a plan which treated petitioner differently from the Reconstruction Finance Corporation.

Petitioner argues that since he and the Reconstruction Finance Corporation were put in the same class, the rule of "equality between creditors" applicable in bankruptcy proceedings (*Clarke* v. *Rogers,* 228 U. S. 534, 548) required that they be treated alike. In other words, he contends that instead of being required to take 52.521 cents in cash on each dollar of principal, he should receive 4 per cent refunding bonds.

We held in *American United Ins. Co.* v. *Avon Park,* 311 U. S. 138, 147, that the principle of equality between creditors governed compositions under Ch. IX as it did compositions under the old § 12. The fact that the Reconstruction Finance Corporation holds the vast majority of all the bonds and therefore is in a dominant position in the reorganization does not mean that it is entitled to preferred treatment. It is clear that it is not. *American United Ins. Co.* v. *Avon Park, supra,* p. 148. The Reconstruction Finance Corporation has not by purchasing bonds in the market acquired merely a speculative position in the plan of composition. Nor is it merely in the position of a holder of a majority of the bonds. By contract with the debtor it has underwritten the whole refinancing program. It has ventured the capital necessary to effectuate the plan of composition. It has long been recognized in reorganization law that those who put new money into the distressed enterprise may be given a participation in the reorganization plan reasonably equiv-

[7] *Texas* v. *Tabasco School Dist.,* 132 F. 2d 62, 133 F. 2d 196, decided by the Fifth Circuit Court of Appeals, is to be contrasted to the decision below and to *West Coast Life Ins. Co.* v. *Merced Irrigation Dist.,* 114 F. 2d 654, decided by the Ninth Circuit Court of Appeals and also to *Luehrmann* v. *Drainage Dist.,* 104 F. 2d 696, decided by the Eighth Circuit Court of Appeals.

alent to their contribution. *Case* v. *Los Angeles Lumber Products Co.*, 308 U. S. 106, 117, 121–122 and cases cited; *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448, 486–487. That rule is based on practical necessities. Without the inducement new money could not be obtained.

It is said, however, that the Reconstruction Finance Corporation when it becomes the holder of bonds must be treated on the basis that it is a creditor and not an outside lender of money. It is clear that Congress intended the Reconstruction Finance Corporation to be treated in situations like the present as a creditor. Sec. 402 of the Act provides that "Any agency of the United States holding securities acquired pursuant to contract with any petitioner under this chapter shall be deemed a creditor in the amount of the full face value thereof." The Reconstruction Finance Corporation is such an agency. Sec. 403 (j) gives securities acquired, as here, pursuant to a plan of composition prior to the filing of a petition the same recognition as any other securities.[8] It is thus apparent that securities acquired by the Reconstruction Finance Corporation, pursuant to a plan of composition, are not extinguished, remain securities "affected by the plan," [9] and may be computed in determining the

[8] Sec. 403 (j) reads as follows: "The partial completion or execution of any plan of composition as outlined in any petition filed under the terms of this title by the exchange of new evidences of indebtedness under the plan for evidences of indebtedness covered by the plan, whether such partial completion or execution of such plan of composition occurred before or after the filing of said petition, shall not be construed as limiting or prohibiting the effect of this title, and the written consent of the holders of any securities outstanding as the result of any such partial completion or execution of any plan of composition shall be included as consenting creditors to such plan of composition in determining the percentage of securities affected by such plan of composition."

[9] For a discussion of the history of § 403 (j) see *West Coast Life Ins. Co.* v. *Merced Irrigation Dist.*, *supra* note 7, pp. 667–668.

percentage of consenting creditors necessary for the filing of a petition under Ch. IX.[10] If the Act were construed as requiring the Reconstruction Finance Corporation in situations like the present to be treated as every other creditor of the same class, the fact that it had underwritten the whole refinancing program would be considered irrelevant. But as we have seen, he who furnishes new capital to a distressed enterprise has long been accorded preferred treatment. The Reconstruction Finance Corporation contributes something that Mason does not. It furnishes the underwriting which makes the refinancing possible. It gives something of value for the preferred treatment which it receives. The other security holders of the same class give nothing new. That difference warrants a difference in treatment. *Case* v. *Los Angeles Lumber Products Co., supra; Ecker* v. *Western Pacific R. Corp., supra.* The plan, of course, must be fair and equitable and it must "not discriminate unfairly" in favor of any creditor. § 403 (e). A secret advantage would not meet that test. *American United Ins. Co.* v. *Avon Park, supra.* But here there was full disclosure to the security holders and to the court. Petitioner receives 52.521 cents on each dollar of principal amount of his bonds. The Reconstruction Finance Corporation receives new and refunding bonds in the face amount of its cash advances. It is, of course, possible that 52.521 cents in cash may not be as advantageous an offer as 52.521 cents in new and refunding bonds. But there is no showing that it is not. Hence it is impossible for us to say that, although a difference in treatment was warranted, any discrimination in favor of the Reconstruction Finance Corporation was so great as to be unfair.

A different question arises when we come to the classification of creditors for voting on a plan of composition.

[10] See note 1, *supra.*

Sec. 403 (b) provides that there shall be put in one class holders of all claims payable without preference from the same source.[11] While this provision states the general rule, we said in *American United Ins. Co.* v. *Avon Park, supra,* p. 146, that the bankruptcy court has the power to make a different classification where inequitable results would otherwise obtain. We assume that a majority bondholder who was receiving preferred treatment under a plan by reason of his underwriting or otherwise would normally have to be put in a different class when it came to voting on the plan. But we see no reason why Congress could not provide otherwise. As we have seen, § 402 allows the Reconstruction Finance Corporation to be treated as a creditor in the amount of the full face value of the securities it acquired. By reason of § 403 (j) those securities may be included in the percentage of consenting securities necessary for the filing of a petition under Chapter IX. Those provisions were inserted to make these refinancing programs possible and practical. They give statutory sanction to this particular method of refinancing. Sec. 403 (d) requires approval by creditors "holding at least two-thirds of the aggregate amount of claims of all classes" affected by the plan.[12] If that is construed to mean not two-thirds of each class but two-thirds of the total amount of all claims in all classes, the separate classification of the Reconstruction Finance Corporation would make no difference in result in the present case. For all of the bonds held by it are more than two-thirds of the aggregate amount of all claims affected by the plan. Only if the Act were construed to mean that two-thirds of each class is necessary for approval of a plan would the separate classification of the Reconstruction Finance Corporation produce a different result in this case. Such a construction, however, would place the success of these refinancing pro-

[11] See note 2, *supra.*

[12] See note 3, *supra.*

grams at the mercy of the minority interests. If it were necessary in this type of case to put non-assenting bondholders in a separate class, they could block the refinancing program even though it were fair and equitable and the only feasible one which the debtor could work out. In designing this legislation Congress was solicitous not only to protect the position of the Reconstruction Finance Corporation in these refinancing programs [13] but also to give this class of debtors a workable and practical method of obtaining relief from oppressive debt burdens. That purpose would be thwarted or impeded if we gave Ch. IX a construction which placed the fate of these plans in the hands of minority, non-consenting bondholders. The aim to provide a method of forcing "recalcitrant minority creditors into agreement" (H. Rep. No. 517, 75th Cong., 1st Sess., p. 3) would be defeated. For once such a rule were announced minority bondholders would have a great nuisance value, making it worthwhile for them to lie back until they got their price.[14]

It is suggested that the plan might be approved without the consent of the minority if, as provided in § 403 (d), "provision is made in the plan for the protection of the interests, claims, or lien of such creditors or class of creditors." Provision "for the protection" of the claims of non-

[13] That the Reconstruction Finance Corporation would play an important role in these refinancing programs was in the forefront when this legislation was before Congress. See H. Rep. No. 517, *supra*, p. 4; 81 Cong. Rec. 6322.

[14] Congressman Sumners, Chairman of the House Judiciary Committee, stated during the debate: "The force of the bill is directed against that minority present in every effort of debtors and creditors to bring the total of amounts payable within the ability of the debtor to pay. It is the minority who try to take advantage of the general desire to settle to compel an advantage to themselves in order to remove their selfishly interposed obstruction. They are hold-up men operating within the law." 81 Cong. Rec. 6313. The same view was expressed by Senator Pepper who managed the legislation on the floor of the Senate. 81 Cong. Rec. 8543.

assenting creditors could be made by leaving them undisturbed. But the purpose of Ch. IX is to provide taxing agencies with a method of scaling down their debt structures and reducing their debt service requirements when the need for relief is shown. If the non-assenting creditors had the option to come in under the plan or to retain their old securities, the debtor would be unable to get the relief which Ch. IX affords, or could do so only on such terms as the minority dictated. The other alternative would be to abandon this type of refinancing. But as we have seen, it has statutory sanction. It is said, however, that provision "for the protection" of the claims of non-assenting creditors could be made in ways other than leaving the claims undisturbed. If, *arguendo,* we assume that is true, we see no reason why payment in cash of the full value of the claims would not be adequate. That is permissible in connection with reorganizations under Ch. IX. 52 Stat. 840, 11 U. S. C. § 616 (7). It is indeed the historic method of dealing with dissenters under plans of reorganization. *Case* v. *Los Angeles Lumber Products Co., supra,* p. 121, note 15. No reason is apparent why, under our assumption, the same could not be done under Ch. IX. Yet, even in that view, the present plan was properly confirmed. For there is no showing whatsoever that the full value of Mason's claims is more than 52.521 cents on the dollar which he receives in cash. The District Court, indeed, found that the cash offer was fair and equitable and we are unable to say that that finding was not warranted.

Affirmed.

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

MR. JUSTICE FRANKFURTER, dissenting.

The Court holds that the Reconstruction Finance Corporation is not to be treated as an ordinary bondholder-creditor but is entitled to preferred treatment because it

acquired the bonds of the debtor as part of an arrangement which made possible financing of the plan of composition. With this I agree. But I find nothing in Chapter IX which, while permitting the R. F. C. to be considered a preferred creditor for purposes of distribution, allows it to be classified among ordinary creditors for purposes of voting. Nor do considerations of policy require that the R. F. C. be given such a two-faced character. It is suggested that if the votes of a preferred creditor in the position of the R. F. C. could not be counted with the votes of the ordinary creditors that class might not furnish the necessary two-thirds of the aggregate amount of claims of that class. It must be remembered, however, that the mere failure of a class like that of ordinary creditors, *e. g.*, those having no preferred position in the scheme for distribution, to accept a plan of composition does not prove that its resistance is improperly or unfairly recalcitrant. *Cf. American United Ins. Co.* v. *Avon Park,* 311 U. S. 138, 148. And recognition that bondholders may exercise their statutory rights as common creditors not to assent does not, of course, make of them a separate class of non-assenting bondholders with a veto power over the plan. But if the recalcitrancy does represent a dog-in-the-manger attitude, Chapter IX would seem to have provided for the contingency. According to § 83 (d) of the Act, 50 Stat. 653, 657, 11 U. S. C. § 403 (d), a plan might be approved without the otherwise necessary vote, not only where the claims of the creditors "are not affected by the plan," but also where "provision is made in the plan for the protection of the interests, claims, or lien of such creditors or class of creditors." But, though the bankruptcy court has the power of dispensing with the need of an approving vote by a class of creditors, by protecting that class' interests, it is not available where the court has not in fact determined, as it has not in this case, that the dissent of that class was an abusive exercise of their right to veto a plan.

To give such flexible scope to § 83 (d),[1] though, like other provisions of Chapter IX, it is not free from ambiguity, is the more pertinent if, as suggested, Chapter IX requires approval of two-thirds not of each class of claims but of the total amount of all claims. See Remington, Bankruptcy (1939) § 4364. On the other hand, if approval of the plan by two-thirds of each class is required, such a requirement can only mean that a group of more than one-third of any class is capable of exercising the veto power, except when § 83 (d) can be invoked. In establishing these classes, creditors are not properly grouped who, on

[1] That this is a reasonable interpretation of § 83 (d) is indicated by the cumbersome but more detailed form in which the purpose of § 83 (d) is explained in an earlier draft of the Act:

". . . (3) shall, with respect to creditors whose acceptance is not required under the provisions of subdivision (e) of this section if their interests, claims, or liens are protected in the manner provided in this clause (3), provide adequate protection for the realization by them of the value of their interests, claims, or liens, if the property or revenue affected by such interests, claims, or liens is dealt with by the plan, either as provided in the plan, (a) by the transfer or sale of such property subject to such interests, claims, or liens, or such property shall continue to be held by the taxing district subject to such interests, claims, or liens, or (b) by a sale free of such interests, claims, or liens at not less than a fair upset price and the transfer of such interests, claims, or liens to the proceeds of such sale, or (c) by appraisal and payment in cash of the value of such interests, claims, or liens, or, at the objecting creditors' election, of the securities allotted to such interests, claims, or liens under the plan, if any shall be so allotted, or (d) by such method as will in the opinion of the judge, under and consistent with the circumstances of the particular case, equitably and fairly provide such protection: *Provided,* That if provision therefor is made in the plan, the judge may require objecting creditors to accept, in lieu of any cash payment under this subdivision, such securities, of any kind, in payment of their interests, claims, or liens as shall, in the opinion of the judge, upon the consummation of the plan, represent the fair and equitable shares of such creditors in the property and revenues of the taxing district, available for the payment of its debts . . ." H. R. 5267, 73d Cong., 1st Sess. (1933) § 81 (b) (3), as it appears in the Hearings on that Bill, at page 17.

the face-value of the same bonds, get different equivalents, and are, as to the only thing that matters, not bound together by the same ties but separated by antagonistic interests. To put these groups with such antagonistic interests into the same class is to contradict the very notion of a class. Reason rejects such classification and nothing in the statute indicates that Congress intended to define a class as a group with inconsistent interests.

WILLIAMS ET AL. v. GREEN BAY & WESTERN RAILROAD CO.

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

No. 100. Argued December 10, 1945.—Decided January 7, 1946.

Petitioners, residents of New York and holders of Class B debentures issued by respondent, a Wisconsin corporation, brought suit in a New York court to recover amounts due and payable under the debentures out of earnings in lieu of interest. Under the covenant in the Class B debentures, the holders thereof were entitled to all of the remaining net earnings each year after holders of Class A debentures had received 5% on the face value thereof and stockholders had received 5% on the par value of the stock, the amounts payable to the Class B debenture holders to "be fixed and declared by the Board of Directors." Respondent's railroad lines were wholly in Wisconsin and its president and general auditor were there. However, it did business in New York; its Class B debentures were payable, listed and traded in there; it maintained its financial office, a traffic office and a bank account there; five of its six directors (including all of the executive and fiscal officers except the president and general auditor) and two of the three members of its executive committee were there; directors' meetings were customarily held there; and its financial records, transfer books, minute books and the like were kept there. After removing the case to a federal district court in New York on the grounds of diversity, respondent moved to dismiss on the ground that the suit concerned the internal affairs of a foreign corporation and could more con-

veniently be tried in the state of its incorporation. The district court granted the motion. *Held:*

1. It was improper to dismiss the suit on the ground of *forum non conveniens.* Pp. 552, 560.

2. This rule was designed as an instrument of justice to prevent a case from being tried in one court when in fairness it should be tried in another. (Illustrations given.) P. 554.

3. When it is invoked, each case turns on its facts. P. 557.

4. The relief sought, a money judgment, was not of such a character that a federal court in New York would be so handicapped that it should remit the parties to Wisconsin. P. 558.

5. Nor should the case have been remitted to Wisconsin on the theory that a construction of the covenant would primarily affect the interests of the public in that State. P. 558.

6. Since the suit sought only a money judgment, it did not involve sufficient interference in the internal affairs of the foreign corporation to justify dismissal on *forum non conveniens.* P. 559.

7. Under the facts in this case, it would not be vexatious or oppressive to entertain the suit in New York, whether the availability of witnesses or any other aspect of a trial be considered. P. 559.

147 F. 2d 777, reversed.

CERTIORARI, *post,* p. 699, to review affirmance of a judgment, 59 F. Supp. 98, dismissing a suit under the rule of *forum non conveniens.*

Mr. Milton Pollack for petitioners.

Mr. W. Lloyd Kitchel, with whom *Messrs. Merrill M. Manning* and *Walter Bruchhausen* were on the brief, for respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioners, residents of the City of New York, are holders of Class B debentures issued by respondent railroad company, a Wisconsin corporation. They brought this suit in the New York courts to recover amounts alleged to be due and payable under the debentures out of earnings in lieu of interest. On petition of respondent the

action was removed to the federal District Court for the Southern District of New York on the grounds of diversity. Respondent thereupon moved (1) to set aside the service because respondent was not doing business in New York and (2) to dismiss because the subject matter was concerned with the internal affairs of a foreign corporation. The District Court denied the first motion, but granted the second. 59 F. Supp. 98. On appeal the Circuit Court of Appeals affirmed by a divided vote, holding that the District Court did not abuse its discretion in basing its dismissal on *forum non conveniens*. 147 F. 2d 777. We granted certiorari because of the importance of the question presented.

The Class B debentures, issued in 1896, have no maturity date. Their principal is payable "only in the event of a sale or reorganization" of the company and "then only out of any net proceeds" remaining after specified payments to the Class A debentures and to the stock. The covenant in the Class B debentures out of which this litigation arises is set forth below.[1] The Circuit Court of

[1] "The said Railroad Company Hereby Agrees that until such payment, the holders of this Series of Debentures shall in lieu of interest thereon participate in the distribution of annual net income to the following extent, viz.:—So much of the annual net earnings of the said Company in any year as would be applicable to the payment of dividends on stock shall be applied as follows, viz.:—To the holders of Class A Debentures 2½ per cent upon the face value thereof, or if such annual net earnings are insufficient for the payment of the same, then all such net earnings shall be distributed pro rata among the holders of said Class A Debentures. After the payment of 2½ per cent upon the face value of Class A Debentures, the stockholders of the Company are entitled to receive the balance of such net earnings until 2½ per cent shall have been paid out of the same upon the par value of the said stock, and all surplus net earnings then remaining shall be paid to the holders of Class A Debentures and of the stock pro rata until five per cent shall have been paid upon the face value of said Debentures and upon the par of said stock for such year, and any surplus net earnings arising in such year which may then remain shall be paid to and distributed among the holders of Class B

Appeals was divided as to its meaning. The majority concluded that even though there were net earnings after the payments to the Class A debentures and to the stock, the directors had discretion to determine whether or not that sum should be paid to the Class B debentures. The court thereupon held, in reliance on *Rogers* v. *Guaranty Trust Co.*, 288 U. S. 123; *Cohn* v. *Mishkoff Costello Co.*, 256 N. Y. 102, 175 N. E. 529; *Cohen* v. *American Window Glass Co.*, 126 F. 2d 111, that the suit concerned the internal affairs of respondent and could better be tried in Wisconsin, the State of its incorporation. The minority thought that the amount of net earnings remaining after deducting the payments made to the Class A debentures and to the stock was to be paid to the Class B debentures, that the directors had no discretion to withhold such amounts, and that their payment involved nothing more than a ministerial act.[2] In that view the suit was substantially the same as one for a liquidated sum and would entail no interference with the internal affairs of a foreign corporation.

We leave open the question of the proper construction of the "net earnings" covenant in the Class B debentures. Although we assume that the majority of the court below

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Debentures pro rata. None of such payments shall be cumulative. The amounts, if any, payable upon this series of debentures out of the net earnings in any year, will be fixed and declared by the Board of Directors on or before the first day of February, in the following year . . ."

[2] Petitioners alleged that, with the exception of three years, respondent had substantial net earnings in each year from 1924 to 1943 inclusive, in excess of the amounts required to be paid and actually paid on the Class A debentures and on the stock. The aggregate amount of such net earnings, after deducting reserves for additions and general improvements and depreciation, and after deducting the payments on the Class A debentures and the stock was alleged to be approximately $1,650,000. The amounts actually paid on the Class B debentures during those years was $840,000, leaving due, according to petitioners, about $810,000.

was right in its interpretation of the covenant, we think it was improper to dismiss the case on the grounds of *forum non conveniens.*

Rogers v. *Guaranty Trust Co., supra,* is the only decision of this Court holding that a federal court should decline to hear a case because it concerns the internal affairs of a corporation foreign to the State where the federal court sits. A corporation chartered by one State commonly does business in the farthest reaches of the nation. Its business engagements—the issuance of securities, mortgaging of assets, contractual undertakings—frequently raise questions concerning the construction of its charter, by-laws and the like, or the scope of authority of its officers or directors, or the responsibility of one group in the corporate family to another group. All such questions involve in a sense the internal affairs of a corporation—whether in a suit on a contract the corporation interposes the defense of *ultra vires,* or a bondholder sues on his bond or a stockholder asserts rights under his stock certificate. But a federal court which undertakes to decide such a question does not trespass on a forbidden domain. See *Williamson* v. *Missouri-Kansas Pipe Line Co.,* 56 F. 2d 503, 510. Under the rule of *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, a federal court in a diversity case applies local law. In conflict of laws cases that may mean ascertaining and applying the law of a State other than that in which the federal court is located. *Klaxon Co.* v. *Stentor Electric Mfg. Co.,* 313 U. S. 487. The fact that the corporation law of another State is involved does not set the case apart for special treatment. The problem of ascertaining the state law may often be difficult. But that is not a sufficient ground for a federal court to decline to exercise its jurisdiction to decide a case properly before it. As we said in *Meredith* v. *Winter Haven,* 320 U. S. 228, 234, "The diversity jurisdiction was not conferred for the benefit of the federal courts or to serve their convenience. Its purpose

was generally to afford to suitors an opportunity in such cases, at their option, to assert their rights in the federal rather than in the state courts." So long as diversity jurisdiction remains, the parties may not be remitted to a state court merely because of the difficulty of making a decision in the federal court. *Meredith* v. *Winter Haven, supra.* If the District Court were sustained in declining to exercise its jurisdiction in this case, there could be no assurance that the litigation would be transferred to the Wisconsin state courts. If petitioners sued in the federal court in Wisconsin, as they could by reason of diversity of citizenship, no reason is apparent why that court should not proceed to decision. The fact that the federal court in Wisconsin could pass on this internal affair of this corporation does not, of course, mean that the federal court in New York need do so. The nature of the problem presented and the relief sought might be of controlling significance in inducing the federal court in New York to remit the parties to Wisconsin. But as we shall see, no special circumstances of that nature are present here.

We mention this phase of the matter to put the rule of *forum non conveniens* in proper perspective. It was designed as an "instrument of justice." [3] Maintenance of a suit away from the domicile of the defendant—whether he be a corporation or an individual—might be vexatious or oppressive.[4] An adventitious circumstance might land

[3] Mr. Justice Cardozo dissenting, *Rogers* v. *Guaranty Trust Co., supra,* p. 151.

[4] In Gibb, International Law of Jurisdiction (1926), pp. 212–213, the law of England and Scotland is stated as follows: "the court will not hold its hand unless there be, in the circumstances of the case, such hardship on the party setting up the plea as would amount to vexatiousness or oppression if the court persisted in exercising jurisdiction. The inconvenience, then, must amount to actual hardship, and this must be regarded as a condition *sine qua non* of success in putting forward a defence of *forum non conveniens.* For the general rule is that a court possessing jurisdiction must exercise it unless the reasons to the contrary are clear and cogent."

a case in one court when in fairness it should be tried in another. The relief sought against a foreign corporation

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In *Societe du Gaz de Paris* v. *"Les Armateurs francais"*, 1926 S. C. (H. L.) 13, perhaps the leading English case on the subject, a French manufacturing company sued a firm of French shipowners in a Scottish court on a charter-party. It provided that the vessel was to load a cargo of coal in England and proceed to a French port. The vessel, after loading, sailed and foundered. The plaintiff attached another vessel of defendants found in a Scottish port and claimed damages by reason of the unseaworthiness of the vessel. Neither plaintiff nor defendant had a place of business in Scotland. The bulk of the evidence necessary to determine the controversy was French, no machinery existed for compelling the attendance of French witnesses in a Scottish court, no question of Scots law was involved, and a trial in Scotland would deprive defendants of a defense open under French law. A judgment sustaining the plea of *forum non conveniens* was sustained. Lord Chancellor Cave summarized the rule as follows : ". . . if in any case it appeared to the Court, after giving consideration to the interests of both parties and to the requirements of justice, that the case could not be suitably tried in the Court in which it was instituted, and full justice could not be done there to the parties, but could be done in another Court, then the former Court might give effect to the plea by declining jurisdiction and permitting the issues to be fought out in the more appropriate Court." pp. 16–17. Lord Shaw of Dunfermline stated: "If in the whole circumstances of the case it be discovered that there is a real unfairness to one of the suitors in permitting the choice of a *forum* which is not the natural or proper *forum*, either on the ground of convenience of trial or the residence or domicile of parties, or of its being either the *locus contractus*, or the *locus solutionis*, then the doctrine of *forum non conveniens* is properly applied." p. 20.

And see *Canada Malting Co.* v. *Paterson Steamships*, 285 U. S. 413, 423, where Mr. Justice Brandeis speaking for the Court said, "Courts of equity and of law also occasionally decline, in the interest of justice, to exercise jurisdiction, where the suit is between aliens or non-residents or where for kindred reasons the litigation can more appropriately be conducted in a foreign tribunal." For reviews of the cases see Blair, The Doctrine of Forum Non Conveniens in Anglo-American Law, 29 Col. L. Rev. 1; Foster, Place of Trial in Civil Actions, 43 Harv. L. Rev. 1217, 44 Harv. L. Rev. 41; Dainow, The Inappropriate Forum, 29 Ill. L. Rev. 867.

may be so extensive or call for such detailed and continuing supervision that the matter could be more efficiently handled nearer home.[5] The limited territorial jurisdiction of the federal court [6] might indeed make it difficult for it to make its decree effective.[7] But where in this type of litigation only a money judgment is sought, the case normally is different. The fact that the claim involves complicated affairs of a foreign corporation is not alone a sufficient reason for a federal court to decline to

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[5] See *Wallace* v. *Motor Products Corp.*, 25 F. 2d 655, where a suit was brought in the federal court in Michigan to annul the reorganization of a New York corporation and to restore the stockholders of the old corporation to the position they had occupied prior to the reincorporation; *Eberhard* v. *Northwestern Life Ins. Co.*, 210 F. 520, where policy holders of a Wisconsin life insurance company sued in the federal court in Ohio for an accounting of dividends received and paid and for an injunction against the election of trustees, and praying that the trustees who had committed allegedly wrongful acts be decreed not to be officers of the company and that a receiver of the company be appointed; *Boyer* v. *Travelers' Protective Assn.*, 75 F. 2d 440, where suit was brought in the federal court in Pennsylvania to enjoin a Missouri corporation from enforcing certain amendments to its constitution; *Cohen* v. *American Window Glass Co.*, 126 F. 2d 111, where stockholders of a Pennsylvania corporation sued in the federal court in New York to enjoin a proposed merger, to have declared illegal the payment of dividends, and to have a receiver, resident in Pennsylvania, appointed.

[6] *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439, 467–468, and cases cited.

[7] The same is true, of course, of state courts. See *Taylor* v. *Mutual Reserve Fund Life Assn.*, 97 Va. 60, 33 S. E. 385; *Howell* v. *Chicago & N. W. R. Co.*, 51 Barb. 378, 383. Cf. also the cases where the court in which suit is brought cannot give the relief necessary to produce an equitable result (*Marshall* v. *Sherman*, 148 N. Y. 9, 42 N. E. 419; *State* v. *Denton*, 229 Mo. 187, 129 S. W. 709) or where the right of recovery is incapable of enforcement because it is so dissimilar to any which the court, whose jurisdiction is invoked, recognizes. *Slater* v. *Mexican National R. Co.*, 194 U. S. 120.

decide it.[8] The same may be true even where an injunction is sought.[9] We give these merely as illustrations. Each case turns on its facts. There are no special circumstances here, however, which should lead the District Court in New York to decline to exercise the jurisdiction which it has.

If petitioners' theory of the case is right, the court need go no further than it would in enforcing any contract to pay money. If, as the majority of the court below thought, the payment of net income to the Class B debentures rested in the discretion of the directors, the question under the applicable local law would normally be whether their discretion had been abused.[10] In case it were found to

[8] *American Seating Co.* v. *Bullard,* 290 F. 896, 901, where stockholders of a New Jersey corporation, who did not consent to the sale of its assets pursuant to a plan of reorganization and refinancing, sued in the federal court in Michigan to recover the value of their stock; *United Milk Products Corp.* v. *Lovell,* 75 F. 2d 923 (semble); *National Lock Co.* v. *Hogland,* 101 F. 2d 576 (semble); *Overfield* v. *Pennroad Corp.,* 113 F. 2d 6, where stockholders brought a derivative action in the federal court in Pennsylvania to recover for wrongs done their company, a Delaware corporation, by a Pennsylvania company; *Williamson* v. *Missouri-Kansas Pipe Line Co., supra,* (semble). Cf. *Kelley* v. *American Sugar Refining Co.,* 139 F. 2d 76.

[9] *Harr* v. *Pioneer Mechanical Corp.,* 65 F. 2d 332, where stockholders of a Delaware corporation sued in the federal court in New York to enjoin the sale of stock on the representation that it had priority over the shares held by plaintiffs; *American Creosote Works* v. *Powell,* 298 F. 417, where stockholders of a Maryland corporation sued in the federal court in Louisiana to annul and cancel the issuance of certain stock.

[10] That is the usual rule in suits to compel the declaration of dividends. *Dodge* v. *Ford Motor Co.,* 204 Mich. 459, 170 N. W. 668; *Morey* v. *Fish Bros. Wagon Co.,* 108 Wis. 520, 529, 84 N. W. 862; *Hiscock* v. *Lacy,* 9 Misc. 578, 30 N. Y. S. 860; *Kassel* v. *Empire Tinware Co.,* 178 App. Div. 176, 164 N. Y. S. 1033.

See Spellman, Corporate Directors (1931) § 141; Weiner, Theory of Anglo-American Dividend Law, 29 Col. L. Rev. 461; Ballantine & Hills, Corporate Capital and Restrictions Upon Dividends Under Modern Corporation Laws, 23 Calif. L. Rev. 229.

have been abused, the customary remedy is comparable to that which a court of equity affords in a suit for specific performance.[11] The point is that, however this suit be viewed, the relief sought is not of such a character as to suggest that the federal court in New York would be so handicapped that it should remit the parties to Wisconsin. There is a suggestion that the parties should be remitted to Wisconsin because a construction of the covenant will primarily affect the interests of the public in that State where all of respondent's railroad lines are located. Reference is made to *New York, L. E. & W. R. Co.* v. *Nickals,* 119 U. S. 296, where preferred stockholders sued for dividends which they claimed had been earned on their stock and wrongfully withheld. The Court construed the particular contract as vesting discretion in the directors. In holding that their discretion in withholding a distribution of net earnings had not been abused, it emphasized "the duty of the company to maintain its track and cars in such condition as to accommodate the public and provide for the safe transportation of passengers and freight." p. 306. But such considerations will frequently be involved in applying the rule of *Erie R. Co.* v. *Tompkins, supra.* They go no further than to suggest one additional phase of local law which the federal court, whether it sits in New York or in Wisconsin, may have to apply. They fall far short of those instances, reviewed in *Meredith* v. *Winter Haven, supra,* p. 235, where the federal court declines to act because its action might interfere with state proceedings, or state functions, or the functioning of state administrative agencies.

It was held in *Weiss* v. *Routh,* 149 F. 2d 193, that a federal court in a diversity case was required by *Erie R.*

[11] For the decree entered in *Dodge* v. *Ford Motor Co., supra* note 9, see *Kales* v. *Woodworth,* 20 F. 2d 395, 396. And see *Boardman* v. *Lake Shore & M. S. R. Co.,* 84 N. Y. 157, 180; *Kassel* v. *Empire Tinware Co., supra* note 10, p. 180.

Co. v. *Tompkins, supra,* to apply the local rule of *forum non conveniens.* We reserve decision on that question. For even if we assume the New York rule to be applicable here, we would reach no different result. *Cohn* v. *Mishkoff Costello Co., supra,* on which the court below relied, was a suit against a foreign corporation for the redemption of its shares of stock or in the alternative for a declaration of a dividend. But that involved a degree of visitation not present here where petitioners seek only a money judgment on their debentures. Nor do petitioners challenge an act of the corporation which "offended solely against the majesty of the State to which it owed its life." *Ernst* v. *Rutherford Gas Co.,* 38 App. Div. 388, 392, 56 N. Y. S. 403. The Court of Appeals in the *Cohn* case stated that "contracts between a foreign corporation and its members will usually be enforced in the courts of this State." 256 N. Y. p. 105. Cardozo, J., stated the New York rule in *Travis* v. *Knox Terpezone Co.,* 215 N. Y. 259, 264, 109 N. E. 250, as follows: "To trace in advance the precise line of demarcation between the controversies affecting a foreign corporation in which jurisdiction will be assumed and those in which jurisdiction will be declined, would be a difficult and hazardous venture. A litigant is not, however, to be excluded because he is a stockholder, unless considerations of convenience or of efficiency or of justice point to the courts of the domicile of the corporation as the appropriate tribunals." And see the New York authorities reviewed in *Weiss* v. *Routh, supra.* In the *Travis* case the court entertained a suit by a stockholder of a foreign corporation to compel the transfer of shares or to recover their value. We perceive in the present case no greater interference in the internal affairs of this foreign corporation.

Nor can we conclude that the maintenance of this suit in New York will be vexatious or oppressive. Petitioners, as we have said, reside there. While respondent's rail-

road lines are wholly in Wisconsin, it does business in New York. The Class B debentures are listed and traded in on the New York Stock Exchange. The amounts payable on them in lieu of interest are payable in New York. Respondent maintains its financial as well as a traffic office in New York. It maintains a bank account in New York, not only to take care of obligations under its securities, but also to handle excess operating funds not needed in Wisconsin. Five of respondent's six directors are to be found in New York. These five directors include all the executive and fiscal officers, except the president who supervises operations in Wisconsin and the general auditor who is in Wisconsin. Directors' meetings are customarily held in New York. Two of the three members of the executive committee, which acts for the board between meetings, are to be found in New York. Financial records, transfer books, minute books and the like are kept in New York. These facts plainly indicate to us that it would not be vexatious or oppressive to entertain this suit in New York, whether the availability of witnesses or any other aspect of a trial be considered. We accordingly conclude that, the requirements of jurisdiction and venue being satisfied (Judicial Code, §§ 24, 51, 28 U. S. C. §§ 41 (1), 112), the District Court should not have declined to hear and decide the case.

Reversed.

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

ORDER OF RAILWAY CONDUCTORS OF AMERICA ET AL. *v.* PITNEY ET AL., TRUSTEES OF CENTRAL RAILROAD CO. OF NEW JERSEY, ET AL.

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

No. 37. Argued November 9, 1945.—Decided January 14, 1946.

While a proceeding for reorganization of a railroad under § 77 of the Bankruptcy Act was pending in the District Court, the trustees agreed with the bargaining representative of "yard conductors" that certain trains which had been manned by "road conductors" should be manned by "yard conductors." Relying on earlier agreements, the bargaining representative of the road conductors petitioned the court to instruct the trustees not to displace the road conductors and to enjoin such action as long as the earlier agreements were not altered in accordance with the Railway Labor Act. The court determined that the yard conductors were entitled to man the trains in question, and dismissed the petition. *Held:*

1. So far as the order constituted instructions to the trustees, it was within the supervisory power of the District Court as a bankruptcy court and is affirmed. Pp. 562, 567.

2. The District Court should not have interpreted the agreements for purposes of finally adjudicating the dispute between the unions and the railroad, but should stay dismissal of the cause so as to afford opportunity for application to the Adjustment Board for an interpretation of the agreements pursuant to the Railway Labor Act. P. 567.

3. Congress having created by the Railway Labor Act an agency especially competent and specifically designated to settle such a labor dispute as is here involved, the court should exercise equitable discretion to give that agency the first opportunity to pass on the issue. The extraordinary relief of an injunction should be withheld at least until then. P. 567.

4. Any rights clearly revealed by an interpretation of the agreements by the Adjustment Board might then, if the situation warrants, be protected in this proceeding. P. 568.

145 F. 2d 351, modified.

CERTIORARI, 325 U. S. 849, to review a judgment which, upon appeal from an order of the bankruptcy court, re-

manded the cause for dismissal without prejudice to any action or proceeding not in conflict with the Railway Labor Act.

Mr. V. C. Shuttleworth, with whom *Messrs. Carl S. Kuebler, Rufus G. Poole* and *Milton C. Denbo* were on the brief (*Mr. James D. Carpenter, Jr.* entered an appearance), for petitioners.

Mr. Richard J. Lally, with whom *Mr. Howard L. Kern* was on the brief, for the Trustees; and *Mr. Harry Lane,* with whom *Mr. Robert Carey* was on the brief, for the Brotherhood of Railroad Trainmen et al., respondents.

Mr. Justice Black delivered the opinion of the Court.

This case requires us to consider to what extent a Federal District Court having charge of a railroad reorganization has power to adjudicate a jurisdictional dispute involving the railroad and two employee accredited bargaining agents in view of the provisions in the Railway Labor Act, 45 U. S. C. § 151 *et seq.*, giving such power to the administrative agencies established thereunder. Each union claims that its respective collective bargaining agreement entitles it to supply conductors for five daily freight trains operated within the Elizabethport, New Jersey, yards of the railroad and both pressed their contentions on the reorganization trustees appointed under the provisions of § 77 of the Bankruptcy Act. 11 U. S. C. § 205. The two unions are the Order of Railway Conductors (O. R. C.), which represents road conductors who ordinarily operate trains outside the yards, and the Brotherhood of Railroad Trainmen (B. R. T.), which represents yard conductors who ordinarily operate trains inside the yards. But here, the practice over a period of years had been that at times yard conductors manned some trains outside the yard and road conductors manned some trains

within the yard, including the five freight trains here involved. In 1940 the railroad in response to pressure by the O. R. C. agreed that thereafter only road conductors would man the outside trains. However, O. R. C. conductors continued to operate the five daily freight trains within the yard. In 1943 the railroad was prevailed upon by the B. R. T. to agree to substitute B. R. T. yard conductors for the O. R. C. conductors operating these five trains.

Thereupon O. R. C. brought this suit in the reorganization court. It alleged that its members had for the past 35 years operated the trains in issue as a result of negotiations as to rules, rates of pay and working conditions between it and the railroad and that the 1940 contract specifically provided that this situation would not be changed without further agreement. Thus, the proposed displacement of O. R. C. conductors would violate § 6 of the Railway Labor Act which makes it unlawful for a carrier or employee representatives to change "pay, rules, or working conditions," unless 30 days written notice of the intended change shall have been given and the controversy has been finally acted upon by the Mediation Board.[1] The O. R. C. asked the court to instruct its

[1] "Sec. 6. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

trustees not to displace road conductors and to enjoin them permanently from taking such action so long as O. R. C.'s contracts with the road were not altered in accordance with the provisions of the Railway Labor Act.

Answers were filed by the trustees and the B. R. T. as intervenor. The case was referred to a Master who, after a hearing, found that O. R. C.'s collective bargaining contracts did not provide that its conductors were to operate the five freight trains and that the B. R. T. contract allotted these lines to its members. The District Court sustained these findings and accordingly dismissed the petition on the merits. The Circuit Court of Appeals held that the petition should be dismissed on jurisdictional grounds because it thought that the remedies of the Railway Labor Act for the settlement of disputes such as here involved are exclusive. 145 F. 2d 351. It further stated that if it should be mistaken on the jurisdictional question, then it agreed with the District Court that the road conductors must lose on the merits.

Section 77 (n) of the Bankruptcy Act provides that "No judge or trustee acting under this Act shall change the wages or working conditions of railroad employees, except in the manner prescribed in the Railway Labor Act . . ." 49 Stat. 923. Section 1 of the Railway Labor Act defines a carrier, subject to it, as including "any receiver, *trustee,* or *other individual or body, judicial* or otherwise, when in *the possession of the business of any such 'carrier'* . . ." And § 2, Seventh, of the Act provides that "no carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class *as embodied in agreements* except in the manner prescribed in such agreements or in section 6 of this Act." Section 6, as we have seen, prohibits such changes unless notice is first given and its requirements are otherwise complied with. Section 2, Tenth, of the Act makes it a

misdemeanor, punishable by both fine and imprisonment, for a carrier wilfully to violate § 6.

These sections make it clear that the only conduct which would violate § 6 is a change of those working conditions which are "embodied" in agreements. But the answers here specifically denied that the O. R. C. agreements provided that road conductors operate the five trains in question. This put in issue the meaning of the contracts that allegedly embodied the working conditions which the trustees were about to change. The court, therefore, had to interpret these contracts before it could find that § 6 had been violated.

In interpreting the contracts the court might act in two distinct capacities. First, it might do so in the capacity of a "judicial" "body" in the "possession of the business," or a "carrier" within the meaning of § 1 of the Railway Labor Act. As such it would have to interpret the contracts in order to exercise the jurisdiction conferred by the Bankruptcy Act [2] to control its trustees so as to insure the preservation and proper administration of the debtor's estate. But such instructions, while binding on the trustees and, just as any other order, subject to appellate review, amount to no more than the decision any other carrier would sooner or later make about the course it must follow and, therefore, can not finally settle the dispute between union and employer.

Finally, to settle that dispute the reorganization court would have to act in the further capacity of a tribunal empowered to grant the equitable relief sought, even though granting that relief requires interpretation of these contracts. But Congress has specifically provided for a tribunal to interpret contracts such as these in order finally to settle a labor dispute. Section 3 First (i) of the Rail-

[2] See especially Subdivision (c) of § 77 of the Act, which provides that action of trustees in administering an estate shall be "subject to the control of the judge."

way Labor Act provides that disputes between a carrier and its employees "growing out of . . . the interpretation or application of agreements concerning rates of pay, rules, or working conditions . . . may be referred . . . by either party to the . . . Adjustment Board." The Board can not only order reinstatement of the employees, should they actually be discharged, but it can also under § 3, First (o) and (p) grant a money award subject to judicial review with an allowance for attorney's fees should the award be sustained. Not only has Congress thus designated an agency peculiarly competent to handle the basic question here involved, but as we have indicated in several recent cases in which we had occasion to discuss the history and purpose of the Railway Labor Act, it also intended to leave a minimum responsibility to the courts.[3]

Of course, where the statute is so obviously violated that "a sacrifice or obliteration of a right which Congress . . . created" [4] to protect the interest of individuals or the public is clearly shown, a court of equity could, in a proper case, intervene. *Texas & N. O. R. Co.* v. *Brotherhood of Clerks,* 281 U. S. 548; *Virginian R. Co.* v. *System Federation,* 300 U. S. 515. But here it does not clearly appear whether the statute has been violated or complied with or that the threatened action "would be prejudicial to the public interest." *Pennsylvania* v. *Williams,* 294 U. S. 176, 185. We have seen that in order to reach a final decision on that question the court first had to interpret the terms of O. R. C.'s collective bargaining agreements. The record shows, however, that interpretation of these contracts involves more than the mere construction of a "document" in terms of the ordinary meaning of words

[3] *General Committee* v. *M.-K.-T. R. Co.,* 320 U. S. 323; *Switchmen's Union* v. *Board,* 320 U. S. 297; *Trainmen* v. *Toledo, P. & W. R. Co.,* 321 U. S. 50; *Telegraphers* v. *Railway Express Agency,* 321 U. S. 342.

[4] *Switchmen's Union* v. *Board, supra,* 300.

and their position. See *Brown Lumber Co.* v. *L. & N. R. Co.*, 299 U. S. 393, 396. *Great Northern R. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, 291. For O. R. C.'s agreements with the railroad must be read in the light of others between the railroad and B. R. T. And since all parties seek to support their particular interpretation of these agreements by evidence as to usage, practice and custom, that too must be taken into account and properly understood. The factual question is intricate and technical. An agency especially competent and specifically designated to deal with it has been created by Congress. Under these circumstances the court should exercise equitable discretion to give that agency the first opportunity to pass on the issue. Certainly the extraordinary relief of an injunction should be withheld, at least, until then. See *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478, 483–484; *Burford* v. *Sun Oil Co.*, 319 U. S. 315. Only after the Adjustment Board acts, but not until then, can it plainly appear that such relief is necessary to insure compliance with the statute. Until such time, O. R. C. can not show irreparable loss and inadequacy of the legal remedy. The court of equity should, therefore, in the exercise of its discretion stay its hand. *Lawrence* v. *St. Louis-San Francisco R. Co.*, 274 U. S. 588, 592–3 and other cases cited in *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 51, n. 9; *Natural Gas Co.* v. *Slattery*, 302 U. S. 300.

We hold that the District Court had supervisory power to instruct its trustees as it did. And a review of the evidence persuades us that the court's findings on which such instructions were based are not clearly erroneous. To the extent that its order constitutes instructions to its trustees, it is affirmed. Of course, in this respect it is no more binding on the Adjustment Board than the action of any other carrier. But the court should not have interpreted the contracts for purposes of finally adjudicating the dispute

between the unions and the railroad. The dismissal of the cause should therefore be stayed by the District Court, so as to give an opportunity for application to the Adjustment Board for an interpretation of the agreements. Any rights clearly revealed by such an interpretation might then, if the situation warrants, be protected in this proceeding.[5]

It is so ordered.

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

MR. JUSTICE RUTLEDGE, dissenting in part.

I agree that the District Court should retain jurisdiction of the cause pending interpretation of the agreements in the procedure provided by the Railway Labor Act for submitting such questions to the Adjustment Board. Section 77 (n) of the Bankruptcy Act was not intended, I think, to give the District Court jurisdiction to determine whether a "change in agreements affecting rates of pay, rules, or working conditions" within the meaning of § 6 has, in fact, taken place. Its sole effect is to require a bankruptcy court to follow the procedure set up by the Railway Labor Act.

In my opinion, however, petitioners are entitled to immediate temporary relief, pending the determination of the Adjustment Board, in order to assure compliance with § 6, if the Board should decide in their favor.

Section 6 enjoins a clear and positive duty on the part of carriers and employees, a duty which is judicially enforceable, since no other remedy is provided.[1] The opinion

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[5] *Mitchell Coal Co.* v. *Pennsylvania R. Co.*, 230 U. S. 247, 267.

[1] *Texas & N. O. R. Co.* v. *Brotherhood of Clerks*, 281 U. S. 548; *Virginian R. Co.* v. *System Federation*, 300 U. S. 515; *Switchmen's Union* v. *National Meditation Board*, 320 U. S. 297; *General Committee* v. *Missouri-Kansas-Texas R. Co.*, 320 U. S. 323, 331.

See text *infra* as to adequacy of the remedy before the Adjustment Board.

of the Court so rules, as I understand it, for otherwise there would be no reason for holding the cause. But if, pending the Board's determination,[2] the change forbidden by § 6 takes place and the Board's decision turns out to be in favor of the petitioners, the very purpose of § 6 will have been defeated. Its object is to maintain the *status quo,* pending the expiration of the period provided by the section for allowing the processes of negotiation, mediation and conciliation to have play. It is to prevent

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[2] The situation in this case is unusual because resort must be had to the Adjustment Board before it can be determined whether the forbidden change has been proposed or has taken place in fact.

Whether the relief sought should be granted depends on whether the Adjustment Board finds that the 1943 contract with B. R. T., or action taken thereunder, constitutes a "change in agreements affecting rates of pay, rules, or working conditions" within the meaning of § 6 or one in "the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements," except as provided in § 6, within the meaning of § 2, Seventh. Cf. also § 77 (n) of the Bankruptcy Act. This in turn will depend upon the effect which the Board finds should be given to the prior agreements, including not only the 1940 contract with O. R. C., but the basic agreements of 1927 and 1928 with O. R. C. and B. R. T., respectively, as affected by the establishment of switching limits in 1929 and other matters bearing upon the interpretation of the written contracts and the rights of the parties.

Only after the Adjustment Board has acted can it be known whether a change in violation of § 6 was proposed or brought about through the 1943 agreement. If petitioners are correct in their view of their rights on the merits, and the Adjustment Board so finds, the 1943 contract and the action taken under it were in violation of § 6. If respondents are right as to the effect of the agreements made prior to 1943, and the Board so finds, no "change" in violation of § 6 was brought about by the 1943 contract, which in that event becomes merely declaratory of preexisting rights. The crucial issue is whether the 1943 agreement "changed," that is, altered the terms of preexisting contractual rights or merely declared them, a question which only the Adjustment Board can decide, initially at any rate, since it requires interpretation of existing collective agreements, not the making of new or different ones. Cf. *Elgin, J. & E. R. Co.* v. *Burley,* 325 U. S. 711.

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changes being made until these processes have been exhausted or the prescribed waiting period has expired without bringing them into effect. See *Trainmen* v. *Toledo, P. & W. R. Co.*, 321 U. S. 50; cf. *Elgin, J. & E. R. Co.* v. *Burley*, 325 U. S. 711.

The decision of the Board will not restore this rightful *status quo* for the period required for making its determination, including the time now gone by, or in fact for any later period. The only relief the Board can give is either "an administrative declaratory determination" or an award of money damages, subject to the special provision for judicial review. Although the latter remedy would afford partial vindication of private rights, it does not safeguard the public interest, in accordance with the primary design of § 6.[3] And in many cases it may be impossible for a court to effectuate the Board's decision for the future with adequate restorative measures.[4]

Accordingly I think the District Court should grant temporary relief to O. R. C., as was done at the beginning of this cause,[5] until the rights of the parties have been ascertained and permanent relief is given or denied. Peti-

[3] In providing a waiting period before final rupture, with leeway for mediation and conciliation to work, § 6 has the obvious purpose not only to prevent infringement of private rights but more especially to save the public from possible disruption of service. See note 4.

[4] Although only five jobs are involved in this jurisdictional dispute, another may involve 500 or 5000. Ordering the reinstatement of any considerable number of men, once they have been wrongfully thrown out, to displace others who have taken their places itself involves the very kind of disruption, or possibility for it, which Congress sought to ward off by the provisions of § 6. And it is common knowledge that strikes involving large numbers may arise from an employer's adverse action affecting directly only a few employees or even one.

[5] The court granted a stay order upon filing of the petition which remained in effect until April 5, 1943, when the order of reference to the master was made. Thereafter the trustees made effective the 1943 contract with B. R. T. and, in my opinion, by this action violated § 6.

tioners have made a prima facie case,[6] not only for holding the cause pending the outcome of the proceedings before the Adjustment Board but also for temporary injunctive relief pending that decision. Without such relief the public interest will not be adequately protected nor will the court's jurisdiction be preserved, in the sense of power to afford the full relief required by the policy of the Act.

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[6] The decision of the Court implies that the petitioners' case is not frivolous. That it is not is borne out by the following facts, among others:

The trustees and B. R. T. do not deny that O. R. C. members had performed the work in question continuously for more than thirty-five years or exclusively until the contract of 1943 with B. R. T. was made and put into effect. They allege no protest against this arrangement until shortly after the 1940 agreement with O. R. C.

In 1929 the carrier established switching limit boundaries. Respondents say the effect of establishing these limits was generally that yardmen, represented by B. R. T., should not perform work outside of them and that roadmen, represented by O. R. C., should not perform work within them. The five drills in question lie within the switching limits. O. R. C. contends that the fixing of switching limits was not intended to change the previous practice under which road conductors had customarily manned the five drills. It points to the fact that road conductors continued to work on the five drills after the establishment of switching limits and to the further fact that, by the agreement made in 1940 between O. R. C. and the carrier, the latter agreed not to change the then present method of assigning conductors. O. R. C. also maintains that the basic agreements, taken in conjunction with the 1929 establishment of switching limits, did not prescribe territorial priorities, but merely provided for rates of pay to be applicable within and without the limits established.

NEW YORK ET AL. *v.* UNITED STATES.

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

No. 5. Argued December 7, 8, 1944. Reargued December 4, 1945.—Decided January 14, 1946.

The State of New York, in the sale of mineral waters taken from Saratoga Springs, owned and operated by the State, is not immune under the Federal Constitution from the tax imposed on mineral waters by § 615 of the Revenue Act of 1932. Pp. 573–574, 584.
140 F. 2d 608, affirmed.

CERTIORARI, 322 U. S. 724, to review the affirmance of a judgment for the United States, 48 F. Supp. 15, in a suit to recover taxes assessed against the State on the sale of mineral water.

ON THE ORIGINAL ARGUMENT:

Henry S. Manley, Assistant Attorney General of New York, with whom *Nathaniel L. Goldstein,* Attorney General, *Orrin G. Judd,* Solicitor General, and *Wendell P. Brown,* First Assistant Attorney General, were on the brief, for the State of New York; and *Mr. Irving I. Goldsmith* was on the brief for the Saratoga Springs Commission and Saratoga Springs Authority, petitioners.

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

ON THE REARGUMENT:

Orrin G. Judd, Solicitor General of New York, with whom *Nathaniel L. Goldstein,* Attorney General, *Wendell P. Brown,* First Assistant Attorney General, and *Henry S. Manley,* Assistant Attorney General, were on the brief, for the State of New York.

Mr. Paul A. Freund, with whom *Solicitor General McGrath, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key* and *Bernard Chertcoff* were on the brief, for the United States.

By special leave of Court, *Greek L. Rice,* Attorney General of Mississippi, argued the cause for the following States as *amici curiae:* Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. The Attorneys General of those States, together with *Messrs. Austin J. Tobin* and *Leander I. Shelley,* joined in the brief.

Separate briefs were also filed on behalf of the States of Illinois and Pennsylvania; the City of New York and the National Institute of Municipal Law Officers; and the American Public Power Association, as *amici curiae.*

MR. JUSTICE FRANKFURTER announced the judgment of the Court and delivered an opinion in which MR. JUSTICE RUTLEDGE joined.

Section 615 (a) (5) of the 1932 Revenue Act, 47 Stat. 169, 264, imposed a tax on mineral waters.[1] The United States brought this suit to recover taxes assessed against the State of New York on the sale of mineral waters taken

[1] "SEC. 615. Tax on Soft Drinks.

"(a) There is hereby imposed— . . .

"(5) Upon all natural or artificial mineral waters or table waters, whether carbonated or not, and all imitations thereof, sold by the producer, bottler, or importer thereof, in bottles or other closed containers, at over 12½ cents per gallon, a tax of 2 cents per gallon."

from Saratoga Springs, New York.[2] The State claims immunity from this tax on the ground that "in the bottling and sale of the said waters the defendant State of New York was engaged in the exercise of a usual, traditional and essential governmental function." The claim was rejected by the District Court and judgment went for the United States. 48 F. Supp. 15. The judgment was affirmed by the Circuit Court of Appeals for the Second Circuit. 140 F. 2d 608. The strong urging of New York for further clarification of the amenability of States to the taxing power of the United States led us to grant certiorari. 322 U. S. 724. After the case was argued at the 1944 Term, reargument was ordered.

On the basis of authority the case is quickly disposed of. When States sought to control the liquor traffic by going into the liquor business, they were denied immunity from federal taxes upon the liquor business. *South Caro-*

[2] The history of New York's relations to the springs at Saratoga may be briefly summarized. Under previous private operation the flow of the springs had been substantially diminished by excessive pumping. In 1911 the State of New York began to acquire title to all the lands on which the mineral springs were located at Saratoga Springs. In order to conserve the springs for beneficial operation, the State took various measures until, in 1930, control over the springs in the State Reservation was given to the newly created Saratoga Springs Commission. In 1933, the Commission leased the springs' facilities and delegated their management to the Saratoga Springs Authority, a public benefit corporation of New York.

During the years 1932 to 1934, for which the tax is asserted, the Commission and the Authority operated the Reservation as a health resort and spa. There are recreation facilities, bath houses, drink halls, a research laboratory, and other buildings on the grounds. Some of the mineral waters of the springs that have a medicinal value are bottled and sold to distributors, retailers, and directly to consumers. The sales are promoted by advertising and customarily yield a profit which is applied to meeting in part the expenses of operating the other facilities. The remainder of those expenses is met by annual legislative appropriations.

lina v. *United States,* 199 U. S. 437; *Ohio* v. *Helvering,* 292 U. S. 360. And in rejecting a claim of immunity from federal taxation when Massachusetts took over the street railways of Boston, this Court a decade ago said: "We see no reason for putting the operation of a street railway [by a State] in a different category from the sale of liquors." *Helvering* v. *Powers,* 293 U. S. 214, 227. We certainly see no reason for putting soft drinks in a different constitutional category from hard drinks. See also *Allen* v. *Regents,* 304 U. S. 439.

One of the greatest sources of strength of our law is that it adjudicates concrete cases and does not pronounce principles in the abstract. But there comes a time when even the process of empiric adjudication calls for a more rational disposition than that the immediate case is not different from preceding cases. The argument pressed by New York and the forty-five other States who, as *amici curiae,* have joined her deserves an answer.

Enactments levying taxes made in pursuance of the Constitution are, as other laws are, "the supreme Law of the Land." Art. VI, Constitution of the United States; *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 153. The first of the powers conferred upon Congress is the power "To lay and collect Taxes, Duties, Imposts and Excises . . ." Art. I, § 8. By its terms the Constitution has placed only one limitation upon this power, other than limitations upon methods of laying taxes not here relevant: Congress can lay no tax "on Articles exported from any State." Art. I, § 9. Barring only exports, the power of Congress to tax "reaches every subject." *License Tax Cases,* 5 Wall. 462, 471. But the fact that ours is a federal constitutional system, as expressly recognized in the Tenth Amendment, carries with it implications regarding the taxing power as in other aspects of government. See, *e. g., Hopkins Savings Assn.* v. *Cleary,* 296 U. S. 315. Thus, for Congress to tax State activities while leaving

untaxed the same activities pursued by private persons would do violence to the presuppositions derived from the fact that we are a Nation composed of States.

But the fear that one government may cripple or obstruct the operations of the other early led to the assumption that there was a reciprocal immunity of the instrumentalities of each from taxation by the other. It was assumed that there was an equivalence in the implications of taxation by a State of the governmental activities of the National Government and the taxation by the National Government of State instrumentalities. This assumed equivalence was nourished by the phrase of Chief Justice Marshall that "the power to tax involves the power to destroy." *McCulloch* v. *Maryland,* 4 Wheat. 316, 431. To be sure, it was uttered in connection with a tax of Maryland which plainly discriminated against the use by the United States of the Bank of the United States as one of its instruments. What he said may not have been irrelevant in its setting. But Chief Justice Marshall spoke at a time when social complexities did not so clearly reveal as now the practical limitations of a rhetorical absolute. See Holmes, J., in *Long* v. *Rockwood,* 277 U. S. 142, 148, and in *Panhandle Oil Co.* v. *Mississippi,* 277 U. S. 218, 223. The phrase was seized upon as the basis of a broad doctrine of intergovernmental immunity, while at the same time an expansive scope was given to what were deemed to be "instrumentalities of government" for purposes of tax immunity. As a result, immunity was until recently accorded to all officers of one government from taxation by the other, and it was further assumed that the economic burden of a tax on any interest derived from a government imposes a burden on that government so as to involve an interference by the taxing government with the functioning of the other government. See *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514; *Helvering* v. *Producers Corp.,* 303 U. S. 376; *Graves* v. *N. Y. ex rel. O'Keefe,* 306 U. S. 466, 480–81.

To press a juristic principle designed for the practical affairs of government to abstract extremes is neither sound logic nor good sense. And this Court is under no duty to make law less than sound logic and good sense. When this Court for the first time relieved State officers from a non-discriminatory Congressional tax, not because of anything said in the Constitution but because of the supposed implications of our federal system, Mr. Justice Bradley pointed out the invalidity of the notion of reciprocal intergovernmental immunity. The considerations bearing upon taxation by the States of activities or agencies of the federal government are not correlative with the considerations bearing upon federal taxation of State agencies or activities. The federal government is the government of all the States, and all the States share in the legislative process by which a tax of general applicability is laid. "The taxation by the State governments of the instruments employed by the general government in the exercise of its powers," said Mr. Justice Bradley, "is a very different thing. Such taxation involves an interference with the powers of a government in which other States and their citizens are equally interested with the State which imposes the taxation." [3] Since then we have moved

[3] The views of Mr. Justice Bradley have been so vindicated by time and experience that his whole compact opinion deserves to be recalled:

"I dissent from the opinion of the court in this case, because, it seems to me that the general government has the same power of taxing the income of officers of the State governments as it has of taxing that of its own officers. It is the common government of all alike; and every citizen is presumed to trust his own government in the matter of taxation. No man ceases to be a citizen of the United States by being an officer under the State government. I cannot accede to the doctrine that the general government is to be regarded as in any sense foreign or antagonistic to the State governments, their officers, or people; nor can I agree that a presumption can be admitted that the general government will act in a manner hostile to the existence or

away from the theoretical assumption that the National Government is burdened if its functionaries, like other citizens, pay for the upkeep of their State governments, and we have denied the implied constitutional immunity of federal officials from State taxes. *Graves* v. *N. Y. ex rel. O'Keefe, supra.* See *Gillespie* v. *Oklahoma,* 257 U. S. 501, criticized in *Burnet* v. *Coronado Oil & Gas Co.,* 285 U. S. 393, 401, and explicitly overruled in *Helvering* v. *Producers Corp.,* 303 U. S. 376; *Long* v. *Rockwood,* 277 U. S. 142, overruled in *Fox Film Corp.* v. *Doyal,* 286 U. S. 123; *Collector* v. *Day,* 11 Wall. 113, and *New York ex rel. Rogers* v. *Graves,* 299 U. S. 401, overruled in *Graves* v. *N. Y. ex rel. O'Keefe, supra.*

In the meantime, cases came here, as we have already noted, in which States claimed immunity from a federal

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functions of the State governments, which are constituent parts of the system or body politic forming the basis on which the general government is founded. The taxation by the State governments of the instruments employed by the general government in the exercise of its powers, is a very different thing. Such taxation involves an interference with the powers of a government in which other States and their citizens are equally interested with the State which imposes the taxation. In my judgment, the limitation of the power of taxation in the general government, which the present decision establishes, will be found very difficult of control. Where are we to stop in enumerating the functions of the State governments which will be interfered with by Federal taxation? If a State incorporates a railroad to carry out its purposes of internal improvement, or a bank to aid its financial arrangements, reserving, perhaps, a percentage on the stock or profits, for the supply of its own treasury, will the bonds or stock of such an institution be free from Federal taxation? How can we now tell what the effect of this decision will be? I cannot but regard it as founded on a fallacy, and that it will lead to mischievous consequences. I am as much opposed as any one can be to any interference by the general government with the just powers of the State governments. But no concession of any of the just powers of the general government can easily be recalled. I, therefore, consider it my duty to at least record my dissent when such concession appears to be made. An extended discussion of the subject would answer no useful purpose." *Collector* v. *Day,* 11 Wall. 113, 128–29.

tax imposed generally on enterprises in which the State itself was also engaged. This problem did not arise before the present century, partly because State trading did not actively emerge until relatively recently, and partly because of the narrow scope of federal taxation. In *South Carolina* v. *United States,* 199 U. S. 437, immunity from a federal tax on a dispensary system, whereby South Carolina monopolized the sale of intoxicating liquors, was denied by drawing a line between taxation of the historically recognized governmental functions of a State, and business engaged in by a State of a kind which theretofore had been pursued by private enterprise. The power of the federal government thus to tax a liquor business conducted by the State was derived from an appeal to the Constitution "in the light of conditions surrounding at the time of its adoption." *South Carolina* v. *United States, supra,* at 457. That there is a constitutional line between the State as government and the State as trader, was still more recently made the basis of a decision sustaining a liquor tax against Ohio. "If a state chooses to go into the business of buying and selling commodities, its right to do so may be conceded so far as the Federal Constitution is concerned; but the exercise of the right is not the performance of a governmental function . . . When a state enters the market place seeking customers it divests itself of its *quasi* sovereignty *pro tanto,* and takes on the character of a trader, so far, at least, as the taxing power of the federal government is concerned." *Ohio* v. *Helvering, supra,* at 369. When the *Ohio* case was decided it was too late in the day not to recognize the vast extension of the sphere of government, both State and National, compared with that with which the Fathers were familiar. It could hardly remain a satisfactory constitutional doctrine that only such State activities are immune from federal taxation as were engaged in by the States in 1787. Such a static concept of government denies its essential nature. "The science of government is the most abstruse

of all sciences; if, indeed, that can be called a science which has but few fixed principles, and practically consists in little more than the exercise of a sound discretion, applied to the exigencies of the state as they arise. It is the science of experiment." *Anderson* v. *Dunn,* 6 Wheat. 204, 226.

When this Court came to sustain the federal taxing power upon a transportation system operated by a State, it did so in ways familiar in developing the law from precedent to precedent. It edged away from reliance on a sharp distinction between the "governmental" and the "trading" activities of a State, by denying immunity from federal taxation to a State when it "is undertaking a business enterprise of a sort that is normally within the reach of the federal taxing power and is distinct from the usual governmental functions that are immune from federal taxation in order to safeguard the necessary independence of the State." *Helvering* v. *Powers, supra,* at 227. But this likewise does not furnish a satisfactory guide for dealing with such a practical problem as the constitutional power of the United States over State activities. To rest the federal taxing power on what is "normally" conducted by private enterprise in contradiction to the "usual" governmental functions is too shifting a basis for determining constitutional power and too entangled in expediency to serve as a dependable legal criterion. The essential nature of the problem cannot be hidden by an attempt to separate manifestations of indivisible governmental powers. See Wambaugh, *Present Scope of Government* (1897) 20 A. B. A. Rep. 307; Frankfurter, *The Public and its Government* (1930).

The present case illustrates the sterility of such an attempt.[4] New York urges that in the use it is making of

[4] This method of solving a problem inherent in a federal constitutional system has been found equally inconclusive in Latin America. See Amadeo, Argentine Constitutional Law (1943) 97–103.

Saratoga Springs it is engaged in the disposition of its natural resources. And so it is. But in doing so it is engaged in an enterprise in which the State sells mineral waters in competition with private waters, the sale of which Congress has found necessary to tap as a source of revenue for carrying on the National Government. To say that the States cannot be taxed for enterprises generally pursued, like the sale of mineral water, because it is somewhat connected with a State's conservation policy, is to invoke an irrelevance to the federal taxing power. Liquor control by a State certainly concerns the most important of a State's natural resources—the health and well-being of its people. See *Mugler* v. *Kansas,* 123 U. S. 623, 662; *Crane* v. *Campbell,* 245 U. S. 304, 307. If in its wisdom a State engages in the liquor business and may be taxed by Congress as others engaged in the liquor business are taxed, so also Congress may tax the States when they go into the business of bottling water as others in the mineral water business are taxed even though a State's sale of its mineral waters has relation to its conservation policy.

In the older cases, the emphasis was on immunity from taxation. The whole tendency of recent cases reveals a shift in emphasis to that of limitation upon immunity. They also indicate an awareness of the limited rôle of courts in assessing the relative weight of the factors upon which immunity is based. Any implied limitation upon the supremacy of the federal power to levy a tax like that now before us, in the absence of discrimination against State activities, brings fiscal and political factors into play. The problem cannot escape issues that do not lend themselves to judgment by criteria and methods of reasoning that are within the professional training and special competence of judges. Indeed the claim of implied immunity by States from federal taxation raises questions not wholly unlike provisions of the Constitution, such as

that of Art. IV, § 4, guaranteeing States a republican form of government, see *Pacific States Tel. & Tel. Co.* v. *Oregon,* 223 U. S. 118, which this Court has deemed not within its duty to adjudicate.

We have already held that by engaging in the railroad business a State cannot withdraw the railroad from the power of the federal government to regulate commerce. *United States* v. *California,* 297 U. S. 175. See also *University of Illinois* v. *United States,* 289 U. S. 48. Surely the power of Congress to lay taxes has impliedly no less a reach than the power of Congress to regulate commerce. There are, of course, State activities and State-owned property that partake of uniqueness from the point of view of intergovernmental relations. These inherently constitute a class by themselves. Only a State can own a Statehouse; only a State can get income by taxing. These could not be included for purposes of federal taxation in any abstract category of taxpayers without taxing the State as a State. But so long as Congress generally taps a source of revenue by whomsoever earned and not uniquely capable of being earned only by a State, the Constitution of the United States does not forbid it merely because its incidence falls also on a State. If Congress desires, it may of course leave untaxed enterprises pursued by States for the public good while it taxes like enterprises organized for private ends. Cf. *Springfield Gas Co.* v. *Springfield,* 257 U. S. 66; *University of Illinois* v. *United States, supra,* at 57; *Puget Sound Co.* v. *Seattle,* 291 U. S. 619. If Congress makes no such differentiation and, as in this case, taxes all vendors of mineral water alike, whether State vendors or private vendors, it simply says, in effect, to a State: "You may carry out your own notions of social policy in engaging in what is called business, but you must pay your share in having a nation which enables you to pursue your policy." After all, the representatives of all the States, having, as the appearance

of the Attorneys General of forty-six States at the bar of this Court shows, common interests, alone can pass such a taxing measure and they alone in their wisdom can grant or withhold immunity from federal taxation of such State activities.

The process of Constitutional adjudication does not thrive on conjuring up horrible possibilities that never happen in the real world and devising doctrines sufficiently comprehensive in detail to cover the remotest contingency. Nor need we go beyond what is required for a reasoned disposition of the kind of controversy now before the Court. The restriction upon States not to make laws that discriminate against interstate commerce is a vital constitutional principle, even though "discrimination" is not a code of specifics but a continuous process of application. So we decide enough when we reject limitations upon the taxing power of Congress derived from such untenable criteria as "proprietary" against "governmental" activities of the States, or historically sanctioned activities of government, or activities conducted merely for profit,[5] and find

[5] Attempts along similar lines to solve kindred problems arising under the Canadian and Australian Constitutions have also proved a barren process. See Australia Constitution Act, 1900, § 114, in Egerton, Federations and Unions in the British Empire (2d ed., 1924) 225; Pond, Intergovernmental Immunity: A Comparative Study of the Federal System (1941) 26 Iowa L. Rev. 272; Kennedy & Wells, The Law of the Taxing Power in Canada (1931) 35–37.

Even where the Constitution of a federal system explicitly deals with the problem of intergovernmental taxation, as in Brazil, litigation is not escaped and nice distinctions have to be made. See cases arising under Article 10 of the Constitution of 1891 and under Article 32 of the Constitution of 1937: Appellação Civel, No. 2.884, 13 Revista do Supremo Tribunal 203 (1917); Appellação Civel, No. 2.900, 14 Revista do Supremo Tribunal 44 (1918); Appellação Civel, No. 2.536, 19 Revista do Supremo Tribunal 76 (1919); Recurso de mandado de segurança No. 617, 56 Archivo Judiciario 1 (1940); Agravo de petição, No. 8.024, 59 Archivo Judiciario 85 (1941). Article 32 of the Constitution of 1937, the present Brazilian Constitution, provides: "The Union, the States and the Municipalities are forbidden: . . . *c*) to

no restriction upon Congress to include the States in levying a tax exacted equally from private persons upon the same subject matter.

Judgment affirmed.

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

MR. JUSTICE RUTLEDGE, concurring.

I join in the opinion of MR. JUSTICE FRANKFURTER and in the result. I have no doubt upon the question of power. The shift from immunity to taxability has gone too far, and with too much reason to sustain it, as respects both state functionaries and state functions, for backtracking to doctrines founded in philosophies of sovereignty more current and perhaps more realistic in an earlier day. Too much is, or may be, at stake for the nation to permit relieving the states of their duty to support it, financially as otherwise, when they take over increasingly the things men have been accustomed to carry on as private, and therefore taxable, enterprise. Competitive considerations unite with the necessity for securing the federal revenue, in a time when the federal burden grows heavier proportionately than that of the states, to forbid that they be free to undermine rather than obligated to sustain the nation's financial requirements.

All agree that not all of the former immunity is gone. For the present I assent to the limitation against discrimination, which I take to mean that state functions

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tax goods, income or services of each other." Speaking of the earlier Constitution, a commentator notes: "These limitations on the federal taxing power are all taken from our own jurisprudence, either by direct transcription from the Constitution of the United States or by the incorporation of principles laid down in decisions of our [the United States] supreme court, as is the case with the last-named prohibition"—"the prohibition against taxing the property, revenues, or services of the states." James, Federal Basis of the Brazilian System (1923) 45.

may not be singled out for taxation when others performing them are not taxed or for special burdens when they are. What would happen if the state should take over a monopoly of traditionally private, income-producing business may be left for the future, in so far as this has not been settled by *South Carolina* v. *United States,* 199 U. S. 437. Perhaps there are other limitations also, apart from the practical one imposed by the state's representation in Congress. If the way were open, I would add a further restricting factor, not of constitutional import, but of construction.

With the passing of the former broad immunity, I should think two considerations well might be taken to require that, before a federal tax can be applied to activities carried on directly by the states, the intention of Congress to tax them should be stated expressly and not drawn merely from general wording of the statute applicable ordinarily to private sources of revenue. One of these is simply a reflection of the old immunity, in the presence of which, of course, it would be inconceivable that general wording, such as the statute now in question contains, could be taken as intended to apply to the states.[1] The other is that, quite apart from reflections of that immunity, I should expect that Congress would say so explicitly, were its purpose actually to include state functions, where the legal incidence of the tax falls upon the state.[2] And the concurring opinion of Mr. Justice Bradley in *United States* v. *Railroad Co.,* 17 Wall. 322, 333, indicates that he may have been of this general view.

[1] To give removal of the immunity the effect of inverting the intention of Congress, in its later use of the same formula, is a leap in construction longer than seems reasonable to make.

[2] Cf. 26 U. S. C. § 22 (a) where Congress has specifically provided that compensation for personal service, includible in gross income, includes compensation for personal service as an officer or employee of a state, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing.

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Nevertheless, since *South Carolina* v. *United States, supra,* such a rule of construction seems not to have been thought required.[3] Accordingly, although I gravely doubt that when Congress taxed every "person" it intended also to tax every state, the ruling has been made [4] and I therefore acquiesce in this case.

MR. CHIEF JUSTICE STONE concurring.

MR. JUSTICE REED, MR. JUSTICE MURPHY, MR. JUSTICE BURTON and I concur in the result. We are of the opinion that the tax here involved should be sustained and the judgment below affirmed.

In view of our decisions in *South Carolina* v. *United States,* 199 U. S. 437; *Ohio* v. *Helvering,* 292 U. S. 360; *Helvering* v. *Powers,* 293 U. S. 214; and *Allen* v. *Regents,* 304 U. S. 439, we would find it difficult not to sustain the tax in this case, even though we regard as untenable the distinction between "governmental" and "proprietary" interests on which those cases rest to some extent. But we are not prepared to say that the national government may constitutionally lay a non-discriminatory tax on every class of property and activities of States and individuals alike.

Concededly a federal tax discriminating against a State would be an unconstitutional exertion of power over a coexisting sovereignty within the same framework of government. But our difficulty with the formula, now first suggested as offering a new solution for an old problem,

[3] *University of Illinois* v. *United States,* 289 U. S. 48; *Ohio* v. *Helvering,* 292 U. S. 360. See *Manhattan Co.* v. *Blake,* 148 U. S. 412. In *Graves* v. *N. Y. ex rel. O'Keefe,* 306 U. S. 466, 479, 480, the Court said, in another connection: "It is true that the silence of Congress, when it has authority to speak, may sometimes give rise to an implication as to the Congressional purpose. . . . But there is little scope for the application of that doctrine to the tax immunity of governmental instrumentalities."

[4] See *Ohio* v. *Helvering, supra.*

is that a federal tax which is not discriminatory as to the subject matter may nevertheless so affect the State, merely because it is a State that is being taxed, as to interfere unduly with the State's performance of its sovereign functions of government. The counterpart of such undue interference has been recognized since Marshall's day as the implied immunity of each of the dual sovereignties of our constitutional system from taxation by the other. *McCulloch* v. *Maryland,* 4 Wheat. 316. We add nothing to this formula by saying, in a new form of words, that a tax which Congress applies generally to the property and activities of private citizens may not be in some instances constitutionally extended to the States, merely because the States are included among those who pay taxes on a like subject of taxation.

If the phrase "non-discriminatory tax" is to be taken in its long accepted meaning as referring to a tax laid on a like subject matter, without regard to the personality of the taxpayer, whether a State, a corporation or a private individual, it is plain that there may be non-discriminatory taxes which, when laid on a State, would nevertheless impair the sovereign status of the State quite as much as a like tax imposed by a State on property or activities of the national government. *Mayo* v. *United States,* 319 U. S. 441, 447–448. This is not because the tax can be regarded as discriminatory but because a sovereign government is the taxpayer, and the tax, even though non-discriminatory, may be regarded as infringing its sovereignty.

A State may, like a private individual, own real property and receive income. But in view of our former decisions we could hardly say that a general non-discriminatory real estate tax (apportioned), or an income tax laid upon citizens and States alike could be constitutionally applied to the State's capitol, its State-house, its public school houses, public parks, or its revenues from taxes or

school lands, even though all real property and all income of the citizen is taxed. If it be said that private citizens do not own State-houses or public school buildings or receive tax revenues, it may equally be said that private citizens do not conduct a State-owned liquor business or derive revenue from a State-owned athletic field. Obviously Congress, in taxing property or income generally, is not taxing a State "as a State" because the State happens to own real estate or receive income. Whether a State or an individual is taxed, in each instance the taxable occasion is the same. The tax reaches the State because of the Congressional purpose to lay the tax on the subject matter chosen, regardless of who pays it. To say that the tax fails because the State happens to be the taxpayer is only to say that the State, to some extent undefined, is constitutionally immune from federal taxation. Only when and because the subject of taxation is State property or a State activity must we consider whether such a non-discriminatory tax unduly interferes with the performance of the State's functions of government. If it does, then the fact that the tax is non-discriminatory does not save it. If we are to treat as invalid, because discriminatory, a tax on "State activities and State-owned property that partake of uniqueness from the point of view of intergovernmental relations," it is plain that the invalidity is due wholly to the fact that it is a State which is being taxed so as unduly to infringe, in some manner, the performance of its functions as a government which the Constitution recognizes as sovereign.

It is enough for present purposes that the immunity of the State from federal taxation would, in this case, accomplish a withdrawal from the taxing power of the nation a subject of taxation of a nature which has been traditionally within that power from the beginning. Its exercise now, by a non-discriminatory tax, does not curtail the business of the state government more than it does the

like business of the citizen. It gives merely an accustomed and reasonable scope to the federal taxing power. Such a withdrawal from a non-discriminatory federal tax, and one which does not bear on the State any differently than on the citizen, is itself an impairment of the taxing power of the national government, and the activity taxed is such that its taxation does not unduly impair the State's functions of government. The nature of the tax immunity requires that it be so construed as to allow to each government reasonable scope for its taxing power, *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514, 524. The national taxing power would be unduly curtailed if the State, by extending its activities, could withdraw from it subjects of taxation traditionally within it. *Helvering* v. *Powers, supra,* 225; *Ohio* v. *Helvering, supra; South Carolina* v. *United States, supra,* and see *Murray* v. *Wilson Distilling Co.*, 213 U. S. 151, 173, explaining *South Carolina* v. *United States, supra.*

The problem is not one to be solved by a formula, but we may look to the structure of the Constitution as our guide to decision. "In a broad sense, the taxing power of either government, even when exercised in a manner admittedly necessary and proper, unavoidably has some effect upon the other. The burden of federal taxation necessarily sets an economic limit to the practical operation of the taxing power of the states, and *vice versa.* Taxation by either the state or the federal government affects in some measure the cost of operation of the other.

"But neither government may destroy the other nor curtail in any substantial manner the exercise of its powers. Hence the limitation upon the taxing power of each, so far as it affects the other, must receive a practical construction which permits both to function with the minimum of interference each with the other; and that limitation cannot be so varied or extended as seriously to impair

either the taxing power of the government imposing the tax . . . or the appropriate exercise of the functions of the government affected by it." *Metcalf & Eddy* v. *Mitchell, supra,* 523–524.

Since all taxes must be laid by general, that is, workable, rules, the effect of the immunity on the national taxing power is to be determined not quantitatively but by its operation and tendency in withdrawing taxable property or activities from the reach of federal taxation. Not the extent to which a particular State engages in the activity, but the nature and extent of the activity by whomsoever performed is the relevant consideration.

Regarded in this light we cannot say that the Constitution either requires immunity of the State's mineral water business from federal taxation, or denies to the federal government power to lay the tax.

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

I

If *South Carolina* v. *United States,* 199 U. S. 437, is to stand, the present judgment would have to be affirmed. For I agree that there is no essential difference between a federal tax on South Carolina's liquor business and a federal tax on New York's mineral water business. Whether *South Carolina* v. *United States* reaches the right result is another matter.

Mr. Justice Brandeis stated that "*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right." *Burnet* v. *Coronado Oil & Gas Co.,* 285 U. S. 393, 406. But throughout the history of the Court *stare decisis* has had only a limited application in the field of constitutional law. And it is a wise policy which largely restricts it to those areas of the law where correction can be had by legislation. Otherwise the Con-

stitution loses the flexibility necessary if it is to serve the needs of successive generations.

I do not believe *South Carolina* v. *United States* states the correct rule. A State's project is as much a legitimate governmental activity whether it is traditional, or akin to private enterprise, or conducted for profit. Cf. *Helvering* v. *Gerhardt,* 304 U. S. 405, 426–427. A State may deem it as essential to its economy that it own and operate a railroad, a mill, or an irrigation system as it does to own and operate bridges, street lights, or a sewage disposal plant. What might have been viewed in an earlier day as an improvident or even dangerous extension of state activities may today be deemed indispensable. But as Mr. Justice White said in his dissent in *South Carolina* v. *United States,* any activity in which a State engages within the limits of its police power is a legitimate governmental activity. Here a State is disposing of some of its natural resources. Tomorrow it may issue securities, sell power from its public power project, or manufacture fertilizer. Each is an exercise of its power of sovereignty. Must it pay the federal government for the privilege of exercising that inherent power? If the Constitution grants it immunity from a tax on the issuance of securities, on what grounds can it be forced to pay a tax when it sells power or disposes of other natural resources?

II

One view, just announced, purports to reject the distinction which *South Carolina* v. *United States* drew between those activities of a State which are and those which are not strictly governmental, usual, or traditional. But it is said that a federal tax on a State will be sustained so long as Congress "does not attempt to tax a State because it is a State." Yet if that means that a federal real estate tax of general application (apportioned) would be valid if applied to a power dam owned by a State but invalid if applied to a State-house, the old doctrine has merely been

poured into a new container. If, on the other hand, any federal tax on any state activity were sustained unless it discriminated against the State, then a constitutional rule would be fashioned which would undermine the sovereignty of the States as it has been understood throughout our history. Any such change should be accomplished only by constitutional amendment. The doctrine of state immunity is too intricately involved in projects which have been launched to be whittled down by judicial fiat.

III

Woodrow Wilson stated the starting point for me when he said [1] that

"the States of course possess every power that government has ever anywhere exercised, except only those powers which their own constitutions or the Constitution of the United States explicitly or by plain inference withhold. They are the ordinary governments of the country; the federal government is its instrument only for particular purposes."

The Supremacy Clause, Article VI, clause 2, applies to federal laws within the powers delegated to Congress by the States. But it is antagonistic to the very implications of our federal system to say that the power of Congress to lay and collect taxes, Article I, § 8, includes the power to tax any state activity or function so long as the tax does not discriminate against the States.[2] As stated in *United States* v. *Railroad Co.*, 17 Wall. 322, 327–328,

[1] Constitutional Government in the United States (1908), pp. 183–184.

[2] As stated in *United States* v. *California*, 297 U. S. 175, 184, 185, the immunity of state instrumentalities from federal taxation "is implied from the nature of our federal system and the relationship within it of state and national governments, and is equally a restriction on taxation by either of the instrumentalities of the other." It went on to say in justification of making state activities subject to the exercise by Congress of the commerce power, "But there is no such limitation upon the plenary power to regulate commerce. The state can no more deny the power if its exercise has been authorized by Congress than can an individual."

"The right of the States to administer their own affairs through their legislative, executive, and judicial departments, in their own manner through their own agencies, is conceded by the uniform decisions of this court and by the practice of the Federal government from its organization. This carries with it an exemption of those agencies and instruments, from the taxing power of the Federal government. If they may be taxed lightly, they may be taxed heavily; if justly, oppressively. Their operation may be impeded and may be destroyed, if any interference is permitted."

Can it be that a general federal tax on the issuance of securities would be constitutional if applied to the issuance of municipal securities or of state bonds or of the securities of public utility districts organized by the States? Could the States be classified with farmers, business men, industrial workers, judges, and other ordinary citizens and required to pay an income tax to the federal government? It is said that a federal income tax on the tax revenues of a State would not be sustained because such a tax would interfere with a sovereign function of the State. But can it be that a federal income tax on state revenues derived not from taxes but from the sale of mineral water, liquor, lumber and the like, would be sustained?

A tax is a powerful, regulatory instrument. Local government in this free land does not exist for itself. The fact that local government may enter the domain of private enterprise and operate a project for profit does not put it in the class of private business enterprise for tax purposes. Local government exists to provide for the welfare of its people, not for a limited group of stockholders. If the federal government can place the local governments on its tax collector's list, their capacity to serve the needs of their citizens is at once hampered or curtailed. The field of federal excise taxation alone is practically without limits. Many state activities are in

marginal enterprises where private capital refuses to venture. Add to the cost of these projects a federal tax and the social program may be destroyed before it can be launched. In any case, the repercussions of such a fundamental change on the credit of the States and on their programs to take care of the needy and to build for the future would be considerable. To say the present tax will be sustained because it does not impair the State's functions of government is to conclude either that the sale by the State of its mineral water is not a function of government or that the present tax is so slight as to be no burden. The former obviously is not true. The latter overlooks the fact that the power to tax lightly is the power to tax severely. The power to tax is indeed one of the most effective forms of regulation. And no more powerful instrument for centralization of government could be devised. For with the federal government immune and the States subject to tax, the economic ability of the federal government to expand its activities at the expense of the States is at once apparent. That is the result whether the rule of *South Carolina* v. *United States* be perpetuated or a new rule of discrimination be adopted.

The notion that the sovereign position of the States must find its protection in the will of a transient majority of Congress is foreign to and a negation of our constitutional system. There will often be vital regional interests represented by no majority in Congress. The Constitution was designed to keep the balance between the States and the Nation outside the field of legislative controversy.

The immunity of the States from federal taxation is no less clear because it is implied. The States on entering the Union surrendered some of their sovereignty. It was further curtailed as various Amendments were adopted. But the Tenth Amendment provides that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the

States respectively, or to the people." The Constitution is a compact between sovereigns. The power of one sovereign to tax another is an innovation so startling as to require explicit authority if it is to be allowed. If the power of the federal government to tax the States is conceded, the reserved power of the States guaranteed by the Tenth Amendment does not give them the independence which they have always been assumed to have. They are relegated to a more servile status. They become subject to interference and control both in the functions which they exercise and the methods which they employ. They must pay the federal government for the privilege of exercising the powers of sovereignty guaranteed them by the Constitution,[3] whether, as here, they are disposing of their natural resources, or tomorrow they issue securities or perform any other acts within the scope of their police power.

Of course, the levying of the present tax does not curtail the business of the state government more than it does the like business of the citizen. But the same might be true in the case of many state activities which have long been assumed to be immune from federal taxation. When a municipality acquires a water system or an electric power plant and transmission facilities, it withdraws projects

[3] That fact distinguishes those cases where a citizen seeks tax immunity because his income was derived from a State or the federal government. Recognition of such a claim would create a "privileged class of taxpayers" (*Helvering* v. *Gerhardt*, *supra*, p. 416) and extend the tax immunity of the States or the federal government to private citizens. It was in protest to the recognition of such a derivative immunity that Mr. Justice Bradley dissented in *Collector* v. *Day*, 11 Wall. 113, 128, where the Court held unconstitutional a federal tax on the salary of a judicial officer of a State. As Mr. Justice Bradley stated, "No man ceases to be a citizen of the United States by being an officer under the State government." 11 Wall. p. 128. And see *Graves* v. *O'Keefe*, 306 U. S. 466, holding that salaries of federal employees may be constitutionally included in a non-discriminatory state income tax.

from the field of private enterprise. Is the tax immunity to be denied because a tax on the municipality would not curtail the municipality more than it would the prior private owner? Is the municipality to be taxed whenever it engages in an activity which once was in the field of private enterprise and therefore was once taxable? Every expansion of state activity since the adoption of the Constitution limits the reach of federal taxation if state immunity is recognized. Yet none would concede that the sovereign powers of the States were limited to those which they exercised in 1787. Nor can it be said that if the present tax is not sustained there will be withdrawn from the taxing power of the federal government a subject of taxation which has been traditionally within that power from the beginning. Not until *South Carolina* v. *United States* was it held that so-called business activities of a State were subject to federal taxation. That was after the turn of the present century. Thus the major objection to the suggested test is that it disregards the Tenth Amendment, places the sovereign States on the same plane as private citizens, and makes the sovereign States pay the federal government for the privilege of exercising the powers of sovereignty guaranteed them by the Constitution.

That this idea is hostile to the view of the Framers of the Constitution is evident from Hamilton's discussion of the taxing power of the federal government in The Federalist, Nos. 30–36 (Sesquicentennial Ed. 1937) pp. 183–224. He repeatedly stated that the taxing powers of the States and of the federal government were to be "concurrent"—"the only admissible substitute for an entire subordination, in respect to this branch of power, of the State authority to that of the Union." pp. 202–203. He also stated, "The convention thought the concurrent jurisdiction preferable to that subordination; and it is evident that it has at least the merit of reconciling an indefi-

nite constitutional power of taxation in the Federal government with an adequate and independent power in the States to provide for their own necessities." p. 209. On such assurances could it possibly be thought that the States were so subordinate that their activities could be taxed by the federal government?

In *M'Culloch* v. *Maryland,* 4 Wheat. 316, the Court held unconstitutional a state tax on notes of the Bank of the United States. The statement of Chief Justice Marshall (pp. 429–430) is adequate to sustain the case for the reciprocal immunity of the state and federal governments:

"If we measure the power of taxation residing in a State, by the extent of sovereignty which the people of a single State possess, and can confer on its government, we have an intelligible standard, applicable to every case to which the power may be applied. We have a principle which leaves the power of taxing the people and property of a State unimpaired; which leaves to a State the command of all its resources, and which places beyond its reach, all those powers which are conferred by the people of the United States on the government of the Union, and all those means which are given for the purpose of carrying those powers into execution. We have a principle which is safe for the States, and safe for the Union. We are relieved, as we ought to be, from clashing sovereignty; from interfering powers; from a repugnancy between a right in one government to pull down what there is an acknowledged right in another to build up; from the incompatibility of a right in one government to destroy what there is a right in another to preserve. We are not driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power."

IV

Those who agreed with *South Carolina* v. *United States* had the fear that an expanding program of state activity would dry up sources of federal revenues and thus cripple the national government. 199 U. S. pp. 454–455. That was in 1905.[4] That fear is expressed again today when we have the federal income tax, from which employees of the States may not claim exemption on constitutional grounds. *Helvering* v. *Gerhardt, supra.* The fear of depriving the national government of revenue if the tax immunity of the States is sustained has no more place in the present decision than the spectre of socialism, the fear of which, said Holmes, "was translated into doctrines that had no proper place in the Constitution or the common law." [5]

There is no showing whatsoever that an expanding field of state activity even faintly promises to cripple the federal government in its search for needed revenues. If the truth were known, I suspect it would show that the activity of the States in the fields of housing, public power and the like have increased the level of income of the people and have raised the standards of marginal or sub-marginal groups. Such conditions affect favorably, not adversely, the tax potential of the federal government.

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[4] As the Solicitor General of New York points out, in the year when *South Carolina* v. *United States* was decided over one-fourth of the entire annual income of the federal government was derived from taxes on spirits and fermented liquors. See Annual Report, Secretary of the Treasury (1905), pp. 7, 26.

[5] Holmes, Collected Legal Papers (1921) p. 295.

Counsel for Parties.

KIRBY PETROLEUM CO. *v.* COMMISSIONER OF INTERNAL REVENUE.

NO. 56. CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.*

Argued November 6, 1945.—Decided January 28, 1946.

A taxpayer owning fee simple title to certain lands leased the lands for the production of oil, gas and other minerals for a cash bonus, a royalty in the usual form and a share of the net profits realized by the lessees from their operations under the lease. *Held:*

1. The taxpayer is entitled to deduct the depletion allowance permitted under §§ 23 (m) and 114 (b) (3) of the Internal Revenue Code from his share of the net profits from the oil extracted from the leased lands, as well as from the income derived from bonuses and royalties. Pp. 600, 607.

2. Since the "net profit" payments flow directly from the lessor's economic interest in the oil and partake of the quality of rent rather than of a sale price, the capital investment of the lessor is reduced by the extraction of the oil and the lessor is entitled to depletion. *Helvering* v. *O'Donnell,* 303 U. S. 370; *Helvering* v. *Elbe Oil Land Development Co.,* 303 U. S. 372, and *Anderson* v. *Helvering,* 310 U. S. 404, differentiated. Pp. 605, 606.

3. The lessor's economic interest in the oil is no less when his right is to share a net profit from its sale than when it is to share the gross receipts. P. 604.

148 F. 2d 80, reversed; 148 F. 2d 776, affirmed.

No. 56. CERTIORARI, 325 U. S. 845, to review a judgment reversing a decision of the Tax Court, 2 T. C. 1258.

No. 197. CERTIORARI, *post,* p. 703, to review a judgment affirming a decision of the Tax Court.

Mr. Homer L. Bruce for petitioner in No. 56.

Miss Helen R. Carloss, with whom *Solicitor General McGrath, Assistant Attorney General Samuel O. Clark,*

*Together with No. 197, *Commissioner of Internal Revenue* v. *Crawford,* on certiorari to the Circuit Court of Appeals for the Ninth Circuit, argued November 6, 7, 1945.

Jr., Messrs. Sewall Key and *Hilbert P. Zarky* were on the brief, for the Commissioner.

Mr. Sidney D. Krystal, with whom *Mr. Oscar Moss* was on the brief, for respondent in No. 197.

Messrs. Cullen R. Liskow and *Norman F. Anderson* filed a brief in No. 56, as *amici curiae,* urging reversal.

MR. JUSTICE REED delivered the opinion of the Court.

The writ of certiorari in *Kirby Petroleum Co.* v. *Commissioner* brings here for review the judgment of the Circuit Court of Appeals for the Fifth Circuit, 148 F. 2d 80, reversing the decision of the Tax Court, 2 T. C. 1258, which had sustained the taxpayer's position. The narrow issue is the deductibility under Sections 23 (m) and 114 (b) (3)[1] of the Internal Revenue Code of the depletion

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[1] Internal Revenue Code:

"SEC. 23. Deductions from Gross Income.

"In computing net income there shall be allowed as deductions:

. . . . . .

"(m) DEPLETION.—In the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case; such reasonable allowance in all cases to be made under rules and regulations to be prescribed by the Commissioner, with the approval of the Secretary. . . . In the case of leases the deductions shall be equitably apportioned between the lessor and lessee. . . ."

"SEC. 114. Basis for Depreciation and Depletion.

. . . . . .

"(b) BASIS FOR DEPLETION.—

. . . . . .

"(3) PERCENTAGE DEPLETION FOR OIL AND GAS WELLS.—In the case of oil and gas wells the allowance for depletion under section 23 (m) shall be 27½ per centum of the gross income from the property during the taxable year, excluding from such gross income an amount equal to any rents or royalties paid or incurred by the taxpayer in respect of the property. . . ."

allowance of 27½ per centum of gross income from the property during the taxable year, permitted by those sections from the taxpayer's gross income for 1940 from certain oil leases.

The taxpayer owned the fee simple title to certain Texas lands, except for a minor mineral interest which is not here involved. It leased the lands to two companies for the production of oil, gas and other minerals for a cash bonus, a royalty in the usual form and an agreement, executed contemporaneously with the lease and as part consideration therefor, that the taxpayer should receive twenty per cent of the net money profits realized by the lessees from their operations under the lease.

The same narrow issue is in *Commissioner* v. *Crawford.* In this latter case, the taxpayer owned an interest in fee in certain real estate in California. She, together with her co-owners, entered into several leases for portions of the property for the production of oil, gas and other minerals. For an understanding of the issues here presented, it is unnecessary to analyze the leases further than to say that they were given in consideration of bonuses, royalties in the usual form and additional payments from the net profits of the operation.[2] The Commissioner assessed a deficiency because of the denial of a claimed depletion allowance for 1938, 1939 and 1940. The Tax Court supported the taxpayer's position. The Circuit Court of Appeals affirmed. 148 F. 2d 776.

In both cases, the Commissioner concedes that the depletion allowance of §§ 23 (m) and 114 (b) (3) is appli-

[2] The following clause of one lease will illustrate the type of arrangement which produced the additional payments:

"When, and as soon as the 'Income Credits' of said account shall exceed the 'Operating Charges' of the Lessee, the Lessor shall be entitled to a secondary and additional royalty, the amount thereof to be one-half of such difference between the 'Operating Charges' and 'Income Credits' of said account." The leases defined methods of computation.

cable to the bonuses and royalties.[3] The statutory provisions are identical for all years. The 27½ per centum allowed by § 114 (b) (3) was therefore properly deducted by the taxpayers from these bonuses and royalties. In each of these years there was also income to these taxpayers from the lease provisions for the lessors to share in the net profits from the oil extracted from the leased lands. The taxpayers claim the right to deduct the 27½ per cent depletion from these receipts also. These are the deductions which the Commissioner disallowed. On account of the conflicting decisions of the Circuits in these cases on the point, certiorari was granted by us. 325 U. S. 845; 326 U. S. 703.

The present provisions for depletion allowances have been worked out so as to give the holder of an economic interest in the oil or other natural resource an allowance for depletion.[4] While there are income incidents to the utilization of natural resources, there is also an obvious exhaustion of the capital used to produce the income. In theory the aggregate sum allowed for depletion would equal the value of the natural resource at the time of its

[3] *Burnet* v. *Harmel*, 287 U. S. 103, 111; *Palmer* v. *Bender*, 287 U. S. 551, 557. See *Anderson* v. *Helvering*, 310 U. S. 404, 409.

[4] Treasury Regulations 103, § 19.23 (m)–1, as amended by T. D. 5413, 1944 Cum. Bull. 124, 129:

"Under such provisions, the owner of an economic interest in mineral deposits or standing timber is allowed annual depletion deductions. An economic interest is possessed in every case in which the taxpayer has acquired, by investment, any interest in mineral in place or standing timber and secures, by any form of legal relationship, income derived from the severance and sale of the mineral or timber, to which he must look for a return of his capital. But a person who has no capital investment in the mineral deposit or standing timber does not possess an economic interest merely because, through a contractual relation to the owner, he possesses a mere economic advantage derived from production. Thus, an agreement between the owner of an economic interest and another entitling the latter to purchase the product upon production or to share in the net income derived from the interest of such owner does not convey a depletable economic interest."

acquisition by the taxpayer, so that at the exhaustion of the resource the taxpayer would have recovered through depletion exactly his investment. The administrative difficulties in taxation of oil and gas production in view of the uncertainties of quantities and time of acquisition, that is at the purchase of the property or at the discovery of oil or gas, finally have brought Congress to the arbitrary allowance of 27½ per cent now embodied in § 114 (b) (3).[5] Thus, the 27½ per cent is appropriated by the statute to the restoration of the taxpayer's capital and the rest of the proceeds of the natural asset becomes gross income. *Anderson* v. *Helvering,* 310 U. S. 404, 407–8. It follows from this theory that only a taxpayer with an economic interest in the asset, here the oil, is entitled to the depletion. *Palmer* v. *Bender,* 287 U. S. 551, 557; *Thomas* v. *Perkins,* 301 U. S. 655, 659. By this is meant only that under his contract he must look to the oil in place as the source of the return of his capital investment. The technical title to the oil in place is not important. Title in a case of a lease may depend upon the law of the state in which the deposit lies. *Burnet* v. *Harmel,* 287 U. S. 103, 109–10. The test of the right to depletion is whether the taxpayer has a capital investment in the oil in place which is necessarily reduced as the oil is extracted. See *Anderson* v. *Helvering,* 310 U. S. 404, 407.

The taxpayers here involved were lessors. Under the leases and our previous decisions, these taxpayers had an economic interest, a capital investment, in so much of the extracted oil as was used by the lessee to pay to the taxpayers the royalties and bonuses. See note 3, *supra.* The taxpayer lessors were entitled to the depletion allowance on these royalties and bonuses whether they were paid to them in oil or cash, the proceeds of the oil. *Helvering* v. *Twin Bell Oil Syndicate,* 293 U. S. 312, 321.

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[5] For the background of the present provisions, see *Helvering* v. *Twin Bell Oil Syndicate,* 293 U. S. 312.

If the additional payment in these leases had been a portion of the gross receipts from the sale of the oil extracted by the lessees instead of a portion of the net profits, there would have been no doubt as to the economic interest of the lessors in such oil. This would be an oil royalty. The lessors' economic interest in the oil is no less when their right is to share a net profit. As in *Thomas* v. *Perkins*, 301 U. S. 655, their only source of payment is from the net profit which the oil produces. In both situations the lessors' possibility of return depends upon oil extraction and ends with the exhaustion of the supply. Economic interest does not mean title to the oil in place but the possibility of profit from that economic interest dependent solely upon the extraction and sale of the oil.[6]

The depletion allowance, in the aggregate, is always the same amount, 27½ per centum of the "gross income from the property."[7] "In the case of leases the deductions shall be equitably apportioned between the lessor and lessee." § 23 (m). An equitable apportionment is obtained by excluding from the lessee's gross income from oil or gas produced from the property, *Helvering* v. *Twin Bell Oil Syndicate, supra,* 321, "an amount equal to any rents or royalties paid or incurred by the taxpayer in respect of the property." § 114 (b) (3).[8] Such deductions become the gross income of the lessor. We think these taxpayers had an economic interest in the oil, sufficient to support depletion on the sums received as net profit.

If we assume that the only payment for the privilege of oil extraction made to the taxpayer lessors by the lessees

[6] While the reservation of royalties shows an economic interest in the oil necessary for the satisfaction of the royalties, such reservation would not show an economic interest in oil not necessary for the payment of the royalties. But see *Estate of Japhet,* 3 T. C. 86.

[7] § 114 (b) (3). The gross income refers only to oil and gas. *Helvering* v. *Twin Bell Oil Syndicate,* 293 U. S. 312, 320–21; *Anderson* v. *Helvering,* 310 U. S. 404, 408.

[8] See *Helvering* v. *Twin Bell Oil Syndicate,* 293 U. S. 312, 322.

was the portion of "net income" paid under the leases, it would be clear that such payment of "net income" would taxwise be rent or royalty paid by the lessees for the privilege of extraction. Since § 114 (b) (3) would require the lessees to deduct this rent or royalty from their gross incomes from the sale of oil from the property before taking the lessees' depletion, a gross receipt from oil sold, equal to the amount of the "net income" paid to the taxpayer lessors, would not be subject to depletion, unless the taxpayer lessors are permitted to apply depletion to this payment. This would be contrary to the purpose of the depletion statute, which is to allow to the lessor and lessee together a depletion of 27½ per cent of the gross sale price of the oil. On the other hand if depletion on the "net income" payments is allowed to the lessors, the lessees are allowed depletion on the gross income from oil sales less the net income payment and the entire allowable depletion is allocated between the lessors and lessees.

Reference is made to a sentence in *Anderson* v. *Helvering*, 310 U. S. 404, 409, as indicating that this Court had determined that "net profit" payments were not subject to depletion. It reads as follows:

"A share in the net profits derived from development and operation, on the contrary, does not entitle the holder of such interest to a depletion allowance even though continued production is essential to the realization of such profits."

The *Anderson* case involved the taxability to the oil operator of the gross proceeds of the oil, which his contract for the purchase of the oil property required him to turn over to the seller as a means of satisfying a deferred payment for the property. As the deferred payment also had to be satisfied out of any sale of the fee simple title to the land, we held the operator liable as a purchaser because the seller was not "entirely dependent"

upon the oil production for his purchase price. This gave the operator the benefit of the applicable depletion. Page 413. Only the reservation of an interest in the fee differentiated the *Anderson* case from *Thomas* v. *Perkins*, 301 U. S. 655, where deferred payment in oil or its proceeds, payable only from production, was held subject to depletion when paid to the assignors.

The part just quoted from the *Anderson* case occurs in setting out the series of cases dealing with depletion. No net income was involved in the *Anderson* case. The statement was supported by the citation of *Helvering* v. *O'Donnell*, 303 U. S. 370, and *Helvering* v. *Elbe Oil Land Co.*, 303 U. S. 372. In the *O'Donnell* case, the taxpayer, who received the "net income" from an oil operation, was a stranger to the lease, who had contracted for a share of its net profits as consideration for his stock in a corporation which was the owner of the lease. "The question is whether respondent had an interest, that is, a capital investment, in the oil and gas in place. . . . As a mere owner of shares in the San Gabriel Company, respondent had no such interest." Page 371. In the *Elbe Oil Land* case, there was a specific provision that consideration other than the "net profit" payment should result in "full ownership" to the buyer. The transaction which included the clause for "net profit" was a sale of all the right, title and interest in the property, which consisted of tangible personalty and drilling permits, agreements, and leases. This Court said the additional payment of a share of net profits did not qualify "in any way the effect of the transaction as an absolute sale." Page 375. Thus the *Anderson* case correctly stated that a share in "net profits," disassociated from an economic interest, does not entitle the holder to a depletion allowance. The facts of each transaction must be appraised to determine whether the transferor has made an absolute sale or has retained an economic interest—a capital investment.

In our view, the "net profit" payments in these cases flow directly from the taxpayers' economic interest in the oil and partake of the quality of rent rather than of a sale price. Therefore, the capital investment of the lessors is reduced by the extraction of the oil and the lessors should have depletion.

No. 56 is reversed.
No. 197 is affirmed.

MR. JUSTICE JACKSON took no part in the consideration or decision of these cases.

MR. JUSTICE DOUGLAS dissents.

BOLLENBACH *v.* UNITED STATES.

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

No. 41. Argued October 12, 15, 1945.—Decided January 28, 1946.

1. In a prosecution for conspiracy to commit an offense under the National Stolen Property Act, an instruction to the jury that the possession of property shortly after it had been stolen in another State created a presumption that the possessor had transported the property in interstate commerce constituted reversible error. Pp. 609, 611, 613.
2. The manifest misdirection in the circumstances of this case can not be treated as a "technical error" not affecting the defendant's substantial rights. P. 614.
3. Under the Criminal Code, one who aids or abets the commission of a federal offense is punishable as a principal; the offense of an accessory after the fact is distinct and differently punishable. P. 611.
4. A conviction ought not to rest on an equivocal direction to the jury on a basic issue. P. 613.
5. Upon review of a conviction in the federal courts, the question is not whether guilt may be spelt out of the record, but whether guilt has been found by the jury according to the procedure and standards appropriate for criminal trials in the federal courts. P. 614.

6. In view of the important place of trial by jury in the Bill of Rights, Congress will not be deemed to have intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be. P. 615.

147 F. 2d 199, reversed.

CERTIORARI, 324 U. S. 837, to review the affirmance of a conviction of conspiracy to commit an offense under the National Stolen Property Act.

Mr. Bernard Hershkopf, with whom *Mr. Henry G. Singer* was on the brief, for petitioner.

Mr. W. Marvin Smith, with whom *Acting Solicitor General Judson* and *Mr. Leon Ulman* were on the brief, for the United States.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

The petitioner was convicted of conspiring to violate the National Stolen Property Act. The Circuit Court of Appeals for the Second Circuit sustained the conviction. 147 F. 2d 199. We brought the case here, 324 U. S. 837, because it was submitted to the jury in a way that raised an important question in the administration of federal criminal justice.

The relevant facts upon which decision must turn are these. Bollenbach, the petitioner, and others were indicted upon two counts: for transporting securities in interstate commerce knowing them to have been stolen (48 Stat. 794, 18 U. S. C. § 415; 35 Stat. 1152, 18 U. S. C. § 550) and for conspiring to commit that offense (35 Stat. 1096, 18 U. S. C. § 88). Having been granted a severance, Bollenbach was tried separately. No doubt the securities had been stolen in Minneapolis and were transported to New York. And it is not controverted that Bollenbach helped to dispose of them in New York.

The question is whether he was properly convicted under the indictment. The trial lasted seven days. After the jury had been out seven hours they returned to the court to report that they were "hopelessly deadlocked." Interchanges then ensued between court and jury and between court and counsel. One of the jurors asked "Can any act of conspiracy be performed after the crime is committed?" The trial judge made some unresponsive comments but failed to answer the question. No exception was noted immediately. In a few minutes the jury left, but after twenty minutes again returned for further instructions. Bollenbach's counsel then indicated that the court had left the bench too hurriedly to enable him to except to the judge's failure to answer the question. After an exception was then taken and allowed, the judge "mistakenly replied," as the lower court noted, "that he had already told them that there could be no conspiracy after the object of the conspiracy had been attained."

After indulging in further colloquy with counsel, not here pertinent, the judge stated that he had this note of inquiry from the jury: "If the defendant were aware that the bonds which he aided in disposing of were stolen does that knowledge make him guilty on the second count." In answer the judge instructed the jury as follows: "Of course if it occurred afterwards it would not make him guilty, but in that connection I say to you that if the possession was shortly after the bonds were stolen, after the theft, it is sufficient to justify the conclusion by you jurors of knowledge by the possessor that the property was stolen. And, just a moment—I further charge you that possession of stolen property in another State than that in which it was stolen shortly after the theft raises a presumption that the possessor was the thief and transported stolen property in interstate commerce, but that such presumption is subject to explanation and must be considered with all the testimony in the case." Counsel for the accused excepted to this charge, but the judge cut short an attempted re-

quest by counsel with the remark, "You may except to the charge, but I will not take any requests." The jury filed out and returned five minutes later with a verdict of guilty on the second—the conspiracy—count. A sentence of two years and a fine of $10,000 were imposed. The Circuit Court of Appeals reversed the judgment and ordered a new trial. It found error in the charge just quoted. "Certainly it is untenable to say," was the crux of its holding, "that the possession of stolen goods raises any presumption that they have in fact been transported in interstate commerce." 147 F. 2d 199, 202. And it held that it could not disregard the error because of the questionable evidence as to whether the accused knew that the bonds had come from another State. But on rehearing the court's attention was called to the fact that, after his arrest, the accused admitted that he knew that the bonds had come from the West and that he may have had that knowledge before he disposed of them. On further consideration of the bearing of this evidence upon the defendant's knowledge of the place of the theft, the Circuit Court of Appeals changed its view and held that "it would be altogether unwarranted to reverse the judgment because of the mistake in the charge." 147 F. 2d at 202.

That court evidently felt free to disregard "the mistake in the charge" only on its assumption that Bollenbach could be convicted under this indictment as an accessory after the fact. But Bollenbach was neither charged nor tried nor convicted as an accessory after the fact. The Government did not invoke that theory in the two lower courts and disavows it here. And rightly so. The receipt of stolen securities after their transportation across State lines was not a federal crime at the time of the transactions in question, and we need not consider the scope of a later amendment making it so. See Act of August 3, 1939, 53 Stat. 1178, 18 U. S. C. § 416; H. R. Rep. 422, 76th Cong., 1st Sess. (1939); and S. Rep. 674,

76th Cong., 1st Sess. (1939). Bollenbach could not properly be convicted for the offense for which he was charged and for which he was convicted, namely, for having conspired to transport securities across State lines merely on proof that he was a "fence," *i. e.,* helped to dispose of the stolen securities after the interstate transportation was concluded. While § 332 of the Criminal Code, *supra,* made aiders and abettors of an offense principals, Congress has not made accessories after the fact principals. Their offense is distinct and is differently punished. (§ 333 of the Criminal Code, 35 Stat. 1152, 18 U. S. C. § 551.)

We are therefore thrown back upon an appraisal of what the Circuit Court of Appeals deemed a mistaken charge in the proper setting of this case.

The Government does not defend the "presumption" as a fair summary of experience. It offends reason, so the Government admits, as much as did the presumption which was found unsupportable in *Tot* v. *United States,* 319 U. S. 463, even though that was embodied in an Act of Congress. Instead, the Government in effect asks us to pay no attention to this palpably erroneous answer by the judge to the jury's inquiry as to guilt on the charge of conspiracy to transport stolen securities "If the defendant were aware that the bonds which he aided in disposing of were stolen." We can pay no attention to this misdirection only by assuming that the jury paid no attention to it and that the case is before us as though no misdirection had been given. To do so is to disregard the significance of the course of events, as revealed by the record, after the case went to the jury.

The Government suggests that the judge's misconceived "presumption" was "just what it appears to be—a quite cursory, last minute, instruction on the question of the necessity of knowledge as to the stolen character of the notes—and nothing more." But precisely because it was a

"last minute instruction" the duty of special care was indicated in replying to a written request for further light on a vital issue by a jury whose foreman reported that they were "hopelessly deadlocked" after they had been out seven hours. "In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law." *Quercia* v. *United States,* 289 U. S. 466, 469. "The influence of the trial judge on the jury is necessarily and properly of great weight," *Starr* v. *United States,* 153 U. S. 614, 626, and jurors are ever watchful of the words that fall from him. Particularly in a criminal trial, the judge's last word is apt to be the decisive word. If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptionable and unilluminating abstract charge.

An experienced trial judge should have realized that such a long wrangle in the jury room as occurred in this case would leave the jury in a state of frayed nerves and fatigued attention, with the desire to go home and escape overnight detention, particularly in view of a plain hint from the judge that a verdict ought to be forthcoming. The jury was obviously in doubt as to Bollenbach's participation in the theft of the securities in Minneapolis and their transportation to New York. The jury's questions, and particularly the last written inquiry in reply to which the untenable "presumption" was given, clearly indicated that the jurors were confused concerning the relation of knowingly disposing of stolen securities after their interstate journey had ended to the charge of conspiring to transport such securities. Discharge of the jury's responsibility for drawing appropriate conclusions from the testimony depended on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria. When a jury makes explicit its difficulties a trial judge should clear them

away with concrete accuracy. In any event, therefore, the trial judge had no business to be "quite cursory" in the circumstances in which the jury here asked for supplemental instruction. But he was not even "cursorily" accurate. He was simply wrong.

The Circuit Court of Appeals read the judge's charge to mean that the jury was permitted to find Bollenbach "guilty of a conspiracy to transport stolen notes if he joined in their disposal after the transportation had ended." We so read it. That court, as we have seen, properly rejected the propriety of leaving the case to the jury as the trial judge had left it, but sustained the conviction on its own accessory-after-the-fact theory. Compelled to repudiate this theory, the Government now seeks to sustain the conviction on the afterthought that the charge did not mean what it said, and that, while the jury asked one question, the trial judge replied to another. Here then are three different and conflicting theories regarding a charge designed to guide the jury in determining guilt, and yet we are asked to sustain the conviction on the assumption that the jury was properly guided. The Government contends that the court below failed to appreciate several factors in regard to the criticized charge. What reason is there for assuming that the jury did not also fail to appreciate these factors which the Government, in an elaborate argument, explains as requisite for a proper understanding of that which at best was dubiously expressed? A conviction ought not to rest on an equivocal direction to the jury on a basic issue. And a charge deemed erroneous by three circuit judges of long experience and who have a sturdy view of criminal justice is certainly not better than equivocal. The Government's suggestion really implies that, although it is the judge's special business to guide the jury by appropriate legal criteria through the maze of facts before it, we can say that the lay jury will know enough to disregard the judge's

bad law if in fact he misguides them. To do so would transfer to the jury the judge's function in giving the law and transfer to the appellate court the jury's function of measuring the evidence by appropriate legal yardsticks.

The Government argues that the sting of error is extracted because there was proof, other than the erroneous "presumption," on the issue of Bollenbach's participation in the wrongdoing before the transportation of the stolen securities had ended. This is to disregard the vital fact that for seven hours the jury was unable to find guilt in the light of the main charge, but reached a verdict of guilty under the conspiracy count five minutes after their inquiry was answered by an untenable legal proposition. It would indeed be a long jump at guessing to be confident that the jury did not rely on the erroneous "presumption" given them as a guide. A charge should not be misleading. See *Agnew* v. *United States,* 165 U. S. 36, 52. Legal presumptions involve subtle conceptions to which not even judges always bring clear understanding. See Thayer, *Preliminary Treatise on Evidence* (1898) Chaps. 8 and 9; Wigmore, *Evidence* (3d ed., 1940) §§ 2490–2540; Morgan, *Some Observations Concerning Presumptions* (1931) 44 Harv. L. Rev. 906; Denning, *Presumptions and Burdens* (1945) 61 L. Q. Rev. 379. In view of the Government's insistence that there is abundant evidence to indicate that Bollenbach was implicated in the criminal enterprise from the beginning, it may not be amiss to remind that the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts.

Accordingly, we cannot treat the manifest misdirection in the circumstances of this case as one of those "technical errors" which "do not affect the substantial rights of the parties" and must therefore be disregarded. 40 Stat. 1181, 28 U. S. C. § 391. All law is technical if viewed solely from concern for punishing crime without heeding the mode by

which it is accomplished. The "technical errors" against which Congress protected jury verdicts are of the kind which led some judges to trivialize law by giving all legal prescriptions equal potency. See Taft, *Administration of Criminal Law* (1905) 15 Yale L. J. 1, 15. Deviations from formal correctness do not touch the substance of the standards by which guilt is determined in our courts, and it is these that Congress rendered harmless. *Bruno* v. *United States,* 308 U. S. 287, 293–94; *Weiler* v. *United States,* 323 U. S. 606, 611.[1] From presuming too often all errors to be "prejudicial," the judicial pendulum need not swing to presuming all errors to be "harmless" if only the appellate court is left without doubt that one who claims its corrective process is, after all, guilty. In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be.

Judgment reversed.

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

MR. JUSTICE BLACK, dissenting.

Tot v. *United States,* 319 U. S. 463, held that the mere possession of a pistol coupled with conviction for a prior

[1] Compare the applications by the English courts of a similar provision in the Criminal Appeal Act, 1907: *Maxwell* v. *Director of Public Prosecutions,* [1935] A. C. 309; *Rex* v. *Leckey,* [1944] 1 K. B. 80; *Rex* v. *Slender,* 26 Crim. App. Rep. 155 (1938); *Rex* v. *Redd,* [1923] 1 K. B. 104; *Rex* v. *Watson,* [1916] 2 K. B. 385; *Rex* v. *Ahlers,* [1915] 1 K. B. 616; *Rex* v. *Thompson,* [1914] 2 K. B. 99; *Rex* v. *Edwards,* [1913] 1 K. B. 287; *Rex* v. *Rodley,* [1913] 3 K. B. 468; *Rex* v. *Ellis,* [1910] 2 K. B. 746; *Rex* v. *Dyson,* [1908] 2 K. B. 454; *cf. Bray* v.

crime was not evidence proving that the pistol had been shipped or transported in interstate commerce. I agree with the government's contention that the trial court's charge in this case does not conflict with the *Tot* holding. For the trial court did not charge the jury that interstate transportation of the stolen securities could be inferred from their mere possession in New York. In fact, the undisputed evidence showed that the securities, stolen in Minnesota, turned up in the petitioner's possession in New York very shortly after the theft. No evidence was offered to explain this possession of the stolen goods. Under these circumstances the trial judge rightly charged the jury that the unexplained possession of stolen property shortly after the theft was sufficient to justify a finding that the petitioner not only knew that the bonds were stolen but that he was the thief. Such seems to have been the established rule of law since time immemorial.[1]

Never until today has this Court cast any doubt on the existence or soundness of the rule. In fact it has recognized or expressly approved it as proper in cases involving larceny, *Dunlop* v. *United States,* 165 U. S. 486, 502; burglary, *McNamara* v. *Henkel,* 226 U. S. 520, 524–525; arson, *Wilson* v. *United States,* 162 U. S. 613, 617, 619, 620; and even murder, *ibid.* And in the *Wilson* case, *supra,* this Court approved a charge by the trial court using substantially the same language as to "presumption," which the trial court here used.[2] There is no reason which I can

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Ford, [1896] A. C. 44. And see *Makin* v. *Attorney General,* [1894] A. C. 57, construing a similar provision in the Criminal Law (Amendment) Act, 1883.

[1] See the cases collected in notes on *Hunt* v. *Commonwealth,* 70 Am. Dec. 443, 447–452; *State* v. *Drew,* 101 Am. St. Rep. 474, 481–524.

[2] The court's charge here condemned was that unexplained possession "raised a presumption." It may be, although I am not sure, that the condemnation rests on the use of the word "presumption" instead of "inference." And it is true that fine-spun refinements have been invented in efforts to distinguish "presumptions" from "infer-

conceive, and the Court offers none, why the sensible and long-established rule should be appropriate in all kinds of cases except the one before us. Certainly evidence of the theft of the bonds and their transport in interstate commerce with knowledge of the theft, was relevant on both counts of the indictment, the first charging the theft and transportation, and the second charging conspiracy to commit the crime. And these relevant facts were capable of proof by circumstantial evidence to the same extent as to each count. The "unexplained possession" rule is in substance a circumstantial evidence rule. The experience of ages has justly given this particular type of circumstantial evidence a high value. In my opinion the trial court's charge insofar as it stated that unexplained possession of the stolen bonds raised a "presumption" that

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ences," cf. *New York Life Ins. Co.* v. *Gamer,* 303 U. S. 161, 175–177. But I am sure that this jury was not familiar with the dialectics which sought without success to deliver these metaphysical distinctions from foetal darkness. And the notes already cited, as well as many cases, have shown that no such practical distinction exists. See e. g. *United States* v. *Di Carlo,* 64 F. 2d 15, 17; *United States* v. *Seeman,* 115 F. 2d 371, 374. That the trial judge treated a "presumption" as an inference, just as any juror would, is shown by an earlier part of his charge as follows: "It is the law that the unexplained possession of stolen property shortly after the theft is sufficient to justify the conclusion by a jury of knowledge by the possessor that the property was stolen." And it is interesting to note that this Court said in the *Wilson* case, *supra,* at 619–620, that "In *Rickman's case,* 2 East P. C. 1035, cited, it was held that on an indictment for arson, proof that property was in the house at the time it was burned, and was soon afterwards found in the possession of the prisoner, raises a probable *presumption* that he was present and concerned in the offence; and in *Rex* v. *Diggles,* (Wills Cir. Ev. *53,) that there is a like *presumption* in the case of murder accompanied by robbery. Proof that defendant had in his possession, soon after, articles apparently taken from the deceased at the time of his death is always admissible, and the fact, with its legitimate *inference,* is to be considered by the jury along with the other facts in the case in arriving at their verdict." (Italics supplied.)

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petitioner was the thief, was a correct statement of law under our former decisions. The Court's opinion does not explicitly repudiate this part of the trial judge's instruction but it seems to me that such repudiation is implicit in the Court's reasoning.

There is some indication in the Court's opinion that it thought the entire answer to the jury's question erroneous because it was misleading. The only reason, I can imagine, why the Court's answer, stating this well-established rule, could be thought misleading, is that the answer was in response to a question on the conspiracy count. Thus the Court may be saying that the jury might have believed from the trial court's instructions that unexplained possession is not only proof that petitioner was the thief but also is in and of itself proof that he was a conspirator. In view of the fact that the judge previously fully instructed the jury on conspiracy, I do not think it either possible or probable that the jury was misled in the way indicated. But my objection is chiefly to the Court's repudiation, either partial, or complete, of a rule which permits courts and juries to draw perfectly justifiable inferences from proven facts.

Nor do I think the trial judge was wrong in instructing the jury that the unexplained possession in New York of the securities recently stolen in Minnesota justified an inference that the petitioner had transported them in interstate commerce. If this possession in New York justified an inference that he had stolen the securities in Minnesota, I fail to see why it does not also justify the inference that he carried them to New York. Can it be said that there is a presumption that he stole them in Minnesota and then passed out of the picture while the stolen goods were carried to New York, and that the jury was compelled to attribute his possession in New York to something as indefinite as an "Act of God or the public enemy"? The very presumption of theft has to carry with it the presumption of transportation. Thieves do not remain at the scene of their

crime. The classical definition of larceny contains the phrase "a felonious taking and carrying away."

The Bill of Rights is improperly invoked to support the Court's holding in this case. It contemplates that a defendant shall have a fair trial, but it does not command that juries shall be denied the right to draw the kind of inferences from admitted facts that all people of reasonable understanding would draw. I assume that if these bonds had been stolen in Minneapolis, Minnesota, at 6 A. M., and this petitioner had turned up with them just outside the New York airport at 12 o'clock noon of the same day, a reasonable person could not only infer that he had stolen them, but also that he had transported them. The only difference between drawing an inference of transportation in that case and the one before us is that the inference of transportation here might not be quite so overpowering. But it is none the less a reasonable one.

The trial judge's oral charge to the jury was clear, fair, correct, and unchallenged. I disagree with the Court's censure of his additional instructions.[3] The jury's verdict, given after a fair trial, was supported, if not compelled, by the evidence. It is, in my judgment, a disservice to the administration of criminal law to reverse this case.

[3] This Court reads the trial judge's charge to mean that Bollenbach was "guilty of a conspiracy to transport stolen notes if he joined in their disposal *after the transportation had ended*." The trial judge actually charged the jury thus: "If the participation of this defendant in this was *subsequent*, that is, that he did not know that they were transported, that is, if he did not transport them or cause them to be transported himself, of course there would be no offense. That is, if the bonds arrived in New York and he had nothing to do with transporting or causing them to be transported there would be no offense." Later the jury asked the judge this question: "If the defendant were aware that the bonds which he aided in disposing of were stolen does that knowledge make him guilty on the second count?" The judge's reply so far as relevant to this particular question was: "Of course if it occurred *afterwards* it would not make him guilty . . ." Not one word and not one intimation have I been able to discover in the instructions to the jury to the effect that Bollenbach could be convicted if he had done no more than join in disposal of the bonds *after* their transportation had ended.

TOWNSHIP OF HILLSBOROUGH ET AL. *v.* CROMWELL.

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

No. 305. Argued December 13, 14, 1945.—Decided January 28, 1946.

1. Under the Declaratory Judgment Act, Judicial Code § 274 (d), a federal district court has jurisdiction to entertain a suit for the purpose of determining the validity of a state tax assessment under the due process and equal protection clauses of the Fourteenth Amendment, where the constitutional rights of the complainant can not be protected adequately by proceedings in the state courts. *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U. S. 293, differentiated. Pp. 622–624.
2. Where a taxpayer who has been singled out for discriminatory taxation may not obtain equalization under the state law by reduction of his own assessment but is restricted to proceedings against other members of his class for the purpose of having their taxes increased, the state remedy is not adequate to protect his rights under the Fourteenth Amendment. P. 623.
3. A taxpayer brought suit in a federal district court for a declaratory judgment to determine the validity of a state tax assessment under the due process and equal protection clauses of the Fourteenth Amendment. There was uncertainty concerning the meaning of the local law. He could have appealed originally to the state board of tax appeals, but that board had no right to pass on constitutional questions. Its judgments could be reviewed by the state supreme court by certiorari, but the allowance of such a writ was discretionary. The refusal of a writ of certiorari by the state supreme court could not be judicially reviewed by the state court of errors and appeals. When the district court ruled on a motion to dismiss, the time for appeal to the state board of tax appeals had expired. When the district court rendered judgment, there had been a recent authoritative interpretation of the local law by the state court. *Held:*

   (a) There was such uncertainty surrounding the adequacy of the state remedy as to justify the federal district court in retaining jurisdiction of the cause. P. 625.

   (b) It was proper for the federal district court to proceed to decide the case on its merits, even though the decision was not on federal grounds but on the ground that the assessment was not in

conformity with the state statute. *Spector Motor Co.* v. *McLaughlin,* 323 U. S. 101, differentiated. Pp. 626–629.

4. This Court is unable to say that the district court and the circuit court of appeals erred in applying to this case the rule of *Duke Power Co.* v. *State Board,* 129 N. J. L. 449, 131 N. J. L. 275, which involved closely analogous facts. P. 629.

149 F. 2d 617, affirmed.

CERTIORARI, *post,* p. 704, to review affirmance of a judgment of a district court, 56 F. Supp. 41, denying a motion to dismiss and declaring certain state tax assessments to be null and void.

Mr. Harry E. Walburg, with whom *Mr. Samuel I. Kessler* was on the brief, for petitioners.

Messrs. Charles E. Hughes, Jr. and *Shelton Pitney,* with whom *Mr. William J. Brennan, Jr.* was on the brief, for respondent.

Mr. JUSTICE DOUGLAS delivered the opinion of the Court.

This action was brought by respondent under the Declaratory Judgment Act, Judicial Code, § 274 (d), 28 U. S. C. § 400, to have declared null and void certain assessments on intangible personal property entered for the years 1940 and 1941 by the Collector of Hillsborough Township, Somerset County, New Jersey.[1] The jurisdiction of the federal court in New Jersey was invoked by

[1] The assessments call for tax payments of nearly $7,000,000 for each year as compared with the Township's budget of something like $97,000 annually. Prior to these assessments the net assessed valuation for taxation of all property assessed, both real and personal, in the Township amounted to $3,117,863 for 1940 and $3,139,020 for 1941. The resulting tax rate was 3.12 per cent for 1940 and 3.10 per cent for 1941. The additional assessments against respondent apparently would have increased the valuation of the township tax ratables by $221,940,438 for each of the two tax years, though it would not have affected the tax rates for those years.

reason of diversity of citizenship and the allegation that the taxing authorities had consistently, systematically and intentionally singled out respondent for discriminatory treatment in the assessment of taxes for which she was without remedy under the laws and decisions of New Jersey. It was prayed that the assessments be declared invalid as in contravention of the due process and equal protection clauses of the Fourteenth Amendment and of the provisions of applicable New Jersey statutes to which we will later refer. The District Court denied a motion to dismiss and gave judgment for respondent. 56 F. Supp. 41. The Circuit Court of Appeals affirmed. 149 F. 2d 617. The case is here on a petition for a writ of certiorari which we granted because the asserted conflict of that decision with *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U. S. 293, raised an important problem concerning the relationship between the federal courts and state taxing authorities.

Sec. 267 of the Judicial Code, 28 U. S. C. § 384, provides that suits in equity shall not be sustained in the federal courts "in any case where a plain, adequate, and complete remedy may be had at law." That principle has long been recognized as having "peculiar force" in cases where the federal courts were asked to enjoin the collection of a state tax. *Matthews* v. *Rodgers*, 284 U. S. 521, 525, and cases cited. "The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it." *Id.*, p. 525. Where the remedy at law is "plain, adequate, and complete," it is the one which must be pursued even for the protection of any federal right. That practice of the federal equity courts was given further recognition and sanc-

tion by Congress in the Johnson Act, 48 Stat. 775, as amended, 50 Stat. 738, § 24 (1) of the Judicial Code, 28 U. S. C. § 41 (1), which provides that "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 efficient remedy may be had at law or in equity in the courts of such State." It was against that background that we held in *Great Lakes Dredge & Dock Co.* v. *Huffman, supra,* that the policy which led federal courts of equity to refrain from enjoining the collection of allegedly unlawful state taxes should likewise govern the exercise of their discretion in withholding relief under the Declaratory Judgment Act.

The Circuit Court of Appeals fully recognized the principle of the *Huffman* case, but concluded that the state procedure was not "speedy, efficient or adequate" to protect the federal right against discriminatory state taxation. It is around that conclusion that the first phase of this controversy turns.

The equal protection clause of the Fourteenth Amendment protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class. The right is the right to equal treatment. He may not complain if equality is achieved by increasing the same taxes of other members of the class to the level of his own. The constitutional requirement, however, is not satisfied if a State does not itself remove the discrimination, but imposes on him against whom the discrimination has been directed the burden of seeking an upward revision of the taxes of other members of the class. *Sioux City Bridge Co.* v. *Dakota County,* 260 U. S. 441, 445–447; *Iowa-Des Moines National Bank* v. *Bennett,* 284 U. S. 239, 247; *Cumberland Coal Co.* v. *Board of Revision,* 284 U. S. 23,

28–29. The courts of New Jersey in a long line of decisions [2] have held that a taxpayer who has been singled out for discriminatory taxation may not obtain equalization by reduction of his own assessment. His remedy is restricted to proceedings against other members of his class for the purpose of having their taxes increased. The rule was stated in *Royal Mfg. Co.* v. *Board of Equalization,* 76 N. J. L. 402, 70 A. 978, aff'd 78 N. J. L. 337, 74 A. 525, as follows: ". . . the county boards are required to secure taxation of all property at its true value; so that the fact that the property of A is assessed at its true value and the property of other taxpayers within the same district is assessed below its true value, affords A no ground for demanding a reduction of his valuation, though it does entitle him to apply for an increase in the valuation of the others." 76 N. J. L. pp. 404–405. On the basis of that rule it is plain that the state remedy is not adequate to protect respondent's rights under the federal Constitution.

It is argued, however, that in 1933 the New Jersey courts adopted a different rule when *Central R. Co.* v. *State Tax Dept.* (*Thayer-Martin*), 112 N. J. L. 5, 169 A. 489, was decided by the Court of Errors and Appeals. In that case the court did entertain an objection that the particular tax assessment violated the rule of *Sioux City Bridge Co.* v. *Dakota County, supra.* It found that the complaining taxpayer had not shown that a discrimination within the meaning of our cases existed. So it is argued that as the highest court in New Jersey recognized the federal rule, the federal District Court should have remitted respondent to her remedy in the New Jersey

[2] *State* v. *Randolph,* 25 N. J. L. 427, 431; *State* v. *Taylor,* 35 N. J. L. 184, 189; *State* v. *Koster,* 38 N. J. L. 308; *State* v. *Segoine,* 53 N. J. L. 339, 340, 21 A. 852, aff'd 54 N. J. L. 212, 25 A. 963; *Central R. Co.* v. *State Board,* 74 N. J. L. 1, 65 A. 244; *Royal Mfg. Co.* v. *Board of Equalization,* 76 N. J. L. 402, 78 N. J. L. 337; *Pennsylvania Coal Co.* v. *Saddle River,* 96 N. J. L. 40, 43, 114 A. 157.

courts. There is, however, a two-fold difficulty with that position.

In the first place, the same judge who wrote the opinion for the Court of Errors and Appeals in the *Thayer-Martin* case wrote the opinion for the Supreme Court of New Jersey a year later in *Lehigh Valley R. Co.* v. *State Board,* 12 N. J. Misc. 673, 174 A. 359. The taxpayer contended that the state board of tax appeals erred in refusing to admit evidence of discrimination. The argument was that the rule of *Sioux City Bridge Co.* v. *Dakota County, supra,* should be followed and the holding of *Royal Mfg. Co.* v. *Board of Equalization, supra,* should be disapproved. The Supreme Court of New Jersey declined to allow a writ of certiorari to review the judgments of the state board of tax appeals. It did not mention the *Thayer-Martin* case, but followed *Royal Mfg. Co.* v. *Board of Equalization, supra,* saying that the New Jersey law on the point was "settled and controlling." 12 N. J. Misc. p. 675. It, therefore, may well be true, as respondent says, that the court in the *Thayer-Martin* case simply decided that the point raised by the taxpayer was not supported by facts and found it unnecessary to consider whether, if systematic discrimination had been shown, New Jersey would have afforded an adequate remedy. In any event, there is such uncertainty concerning the New Jersey remedy as to make it speculative (*Wallace* v. *Hines,* 253 U. S. 66, 68) whether the State affords full protection to the federal rights. In the second place, the state board of tax appeals to which respondent might have appealed concededly has no right to pass on constitutional questions.[3] Its judgments may be reviewed by the New Jersey Supreme Court by certiorari. The allowance of that writ, however, is not a matter

[3] *Duke Power Co.* v. *Hillsborough Township,* 20 N. J. Misc. 240, 243, 26 A. 2d 713 (reversed on another point, 129 N. J. L. 449, 30 A. 2d 416); *Schwartz* v. *Essex County Board,* 129 N. J. L. 129, 132, 28 A. 2d 482, aff'd 130 N. J. L. 177, 32 A. 2d 354.

of right, but purely discretionary.[4] And the refusal of a writ of certiorari by the Supreme Court may not be judicially reviewed by the Court of Errors and Appeals.[5] Accordingly we conclude that there was such uncertainty surrounding the adequacy of the state remedy as to justify the District Court in retaining jurisdiction of the cause. While the charges of discrimination in the complaint were denied, the jurisdiction of the District Court is determined by the allegations of the bill (*Hart* v. *B. F. Keith Vaudeville Exchange,* 262 U. S. 271) which here were substantial.

This brings us to the second phase of the controversy. Neither the District Court nor the Circuit Court of Appeals decided the case on federal grounds. They held in reliance on *Duke Power Co.* v. *State Board,* 129 N. J. L. 449, 30 A. 2d 416, 131 N. J. L. 275, 36 A. 2d 201, that the assessments were invalid under the New Jersey statutes. In that case, as in the present one, property "omitted in the assessment" was attempted to be assessed by the County Board against the taxpayer after April 1st of each of the tax years involved without notice and hearing.[6]

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[4] *Staubach* v. *Cities Service Oil Co.,* 130 N. J. L. 157, 31 A. 2d 804.

[5] *Post* v. *Anderson,* 111 N. J. L. 303, 168 A. 622; *Staubach* v. *Cities Service Oil Co., supra* note 4.

[6] N. J. Rev. Stat. § 54 : 3–20 provides in part, "On the written complaint of the collector, or any taxpayer of the taxing district or of the governing body thereof, that property specified has been omitted in the assessment, the county board, on five days' notice in writing to the owner by the party complaining, and after due examination and hearing, may enter the omitted property on the duplicate by judgment rendered within ten days after the hearing, a transcript whereof shall be furnished by the board to the collector, who shall amend his duplicate accordingly."

A different procedure is provided by § 54 : 3–20 for inclusion of property "omitted by the assessor." For a discussion of the difference between the two types of assessments see *Duke Power Co.* v. *State Board, supra,* 129 N. J. L. pp. 452–455. At p. 455, the court said: "If property in a taxing district is omitted by the assessor it must be added to the assessment before April 1st. Its addition decreases

The assessment was set aside as not being in conformity with the statute. And it was held that the remedial statutes,[7] designed to cure irregularities in assessing or levying taxes, "do not apply where the statute for the addition of property omitted from the assessment is not complied with." 129 N. J. L. p. 457.

Petitioner argues that it is clear from *Duke Power Co.* v. *State Board, supra,* that respondent had a remedy in the state tribunals for failure of petitioner to follow the procedure required by the New Jersey statutes and that the federal court should have required her to pursue it.

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the amount of taxes to be raised since the ratables are thereby increased. The taxpayer is not embarrassed. He knows he will have a tax to pay and is liable anyway even if the property was not included in the assessment. However, if property is added to the assessment after the rate has been fixed it gives rise to a municipal windfall. There is no harm in this if there were due notice and a fair hearing by the County Board and a judicial determination by it."

[7] Sec. 54 : 4–58 provides:

"No tax, assessment or water rate imposed or levied in this state shall be set aside or reversed in any action, suit or proceeding for any irregularity or defect in form, or illegality in assessing, laying or levying any such tax, assessment or water rate, or in the proceeding for its collection if the person against whom or the property upon which it is assessed or laid is, in fact, liable to taxation, assessment or imposition of the water rate, in respect to the purposes for which the tax, assessment or rate is levied, assessed or laid."

Sec. 54 : 4–59 provides:

"The court in which any action, suit or proceeding is or shall be pending to review any such tax, assessment or water rate shall amend all irregularities, errors or defects, and may if necessary ascertain and determine the sum for which the person or property was legally liable and by order or decree fix the amount thereof. The sum so fixed shall be the amount of tax, assessment or water rate for which the person or property shall be liable."

The court in *Duke Power Co.* v. *State Board, supra,* 129 N. J. L. p. 457, stated that "the remedial statutes we do not find to have been a substitute for proper assessment. Their application has been only in instances where property has been omitted by the assessor or has been assessed in the name of one other than the true owner."

We have held that where a federal constitutional question turns on the interpretation of local law and the local law is in doubt, the proper procedure is for the federal court to hold the case until a definite determination of the local law can be made by the state courts. *Railroad Commission* v. *Pullman Co.*, 312 U. S. 496; *Chicago* v. *Fieldcrest Dairies*, 316 U. S. 168; *Spector Motor Co.* v. *McLaughlin*, 323 U. S. 101. The latter case involved a suit in which the constitutionality of a Connecticut tax was challenged. There was uncertainty concerning the meaning of the local law. Under one construction the constitutional issues would fall; and in any event a decision by the state courts would cause the constitutional issues to be formulated in an authoritative rather than a speculative way. But it was clear that there was available a state remedy to which the complainant could resort on the remand of the cause. In the present case it appears that respondent's opportunity to appeal to the State Board of Tax Appeals [8] had expired even before the District Court ruled on the motion to dismiss.[9] And it is not clear that today respondent has open any adequate remedy in the New Jersey courts for challenging the assessments on local law grounds.[10] Moreover, *Duke Power Co.* v. *State Board*, *supra*, decided shortly

[8] Ninety days are allowed. State Board of Tax Appeals, Rule V (c), CCH. Corp. Tax Serv. par. 89–505. The resolutions of the County Board attempting to make the assessments were entered June 26, 1941.

[9] The present bill was filed in July, 1941, the answer in September, 1941, and the motion to dismiss in November, 1941. The order denying the motion to dismiss was made in August, 1942.

[10] It seems that under certain circumstances certiorari to the Supreme Court may be had in lieu of an appeal to the State Board of Tax Appeals. It was held in *Schwartz* v. *Essex County Board*, *supra* note 3, that lack of jurisdiction of the county board or irregularity in its proceedings may be tested by certiorari. 130 N. J. L. p. 178. And see *State* v. *Clothier*, 30 N. J. L. 351. But as we have seen, note 4 *supra*, it is a discretionary writ.

before the District Court rendered judgment,[11] gave an authoritative interpretation of the local law. Hence, the reason for holding the case in *Spector Motor Co.* v. *McLaughlin, supra,* and remitting the complainant to the state courts for determination of the local law question no longer was existent here.

It follows *a fortiori* that the bill should not have been dismissed. As stated in *Greene* v. *Louisville & I. R. Co.,* 244 U. S. 499, 520, "A remedy at law cannot be considered adequate, so as to prevent equitable relief, unless it covers the entire case made by the bill in equity." Though the availability of a state remedy on the local law question be assumed to exist, so much uncertainty surrounds the New Jersey remedy to protect the taxpayer's federal right that a refusal to dismiss the bill was a proper exercise of discretion. Thus, however the case may be viewed, the exceptional circumstances which we have noted take it out of the general rule of *Great Lakes Dredge & Dock Co.* v. *Huffman, supra.* The District Court, therefore, properly proceeded to decide the case on the merits. That it placed its decision on local law grounds is not objectionable. For it is well settled that where the federal court has jurisdiction, it may pass on the whole case and agreeably with the desired practice decide it on local law questions, without reaching the constitutional issues. *Siler* v. *Louisville & N. R. Co.,* 213 U. S. 175, 191, 193; *Greene* v. *Louisville & I. R. Co., supra,* p. 508; *Chicago G. W. R. Co.* v. *Kendall,* 266 U. S. 94, 97–98; *Risty* v. *Chicago, R. I. & P. R. Co.,* 270 U. S. 378, 387; *Waggoner Estate* v. *Wichita County,* 273 U. S. 113, 116; *Hurn* v. *Oursler,* 289 U. S. 238, 243–248.

Petitioner makes an extended argument to the effect that *Duke Power Co.* v. *State Board, supra,* is not a con-

[11] That case was decided by the Court of Errors and Appeals on March 9, 1944. The present case was decided by the District Court on July 14, 1944.

trolling precedent on the local law question on which the decision below turned. On such questions we pay great deference to the views of the judges of those courts "who are familiar with the intricacies and trends of local law and practice." *Huddleston* v. *Dwyer,* 322 U. S. 232, 237. We are unable to say that the District Court and the Circuit Court of Appeals erred in applying to this case the rule of *Duke Power Co.* v. *State Board,* which involved closely analogous facts.

Affirmed.

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

ALLEN, COLLECTOR OF INTERNAL REVENUE, *v.* TRUST COMPANY OF GEORGIA ET AL., EXECUTORS.

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

No. 289. Argued January 3, 4, 1946.—Decided January 28, 1946.

In 1925, decedent established two spendthrift trusts for his children, transferring securities to each trust and reserving the power to amend with the consent of the trustee and beneficiary. In 1934 he added securities to each trust. He paid gift taxes on these transfers. Learning in 1937 that, under a recent decision of this Court, the reservation of the power to amend brought the corpus of the trust into the settlor's estate for estate tax purposes, he renounced the power to amend. He died in 1938 at the age of 82. The Commissioner of Internal Revenue included the corpus of each trust in his estate and collected the estate tax on it. The executors sued for a refund. Both the district court and the circuit court of appeals found that decedent established the trusts to meet the necessities of his children by giving them property freed of all claims, tax or otherwise, and that he renounced the power to amend

in order to accomplish the purpose which he originally had but which he later discovered had not been achieved. *Held:*

1. Those findings are sufficient to overcome the statutory presumption that the renouncement of the power to amend, being made within two years of decedent's death, was made in contemplation of death within the meaning of § 302 (d) of the Revenue Act of 1926. P. 635.

2. The question whether a donor's dominant motive is associated with life, rather than with the distribution of property in contemplation of death, is a question of fact in each case. P. 636.

3. Where the question arises out of a series of transactions all related to the same purpose, it is not proper to isolate one transaction from all the others and treat it as a wholly independent transaction. P. 636.

4. Where the dominant purpose of a series of transactions is to provide for the donor's children, the fact that the purpose of the last transaction is to rectify an error which would have subjected the corpus of the trust to an estate tax does not lead to the conclusion that it was a transaction in contemplation of death within the meaning of § 302 (d) of the Revenue Act of 1926. P. 636.

149 F. 2d 120, affirmed.

CERTIORARI, *post*, p. 700, to review affirmance of a judgment, 55 F. Supp. 269, against a Collector of Internal Revenue for a refund of an overpayment of an estate tax.

Mr. J. Louis Monarch, with whom *Solicitor General McGrath*, *Assistant Attorney General Samuel O. Clark, Jr.*, *Messrs. Sewall Key* and *Carlton Fox* were on the brief, for petitioner.

Mr. John A. Sibley, with whom *Mr. Furman Smith* was on the brief, for respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The decedent, Jack J. Spalding, died December 8, 1938, at the age of 82. In 1925 he established two spendthrift

trusts—one for his daughter Suzanne and one for his son Jack—and transferred to each trust securities of the value of $50,000. In 1934 he added securities to each trust. He paid gift taxes on these transfers. When he died, the Commissioner included the corpus of each trust in his estate and collected the estate tax on it. The executors brought this suit for a refund. The District Court found that the trusts were established under the following circumstances.

Suzanne and her husband, before 1925, had engaged in a business venture which had ended in disaster. Both had lost all their property and were heavily indebted. Suzanne's husband was without means to support her and their five children. Jack likewise had engaged in an unsuccessful business venture. He was not earning enough to support his family. The gifts were made by the decedent to relieve the needs and to make secure the maintenance of his children and the education and support of his grandchildren. The gifts were placed in trust because Suzanne and Jack had lost prior gifts in unsuccessful projects. The decedent desired to protect them against their own business misadventures and not to retain any benefit, directly or indirectly, to himself. He made the gifts to meet their necessities and desired to set aside the trust property, freed from all claims, tax or otherwise. The decedent, however, retained under the trusts a power to amend with the consent of the trustee and beneficiary.[1] At the time the trusts were established in 1925 and enlarged in 1934 he believed that the gifts were complete and absolute and intended them to be such. He was a lawyer and believed that under the federal law the reservation of such a power to amend would not require the inclusion in his gross estate at his death of the value of the corpus of each

[1] "During my life, by the unanimous consent of the said trustee, my said daughter [son] and of myself, the terms of this agreement may be amended, changed, enlarged or limited, but in no event shall the conveyance of said stock to the party of the second part be revoked."

trust. But in 1935 *Helvering* v. *City Bank Farmers Trust Co.*, 296 U. S. 85, was decided, holding that the reservation of a power to amend brought the corpus of the trust into the settlor's estate, even though the power could not be exercised by the settlor alone. Upon being advised in 1937 that the gifts remained a part of his estate for estate tax purposes, decedent executed an instrument renouncing the power to amend the trusts. This was done so that the trusts would not be a part of his estate for estate tax purposes. At that time, as well as in 1925 and 1934, the decedent was in average good health for a man of his age. He released the power to amend so as to put the trusts in the condition he had thought they were in when he made them. The release was designed to carry out his original purpose in setting aside the property freed from all claims, tax or otherwise. In 1925, 1934, and 1937, he did not entertain thoughts of death except the general expectation of death that all entertain.

The District Court concluded that neither the establishment or the enlargement of the trusts, nor the release of the power to amend was made in contemplation of death. Accordingly, it rendered judgment for respondents. 55 F. Supp. 269. The Circuit Court of Appeals sustained the findings of the District Court and affirmed the judgment. 149 F. 2d 120. The case is here on a petition for a writ of certiorari which we granted because of an apparent conflict between that decision and cases from other circuits.[2]

It is clear that the corpus of each trust was properly included in decedent's gross estate if he released the power

[2] Cf. *Farmers' Loan & Trust Co.* v. *Bowers*, 68 F. 2d 916; *Farmers' Loan & Trust Co.* v. *Bowers*, 98 F. 2d 794; *First Trust & Deposit Co.* v. *Shaughnessy*, 134 F. 2d 940; *Commonwealth Trust Co.* v. *Driscoll*, 50 F. Supp. 949, aff'd 137 F. 2d 653. And see Pavenstedt, Taxation of Transfers in Contemplation of Death, 54 Yale L. Journ. 70; Harriss, Gift Taxation in the United States (1940) ch. II.

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to amend in contemplation of his death.[3] And there is a presumption that he did so because the release was made less than two years before his death.[4]

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[3] Sec. 302 (d) (1) of the Revenue Act of 1926, 44 Stat. 9, as amended by § 401 of the Revenue Act of 1934, 48 Stat. 680, reads as follows: "The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

. . . . . .

"(d) (1) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth."

Article 16 of Treasury Regulations 80 (1937 ed.) as amended by T. D. 4966, 1940–1 Cum. Bull. 220, provides in part:

"The phrase 'contemplation of death,' as used in the statute, does not mean, on the one hand, that general expectation of death such as all persons entertain, nor, on the other, is its meaning restricted to an apprehension that death is imminent or near. A transfer in contemplation of death is a disposition of property prompted by the thought of death (though it need not be solely so prompted). A transfer is prompted by the thought of death if it is made with the purpose of avoiding the tax, or as a substitute for a testamentary disposition of the property, or for any other motive associated with death. The bodily and mental condition of the decedent and all other attendant facts and circumstances are to be scrutinized to determine whether or not such thought prompted the disposition."

[4] Sec. 302 (d) (3) provides:

"The relinquishment of any such power, not admitted or shown to have been in contemplation of the decedent's death, made within two years prior to his death without such a consideration and affecting the interest or interests (whether arising from one or more transfers or the creation of one or more trusts) of any one beneficiary of a value or aggregate value, at the time of such death, in excess of $5,000, then, to the extent of such excess, such relinquishment or relinquishments shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title."

It was said in *United States* v. *Wells,* 283 U. S. 102, 117, that a gift is made in contemplation of death within the meaning of the estate tax law if "the motive which induces" it is "of the sort which leads to testamentary disposition." Petitioner's argument is that a purpose to avoid the estate tax is such a motive. It is a motive which would cause a decedent to make an *inter vivos* transfer rather than a will. Since the purpose of the contemplation of death provision was to reach substitutes for testamentary dispositions in order to prevent evasions of the tax (*United States* v. *Wells, supra,* pp. 116–117), the statute is satisfied, it is said, where for any reason the decedent becomes concerned about what will happen to his property at his death and as a result takes action to control or in some manner affect its devolution.

That is a correct statement of the governing principle for it presumes the existence of the requisite motive. The transfer is made in contemplation of death if the thought of death is the "impelling cause of the transfer." *City Bank Farmers Trust Co.* v. *McGowan,* 323 U. S. 594, 599. The transfer may be so motivated, even though the decedent had no idea that he was about to die. *United States* v. *Wells, supra,* pp. 117–118. On the other hand, every man making a gift knows that what he gives away today will not be included in his estate when he dies. All such gifts plainly are not made in contemplation of death in the statutory sense. Many gifts, even to those who are the natural and appropriate objects of the donor's bounty, are motivated by "purposes associated with life, rather than with the distribution of property in anticipation of death." *United States* v. *Wells, supra,* p. 118. Those motives cover a wide range. See 1 Paul, Federal Estate & Gift Taxation (1942) §§ 6.09 *et seq.* "There may be the desire to recognize special needs or exigencies or to discharge moral obligations. The gratification of such desires may be a more compelling motive than any thought

of death." *United States* v. *Wells, supra,* p. 119. Whether such a desire was the dominant, controlling or impelling motive is a question of fact in each case. We do not have here the type of problem presented in *McCaughn* v. *Real Estate Land Co.,* 297 U. S. 606, where the appellate court undertook to reverse the trial court on a review of the evidence. Here two courts have resolved that question of fact in favor of respondents. They have found, as we have said, that Mr. Spalding established the trusts to meet the necessities of his children by giving them property, freed of all claims, tax or otherwise; and that in 1937 he released the power to amend to accomplish the purpose which he originally had, but which he later discovered had not been achieved. Those findings are sufficient to overcome the statutory presumption that the gifts, being made within two years of Mr. Spalding's death, were made in contemplation of death. Those findings, being concurrent findings of the two lower courts, will be accepted here without reexamination of the evidence. See *United States* v. *O'Donnell,* 303 U. S. 501, 508, and cases cited.

It is said, however, that those findings rest on a misconception of the law, since admittedly the decedent in 1937 released the power to amend so as to avoid paying an estate tax on the property included under the trusts. But that is to isolate the release from all that preceded and to treat it as a wholly independent transaction. This is not a case where a settlor, having made one plan for the disposition of his property, later makes a different one to avoid death taxes. Mr. Spalding, in making the release, did what he originally intended to do—to make complete and absolute gifts to his children, freed of all claims, including taxes. Retention of the power to amend would have brought the trust property into Mr. Spalding's estate and subjected it to the estate tax lien.[5] His purpose

[5] See Int. Rev. Code § 827, 53 Stat. 128, 26 U. S. C. § 827. It was held in *Higley* v. *Commissioner,* 69 F. 2d 160, that the personal liability of transferees did not extend to the beneficiaries under a trust.

to take care of his children, come what may, might thus have been thwarted or impaired. He guessed wrong on the law, when he retained the power to amend. When he rectified the error, he was in good faith, endeavoring to complete his original project, not to give his children more than he at first intended in order to save taxes. What he did in 1937 was merely to accomplish by an additional step what he assumed he had already done. The findings make plain that the establishment of the trusts in 1925, their enlargement in 1934, and the release of the power to amend in 1937 were parts of one integrated transaction. That is a finding of fact which we are not at liberty to disturb on this record. On these facts, his desire to avoid death taxes does no more than establish that he did not want his plan to underwrite the necessities of his children and grandchildren jeopardized. His desire to make adequate provision for them remained the dominant motive, or so the triers of fact could properly find.

Affirmed.

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

UNITED STATES ET AL. *v.* NEW YORK TELEPHONE CO.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 55. Argued November 13, 14, 1945.—Decided January 28, 1946.

Property sold to the appellee telephone company by its parent corporation was entered on appellee's books at "structural value," an amount considerably in excess of the "original cost" of the property to the parent. Thereafter, the appellee did not apply special depreciation rates to this property although at the time of the sale it had a relatively short remaining life. At the time of the original entries, appellee was subject to the accounting regulations of the Interstate Commerce Commission. Subsequently the Federal Communications Commission, under the Communications Act, ordered the appellee to charge to surplus the difference between the "structural value" and the "original cost" of the property, less related depreciation, and to make appropriate concurrent entries in other accounts. At the time of this order, some of the property in question had been retired. *Held:*

1. It is unnecessary to determine whether the original entries in appellee's books were in conformity with the system of accounts prescribed by the Interstate Commerce Commission, since the principal foundation of the order was that the appellee was subject under the Communications Act to the requirement of restating its accounts on the basis of original cost. P. 647.

2. It was within the power of the Communications Commission to order a reclassification of the entries as to that part of the property which had been retired as well as to that which had not. P. 648.

3. Rates established under the "group method" of depreciation are not properly applied to property which is known not to have as long an expected serviceable life as property of the same sort purchased new. P. 650.

4. To show separately the amount by which the price paid by the accounting company for property now in service exceeded the original cost of that property is not the sole purpose of original-cost accounting. Under that system the inflation in accounts may be not only segregated but also written off. P. 651.

5. The order of the Commission does not contravene the stipulation in *American Telephone & Telegraph Co.* v. *United States*, 299 U. S. 232. P. 652.

A finding by the Communications Commission, after a full hearing and on evidence which sustains the finding, that part of the cost on the books of a company is due to a profit made by a parent corporation upon a sale of property to the company, constitutes a determination "after a fair consideration of all the circumstances" that there has been no true investment but only a "fictitious or paper increment." P. 653.

6. The Communications Act imposes upon the company, and not upon the Commission, the burden of justifying accounting entries. P. 654.

7. An accounting order of the Communications Commission may not be set aside on judicial review unless it is so entirely at odds with fundamental principles of correct accounting as to be the expression of a whim rather than an exercise of judgment. P. 655.

56 F. Supp. 932, reversed.

APPEAL from a judgment of a district court of three judges, which enjoined the enforcement of an order of the Federal Communications Commission.

Mr. Harry M. Plotkin, with whom *Solicitor General McGrath*, *Messrs. Rosel H. Hyde*, *Harold J. Cohen*, *Max Goldman* and *Joseph M. Kittner* were on the brief, for appellants.

Mr. Henry J. Friendly, with whom *Messrs. Ralph W. Brown*, *Stephen H. Fletcher*, *Alan J. McBean* and *John B. King* were on the brief, for appellee.

Messrs. Philip Halpern and *Frank C. Bowers* filed a brief on behalf of the Public Service Commission of the State of New York, as *amicus curiae*, urging reversal.

MR. JUSTICE RUTLEDGE delivered the opinion of the Court.

This case presents new questions of "original cost" accounting, which arise from an order of the Federal Com-

munications Commission requiring readjustments in appellee's accounts. A detailed statement of the facts is necessary to an understanding of the issues. But the short effect of the controversy is that the Commission has required the appellee, New York Telephone Company, to make charges of some $4,166,000 to surplus, with corresponding credits to other accounts; the ultimate effect being substantially to compel the elimination of so-called write-ups from the company's accounts in order to bring them, to this extent, into conformity with the Commission's Uniform System of Accounts, which is based upon "original cost." The attacked entries were made in 1925, 1926, 1927 and 1928, prior to enactment of the Federal Communications Act, upon acquisition by appellee of business and property from its affiliate, American Telephone and Telegraph Company. The case embodies a rather long delayed chapter of the broad controversy presented in *American Telephone & Telegraph Co.* v. *United States,* 299 U. S. 232, to be discussed later.

For preliminary purposes it is enough to say that the appellee questions the Commission's power to make the order in issue and a District Court, composed of three judges, has permanently enjoined its execution. 56 F. Supp. 932. From that judgment this appeal has followed.

We turn to the facts before undertaking to state the issues more precisely. Appellee, the New York Telephone Company, is a subsidiary of the American Telephone and Telegraph Company, which owns all its common stock. Since its incorporation in 1896 appellee has engaged in the business of furnishing intrastate and interstate telephone service to the public in the states of New York and Connecticut. Prior to 1925, for historical reasons, American also had furnished intrastate toll service between certain points in New York State; but in that year, as part of its plan to withdraw from all such business, Ameri-

can transferred its intrastate toll business in New York State to the appellee.

In connection with this transaction occurred the four transfers of property, the accounting for which now concerns us. In November, 1925, September, 1926, and December, 1928, appellee purchased from American certain toll plant consisting of property such as poles, crossarms, guys and anchors, aerial wire and cable, underground cable, loading coils, conduit, and right of way. This property was needed to handle the additional intrastate business which had been transferred to it. Much of the property so acquired was in the form of an additional interest in toll plant which, prior to these transfers, had been jointly owned by American and New York.

The fourth sale took place in 1927. Before that time American had retained ownership of three essential parts, collectively called "the instruments"—the transmitter, receiver and induction coil—of the telephone stations used by subscribers. American had furnished and maintained these instruments under a contract between it and New York under which New York paid it a specified percentage of its gross revenues. In December, 1927, American sold to New York the instruments then in the service or supplies of New York.

None of these transfers of property changed the physical character of the plant or the service rendered to the public. The sole effects were to shift certain operating costs of American and certain fixed charges and taxes connected with the ownership of the property to New York and to eliminate New York's obligation to make payments to American for use of "the instruments"; for the rest, as the New York Public Service Commission described the transfer, it was "a bookkeeping transaction, with no change in ultimate ownership, in location, or in use of the

. . . property, but reflecting only a revised business relationship between affiliated corporations." [1]

American and New York agreed that the purchase price of the toll plant was to be an amount equal to its "structural value." As defined by the Uniform System of Accounts for Telephone Companies (Instruction 13) of the Interstate Commerce Commission, this was "the estimated cost of replacement or reproduction less deterioration to the then existing conditions through wear and tear, obsolescence, and inadequacy." A field inspection and an appraisal of the property were made by engineers, and appellee paid to American a total of $5,973,441.47 for the toll plant. The purchase price of the instruments transferred in 1927 was $6,661,238.91. This was based on the average price charged American by the Western Electric Company, the manufacturer and also a subsidiary of American, during the first nine months of 1927, less a twenty per cent allowance to reflect the then existing condition of the instruments.

The tables set out in the margin show the accounting treatment of these transfers at the time they occurred.[2]

[1] Opinion of the New York Public Service Commission, Case 9436, adopted December 14, 1943, 1 Report of the Public Service Commission (1943) 569, 571.

[2]

Property group	Book cost to American	Related depreciation and amortization reserves	Net book cost of American	Recorded book cost to New York	Excess or "profit" to American
1925—Toll line property	$5,010,340.19	$801,858.95	$4,208,481.24	$5,831,884.78	$1,623,403.54
1926—Toll line property	95,924.66	14,449.20	81,475.46	97,310.39	15,834.93
1928—Toll line property	28,077.64	4,144.78	23,932.86	44,246.30	20,313.44
1927—Telephone instruments	8,135,224.98	3,980,944.73	4,154,280.25	6,661,238.91	2,506,958.66
Total	13,269,567.47	4,801,397.66	8,468,169.81	12,634,680.38	4,166,510.57

As the tables disclose, the "profit" to American, that is, the difference between the net book cost to it and the record book cost to New York, was $4,166,510.57. This amount American credited to surplus accounts as profit on the transactions.

This "profit," of course, arises from the fact that New York in making its accounting entries ignored the original cost to American and the depreciation which had accrued on the books of American up to the time of transfer, and entered solely the actual price paid by it for the properties. It did not, so to speak, "fold in" the net book cost to American.

Having set down these properties on its books at the price it paid to the parent corporation for them, New York then applied what it calls the "group method" of depreciation.[3] Under this method special depreciation rates were not applied to the property in question, despite the fact that it had a relatively short remaining life. Instead the current depreciation rates applicable to similar classes of plant were applied as long as the property remained in service. As portions of the property were retired, they were written out of the plant account at the amounts at which they had been recorded therein, that is, at the structural value; and debits of corresponding amounts, less allowance for salvage, were charged concurrently to the depreciation or amortization reserve.

[3] The Federal Communications Commission defines "'Group plan,' as applied to depreciation accounting" as "the plan under which depreciation charges are accrued upon the basis of the original cost . . . of all property included in each depreciable plant account, using the average service life thereof properly weighted, and upon the retirement of any depreciable property its full service value is charged to the depreciation reserve whether or not the particular item has attained the average service life." 47 Code Fed. Reg. 31.01–3 (p).

On January 1, 1937, the Uniform System of Accounts of the Federal Communications Commission [4] for Class A and Class B telephone companies became effective [5] and

[4] The Communications Act of 1934 (48 Stat. 1064) provides:

"Sec. 220 (a). The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to this Act, including the accounts, records, and memoranda of the movement of traffic, as well as of the receipts and expenditures of moneys."

"Sec. 220 (c). The Commission shall at all times have access to and the right of inspection and examination of all accounts, records, and memoranda, including all documents, papers, and correspondence now or hereafter existing, and kept or required to be kept by such carriers, and the provisions of this section respecting the preservation and destruction of books, papers, and documents shall apply thereto. The burden of proof to justify every accounting entry questioned by the Commission shall be on the person making, authorizing, or requiring such entry and the Commission may suspend a charge or credit pending submission of proof by such person. . . ."

"Sec. 220 (g). After the Commission has prescribed the forms and manner of keeping of accounts, records, and memoranda to be kept by any person as herein provided, it shall be unlawful for such person to keep any other accounts, records, or memoranda than those so prescribed or such as may be approved by the Commission or to keep the accounts in any other manner than that prescribed or approved by the Commission. Notice of alterations by the Commission in the required manner or form of keeping accounts shall be given to such persons by the Commission at least six months before the same are to take effect."

Prior to passage of the Communications Act the power to prescribe accounts for telephone companies had been lodged with the Interstate Commerce Commission. Interstate Commerce Act § 20 (5), 41 Stat. 493, subsequently amended, 54 Stat. 917. See *American Telephone & Telegraph Co.* v. *United States*, 299 U. S. 232, 235–236.

[5] The order of the Federal Communications Commission prescribing a uniform system of accounts for telephone companies having average annual operating revenues exceeding $50,000, was adopted on June 19, 1935, 1 F. C. C. 45, and was originally to be effective January 1, 1936. This order was stayed because of the proceeding in the *American Telephone & Telegraph Co.* case, *supra* note 4, and did not become effective, as amended, until January 1, 1937. 3 F. C. C. 9.

applicable to New York. Under this system telephone companies were obliged to establish or reclassify their investment accounts on the basis of "original cost." [6]

In reclassifying its accounts as of January 1, 1937, New York estimated the amounts attributable to the surviving toll plant received from American, which it originally had included in its books on the basis of structural value. New York then determined the difference between those estimates and what it estimated was the original cost of such surviving plant to American. The difference was placed in Account 100.4, Telephone Plant Acquisition Adjustment. Account 100.4 includes amounts "representing the difference between (1) the amount of money actually paid (or the current money value of any consideration other than money exchanged) for telephone plant acquired, plus preliminary expenses incurred in connection with the acquisition; and (2) the original cost of such plant, governmental franchises and similar rights acquired, less the amounts of reserve requirements for depreciation and amortization of the property acquired." [7]

In 1938 New York began amortizing this sum by charges and credits to its operating expense Account 614, Amortization of Telephone Plant Acquisition Adjustment, with concurrent entries to Account 172, Amortization Reserve. As portions of the acquired plant were retired, amounts in

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[6] The Rules and Regulations of the Federal Communications Commission provide that " 'Original cost' or 'Cost,' as applied to telephone plant, franchise, patent rights, and right-of-way, means the actual money cost of (or the current money value of any consideration other than money exchanged for) property at the time when it was first dedicated to the public use, whether by the accounting company or by predecessors." 47 Code Fed. Reg. 31.01–3 (x).

[7] At the same time appellee transferred from its Account 171, Depreciation Reserve, to its Account 172, Amortization Reserve, an amount which, when supplemented by future accruals over the estimated remaining life of the plant at the then current depreciation rates, would provide a reserve equivalent to the amount in question in Account 100.4 at the termination of the life of the property involved.

Account 100.4 were written out of that account and concurrent entries were made in Account 172.

On June 16, 1942, the Federal Communications Commission instituted the present proceeding by ordering a general investigation into the accounting performed by appellee at the time of and subsequent to the four transfers of property involved in this suit. The order required New York to show cause why $4,166,510.57 (the difference between book cost to American, less related depreciation, and the structural value of the property as recorded on the books of New York) should not be charged to its Account 413, Miscellaneous Debits to Surplus, with concurrent entries to such accounts as might be appropriate. The order also suspended all charges to operating expense accounts made by New York on or after January 1, 1943, for the purpose of or in conjunction with amortizing or otherwise disposing of amounts included in Account 100.4, pending submission of proof by respondent of the propriety and reasonableness of such charges.[8]

A joint hearing was then held with the New York Public Service Commission, and in June, 1943, the Federal Communications Commission issued its proposed report. After oral argument before the Commission sitting en banc, a final report and order were issued on December 14, 1943. 52 P. U. R. (N. S.) 101. The order directed New York to charge $4,166,510.57 to its Account 413, Miscellaneous Debits to Surplus, and to make appropriate concurrent entries to other accounts.[9]

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[8] The Commission's order was grounded upon the provisions of § 220 (c) of the Communications Act. See note 4.

[9] On the same date the New York Public Service Commission also adopted its final report and reached the same conclusion. See note 1. We are informed by a brief *amicus curiae* filed by the New York Public Service Commission that "a proceeding for the review of the order of the New York Commission has been brought in the Appellate Division of the Supreme Court of the State of New York but the argument thereof has been deferred, pending the decision by this Court in the present case."

New York then brought this suit before a district court of three judges to enjoin the Commission's order.[10] Appellants' motion for summary judgment was denied and on January 2, 1945, as has been said, the District Court entered its judgment permanently enjoining the order. 56 F. Supp. 932. The court held that the accounting entries were legal when made, since they were in accordance with the accounting system then prescribed by the Interstate Commerce Commission; and that, consequently, the Commission could "not apply retroactively a new system to write down the plaintiff's surplus." The court also held that the Commission's order was contrary to this Court's decision in *American Telephone & Telegraph Co.* v. *United States,* 299 U. S. 232, and to a "stipulation" filed in that cause by the Solicitor General. The present appeal followed.

Appellee's first argument in support of the District Court's decision is a simple one. It is, shortly, that the Commission's order was premised upon the conclusion that the original accounting entries were illegal when made. Appellee disputes this, maintaining that the accounting entries made prior to January 1, 1937, were in full accordance with the system of accounts prescribed by the Interstate Commerce Commission. That system, by the argument, was based not upon original cost but upon actual cost "without distinction between acquisitions from affiliated companies and acquisitions from others than affiliates." [11]

The answer to this contention is equally simple. It is not necessary to decide whether the accounting entries,

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[10] Section 402 (a) of the Communications Act makes applicable to orders of the Federal Communications Commission, with certain exceptions, the Urgent Deficiencies Act. 38 Stat. 219, 220.

[11] The District Court apparently accepted this argument, for it said: "The order under review proceeds upon the theory that plaintiff's accounting in question was improper when made and should be corrected." 56 F. Supp. at 938.

when made, were legal under the system promulgated by the Interstate Commerce Commission; for we think the order in review was not based exclusively upon that premise. It is true that language in the Commission's report, when read out of context, might be taken to lend support to appellee's position. But the report, read as a whole, shows that the Commission's order for the readjustment of the accounts went on the view that the inflation was not justifiable in the light of its own original cost system of accounts. The Commission may have thought, as an alternative ground for its decision, that the accounts were illegal when made; [12] but the principal foundation of the order was that appellee was legally subject to the requirement of restating its accounts on the basis of original cost; [13] and consequently any excess on its books over American's net book cost must be eliminated.

We turn therefore to New York's further argument, which begins with a concession. The brief admits that the Commission "could require *the balances remaining* in appellee's property accounts to be reclassified." (Emphasis added.) But it is urged that the Commission properly can go no further. Since portions of the property have been retired and written out of the plant account at

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[12] Cf. Opinion of the Public Service Commission of New York holding, in part, that the Interstate Commerce Commission accounting requirements did not oblige New York "to write up the book value of system property or to inflate surplus by intra-system profits. But the adroit companies found it a convenient excuse for inflating book values." 1 Report of the Public Service Commission (1943) 569, 587.

[13] See *American Telephone & Telegraph Co.* v. *United States*, 299 U. S. 232, 242: "We are not impressed by the argument that the classification is to be viewed as arbitrary because the fate of any item, its ultimate disposition, remains in some degree uncertain until the Commission has given particular directions with reference thereto. By being included in the adjustment account, it is classified as provisionally a true investment, subject to be taken out of that account and given a different character if investigation by the Commission shows it to be deserving of that treatment."

the amount at which they were recorded originally and since corresponding charges have been made concurrently to the depreciation reserve,[14] appellee says the Commission is without power, perhaps under the terms of the Communications Act, but at any rate under its own system of accounts, to order a reclassification of the entries for plant which has now been retired.

The Government answers that the effect of the write-up caused originally by New York's recording the property at structural value rather than at American's net book cost has never been eradicated. It points to the fact that New York did not apply a special depreciation rate to the property in question although it was not new and its price purported to reflect existing depreciation. Thus, the Government in effect asserts that there has been an under-depreciation.[15] New York denies this. It says that the group method,[16] under which the property was depreciated at rates similar to those applying to like property, takes into account the fact that some property may remain in service for a shorter time than is expected and that some property may remain serviceable for a long time. Under the group method, it insists, such inequalities are averaged out in the rate fixed for the group as a whole.

The effect of appellee's argument would be to render the Commission powerless to write off much of the inflation caused by the original accounting in this case. For, as has been pointed out, the inflation is not "removed as property is retired. . . . When property is retired its

[14] See text at note 3.

[15] The brief *amicus curiae* of the New York Public Service Commission states: "A write-up or inflation of the book cost may be brought about either by an inflation of the book cost figure on the asset side or by a reduction of the related depreciation figure on the liability side.

"In this case, the inflation was accomplished principally by an understatement of the related depreciation."

[16] See text at note 3.

cost is credited to the proper asset account and (neglecting the effect of salvage) the same cost is debited to depreciation reserve, and the resultant change in book value is zero. Thus the effect of retiring an inflationary asset item is to create a deficiency in depreciation reserve equal to the inflation formerly existing in the asset account." [17]

Moreover, it would seem clear that rates established under the group method of depreciation are not properly applied to property purchased which is *known* not to have as long an expected serviceable life as property of the same sort purchased when new. It is true that testimony appears in the record that at the time of the purchase of the property "the question of the effect of this purchase on the depreciation rates, and whether or not the depreciation rates should be increased [so as] to allow for the fact that the property purchased was not new and, therefore, had less than the full life remaining" arose and was considered. True also, testimony showed it was decided at the time "that without any increase in the rates the rates that were already in effect would be ample to provide for retirement of the property purchased." Nevertheless the Commission apparently found that such was not the case.

We cannot say that such a conclusion was erroneous.[18] And it may be added, in support of the Commission's de-

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[17] Opinion of the New York Public Service Commission, 1 Report of the Public Service Commission (1943) 569, 590.

[18] The Commission stated: "New York attempted to counter these conclusions with the contention that its depreciation reserve *as a whole* is now in excess of requirements and consequently the inflation introduced through the accounting for the transactions in question has been offset by an excess in the reserve resulting from other causes; and that, further, unless the Commission can show that the reserve as a whole is deficient no correcting entry which would increase the reserve can be required. But the question as to whether the depreciation reserve, taken as a whole, is adequate is irrelevant to the issues herein. No challenge is here being made to the adequacy of the depreciation reserve as a whole. This line of argument represents an attempt to offset one error by another. If New York's de-

sire to put New York's accounts on an original cost basis, that one of the effects of original cost accounting will be not to require New York in the future to do what it should have done in the past, at least under the Federal Communications Commission system of accounts. ". . . The depreciation rate [under original cost accounting] applicable to a specific class of plant can be based on an estimate of total service life. There is no necessity to depreciate part of the account (constructed plant) on a total service-life basis and another part (acquired properties) on a remainder-life basis." [19]

Appellee further urges that so much of the Commission's order as affects property already retired is improper, because the sole purpose of original cost accounting is to show separately the amount by which the price paid by the accounting company for property now in service exceeded the original cost of that property. But the purposes of an original cost system of accounting are broader. Under such a system the inflation in accounts not only may be segregated but may also be written off.[20] *North-*

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preciation reserve is in excess of requirements, it means that New York has been making excessive charges to operating expenses for depreciation." 52 P. U. R. (N. S.) 101, 116–117.

It has been urged that, even if the Federal Communications Commission was correct in ordering the inflation in the accounts of New York written off the books, that inflation has been reduced by some fraction of the depreciation previously taken, that is, prior to elimination of the inflation, even though the group method of depreciation was employed. That point, whatever its merits, was not made until the case reached this Court. Accordingly we do not consider it.

[19] Colbert, Advantages of Original Cost Classification of Plant (1945) 35 Public Utilities Fortnightly 333, 343.

[20] For obvious reasons, the utility companies have not objected so much to the segregating of the difference between the cost to the accounting company of property acquired and original cost less depreciation as they have to removing this difference from the books. See Kripke, A Case Study in the Relationship of Law and Accounting: Uniform Accounts 100.5 and 107 (1944) 57 Harv. L. Rev. 433, 438 ff., especially at 445.

western Electric Co. v. *Federal Power Commission,* 321 U. S. 119, 123–124; *California Oregon Co.* v. *Federal Power Commission,* 150 F. 2d 25, 27–28.

The final question is whether the order falls within the decision in *American Telephone & Telegraph Co.* v. *United States,* 299 U. S. 232. That case involved an attempt to set aside an order of the Federal Communications Commission prescribing a uniform system of accounts for telephone companies. The companies objected to the order's "original cost" provisions as preventing them " 'from recording their actual investment in their accounts' with the result that the accounts do not fairly exhibit their financial situation to shareholders, investors, tax collectors and others." The Court replied that such a consequence would not be entailed, but that under the order only such an amount would be written off "as appears . . . to be a fictitious or paper increment." 299 U. S. at 240. However, to avoid possible misunderstanding and to give assurance to the companies, the Court requested the assistant attorney general appearing for the Government to reduce to writing his statement in that regard in behalf of the Commission. This he did, informing the Court that "the Federal Communications Commission construes the provisions of Telephone Division Order No. 7–C, issued June 19, 1935, pertaining to account 100.4" as meaning "that amounts included in account 100.4 that are deemed, after a fair consideration of all the circumstances, to represent an investment which the accounting company has made in assets of continuing value will be retained in that account until such assets cease to exist or are retired; and, in accordance with paragraph (C) of account 100.4, provision will be made for their amortization." This statement the Court accepted "as an administrative construction binding upon the Commission in its future dealings with the companies." The Court also noted that the case was to be distinguished from *New York Edison Co.* v. *Maltbie,* 244 App. Div. 685,

281 N. Y. S. 223, aff'd, 271 N. Y. 103, 2 N. E. 2d 277, "where under rules prescribed by the Public Service Commission of New York, there was an inflexible requirement that an account similar in some aspects to 100.4 be written off in its entirety out of surplus, whether the value there recorded was genuine or false."

The District Court thought the order in the instant case was erroneous "in view of the stipulation of these same defendants made in American T. & T. Co. v. United States, supra; certainly in the absence of proof that the excess of price over the seller's net book cost was not a 'true increment of value.' There has not been any determination based upon a fair consideration of all the circumstances in accordance with the stipulation mentioned, nor upon the evidentiary circumstances referred to in the opinion of the Supreme Court." 56 F. Supp. at 938.

We think this misconceives the "stipulation's" purport and effect. When the Federal Communications Commission finds, after full hearing and on evidence which sustains the finding, that part of the cost on the books of a company is due to a profit made by an affiliate or a parent at the time when the affiliate or parent has transferred property to it, the Commission has determined, "after a fair consideration of all the circumstances" in full compliance with the "stipulation's" reservation, that there has been no true investment but only a "fictitious or paper increment" within the meaning of the *American Telephone & Telegraph Company* case.[21] The stipulation did not

[21] All relevant facts pertaining to the transaction were before the Commission. The Commission found that there was no real increment of value to the assets as a result of the transfer and that the inclusion of any write-up would introduce "inflationary elements" into the plant accounts which in time would be "improperly reflected in the depreciation expense account as an alleged operating cost." No other findings were necessary. And the rejection by the Commission of the company's contention that reproduction cost less depreciation was the true criterion of "value" was plainly no error of law.

foreclose, rather it in terms reserved this inquiry. "For an intercorporate profit which upon a consolidated income statement of the affiliated group would disappear entirely is too lacking in substance to be treated as an actual cost." *Pennsylvania Power & Light Co.* v. *Federal Power Commission,* 139 F. 2d 445, 450. Indeed the opinion in the *American Telephone & Telegraph Company* case said: "There is widespread belief that transfers between affiliates or subsidiaries complicate the task of rate-making for regulatory commissions and impede the search for truth. Buyer and seller in such circumstances may not be dealing at arm's length, and the price agreed upon between them may be a poor criterion of value." 299 U. S. at 239.

It is argued, however, that the use of the word "may" was intended to put the burden on the Commission to find that in such inter-affiliate or parent-subsidiary transactions the price actually was a poor criterion of value. That is not our understanding. In the first place, the Act imposes upon the company, not on the Commission, the burden of proof to justify accounting entries. Neither the Court nor the Commission, in action taken with relation to the "stipulation," can be thought to have undertaken to shift this burden in the teeth of the statutory provision, as the full terms of the "stipulation," set forth below,[22] disclose. We think that the use of the condi-

[22] The entire statement (sometimes called "stipulation") of the Government in the *American Telephone & Telegraph Company* case (exhibit C in the instant case) reads as follows:

"The Federal Communications Commission construes the provisions of Telephone Division Order No. 7–C, issued June 19, 1935, pertaining to account 100.4, as follows:

"(1) That amounts included in account 100.4 that are deemed, after a fair consideration of all the circumstances, to represent an investment which the accounting company has made in assets of continuing value will be retained in that account until such assets cease to exist or are retired; and, in accordance with paragraph (C) of account 100.4, provision will be made for their amortization.

"(2) That when amounts included in account 100.4 are deemed, after a fair consideration of all the circumstances, to be definitely attributable to depreciable telephone plant, provision will be made

tional was meant to indicate no more than that this Court was not taking sides in the debate in accounting circles as to whether the price agreed upon between affiliates was or was not in fact a poor criterion of value. To resolve that discussion was and is for the regulatory commissions and not for the courts. We repeat that for a court to upset an accounting order it must be " 'so entirely at odds with fundamental principles of correct accounting' . . . as to be the expression of a whim rather than an exercise of judgment." 299 U. S. at 236–237. The order in this case is not of that character.[23]

The judgment is

Reversed.

MR. CHIEF JUSTICE STONE is of opinion that the judgment should be affirmed on the ground, as the court below held, that appellant, the Federal Communications Commission, is bound by and has not complied with the stipulation to which it was a party and which this Court approved in *American Tel. & Tel. Co.* v. *United States,* 299 U. S. 232, 240, 241. In that case it was contended that the Federal Communications Commission's uniform system of accounts for telephone companies would require that all amounts representing excess of purchase price paid by the telephone company to its parent company over the seller's original cost be written off.

The Court held that under that system, applied to the account here in question, which had been lawfully estab-

for amortization of such amounts through operating expenses, through the medium of either account 613 (R. 186) or account 675 (R. 205).

"The Commission believes that the foregoing construction of its order is that which it presented to the District Court through the affidavits of its witnesses."

[23] The Federal Power Commission, the Securities and Exchange Commission, and some state commissions (see the opinion of the New York Public Service Commission in the instant case) have taken the same position concerning interaffiliate transactions as has the Federal Communications Commission. See Kripke, A Case Study in the Relationship of Law and Accounting: Uniform Accounts 100.5 and 107 (1944) 57 Harv. L. Rev. 693, 705–708.

lished under Interstate Commerce Commission regulations, only such amount could be written off as appeared "to be a fictitious or paper increment," and not "a true increment of value." To avoid "the chance of misunderstanding and to give adequate assurance to the companies [including appellee here] as to the practice to be followed," the Court requested the Assistant Attorney General to reduce his statements to that effect to writing in behalf of the Commission. He did this and informed the Court "that 'the Federal Communications Commission construes the provisions of Telephone Division Order No. 7–C, issued June 19, 1935, pertaining to account 100.4' as meaning 'that amounts included in account 100.4 that are deemed, after a fair consideration of all the circumstances, to represent an investment which the accounting company has made in assets of continuing value will be retained in that account until such assets cease to exist or are retired; and, in accordance with paragraph (C) of account 100.4, provision will be made for their amortization.' "

Before the Commission could rightly direct that the assets in that account, which have not been retired, be written off, the stipulation required it to find, after a "fair consideration of all the circumstances," that the difference between the original cost and the price claimed to have been paid is not "a true increment of value." This the Commission has not done. In the face of its stipulation it may not assume, without a finding based upon evidence, that there is no "true increment of value" to the assets which appellee purchased over the cost to the seller, merely because appellee purchased the assets from its parent corporation.

The judgment should be affirmed.

MR. JUSTICE BLACK, MR. JUSTICE REED and MR. JUSTICE JACKSON took no part in the consideration or decision of this case.

Syllabus.

ROLAND ELECTRICAL CO. *v.* WALLING, WAGE AND HOUR ADMINISTRATOR.

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

No. 45. Argued October 8, 1945.—Decided January 28, 1946.

Petitioner, a Maryland corporation having its principal office, place of business and a manufacturing plant in Baltimore, is engaged there in commercial and industrial wiring, electrical contracting, and dealing in electrical motors and generators for private, commercial and industrial uses. It had approximately 1,000 active accounts, 99% of which were commercial or industrial firms. Of its 33 larger and most active accounts, one was a telephone company engaged in interstate commerce, four were engaged in the repair of ships, tugs, barges and other boats intended for movement in interstate commerce, and (with one exception) the remainder were engaged in the production of goods for commerce as defined in § 3 of the Fair Labor Standards Act, shipping at least a substantial portion of their total production out of Maryland. All of petitioner's mechanics worked, in practically every work week, for some of these 33 customers, either in the repair of their motors or generators, the reconstruction of used motors sold to them, or in performing electrical work at their respective establishments. The Wage and Hour Administrator brought suit to enjoin petitioner from violating the minimum wage, maximum hour, and report-making provisions of the Fair Labor Standards Act. *Held:*

1. Petitioner's employees are engaged "in the production of goods for [interstate] commerce" so as to bring them within the coverage of §§ 6 and 7 of the Fair Labor Standards Act. P. 662.

2. They are not exempted from the Act on the ground that petitioner is a "service establishment" within the meaning of § 13 (a) (2). P. 666.

3. Section 6 (a) of the Act, when read with the definitions of "commerce," "goods," and "produced" in § 3 (b), (i), and (j), requires every employer to pay not less than the required minimum wages to each of his employees who is employed in any process or occupation necessary to the production, in any State, of any part or ingredient of any articles or subjects of trade, commerce or transportation, of any character, for trade, commerce or transportation among the several States. P. 663.

(a) This does not require the employee to be directly "engaged in commerce" among the several States. P. 663.

(b) It does not require the employee to be employed in the production of an article which itself becomes a subject of commerce or transportation among the several States. P. 663.

(c) It is enough that the employee be employed, for example, in an occupation which is necessary to the production of a part of any other "articles or subjects of commerce of any character" which are produced for trade, commerce or transportation among the several States. P. 663.

(d) It does not require an employee to be employed exclusively in the specified occupation. P. 664.

(e) It does not require the occupation in which he is employed to be indispensable to the production under consideration. P. 664.

(f) It is enough that his occupation be "necessary to the production." P. 664.

(g) Even though there may be alternative occupations that could be substituted for it, it is enough that the one at issue is needed in such production and would, if omitted, handicap the production. P. 664.

4. The work of petitioner's employees has such a close and immediate tie with the process of production for commerce, and was such an essential part of it, that the employees are to be regarded as engaged in an occupation "necessary to the production of goods for commerce." *Kirschbaum Co.* v. *Walling*, 316 U. S. 517. P. 665.

5. When read in the light of the declared purpose of the Act, its legislative history, and its administrative interpretation, § 13 (a) (2), exempting employees "engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce," does not exempt employees "engaged in the production of goods for [interstate] commerce." P. 666.

(a) When so read, it exempts employees of only such retail or service establishments as are comparable to local merchants, corner grocers or filling station operators who sell to or serve ultimate consumers. P. 666.

(b) Its origin has nothing to do with establishments "producing goods for [interstate] commerce." P. 667.

6. To the extent that sales or services are necessary for the production of goods for interstate commerce, they generally are not sales or services to an ultimate consumer for his personal use and, accordingly, are neither retail sales nor services of a comparable character within the meaning of § 13 (a) (2). P. 667.

7. To fail to cover in this Act the multitude of employees who are engaged in establishments which supply the materials and services currently needed for the maintenance of productive machinery used by those who produce goods for interstate commerce would take the heart out of the Act. P. 668.

8. Its primary purpose is not so much to regulate interstate commerce as such, as it is to prohibit the shipment in interstate commerce of goods produced under substandard labor conditions and thus to raise living standards. P. 669.

9. This purpose will fail of realization unless the Act has sufficiently broad coverage to eliminate in large measure from interstate commerce the competitive advantage accruing from savings in costs based upon substandard labor conditions. P. 670.

10. In the legislative history of the Act, there never was an intent expressed to exempt retailers other than local merchants of the type dealing with the ultimate consumer. P. 671.

11. The debates in Congress show an intent to restrict the word "retail" to such transactions with ultimate consumers as are commonly carried on at local dry goods, butchering or grocery stores. P. 672.

12. This is confirmed by the general usage of the word "retail," which makes a distinction, not merely between the size and volume of sales but also between types of purchasers. It relates to sales to ultimate consumers, as distinguished from those who buy to resell or to use for business needs. P. 673.

13. Government usage makes the same distinction on the basis of the use for which the goods are purchased. P. 674.

14. The word "service" is associated with the word "retail" in this Act so as to restrict its meaning similarly to services to ultimate users of them for personal rather than commercial purposes. P. 675.

15. This interpretation of the term "retail and service establishments" is reinforced by the administrative interpretations of the Wage and Hour Administrator, which are entitled to great weight. P. 676.

16. Although the motors sold by petitioner were not purchased by its customers for resale or to be processed for resale, and although they were to be used and probably ultimately "consumed" in the hands of petitioner's customers, they remained actively in use in the great field of the production of goods for interstate commerce to which the Act is directed. P. 678.

17. The record establishes the character of petitioner's customers as "commercial and industrial" and not "retail" customers in the same sense as is the customer of the local merchant, grocer or filling station operator who buys for his own personal consumption. P. 678.

18. The Act is concerned with goods in the stream of commerce but not with those in "the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof." P. 678.

146 F. 2d 745, affirmed.

CERTIORARI, 325 U. S. 849, to review reversal of an order, 54 F. Supp. 733, dismissing a complaint of the Administrator of the Wage and Hour Division of the Department of Labor seeking to enjoin violations of the Fair Labor Standards Act of 1938.

Mr. O. R. McGuire for petitioner.

Miss Bessie Margolin, with whom *Acting Solicitor General Judson*, *Messrs. Robert L. Stern* and *Albert A. Spiegel* were on the brief, for respondent.

MR. JUSTICE BURTON delivered the opinion of the Court.

The questions presented are (1) whether petitioner's employees are engaged "in the production of goods for commerce" so as to bring them within the coverage of §§ 6 and 7 of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 1062–3, 29 U. S. C. §§ 206 and 207), and (2), if so, whether they are exempted from the Act because "engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce" within the meaning of § 13 (a) (2). 29 U. S. C. § 213 (a) (2).

Respondent sought a permanent injunction in the United States District Court restraining petitioner from continued violation of the minimum wage, maximum hour and report-making provisions of the Act. 29 U. S. C.

§§ 206, 207, 211 (c). As to the coverage by the Act, the District Court said that "the view of the Administrator should not be accepted," but it rested its dismissal of the complaint upon the ground that the petitioner was exempted under § 13 (a) (2). 54 F. Supp. 733, 736. The Circuit Court of Appeals, on the other hand, held that petitioner's employees "were engaged in the production of goods for commerce" and that the petitioner was not a "retail or service establishment" within the exemption prescribed in § 13 (a) (2). It accordingly reversed the order of dismissal and remanded the cause for further proceedings in accordance with its opinion. 146 F. 2d 745. We granted certiorari especially because of the divergence of opinions among the Circuit Courts of Appeals as to the interpretation of § 13 (a) (2).[1]

Most of the relevant facts were stipulated. Petitioner is a Maryland corporation "having its principal office, place of business and a manufacturing plant" in Baltimore. It is there engaged in "commercial and industrial wiring, electrical contracting, and dealing in electrical motors and generators, for private, commercial, and industrial uses."

Petitioner had "approximately 1,000 active accounts . . . 99 percent of which are commercial or industrial firms." Its "larger and most active accounts" were 33 in number. Of such 33 customers, one was a telephone company "engaged in interstate commerce"; four were "engaged in the repair of ships, tugs, barges, and other boats which were intended for movement in interstate com-

[1] Compare *Fleming* v. *A. B. Kirschbaum Co.*, 124 F. 2d 567, 572, and *Fleming* v. *Arsenal Bldg. Corp.*, 125 F. 2d 278, 280, both affirmed *sub nom. Kirschbaum Co.* v. *Walling*, 316 U. S. 517, without disposing of the question now presented; *Guess* v. *Montague*, 140 F. 2d 500; *Bracey* v. *Luray*, 138 F. 2d 8; with *Lonas* v. *National Linen Corp.*, 136 F. 2d 433, cert. denied, 320 U. S. 785; *Martino* v. *Michigan Window Cleaning Co.*, 145 F. 2d 163, cert. granted, 325 U. S. 849.

merce"; and "the remaining companies on said list, with the exclusion of the American Ice Company [a small account in the period stipulated to be representative], were engaged in the production of goods for commerce as defined in Section 3 of the Fair Labor Standards Act of 1938, shipping at least a substantial portion of their total production to points outside the State of Maryland." During the period stipulated, "every mechanic of the defendant [petitioner] worked, in practically every workweek, for some of the said [33] customers either in the repair of their motors, generators, the reconstruction of used motors sold to them, or in performing electrical work at their respective establishments." To carry on its entire business, the petitioner had 36 employees, consisting of a foreman, 4 trouble shooters, 14 mechanics, 11 helpers and 6 office employees. No claim of coverage is made on the ground that any of the petitioner's employees were engaged "in [interstate] commerce," but only that they were engaged "in production of goods for [interstate] commerce."

I

As to coverage, the Act is unambiguous and the petitioner's employees come squarely within it as employees "engaged in the production of goods for commerce." This turns on §§ 6 (a), 7 (a), 3 (b), 3 (i) and 3 (j). Section 6 (a) provides: "Every employer shall pay to each of his employees who is engaged in commerce or *in the production of goods for commerce* wages at the following rates . . ." (Italics supplied.) Section 7 (a) likewise provides: "No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or *in the production of goods for commerce*" at wages less than 1½ times the regular rate, where an employee is employed for more than the maximum number of hours prescribed. (Italics supplied.)

Section 3 includes the following:

"(b) *'Commerce' means* trade, commerce, transportation, transmission, or communication *among the several States* or from any State to any place outside thereof.

. . . . . .

"(i) *'Goods' means* goods (including ships and marine equipment), wares, products, commodities, merchandise, or *articles or subjects of commerce of any character, or any part or ingredient thereof,* but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

"(j) 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act *an employee shall be deemed to have been engaged in the production of goods if* such employee was *employed* in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or *in any process or occupation necessary to the production thereof,* in any State." (Italics supplied.)

Putting these definitions together in their own terms, § 6 (a), as applied to the facts of this case, provides in effect that "Every employer shall pay [not less than the required minimum wages] to each of his employees who is employed in any process or occupation necessary to the production, in any state, of any part or ingredient of any articles or subjects of trade, commerce or transportation, of any character, for trade, commerce or transportation among the several states." This does *not* require the employee to be directly "engaged in commerce" among the several states. This does *not* require the employee to be employed even in the production of an article which *itself* becomes the subject of commerce or transportation among the several states. It is enough that the employee be employed, for example, in an occupation which is neces-

sary to the production of a part of any other "articles or subjects of commerce of any character" which are produced for trade, commerce or transportation among the several states. This does *not* require an employee to be employed exclusively in the specified occupation. This does *not* require that the occupation in which he is employed be *indispensable* to the production under consideration. It is enough that his occupation be "*necessary to the production.*" There may be alternative occupations that could be substituted for it but it is enough that the one at issue is needed in such production and would, if omitted, handicap the production.

The *necessity* to the petitioner's customers, in their productive work, of the sales made and the services supplied to them by the petitioner's employees is the foundation of petitioner's business. The essential need for motors and wiring in the conduct of electrically operated productive processes of manufacture is beyond question. When commercial or industrial producers, such as the petitioner's customers, use electric motors in the production of goods for interstate commerce, services such as those of petitioner's employees are necessary to the continuity of such production. Such sales and services must be immediately available to petitioner's customers or their production will stop. If not supplied to the customers by employees of the petitioner, such customers would have to employ comparable employees of their own or of other contractors.[2]

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[2] The dependence of the commercial and industrial customers of the petitioner upon such sales and services is well presented in the petitioner's advertising circular:

"It costs more to operate a faulty motor than to buy a new one. But it isn't necessary to buy a new motor. We'll recondition your present motors to give you the same service and satisfaction as new ones. And we'll save you 25% to 50% on new motor costs. . . .

"When a motor suddenly goes dead or lags, when trouble in electrical equipment arises, you need service and you need it quick! Every second of delay means more dollars lost. How well do we ap-

The work of petitioner's employees has "such a close and immediate tie with the process of production for commerce, and was therefore so much an essential part of it, that the employees are to be regarded as engaged in an occupation 'necessary to the production of goods for commerce.' " *Kirschbaum Co.* v. *Walling,* 316 U. S. 517, 525–526. The relation of petitioner's employees to the production of goods for interstate commerce by petitioner's customers is fully as close and "necessary" as was that of the loft building watchmen and porters to the petitioner's tenants in *Kirschbaum Co.* v. *Walling, supra;* the manufacturing plant watchman of the respondent in *Walton* v. *Southern Package Corp.,* 320 U. S. 540; or the fireguards subject to call in *Armour & Co.* v. *Wantock,* 323 U. S. 126. In the latter case this Court said (p. 130):

". . . 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. . . . 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 foregoing conclusions follow so clearly from the language of the statute as to make unnecessary a discussion of the declared purpose or the legislative history of the Act to support them.[3]

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preciate what speed means to our patrons, as well as dependable workmanship! . . .

"No job is too small or too large to handle promptly. Temporary replacements can be made immediately from our stocks. No charge is made for equipment that is loaned while repairs are being made."

[3] The decision does not rest on the small quantities of scrap annually sold, melted down and shipped in interstate commerce, nor on the small amount of work performed by the petitioner in Maryland directly for customers outside of the State, nor upon the small numbers of sales of rebuilt motors to customers outside of the State. The result reached makes it unnecessary to consider whether any or all of the petitioner's employees were engaged "in [interstate] commerce" as distinguished from the "production of goods for [interstate] commerce."

II

The second question is whether or not petitioner's employees are exempted from the Act on the ground that petitioner is a "service establishment" within the meaning of § 13 (a) (2).[4] The language of that clause is capable of two interpretations. If read in a detached and broad sense, it can be made to exempt from the Act the employees of the petitioner together with hundreds of thousands of other employees like them, to the serious detriment of the effectiveness of the Act. However, if read in connection with the declared purpose of the Act and in the light of its legislative history and administrative interpretation, the clause does not reach employees "engaged in the production of goods for commerce" as were those in this case. When so read, the exemption reaches employees of only such retail or service establishments as are comparable to the local merchant, corner grocer or filling station operator who sells to or serves ultimate consumers who are at the end of, or beyond, that "flow of goods in commerce" which it is the purpose of the Act to reach. See § 2, *infra*. Without this clause such local establishments might find themselves technically covered by the Act, not because they were "producing goods for [interstate] commerce," but because, for example, they were retailing milk near a state line and, therefore, might be regarded as actually in interstate commerce when delivering retail sales of milk to local customers, all of whom were ultimate consumers of it for their personal use, but a small proportion of whom lived across the state line from the milk dealer. *Walling* v.

[4] "Sec. 13. (a) The provisions of sections 6 and 7 shall not apply with respect to . . . (2) any employee engaged in *any retail or service establishment* the greater part of whose selling or servicing is in intrastate commerce; . . ." 52 Stat. 1060, 1067, 29 U. S. C. § 213 (a) (2). (Italics supplied.)

Jacksonville Paper Co., 317 U. S. 564, 571; *Phillips Co.* **v.** *Walling*, 324 U. S. 490, 497. Similarly, it was felt that without this exemption clause, the employees of a local merchant who purchased his goods from outside his State but retailed them all within his State to ultimate consumers across his counter, might, nevertheless, technically be covered by the Act as being actually "in [interstate] commerce" because of his purchases, although his sales all might be at "retail" and beyond the end of the "flow of goods in commerce." 83 Cong. Rec. 7393–7394, 7436–7438. The origin of this clause, § 13 (a) (2), had nothing to do with establishments "producing goods for [interstate] commerce."

It is rare, if not impossible, for an employee who is engaged in an occupation necessary to the production of goods for interstate commerce to be said to be at the same time an employee engaged in a retail or service establishment whose selling and servicing is confined to ultimate consumers. These employments are largely mutually exclusive. To the extent that sales or services are necessary for the production of goods for interstate commerce they generally are by that hypothesis not sales or services to an ultimate consumer for his personal use and, accordingly, are neither "retail" sales nor services of a comparable character, within the meaning of § 13 (a) (2).

The logic of this result is as clear as the declared purpose, legislative history and administrative practice which combine to produce it.

The purposes of the Act are declared as follows in § 2:

"(a) The Congress hereby finds that *the existence, in industries engaged* in commerce or *in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living* necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and per-

petuate such labor conditions among the workers of the several States; (2) *burdens commerce and the free flow of goods in commerce;* (3) *constitutes an unfair method of competition in commerce;* (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

"(b) It is hereby declared to be the *policy of this Act, through the exercise by Congress of its power to regulate commerce* among the several States, to correct and as rapidly as practicable *to eliminate the conditions above referred to in such industries* without substantially curtailing employment or earning power." 52 Stat. 1060, 29 U. S. C. § 202. (Italics supplied.)

To fail to cover in this Act the multitude of employees who are engaged in establishments like that of the petitioner and which supply the materials and services currently needed for the maintenance of productive machinery used by those who produce goods for interstate commerce would take the heart out of this Act. Savings resulting from substandard labor conditions would be reflected directly into competitive costs. This would weaken the governmental mechanism for sustaining "the minimum standard of living necessary for the health, efficiency, and general well-being of workers" referred to as the purpose of the Act.[5]

[5] *Phillips Co.* v. *Walling,* 324 U. S. 490, 493. The Bill was introduced May 24, 1937, as S. 2475 and H. R. 7200, accompanied by a Presidential message. The sponsor of the Bill agreed that the Bill was "intended to carry out the suggestions made by the President in his message." 81 Cong. Rec. 4960, 4961. The President said "to protect the fundamental interests of free labor and a free people we propose that only goods which have been produced under conditions which meet the minimum standards of free labor shall be admitted to interstate commerce. Goods produced under conditions which do not meet rudimentary standards of decency should be regarded as contraband and ought not to be allowed to pollute the

The primary purpose of the Act is not so much to regulate interstate commerce as such, as it is, through the exercise of legislative power, to prohibit the shipment of goods in interstate commerce if they are produced under substandard labor conditions. Such a prohibition is an appropriate exercise of the power of Congress over interstate commerce. *United States* v. *Darby,* 312 U. S. 100, 115; *United States* v. *Carolene Products Co.,* 304 U. S. 144, 147. This Act seeks to eliminate substandard labor

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channels of interstate trade." *Id.* at 4961. The President emphasized his purpose to follow the reasoning of Mr. Justice Holmes' dissenting opinion in the 5 to 4 decision in *Hammer* v. *Dagenhart,* 247 U. S. 251, 277. This Court has now overruled that decision and unanimously upheld the constitutionality of the Fair Labor Standards Act of 1938. *United States* v. *Darby,* 312 U. S. 100, 115–117. The Bill became known as the "Wage and Hour Bill." Later it received its official title of the "Fair Labor Standards Act of 1938." The respective Bills were referred to the Committee on Education and Labor in the Senate and the Committee on Labor in the House. Joint hearings were had before these Committees June 2–5, 7–15, 21 and 22, 1937. Hearings on S. 2475 and H. R. 7200, 75th Cong., 1st Sess. It was reported to the Senate July 8, 1937 with amendments. Sen. Rep. No. 884, 75th Cong., 1st Sess. After full discussion it was passed by the Senate July 31, 1937, with amendments. 81 Cong. Rec. 7957. In that form it was referred to the Committee on Labor of the House, and was reported out August 6, 1937 (H. Rep. No. 1452, 75th Cong., 1st Sess.), without significant changes as to coverage or exemptions. After debate, it was recommitted to the Committee on Labor December 17, 1937 (82 Cong. Rec. 1835), including particularly the substitution of a single Administrator in place of the Fair Labor Standards Board proposed in the original Bill. It was again reported favorably by the House Committee on Labor April 21, 1938, with amendments. H. Rep. No. 2182, 75th Cong., 3d Sess. After debate, it was passed by the House May 24, 1938. 83 Cong. Rec. 7449. It went to conference between the two Houses and was reported out of conference with several amendments in substantially its present form and the conference reports were adopted in both Houses June 14, 1938. 83 Cong. Rec. 9158, 9246. It was approved by the President June 25, 1938. The questions of coverage and exemption are closely related to each other in the discussion in Congress and in the amendments adopted.

conditions, including child labor, on a wide scale throughout the nation. The purpose is to raise living standards. This purpose will fail of realization unless the Act has sufficiently broad coverage to eliminate in large measure from interstate commerce the competitive advantage accruing from savings in costs based upon substandard labor conditions. Otherwise the Act will be ineffective, and will penalize those who practice fair labor standards as against those who do not.

The original Bill provided for a labor standards board which was given broad authority to issue regulations and orders to carry out the provisions of the Act including authority to determine some questions of coverage. It listed no specific exemptions such as are now contained in § 13. In the joint hearings on this Bill (Joint Hearings, 75th Cong., 1st Sess., on S. 2475 and H. R. 7200, pp. 1–89, see especially pp. 24–25, 24–29, 35 *et seq.*), the Chairman of the Senate Committee on Education and Labor asked the Assistant Attorney General (p. 35)—

"Would you explain under just what circumstances and under what circumstances only, it would be possible for the regulation of retail establishments and small business enterprises to come under this bill?"

to which he replied—

"It was not intended by this bill to apply generally to retailers or to apply to the service trades, such as the filling-station attendant, and the pants presser and small business generally.

. . . . .

"Practically, the situation in which a local merchant might be affected would be if he were moving his goods in the course of delivery across the State line to a substantial extent so that he were engaging in interstate commerce; but generally speaking, the policy of the bill is not to include the service trades and small businesses and the retailing enterprises."

Section 6 (a) of the original Bill proposed to exempt the employees of any employer employing less than a fixed minimum number of employees except in those circumstances where the Labor Standards Board found that the maintenance of appropriate fair labor standards by even such a class of employers was necessary or appropriate in order to carry out the purposes, or prevent the circumvention, of any provision of the Act. The requirement of a minimum size for an included establishment, and the provisions for the Board and its discretionary power were later eliminated but the purpose of all of these provisions is served to a substantial degree by the insertion of § 13 in their place.

While its language and coverage were changed in details, the Bill did not depart substantially from its original purpose. This purpose remains the key to the meaning of the words defining its coverage and also to those defining exemption from its coverage. There never was an intent expressed to exempt retailers other than the local merchants of the type dealing with the ultimate consumer. Section 13 (a) (2) clarified the exemption of such of these as were near state lines and of local merchants whose *purchases* might be interstate although the greater part of their sales were intrastate.[6]

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[6] The original Senate Committee report said (Sen. Rep. No. 884, 75th Cong., 1st Sess., p. 5):

"The bill carefully excludes from its scope business in the several States that is of a purely local nature. It applies only to the industrial and business activities of the Nation insofar as they utilize the channels of interstate commerce, or seriously and substantially burden or harass such commerce. It leaves to State and local communities their own responsibilities concerning those local service and other business trades that do not substantially influence the stream of interstate commerce. For example, the policy in this regard is such that it is not even intended to include in its scope those purely local and small business establishments that happen to lie near State lines, and solely on account of such location, actually serve a wholly local community trade within two States."

See also, note 8, *infra; Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 571, and *Phillips Co.* v. *Walling*, 324 U. S. 490, 497.

In the Bill as reported to the House of Representatives, April 21, 1938, the declaration of purposes referred to "substandard labor conditions in occupations in commerce, in the production of goods for commerce, or *otherwise affecting commerce.*"[7] (Italics supplied.) The breadth of the phrase "affecting commerce" was so uncertain and difficult of definition that it was at first proposed in the Bill to grant to a labor standards board, and later to the Secretary of Labor, authority to determine what should be considered as actually "affecting commerce" within the meaning of the Act. This proposal proved unsatisfactory and Congress finally chose to forego the exercise of its full constitutional power and eliminated from the Act the clause "affecting commerce." The remaining coverage relates only to employees (1) "in [interstate] commerce,"—from whom § 13 (a) (2) exempts employees of retail and service establishments the greater part of whose selling or servicing is in intrastate commerce—and to those (2) "in production of goods for [interstate] commerce." The debates in Congress show an intent to restrict the word "retail" to such transactions with ultimate consumers as are commonly carried on at local dry goods, butchering, or grocery stores. The words "service establishments" and "servicing," however, were introduced in the final Conference Report and were not discussed on the floor.[8] 83 Cong. Rec. 9161, 9249.

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[7] Section 2 (a), S. 2475 accompanying report No. 2182 on Union Calendar No. 804 in the House of Representatives, 75th Cong., 3d Sess.

[8] See, Debates in House of Representatives, 83 Cong. Rec. 7393–7394, 7436–7438. It is here that § 13 (a) (2) had its origin in an amendment presented by Representative Celler and accepted by Chairman Norton of the House Committee on Labor. It provided for the insertion of the words "but no such order shall be applicable to any retail industry, the greater part of whose sales is in intrastate commerce."

It was intended "to eliminate retailing" and to prevent the classification of employees of retail establishments as employees engaged

Returning to the text of the Act and to its authoritative administrative interpretation, further confirmation is apparent. In general usage the noun "retail" means "The sale of commodities in small quantities or parcels;—opposed to *wholesale.*" The verb "retail" means "To sell in small quantities, as by the single yard, pound, gallon, etc.; to sell directly to the consumer; as, to *retail* cloth or groceries." Webster's New International Dictionary, Unabridged (2d ed., 1938).

In the suggested use of the word "retail" as opposed to the word "wholesale," a distinction appears not merely between the size and volume of the sales but between types of purchasers. For example—

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in interstate commerce because of either purchases or sales made by such employers across state lines. Representative Celler said (83 Cong. Rec. 7438):

"The courts will look to the debates in this House for what is meant by these words. . . . If you want to eliminate retailing, you should say so in clear-cut language, and this amendment which I offer indicates in the clearest way that retailing is exempted. . . . Accept it and then retail dry goods, retail butchering, grocers, retail clothing stores, department stores will all be exempt."

Representative Norton replied: ". . . in view of the great misunderstanding there must be about this retailing feature of the bill, the committee will accept the amendment. There has been a great deal of doubt as to the understanding of that particular section, and I think this amendment will not weaken our bill, but will in fact strengthen it."

The amendment thereupon was agreed to. (Ayes, 145—Noes, 56.)

Representative Johnson of Oklahoma, in withdrawing an amendment which would have expressly stricken out interstate purchases as a basis for bringing within the Act employees of an industry making such purchases, then said:

". . . the amendment . . . offered by the gentleman from New York [Mr. Celler], which amendment has been approved by this body, is to protect the little corner store, filling station, and other retailers who purchase a substantial part of their goods across the State line."

"Wholesaling includes all marketing transactions in which the purchaser is actuated solely by a profit or business motive in making the purchase.

"Retailing includes all marketing transactions in which the purchaser is actuated solely by a desire to satisfy his own personal wants or those of his family or friends through the personal use of the commodity or service purchased." (Beckman and Engle in Wholesaling Principles and Practice (1937) p. 25.)

Similarly the *Encyclopedia of Social Sciences* states that "The distinguishing feature of the retail trade . . . consists in selling merchandise to ultimate consumers," (Vol. 13, p. 346), whereas wholesaling is said to cover sales "to a retailer, a wholesaler or an industrial consumer so long as the purpose of the customer in buying such goods is to resell them in one form or another or to use them for business needs as supplies or equipment." (Vol. 15, p. 411.)

Governmental usage makes the same distinction on the basis of the use for which the goods are purchased. The Bureau of the Census states in its definition of "wholesale" that "in general, the distinguishing characteristic is that goods sold at wholesale are to be used for business purposes (such as materials for further processing and fabrication, merchandise for resale unchanged, etc.), rather than for personal or household consumption." U. S. Census of Business, 1939, Instructions to Enumerators For Business and Manufacturers, p. 18; also Vol. I, Retail Trade, p. 1; Vol. II, Wholesale Trade, p. 1. It classifies as "wholesale sales," sales of goods or merchandise "to trading establishments of all kinds, to institutions, industrial, commercial, and professional users, and sales to governmental bodies." (*Ibid.*) The Bureau of the Budget, in its *Standard Industrial Classification Manual,* likewise classifies "wholesale trade" to include "all establishments or places of business engaged primarily in selling merchandise to retailers, to industrial or commercial

users, or to other wholesalers . . ." Vol. II—Nonmanufacturing Industries, 1942, p. 35. It defines "retail trade" to include "establishments engaged in selling merchandise for personal or household consumption and rendering services incidental to the sales of goods." (*Ibid.*) Similarly the Social Security Board, in its *Industrial Classification Code,* Vol. I, Description of Industries, 1942, pp. 99–100, prepared for use of the Board and State agencies administering employment security legislation, distinguishes between wholesale and retail establishments on the basis of whether the goods they sell are to be used for business purposes or for personal or household purposes.

The word "retail" because of its ready contrast with "wholesale" is generally more restrictive than the word "service." The two, however, are used so closely together in this statute as to require them to be interpreted similarly. This makes it appropriate to restrict the broader meaning of "service" to a meaning comparable to that given the narrower term "retail." The words are put on a like level especially by their use in the alternative with the single word "establishment" in the phrase "any *retail or service establishment* the greater part of *whose selling or servicing* is in intrastate commerce." (Italics supplied.) Accordingly, in proportion as the meaning of the word "retail" is restricted to sales made in small quantities to ultimate consumers to meet personal rather than commercial and industrial uses of those articles, so it is correspondingly appropriate to restrict the word "service" to services to ultimate users of them for personal rather than commercial purposes. This is supported by judicial interpretation of the clause.[9]

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[9] *Guess* v. *Montague,* 140 F. 2d 500, 503; cf. *Fleming* v. *Arsenal Bldg. Corp.,* 125 F. 2d 278, 280, affirmed *sub nom., Kirschbaum Co.* v. *Walling,* 316 U. S. 517, 526.

The administrative interpretation by the Administrator of the Wage and Hour Division of the terms "retail and service establishments," "retail sales" and "services" as used in this connection reinforces the interpretations above stated,[10] and this Court, in speaking of interpretations of this Act by the Wage and Hour Division, has said: "In any case such interpretations are entitled to great weight."

[10] Interpretative Bulletin No. 6 of the Wage and Hour Division of the United States Department of Labor and under the title of "Retail and Service Establishment—The Scope and Applicability of the Exemption Provided by Section 13 (a) (2) of the Fair Labor Standards Act of 1938" originally issued December, 1938, and revised June, 1941, 2 C. C. H. Labor Law Service, ¶ 32,106.

Some of these interpretations are as follows:

"Section 13 (a) (2), was intended to apply typically to the grocery store, butcher shop, haberdashery, clothing store, filling station, beauty parlor, hotel, and similar commonly recognized retail and service establishments." Par. 3.

"A retail sale is a sale of goods for direct consumption and not for purposes of resale or redistribution in any form." Par. 12.

"A retail establishment sells goods to private individuals for personal or family consumption." Par. 14.

"The term 'service establishment' as used in section 13 (a) (2) may be considered to include generally that large miscellaneous assortment of business enterprises which are similar in character to retail establishments, but which may not be accurately classified as such. Such an interpretation is suggested by the manner in which section 13 (a) (2) is drafted. Service and retail establishments are considered in the same sentence and the same criterion of intrastate commerce is made applicable to both." Par. 22. See also, Pars. 23–29.

"As already indicated, establishments which perform a substantial amount of work for industrial or business users, government agencies, institutions, and similar customers may not be considered service establishments. A service establishment is one which performs service for private individuals for personal or family use." Par. 27.

In paragraph 29, the Administrator lists many examples of "establishments not considered service establishments under exemption" and says of them—

"Although we recognize that the foregoing companies *perform service*, it is nevertheless our opinion that establishments engaged in such businesses are *not in the ordinary case sufficiently similar in character*

United States v. *American Trucking Assns.*, 310 U. S. 534, 549. See also, *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140. The Administrator classifies as "non-retail" many types of sales closely comparable to those made by the petitioner in this case, of motors, generators and similar equipment to commercial and industrial customers for their use in producing goods for interstate commerce.[11]

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to retail establishments to be considered service establishments within the meaning of section 13 (a) (2)." (Italics supplied.)

Among the companies so listed in paragraph 29, and to which the above quotation refers, are the following which have special significance in connection with this case: engineering firms, machine shops and foundries, establishments engaged in sharpening and reconditioning industrial tools, in resistance welding, in armature rewinding, or in making electric signs, companies engaged in the repair of business machines or in repairing elevators.

[11] "Thus, many establishments are engaged in selling goods which have only an industrial or business market, e. g., establishments engaged in selling production machinery, freight trailers, oil-well drilling machinery and equipment, etc. These establishments are *not retail establishments* within the meaning of section 13 (a) (2) since they do not sell regularly to the general consuming public." (Italics supplied.) Interpretative Bulletin No. 6, Par. 11, 2 C. C. H. Labor Law Service, ¶ 32,106. A footnote to paragraph 11 in the same bulletin contains the following statement: "Ordinarily the following types of goods have only an industrial or business market and are not sold to the general consuming public. Accordingly, sales of such goods, in the ordinary case, are not retail. It should be noted that the types of goods listed below are merely examples and do not comprise an exhaustive enumeration." The note then lists many illustrations some of which are closely comparable to the types of goods sold and serviced in this case. Among the illustrations are butchers' equipment, filling station equipment, construction equipment, machine tools, mechanical rubber goods (such as belting, packing, gaskets, and recoil pads), power engines, powerhouse equipment, welding equipment, hospital equipment (such as X-ray machines), plumbers' equipment, shoe repairers' equipment, commercial aircraft equipment, railroad equipment and commercial ship equipment.

Although in this case the motors sold by the petitioner were not purchased by its customers for resale or to be processed for resale, and although they were to be used and probably ultimately to be "consumed" in the hands of the petitioner's customers, these motors remained actively in use in the production of the "flow of goods in commerce." It is to this great field of the production of goods for interstate commerce that the Act is directed.

The record establishes the "commercial and industrial" character of the petitioner's customers. The petitioner's circular advertises its business as that of "electrical engineers, motor dealers, *commercial and industrial wiring.*" (Italics supplied.) The circular offers "service for *all types of commercial and industrial wiring.*" (Italics supplied.) The stipulation filed by the petitioner shows that 99% of its "active accounts as reflected in its Accounts Receivable Ledger . . . are *commercial or industrial firms.*" (Italics supplied.) These are not "retail" customers in the same sense as is the customer of the local merchant, local grocer or filling station operator who buys for his own personal consumption. The Fair Labor Standards Act is concerned with goods in the stream of commerce but not with those in "the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof." See § 3 (i), *supra.*

For these reasons the employees of the petitioner were properly held to be engaged in the production of goods for interstate commerce under the coverage of the Fair Labor Standards Act and were not taken out of that coverage by the exemption stated in § 13 (a) (2). The judgment of the Circuit Court of Appeals accordingly is

Affirmed.

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

DECISIONS PER CURIAM, ETC., FROM OCTOBER 1, 1945, THROUGH JANUARY 28, 1946.*

No. 201. CALLAN *v.* SANFORD, WARDEN. On petition for certiorari to the Circuit Court of Appeals for the Fifth Circuit. October 1, 1945. Dismissed on motion of counsel for petitioner. *Mr. Jeremiah A. O'Leary* for petitioner. Reported below: 148 F. 2d 376.

No. 315. JENNINGS *v.* SMITH, WARDEN. On petition for certiorari to the Supreme Court of Pennsylvania. October 1, 1945. Dismissed on motion of petitioner.

No. 141. JOHNSON ET AL. *v.* MEAGHER COUNTY ET AL. Appeal from the Supreme Court of Montana. October 8, 1945. *Per Curiam:* The motion to dismiss is granted, and the appeal is dismissed for want of jurisdiction. § 237 (a), Judicial Code as amended, 28 U. S. C. § 344 (a); *Charleston Assn.* v. *Alderson,* 324 U. S. 182, 185, 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. Oscar A. Provost* for appellants. *Mr. R. V. Bottomly* for appellees. Reported below: 155 P. 2d 750.

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*MR. JUSTICE JACKSON took no part in the consideration or decision of the cases in which judgments or orders were announced during this period.

MR. JUSTICE BURTON took no part in the consideration or decision of the cases in which judgments or orders were announced on October 1 and 8, 1945.

For decisions on applications for certiorari, see *post,* pp. 698, 716; rehearing, *post,* pp. 801, 802.

No. 144. St. Louis Amusement Co. et al. *v.* United States et al. Appeal from the District Court of the United States for the Southern District of New York. October 8, 1945. *Per Curiam:* The motions to dismiss are granted and the appeal is dismissed for want of jurisdiction. *United States* v. *California Canneries,* 279 U. S. 553, 556, and cases cited; *Allen Co.* v. *Cash Register Co.,* 322 U. S. 137, 142. *Messrs. John M. Minton, Jr.* and *Russell Hardy* for appellants. *Solicitor General Fahy* for the United States, and *Messrs. Whitney North Seymour, John W. Davis, George S. Leisure* and *Joseph M. Proskauer* for Paramount Pictures, Inc. et al., appellees. Reported below: 61 F. Supp. 854.

No. 178. 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. October 8, 1945. *Per Curiam:* The motions to affirm are granted and the judgment is affirmed. *I. C. C.* v. *Jersey City,* 322 U. S. 503, 515, and cases cited. *Mr. Wilmer A. Hill* for appellant. *Assistant Solicitor General Cox* and *Mr. Daniel W. Knowlton* for the United States and Interstate Commerce Commission, and *Mr. William A. Roberts* and *Mrs. Irene Kennedy* for the Smoky Mountain Stages, Inc., appellees. Reported below: 59 F. Supp. 336.

No. 215. Deaton Truck Line, Inc. *v.* United States et al. Appeal from the District Court of the United States for the Northern District of Alabama. October 8, 1945. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. (1) *United States* v. *Hancock Truck Lines,* 324 U. S. 774. (2) *United States* v. *Carolina Carriers Corp.,* 315 U. S. 475. *Mr. Francis H. Hare* for

appellant. *Assistant Solicitor General Cox* and *Mr. Daniel W. Knowlton* for appellees.

No. 225. BEMIS *v.* HUMBLE OIL & REFINING CO. ET AL. Appeal from the Court of Civil Appeals, 1st Supreme Judicial District, of Texas. October 8, 1945. *Per Curiam:* The appeal is dismissed for want of jurisdiction. § 237 (a), Judicial Code, as amended, 28 U. S. C. § 344 (a); *Charleston Assn.* v. *Alderson,* 324 U. S. 182, 185, 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. Edward S. Boyles* for appellant. *Messrs. R. E. Seagler* and *Fred V. Hughes* for appellees. Reported below: 184 S. W. 2d 645.

No. 267. STROBEL *v.* MULCAHY, SHERIFF. Appeal from the Supreme Court of Illinois. October 8, 1945. *Per Curiam:* The appeal is dismissed for want of jurisdiction. § 237 (a), Judicial Code, as amended, 28 U. S. C. § 344 (a); *Charleston Assn.* v. *Alderson,* 324 U. S. 182, 185, 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. Wm. Scott Stewart* for appellant. Reported below: 390 Ill. 233, 60 N. E. 2d 397.

No. 284. DELAVAN HOME & LAND CO., INC. *v.* COUNTY OF ERIE. Appeal from the Supreme Court of New York, Erie County. October 8, 1945. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. *Winona & St. Peter Land Co.* v. *Minnesota,* 159 U. S. 526; *Anderson National Bank* v. *Luckett,* 321 U. S. 233, 243,

and cases cited. *Mr. Joseph A. Wechter* for appellant. See 294 N. Y. 847, 62 N. E. 2d 396.

No. 341. MOSHER *v.* WAYLAND ET AL. Appeal from the Supreme Court of Arizona. October 8, 1945. *Per Curiam:* The appeal is dismissed for want of a properly presented federal question. *Whitney* v. *California,* 274 U. S. 357, 360, and cases cited. Appellant *pro se. Messrs. Charles L. Strouss* and *Frank L. Snell* for appellees. Reported below: 158 P. 2d 654.

No. 368. MADISON AVENUE OFFICES, INC. *v.* BROWNE ET AL. Appeal from the Supreme Court of New York. October 8, 1945. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. *Rapid Transit Corp.* v. *New York,* 303 U. S. 573, 577–578, 582–583; *Carmichael* v. *Southern Coal Co.,* 301 U. S. 495, 509–513. *Mr. Harold J. Treanor* for appellant. *Nathaniel L. Goldstein,* Attorney General of New York, *Orrin G. Judd,* Solicitor General, and *Wendell P. Brown,* First Assistant Attorney General, for appellees. See 294 N. Y. 811, 62 N. E. 2d 241.

No. 369. MACDONALD ET AL., EXECUTORS, *v.* BROWNE ET AL. Appeal from the Supreme Court of New York. October 8, 1945. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. *Rapid Transit Corp.* v. *New York,* 303 U. S. 573, 577–578, 582–583; *Carmichael* v. *Southern Coal Co.,* 301 U. S. 495, 509–513. *Mr. Harold J. Treanor* for appellants. *Nathaniel L. Goldstein,* Attorney General of New York, *Orrin G. Judd,* Solicitor General, and *Wendell P. Brown,* First Assistant Attorney General, for appellees. See 294 N. Y. 263, 62 N. E. 2d 63.

No. 386. AMERICAN STORES DAIRY CO. *v.* WISCONSIN DEPARTMENT OF TAXATION. Appeal from the Supreme Court of Wisconsin. October 8, 1945. *Per Curiam:* The appeal is dismissed for want of a properly presented federal question. *Whitney* v. *California,* 274 U. S. 357, 360, and cases cited; *Godchaux Co.* v. *Estopinal,* 251 U. S. 179. *Mr. George D. Spohn* for appellant. *John E. Martin,* Attorney General of Wisconsin, and *Harold H. Persons,* Assistant Attorney General, for appellee. Reported below: 246 Wis. 396, 17 N. W. 2d 596.

No. 8. ATKINS *v.* ATKINS. Certiorari, 325 U. S. 846, to the Supreme Court of Illinois. October 8, 1945. *Per Curiam:* The judgment is vacated and the cause is remanded to the Supreme Court of Illinois in order to enable it to reexamine its decision in the light of *Williams* v. *North Carolina,* 325 U. S. 226, and *Esenwein* v. *Commonwealth ex rel. Esenwein,* 325 U. S. 279; *Busey* v. *District of Columbia,* 319 U. S. 579, 580; *New York ex rel. Whitman* v. *Wilson,* 318 U. S. 688, 690–691 and cases cited; *State Tax Commission* v. *Van Cott,* 306 U. S. 511, 515–516. MR. JUSTICE BLACK dissents. *Messrs. Harry F. Gillis* and *A. Rea Williams* for petitioner. *Mr. Harold F. Trapp* for respondent. Reported below: 386 Ill. 345, 54 N. E. 2d 488.

No. 6, original. NEBRASKA *v.* WYOMING ET AL. October 8, 1945. Decree entered. Reported at 325 U. S. 665.

No. 8, original. KANSAS *v.* MISSOURI. October 8, 1945. Upon consideration of the stipulation of counsel it is ordered that the time for marking the boundary be extended until the further order of the Court.

No. 2, October Term, 1941. BERNARDS ET AL. *v.* JOHNSON ET AL. October 8, 1945. The motion to recall the mandate is denied.

No. 337, October Term, 1944. INTERNATIONAL UNION OF MINE, MILL & SMELTER WORKERS LOCALS NOS. 15, 17, 107, 108 AND 111 (C. I. O.) ET AL. *v.* EAGLE-PICHER MINING & SMELTING CO. ET AL. October 8, 1945. The motions for leave to withdraw the petitions for rehearings are granted. 325 U. S. 335.

No. 470. UNITED STATES EX REL. DOSS *v.* LINDSLEY, SHERIFF. October 8, 1945. The application for bail presented to MR. JUSTICE MURPHY, and by him referred to the Court, was considered by it and denied.

No. 12, Misc. SHOTKIN *v.* KENNEDY, ACTING JUDGE. October 8, 1945. The motion for leave to file petition for writ of mandamus is denied.

No. 1, Misc. KELLY *v.* DOWD, WARDEN;
No. 5, Misc. AUDETT *v.* JOHNSTON, WARDEN;
No. 6, Misc. FRETTIE *v.* SQUIER, WARDEN;
No. 7, Misc. WALEY *v.* JOHNSTON, WARDEN;
No. 8, Misc. UNITED STATES EX REL. STAPLES *v.* NIERSTHEIMER, WARDEN;
No. 10, Misc. EDMONDSON *v.* WRIGHT;
No. 11, Misc. FIFE *v.* RAGEN, WARDEN;
No. 13, Misc. THOMPSON *v.* LAINSON, WARDEN;
No. 14, Misc. REEVES *v.* LAINSON, WARDEN;
No. 17, Misc. BENNETT *v.* NEW JERSEY;
No. 19, Misc. DAVIS *v.* SMYTH, SUPERINTENDENT;
No. 22, Misc. TURNER *v.* RAGEN, WARDEN; and

No. 23, Misc. JONES *v.* NIERSTHEIMER, WARDEN. October 8, 1945. The motions for leave to file petitions for writs of habeas corpus are denied.

No. 2, Misc. IN RE DELISLE;
No. 3, Misc. SRYGLEY *v.* UNITED STATES; and
No. 4, Misc. CRUM *v.* HUNTER, WARDEN. October 8, 1945. The applications are denied.

No. 9, Misc. BOZELL *v.* CLARK, ATTORNEY GENERAL. October 8, 1945. The petition for writ of injunction is denied.

No. 15, Misc. SINCLAIR *v.* DOWD, WARDEN. October 8, 1945. The motion for leave to file petition for writ of certiorari is denied.

No. 158. NEW YORK EX REL. RAY *v.* MARTIN, WARDEN. Appeal from the County Court, Wyoming County, New York. October 8, 1945. The appeal is dismissed for want of jurisdiction, § 237 (a) of the Judicial Code, as amended, 28 U. S. C. § 344 (a). Treating the papers whereon the appeal was allowed as 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 granted. *Mr. Thomas J. McKenna* for appellant.

No. 329. COOK, COMMISSIONER, *v.* WILSON ET AL., PARTNERS, DOING BUSINESS AS WILSON LUMBER CO. Appeal from the Supreme Court of Arkansas. October 8, 1945. The appeal is dismissed for want of jurisdiction, § 237 (a) of the Judicial Code, as amended, 28 U. S. C. § 344 (a). Treating the papers whereon the appeal was allowed as 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 granted. *Mr. Thomas S. Buzbee* for appellant. Reported below: 208 Ark. 459, 187 S. W. 2d 7.

No. 820, October Term, 1944. 10 East 40th Street Building, Inc. *v.* Callus et al. October 8, 1945. Order entered amending opinion. The petition for rehearing is denied.

Opinion reported as amended, 325 U. S. 578.

No. 111. DiBenedetto, Inspector of Customs, et al. *v.* Morgenthau, Secretary of the Treasury. On petition for writ of certiorari to the United States Court of Appeals for the District of Columbia. October 8, 1945. Dismissed on motion of counsel for petitioners. *Mr. Charles A. Horsky* for petitioners. *Acting Solicitor General Cox, Messrs. Paul A. Sweeney* and *Joseph B. Goldman* for respondent. Reported below: 148 F. 2d 223.

No. 243. Devereux Foundation, Inc. *v.* Lea et al. Appeal from the Supreme Court of Pennsylvania. October 15, 1945. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 388, 390, and cases cited; *Zahn* v. *Board of Public Works*, 274 U. S. 325, 328, and cases cited; *Nectow* v. *Cambridge*, 277 U. S. 183. The petition for leave to intervene and for leave to file a motion to dismiss is denied. *Mr. Edward J. Griffiths* for appellant. *Mr. Joseph Neff Ewing* for petitioners. Reported below: 351 Pa. 478, 41 A. 2d 744.

No. 18, Misc. Gray et al. *v.* Bybee et al. October 15, 1945. The motion for leave to file a petition for writ of certiorari is denied.

No. 24, Misc. IN RE WILSON;
No. 26, Misc. SAWYER *v.* DUFFY, WARDEN;
No. 27, Misc. ISENBERG *v.* WELCH, SUPERINTENDENT;
No. 28, Misc. PETERS *v.* ASHE, WARDEN;
No. 29, Misc. BROWN *v.* UTAH;
No. 30, Misc. HILLIARD *v.* JOHNSTON, WARDEN;
No. 32, Misc. FOSTER *v.* ASHE, WARDEN; and
No. 33, Misc. ROGERS *v.* SQUIER, WARDEN. October 15, 1945. The motions for leave to file petitions for writs of habeas corpus are denied.

No. 34, Misc. JOHNSON *v.* UTAH; and
No. 35, Misc. METTER *v.* ZRISKEY ET AL. October 15, 1945. The applications are denied.

No. 31, Misc. ILLINOIS EX REL. SHAFFER *v.* RAGEN, WARDEN. October 15, 1945. The motion for leave to withdraw the motion for leave to file a petition for writ of habeas corpus is granted.

No. 204. GRECO *v.* WHITECOTTON, WARDEN. October 15, 1945. The order of October 8, 1945 denying the petition for writ of certiorari, 326 U. S. 748, is vacated.

No. 219. GERSEWITZ v. NEW YORK. October 15, 1945. The petition for writ of certiorari to the Court of Appeals of New York is dismissed, it appearing that the petitioner died on September 8, 1945. Petitioner *pro se*. *Mr. Henry J. Walsh* for respondent. Reported below: 294 N. Y. 163, 61 N. E. 2d 427.

No. 431. FELDMAN ET AL. *v.* UNITED STATES. On petition for writ of certiorari to the Circuit Court of Appeals

for the Seventh Circuit. October 15, 1945. Dismissed pursuant to stipulation of counsel. *Mr. Arthur Abraham* for petitioners. *Acting Solicitor General Judson* for the United States. Reported below: 149 F. 2d 951.

No. 12, original. UNITED STATES *v.* CALIFORNIA. October 22, 1945. The motion for leave to file the bill of complaint is granted.

No. 36, Misc. McCOY *v.* UTAH;
No. 37, Misc. KING *v.* RAGEN, WARDEN;
No. 38, Misc. KING *v.* HORGAN;
No. 39, Misc. CARSON *v.* RAGEN, WARDEN; and
No. 40, Misc. JENKOT *v.* RAGEN, WARDEN. October 22, 1945. The motions for leave to file petitions for writs of habeas corpus are denied.

No. 41, Misc. COYLE *v.* CALIFORNIA ET AL. October 22, 1945. The motions for leave to file petitions for writs of habeas corpus and certiorari are denied. The petition for appeal is also denied.

Nos. 20 and 21, Misc. LOBER ET AL. *v.* MORGAN, LEWIS & BOCKIUS ET AL. October 22, 1945. The motion for leave to file petition for writs of certiorari is denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Mr. Archibald Palmer* for petitioners. *Messrs. Frederic L. Ballard* and *Allen Hunter White* for Ballard, Spahr, Andrews & Ingersoll et al., *Mr. Henry S. Drinker* for Drinker, Biddle & Reath et al., and *Acting Solicitor General Judson, Messrs. Roger S. Foster, Milton V. Freeman* and *George Zolotar* for the Securities & Exchange Commission, respondents.

No. 43. KEETON, ADMINISTRATRIX, *v.* THOMPSON, TRUSTEE IN BANKRUPTCY. Certiorari, 324 U. S. 838, to the Supreme Court of Arkansas. Submitted October 15, 1945. Decided November 5, 1945. *Per Curiam:* On examination of all the evidence considered in this case by the Supreme Court of Arkansas, we are of opinion that the question of respondent's negligence should have been submitted to the jury. The judgment will be reversed and the cause remanded for further proceedings not inconsistent with this opinion. *Messrs. Theron W. Agee* and *David S. Partain* submitted for petitioner. *Messrs. Thomas T. Railey* and *Thomas B. Pryor* submitted for respondent. Reported below: 207 Ark. 793, 183 S. W. 2d 505.

No. 421. MCCALLUM *v.* BOARD OF MANAGERS AND THE GRIEVANCE COMMITTEE OF THE CHICAGO BAR ASSOCIATION. Appeal from the Supreme Court of Illinois. November 5, 1945. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Mr. Charles A. Horsky* for appellant. *Mr. Charles Leviton* for appellees. Reported below: 391 Ill. 400, 64 N. E. 2d 310.

No. 42, Misc. BERNARD *v.* WRIGHT, WARDEN; and

No. 47, Misc. HILLIARD *v.* JOHNSTON, WARDEN. November 5, 1945. The motions for leave to file petitions for writs of habeas corpus are denied.

No. 46, Misc. IN RE YOUNG;

No. 48, Misc. HILLIARD *v.* ROCHE, U. S. DISTRICT JUDGE; and

No. 49, Misc. HILLIARD *v.* JOHNSTON, WARDEN. November 5, 1945. The motions for leave to file petitions for writs of mandamus are denied.

No. 45, Misc. YOUNG *v.* ST. SURE, U. S. DISTRICT JUDGE. November 5, 1945. The motion for leave to file a petition for writ of certiorari is denied.

No. 43, Misc. IN RE YOUNG; and

No. 44, Misc. BANTZ *v.* SQUIER, WARDEN. November 5, 1945. The applications are denied.

No. 408. MONTGOMERY WARD & CO., INC. ET AL. *v.* UNITED STATES. November 5, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. The judgment of the Circuit Court of Appeals is vacated and the cause is remanded to the District Court with directions to dismiss the cause as moot. *Messrs. Stuart S. Ball, John A. Barr, Harold A. Smith* and *Guy A. Gladson* for petitioners. *Solicitor General McGrath* for the United States. Reported below: 150 F. 2d 369.

No. 50, Misc. REAGAN *v.* UTAH. November 13, 1945. The motion for leave to file a petition for writ of habeas corpus is denied.

No. 593. MCELROY, SECRETARY, ET AL. *v.* MITCHELL, ATTORNEY GENERAL, ET AL.; and

No. 594. MITCHELL, ATTORNEY GENERAL, ET AL. *v.* MCELROY, SECRETARY, ET AL. Appeals from the District Court of the United States for the District of Kansas. November 13, 1945. Appeals dismissed pursuant to stipulation, costs to be equally divided. *Mr. Clyde Taylor* for McElroy et al. *A. B. Mitchell,* Attorney General of Kansas, for Mitchell et al. Reported below: 60 F. Supp. 51.

No. 2, October Term, 1941. BERNARDS ET AL. *v.* JOHNSON ET AL. November 19, 1945. The motion to recall the mandate is denied.

No. 51, Misc. IN RE FRASER. November 19, 1945. The application is denied.

No. 25, Misc. SPEARS *v.* JOHNSTON, WARDEN. December 3, 1945. The motion for leave to file a petition for a writ of certiorari is denied.

No. 16, Misc. DECLOUX *v.* JOHNSTON, WARDEN, ET AL. December 3, 1945. The motion for leave to file a petition for a writ of certiorari is denied. Petitioner *pro se*. *Solicitor General McGrath, Messrs. Robert S. Erdahl* and *Leon Ulman* for respondents.

No. 53, Misc. IN RE GUTTERMAN. December 3, 1945. The motion for leave to file a petition for a writ of mandamus is denied.

No. 54, Misc. JACKSON *v.* RAGEN, WARDEN;
No. 55, Misc. IN RE WRIGHT; and
No. 56, Misc. IN RE THUNDER. December 3, 1945. The applications are denied.

No. 49. BAILEY *v.* ANDERSON, STATE HIGHWAY COMMISSIONER. December 3, 1945. Order entered amending opinion. The petition for rehearing is denied.
Opinion reported as amended, 326 U. S. 203.

No. 558. HOUGH *v.* CALIFORNIA. On petition for writ of certiorari to the Supreme Court of California. Decem-

ber 3, 1945. Dismissed on motion of counsel for petitioner. *Mr. Morris Lavine* for petitioner. *Robert W. Kenny,* Attorney General of California, and *Frank W. Richards,* Deputy Attorney General, for respondent. Reported below: 26 Cal. 2d 618, 160 P. 2d 549.

No. 57, Misc. FLANNIGAN *v.* RAGEN, WARDEN; and

No. 59, Misc. IN RE SMITH. December 10, 1945. The motions for leave to file petitions for writs of habeas corpus are denied.

No. 58, Misc. FISHER *v.* MATCHETT ET AL. December 10, 1945. The motion for leave to file petition for writ of mandamus or prohibition is denied.

No. 481. LAUGHLIN *v.* UNITED STATES. December 11, 1945. The motion of the petitioner to stay issuance of order denying petition for writ of certiorari is denied.

No. 489. ZAP *v.* UNITED STATES. December 11, 1945. The issuance of the order denying petition for writ of certiorari, 326 U. S. 777, is stayed pending the consideration and decision on a petition for rehearing to be filed within the time prescribed in Rule 33, on motion of counsel for the petitioner.

No. 60, Misc. DAVIS *v.* NIERSTHEIMER, WARDEN; and

No. 62, Misc. SINGER *v.* RAGEN, WARDEN. December 17, 1945. The motions for leave to file petitions for writs of certiorari are denied.

No. 63, Misc. WOODS *v.* NIERSTHEIMER, WARDEN. December 17, 1945. The motion for leave to file a petition for writ of habeas corpus is denied.

No. 64, Misc. BURALL *v.* ROCHE, U. S. DISTRICT JUDGE. December 17, 1945. The motion for leave to file a petition for writ of mandamus is denied.

No. 11, original. GEORGIA *v.* PENNSYLVANIA RAILROAD CO. ET AL. December 17, 1945. Lloyd K. Garrison, Esquire, appointed Special Master.

No. 61, Misc. IN RE YAMASHITA. Application for leave to file petition for writ of habeas corpus and writ of prohibition; and

No. —. YAMASHITA *v.* STYER, COMMANDING GENERAL. Petition for writ of certiorari to the Supreme Court of the Philippines. December 17, 1945.

It having been represented to this Court by the Attorney General of the United States that a petition for writ of certiorari in the above-entitled cause has been forwarded to this Court from Manila to review the denial of writs of habeas corpus and prohibition by the Supreme Court of the Philippines, on or about November 28, 1945;

And whereas, the Court considers it advisable to defer consideration of the application for writs of habeas corpus and prohibition until it has had an opportunity to examine the petition for writ of certiorari;

It is ordered by this Court that all further proceedings in this cause be, and the same are hereby, stayed pending the consideration and determination by this Court of the applications for writs of habeas corpus and prohibition now pending as No. 61, Miscellaneous of the present term, and of the petition for writ of certiorari now in transit.

The Secretary of War is requested to advise the Military Authorities of this action of the Court.

No. 59. UNITED STATES *v.* ROMPEL, ADMINISTRATOR. December 17, 1945. Order entered amending opinion.

Opinion reported as amended, 326 U. S. 367.

No. 71. MINE SAFETY APPLIANCES CO. *v.* FORRESTAL. December 17, 1945. The concurring opinion of MR. JUSTICE REED in this case is amended.

Opinion reported as amended, 326 U. S. 375.

No. 61, Misc. IN RE YAMASHITA. Application for leave to file petition for writ of habeas corpus and writ of prohibition; and

No. 672. YAMASHITA *v.* STYER, COMMANDING GENERAL. Petition for writ of certiorari to the Supreme Court of the Philippines. December 20, 1945.

The Court desires to hear argument upon the questions presented by the motion for leave to file the petition for writs of habeas corpus and prohibition and by the petition for writ of certiorari. Action upon the motion for leave to file and the petition for writ of certiorari will be withheld meanwhile, and the motion and petition are set down for oral argument on Monday, January 7, next.

MR. JUSTICE JACKSON took no part in the consideration of this order.

No. 637. BOARD OF SUPERVISORS OF MONONA COUNTY ET AL. *v.* BOARD OF TRUSTEES OF MONONA-HARRISON DRAINAGE DISTRICT No. 1 ET AL. Appeal from the Supreme Court of Iowa. January 2, 1946. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Breiholz* v. *Board of Supervisors,* 257 U. S. 118. *Mr. Allan A. Herrick* for appellants. *Messrs. J. W. Anderson* and *M. M. Lothrop* for appellees. Reported below: 19 N. W. 2d 196.

No. 65, Misc. IN RE EDMONDSON;

No. 69, Misc. JOHNSON *v.* JOHN HANCOCK MUTUAL LIFE INSURANCE CO. ET AL.; and

No. 71, Misc. DURKIN *v.* CLARK, ATTORNEY GENERAL. January 2, 1946. The applications are denied.

No. 66, Misc. HAYES *v.* RAGEN, WARDEN. January 2, 1946. The motion for leave to file petition for writ of certiorari is denied.

No. 67, Misc. MCMILLAN *v.* MUNICIPAL COURT FOR THE D. C. ET AL. January 2, 1946. The motion for leave to file a petition for writ of prohibition is denied.

No. 68, Misc. GRIMM *v.* NIERSTHEIMER, WARDEN; and

No. 70, Misc. KELLY *v.* JOHNSTON, WARDEN. January 2, 1946. The motions for leave to file petitions for writs of habeas corpus are denied.

No. 73, Misc. SMITH *v.* NIERSTHEIMER, WARDEN. January 7, 1946. The motion for leave to file a petition for a writ of habeas corpus is denied.

No. 52, Misc. WRIGHT *v.* ROCHE, U. S. DISTRICT JUDGE. January 7, 1946. The motion for leave to file a petition for writ of mandamus is denied.

No. 72, Misc. IN RE STORCH. January 14, 1946. The motion for leave to file petition for a writ of habeas corpus is denied.

No. 76, Misc. STIZZA *v.* ESSEX COUNTY JUVENILE AND DOMESTIC RELATIONS COURT. January 14, 1946. The application is denied.

No. 77, Misc. EUREKA GAS CO. *v.* FORD, U. S. DISTRICT JUDGE. January 14, 1946. The motion for leave to file a petition for a writ of mandamus is denied. MR. JUSTICE REED took no part in the consideration or decision of this application. *Mr. J. W. Jones* for petitioner.

No. 290. HALLIBURTON OIL WELL CEMENTING CO. *v.* WALKER ET AL., DOING BUSINESS AS DEPTHOGRAPH COMPANY. Certiorari, 326 U. S. 705, to the Circuit Court of Appeals for the Ninth Circuit. Argued January 9, 1946. Decided January 28, 1946. *Per Curiam:* The judgment is affirmed by an equally divided Court. *Mr. Earl Babcock* for petitioner. *Mr. Harold W. Mattingly* for respondents. Reported below: 149 F. 2d 896.

No. 724. MONKS *v.* LEE. Appeal from Probate Court, Suffolk County, Massachusetts. January 28, 1946. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. § 237 (a), Judicial Code, as amended, 28 U. S. C. § 344 (a). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari as required by § 237 (c) of the Judicial Code, as amended, 28 U. S. C. § 344 (c), certiorari is denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this case. *Mr. Herbert S. Avery* for appellant. *Mr. Robert E. Goodwin* for appellee. See 318 Mass. 513, 62 N. E. 2d 657.

No. 725. TWENTIETH CENTURY ASSOCIATES, INC. *v.* WALDMAN. Appeal from Municipal Court, City of New

York, New York. January 28, 1946. *Per Curiam:* The appeal is dismissed for the reason that it was not properly allowed. Rule 36, 28 U. S. C. § 868; *Bartemeyer* v. *Iowa,* 14 Wall. 26. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this case. *Mr. Benjamin Bernstein* for appellant. *Nathaniel L. Goldstein,* Attorney General of New York, *Orrin G. Judd,* Solicitor General, and *Saul A. Shames,* Assistant Attorney General, filed a statement on behalf of the State of New York, as *amicus curiae,* with respect to jurisdiction. Reported below: 184 Misc. 24, 53 N. Y. S. 2d 612.

No. 726. TWENTIETH CENTURY ASSOCIATES, INC. *v.* WALDMAN. Appeal from Municipal Court, City of New York, New York. January 28, 1946. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. *Block* v. *Hirsh,* 256 U. S. 135; *Marcus Brown Holding Co.* v. *Feldman,* 256 U. S. 170; *East New York Savings Bank* v. *Hahn,* 326 U. S. 230. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this case. *Mr. Benjamin Bernstein* for appellant. Reported below: 184 Misc. 24, 53 N. Y. S. 2d 612.

No. 78, Misc. MCMAHAN *v.* BENNETT, DIRECTOR. January 28, 1946. The motion for leave to file a petition for a writ of mandamus is denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application.

No. 79, Misc. KINNER MOTORS, INC. *v.* BEAUMONT, U. S. DISTRICT JUDGE. January 28, 1946. The motion for leave to file a petition for a writ of mandamus is denied because application therefor is made to this Court rather than to the Circuit Court of Appeals. MR. JUSTICE RUT-

LEDGE took no part in the consideration or decision of this application. *Mr. Ford W. Harris* for petitioner.

No. 80, Misc. MILLER *v.* WILTMER, SUPERINTENDENT. January 28, 1946. The motion for leave to file a petition for a writ of habeas corpus is denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application.

No. 81, Misc. DIOGUARDI *v.* DURNING, COLLECTOR OF CUSTOMS;

No. 82, Misc. SMITH *v.* MAGUIRE, JUSTICE, ET AL.; and

No. 83, Misc. HARDING *v.* LAGUARDIA, MAYOR, ET AL. January 28, 1946. The applications are denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of these applications.

No. 36. JOHN KELLEY CO. *v.* COMMISSIONER OF INTERNAL REVENUE; and

No. 47. TALBOT MILLS *v.* COMMISSIONER OF INTERNAL REVENUE. January 28, 1946. Order entered amending opinion.

Opinion reported as amended, 326 U. S. 521.

ORDERS GRANTING CERTIORARI, FROM OCTOBER 1, 1945, THROUGH JANUARY 28, 1946.

No. 158. NEW YORK EX REL. RAY *v.* MARTIN, WARDEN. See *ante,* p. 685.

No. 329. COOK, COMMISSIONER, *v.* WILSON ET AL., PARTNERS, DOING BUSINESS AS WILSON LUMBER CO. See *ante,* p. 685.

No. 100. WILLIAMS ET AL. *v.* GREEN BAY & WESTERN RAILROAD CO. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Milton Pollack* for petitioners. *Mr. Wm. Lloyd Kitchel* for respondent. 147 F. 2d 777.

No. 142. AMERICAN SURETY CO. *v.* SAMPSELL, TRUSTEE IN BANKRUPTCY. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. William C. Mathes* for petitioner. *Mr. Thomas S. Tobin* for respondent. Reported below: 148 F. 2d 986.

No. 198. M. KRAUS & BROS., INC. *v.* UNITED STATES. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Thomas Turner Cooke* for petitioner. *Acting Solicitor General Judson, Mr. Robert S. Erdahl* and *Miss Beatrice Rosenberg* for the United States.

Nos. 278 and 281. RECONSTRUCTION FINANCE CORPORATION ET AL. *v.* DENVER & RIO GRANDE WESTERN RAILROAD CO. ET AL.;

No. 279. RECONSTRUCTION FINANCE CORPORATION ET AL. *v.* DENVER & SALT LAKE WESTERN RAILROAD CO. ET AL.;

No. 280. RECONSTRUCTION FINANCE CORPORATION ET AL. *v.* CITY BANK FARMERS TRUST CO., TRUSTEE, ET AL.; and

No. 282. RECONSTRUCTION FINANCE CORPORATION ET AL. *v.* THOMPSON, TRUSTEE, ET AL. October 8, 1945. Petition for writs of certiorari to the Circuit Court of Appeals for the Tenth Circuit granted. *Acting Solicitor General Judson, Messrs. John W. Davis, Edwin S. S. Sunderland, James L. Homire, Thomas O'G. FitzGibbon, Judson C.*

McLester, Jr., Henry W. Anderson, George D. Gibson, W. A. W. Stewart, Arthur A. Gammell, John W. Drye, Jr. and *George L. Shearer* for petitioners. *Messrs. William V. Hodges* and *Frank C. Nicodemus, Jr.* for the Denver & Rio Grande Western Railroad Co., and *Messrs. Edward E. Watts, Jr.* and *Peter H. Holme* for the City Bank Farmers Trust Co., respondents. Reported below: 150 F. 2d 28.

No. 289. ALLEN, COLLECTOR OF INTERNAL REVENUE, *v.* TRUST COMPANY OF GEORGIA ET AL., EXECUTORS. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Acting Solicitor General Judson* for petitioner. *Messrs. John A. Sibley* and *Furman Smith* for respondents. Reported below: 149 F. 2d 120.

No. 309. UNEMPLOYMENT COMPENSATION COMMISSION OF ALASKA ET AL. *v.* ARAGON ET AL. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Messrs. E. Coke Hill, Marshall P. Madison* and *Francis R. Kirkham* for petitioners. *Mr. Herbert Resner* for respondents. Reported below: 149 F. 2d 447.

No. 318. SOCIAL SECURITY BOARD *v.* NIEROTKO. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Acting Solicitor General Judson* for petitioner. *Messrs. Ernest Goodman* and *Morton A. Eden* for respondent. Reported below: 149 F. 2d 273.

No. 365. SEAS SHIPPING CO., INC. *v.* SIERACKI. October 8, 1945. Petition for writ of certiorari to the Circuit

Court of Appeals for the Third Circuit granted. *Messrs. John B. Shaw, Rowland C. Evans, Jr.* and *Thomas E. Byrne, Jr.* for petitioner. *Mr. Abraham E. Freedman* for respondent. Reported below: 149 F. 2d 98.

No. 93. HERCULES GASOLINE CO., INC. *v.* COMMISSIONER OF INTERNAL REVENUE. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Messrs. Melvin F. Johnson* and *Joseph H. Jackson* for petitioner. *Acting Solicitor General Cox, Assistant Attorney General Clark, Messrs. Sewall Key, J. Louis Monarch, Walter J. Cummings, Jr.* and *Mrs. Maryhelen Wigle* for respondent. Reported below: 147 F. 2d 972.

No. 123. WILLIAMS *v.* UNITED STATES. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. M. J. Dougherty* for petitioner. *Acting Solicitor General Cox, Messrs. James M. McInerney, Robert S. Erdahl* and *Irving S. Shapiro* for the United States. Reported below: 148 F. 2d 960.

No. 145. COMMISSIONER OF INTERNAL REVENUE *v.* FLOWERS. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Solicitor General Fahy* for petitioner. *Mr. James N. Ogden* for respondent. Reported below: 148 F. 2d 163.

No. 163. COMMISSIONER OF INTERNAL REVENUE *v.* WILCOX ET AL. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Solicitor General Fahy* for petitioner. *Mr.*

George B. Thatcher for respondents. Reported below: 148 F. 2d 933.

No. 203. COMMISSIONER OF INTERNAL REVENUE *v.* ESTATE OF HOLMES. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Acting Solicitor General Cox* for petitioner. *Messrs. W. J. Howard, J. E. Price* and *J. V. Wheat* for respondent. Reported below: 148 F. 2d 740.

No. 234. MISSISSIPPI PUBLISHING CORP. *v.* MURPHREE. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Messrs. E. C. Brewer, William H. Watkins, P. H. Eager, Jr.* and *Mrs. Elizabeth Hulen* for petitioner. *Messrs. W. E. Gore, H. H. Creekmore* and *Rufus Creekmore* for respondent. Reported below: 149 F. 2d 138.

No. 263. LUSTHAUS *v.* COMMISSIONER OF INTERNAL REVENUE. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Messrs. W. A. Seifert, William Wallace Booth, Norman D. Keller* and *Paul E. Hutchinson* for petitioner. *Acting Solicitor General Judson* for respondent. Reported below: 149 F. 2d 232.

No. 115. UNITED STATES *v.* JOHNSON; and

No. 116. UNITED STATES *v.* SOMMERS ET AL. October 8, 1945. Petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. MR. JUSTICE MURPHY took no part in the consideration or decision of these applications. *Acting Solicitor General Cox* for the United States. *Messrs. Homer Cummings, Wil-*

liam J. Dempsey and *Harold R. Schradzke* for respondents. Reported below: 149 F. 2d 31.

No. 139. LEVINSON *v.* SPECTOR MOTOR SERVICE. October 8, 1945. Petition for writ of certiorari to the Supreme Court of Illinois granted. *Mr. Richard S. Folsom* for petitioner. *Messrs. Harry J. Lurie* and *Roland Rice* for respondent. Reported below: 389 Ill. 466, 59 N. E. 2d 817.

No. 197. COMMISSIONER OF INTERNAL REVENUE *v.* CRAWFORD. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Acting Solicitor General Cox* for petitioner. *Messrs. Sidney D. Krystal* and *Oscar Moss* for respondent. Reported below: 148 F. 2d 776.

No. 292. ESTEP *v.* UNITED STATES. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Mr. Hayden C. Covington* for petitioner. *Acting Solicitor General Judson, Messrs. Robert S. Erdahl* and *Irving S. Shapiro* for the United States. Reported below: 150 F. 2d 768.

No. 317. COMMISSIONER OF INTERNAL REVENUE *v.* TOWER. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Acting Solicitor General Judson* for petitioner. *Mr. Oscar E. Waer* for respondent. Reported below: 148 F. 2d 388.

Nos. 254 and 255. S. R. A., INC. *v.* MINNESOTA. October 8, 1945. Petitions for writs of certiorari to the Su-

preme Court of Minnesota granted. *Mr. Roland J. Faricy* for petitioner. *J. A. A. Burnquist,* Attorney General of Minnesota, *George B. Sjoselius,* Deputy Attorney General, *Messrs. James F. Lynch* and *Andrew R. Bratter* for respondent. Reported below: 219 Minn. 493, 517, 18 N. W. 2d 442, 455.

No. 305. TOWNSHIP OF HILLSBOROUGH ET AL. *v.* CROMWELL. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. MR. JUSTICE MURPHY took no part in the consideration or decision of this application. *Mr. Samuel I. Kessler* for petitioners. *Mr. Shelton Pitney* for respondent. Reported below: 149 F. 2d 617.

No. 320. FEDERAL TRADE COMMISSION *v.* A. P. W. PAPER CO., INC. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. The CHIEF JUSTICE took no part in the consideration or decision of this application. *Acting Solicitor General Judson* for petitioner. *Messrs. Edward H. Green* and *Emery H. Sykes* for respondent. Reported below: 149 F. 2d 424.

No. 306. MASON *v.* PARADISE IRRIGATION DISTRICT. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted limited to the question whether any applicable rule requiring equality of treatment among creditors was violated by the difference between the treatment accorded the petitioner and that accorded the Reconstruction Finance Corporation under the approved plan. Petitioner *pro se. Mr. P. M. Barceloux* for respondent. Reported below: 149 F. 2d 334.

No. 86. GRIFFIN *v.* GRIFFIN. October 8, 1945. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia granted. Reported below: 148 F. 2d 17.

No. 122. FISHER *v.* UNITED STATES. October 8, 1945. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia granted. *Mr. Charles H. Houston* for petitioner. *Acting Solicitor General Judson, Messrs. W. Marvin Smith, Robert S. Erdahl* and *Leon Ulman* for the United States. Reported below: 149 F. 2d 28.

No. 152. CANIZIO *v.* NEW YORK. October 8, 1945. Petition for writ of certiorari to the County Court, Kings County, New York, granted. Petitioner *pro se*. *Mr. Henry J. Walsh* for respondent.

No. 290. HALLIBURTON OIL WELL CEMENTING CO. *v.* WALKER ET AL., DOING BUSINESS AS DEPTHOGRAPH COMPANY. October 15, 1945. The order of October 8, 1945, *post*, p. 740, denying the petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit is vacated and the petition for writ of certiorari is granted. *Mr. Earl Babcock* for petitioner. *Mr. Harold W. Mattingly* for respondent. Reported below: 149 F. 2d 896.

No. 187. CHERRY COTTON MILLS, INC. *v.* UNITED STATES. October 15, 1945. Petition for writ of certiorari to the Court of Claims granted. *Mr. Theodore B. Benson* for petitioner. *Acting Solicitor General Judson* for the United States. Reported below: 103 Ct. Cls. 243, 59 F. Supp. 122.

No. 261. CASE, COMMISSIONER OF PUBLIC LANDS, *v.* BOWLES, PRICE ADMINISTRATOR, ET AL. October 15, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Smith Troy*, Attorney General of Washington, and *Edwin C. Ewing*, Assistant Attorney General, for petitioner. *Acting Solicitor General Judson* and *Mr. Richard H. Field* for respondents. Reported below: 149 F. 2d 777.

No. 342. ANDERSON ET AL. *v.* MT. CLEMENS POTTERY CO. October 15, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Messrs. Lee Pressman* and *Edward Lamb* for petitioners. *Mr. Bert V. Nunneley* for respondent. Reported below: 149 F. 2d 461.

No. 354. HOWITT ET AL. *v.* UNITED STATES. October 15, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Mr. Bart. A. Riley* for petitioners. *Acting Solicitor General Judson, Messrs. Robert S. Erdahl* and *Irvin Goldstein* for the United States. Reported below: 150 F. 2d 82.

No. 319. NATIONAL LABOR RELATIONS BOARD *v.* CHENEY CALIFORNIA LUMBER CO. October 22, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Acting Solicitor General Judson* and *Mr. Alvin J. Rockwell* for petitioner. No appearance for respondent. Reported below: 149 F. 2d 333.

No. 344. BELL ET AL. *v.* HOOD ET AL. October 22, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Messrs. A. L. Wirin*

and *Russell E. Parsons* for petitioners. *Acting Solicitor General Judson* for respondents. *Mr. Wayne M. Collins* filed a brief on behalf of the Northern and Southern California Branches of the American Civil Liberties Union, as *amici curiae,* in support of the petition. Reported below: 150 F. 2d 96.

No. 387. UNITED STATES *v.* ALCEA BAND OF TILLAMOOKS ET AL. October 22, 1945. Petition for writ of certiorari to the Court of Claims granted. *Acting Solicitor General Judson* for the United States. *Messrs. Everett Sanders, L. A. Gravelle* and *Edward F. Howrey* for respondents. Reported below: 103 Ct. Cls. 494, 59 F. Supp. 934.

No. 238. HULBERT ET AL. *v.* TWIN FALLS COUNTY. October 22, 1945. Petition for writ of certiorari to the Supreme Court of Idaho granted. *Acting Solicitor General Cox* for petitioners. *Frank Langley,* Attorney General of Idaho, and *Mr. Everett M. Sweeley* for respondent. Reported below: 156 P. 2d 319.

No. 384. SMITH, TRUSTEE, ET AL. *v.* HOBOKEN RAILROAD, WAREHOUSE & STEAMSHIP CONNECTING CO. ET AL. October 22, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Messrs. James D. Carpenter, Jr., Edward A. Markley* and *Parker McCollester* for petitioners. *Mr. Edward J. O'Mara* for respondents. Reported below: 150 F. 2d 921.

No. 392. MEYER *v.* FLEMING ET AL., TRUSTEES. October 22, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. MR. JUSTICE FRANKFURTER took no part in the consideration

or decision of this application. *Mr. Walter E. Meyer, pro se. Messrs. W. F. Peter* and *A. B. Enoch* for respondents. Reported below: 149 F. 2d 529.

No. 399. WALKER, POSTMASTER GENERAL, *v.* ESQUIRE, INC. October 22, 1945. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia granted. Hannegan substituted as the party petitioner. *Acting Solicitor General Judson* for petitioner. *Messrs. Bruce Bromley, Wm. Dwight Whitney* and *Morris L. Ernst* for respondent. *Messrs. Charles Horsky, Luther Ely Smith, Arthur Garfield Hays* and *Whitney North Seymour* filed a brief on behalf of the American Civil Liberties Union, as *amicus curiae,* in support of the petition. Reported below: 151 F. 2d 49.

No. 221. GIBSON *v.* UNITED STATES. October 22, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Mr. Hayden C. Covington* for petitioner. *Acting Solicitor General Judson, Messrs. Robert S. Erdahl* and *Irving S. Shapiro* for the United States. Reported below: 149 F. 2d 751.

No. 170. CHICKASAW NATION *v.* UNITED STATES. See *ante,* p. 217.

No. 410. MACGREGOR *v.* WESTINGHOUSE ELECTRIC & MANUFACTURING CO. November 5, 1945. Petition for writ of certiorari to the Supreme Court of Pennsylvania granted. *Mr. William B. Jaspert* for petitioner. *Mr. Jo. Baily Brown* for respondent. Reported below: 352 Pa. 443, 43 A. 2d 332.

No. 418. DUGGAN, TRUSTEE, *v.* SANSBERRY, TRUSTEE; and

No. 419. NATIONAL AIRCRAFT CORP. *v.* SANSBERRY, TRUSTEE. November 5, 1945. Petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Messrs. Luke E. Hart, Geo. O. Durham* and *Noah Weinstein* for petitioners. *Messrs. Ralph Bamberger* and *Isidore Feibleman* for respondent. Reported below: 149 F. 2d 548.

No. 435. LAND, CHAIRMAN OF THE U. S. MARITIME COMMISSION, ET AL. *v.* WATERMAN STEAMSHIP CORP. November 5, 1945. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia granted. *Acting Solicitor General Judson* for petitioners. *Mr. Bon Geaslin* for respondent. Reported below: 151 F. 2d 292.

No. 444. BIGELOW ET AL. *v.* R K O RADIO PICTURES, INC. ET AL. November 5, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Messrs. Thomas C. McConnell* and *Hubert Van Hook* for petitioners. *Messrs. Carl Meyer, Miles G. Seeley, Edward R. Johnston, Edmund D. Adcock* and *Vincent O'Brien* for respondents. *Solicitor General McGrath* filed a memorandum on behalf of the United States, as *amicus curiae,* in support of the petition. Reported below: 150 F. 2d 877.

No. 473. PENNEKAMP ET AL. *v.* FLORIDA. November 5, 1945. Petition for writ of certiorari to the Supreme Court of Florida granted. *Messrs. Robert R. Milam, E. T. McIlvaine* and *Elisha Hanson* for petitioners. *J. Tom Watson,* Attorney General of Florida, *Messrs. James M.*

Carson, Giles J. Patterson, F. M. Hudson and *M. L. Mershon* for respondent. Reported below: 156 Fla. 227, 22 So. 2d 875.

No. 405. SWANSON *v.* MARRA BROTHERS, INC. November 5, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Messrs. Abraham E. Freedman* and *Charles Lakatos* for petitioner. *Messrs. Joseph W. Henderson* and *George M. Brodhead* for respondent. Reported below: 149 F. 2d 646.

No. 408. MONTGOMERY WARD & CO., INC. ET AL. *v.* UNITED STATES. See *ante*, p. 690.

No. 452. COMMISSIONER OF INTERNAL REVENUE *v.* FISHER ET AL., EXECUTORS, ET AL. November 5, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. MR. JUSTICE MURPHY took no part in the consideration or decision of this application. *Acting Solicitor General Judson* for petitioner. *Messrs. Benjamin E. Jaffe* and *R. M. O'Hara* for respondents. Reported below: 150 F. 2d 198.

No. 393. COLLINS ET AL. *v.* BOWLES, PRICE ADMINISTRATOR. November 5, 1945. Petition for writ of certiorari to the United States Emergency Court of Appeals granted. *Messrs. Allen P. Dodd, Sr., Max O'Rell Truitt* and *Mac Asbill* for petitioners. *Acting Solicitor General Judson* for respondent.

No. 400. UTAH JUNK CO. *v.* BOWLES, PRICE ADMINISTRATOR. November 5, 1945. Petition for writ of certiorari to the United States Emergency Court of Appeals granted.

Mr. Keith L. Seegmiller for petitioner. *Acting Solicitor General Judson* for respondent. Reported below: 150 F. 2d 963.

No. 424. KENNECOTT COPPER CORP. *v.* STATE TAX COMMISSION ET AL.; and

No. 425. SILVER KING COALITION MINES CO. *v.* STATE TAX COMMISSION ET AL. November 5, 1945. Petition for writs of certiorari to the Circuit Court of Appeals for the Tenth Circuit granted. The CHIEF JUSTICE took no part in the consideration or decision of these applications. *Messrs. C. C. Parsons* and *H. Thomas Austern* for petitioners. *Grover A. Giles,* Attorney General of Utah, for respondents. Reported below: 150 F. 2d 905.

No. 402. BRUCE'S JUICES, INC. *v.* AMERICAN CAN CO. November 13, 1945. Petition for writ of certiorari to the Supreme Court of Florida granted. *Messrs. Cody Fowler, R. W. Shackleford* and *Thurman Arnold* for petitioner. *Messrs. Leonard B. Smith, John M. Allison, Harry B. Terrell* and *John Lord O'Brian* for respondent. *Mr. Wright Patman* filed a brief, as *amicus curiae,* in support of the petition. Reported below: 155 Fla. 877, 22 So. 2d 461.

No. 404. DAVIS *v.* UNITED STATES. November 13, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Irving Spieler* for petitioner. *Solicitor General McGrath, Mr. Robert S. Erdahl* and *Miss Beatrice Rosenberg* for the United States. Reported below: 151 F. 2d 140.

No. 457. KOTTEAKOS ET AL. *v.* UNITED STATES; and

No. 458. REGENBOGEN *v.* UNITED STATES. November 13, 1945. Petition for writs of certiorari to the Circuit

Court of Appeals for the Second Circuit granted. *Messrs. James I. Cuff* and *Henry G. Singer* for petitioners. *Solicitor General McGrath, Mr. Robert S. Erdahl* and *Miss Beatrice Rosenberg* for the United States. Reported below: 151 F. 2d 170.

No. 484. POFF, EXECUTRIX, *v.* PENNSYLVANIA RAILROAD CO. November 13, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Morris A. Wainger* for petitioner. *Mr. Ray Rood Allen* for respondent. Reported below: 150 F. 2d 902.

No. 505. HOLMBERG ET AL. *v.* ARMBRECHT ET AL. November 19, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. Edmund Burke, Jr.* and *Clarence Fried* for petitioners. *Messrs. Chester Rohrlich* and *Edgar M. Souza* for respondents. Reported below: 150 F. 2d 829.

No. 517. D. A. SCHULTE, INC. *v.* GANGI. November 19, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. Edwin A. Falk* and *Abraham Friedman* for petitioner. Respondent *pro se.* Reported below: 150 F. 2d 694.

No. 556. ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA *v.* WOLFE. November 19, 1945. Petition for writ of certiorari to the Supreme Court of South Dakota granted. *Messrs. Byron S. Payne* and *E. W. Dillon* for petitioner. *Mr. Hubbard F. Fellows* for respondent. Reported below: 18 N. W. 2d 755.

No. 518. McGOLDRICK, COMPTROLLER, ET AL. *v.* CARTER & WEEKES STEVEDORING CO. November 19, 1945. Petition for writ of certiorari to the Supreme Court of New York granted. *Messrs. Isaac C. Donner* and *Harry Katz* for petitioners. *Messrs. Roger S. Baldwin* and *Samuel M. Lane* for respondent. See 294 N. Y. 906, 63 N. E. 2d 112.

No. 519. McGOLDRICK, COMPTROLLER, ET AL. *v.* JOHN T. CLARK & SON. November 19, 1945. Petition for writ of certiorari to the Supreme Court of New York granted. *Messrs. Isaac C. Donner* and *Harry Katz* for petitioners. *Messrs. Roger S. Baldwin* and *Samuel M. Lane* for respondent. See 294 N. Y. 908, 63 N. E. 2d 112.

No. 540. ANGEL *v.* BULLINGTON. December 3, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. *Mr. George Lyle Jones* for petitioner. *Messrs. John L. Walker* and *R. Roy Rush* for respondent. Reported below: 150 F. 2d 679.

No. 550. LAVENDER, ADMINISTRATOR, *v.* KURN ET AL., TRUSTEES, ET AL. December 3, 1945. Petition for writ of certiorari to the Supreme Court of Missouri granted. *Messrs. N. Murry Edwards, James A. Waechter* and *Douglas H. Jones* for petitioner. *Messrs. Maurice G. Roberts* and *Cornelius H. Skinker, Jr.* for J. M. Kurn et al., and *Messrs. Wm. R. Gentry, C. A. Helsell* and *John W. Freels* for the Illinois Central Railroad Co., respondents. Reported below: 354 Mo. 196, 189 S. W. 2d 253.

No. 381. ASHCRAFT ET AL. *v.* TENNESSEE. December 3, 1945. Petition for writ of certiorari to the Supreme Court of Tennessee granted. *Messrs. James F. Bickers*

and *Grover N. McCormick* for petitioners. *Roy H. Beeler*, Attorney General of Tennessee, and *Nat Tipton*, Assistant Attorney General, for respondent.

No. 510. KNAUER *v.* UNITED STATES. December 10, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Mr. Ode L. Rankin* for petitioner. *Solicitor General McGrath, Mr. Robert S. Erdahl* and *Miss Beatrice Rosenberg* for the United States. Reported below: 149 F. 2d 519.

No. 528. UNITED STATES EX REL. TENNESSEE VALLEY AUTHORITY *v.* WELCH;

No. 529. UNITED STATES EX REL. TENNESSEE VALLEY AUTHORITY *v.* BURNS ET AL.;

No. 530. UNITED STATES EX REL. TENNESSEE VALLEY AUTHORITY *v.* LOLLIS ET AL.;

No. 531. UNITED STATES EX REL. TENNESSEE VALLEY AUTHORITY *v.* BRADSHAW ET AL.;

No. 532. UNITED STATES EX REL. TENNESSEE VALLEY AUTHORITY *v.* RUST ET AL.; and

No. 533. UNITED STATES EX REL. TENNESSEE VALLEY AUTHORITY *v.* HYATT ET AL. December 10, 1945. Petition for writs of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. *Solicitor General McGrath* for petitioner. *Messrs. McKinley Edwards, G. L. Jones* and *George H. Ward* for respondent. Reported below: 150 F. 2d 613.

No. 572. GIROUARD *v.* UNITED STATES. December 10, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Messrs. Homer Cummings* and *David J. Coddaire* for petitioner. *Solicitor General McGrath, Mr. Robert S. Erdahl* and *Miss Bea-*

trice Rosenberg for the United States. Reported below: 149 F. 2d 760.

No. 496. HEISER *v.* WOODRUFF ET AL. December 17, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit granted. *Messrs. Leonard J. Meyberg* and *Rupert B. Turnbull* for petitioner. *Messrs. H. A. Ledbetter, Thos. W. Champion* and *Louis A. Fischl* for respondents. Reported below: 150 F. 2d 869.

No. 578. THOMAS PAPER STOCK CO. ET AL. *v.* BOWLES, PRICE ADMINISTRATOR. January 2, 1946. Petition for writ of certiorari to the United States Emergency Court of Appeals granted. *Messrs. Claude A. Roth* and *Jack H. Oppenheim* for petitioners. *Solicitor General McGrath* and *Mr. Richard H. Field* for respondent. Reported below: 151 F. 2d 345.

No. 603. FIRST IOWA HYDRO-ELECTRIC COOPERATIVE *v.* FEDERAL POWER COMMISSION ET AL. January 2, 1946. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia granted. *Messrs. George B. Porter, Andrew G. Haley* and *John Connolly, Jr.* for petitioner. *Solicitor General McGrath, Messrs. Howard E. Wahrenbrock* and *Louis W. McKernan* for the Federal Power Commission, and *John M. Rankin*, Attorney General of Iowa, *Messrs. Neill Garrett* and *Horace L. Lohnes* for the State of Iowa, respondents. Reported below: 151 F. 2d 20.

No. 605. JACOB SIEGEL CO. *v.* FEDERAL TRADE COMMISSION. January 2, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted.

Messrs. Robert T. McCracken, Leo Weinrott and *C. Russell Phillips* for petitioner. *Solicitor General McGrath, Assistant Attorney General Berge* and *Mr. W. T. Kelley* for respondent. *Mr. Seymour M. Klein* filed a brief on behalf of Arnold Constable & Co. et al., as *amici curiae,* in support of the petition. Reported below: 150 F. 2d 751.

No. 609. COMET CARRIERS, INC. *v.* WALLING, ADMINISTRATOR. January 2, 1946. The petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit is granted limited to the third question raised in the Government's brief. *Mr. Ralph D. Elmer* for petitioner. *Solicitor General McGrath* and *Miss Bessie Margolin* for respondent. Reported below: 151 F. 2d 107.

No. 489. ZAP *v.* UNITED STATES. See *post,* p. 802.

No. 349. THIEL *v.* SOUTHERN PACIFIC CO. January 14, 1946. The petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit is granted limited to the question whether petitioner's motion to strike the jury panel was properly denied. *Mr. Allen Spivock* for petitioner. *Mr. Arthur B. Dunne* for respondent. Reported below: 149 F. 2d 783.

ORDERS DENYING CERTIORARI, FROM OCTOBER 1, 1945, THROUGH JANUARY 28, 1946.

No. 141. JOHNSON ET AL. *v.* MEAGHER COUNTY ET AL. See *ante,* p. 679.

No. 225. BEMIS *v.* HUMBLE OIL & REFINING CO. ET AL. See *ante,* p. 681.

No. 267. STROBEL *v.* MULCAHY, SHERIFF. See *ante*, p. 681.

No. 70. MARMON ET AL. *v.* ILLINOIS. October 8, 1945. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Mr. Charles P. R. Macaulay* for petitioners. Reported below: 389 Ill. 19, 58 N. E. 2d 603.

No. 84. PARADISE LAND & LIVESTOCK CO. *v.* FEDERAL LAND BANK OF BERKELEY. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. J. D. Skeen* for petitioner. *Mr. Richard W. Young* for respondent. Reported below: 147 F. 2d 594.

No. 85. CRANSON *v.* UNITED STATES. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Leon de Fremery* for petitioner. *Solicitor General Fahy, Assistant Attorney General Clark, Messrs. Sewall Key, J. Louis Monarch* and *Miss Helen Goodner* for the United States. Reported below: 146 F. 2d 871.

No. 88. MESSLER *v.* UNITED STATES RUBBER CO. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Nathaniel Frucht* for petitioner. *Messrs. Newton A. Burgess* and *Lester G. Budlong* for respondent. Reported below: 148 F. 2d 734.

No. 89. DEPARTMENT OF CONSERVATION OF LOUISIANA ET AL. *v.* FEDERAL POWER COMMISSION ET AL.; and

No. 132. NATIONAL COAL ASSOCIATION ET AL. *v.* FEDERAL POWER COMMISSION. October 8, 1945. Petitions

for writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Fred S. LeBlanc*, Attorney General of Louisiana, and *Mr. E. Leland Richardson* for petitioners in No. 89. *Messrs. Tom J. McGrath, Welly K. Hopkins* and *James W. Haley* for petitioners in No. 132. *Solicitor General Fahy, Assistant Attorney General Shea, Messrs. Paul A. Sweeney, Jerome H. Simonds* and *Charles V. Shannon* for the Federal Power Commission. *William F. Barry*, Solicitor General of Tennessee, for the State of Tennessee, and *Messrs. T. A. McEachern, Jr., Charles C. Crabtree* and *Hamilton E. Little* for the Memphis Natural Gas Co. et al., respondents in No. 89. Reported below: 148 F. 2d 746.

No. 90. PARKER *v.* PARKER. October 8, 1945. Petition for writ of certiorari to the Supreme Court of Florida denied. *Mr. Robert E. Lynch* for petitioner. Reported below: 155 Fla. 635, 21 So. 2d 141.

No. 91. ELLIS, DOING BUSINESS AS GENERAL EXPORT CO., *v.* DE LA RAMA STEAMSHIP CO., INC. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. George Olshausen* for petitioner. *Mr. Frank J. Foley* for respondent. Reported below: 149 F. 2d 61.

No. 94. HAMBURGER ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Edward S. Reid, Jr.* for petitioners. *Acting Solicitor General Judson, Assistant Attorney General Clark, Messrs. Sewall Key, J. Louis Monarch* and *Mrs. Muriel S. Paul* for respondent. Reported below: 147 F. 2d 856.

No. 96. STOCKSTROM *v.* COMMISSIONER OF INTERNAL REVENUE. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Thomas R. Reyburn* for petitioner. *Acting Solicitor General Judson, Assistant Attorney General Clark, Messrs. Sewall Key, J. Louis Monarch* and *Harold C. Wilkenfeld* for respondent. Reported below: 148 F. 2d 491.

No. 97. MACK *v.* COMMISSIONER OF INTERNAL REVENUE. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. John A. McCann* for petitioner. *Solicitor General Fahy, Assistant Attorney General Clark, Messrs. Sewall Key* and *J. Louis Monarch* for respondent. Reported below: 148 F. 2d 62.

No. 98. GURMAN *v.* ILLG ET AL. October 8, 1945. Petition for writ of certiorari to the Supreme Court of Errors for Connecticut denied. *Mr. William L. Beers* for petitioner. *Acting Solicitor General Cox* and *Mr. David London* for the Price Administrator, and *Mr. David M. Reilly* for Illg, respondents. Reported below: 132 Conn. 58, 42 A. 2d 362.

No. 99. E. KAHN'S SONS CO. *v.* BOWLES, PRICE ADMINISTRATOR. October 8, 1945. Petition for writ of certiorari to the United States Emergency Court of Appeals denied. *Messrs. Wilbur La Roe, Jr.* and *Arthur L. Winn, Jr.* for petitioner. *Solicitor General Fahy* and *Mr. Richard H. Field* for respondent. Reported below: 150 F. 2d 546.

No. 101. SEMINOLE NATION *v.* UNITED STATES. October 8, 1945. Petition for writ of certiorari to the Court

of Claims denied. *Messrs. Paul M. Niebell, W. W. Pryor* and *C. Maurice Weidemeyer* for petitioner. *Acting Solicitor General Cox, Messrs. J. Edward Williams, Roger P. Marquis, John C. Harrington* and *Walter J. Cummings, Jr.* for the United States. Reported below: 102 Ct. Cls. 565.

No. 102. GRACE, TRADING AS R. J. & M. C. GRACE, *v.* MAGRUDER, COLLECTOR OF INTERNAL REVENUE. October 8, 1945. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. Lowry N. Coe* for petitioner. *Acting Solicitor General Cox, Assistant Attorney General Clark, Messrs. Sewall Key, J. Louis Monarch* and *Chester T. Lane* for respondent. Reported below: 148 F. 2d 679.

No. 104. ECHO BAY WATERFRONT CORP. *v.* NEW ROCHELLE. October 8, 1945. Petition for writ of certiorari to the County Court of Westchester County, New York, denied. *Mr. Albert Ritchie* for petitioner. *Mr. Charles S. Rhyne* for respondent. See 294 N. Y. 771, 61 N. E. 2d 779.

No. 105. NORO ET AL. *v.* UNITED STATES. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Wm. C. Pierce* for petitioners. *Acting Solicitor General Cox, Assistant Attorney General Clark, Messrs. Sewall Key* and *J. Louis Monarch* for the United States. Reported below: 148 F. 2d 696.

No. 106. LANE *v.* UNITED STATES. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Wm. C. Pierce* for petitioner. *Acting Solicitor General Cox, Messrs. James*

M. McInerney, Robert S. Erdahl, Leon Ulman and *Miss Rosalie Moynahan* for the United States. Reported below: 148 F. 2d 816.

No. 108. EDISON *v.* COMMISSIONER OF INTERNAL REVENUE. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. David Baron* for petitioner. *Acting Solicitor General Judson, Assistant Attorney General Clark, Messrs. Sewall Key, J. Louis Monarch* and *Miss Melva M. Graney* for respondent. Reported below: 148 F. 2d 810.

No. 109. VIRZERA *v.* UNITED STATES; and

No. 110. VIRZERA *v.* UNITED STATES. October 8, 1945. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Julien Cornell* for petitioners. *Acting Solicitor General Cox, Messrs. James M. McInerney, Robert S. Erdahl* and *Irving S. Shapiro* for the United States. Reported below: 149 F. 2d 188.

No. 113. ENOCH PRATT FREE LIBRARY ET AL. *v.* KERR ET AL. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Harry N. Baetjer* and *John Henry Lewin* for petitioners. *Mr. Charles H. Houston* for respondents. Reported below: 149 F. 2d 212.

No. 117. JENKINS *v.* UNITED STATES. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. John J. Bouhan* for petitioner. *Acting Solicitor General Cox, Mr. Robert S. Erdahl* and *Miss Beatrice Rosenberg* for the United States. Reported below: 149 F. 2d 118.

No. 118. PICARELLI *v.* UNITED STATES. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Abraham Solomon* for petitioner. *Acting Solicitor General Cox, Messrs. James M. McInerney* and *Robert S. Erdahl* for the United States. Reported below: 148 F. 2d 997.

No. 119. CLEVELAND ET AL., EXECUTORS, *v.* HIGGINS, COLLECTOR OF INTERNAL REVENUE. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Earl A. Darr* for petitioners. *Acting Solicitor General Cox, Assistant Attorney General Clark, Messrs. Sewall Key, Fred E. Youngman* and *Miss Helen R. Carloss* for respondent. Reported below: 148 F. 2d 722.

No. 120. CARLOS *v.* FLORIDA. October 8, 1945. Petition for writ of certiorari to the Supreme Court of Florida denied. *Mr. George Palmer Garrett* for petitioner. Reported below: 155 Fla. 740, 21 So. 2d 537.

No. 121. MANHATTAN LIGHTERAGE CORP. *v.* ANDERSON ET AL. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Chauncey I. Clark* for petitioner. *Mr. Isidor Enselman* for respondents. *Acting Solicitor General Judson, Mr. Albert A. Spiegel* and *Miss Bessie Margolin* filed a memorandum on behalf of the Administrator of the Wage & Hour Division, U. S. Department of Labor, opposing the petition. Reported below: 148 F. 2d 971.

No. 124. JOHNSON ET AL., DOING BUSINESS AS UNITED STATES DENTAL CO., ET AL. *v.* UNITED STATES. October 8,

1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. H. Albert Young, Albert I. Kegan* and *Walter F. Dodd* for petitioners. *Acting Solicitor General Cox, Messrs. James M. McInerney, Robert S. Erdahl* and *Irving S. Shapiro* for the United States. Reported below: 149 F. 2d 53.

No. 125. TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS *v.* MOONEY, ADMINISTRATRIX. October 8, 1945. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Mr. Arnot L. Sheppard* for petitioner. *Mr. Chelsea O. Inman* for respondent. Reported below: 353 Mo. 1080, 186 S. W. 2d 450.

No. 126. AVIATION CAPITAL, INC. *v.* PEDRICK, COLLECTOR OF INTERNAL REVENUE. October 8, 1945. Petition for writ of certiorari to Circuit Court of Appeals for the Second Circuit denied. *Mr. Francis H. Horan* for petitioner. *Acting Solicitor General Cox, Assistant Attorney General Clark, Mr. Sewall Key* and *Miss Helen R. Carloss* for respondent. Reported below: 148 F. 2d 165.

No. 127. STANDARD LIME & STONE CO. *v.* NATIONAL LABOR RELATIONS BOARD. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Harry N. Baetjer* for petitioner. *Acting Solicitor General Cox, Messrs. Alvin J. Rockwell, Marcel Mallet-Prevost* and *Miss Ruth Weyand* for respondent. Reported below: 149 F. 2d 435.

No. 128. MCADEN *v.* FLORIDA. October 8, 1945. Petition for writ of certiorari to the Supreme Court of Florida denied. *Messrs. Patrick C. Whitaker, Charles F. Blake*

and *Thomas P. Whitaker* for petitioner. *J. Tom Watson*, Attorney General of Florida, for respondent. Reported below: 155 Fla. 523, 21 So. 2d 33.

No. 130. ABDALLAH *v.* UNITED STATES. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Samuel Rubinton* for petitioner. *Acting Solicitor General Cox, Messrs. James M. McInerney, Robert S. Erdahl* and *Miss Beatrice Rosenberg* for the United States. Reported below: 149 F. 2d 219.

No. 131. NORRISTOWN HERALD, INC. *v.* BAUSEWINE. October 8, 1945. Petition for writ of certiorari to the Supreme Court of Pennsylvania denied. *Mr. John J. O'Connor* for petitioner. *Mr. Joseph Knox Fornance* for respondent. Reported below: 351 Pa. 634, 41 A. 2d 736.

No. 133. CURTIS *v.* UTAH FUEL CO. ET AL. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. Petitioner *pro se*. *Mr. H. Brua Campbell* for respondents. Reported below: 148 F. 2d 340.

No. 134. O'KELLEY *v.* UNITED STATES. October 8, 1945. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. Henry Lincoln Johnson, Jr.* for petitioner. *Acting Solicitor General Cox, Messrs. James M. McInerney, Robert S. Erdahl* and *Miss Beatrice Rosenberg* for the United States. Reported below: 149 F. 2d 381.

No. 135. SCHEFOLD *v.* UNITED STATES. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. James L. Gerry* for petitioner. *Acting Solicitor General Cox, Messrs. James M. McInerney, Robert S. Erdahl* and *Miss Beatrice Rosenberg* for the United States. Reported below: 149 F. 2d 492.

No. 136. KOENIGER *v.* UNITED STATES. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Edward V. Broderick* for petitioner. *Acting Solicitor General Cox, Messrs. James M. McInerney, Robert S. Erdahl* and *Miss Beatrice Rosenberg* for the United States. Reported below: 149 F. 2d 492.

No. 137. TIMKEN-DETROIT AXLE CO. *v.* CLEVELAND STEEL PRODUCTS CORP. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. F. O. Richey* and *Wm. A. Strauch* for petitioner. *Messrs. Newton A. Burgess, John F. Ryan* and *Lloyd L. Evans* for respondent. Reported below: 148 F. 2d 267.

No. 138. DOLL *v.* COMMISSIONER OF INTERNAL REVENUE. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. William M. Fitch* for petitioner. *Acting Solicitor General Judson, Assistant Attorney General Clark, Messrs. Sewall Key, Hilbert P. Zarky* and *Miss Helen R. Carloss* for respondent. Reported below: 149 F. 2d 239.

No. 140. MARMON ET AL. *v.* ILLINOIS. October 8, 1945. Petition for writ of certiorari to the Supreme Court of

Illinois denied. *Mr. Charles P. R. Macaulay* for petitioners. Reported below: 389 Ill. 478, 59 N. E. 2d 808.

No. 143. LAKE LUCERNE PLAZA, INC. *v.* BOWLES, PRICE ADMINISTRATOR. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Claude L. Gray* for petitioner. *Acting Solicitor General Judson* and *Mr. David London* for respondent. Reported below: 148 F. 2d 967.

No. 146. COLBY ET AL. *v.* FRENCH ET AL. October 8, 1945. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. Herbert B. Barlow* and *Earle D. Crammond* for petitioners. *Mr. Harry C. Bierman* for respondents. Reported below: 147 F. 2d 883.

No. 147. COOPER *v.* PARSONS, RECEIVER. October 8, 1945. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. Wade H. Cooper, pro se.* Reported below: 148 F. 2d 21.

No. 148. AIROLITE COMPANY ET AL. *v.* FIEDLER, DOING BUSINESS AS AIR CONDITIONING UTILITIES CO. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Frederic P. Warfield* for petitioners. *Mr. J. Preston Swecker* for respondent. Reported below: 147 F. 2d 496.

No. 149. NEVILLE COKE & CHEMICAL CO. *v.* COMMISSIONER OF INTERNAL REVENUE. October 8, 1945. Petition

for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. John P. Ohl* for petitioner. *Acting Solicitor General Cox, Assistant Attorney General Clark, Mr. Sewall Key, Miss Helen R. Carloss* and *Mrs. Muriel S. Paul* for respondent. Reported below: 148 F. 2d 599.

No. 150. CLARAGE FAN CO. *v.* B. F. STURTEVANT CO. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Fred L. Chappell* and *Wm. S. Hodges* for petitioner. *Messrs. Harry Dexter Peck* and *Melvin R. Jenney* for respondent. Reported below: 148 F. 2d 786.

No. 151. SEVEN UP CO. *v.* CHEER UP SALES CO. ET AL. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Frank Y. Gladney* and *John H. Cassidy* for petitioner. *Mr. Oliver T. Remmers* for respondents. Reported below: 148 F. 2d 909.

No. 153. PALMQUIST *v.* UNITED STATES. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Bart. A. Riley* for petitioner. *Acting Solicitor General Judson, Mr. Robert S. Erdahl* and *Miss Beatrice Rosenberg* for the United States. Reported below: 149 F. 2d 352.

No. 154. CRYNE *v.* UNITED STATES. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Archibald Palmer* for petitioner. *Acting Solicitor General Cox, Messrs. James M. McInerney, Robert S. Erdahl* and *Irving*

S. Shapiro for the United States. Reported below: 149 F. 2d 105.

No. 156. LONGHORN PORTLAND CEMENT CO. ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. James H. Yeatman* for petitioners. *Acting Solicitor General Cox, Assistant Attorney General Clark, Mr. Sewall Key, Misses Helen R. Carloss* and *Melva M. Graney* for respondent. Reported below: 148 F. 2d 276.

No. 162. SHRIER, DOING BUSINESS AS A. SHRIER & SONS CO., *v.* UNITED STATES. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Jason L. Honigman* for petitioner. *Acting Solicitor General Cox, Messrs. James M. McInerney, Robert S. Erdahl* and *Leon Ulman* for the United States. Reported below: 149 F. 2d 606.

No. 164. LORRAINE CASTLE APARTMENTS BUILDING CORP., INC. ET AL. *v.* MACKIEWICH ET AL.; and

No. 165. CASTELLANI ET AL. *v.* MCNICHOLS, TRUSTEE, ET AL. October 8, 1945. Petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. John J. Yowell* and *Charles O. Loucks* for petitioners. *Acting Solicitor General Judson* and *Mr. Roger S. Foster* for the Securities & Exchange Commission, *Mr. William T. Murphy* for McNichols, Trustee, and *Mr. William Henning Rubin* for Bart, respondents. Reported below: 149 F. 2d 55.

No. 167. LOUIS F. HALL & CO., INC. *v.* UNITED STATES. October 8, 1945. Petition for writ of certiorari to the Cir-

cuit Court of Appeals for the Second Circuit denied. *Mr. David J. Shorb* for petitioner. *Acting Solicitor General Cox, Assistant Attorney General Clark, Messrs. Sewall Key, Fred E. Youngman* and *Miss Helen R. Carloss* for the United States. Reported below: 148 F. 2d 274.

No. 168. London Weatherproofs, Inc. *v.* United States. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. David J. Shorb* for petitioner. *Acting Solicitor General Cox, Assistant Attorney General Clark, Messrs. Sewall Key, Fred E. Youngman* and *Miss Helen R. Carloss* for the United States. Reported below: 148 F. 2d 340.

Nos. 171, 172, 173, 176 and 177. Harvey et al. *v.* Grossman, Trustee, et al.;

No. 174. Harvey *v.* Grossman et al.; and

No. 175. Plankinton Building Co. *v.* Grossman, Trustee, et al. October 8, 1945. Petitions for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Joseph A. Padway, Herbert S. Thatcher, Morris Berick, Joseph B. Keenan* and *Carroll J. Lord* for petitioners. *Mr. Joseph V. Quarles* for Grossman et al., and *Messrs. Bernard V. Brady* and *Colby Stilson* for the Trustees of the Plankinton Trust, respondents. Reported below: 148 F. 2d 119.

No. 179. Standard Accident Insurance Co. et al. *v.* United States. October 8, 1945. Petition for writ of certiorari to the Court of Claims denied. *Messrs. M. Carl Levine, David Morgulas* and *Albert Foreman* for petitioners. *Acting Solicitor General Judson, Messrs. Paul A. Sweeney* and *Jerome H. Simonds* for the United States. Reported below: 103 Ct. Cls. 607, 59 F. Supp. 407.

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No. 181. WELLS LAMONT CORP. *v.* BOWLES, PRICE ADMINISTRATOR, ET AL. October 8, 1945. Petition for writ of certiorari to the United States Emergency Court of Appeals denied. *Messrs. Ernest S. Ballard* and *Karl D. Loos* for petitioner. *Acting Solicitor General Cox* and *Mr. Richard H. Field* for respondents. Reported below: 149 F. 2d 364.

No. 183. GIANNINI, ADMINISTRATOR, *v.* COMMISSIONER OF INTERNAL REVENUE. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. George H. Koster* for petitioner. *Acting Solicitor General Cox, Assistant Attorney General Clark, Mr. Sewall Key* and *Miss Helen R. Carloss* for respondent. Reported below: 148 F. 2d 285.

No. 184. SHOTTS *v.* LOUISIANA. October 8, 1945. Petition for writ of certiorari to the Supreme Court of Louisiana denied. *Mr. Warren O. Coleman* for petitioner. Reported below: 207 La. 898, 22 So. 2d 209.

No. 185. TREIBLY *v.* OVERHOLSER, SUPERINTENDENT. October 8, 1945. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. J. Austin Latimer* for petitioner. *Acting Solicitor General Judson, Messrs. W. Marvin Smith, Robert S. Erdahl* and *Miss Beatrice Rosenberg* for respondent. Reported below: 147 F. 2d 705.

No. 186. OHIO TANK CAR CO. *v.* KEITH RAILWAY EQUIPMENT CO. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. H. D. Driscoll* and *H. Russell*

Bishop for petitioner. *Mr. Arthur D. Welton, Jr.* for respondent. Reported below: 148 F. 2d 4.

No. 188. LAWRENCE *v.* ILLINOIS. October 8, 1945. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Mr. Thomas Marshall* for petitioner. Reported below: 390 Ill. 499, 61 N. E. 2d 361.

No. 189. NORTHERN TRUST CO. ET AL. *v.* NATIONAL LABOR RELATIONS BOARD; and

No. 190. AMERICAN NATIONAL BANK & TRUST CO. ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. October 8, 1945. Petitions for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. John E. MacLeish* and *Leland K. Neeves* for petitioners in No. 189, and *Messrs. Lewis F. Jacobson* and *David Silbert* for petitioners in No. 190. *Acting Solicitor General Judson, Mr. Alvin J. Rockwell* and *Miss Ruth Weyand* for respondent. Reported below: 148 F. 2d 24.

No. 191. MORGAN *v.* UNITED STATES. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Louis H. Yarrut* for petitioner. *Acting Solicitor General Judson, Messrs. Robert S. Erdahl* and *Leon Ulman* for the United States. Reported below: 149 F. 2d 185.

No. 194. ABELL ET AL. *v.* ANDERSON, RECEIVER. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Lafon Allen, Percy N. Booth, Edward P. Humphrey, Henry E. McElwain, Jr., Benjamin F. Washer, David R.*

Castleman, James W. Stites, Ernest Woodward and *Squire R. Ogden* for petitioners. *Messrs. Frank E. Wood, Robert S. Marx, Harry Kasfir* and *John F. Anderson* for respondent. Reported below: 148 F. 2d 372.

No. 195. TAUB ET AL. *v.* BOWLES, PRICE ADMINISTRATOR. October 8, 1945. Petition for writ of certiorari to the United States Emergency Court of Appeals denied. *Messrs. Irwin Geiger* and *Max O'Rell Truitt* for petitioners. *Acting Solicitor General Judson* and *Mr. Richard H. Field* for respondent. Reported below: 149 F. 2d 817.

No. 199. HALE *v.* UNITED STATES. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Leonard L. Lockard* for petitioner. *Acting Solicitor General Judson* and *Mr. Robert S. Erdahl* for the United States. Reported below: 149 F. 2d 401.

No. 202. STANDARD REGISTER CO. *v.* AMERICAN SALES BOOK CO., INC. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Samuel E. Darby, Jr., W. B. Turner* and *Marston Allen* for petitioner. *Messrs. Stephen H. Philbin* and *William J. Barnes* for respondent. Reported below: 148 F. 2d 612.

No. 210. P. G. LAKE, INC. *v.* COMMISSIONER OF INTERNAL REVENUE. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Harry C. Weeks* for petitioner. *Acting Solicitor General Judson, Assistant Attorney General Clark, Messrs. Sewall Key, Newton K. Fox, Walter J.*

Cummings, Jr. and *Miss Helen R. Carloss* for respondent. Reported below: 148 F. 2d 898.

No. 211. COSTELLO ET AL. *v.* COSTELLO ET AL. October 8, 1945. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. Frederick J. Rice* and *William E. Leahy* for petitioners. *Mr. John F. Hillyard* for respondents. Reported below: 149 F. 2d 379.

No. 212. GENECOV *v.* TEXAS ET AL. October 8, 1945. Petition for writ of certiorari to the Supreme Court of Texas denied. *Messrs. Gabriel Hawkins Golden* and *Joel Manuel Hoppenstein* for petitioner. Reported below: 143 Tex. 476, 186 S. W. 2d 225.

No. 213. BADENHAUSEN ET AL. *v.* GLAZEBROOK ET AL. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Abraham Mitnovetz* for petitioners. *Messrs. Edwin S. S. Sunderland, Thomas O'G. FitzGibbon, H. P. Adair, Carlyle Barton, Irwin L. Tappen, Olin E. Watts, William H. Rogers* and *Leonard D. Adkins* for respondents. Reported below: 148 F. 2d 450.

No. 214. JACKSON & PERKINS CO. *v.* MUSHROOM TRANSPORTATION CO., INC. ET AL. October 8, 1945. Petition for writ of certiorari to the Supreme Court of Pennsylvania denied. *Mr. Austin F. Canfield* for petitioner. *Messrs. Lemuel B. Schofield* and *W. Bradley Ward* for the Mushroom Transportation Co., and *Mr. Thomas F. Gain* for Bickley, respondents. Reported below: 351 Pa. 583, 41 A. 2d 635.

No. 216. CLARK OIL CO. ET AL. *v.* PHILLIPS PETROLEUM CO. ET AL. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Tom Davis, Ernest A. Michel* and *Carl L. Yaeger* for petitioners. *Messrs. David T. Searls* and *G. Aaron Youngquist* for respondents. Reported below: 148 F. 2d 580.

No. 220. MORGAN, EXECUTRIX, *v.* HINES, ADMINISTRATOR OF VETERANS' AFFAIRS. October 8, 1945. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. Robert H. McNeill* and *C. L. Dawson* for petitioner. *Acting Solicitor General Judson, Messrs. Wilbur C. Pickett, Fendall Marbury* and *Walter J. Cummings, Jr.* for respondent. Reported below: 149 F. 2d 21.

No. 223. PRUDENCE REALIZATION CORP. *v.* HURD COMMITTEE ET AL. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Irving L. Schanzer* for petitioner. *Mr. Roger S. Foster* for the Securities & Exchange Commission, and *Mr. Eugene Blanc, Jr.* for the Hurd Committee et al., respondents. Reported below: 150 F. 2d 477.

No. 229. OLD MONASTERY CO. *v.* UNITED STATES. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Irwin Geiger* for petitioner. *Acting Solicitor General Judson, Messrs. Robert S. Erdahl* and *Leon Ulman* for the United States. Reported below: 147 F. 2d 905.

No. 230. SAMUEL H. MOSS, INC. *v.* FEDERAL TRADE COMMISSION. October 8, 1945. Petition for writ of cer-

tiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Henry Ward Beer* for petitioner. *Acting Solicitor General Judson, Assistant Attorney General Berge, Messrs. Charles H. Weston, Matthias N. Orfield, Robert L. Stern, W. T. Kelley,* and *Joseph J. Smith, Jr.* for respondent. Reported below: 148 F. 2d 378.

No. 231. COWELL PORTLAND CEMENT CO. *v.* NATIONAL LABOR RELATIONS BOARD. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Max Thelen* and *Gordon Johnson* for petitioner. *Acting Solicitor General Judson, Messrs. Robert L. Stern, Alvin J. Rockwell, Marcel Mallet-Prevost* and *Miss Ruth Weyand* for respondent. Reported below: 148 F. 2d 237.

No. 232. TEXAS & NEW ORLEANS RAILROAD CO. ET AL. *v.* UNITED STATES. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. J. M. Burford* and *Harry R. Jones* for petitioners. *Acting Solicitor General Judson, Messrs. Paul A. Sweeney* and *Walter J. Cummings, Jr.* for the United States. Reported below: 148 F. 2d 896.

No. 235. SPURR *v.* SPURR. October 8, 1945. Petition for writ of certiorari to the Supreme Court of Appeals of Virginia denied. *Mr. George E. Allen* for petitioner. *Mr. Jas. G. Martin* for respondent.

No. 237. ROSS ENGINEERING CO., INC. *v.* UNITED STATES. October 8, 1945. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Bernard J. Gallagher* and *M. Walton Hendry* for petitioner. *Acting So-*

licitor General Judson and *Mr. Paul A. Sweeney* for the United States. Reported below: 103 Ct. Cls. 185.

No. 240. WEISS *v.* UNITED STATES. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Walter Brower* for petitioner. *Acting Solicitor General Judson, Mr. Robert S. Erdahl* and *Miss Beatrice Rosenberg* for the United States. Reported below: 150 F. 2d 17.

No. 241. ELIAS ET AL. *v.* CLARKE, TRUSTEE, ET AL.; and

No. 242. ELIAS ET AL. *v.* DRISCOLL ET AL., TRUSTEES, ET AL. October 8, 1945. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Paul Duryea Miller* and *Abraham Mitnovetz* for petitioners. *Acting Solicitor General Judson* and *Mr. Roger S. Foster* for the Securities & Exchange Commission, and *Messrs. Lewis M. Dabney, Jr.* and *Allen E. Throop* for Clarke et al., respondents. Reported below: 149 F. 2d 996.

No. 244. SCHONGALLA, EXECUTRIX, *v.* HICKEY, COLLECTOR OF INTERNAL REVENUE. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Edward A. Alexander* for petitioner. *Acting Solicitor General Judson, Assistant Attorney General Clark, Messrs. Sewall Key, J. Louis Monarch* and *Leon F. Cooper* for respondent. Reported below: 149 F. 2d 687.

No. 245. SOUTHERN CALIFORNIA FREIGHT LINES *v.* MCKEOWN. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Hugh Taylor Gordon, Jr.* for petitioner. *Mr.*

Otis J. Baughn for respondent. Reported below: 148 F. 2d 890.

No. 246. TOBIN *v.* UNITED STATES. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Ode L. Rankin* for petitioner. *Acting Solicitor General Judson* and *Mr. Robert S. Erdahl* for the United States. Reported below: 149 F. 2d 534.

No. 247. POPE & TALBOT, INC. *v.* MATSON NAVIGATION CO. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Ira S. Lillick* and *Joseph J. Geary* for petitioner. *Mr. Maurice E. Harrison* for respondent. Reported below: 149 F. 2d 295.

No. 248. HEFFRON, TRUSTEE, *v.* HAMAKER ET AL. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Thomas S. Tobin* for petitioner. *Mr. James J. Broz* for respondents. Reported below: 148 F. 2d 981.

No. 250. COLLINS ET AL. *v.* SEIFRIED. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Roy Massena* for petitioners. *Mr. Sveinbjorn Johnson* for respondent. *Acting Solicitor General Judson* and *Mr. Roger S. Foster* filed a memorandum on behalf of the Securities & Exchange Commission, as *amicus curiae,* in support of the petition. Reported below: 149 F. 2d 532.

No. 257. WRIGHT *v.* BOARD OF PUBLIC INSTRUCTION. October 8, 1945. Petition for writ of certiorari to the Cir-

cuit Court of Appeals for the Fifth Circuit denied. *Mr. Miller Walton* for petitioner. *Mr. John D. Kennedy* for respondent. Reported below: 148 F. 2d 367.

No. 259. PARKENING *v.* ARNOLD. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Irl D. Brett* for petitioner. Reported below: 148 F. 2d 210.

No. 262. CAPITOL NOVELTY CO., LTD. *v.* EVATT, TAX COMMISSIONER. October 8, 1945. Petition for writ of certiorari to the Supreme Court of Ohio denied. *Mr. Arthur L. Rowe* for petitioner. *Mr. Aubrey A. Wendt* for respondent. Reported below: 145 Ohio St. 205, 61 N. E. 2d 211.

No. 264. LADIN *v.* HURWITH ET AL. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. David M. Palley* for petitioner. *Mr. Robert K. Bell* for Hurwith et al., and *Acting Solicitor General Judson* and *Mr. Roger S. Foster* for the Securities & Exchange Commission, respondents. Reported below: 149 F. 2d 645.

No. 265. EVANS *v.* EVANS. October 8, 1945. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. Joseph T. Sherier* for petitioner. Reported below: 149 F. 2d 831.

No. 266. LANDRY *v.* MUTUAL LIFE INSURANCE CO. OF NEW YORK. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Homer Hendricks* for petitioner. *Mr. Rich-*

ard B. Montgomery for respondent. Reported below: 148 F. 2d 699.

No. 268. LEITHAUSER, ADMINISTRATOR, *v.* HARTFORD FIRE INSURANCE CO. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Frazier Reams* and *George C. Sprague* for petitioner. *Messrs. Ross W. Shumaker* and *C. G. Myers* for respondent. Reported below: 149 F. 2d 152.

No. 272. MIEDEMA *v.* PRATT. October 8, 1945. Petition for writ of certiorari to the Supreme Court of Michigan denied. *Mr. Fred Roland Allaben* for petitioner. Reported below: 311 Mich. 64, 18 N. W. 2d 279.

No. 275. NYCUM *v.* CITY OF ALTOONA. October 8, 1945. Petition for writ of certiorari to the Supreme Court of Pennsylvania denied. See 156 Pa. Super. 445, 41 A. 2d 219.

No. 276. WORSHAM, TRADING AS WORSHAM BROTHERS, *v.* UNITED STATES. October 8, 1945. Petition for writ of certiorari to the Court of Claims denied. *Messrs. George R. Shields, Herman J. Galloway, John W. Gaskins* and *Fred W. Shields* for petitioner. *Acting Solicitor General Judson, Messrs. Paul A. Sweeney* and *Jerome H. Simonds* for the United States. Reported below: 103 Ct. Cls. 378.

No. 285. DUNN ET AL. *v.* TOWN OF BURLINGTON. October 8, 1945. Petition for writ of certiorari to the Superior Court, County of Middlesex, Massachusetts denied. *Messrs. John H. Devine* and *Frank G. Volpe* for petitioners. See 318 Mass. 216, 61 N. E. 2d 243.

No. 287. MOORE *v.* UNITED STATES. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. John B. Dudley* for petitioner. *Acting Solicitor General Judson, Mr. Robert S. Erdahl* and *Miss Beatrice Rosenberg* for the United States. Reported below: 150 F. 2d 323.

No. 290. HALLIBURTON OIL WELL CEMENTING CO. *v.* WALKER ET AL., DOING BUSINESS AS DEPTHOGRAPH COMPANY. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Earl Babcock* for petitioner. *Mr. Harold W. Mattingly* for respondents. Reported below: 149 F. 2d 896.

No. 293. MESECK TOWING & TRANSPORTATION CO. *v.* RICE. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Christopher E. Heckman* for petitioner. Reported below: 148 F. 2d 522.

No. 294. SOUTHEASTERN BUILDING CORP. *v.* COMMISSIONER OF INTERNAL REVENUE. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. H. C. Ackert* and *John W. Giesecke* for petitioner. *Acting Solicitor General Judson, Assistant Attorney General Clark, Messrs. Sewall Key, Robert N. Anderson* and *Miss Louise Foster* for respondent. Reported below: 148 F. 2d 879.

No. 299. RUTHBELL COAL CO. *v.* STANTON, ADMINISTRATRIX. October 8, 1945. Petition for writ of certiorari to the Supreme Court of Appeals of West Virginia denied.

Mr. F. E. Parrack for petitioner. Reported below: 127 W. Va. 685, 34 S. E. 2d 257.

No. 301. HALL ET AL. *v.* UNITED STATES. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. J. Frank Kemp* for petitioners. *Acting Solicitor General Judson, Mr. Robert S. Erdahl* and *Miss Beatrice Rosenberg* for the United States. Reported below: 150 F. 2d 281.

No. 302. PATCH *v.* SOLAR CORPORATION. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. James G. Nye* for petitioner. *Mr. G. A. Youngquist* for respondent. Reported below: 149 F. 2d 558.

No. 304. HOWE ET AL., COPARTNERS, TRADING AS HOWE & CO., *v.* FEDERAL TRADE COMMISSION. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Albert E. Stephan* for petitioners. *Acting Solicitor General Judson, Assistant Attorney General Berge, Messrs. Charles H. Weston* and *Matthias N. Orfield* for respondent. Reported below: 148 F. 2d 561.

No. 307. RICHARD T. GREEN CO. ET AL. *v.* CITY OF CHELSEA. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. Samuel Hoar* and *George K. Gardner* for petitioners. *Mr. Michael H. Sullivan* for respondent. Reported below: 149 F. 2d 927.

No. 310. FAKOURI *v.* CADAIS ET AL. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. James Craig Peacock* and *D. Worth Clark* for petitioner. *Messrs. George M. Wallace* and *Wade O. Martin, Jr.* for respondents. Reported below: 149 F. 2d 321.

No. 311. HICKEY ET AL., EXECUTORS, *v.* FEDERAL DEPOSIT INSURANCE CORPORATION, RECEIVER. October 8, 1945. Petition for writ of certiorari to the Court of Appeals of New York denied. *Mr. James H. Hickey* for petitioners. *Messrs. Francis C. Brown, James M. Kane* and *Sidney R. Nussenfeld* for respondent. Reported below: 294 N. Y. 780, 62 N. E. 2d 230.

No. 316. SHARP, EXECUTRIX, *v.* GRIP NUT CO. ET AL. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Francis Heisler* and *Ephraim Banning* for petitioner. *Messrs. Bernard A. Schroeder, Charles J. Merriam* and *George A. Chritton* for respondents. Reported below: 150 F. 2d 192.

No. 321. BUHL ET AL. *v.* UNIVERSITY OF THE STATE OF NEW YORK ET AL. October 8, 1945. Petition for writ of certiorari to the Appellate Division of the Supreme Court of New York denied. *Mr. Jacob W. Friedman* for petitioners. *Mr. George H. Bond* for respondents. Reported below: 268 App. Div. 530, 52 N. Y. S. 2d 511.

No. 323. INSULAR SUGAR REFINING CORP. *v.* COMMISSIONER OF INTERNAL REVENUE. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for

the Second Circuit denied. *Mr. J. Sterling Halstead* for petitioner. *Acting Solicitor General Judson, Assistant Attorney General Clark, Messrs. Sewall Key, A. F. Prescott* and *Newton K. Fox* for respondent. Reported below: 150 F. 2d 8.

No. 324. GLOBE INDEMNITY CO. *v.* GULF PORTLAND CEMENT CO. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Fred. W. Moore* for petitioner. *Mr. Frank A. Liddell* for respondent. Reported below: 149 F. 2d 196.

No. 330. WABER *v.* MONTGOMERY WARD & CO., INC. ET AL. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. George I. Haight* and *M. K. Hobbs* for petitioner. *Messrs. Arthur A. Olson* and *Eugene M. Giles* for respondents. Reported below: 149 F. 2d 536.

No. 333. DES MOINES COUNTY ET AL. *v.* UNITED STATES. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. J. C. Pryor* for petitioners. *Acting Solicitor General Judson, Messrs. J. Edward Williams, Roger P. Marquis, Walter J. Cummings, Jr.* and *Mrs. Kelsey Martin Mott* for the United States. Reported below: 148 F. 2d 448.

No. 340. GRASSO *v.* LORENTZEN, DIRECTOR. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. George J. Engelman* for petitioner. *Mr. Edgar R. Kraetzer* for respondent. Reported below: 149 F. 2d 127.

No. 352. COUNTY OF THURSTON ET AL. *v.* UNITED STATES. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Walter R. Johnson,* Attorney General of Nebraska, *H. Emerson Kokjer,* Deputy Attorney General, and *Mr. Alfred D. Raun* for petitioners. *Acting Solicitor General Judson, Messrs. J. Edward Williams* and *Roger P. Marquis* for the United States. Reported below: 149 F. 2d 485.

No. 359. STOCKHOLDERS' COMMITTEE OF THE UNIVERSAL LUBRICATING SYSTEMS, INC. *v.* STALEY, TRUSTEE. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. S. Wallace Dempsey* for petitioner. *Messrs. A. E. Kountz* and *Clarence A. Fry* for respondent. Reported below: 150 F. 2d 832.

No. 370. NATIONAL ELECTRIC PRODUCTS CORP. *v.* TRIANGLE CONDUIT & CABLE CO., INC. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. George E. Faithfull* for petitioner. *Messrs. Samuel E. Darby, Jr.* and *Floyd H. Crews* for respondent. Reported below: 149 F. 2d 87.

No. 371. SACHAROFF *v.* CORSI, INDUSTRIAL COMMISSIONER, ET AL.; and

No. 372. SCHIFFMAN *v.* CORSI, INDUSTRIAL COMMISSIONER, ET AL. October 8, 1945. Petition for writs of certiorari to the Court of Appeals of New York denied. *Mr. George A. Ferris* for petitioners. *Nathaniel L. Goldstein,* Attorney General of New York, and *Orrin G. Judd,* Solicitor General, for respondents. Reported below: 294 N. Y. 305, 62 N. E. 2d 81.

No. 68. THOMPSON *v.* UNITED STATES. October 8, 1945. Petition for writ of certiorari to the Court of Claims denied. *Mr. John B. Cuningham* for petitioner. *Acting Solicitor General Cox, Messrs. Paul A. Sweeney, Howard L. Godfrey* and *Jerome H. Simonds* for the United States. Reported below: 102 Ct. Cls. 402.

No. 92. NISONOFF *v.* NEW YORK. October 8, 1945. Petition for writ of certiorari to the Court of Appeals of New York denied. MR. JUSTICE MURPHY is of the opinion that the petition should be granted. *Mr. Louis B. Boudin* for petitioner. *Mr. George Tilzer* for respondent. Reported below: 294 N. Y. 696, 60 N. E. 2d 846.

No. 258. BEACH *v.* UNITED STATES. October 8, 1945. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. James R. Kirkland* and *Nathan M. Lubar* for petitioner. *Acting Solicitor General Judson, Messrs. Robert S. Erdahl, Leon Ulman* and *Miss Rosalie M. Moynahan* for the United States. Reported below: 149 F. 2d 837.

No. 129. GROOPMAN *v.* UNITED STATES. October 8, 1945. The petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit is 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. *Mr. Archibald Palmer* for petitioner. *Acting Solicitor General Judson* for the United States. Reported below: 147 F. 2d 782.

No. 161. LARSON ET AL. *v.* GENERAL MOTORS CORP. October 8, 1945. Petition for writ of certiorari to the Cir-

cuit Court of Appeals for the Second Circuit denied. The CHIEF JUSTICE took no part in the consideration or decision of this application. *Mr. Murray M. Cowen* for petitioners. *Messrs. Drury W. Cooper* and *Drury W. Cooper, Jr.* for respondent. Reported below: 148 F. 2d 319.

No. 288. BAKER ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. The CHIEF JUSTICE took no part in the consideration or decision of this application. *Mr. Arthur S. Dayton* for petitioners. *Acting Solicitor General Judson, Assistant Attorney General Clark, Messrs. Sewall Key* and *J. Louis Monarch* for respondent. Reported below: 149 F. 2d 342.

No. 366. EMMONS *v.* SMITT ET AL. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. MR. JUSTICE MURPHY took no part in the consideration or decision of this application. *Messrs. John J. Sloan* and *Hugh Francis* for petitioner. *Mr. George E. Brand* for respondents. Reported below: 149 F. 2d 869.

No. 296. REYNOLDS *v.* BOARD OF PUBLIC INSTRUCTION ET AL. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. MR. JUSTICE DOUGLAS and MR. JUSTICE MURPHY are of opinion that the petition should be granted. *Mr. Alonzo Wilder* for petitioner. *Messrs. J. V. Keen* and *Robert W. Shackleford* for respondents. Reported below: 148 F. 2d 754.

No. 222. DEFENSE SUPPLIES CORPORATION *v.* UNITED STATES. October 8, 1945. Reconstruction Finance Cor-

poration substituted as the party petitioner. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Horace T. Atkins* for petitioner. *Acting Solicitor General Judson* for the United States. Reported below: 148 F. 2d 311.

No. 260. ELLITHORPE ET AL. *v.* OSBORN ET AL. October 8, 1945. The motion to strike the petition is denied. The petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit is also denied. *Mr. Weightstill Woods* for petitioners. *Mr. Leo J. Hassenauer* for respondents.

No. 112. GREGORY *v.* UNITED STATES. October 8, 1945. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Paul B. Cromelin, John W. Townsend* and *Francis C. Brooke* for petitioner. *Solicitor General Fahy, Assistant Attorney General Clark, Mr. Sewall Key, Miss Helen R. Carloss* and *Mrs. Elizabeth B. Davis* for the United States. Reported below: 57 F. Supp. 962.

No. 155. PIZZA *v.* NEW YORK. October 8, 1945. Petition for writ of certiorari to the Supreme Court of New York denied. Reported below: 53 N. Y. S. 2d 469.

No. 157. SMITH *v.* RAGEN, WARDEN. October 8, 1945. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 159. ROBERTS *v.* RAGEN, WARDEN. October 8, 1945. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 160. TANNER *v.* CALIFORNIA ET AL. October 8, 1945. Petition for writ of certiorari to the Supreme Court of California denied.

No. 166. DAVIS *v.* NIERSTHEIMER, WARDEN. October 8, 1945. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 180. MILLWOOD *v.* CALIFORNIA. October 8, 1945. Petition for writ of certiorari to the Supreme Court of California denied.

No. 182. MACKEY *v.* WHITECOTTON, WARDEN. October 8, 1945. Petition for writ of certiorari to the Supreme Court of Missouri denied. Reported below: 187 S. W. 2d 198.

No. 200. GARRETT *v.* NIERSTHEIMER, WARDEN. October 8, 1945. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 204. GRECO v. WHITECOTTON, WARDEN. October 8, 1945. Petition for writ of certiorari to the Supreme Court of Missouri denied. Petitioner *pro se.* *J. E. Taylor,* Attorney General of Missouri, and *Robert L. Hyder,* Assistant Attorney General, for respondent.

No. 205. NEW YORK EX REL. RENSING *v.* MORHOUS, WARDEN. October 8, 1945. Petition for writ of certiorari to Washington County Court, New York, denied. Petitioner *pro se.* *Nathaniel L. Goldstein,* Attorney General of New York, for respondent. See 269 App. Div. 719, 53 N. Y. S. 2d 585.

No. 206. MILLMAN *v.* RAGEN, WARDEN. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied.

No. 207. POND *v.* ILLINOIS EX REL. BARRETT, ATTORNEY GENERAL. October 8, 1945. Petition for writ of certiorari to the Supreme Court of Illinois denied. Reported below: 390 Ill. 237, 61 N. E. 2d 37.

No. 217. KERN *v.* RAGEN, WARDEN. October 8, 1945. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 224. SPRUILL *v.* CAMPBELL. October 8, 1945. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied.

No. 226. ADKISON *v.* RAGEN, WARDEN. October 8, 1945. Petition for writ of certiorari to the Circuit Court, Rock Island County, Illinois, denied.

No. 227. CARTER *v.* RAGEN, WARDEN. October 8, 1945. Petition for writ of certiorari to the Circuit Court, Will County, Illinois, denied.

No. 236. PYLE *v.* AMRINE, WARDEN. October 8, 1945. Petition for writ of certiorari to the Supreme Court of Kansas denied. Reported below: 159 Kan. 458, 156 P. 2d 509.

No. 249. SULLINGER *v.* SHAW, DIRECTOR. October 8, 1945. Petition for writ of certiorari to the Court of Ap-

peals of New York denied. Petitioner *pro se.* *Mr. Henry J. Walsh* for respondent.

No. 252. VAN PELT *v.* ILLINOIS. October 8, 1945. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 271. MARCINKOWSKI *v.* NEW YORK. October 8, 1945. Petition for writ of certiorari to the Supreme Court of New York denied. Petitioner *pro se.* *Nathaniel L. Goldstein,* Attorney General of New York, *Orrin G. Judd,* Solicitor General, and *Wendell P. Brown,* First Assistant Attorney General, for respondent.

No. 273. TAIT *v.* ILLINOIS. October 8, 1945. Petition for writ of certiorari to the Supreme Court of Illinois denied. Reported below: 390 Ill. 272, 61 N. E. 2d 166.

No. 308. EULER *v.* RAGEN, WARDEN. October 8, 1945. Petition for writ of certiorari to the Circuit Court, Livingston County, Illinois, denied.

No. 312. CLARK *v.* NIERSTHEIMER, WARDEN. October 8, 1945. Petition for writ of certiorari to the Circuit Court, Randolph County, Illinois, denied.

No. 313. GASH *v.* NIERSTHEIMER, WARDEN. October 8, 1945. Petition for writ of certiorari to the Circuit Court, Randolph County, Illinois, denied.

No. 335. FOSTER *v.* WHITECOTTON, WARDEN. October 8, 1945. Petition for writ of certiorari to the Supreme Court of Missouri denied.

No. 196. McCANN *v.* UNITED STATES ET AL. October 8, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. The motions for other relief are also denied.

No. 314. ANDERSON *v.* NIERSTHEIMER, WARDEN. October 8, 1945. The petition for writ of certiorari to the Circuit Court, Randolph County, Illinois, is denied for the reason that application therefor was not made within the time provided by law. § 8 (a), Act of February 13, 1925 (43 Stat. 936, 940), 28 U. S. C. § 350.

No. 290. HALLIBURTON OIL WELL CEMENTING CO. *v.* WALKER ET AL., DOING BUSINESS AS DEPTHOGRAPH COMPANY. See *ante*, p. 705.

No. 169. CHICKASAW NATION *v.* UNITED STATES; and No. 337. UNITED STATES *v.* CHICKASAW NATION ET AL. October 15, 1945. Petitions for writs of certiorari to the Court of Claims denied. *Messrs. William A. Cornish* and *Paul M. Niebell* for petitioner in No. 169. *Acting Solicitor General Judson, Messrs. J. Edward Williams, Roger P. Marquis, John C. Harrington* and *Walter J. Cummings, Jr.* for the United States. Reported below: 103 Ct. Cls. 45.

No. 193. BERG SHIPBUILDING CO. ET AL. *v.* UNITED STATES. October 15, 1945. Petition for writ of certiorari to the Court of Claims denied. Petitioners *pro se*. *Acting Solicitor General Judson, Messrs. Paul A. Sweeney* and *Jerome H. Simonds* for the United States. Reported below: 103 Ct. Cls. 102, 58 F. Supp. 554.

No. 233. ZINSER ET AL. *v.* FEDERAL PETROLEUM BOARD. October 15, 1945. Petition for writ of certiorari to the

Circuit Court of Appeals for the Fifth Circuit denied. *Mr. W. Edward Lee* for petitioners. *Acting Solicitor General Judson, Messrs. Robert S. Erdahl* and *Maurice H. Matzkin* for respondent. Reported below: 148 F. 2d 993.

No. 251. SWATZKA *v.* SULLIVAN, COMMANDING OFFICER, ET AL. October 15, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Allan A. Bynon* and *Gerald J. Meindl* for petitioner. *Acting Solicitor General Judson, Messrs. Robert S. Erdahl* and *Irving S. Shapiro* for respondents. Reported below: 148 F. 2d 965.

No. 295. CLOVERLEAF BUTTER CO. *v.* UNITED STATES. October 15, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Erle Pettus* and *Horace C. Wilkinson* for petitioner. *Acting Solicitor General Judson* and *Mr. Robert S. Erdahl* for the United States. Reported below: 148 F. 2d 365.

No. 297. ARUNDEL CORPORATION *v.* UNITED STATES. October 15, 1945. Petition for writ of certiorari to the Court of Claims denied. *Mr. William S. Hammers* for petitioner. *Acting Solicitor General Judson* and *Mr. Paul A. Sweeney* for the United States. Reported below: 103 Ct. Cls. 688.

No. 325. ROSENBERG ET AL. *v.* UNITED STATES; and

No. 326. WEISS ET AL. *v.* UNITED STATES. October 15, 1945. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. James I. Cuff* for petitioners in No. 325, and *Mr. Harold St. L. O'Dougherty* for petitioners in No. 326. *Acting Solicitor*

General Judson, Mr. Robert S. Erdahl and *Miss Beatrice Rosenberg* for the United States. Reported below: 150 F. 2d 788.

No. 339. FISCHER ET AL. *v.* BOWERS ET AL. October 15, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Casimir A. Miketta* for petitioners. Respondents *pro se.* Reported below: 149 F. 2d 612.

No. 343. NEALON *v.* HILL, RECEIVER. October 15, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Leslie C. Hardy* for petitioner. *Mr. Alexander B. Baker* for respondent. Reported below: 149 F. 2d 883.

No. 345. WILSON *v.* UNITED STATES. October 15, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. John Y. Brown* and *Cleon K. Calvert* for petitioner. *Acting Solicitor General Judson, Mr. Robert S. Erdahl* and *Miss Beatrice Rosenberg* for the United States. Reported below: 149 F. 2d 780.

No. 346. SACHS ET AL. *v.* OHIO NATIONAL LIFE INSURANCE CO. October 15, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. John W. Cragun* for petitioners. *Mr. Karl Edwin Seyfarth* for respondent. Reported below: 148 F. 2d 128.

No. 347. F. H. MCGRAW & CO., INC. ET AL. *v.* JOHN T. D. BLACKBURN, INC. ET AL.; and

No. 348. AETNA CASUALTY & SURETY CO. ET AL. *v.* MILCOR STEEL CO. ET AL. October 15, 1945. Petitions for writs

of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Louis A. Tepper* for petitioners. *Mr. David M. Richman* for respondents. Reported below: 149 F. 2d 301.

No. 356. WINTER REALTY & CONSTRUCTION CO. *v.* COMMISSIONER OF INTERNAL REVENUE. October 15, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Roswell Magill, Wm. Dwight Whitney* and *George G. Tyler* for petitioner. *Acting Solicitor General Judson, Assistant Attorney General Clark, Messrs. Sewall Key, Robert N. Anderson* and *Hilbert P. Zarky* for respondent. Reported below: 149 F. 2d 567.

No. 357. FLUSHINGSIDE REALTY & CONSTRUCTION CO. *v.* COMMISSIONER OF INTERNAL REVENUE. October 15, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Roswell Magill* and *George G. Tyler* for petitioner. *Acting Solicitor General Judson, Assistant Attorney General Clark, Messrs. Sewall Key, Robert N. Anderson* and *Hilbert P. Zarky* for respondent. Reported below: 149 F. 2d 572.

No. 358. TWINBORO CORPORATION *v.* COMMISSIONER OF INTERNAL REVENUE. October 15, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Roswell Magill* and *George C. Tyler* for petitioner. *Acting Solicitor General Judson, Assistant Attorney General Clark, Messrs. Sewall Key, Robert N. Anderson* and *Hilbert P. Zarky* for respondent. Reported below: 149 F. 2d 574.

No. 362. BURTON-SUTTON OIL CO., INC. *v.* COMMISSIONER OF INTERNAL REVENUE. October 15, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Cullen R. Liskow* for petitioner. *Acting Solicitor General Judson* for respondent. Reported below: 150 F. 2d 621.

No. 385. JEFFRIES ET AL. *v.* JEFFRIES ET AL. October 15, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Charles Rivers Aiken* for petitioners. *Messrs. William H. Beckman, George C. Adams* and *Daniel M. Healy* for respondents. Reported below: 149 F. 2d 555.

No. 338. BERRY ET AL. *v.* ROOT ET AL. October 15, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Mr. Miller Walton* for petitioners. *Mr. Olin E. Watts* for respondents. Reported below: 148 F. 2d 945.

No. 355. SCARBOROUGH *v.* PENNSYLVANIA RAILROAD CO. October 15, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, and MR. JUSTICE MURPHY are of the opinion that petition for certiorari should be granted because of conflict with *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54. *Mr. John H. Hoffman* for petitioner. *Mr. R. Aubrey Bogley* for respondent. *Messrs. Lee Pressman* and *Frank Donner* filed a brief on behalf of the United Railroad Workers of America, as *amicus curiae,* in support of the petition. Reported below: 149 F. 2d 636.

No. 192. ODDO *v.* UNITED STATES; and

No. 208. DE NORMAND ET AL. *v.* UNITED STATES. October 15, 1945. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. Petitioners *pro se*. *Acting Solicitor General Judson, Messrs. W. Marvin Smith, Robert S. Erdahl* and *Leon Ulman* for the United States. Reported below: No. 208, 149 F. 2d 622.

No. 256. SEKT *v.* JUSTICE'S COURT. October 22, 1945. Petition for writ of certiorari to the Supreme Court of California denied. *Mr. Alan W. Davidson* for petitioner. *Robert W. Kenny,* Attorney General of California, for respondent. Reported below: 159 P. 2d 17.

No. 298. FRIED *v.* UNITED STATES. October 22, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Melvin A. Albert* for petitioner. *Acting Solicitor General Judson, Mr. Robert S. Erdahl* and *Miss Beatrice Rosenberg* for the United States. Reported below: 149 F. 2d 1011.

No. 300. ALOISIO ET AL. *v.* UNITED STATES;

No. 331. CERONE *v.* UNITED STATES; and

No. 332. CERONE ET AL. *v.* UNITED STATES. October 22, 1945. Petitions for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. James C. Leaton* for petitioners in No. 300. *Messrs. Gerald T. Wiley, Victor E. LaRue* and *Eugene A. Tappy* for petitioners in Nos. 331 and 332. *Acting Solicitor General Judson* and *Mr. Robert S. Erdahl* for the United States. Reported below: 150 F. 2d 382.

No. 327. SCHWARTZ *v.* UNITED STATES. October 22, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Charles D. Lewis* and *James Dempsey* for petitioner. *Acting Solicitor General Judson* and *Mr. Robert S. Erdahl* for the United States. Reported below: 150 F. 2d 627.

No. 334. MASON *v.* BANTA CARBONA IRRIGATION DISTRICT. October 22, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. Petitioner *pro se*. *Mr. Percy S. Webster* for respondent. Reported below: 149 F. 2d 49.

No. 353. PURMAN *v.* FITCH ET AL. October 22, 1945. Petition for writ of certiorari to the Supreme Court of Pennsylvania denied. Petitioner *pro se*. *Mr. John H. Davidson* for respondents. Reported below: 352 Pa. 134, 42 A. 2d 318.

No. 377. HUNNICUTT *v.* UNITED STATES. October 22, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. A. C. Wheeler* for petitioner. *Acting Solicitor General Judson, Messrs. Robert S. Erdahl* and *Irving S. Shapiro* for the United States. Reported below: 149 F. 2d 888.

No. 378. AMERICAN BOWLING & BILLIARD CORP. *v.* BRUNSWICK-BALKE-COLLENDER CO. October 22, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Samuel E. Darby, Jr.* and *Walter A. Darby* for petitioner. *Messrs. Leo F. Tierney* and *Theodore S. Kenyon* for respondent. Reported below: 150 F. 2d 69.

No. 391. NASH *v.* RAUN. October 22, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. John B. Brooks* for petitioner. *Messrs. Franklin B. Hosbach* and *Thomas D. Caldwell* for respondent. Reported below: 149 F. 2d 885.

No. 394. HUFFMAN *v.* HOME OWNERS' LOAN CORPORATION. October 22, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Price Wickersham* and *Clay C. Rogers* for petitioner. *Acting Solicitor General Judson, Messrs. Harold Lee* and *Charles M. Miller* for respondent. Reported below: 150 F. 2d 162.

No. 395. NEWTON ET UX. *v.* GLENN ET AL. October 22, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. T. J. Wills* and *Jeff Busby* for petitioners. *Messrs. Thomas C. Hannah, Edward P. Russell* and *M. M. Roberts* for respondents. Reported below: 149 F. 2d 879.

No. 396. SALMON & COWIN, INC. *v.* NATIONAL LABOR RELATIONS BOARD. October 22, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Horace C. Wilkinson* and *Borden Burr* for petitioner. *Acting Solicitor General Judson, Misses Ruth Weyand* and *Margaret M. Farmer* for respondent. Reported below: 148 F. 2d 941.

No. 401. GRANIERI *v.* SCHRAMM. October 22, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Nat L. Hardy* for

petitioner. *Mr. L. G. Seeligson* for respondent. Reported below: 149 F. 2d 811.

No. 269. SABIN ET AL. *v.* HOME OWNERS' LOAN CORPORATION ET AL. October 22, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Herbert K. Hyde* for petitioners. *Acting Solicitor General Judson* and *Mr. Harold Lee* for the Home Owners' Loan Corporation, respondent. Reported below: 147 F. 2d 653.

No. 373. DUISBERG *v.* MARKHAM, ALIEN PROPERTY CUSTODIAN. October 22, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Eugene L. Garey* for petitioner. *Acting Solicitor General Judson* and *Assistant Attorney General Wechsler* for respondent. Reported below: 149 F. 2d 812.

No. 388. UNITED STATES *v.* HAVEMEYER; and

No. 389. HAVEMEYER *v.* UNITED STATES. November 5, 1945. Petitions for writs of certiorari to the Court of Claims denied. *Solicitor General McGrath, Assistant Solicitor General Judson, Assistant Attorney General Clark, Messrs. Sewall Key, Arnold Raum* and *Miss Helen R. Carloss* for the United States. *Messrs. Preston B. Kavanagh* and *William M. Sperry, 2nd* for Havemeyer. Reported below: 103 Ct. Cls. 564, 59 F. Supp. 537.

No. 406. MADAFFER *v.* UNITED STATES. November 5, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Edward E. Petrillo* for petitioner. *Solicitor General McGrath* and

Mr. Robert S. Erdahl for the United States. Reported below: 150 F. 2d 406.

No. 407. VIRGINIA EX REL. TOWN OF APPALACHIA ET AL. *v.* OLD DOMINION POWER CO., INC. November 5, 1945. Petition for writ of certiorari to the Supreme Court of Appeals of Virginia denied. *Mr. M. M. Heuser* for petitioners. *Messrs. E. Randolph Williams* and *T. Justin Moore* for respondent. Reported below: 184 Va. 6, 34 S. E. 2d 364.

No. 412. GREAT LAKES DREDGE & DOCK CO. *v.* WALLING, ADMINISTRATOR. November 5, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Homer D. Dines* and *James P. Dillie* for petitioner. *Solicitor General McGrath* and *Miss Bessie Margolin* for respondent. Reported below: 149 F. 2d 9.

No. 413. BAY STATE DREDGING & CONTRACTING CO. *v.* WALLING, ADMINISTRATOR. November 5, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Edward C. Park* for petitioner. *Solicitor General McGrath* and *Miss Bessie Margolin* for respondent. Reported below: 149 F. 2d 346.

No. 414. HALL *v.* UNITED STATES. November 5, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. James F. Kemp* for petitioner. *Acting Solicitor General Judson, Mr. Robert S. Erdahl* and *Miss Beatrice Rosenberg* for the United States. Reported below: 150 F. 2d 280.

No. 415. HEINEL MOTORS, INC. ET AL. *v.* BOWLES, PRICE ADMINISTRATOR. November 5, 1945. Petition for

writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. John E. Sheridan* and *Samuel I. Sacks* for petitioners. *Solicitor General McGrath* and *Mr. David London* for respondent. Reported below: 149 F. 2d 815.

No. 416. OBEAR-NESTER GLASS CO. *v.* UNITED DRUG CO. November 5, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Lawrence C. Kingsland* and *Edmund C. Rogers* for petitioner. *Mr. Delos G. Haynes* for respondent. Reported below: 149 F. 2d 671.

No. 417. HORST, EXECUTRIX, *v.* COMMISSIONER OF INTERNAL REVENUE. November 5, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Maurice E. Harrison* for petitioner. *Assistant Attorney General Clark, Messrs. Sewall Key, Fred E. Youngman, Walter J. Cummings, Jr.* and *Miss Helen R. Carloss* for respondent. Reported below: 150 F. 2d 1.

No. 423. MCALEENAN ET AL. *v.* GEORGE D. HORNING, INC. November 5, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. John Paul Jones* for petitioners. *Mr. Rudolph H. Yeatman* for respondent. Reported below: 149 F. 2d 561.

No. 426. INTERCOUNTY OPERATING CORP. ET AL. *v.* COUNTY OF NASSAU. November 5, 1945. Petition for writ of certiorari to the Supreme Court of New York, Appellate Division, denied. *Mr. Morris Rochman* for petitioners. See 293 N. Y. 688, 56 N. E. 2d 299.

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No. 427. INTERCOUNTY OPERATING CORP. *v.* CONNOLLY. November 5, 1945. Petition for writ of certiorari to the Supreme Court of New York, Appellate Division, denied. *Mr. Morris Rochman* for petitioner. See 293 N. Y. 688, 56 N. E. 2d 299.

No. 429. SHERR *v.* ANACONDA WIRE & CABLE CO. ET AL. November 5, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. Petitioner *pro se*. *Mr. Horace G. Hitchcock* for the Anaconda Wire & Cable Co., and *Solicitor General McGrath, Messrs. Joseph M. Friedman* and *Tobias G. Klinger* for the United States, respondents. Reported below: 149 F. 2d 680.

No. 432. KASTAR, INC. *v.* CLAIR ET AL., COPARTNERS, DOING BUSINESS AS ANTI-SHIMMIE MANUFACTURING CO. November 5, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Armand E. Lackenbach* for petitioner. *Messrs. John H. Glaccum* and *C. W. Prince* for respondents. Reported below: 148 F. 2d 644.

No. 434. CAPITAL TRANSIT CO. *v.* JACKSON. November 5, 1945. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. Edwin A. Swingle* for petitioner. Reported below: 149 F. 2d 839.

No. 436. ARGO *v.* COMMISSIONER OF INTERNAL REVENUE. November 5, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. H. Cecil Kilpatrick* and *Douglas Arant* for petitioner. *Solicitor General McGrath, Assistant At-*

torney General Clark, Messrs. Sewall Key and *Robert N. Anderson* for respondent. Reported below: 150 F. 2d 67.

No. 437. CORNUCOPIA GOLD MINES *v.* LOCKEN, ADMINISTRATOR. November 5, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. James Arthur Powers* and *Dean H. Dickinson* for petitioner. *Mr. George T. Cochran* for respondent. Reported below: 150 F. 2d 75.

No. 439. FLETCHER ET AL., SURVIVING TRUSTEES, *v.* CLARK, COLLECTOR OF INTERNAL REVENUE. November 5, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. George T. Evans* for petitioners. *Solicitor General McGrath, Assistant Attorney General Clark, Messrs. Sewall Key, Robert N. Anderson* and *Mrs. Muriel S. Paul* for respondent. Reported below: 150 F. 2d 239.

No. 442. SCHLECTER *v.* FOSTER, WARDEN. November 5, 1945. Petition for writ of certiorari to the Supreme Court of New York, Appellate Division, denied. *Mr. Avel B. Silverman* for petitioner. *Nathaniel L. Goldstein,* Attorney General of New York, *Orrin G. Judd,* Solicitor General, and *Wendell P. Brown,* First Assistant Attorney General, for respondent. Reported below: 54 N. Y. S. 2d 926.

No. 445. LINCOLN NATIONAL LIFE INSURANCE CO. *v.* STATE TAX COMMISSION ET AL. November 5, 1945. Petition for writ of certiorari to the Supreme Court of Mississippi denied. *Mr. Clyde J. Cover* for petitioner. Reported below: 196 Miss. 82, 16 So. 2d 369; 22 So. 2d 416.

No. 450. FEDERAL LAND BANK OF BERKELEY *v.* SMITH ET AL. November 5, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Richard W. Young* for petitioner. *Mr. Allan J. Carter* for respondents. Reported below: 150 F. 2d 318.

No. 453. COMMERCIAL DISCOUNT CO. *v.* ROGAN, EXECUTRIX. November 5, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Maynard J. Toll* and *W. Joseph McFarland* for petitioner. *Solicitor General McGrath, Assistant Attorney General Clark, Messrs. Sewall Key, S. Dee Hanson* and *Miss Helen R. Carloss* for respondent. Reported below: 149 F. 2d 585.

No. 459. KRESBERG *v.* INTERNATIONAL PAPER CO. November 5, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Joseph Nemerov* for petitioner. *Mr. Ralph M. Carson* for respondent. Reported below: 149 F. 2d 911.

No. 460. KERFOOT, ADMINISTRATOR, *v.* KELLEY. November 5, 1945. Petition for writ of certiorari to the Court of Appeals of New York denied. *Mr. George J. Engelman* for petitioner. *Mr. Frederick A. Keck* for respondent. See 294 N. Y. 288, 62 N. E. 2d 74.

No. 471. CARNEGIE-ILLINOIS STEEL CORP. *v.* ALDERSON, TAX COMMISSIONER. November 5, 1945. Petition for writ of certiorari to the Supreme Court of Appeals of West Virginia denied. *Mr. Arthur S. Dayton* for petitioner. Reported below: 127 W. Va. 807, 34 S. E. 2d 737.

No. 483. WEIRTON STEEL CO. *v.* COSTANZO COAL MINING CO. November 5, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. C. M. Thorp, Jr.* and *Carl G. Bachmann* for petitioner. *Mr. Gordon D. Kinder* for respondent. Reported below: 150 F. 2d 929.

No. 504. POND FORK OIL & GAS CO. *v.* COLE ET AL., TRUSTEES. November 5, 1945. Petition for writ of certiorari to the Supreme Court of Appeals of West Virginia denied. *Mr. Harold A. Ritz* for petitioner. *Messrs. Selden S. McNeer* and *Rolla D. Campbell* for respondents. Reported below: 127 W. Va. 762, 35 S. E. 2d 25.

No. 470. UNITED STATES EX REL. DOSS *v.* LINDSLEY, SHERIFF. November 5, 1945. Petition for writ of certiorari to the Circuit Court of Piatt County, Illinois, denied.

No. 209. KUZMACK *v.* UNITED STATES. November 5, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. John S. Kuzmack, pro se.*

No. 239. HICKOK *v.* HUNTER, WARDEN. November 5, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. Petitioner *pro se.* *Acting Solicitor General Judson, Messrs. Robert S. Erdahl* and *Irving S. Shapiro* for respondent. Reported below: 150 F. 2d 635.

No. 228. BURNS *v.* ALABAMA. November 5, 1945. The petition for writ of certiorari to the Supreme Court

of Alabama is denied and the order granting a stay of execution is vacated. MR. JUSTICE BLACK took no part in the consideration or decision of these applications. *Mr. Horace C. Alford* for petitioner. *Robert B. Harwood,* Attorney General of Alabama, and *John O. Harris,* Assistant Attorney General, for respondent. Reported below: 246 Ala. 135, 19 So. 2d 450.

No. 443. WORLEY *v.* WAHLQUIST ET AL. November 13, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. W. C. Fraser* for petitioner. *Mr. Philip E. Horan* for respondents. Reported below: 150 F. 2d 1007.

No. 449. RUBENSTEIN *v.* UNITED STATES. November 13, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Francis J. Quillinan* for petitioner. *Solicitor General McGrath, Messrs. W. Marvin Smith, Robert S. Erdahl* and *Miss Beatrice Rosenberg* for the United States. Reported below: 151 F. 2d 915.

No. 451. BARNETT ET AL. *v.* BOWLES, PRICE ADMINISTRATOR. November 13, 1945. Petition for writ of certiorari to the United States Emergency Court of Appeals denied. *Mr. Victor W. Gilbert* for petitioners. *Solicitor General McGrath* and *Mr. Richard H. Field* for respondent. Reported below: 151 F. 2d 77.

No. 468. GROS *v.* LOUISIANA. November 13, 1945. Petition for writ of certiorari to the Supreme Court of Louisiana denied. *Mr. Emmet Alpha* for petitioner. Reported below: 23 So. 2d 24.

No. 490. TURNER *v.* LUER ET AL. November 13, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Meredith M. Daubin* and *Charles P. Williams* for petitioner. Respondents *pro se*. Reported below: 149 F. 2d 51.

No. 497. EMIGRANT INDUSTRIAL SAVINGS BANK *v.* BALDWIN ET AL. November 13, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Joseph M. Proskauer* and *Harold H. Levin* for petitioner. *Messrs. Monroe Goldwater* and *James L. Goldwater* for respondents. Reported below: 150 F. 2d 524.

No. 514. SMITH, ADMINISTRATOR, ET AL. *v.* ORANGETOWN ET AL. November 13, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Leonard Acker* for petitioners. *Mr. Fred H. Rees* for respondents. Reported below: 150 F. 2d 782.

No. 303. GANCY *v.* UNITED STATES. November 13, 1945. The motion to defer consideration of the petition is denied and the petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit is also denied for the reason that application therefor was not made within the time provided by law. Rule XI of the Criminal Appeals Rules. Petitioner *pro se*. *Solicitor General McGrath* for the United States. Reported below: 149 F. 2d 788.

No. 455. MATHER *v.* COMMISSIONER OF INTERNAL REVENUE; and

No. 456. TESTAMENTARY TRUST UNDER THE WILL OF MATHER ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE.

November 13, 1945. Petitions for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. MR. JUSTICE BURTON took no part in the consideration or decision of these applications. *Mr. John B. Putnam* for petitioners. *Solicitor General McGrath, Assistant Attorney General Clark, Messrs. Sewall Key, J. Louis Monarch* and *Harold C. Wilkenfeld* for respondent. Reported below: 149 F. 2d 393.

No. 253. STRONG *v.* HUFF, GENERAL SUPERINTENDENT. November 13, 1945. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. Warren E. Magee* for petitioner. *Acting Solicitor General Judson, Messrs. Robert S. Erdahl* and *Irving S. Shapiro* for respondent. Reported below: 148 F. 2d 692.

No. 270. NEELY *v.* UNITED STATES. November 13, 1945. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. John E. Laskey* for petitioner. *Solicitor General McGrath, Mr. Robert S. Erdahl* and *Miss Beatrice Rosenberg* for the United States. Reported below: 150 F. 2d 977.

No. 351. WOODS *v.* NIERSTHEIMER, WARDEN. November 13, 1945. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 364. MITCHELL *v.* WHITECOTTON, WARDEN. November 13, 1945. Petition for writ of certiorari to the Supreme Court of Missouri denied.

No. 397. COLLINS *v.* SMITH, SUPERINTENDENT. November 13, 1945. Petition for writ of certiorari to the

Supreme Court of Washington denied. Reported below: 23 Wash. 2d 939, 161 P. 2d 141.

No. 403. GRIMES ET AL. *v.* HEINZE, WARDEN. November 13, 1945. Petition for writ of certiorari to the Supreme Court of California denied.

No. 478. RUSNAK *v.* ILLINOIS. November 13, 1945. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 485. MITCHELL *v.* RAGEN, WARDEN. November 13, 1945. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 488. HAWKINS *v.* RAGEN, WARDEN. November 13, 1945. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 374. UNITED STATES EX REL. ROONEY *v.* RAGEN, WARDEN; and

No. 390. ILLINOIS EX REL. BANKS *v.* RAGEN, WARDEN. On petitions for writs of certiorari to the Supreme Court of Illinois;

No. 461. RENNINGER *v.* NEW YORK. On petition for writ of certiorari to the Supreme Court, Seneca County, New York;

No. 464. BERRY *v.* RAGEN, WARDEN. On petition for writ of certiorari to the Criminal Court of Cook County, Illinois; and

No. 465. HUMBLE *v.* RAGEN, WARDEN. On petition for writ of certiorari to the Supreme Court of Illinois.

November 13, 1945. 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.

No. 480. FIELDS *v.* FERGUSON ET AL. November 19, 1945. Petition for writ of certiorari to the Supreme Court of Arkansas denied. *Mr. William J. Kirby* for petitioner. *Mr. Aaron L. Ford* for respondents. Reported below: 208 Ark. 839, 188 S. W. 2d 302.

No. 482. ESTATE OF HANAUER ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. November 19, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Morris L. Ernst* for petitioners. *Solicitor General McGrath, Assistant Attorney General Clark, Messrs. Sewall Key, J. Louis Monarch* and *Bernard Chertcoff* for respondent. Reported below: 149 F. 2d 857.

No. 498. NORTH DAKOTA *v.* SZARKOWSKI. November 19, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Nels G. Johnson,* Attorney General of North Dakota, and *P. O. Sathre,* Assistant Attorney General, for petitioner. Reported below: 151 F. 2d 153.

No. 500. ALBA TRADING CO., INC. *v.* MUSHER FOUNDATION, INC. November 19, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Joseph Joffe* for petitioner. *Mr. Harry Price* for respondent. Reported below: 150 F. 2d 885.

No. 501. GIBBS ET AL. *v.* UNITED STATES. November 19, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. J. C. B. Ehringhaus* for petitioners. *Solicitor General McGrath, Messrs. J. Edward Williams, Roger P. Marquis, Lawrence Vold* and *Walter J. Cummings, Jr.* for the United States. Reported below: 150 F. 2d 504.

No. 502. DI ORIO *v.* UNITED STATES. November 19, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Harold Simandl* for petitioner. *Solicitor General McGrath, Mr. Robert S. Erdahl* and *Miss Beatrice Rosenberg* for the United States. Reported below: 150 F. 2d 938.

No. 503. SPIERS *v.* BOWLES, PRICE ADMINISTRATOR. November 19, 1945. Petition for writ of certiorari to the United States Emergency Court of Appeals denied. *Mr. T. J. Wills* for petitioner. *Solicitor General McGrath* and *Mr. Richard H. Field* for respondent. Reported below: 151 F. 2d 77.

No. 506. TONKIN ET AL., EXECUTORS, *v.* UNITED STATES. November 19, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Charles F. C. Arensberg* and *Miss Ella Graubart* for petitioners. *Solicitor General McGrath, Assistant Attorney General Clark, Messrs. Sewall Key* and *J. Louis Monarch* for the United States. Reported below: 150 F. 2d 531.

No. 511. CITY OF MENASHA *v.* FURTON ET AL., COPARTNERS, DOING BUSINESS AS FURTON BROTHERS CONSTRUCTION CO. November 19, 1945. Petition for writ of cer-

tiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Emil Hersh* for petitioner. *Mr. William B. Rubin* for respondents. Reported below: 149 F. 2d 945.

No. 516. ELDREDGE ET AL. *v.* ROTHENSIES, COLLECTOR OF INTERNAL REVENUE. November 19, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Laurence H. Eldredge* for petitioners. *Solicitor General McGrath, Assistant Attorney General Clark, Messrs. Sewall Key, J. Louis Monarch* and *L. W. Post* for respondent. Reported below: 150 F. 2d 23.

No. 537. LONERGAN *v.* NEW YORK. November 19, 1945. Petition for writ of certiorari to the Court of Appeals of New York denied. *Mr. Edward V. Broderick* for petitioner. *Mr. Whitman Knapp* for respondent. Reported below: 294 N. Y. 972, 63 N. E. 2d 599.

No. 566. LANSBURGH & BRO. *v.* DEFFEBACH. November 19, 1945. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. Austin F. Canfield* and *Eugene Young* for petitioner. *Mr. Cornelius H. Doherty* for respondent. Reported below: 150 F. 2d 591.

No. 446. NEWMAN *v.* TEXAS. November 19, 1945. Petition for writ of certiorari to the Court of Criminal Appeals of Texas denied. Reported below: 187 S. W. 2d 559.

No. 469. COMPTON-DELEVAN IRRIGATION DISTRICT *v.* BEKINS ET AL., TRUSTEES. December 3, 1945. Petition

for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. P. Marcell Barceloux* for petitioner. *Mr. W. Coburn Cook* for respondents. Reported below: 150 F. 2d 526.

No. 535. TITUS *v.* UNITED STATES. December 3, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Robert Ash* and *Ray S. Fellows* for petitioner. *Solicitor General McGrath, Assistant Attorney General Clark, Messrs. Sewall Key, Robert N. Anderson* and *Carlton Fox* for the United States. Reported below: 150 F. 2d 508.

No. 542. ELIZABETH ARDEN SALES CORP. *v.* GUS BLASS CO. December 3, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. A. W. Dobyns* and *A. F. House* for petitioner. *Messrs. Grover T. Owens* and *S. Lasker Ehrman* for respondent. Reported below: 150 F. 2d 988.

No. 545. MCMANUS *v.* MARINE TRANSPORT LINES, INC. December 3, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Silas B. Axtell* and *Lucien V. Axtell* for petitioner. *Messrs. Walter X. Connor* and *Vernon S. Jones* for respondent. Reported below: 149 F. 2d 969.

No. 546. O'LEARY ET AL. *v.* LIGGETT DRUG CO.;

No. 547. O'LEARY ET AL. *v.* SEARS, ROEBUCK & CO.; and

No. 548. O'LEARY ET AL. *v.* JOHNSTON-SHELTON CO., DOING BUSINESS AS THE HOME STORE. December 3, 1945.

Petition for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Marston Allen* for petitioners. *Messrs. Henry M. Huxley* and *Ralph Munden* for respondents in Nos. 546 and 547, and *Mr. H. A. Toulmin, Jr.* for respondent in No. 548. Reported below: 150 F. 2d 656.

No. 565. MUSKOGEE ELECTRIC TRACTION CO. *v.* VICTORY INVESTMENT CORP. December 3, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Joseph C. Stone* and *A. Camp Bonds* for petitioner. *Messrs. Byron Lamun* and *Tom W. Garrett* for respondent. Reported below: 150 F. 2d 889.

No. 283. REA *v.* BEGNAUD. December 3, 1945. Petition for writ of certiorari to the Supreme Court of Louisiana denied. *Mr. Irwin W. Rosenthal* for petitioner. *Mr. Harry P. Gamble* for respondent. Reported below: 207 La. 789, 22 So. 2d 119.

No. 523. SOUTHGATE BROKERAGE CO., INC. *v.* FEDERAL TRADE COMMISSION. December 3, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. William P. Smith, Charles L. Kaufman* and *Guilford Jameson* for petitioner. *Solicitor General McGrath, Assistant Attorney General Berge, Messrs. Charles H. Weston, Matthias N. Orfield, W. T. Kelley* and *Joseph J. Smith, Jr.* for respondent. Reported below: 150 F. 2d 607.

No. 507. CENTRAL NATIONAL BANK, TRUSTEE, *v.* GENERAL AMERICAN LIFE INSURANCE CO. December 3, 1945.

Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. MR. JUSTICE BURTON took no part in the consideration or decision of this application. *Mr. M. C. Harrison* for petitioner. *Mr. Robert H. Jamison* for respondent.

No. 539. CLEVELAND *v.* SECOND NATIONAL BANK & TRUST CO. December 3, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. William Alfred Lucking* for petitioner. *Mr. William C. O'Keefe* for respondent. Reported below: 149 F. 2d 466.

No. 204. GRECO *v.* WHITECOTTON, WARDEN. December 3, 1945. Petition for writ of certiorari to the Supreme Court of Missouri denied. Petitioner *pro se*. *J. E. Taylor*, Attorney General of Missouri, and *Robert L. Hyder*, Assistant Attorney General, for respondent.

No. 499. WHEELER *v.* BOWLES, PRICE ADMINISTRATOR. December 10, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. John F. Reilly, Carl E. Davidson* and *Sidney J. Graham* for petitioner. *Solicitor General McGrath, Messrs. John R. Benney* and *David London* for respondent. Reported below: 152 F. 2d 34.

No. 515. KIRK *v.* SQUIER, WARDEN. December 10, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Loren Grinstead* for petitioner. *Solicitor General McGrath, Messrs. Robert S. Erdahl* and *Laurence A. Knapp* for respondent. Reported below: 150 F. 2d 3.

No. 534. MAS *v.* UNITED STATES. December 10, 1945. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. P. Bateman Ennis* for petitioner. *Solicitor General McGrath, Messrs. Robert S. Erdahl* and *Laurence A. Knapp* for the United States. Reported below: 151 F. 2d 32.

No. 549. MCGUNNIGAL ET AL. *v.* UNITED STATES. December 10, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Joseph Kruger* for petitioners. *Solicitor General McGrath, Messrs. Robert S. Erdahl* and *Laurence A. Knapp* for the United States. Reported below: 151 F. 2d 162.

No. 552. OFFICIAL AVIATION GUIDE CO., INC. *v.* AMERICAN AVIATION ASSOCIATES, INC. ET AL.; and

No. 591. AMERICAN AVIATION ASSOCIATES, INC. *v.* OFFICIAL AVIATION GUIDE CO., INC. ET AL. December 10, 1945. Petitions for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Clarence J. Loftus* and *John M. Mason* for petitioner in No. 552. *Mr. J. Glenn Shehee* for respondents in No. 552 and petitioner in No. 591. Reported below: 150 F. 2d 173.

No. 557. JUDSON L. THOMSON MANUFACTURING CO. *v.* FEDERAL TRADE COMMISSION. December 10, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. Harry LeBaron Sampson* and *Andrew Marshall* for petitioner. *Solicitor General McGrath, Assistant Attorney General Berge, Messrs. Charles H. Weston, W. T. Kelley* and *Joseph J. Smith, Jr.* for respondent. Reported below: 150 F. 2d 952.

No. 564. KITHCART *v.* METROPOLITAN LIFE INSURANCE CO. December 10, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Martin J. O'Donnell* for petitioner. *Messrs. Henry I. Eager, Charles M. Blackmar* and *Harry Cole Bates* for respondent. Reported below: 150 F. 2d 997.

No. 481. LAUGHLIN *v.* UNITED STATES. December 10, 1945. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. James J. Laughlin, pro se. Solicitor General McGrath, Messrs. Robert S. Erdahl* and *Fred E. Strine* for the United States. Reported below: 151 F. 2d 281.

No. 489. ZAP *v.* UNITED STATES. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit. December 10, 1945. The petition for writ of certiorari in this case is denied for failure to comply with par. 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. JUSTICE BLACK is of the opinion that the length of the brief does not justify the action taken by the Court. *Mr. Morris Lavine* for petitioner. *Solicitor General McGrath, Messrs. Robert S. Erdahl, Walter J. Cummings, Jr.* and *Miss Beatrice Rosenberg* for the United States. Reported below: 151 F. 2d 100.

No. 420. HAINES *v.* NIERSTHEIMER, WARDEN. December 10, 1945. Petition for writ of certiorari to the Circuit Court of Randolph County, Illinois, denied.

No. 430. ROONEY *v.* RAGEN, WARDEN. December 10, 1945. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois, denied.

No. 438. CARMAN *v.* SULLIVAN, ILLINOIS STATE PRISON DIRECTOR, ET AL. December 10, 1945. Petition for writ of certiorari to the Circuit Court of Randolph County, Illinois, denied.

No. 440. MOORE *v.* WISCONSIN. December 10, 1945. Petition for writ of certiorari to the Supreme Court of Wisconsin denied.

No. 441. FITZPATRICK *v.* NIERSTHEIMER, WARDEN. December 10, 1945. Petition for writ of certiorari to the Circuit Court of Randolph County, Illinois, denied.

No. 466. SMITH *v.* RAGEN, WARDEN. December 10, 1945. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois, denied.

No. 467. BARLAND *v.* RAGEN, WARDEN. December 10, 1945. Petition for writ of certiorari to the Circuit Court of Will County, Illinois, denied.

No. 571. WOODRUFF *v.* HEISER. December 17, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. H. A. Ledbetter* for petitioner. *Messrs. Leonard J. Meyberg* and *Rupert B. Turnbull* for respondent. Reported below: 150 F. 2d 867.

No. 509. HEISER *v.* WOODRUFF ET AL.; and

No. 581. WOODRUFF ET AL. *v.* HEISER. December 17, 1945. Petitions for writs of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Leonard*

J. Meyberg and *Rupert B. Turnbull* for Heiser. *Mr. H. A. Ledbetter* for Woodruff et al. Reported below: 150 F. 2d 867.

No. 562. YOON *v.* TERRITORY OF HAWAII. December 17, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. O. P. Soares* for petitioner. Reported below: 150 F. 2d 545.

No. 595. SHELTON *v.* UNITED STATES. December 17, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. John Y. Brown* for petitioner. *Solicitor General McGrath, Messrs. Robert S. Erdahl* and *Irving S. Shapiro* for the United States. Reported below: 151 F. 2d 695.

No. 596. BODE ET AL. *v.* UNITED STATES. December 17, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Francis Heisler* and *Charles Liebman* for petitioners. *Solicitor General McGrath, Messrs. Robert S. Erdahl* and *Irving S. Shapiro* for the United States. Reported below: 151 F. 2d 535.

Nos. 638 and 639. GODFREY ET AL. *v.* POWELL ET AL., RECEIVERS, ET AL. December 17, 1945. Petition for writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Giles J. Patterson* for petitioners. *Messrs. Francis P. Fleming, W. R. C. Cocke* and *Harold J. Gallagher* for Legh R. Powell, Jr. et al., and *Messrs. William H. Rogers, Leonard D. Adkins* and *James B. McDonough, Jr.* for the Seaboard Air Line Railroad Co., respondents. Reported below: 150 F. 2d 486.

No. 479. BARNARD *v.* RAGEN, WARDEN. December 17, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied.

No. 487. NOWAK *v.* NIERSTHEIMER, WARDEN. December 17, 1945. Petition for writ of certiorari to the Criminal Court, Cook County, Illinois, denied.

No. 520. POPE *v.* UNITED STATES. January 2, 1946. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Herman J. Galloway, John W. Gaskins* and *Fred W. Shields* for petitioner. *Solicitor General McGrath, Messrs. Paul A. Sweeney* and *Abraham J. Harris* for the United States. Reported below: 104 Ct. Cls. 496, 62 F. Supp. 408.

No. 573. ESTATE OF LYNCH ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. January 2, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Warner Pyne* for petitioners. *Solicitor General McGrath, Assistant Attorney General Clark, Mr. Sewall Key, Miss Helen R. Carloss* and *Mrs. Muriel S. Paul* for respondent. Reported below: 150 F. 2d 747.

No. 579. 870 SEVENTH AVENUE CORP., DOING BUSINESS AS THE PARK CENTRAL, *v.* BOWLES, PRICE ADMINISTRATOR. January 2, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Henry Cohen* for petitioner. *Solicitor General McGrath, Messrs. John R. Benney* and *David London* for respondent. Reported below: 150 F. 2d 819.

No. 582. California Oregon Power Co. *v.* Federal Power Commission. January 2, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. A. Louis Flynn* and *Helmer Hansen* for petitioner. *Solicitor General McGrath, Messrs. Howard E. Wahrenbrock, Louis W. McKernan* and *Reuben Goldberg* for respondent. Reported below: 150 F. 2d 25.

No. 613. Green *v.* Darden, Governor of Virginia. January 2, 1946. Petition for writ of certiorari to the Supreme Court of Appeals of Virginia denied. Reported below: 184 Va. lxiv.

No. 619. Chicago Great Western Railway Co. *v.* Beecher. January 2, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Guy A. Gladson* and *Harry S. Stearns* for petitioner. *Mr. William H. DeParcq* for respondent. Reported below: 150 F. 2d 394.

No. 563. Valentine & Sons et al. *v.* Bowles, Price Administrator. January 2, 1946. Petition for writ of certiorari to the United States Emergency Court of Appeals denied. *Mr. Carey Van Fleet* for petitioners. *Solicitor General McGrath* and *Mr. Richard H. Field* for respondent. Reported below: 151 F. 2d 343.

No. 576. Reeves et al. *v.* Bowles, Price Administrator. January 2, 1946. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. Walter M. Bastian, A. K. Shipe, Ringgold Hart, John J. Wilson* and *Leo A. Rover* for petitioners. *Solicitor General McGrath* for respondent. Reported below: 151 F. 2d 16.

No. 599. COCHRAN *v.* UNITED STATES. January 2, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. James F. Kemp* for petitioner. *Solicitor General McGrath* and *Mr. Robert S. Erdahl* for the United States. Reported below: 151 F. 2d 267.

No. 607. SMREKAR *v.* BAY & RIVER NAVIGATION CO. ET AL. January 2, 1946. Petition for writ of certiorari to the District Court of Appeal, 1st Appellate District, of California, denied. *Mr. Thomas J. Riordan* for petitioner. *Mr. W. N. Mullen* for respondents. Reported below: 69 Cal. App. 2d 654, 160 P. 2d 85.

No. 601. LOWNSBURY ET AL. *v.* SECURITIES & EXCHANGE COMMISSION ET AL. January 2, 1946. The motion to defer consideration is denied. The petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit is also denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of these applications. *Mr. Alfred J. Snyder* and *Miss Elizabeth C. Lownsbury* for petitioners. *Solicitor General McGrath, Messrs. Roger S. Foster* and *Milton V. Freeman* for the Securities & Exchange Commission, respondent. Reported below: 151 F. 2d 217.

Nos. 587, 588 and 589. CREEL *v.* CREEL. January 2, 1946. The motion for leave to file a substituted petition is denied. The petition for writs of certiorari to the United States Court of Appeals for the District of Columbia is also denied. Petitioner *pro se*. *Messrs. Leon Tobriner* and *Selig C. Brez* for respondent. Reported below: 149 F. 2d 830.

No. 218. DAINARD *v.* JOHNSTON, WARDEN. January 2, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. Petitioner *pro se.* *Solicitor General McGrath* and *Mr. Robert S. Erdahl* for respondent. Reported below: 149 F. 2d 749.

No. 336. GARDNER *v.* RAILROAD RETIREMENT BOARD. January 2, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Will C. Hurst* for petitioner. *Solicitor General McGrath, Messrs. Myles F. Gibbons* and *David B. Schreiber* for respondent. Reported below: 148 F. 2d 935.

No. 367. SYKES *v.* SANFORD, WARDEN. January 2, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. Petitioner *pro se.* *Solicitor General McGrath* for respondent. Reported below: 150 F. 2d 205.

No. 376. LINDSEY *v.* LEAVY ET AL. January 2, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. Reported below: 149 F. 2d 899.

No. 398. MCMAHAN *v.* JOHNSTON, WARDEN. January 2, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. Petitioner *pro se.* *Solicitor General McGrath* for respondent. Reported below: 150 F. 2d 498.

No. 462. WILSON *v.* ILLINOIS. January 2, 1946. Petition for writ of certiorari to the Circuit Court of Will County, Illinois, denied.

No. 463. WITT *v.* RAGEN, WARDEN. January 2, 1946. Petition for writ of certiorari to the Circuit Court of Kendall County, Illinois, denied.

No. 472. BOOTH *v.* ADERHOLD, WARDEN. January 2, 1946. Petition for writ of certiorari to the Supreme Court of Georgia denied. *Mrs. Readie P. Ashurst* for petitioner. Reported below: 199 Ga. 655, 34 S. E. 2d 869.

No. 491. WELCH *v.* RAGEN, WARDEN. January 2, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 492. WOODS *v.* RAGEN, WARDEN. January 2, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied.

Nos. 493 and 494. KIRSCH *v.* RAGEN, WARDEN. January 2, 1946. Petitions for writs of certiorari to the Criminal Court, Cook County, Illinois, denied.

No. 508. FLEEGER *v.* RAGEN, WARDEN. January 2, 1946. Petition for writ of certiorari to the Criminal Court, Cook County, Illinois, denied.

No. 512. TAYLOR *v.* ILLINOIS. January 2, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied. Reported below: 391 Ill. 11, 62 N. E. 2d 683.

No. 513. MATHEWS *v.* RAGEN, WARDEN. January 2, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 521. SHARP *v.* RAGEN, WARDEN. January 2, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 522. STRATTON *v.* RAGEN, WARDEN. January 2, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 525. WEST *v.* RAGEN, WARDEN. January 2, 1946. Petition for writ of certiorari to the Circuit Court, Kane County, Illinois, denied.

No. 526. FITZPATRICK *v.* NIERSTHEIMER, WARDEN. January 2, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 527. NOWAK *v.* NIERSTHEIMER, WARDEN. January 2, 1946. Petition for writ of certiorari to the Circuit Court, Randolph County, Illinois, denied.

No. 536. NITTI *v.* ILLINOIS. January 2, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 538. PLATT *v.* RAGEN, WARDEN. January 2, 1946. Petition for writ of certiorari to the Circuit Court of Will County, Illinois, denied.

No. 541. MADDEN *v.* RAGEN, WARDEN. January 2, 1946. Petition for writ of certiorari to the Circuit Court of Will County, Illinois, denied.

No. 580. WILKY CARRIER CORP. *v.* YOUNG ET AL. January 7, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. John J. McDevitt, Jr.* for petitioner. *Mr. Abbot P. Mills* for respondents. Reported below: 150 F. 2d 764.

No. 608. TAYLOR *v.* NEW YORK CENTRAL RAILROAD CO. January 7, 1946. Petition for writ of certiorari to the Court of Appeals of New York denied. *Mr. Copal Mintz* for petitioner. *Mr. John Godfrey Saxe* for respondent. Reported below: 294 N. Y. 977, 63 N. E. 2d 711.

No. 632. TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS *v.* SCHORB. January 7, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Arnot L. Sheppard* for petitioner. *Messrs. William H. DeParcq* and *Harvey B. Cox* for respondent. Reported below: 151 F. 2d 361.

No. 640. ROBERTSON *v.* NEW YORK LIFE INSURANCE CO. January 7, 1946. Petition for writ of certiorari to the Supreme Court of Michigan denied. Petitioner *pro se.* *Mr. Harold H. Armstrong* for respondent. Reported below: 312 Mich. 92, 19 N. W. 2d 498.

No. 383. WRIGHT *v.* JOHNSTON, WARDEN. January 7, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. Petitioner *pro se.* *Solicitor General McGrath, Messrs. Robert S. Erdahl* and *Leon Ulman* for respondent. Reported below: 149 F. 2d 648.

No. 476. FITZPATRICK *v.* NIERSTHEIMER, WARDEN. January 7, 1946. Petition for writ of certiorari to the Criminal Court, Cook County, Illinois, denied.

No. 486. BLACKBURN ET AL. *v.* OHIO. January 7, 1946. Petition for writ of certiorari to the Supreme Court of Ohio denied. *Mr. Robert L. Bobrick* for petitioners. Reported below: 145 Ohio St. 136, 60 N. E. 2d 654.

No. 652. MCALLISTER LIGHTERAGE LINE, INC. *v.* RIVAS, ADMINISTRATRIX. January 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Russell Conwell Gay* for petitioner. *Mr. Asbury Hayne De Yampert* for respondent. Reported below: 151 F. 2d 848.

No. 633. SLATTERY *v.* MCDONALD, SHERIFF. January 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. MR. JUSTICE BLACK is of the opinion that certiorari should be granted. *Mr. Wm. Henry Gallagher* for petitioner. *Messrs. Kim Sigler, Victor C. Anderson* and *H. H. Warner* for respondent. Reported below: 151 F. 2d 326.

No. 277. MILLER *v.* SANFORD, WARDEN. January 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. Petitioner *pro se*. *Solicitor General McGrath, Messrs. Robert S. Erdahl* and *Irving S. Shapiro* for respondent. Reported below: 150 F. 2d 637.

No. 360. HUNTER *v.* UNITED STATES. January 14, 1946. Petition for writ of certiorari to the Circuit Court of Ap-

peals for the Sixth Circuit denied. Petitioner *pro se.* *Solicitor General McGrath, Messrs. Robert S. Erdahl* and *Fred E. Strine* for the United States. Reported below: 149 F. 2d 710.

No. 363. McFarland *v.* United States. January 14, 1946. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. P. Bateman Ennis* for petitioner. *Solicitor General McGrath, Messrs. Robert S. Erdahl* and *Leon Ulman* for the United States. Reported below: 150 F. 2d 593.

No. 375. Wilson *v.* United States. January 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. Petitioner *pro se.* *Solicitor General McGrath, Mr. Robert S. Erdahl* and *Miss Beatrice Rosenberg* for the United States. Reported below: 149 F. 2d 814.

No. 379. Sipe *v.* United States. January 14, 1946. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. James J. Laughlin* for petitioner. *Solicitor General McGrath* and *Mr. Robert S. Erdahl* for the United States. Reported below: 150 F. 2d 984.

No. 380. Laubaugh *v.* United States. January 14, 1946. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. James J. Laughlin* for petitioner. *Solicitor General McGrath* and *Mr. Robert S. Erdahl* for the United States. Reported below: 150 F. 2d 984.

No. 382. BURT *v.* COE, COMMISSIONER OF PATENTS. January 14, 1946. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied.

No. 409. PRICE *v.* UNITED STATES. January 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. Petitioner *pro se*. *Solicitor General McGrath, Messrs. Robert S. Erdahl* and *Leon Ulman* for the United States. Reported below: 150 F. 2d 283.

No. 422. BURTON *v.* UNITED STATES. January 14, 1946. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. James J. Laughlin* for petitioner. *Solicitor General McGrath* and *Mr. Robert S. Erdahl* for the United States. Reported below: 151 F. 2d 17.

No. 433. VOORHEIS *v.* HUNTER, WARDEN. January 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. Petitioner *pro se*. *Solicitor General McGrath, Messrs. Robert S. Erdahl* and *Leon Ulman* for respondent. Reported below: 150 F. 2d 52.

No. 475. PHILLIPS *v.* NEW YORK. January 14, 1946. Petition for writ of certiorari to the Court of Appeals of New York denied. Reported below: 294 N. Y. 975, 63 N. E. 2d 710.

No. 477. HAINES *v.* NIERSTHEIMER, WARDEN. January 14, 1946. Petition for writ of certiorari to the Criminal Court, Cook County, Illinois, denied.

No. 543. HINE *v.* RAGEN, WARDEN. January 14, 1946. Petition for writ of certiorari to the Circuit Court of Will County, Illinois, denied.

No. 551. BRANDON *v.* SMITH, SUPERINTENDENT. January 14, 1946. Petition for writ of certiorari to the Supreme Court of Washington denied.

No. 553. MINER *v.* RAGEN, WARDEN. January 14, 1946. Petition for writ of certiorari to the Criminal Court, Cook County, Illinois, denied.

No. 554. BUFORD *v.* RAGEN, WARDEN. January 14, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 555. MCCANN *v.* UNITED STATES. January 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. Petitioner *pro se*. *Solicitor General McGrath, Messrs. Robert S. Erdahl* and *Irving S. Shapiro* for the United States.

No. 559. HUGGINS *v.* PENNSYLVANIA. January 14, 1946. Petition for writ of certiorari to the Supreme Court of Pennsylvania denied. *Mr. J. Harry Pershing* for petitioner.

No. 561. BREWER *v.* NIERSTHEIMER, WARDEN. January 14, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 567. WHITEHALL *v.* RAGEN, WARDEN. January 14, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 568. CONN *v.* ILLINOIS. January 14, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied. Reported below: 391 Ill. 190, 62 N. E. 2d 806.

No. 569. RAWLS *v.* ILLINOIS. January 14, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied. Reported below: 390 Ill. 476, 62 N. E. 2d 438.

No. 570. SPATES *v.* HEINZE, WARDEN. January 14, 1946. Petition for writ of certiorari to the Supreme Court of California denied.

No. 574. MAZY *v.* RAGEN, WARDEN. January 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Francis S. Clamitz* for petitioner. *George F. Barrett,* Attorney General of Illinois, and *William C. Wines,* Assistant Attorney General, for respondent. Reported below: 149 F. 2d 948.

No. 575. NEW YORK EX REL. MONTAGNO *v.* MORHOUS, WARDEN. January 14, 1946. Petition for writ of certiorari to the Court of Appeals of New York denied. Reported below: 294 N. Y. 768, 61 N. E. 2d 777.

No. 583. LEVANOWICZ *v.* RAGEN, WARDEN. January 14, 1946. Petition for writ of certiorari to the Criminal Court, Cook County, Illinois, denied.

No. 584. STACK *v.* ILLINOIS. January 14, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied. Reported below: 391 Ill. 15, 62 N. E. 2d 807.

No. 585. ATOR *v.* RAGEN, WARDEN. January 14, 1946. Petition for writ of certiorari to the Circuit Court of Will County, Illinois, denied.

No. 586. NOVAK *v.* RAGEN, WARDEN. January 14, 1946. Petition for writ of certiorari to the Criminal Court, Cook County, Illinois, denied.

No. 590. EDWARDS *v.* NIERSTHEIMER, WARDEN. January 14, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 597. SHORT *v.* RAGEN, WARDEN. January 14, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 598. HUNKE *v.* RAGEN, WARDEN. January 14, 1946. Petition for writ of certiorari to the Criminal Court, Cook County, Illinois, denied.

No. 600. HOUSE *v.* FLORIDA ET AL. January 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. Reported below: 151 F. 2d 1014.

No. 602. UTTERBACK *v.* NIERSTHEIMER, WARDEN. January 14, 1946. Petition for writ of certiorari to the Circuit Court, Randolph County, Illinois, denied.

No. 604. JAMES *v.* RAGEN, WARDEN. January 14, 1946. Petition for writ of certiorari to the Circuit Court of Vermilion County, Illinois, denied.

No. 610. DORSCH *v.* RAGEN, WARDEN. January 14, 1946. Petition for writ of certiorari to the Circuit Court of Will County, Illinois, denied.

No. 611. DUNCAN *v.* RAGEN, WARDEN. January 14, 1946. Petition for writ of certiorari to the Circuit Court of Will County, Illinois, denied.

No. 612. TARVER *v.* SULLIVAN, DIRECTOR OF THE DEPARTMENT OF PUBLIC SAFETY, ET AL. January 14, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 614. SMITH *v.* RAGEN, WARDEN. January 14, 1946. Petition for writ of certiorari to the Circuit Court of Peoria County, Illinois, denied.

No. 615. TAYLOR *v.* RAGEN, WARDEN. January 14, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 626. MONDER *v.* RAGEN, WARDEN. January 14, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 724. MONKS *v.* LEE. See *ante*, p. 696.

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No. 322. KAROS *v.* SACHS. January 28, 1946. Petition for writ of certiorari to the Supreme Court of Michigan denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application. *Mr. Wm. Henry Gallagher* for petitioner. Reported below: 310 Mich. 577, 17 N. W. 2d 759.

No. 524. SHAMOS *v.* NEW YORK. January 28, 1946. Petition for writ of certiorari to the Court of Appeals of New York denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application. *Mr. Alvin C. Cass* for petitioner. *Mr. Whitman Knapp* for respondent. Reported below: 294 N. Y. 948, 63 N. E. 2d 183.

No. 617. INDIANAPOLIS GLOVE CO. *v.* BOWLES, PRICE ADMINISTRATOR. January 28, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application. *Messrs. William H. Thompson, Perry E. O'Neal* and *Patrick J. Smith* for petitioner. *Solicitor General McGrath* and *Mr. David London* for respondent. Reported below: 150 F. 2d 597.

No. 618. GOOD LUCK GLOVE CO. *v.* BOWLES, PRICE ADMINISTRATOR. January 28, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application. *Messrs. Charles E. Feirich* and *Fletcher Lewis* for petitioner. *Solicitor General McGrath* and *Mr. David London* for respondent. Reported below: 150 F. 2d 853.

No. 622. BRADEY, ADMINISTRATRIX, *v.* UNITED STATES, AS REPRESENTED BY WAR SHIPPING ADMINISTRATION. January 28, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application. *Mr. Simone N. Gazan* for petitioner. *Solicitor General McGrath* and *Mr. Paul A. Sweeney* for respondent. Reported below: 151 F. 2d 742.

No. 643. PETERSON ET AL. *v.* ICKES, SECRETARY OF THE INTERIOR, ET AL. January 28, 1946. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application. *Messrs. Walter G. Moyle, Ernest H. Oliver* and *Horace S. Davis* for petitioners. *Solicitor General McGrath, Messrs. J. Edward Williams, Roger P. Marquis* and *Fred W. Smith* for respondents. Reported below: 151 F. 2d 301.

No. 645. ALDRED INVESTMENT TRUST ET AL. *v.* SECURITIES & EXCHANGE COMMISSION. January 28, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application. *Mr. Hugh D. McLellan* for petitioners. *Solicitor General McGrath, Messrs. Roger S. Foster, Milton V. Freeman* and *Arnold R. Ginsburg* for respondent. Reported below: 151 F. 2d 254.

No. 667. WEST *v.* COMMISSIONER OF INTERNAL REVENUE;

No. 668. WEST *v.* COMMISSIONER OF INTERNAL REVENUE;

No. 669. ESTATE OF WEST ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE; and

No. 670. WEST *v.* COMMISSIONER OF INTERNAL REVENUE. January 28, 1946. Petition for writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of these applications. *Messrs. Randolph E. Paul, J. Arthur Platt* and *James H. Yeatman* for petitioners. *Solicitor General McGrath, Messrs. Sewall Key, A. F. Prescott* and *Hilbert P. Zarky* for respondent. *Grover Sellers,* Attorney General of Texas, *Wm. J. Fanning,* Assistant Attorney General of Texas, and *Robert W. Kenny,* Attorney General of California, filed a brief on behalf of those States, as *amici curiae,* in support of the petition. Reported below: 150 F. 2d 723.

No. 653. GAS RIDGE, INC. *v.* SUBURBAN AGRICULTURAL PROPERTIES, INC. January 28, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application. *Mr. Fagan Dickson* for petitioner. *Mr. Leo Brewer* for respondent. Reported below: 150 F. 2d 363, 1020.

No. 678. MAUGERI *v.* UNITED STATES. January 28, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application. *Mr. Leo R. Friedman* for petitioner. *Solicitor General McGrath* and *Mr. Robert S. Erdahl* for the United States. Reported below: 151 F. 2d 335.

No. 682. RICHARDSON *v.* COMMISSIONER OF INTERNAL REVENUE. January 28, 1946. Petition for writ of certi-

orari to the Circuit Court of Appeals for the Second Circuit denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application. *Mr. Erwin N. Griswold* for petitioner. *Solicitor General McGrath, Messrs. Sewall Key, Robert N. Anderson* and *Lee A. Jackson* for respondent. Reported below: 151 F. 2d 102.

No. 686. LOBER *v.* CANADIAN PACIFIC RAILWAY CO. ET AL. January 28, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application. *Messrs. Ralph Royall* and *Frederick H. Stinchfield* for petitioner. *Mr. Henry S. Mitchell* for respondents. Reported below: 151 F. 2d 758.

No. 695. KEEHN, RECEIVER, *v.* CHARLES J. ROGERS, INC. January 28, 1946. Petition for writ of certiorari to the Supreme Court of Michigan denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application. *Messrs. Cleveland Thurber* and *Emmett E. Eagan* for petitioner. *Messrs. Lawrence E. Kelly* and *Howard L. Ellis* for respondent. Reported below: 311 Mich. 416, 18 N. W. 2d 877.

No. 708. READER'S DIGEST ASSOCIATION, INC. *v.* GRANT. January 28, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application. *Mr. Robert E. Coulson* for petitioner. *Mr. Osmond K. Fraenkel* for respondent. Reported below: 151 F. 2d 733.

No. 737. ZINK, COMPTROLLER, ET AL. *v.* JERSEY CITY ET AL. January 28, 1946. Petition for writ of certiorari

to the Court of Errors and Appeals of New Jersey denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application. *Mr. Benj. C. Van Tine* for petitioners. *Messrs. Charles A. Rooney* and *Charles Hershenstein* for respondents. Reported below: 133 N. J. L. 437, 44 A. 2d 825.

No. 621. GLASTON *v.* GLASTON. January 28, 1946. Petition for writ of certiorari to the District Court of Appeal, 2d Appellate District, of California, denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application. *Mr. Sanford H. Cohen* for petitioner. *Mrs. Dolly Lee Butler* for respondent. Reported below: 69 Cal. App. 2d 787, 160 P. 2d 45.

No. 623. EVENOW *v.* ILLINOIS. January 28, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application.

No. 624. JOINER *v.* RAGEN, WARDEN. January 28, 1946. Petition for writ of certiorari to the Criminal Court, Cook County, Illinois, denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application.

No. 635. WILLIAMS *v.* RAGEN, WARDEN. January 28, 1946. Petition for writ of certiorari to the Criminal Court, Cook County, Illinois, denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application.

No. 641. BERNOVICH *v.* ILLINOIS. January 28, 1946. Petition for writ of certiorari to the Supreme Court of

Illinois denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application. Reported below: 391 Ill. 141, 62 N. E. 2d 691.

No. 646. PALMER *v.* RAGEN, WARDEN. January 28, 1946. Petition for writ of certiorari to the Criminal Court, Cook County, Illinois, denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application.

No. 647. KADLECEK *v.* ILLINOIS. January 28, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application. Reported below: 391 Ill. 470, 63 N. E. 2d 497.

No. 648. BERRY *v.* RAGEN, WARDEN. January 28, 1946. Petition for writ of certiorari to the Criminal Court, Cook County, Illinois, denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application.

No. 657. MOORE *v.* ILLINOIS. January 28, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application.

No. 660. BARONIA *v.* RAGEN, WARDEN. January 28, 1946. Petition for writ of certiorari to the Circuit Court of Will County, Illinois, denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application.

No. 661. WALKER *v.* RAGEN, WARDEN. January 28, 1946. Petition for writ of certiorari to the Circuit Court of Will County, Illinois, denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application.

No. 662. JONES *v.* RAGEN, WARDEN. January 28, 1946. Petition for writ of certiorari to the Circuit Court of Will County, Illinois, denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application.

No. 664. PROKOP *v.* RAGEN, WARDEN. January 28, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application.

No. 673. HINES *v.* NIERSTHEIMER, WARDEN. January 28, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application.

No. 679. KRAZIK *v.* RAGEN, WARDEN. January 28, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application.

No. 690. FELETTI *v.* RAGEN, WARDEN. January 28, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application.

No. 691. RUGGIO *v.* RAGEN, WARDEN. January 28, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application.

No. 711. JAMES *v.* RAGEN, WARDEN. January 28, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application.

No. 628. LEWIS *v.* ILLINOIS. On petition for writ of certiorari to the Supreme Court of Illinois;

No. 642. LAPEAN *v.* WISCONSIN. On petition for writ of certiorari to the Supreme Court of Wisconsin;

No. 681. TERRY *v.* NIERSTHEIMER, WARDEN. On petition for writ of certiorari to the Supreme Court of Illinois; and

No. 684. GRIFFIN *v.* NIERSTHEIMER, WARDEN. On petition for writ of certiorari to the Supreme Court of Illinois. January 28, 1946. 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. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of these applications. *Mr. W. C. Cherry* for petitioner in No. 681. Reported below: No. 642, 247 Wis. 302, 19 N. W. 2d 289.

ORDERS GRANTING REHEARING FROM OCTOBER 1, 1945, THROUGH JANUARY 28, 1946.

No. 160, October Term, 1944. ELGIN, JOLIET & EASTERN RAILWAY CO. *v.* BURLEY ET AL. October 15, 1945. The petition for rehearing is granted. MR. JUSTICE BUR-

TON took no part in the consideration or decision of this application. *Mr. Paul R. Conaghan* for petitioner. Briefs were filed on behalf of the United States, the Congress of Industrial Organizations and certain affiliated organizations, and the Railway Labor Executives' Association, as *amici curiae,* in support of the petition. See 325 U. S. 711.

No. 489. ZAP *v.* UNITED STATES. January 7, 1946. The petition for rehearing is granted and the order entered December 10th denying certiorari, 326 U. S. 777, is vacated. The petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit is granted limited to the question whether books and records relating to the petitioner's contract with the Navy Department were properly admitted as evidence at his trial. *Mr. Morris Lavine* for petitioner. *Solicitor General McGrath, Messrs. Robert S. Erdahl, Walter J. Cummings, Jr.* and *Miss Beatrice Rosenberg* for the United States. Reported below: 151 F. 2d 100.

ORDERS DENYING REHEARING FROM OCTOBER 1, 1945, THROUGH JANUARY 28, 1946.*

No. —, October Term, 1944. BOZELL *v.* BIDDLE ET AL. October 8, 1945. 325 U. S. 842.

No. —, October Term, 1944. EX PARTE RAYMOND O. DEMAUREZ. October 8, 1945. 325 U. S. 835.

No. 57, October Term, 1944. ASSOCIATED PRESS ET AL. *v.* UNITED STATES; and

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*See Table of Cases Reported in this volume for earlier decisions in these cases, unless otherwise indicated.

No. 58, October Term, 1944. TRIBUNE COMPANY ET AL. *v.* UNITED STATES. October 8, 1945. 326 U. S. 1.

No. 507, October Term, 1944. INTERSTATE COMMERCE COMMISSION ET AL. *v.* PARKER ET AL.; and

No. 508, October Term, 1944. UNITED STATES *v.* PARKER ET AL. October 8, 1945. 326 U. S. 60.

No. 560, October Term, 1944. NORTH CAROLINA ET AL. *v.* UNITED STATES ET AL.; and

No. 561, October Term, 1944. DAVIS, ECONOMIC STABILIZATION DIRECTOR, *v.* UNITED STATES ET AL. October 8, 1945. 325 U. S. 507.

No. 570, October Term, 1944. HUNT ET AL. *v.* CRUMBOCH ET AL. October 8, 1945. 325 U. S. 821.

No. 574, October Term, 1944. ALABAMA ET AL. *v.* UNITED STATES ET AL. October 8, 1945. 325 U. S. 535.

No. 592, October Term, 1944. DAVIS, ECONOMIC STABILIZATION DIRECTOR, *v.* UNITED STATES ET AL. October 8, 1945. 325 U. S. 535.

No. 613, October Term, 1944. INLAND EMPIRE DISTRICT COUNCIL ET AL. *v.* MILLIS ET AL. October 8, 1945. 325 U. S. 697.

No. 702, October Term, 1944. ALLEN BRADLEY CO. ET AL. *v.* LOCAL UNION NO. 3, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, ET AL. October 8, 1945. 325 U. S. 797.

No. 811, October Term, 1944. HILL ET AL. *v.* FLORIDA EX REL. WATSON, ATTORNEY GENERAL. October 8, 1945. 325 U. S. 538.

No. 955, October Term, 1944. WALLING, ADMINISTRATOR, *v.* YOUNGERMAN-REYNOLDS HARDWOOD CO., INC. October 8, 1945. 325 U. S. 419.

No. 1193, October Term, 1944. WISCONSIN ALUMNI RESEARCH FOUNDATION *v.* VITAMIN TECHNOLOGISTS, INC. ET AL. October 8, 1945. 325 U. S. 876.

No. 1213, October Term, 1944. GLICK BROTHERS LUMBER CO. ET AL. *v.* BOWLES, PRICE ADMINISTRATOR. October 8, 1945. 325 U. S. 842, 877.

No. 1230, October Term, 1944. MROZIK *v.* JOHNSTON, WARDEN. October 8, 1945. 325 U. S. 878.

No. 1237, October Term, 1944. NATIONAL LABOR RELATIONS BOARD *v.* JONES & LAUGHLIN STEEL CORP.; and

No. 1238, October Term, 1944. NATIONAL LABOR RELATIONS BOARD *v.* E. C. ATKINS & CO. October 8, 1945. 325 U. S. 838.

No. 1244, October Term, 1944. OXMAN *v.* UNITED STATES. October 8, 1945. 325 U. S. 887.

No. 1246, October Term, 1944. ESTATE OF MARSHALL ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. October 8, 1945. 325 U. S. 872.

No. 1247, October Term, 1944. VANDENBERGE ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. October 8, 1945. 325 U. S. 875.

No. 1250, October Term, 1944. COGHLAN *v.* UNITED STATES. October 8, 1945. 325 U. S. 888.

No. 1284, October Term, 1944. STONESIFER ET AL. *v.* SWANSON ET AL. October 8, 1945. 325 U. S. 880.

No. 1288, October Term, 1944. NOBLE *v.* BOTKIN, SUPERINTENDENT. October 8, 1945. 325 U. S. 888.

No. 1291, October Term, 1944. ROBERTS *v.* UNITED STATES. October 8, 1945. 325 U. S. 881.

No. 1296, October Term, 1944. WAREHIME, DOING BUSINESS AS NEZEN MILK FOOD CO., ET AL. *v.* VARNEY ET AL. October 8, 1945. 325 U. S. 882.

No. 1314, October Term, 1944. ASCHER *v.* UNITED STATES. October 8, 1945. 325 U. S. 884.

No. 1316, October Term, 1944. CHAPIN ET AL. *v.* NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO. ET AL. October 8, 1945. 325 U. S. 884.

No. 1353, October Term, 1944. DE MARCOS *v.* OVERHOLSER, SUPERINTENDENT. October 8, 1945. 325 U. S. 889.

No. 1358, October Term, 1944. BAILEY *v.* FLORIDA. October 8, 1945. 325 U. S. 890.

No. 264, October Term, 1944. GUARANTY TRUST CO. *v.* YORK. October 8, 1945. The motion to recall mandate, retax costs and to modify the judgment is also denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. 326 U. S. 99.

No. 506, October Term, 1944. MOSHER *v.* HUNTER, WARDEN. October 8, 1945. Second petition for rehearing denied. 325 U. S. 838.

No. 820, October Term, 1944. 10 EAST 40TH STREET BUILDING, INC. *v.* CALLUS ET AL. See *ante*, p. 686.

No. 1220, October Term, 1944. ARMOUR & CO. *v.* BOWLES, PRICE ADMINISTRATOR. October 8, 1945. The motion in the alternative for leave to file briefs on the merits is also denied. 325 U. S. 871.

No. 1235, October Term, 1944. NATHANSON *v.* ILLINOIS. October 8, 1945. The motion for leave to file petition for rehearing is denied. 325 U. S. 872.

No. 1294, October Term, 1944. JONES & LAUGHLIN STEEL CORP. *v.* NATIONAL LABOR RELATIONS BOARD. October 8, 1945. The CHIEF JUSTICE took no part in the consideration or decision of this application. 325 U. S. 886.

No. 853, October Term, 1944. AKINS *v.* TEXAS. October 15, 1945. MR. JUSTICE BURTON took no part in the consideration or decision of this application. 325 U. S. 398.

No. 514, October Term, 1944. ROBINSON *v.* UNITED STATES. October 15, 1945. The motion for leave to file petition for rehearing is denied. MR. JUSTICE BURTON took no part in the consideration or decision of this application. 325 U. S. 895.

No. 205, October Term, 1944. IN RE SUMMERS;

No. 205. NEW YORK EX REL. RENSING *v.* MORHOUS, WARDEN; and

No. 330. WABER *v.* MONTGOMERY WARD & CO., INC. ET AL. October 22, 1945. MR. JUSTICE BURTON took no part in the consideration or decision of these applications. No. 205, October Term, 1944, 325 U. S. 561.

No. —. October Term, 1944. EX PARTE GEORGE ALBERT BROWN;

No. 212, October Term, 1944. WHITE *v.* RAGEN, WARDEN; and

No. 1212, October Term, 1944. BANGHART *v.* UNITED STATES. November 5, 1945. The motions for leave to file petitions for rehearing are denied. MR. JUSTICE BURTON took no part in the consideration or decision of these applications. 324 U. S. 825; 324 U. S. 760; 325 U. S. 887.

No. 1244, October Term, 1944. OXMAN *v.* UNITED STATES. November 5, 1945. The motion for leave to file a second petition for rehearing is denied. MR. JUSTICE BURTON took no part in the consideration or decision of this application.

No. 30, Misc. HILLIARD *v.* JOHNSTON, WARDEN;

No. 70. MARMON ET AL. *v.* ILLINOIS;

No. 137. TIMKEN-DETROIT AXLE CO. *v.* CLEVELAND STEEL PRODUCTS CORP.;

No. 140. MARMON ET AL. *v.* ILLINOIS;

No. 147. COOPER *v.* PARSONS, RECEIVER;

No. 181. WELLS LAMONT CORP. *v.* BOWLES, PRICE ADMINISTRATOR, ET AL.;

No. 188. LAWRENCE *v.* ILLINOIS;

No. 202. STANDARD REGISTER CO. *v.* AMERICAN SALES BOOK CO., INC.;

No. 212. GENECOV *v.* TEXAS ET AL.;

No. 245. SOUTHERN CALIFORNIA FREIGHT LINES *v.* MCKEOWN;

No. 275. NYCUM *v.* CITY OF ALTOONA;

No. 352. COUNTY OF THURSTON ET AL. *v.* UNITED STATES; and

No. 359. STOCKHOLDERS' COMMITTEE OF THE UNIVERSAL LUBRICATING SYSTEMS, INC. *v.* STALEY, TRUSTEE. November 5, 1945. MR. JUSTICE BURTON took no part in the consideration or decision of these applications.

No. 24, Misc. IN RE WILSON. November 13, 1945.

No. 208. DE NORMAND ET AL. *v.* UNITED STATES. November 13, 1945.

No. 295. CLOVERLEAF BUTTER CO. *v.* UNITED STATES. November 13, 1945.

No. 297. ARUNDEL CORPORATION *v.* UNITED STATES. November 13, 1945.

No. 334. MASON *v.* BANTA CARBONA IRRIGATION DISTRICT. November 13, 1945.

No. —. October Term, 1944. NOBLE ET AL. *v.* BOTKIN. November 13, 1945. The motion for leave to file a second petition for rehearing is denied. MR. JUSTICE BURTON took no part in the consideration or decision of this application. 325 U. S. 893.

No. 236. PYLE *v.* AMRINE, WARDEN. November 13, 1945.

No. 68. THOMPSON *v.* UNITED STATES;

No. 141. JOHNSON ET AL. *v.* MEAGHER COUNTY ET AL.;

No. 154. CRYNE *v.* UNITED STATES;

No. 215. DEATON TRUCK LINE, INC. *v.* UNITED STATES ET AL.; and

No. 230. SAMUEL H. MOSS, INC. *v.* FEDERAL TRADE COMMISSION. November 13, 1945. MR. JUSTICE BURTON took no part in the consideration or decision of these applications.

No. 41, Misc. COYLE *v.* CALIFORNIA. November 19, 1945.

No. 439. FLETCHER ET AL., TRUSTEES, *v.* CLARK, COLLECTOR OF INTERNAL REVENUE. November 19, 1945.

No. 355. SCARBOROUGH *v.* PENNSYLVANIA RAILROAD CO. November 19, 1945.

Nos. 20 and 21, Misc. LOBER ET AL. *v.* MORGAN, LEWIS & BOCKIUS ET AL. November 19, 1945. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application.

673554°—46——57

No. 224. SPRUILL *v.* CAMPBELL. November 19, 1945. MR. JUSTICE BURTON took no part in the consideration or decision of this application.

No. 368. MADISON AVENUE OFFICES, INC. *v.* BROWNE ET AL., CONSTITUTING THE STATE TAX COMMISSION; and No. 369. MACDONALD ET AL., EXECUTORS, *v.* BROWNE ET AL., CONSTITUTING THE STATE TAX COMMISSION. November 19, 1945. MR. JUSTICE BURTON took no part in the consideration or decision of these applications.

No. 46. GENERAL ELECTRIC CO. *v.* JEWEL INCANDESCENT LAMP CO. ET AL. December 3, 1945. 326 U. S. 242.

No. 192. ODDO *v.* UNITED STATES. December 3, 1945.

No. 303. GANCY *v.* UNITED STATES. December 3, 1945.

No. 353. PURMAN *v.* FITCH ET AL. December 3, 1945.

No. 416. OBEAR-NESTER GLASS CO. *v.* UNITED DRUG CO. December 3, 1945.

No. 49. BAILEY *v.* ANDERSON, STATE HIGHWAY COMMISSIONER. See *ante*, p. 691.

No. 188. LAWRENCE *v.* ILLINOIS. December 3, 1945. Second petition for rehearing denied. MR. JUSTICE BURTON took no part in the consideration or decision of this application.

No. 112. GREGORY *v.* UNITED STATES; and

No. 210. P. G. LAKE, INC. *v.* COMMISSIONER OF INTERNAL REVENUE. December 3, 1945. MR. JUSTICE BURTON took no part in the consideration or decision of these applications.

No. 54. SCOTT PAPER CO. *v.* MARCALUS MANUFACTURING CO. ET AL. December 10, 1945. 326 U. S. 249.

No. 461. RENNINGER *v.* NEW YORK. December 10, 1945.

No. 208. DE NORMAND ET AL. *v.* UNITED STATES. January 2, 1946. Second petition for rehearing denied.

No. 552. OFFICIAL AVIATION GUIDE CO., INC. *v.* AMERICAN AVIATION ASSOCIATES, INC. ET AL. January 2, 1946.

No. 69. BOEHM *v.* COMMISSIONER OF INTERNAL REVENUE. January 7, 1946. 326 U. S. 287.

No. 188. LAWRENCE *v.* ILLINOIS. January 7, 1946. The motion for leave to file a third petition for rehearing is denied. MR. JUSTICE BURTON took no part in the consideration or decision of this application.

No. 25, Misc. SPEARS *v.* JOHNSTON, WARDEN. January 7, 1946.

No. 39. MAY DEPARTMENT STORES CO., DOING BUSINESS AS FAMOUS-BARR CO., *v.* NATIONAL LABOR RELATIONS BOARD. January 7, 1946. 326 U. S. 376.

No. 564. KITHCART *v.* METROPOLITAN LIFE INSURANCE Co. January 7, 1946.

No. 44, Misc. BANTZ *v.* SQUIER, WARDEN. January 14, 1946.

No. 93. HERCULES GASOLINE Co., INC. *v.* COMMISSIONER OF INTERNAL REVENUE. January 14, 1946. 326 U. S. 425.

No. 51, Misc. IN RE FRASER. January 28, 1946.

No. 69, Misc. JOHNSON *v.* JOHN HANCOCK MUTUAL LIFE INSURANCE Co. ET AL. January 28, 1946.

No. 76, Misc. STIZZA *v.* ESSEX COUNTY JUVENILE AND DOMESTIC RELATIONS COURT. January 28, 1946.

No. 145. COMMISSIONER OF INTERNAL REVENUE *v.* FLOWERS. January 28, 1946. 326 U. S. 465.

No. 188. LAWRENCE *v.* ILLINOIS. January 28, 1946. The motion for leave to file a fourth petition for rehearing is denied. MR. JUSTICE BURTON took no part in the consideration or decision of this application.

No. 269. SABIN ET AL. *v.* HOME OWNERS' LOAN CORPORATION ET AL. January 28, 1946. The petition for rehearing in this case and the supplement thereto are denied.

INDEX

I. In General.

1. *Federal-State Relations. Tax Immunity.* Sale by New York of Saratoga Springs water not immune from federal tax on mineral waters. *New York* v. *U. S.,* 572.

2. *Judicial Power.* Case or controversy. *Railway Mail Assn.* v. *Corsi,* 88.

3. *Id.* Courts may not inquire into purposes or motives of Congress in enacting legislation within constitutional power. *Fernandez* v. *Wiener,* 340.

4. *Trial by Jury.* Scope of guarantee. *Bollenbach* v. *U. S.,* 607.

5. *Federal-State Relations. Postal Service.* State statute forbidding labor organizations to discriminate against members or applicants for membership on account of race, valid as applied to organization of employees in postal service. *Railway Mail Assn.* v. *Corsi,* 88.

6. *Id.* Congress has not so occupied field as to exclude state regulation here involved. *Id.*

7. *Federal Taxation. Uniformity.* Application of federal estate tax to community-property interests did not violate Tenth Amendment or requirement of uniformity. *Fernandez* v. *Wiener,* 340.

8. *Challenging Statute.* Appellant failed to show such substantial injury, actual or impending, as would sustain attack on Washington Industrial Insurance Act. *Gange Lumber Co.* v. *Rowley,* 295.

II. Freedom of Religion, Speech and Press.

1. *Freedom of Religion.* State may not penalize person distributing religious literature in company-owned town. *Marsh* v. *Alabama,* 501.

2. *Id.* State may not penalize person engaged in religious activities and distributing religious literature in village owned by United States under Housing Act. *Tucker* v. *Texas,* 517.

673554°—46——58

References to particular subjects under title Jurisdiction: Alcohol Administration Act, I, 6; Alien Property Custodian, III, 3; Bankruptcy Act, III, 4; Case or Controversy, I, 2; Crimes, IV; Declaratory Judgment Act, III, 2; Diversity Jurisdiction, I, 4; III, 1; Equity, I, 4; Federal Question, I, 5; II, 3–6; Finality of Judgment, II, 1–2; Forum Non Conveniens, I, 11; Habeas Corpus, II, 6; Indians, IV; Moot Case, I, 3; Murder, IV; Parties, I, 9–10; Probate, III, 3; Renegotiation Act, I, 1, 10; Service of Process, III, 1; State Courts, II, 1–6; Suit Against United States, I, 1; Tax Court, I, 7–8; Trading with the Enemy Act, III, 3; Treaties, IV; Under Secretary of Navy, I, 10; Venue, III, 1.

I. In General.

1. *Suit Against United States.* Properly dismissed where without consent, though challenging constitutionality of Renegotiation Act. *Mine Safety Co.* v. *Forrestal*, 371.

2. *Case or Controversy. Railway Mail Assn.* v. *Corsi*, 88.

3. *Moot Controversy.* Dismissal. *Montgomery Ward & Co.* v. *U. S.*, 690.

4. *Diversity Jurisdiction. Equity.* Recovery on state-created right in equity suit in federal court barred if state statute of limitations would bar recovery in state court. *Guaranty Trust Co.* v. *York*, 99.

5. *Construction of Federal Laws.* Effect of expiration of patent is federal question. *Scott Paper Co.* v. *Marcalus Co.*, 249.

6. *Review Under Alcohol Administration Act.* Application for rehearing before District Supervisor not prerequisite to judicial review. *Levers* v. *Anderson*, 219.

7. *Review of Tax Court.* Decision which is "in accordance with law" may not be set aside. *Boehm* v. *Commissioner*, 287.

8. *Id.* Finality of determination by Tax Court as to whether payments by corporation were interest or dividends. *John Kelley Co.* v. *Commissioner*, 521.

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